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

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **IRELAND**

IN 2005

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

on 15 December 2005

Reference: CFR-CDF/IE/2005

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon 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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The EU Network of Independent Experts on Fundamental Rights is composed of 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 (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), 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), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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INTRODUCTION

In its conclusions for 2005 the European Committee of Social Rights (ECSR) notes the "failure of Ireland to respect its obligation, under the Charter, to report on the implementation of [the Charter] within the deadline". Ireland should have submitted its second report to the ECSR (dealing, *inter alia*, with the rights to just conditions of work, fair remuneration, protection of health and the right to benefit from social welfare services) by the 30 June 2004. Instead an incomplete report was submitted to the Committee in May 2005, as a result of which the ECSR was unable to adopt conclusions with respect to the status of the implementation of the Charter in Ireland.[1]

The author is very grateful to the following for their research input to the Report: Simon McCormack, who worked on material from December 2004 until May 2005; Paul O'Connell who worked on the period May-October 2005; Diarmuid Griffin who worked on Chapter VI; and Luke McDonagh who contributed to the sections dealing with the Environment and the Elderly. While the work of all researchers was invaluable responsibility for the contents of the Report rests with the author.

[1] See http://www.coe.int/T/E/Human_Rights/Esc/3_Reporting_procedure/2_Recent_Conclusions/1_By_State/Ireland_2005.pdf.

CHAPTER I . DIGNITY

Article 1. Human dignity

Article 2. Right to life

Euthanasia

Legislative initiatives, national case law and practices of national authorities

In a survey carried out by *The Irish Times* newspaper at a conference organised by the Irish Medical Organisation in April 2005, it was revealed that a third of doctors had been asked by their patients for help in ending their lives.[2] The survey was in response to the reporting of an assisted suicide of an Irish man in Switzerland who had suffered from quadriplegia. The survey was based on the responses of 15 doctors at the conference and also asked if there should be a role for the medical profession in assisted suicides if such was to be legalised in the State. Here 20% had no opinion on the matter, whereas almost one quarter felt the profession should have a role with the remainder classifying the issue as a societal matter rather than one for medical personnel.[3] At present, assisted suicide is illegal in Ireland with a maximum 14 year imprisonment for anybody who attempts to help a person procure this service.

Domestic violence

Legislative initiatives, national case law and practices of national authorities

In July the National Crime Council (NCC) published a report on the extent of domestic abuse in Ireland representing the "first ever large-scale study undertaken to give an overview of the nature, extent and impact of domestic abuse against women and men in intimate partner relationships in Ireland today".[4] The report revealed that some 213,000 women and 88,000 men had been abused by their intimate partners at some point in their lives.[5]

In a more detailed breakdown of the figures this meant that 1 in every 11 women experienced severe physical abuse in a relationship, 1 in 12 experienced sexual abuse, and 1 in 13 experienced severe emotional abuse. With respect to men the figures showed that 1 in 25 experienced severe physical abuse, 1 in 90 experienced sexual abuse and 1 in 37 experienced severe emotional abuse.[6]

In response to this serious problem the NCC called for a comprehensive and holistic approach to tackling the problem, although they argued that tackling the issue of domestic abuse must be spearheaded by the criminal justice system.[7] However, the report did not advocate the creation of a specific offence of "domestic abuse" as the panoply of existing criminal sanctions was deemed to be sufficient to address the issue, provided they were applied appropriately.[8]

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[2] *The Irish Times,* 4th April 2005
[3] *Ibid.*
[4] *Domestic Abuse of Men and Women in Ireland* (July, 2005) at p.15.
[5] *Ibid* at p.169, see also the *Irish Times*, 06 July 2005 at p.1.
[6] *Ibid* at p.24.
[7] *Ibid* at p.26.
[8] *Ibid* at pp.15-16.

Consequently the NCC made a number of recommendations for the various bodies involved in the criminal justice process, in order to effectively tackle the issue of domestic violence. The main recommendations were:

For An Garda Siochana (the national police force):

- to closely monitor call-outs for domestic violence complaints, and to also record Garda responses to such call-outs;
- to review policy and procedures with a view to encouraging increased reporting of domestic abuse incidents;
- to provide the members of An Garda Siochana with ongoing and appropriate training to deal with domestic abuse call-outs, with particular emphasis on dealing with cases in a confidential and sensitive manner;[9]

As regards court practice and procedure, that:

- where domestic abuse is a contributory factor in a crime, the court should consider it as an aggravating factor when it comes to sentencing;
- in criminal cases, where it is deemed appropriate, the court should consider deferring sentence, pending the completion of a mandated treatment or rehabilitation program;[10]

With regard to the State Courts Service:

- the establishment of dedicated Family Law Courts, at a regional level, to protect the privacy of parties in domestic abuse related cases;
- data on gender, age group and other available demographic data of applicants and respondents in family law cases, as well as that of victims and offenders in criminal law cases involving domestic abuse, be recorded;
- data on applications for domestic violence orders (barring and/or safety orders) which are withdrawn or struck out be recorded separately[11]

The NCC also recommended that relevant health service authorities ensure that specialist nurses and social workers be appointed in both General and Maternity Hospitals, to help with the early detection of domestic violence and to provide appropriate support to those suffering from such abuse.[12]

Finally, as regards general awareness-raising about the issue of domestic violence, the NCC report recommended: (i) that the Government should run a campaign highlighting the problem of domestic abuse; (ii) that information on supports available for those experiencing domestic abuse be widely disseminated and made available in a user-friendly format; and (iii) that an easily accessible 'plain English' guide to civil and criminal avenues of redress for those suffering domestic abuse be produced and widely distributed.[13]

Reasons for concern

A report published by the Irish section of Amnesty International raised concerns about the state's failure to adequately address the issue of domestic violence perpetrated against

[9] *Ibid* at p.17.
[10] *Ibid* at pp.17-18.
[11] *Ibid* at p.18.
[12] *Ibid* at p.19.
[13] *Ibid* at p.20.

women.[14] The report referred to data from the Rape Crisis Centre, which showed that, of the 45,000 calls made to the Centres' helpline in 2004, 89% were from women.[15] Drawing on a variety of international sources, such as the work of the Committee on the Elimination of All forms of Discrimination and the UN Special Rapporteur on Violence Against Women (CEDAW), the report described the State's obligation under international human rights law as being, *inter alia*, an obligation to have effective measures in place to ensure the prevention of violence against women, and in the case of such violence to ensure that the perpetrators are brought to justice.[16]

The report then highlighted a number of deficiencies in the State response to violence against women, such as under-funding of frontline services dealing with victims of violence,[17] inadequate collation of data relating to the incidence of violence against women, a fragmented statutory scheme for addressing the issue of violence against women,[18] and the absence of a public education initiative to address the issue of violence against women.[19] From all of this the report concluded that

> "[The] government has not demonstrated that it is, to the best of its ability, using all of its available resources combating violence against women. Therefore, it has not done enough to satisfy the state's human rights obligations. Hence Amnesty International urges the Irish Government to recognise that it is in breach of international human rights law if [it] does not take immediate and effective action to address the concerns raised in this report. When the state fails to provide justice and redress for these violations, the state itself is guilty of abusing human rights."[20]

The report also made a number of specific recommendations in order to improve the State's response to the issue of violence against women. These included (i) the adoption of a national strategy on violence against women, (ii) the systemic gathering, analysis and regular dissemination of data on violence against women, (iii) adequate funding for frontline service providers and a review, and where necessary amendment, of all relevant laws on violence against women.[21]

Other relevant developments

Reasons for concern

In May 2005, the Garda Emergency Response Unit used lethal force against two men involved in a Post Office robbery in north County Dublin. The incident is the subject of an internal Garda inquiry. At the time of the incident, Amnesty International (Irish Section) and other NGOs raised concerns about the internal nature of the inquiry in the absence of an established independent mechanism for the investigation of such incidents[22].

[14] Amnesty International-Irish Section, *Justice and Accountability – Stop Violence Against Women: Summary Report* (June, 2005) at p.1.
[15] *Ibid*.
[16] *Ibid* at p.2.
[17] *Ibid* at p.7.
[18] *Ibid* at p.8.
[19] *Ibid* at p.9.
[20] *Ibid*.
[21] *Ibid* at p.10.
[22] //// newspaper reference ???

Article 3. Right to the integrity of the person

Breaches of the right to the integrity of the person

Legislative initiatives, national case law and practices of national authorities

In April, an inquest into the death of a man who had, in the words of the coroner, received misleading health advice from an alternative health practitioner raised issues about: (i) the regulation of alternative health practice; and (ii) the powers available to coroners conducting an investigation. Mr Paul Howie died of suffocation caused by a cancerous tumour in his throat in 2004, for some time prior to his death he had been attending and receiving medical advice from a natural health therapist who had failed to correctly diagnose his illness and had warned him against seeking conventional medical advice.

The practitioner in question had refused to attend the inquest, and the coroner expressed dissatisfaction at the fact that he had no powers to compel witnesses to attend in such cases. The coroner pointed out that pursuant to s.37 of the Coroners Act, 1962 a person who was summonsed to appear before an inquest but failed to do so would only be liable to a fine not exceeding €6.35, which, the coroner noted, was unsatisfactory in the context of an inquiry into the facts surrounding the death of an individual.

A second issue raised by this case relates to the regulation of natural health practitioners. The coroner, in his decision, concluded that Mr Howie would quite likely still be alive had he sought and received conventional medical treatment. The coroner expressed concern at the fact that all qualified health care practitioners, from chiropodists to radiographers, were subject to regulation, but that what he called "freelance operators in health care" were not subject to any regulatory authority.[23]

In response to the case, the Minister for Justice, Equality & Law Reform announced that he was considering the introduction of new legislation, which would provide for the imposition of fines up to €2,000 for key witnesses who refused to attend inquests.[24] Also in response to this case the Medical Council called for the introduction of a regulatory regime for alternative health therapists.

Positive aspects

Although outside the period under review, it is worth noting that a Private Member's Bill introduced by the Opposition Labour Party, the Coroners (Amendment) Bill 2005, was passed with government support in December. It deals with some of the issues raised in the abovementioned case of Mr. Howie and is to be followed by more comprehensive government-sponsored legislation in the near future.

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

Guidelines published (partially in response to public concern arising out of an earlier organ retention scandal) by the Medical Council in June 2005 provide that, in future, the commercial use of archived human tissue should only occur with the explicit consent of the patient it belongs to or, in the case of deceased patients, their next-of-kin. The Council argued that the various other ways in which such samples were utilised (e.g. in the context of medical

[23] *Irish Times*, 05 April 2005.
[24] *Irish Times*, 06 April 2005.

education) should, in the interest of advancing medical science, continue as before, that is without seeking the explicit consent of the person to whom the specimen belongs.[25]

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 and institutions for the detention of persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

In January 2005, the Health Research Board issued figures which showed that psychiatric patients in certain areas were four times more likely to receive electro-convulsive therapy (ECT) in some health board areas than in others. The figures showed that, in 2003, 859 patients received ECT with 38.7 patients per hundred thousand given the controversial treatment in the South Eastern Health Board region as opposed to 8.4 patients per hundred thousand in the Southern Health Board region.[26] The Chairman of the Mental Health Commission, Dr. John Owens, said the figures were "disturbing" and that "for a procedure subject to strict protocols, it is difficult to understand why there is such a variation."[27]

In July 2005, the Inspector of Prisons and Places of Detention published his Third Annual Report. The Report was unequivocal in its criticism of the current conditions in many of the State's prisons and of current government policy in relation to prisons. The Inspector recommended that:

- an independent human right lawyer be appointed as Prisoners' Ombudsman;
- the State's prison structure and budget be examined by an independent body to ensure it was providing efficiency, transparency and value for money;
- the office of Prisons Inspector be placed on a statutory footing and that, in future, annual reports be submitted to the Oireachtas (Parliament) and not to the Minster for Justice, Equality & Law Reform;
- in light of "gross overcrowding" and "appalling conditions", Cork Prison be given a different role within the prison system, so that it is required to hold fewer prisons;
- Saint Patrick's Institution in Dublin, the main institution of young offenders in the State, be closed immediately

On this last point Mr Justice Kinlen argued that the current conditions in St Patrick's Institution were, or should be, a cause of shame for the Oireachtas. He argued that detention of juvenile offenders should be the responsibility of the Department of Education and that any institution for the detention of such offenders must place primary emphasis on the education, training and rehabilitation of such offenders. Also, because of the current deficiencies in the Prison System, Mr Justice Kinlen argued that judges should only send people to prison as a very last resort.[28]

In response to a written parliamentary question, the Minister for Justice, Equality & Law Reform released figures on the use of solitary confinement cells in the State's prisons. The figures revealed that prisoners were placed in such cells on a total of 1168 occasions in 2004

[25]Irish Times, 15 June 2005, the guidelines are available at: http://www.medicalcouncil.ie/_fileupload/standards/Archived_Human_Tissue.pdf.
[26] The Irish Times, 31st January 2005
[27] Ibid.
[28] See the Irish Times, 02 July 2005 at p.3 and the Third Annual Report of the Inspector of Prisons and Places of Detention for the Year 2004-2005 (July, 2005).

and a total of 558 occasions to the end of June 2005. The figures revealed that the most frequent use of the cells took place in Mountjoy Prison, Dublin and St Patrick's Institution, Dublin.

A member of the Opposition described the statistics, and the practices which they pointed to, as "a disgrace, and outrage against human rights and a shame for our country". In response the Minster for Justice, Equality & Law Reform pointed out that the current practice of using such cells was under review with a view to suggesting alternative approaches.[29]

In another important development for the rights of prisoners, the Irish Penal Reform Trust (IPRT), a non-governmental organisation that campaigns for the rights of people in prison and reform of Irish penal policy, won the right to sue the State on behalf of prisoners with psychiatric problems. In a significant decision on legal standing, Mr Justice Paul Gilligan in the High Court held that the significant number of Irish prisoner who suffered from mental health problems[30] would, in most cases, not be in a position to vindicate their own rights (either through ignorance of such rights or fear of retribution for challenging the authorities), their claims would be better advanced by the IPRT.

Mr Justice Gilligan held that while mentally-ill prisoners could, in theory, assert their own rights, the IPRT, because it had the expertise and finance, could more effectively pursue claims for such prisoners against systematic failings in the prison system.[31]

In July, the Inspector of Mental Health Services published her first comprehensive Annual Report,[32] in which she highlighted significant deficiencies in the services provided for people with mental health problems in Ireland. The report highlighted how mismanagement of resources, lack of accountability and under-investment in mental health has resulted in a service which is failing to meet many patients' needs.

Of particular importance, for present purposes at least, the Report highlighted unsatisfactory sanitary conditions in a number of mental health institutions as well as raising concerns about the basis on which a number of people are held in mental health institutions. In particular, the Inspector's visit to the Central Mental Hospital revealed substandard levels of hygiene and a shortage of toilets which meant that many patients had to 'slop-out'.

The Report also raised concerns about the incidence of involuntary admission throughout the State. In particular, the Report raised concerns about the use of 'persons of unsound mind' orders (PUM orders), pursuant to which an individual can be detained indefinitely in a psychiatric hospital. The report highlighted the fact that, in East Galway, 50 such orders had been issued in the last year.[33]

In October, the Inspector of Prisons and Places of Detention published two reports relating to his visits to the Training Unit at Mountjoy Prison[34] and Cork Prison.[35] One of the most significant recommendations which came out of the Inspector's first report was that the Training Unit should be exempted from the proposed relocation of the Mountjoy complex to

[29] *Irish Times*, 12 July 2005.
[30] On the high incidence of Irish prisoners suffering from mental health problems see Mairead Seymour and Liza Costello, *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody* (August, 2005) and the *Irish Times*, 29 August 2005 at pp.1 and 5.
[31] *Irish Times*, 03 September 2005.
[32] Mental Health Commission, *Annual Report 2004, Including the Report of the Inspector of Mental Health Services* (July, 2005).
[33] See the *Irish Times*, 23 July 2005 at p.3.
[34] Irish Prisons Inspectorate, *Training Unit* (October, 2005) [hereinafter: *Training Unit*].
[35] Irish Prisons Inspectorate, *Cork Prison* (October, 2005) [hereinafter: *Cork Prison*].

north county Dublin (discussed in last year's Report on Ireland). The Inspector made the point that: "A third of the population [of the training unit] leave on daily temporary release and can get buses, trains, walk etc to their place of work, courses etc. But if [the unit was] located in north Dublin, no such public transport would be available". The inspector thus recommended the relocation of the training unit to an appropriate site within Dublin city centre.[36]

With respect to Cork Prison, the Inspector described it as the "most overcrowded prison in the system", which was a matter of concern, the inspector was also highly critical of the continued practice of 'slopping-out' in all but one of the prison's wings.[37] The report was also critical of the lack of workshops or work/training areas in the prison, the inspector described the lack of stimuli and creative facilities for the prisoners as "soul destroying" and recommended immediate measures to remedy the deficiency.[38]

Positive aspects

In the period under review, a protracted industrial relations dispute between the Prison Officers' Association and the Department of Justice, Equality & Law Reform on overtime pay and related matters was resolved. This, coupled with a commitment to invest significant additional resources for the purpose of upgrading facilities is to be welcomed although the spending of such resources on the provision of additional prison places has been criticised.

Although long overdue, a Prisons Bill was published during the period under review.

Reasons for concern

In October, the Irish Human Rights Commission (IHRC), raised concerns about the government's failure to implement Part 2 of the Mental Health Act, 2001, which provides for the establishment of Mental Health Tribunals to review involuntary admissions to mental health institutions. The IHRC noted that the "tardiness of the State" in relation to the implementation of these measures raised issues about State compliance with both the ECHR and various international human rights instruments.[39]

Protection of the child against ill-treatments

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

In June, the European Committee on Social Rights (ECSR) found Ireland in breach of Article 17 of the Revised European Social Charter ((Rev) ESC) for continuing to allow children to be slapped.[40] The case arose out of a complaint made by the World Organisation Against Torture (OMCT), claiming that Ireland failed to comply with Article 17 (Rev) ESC as "corporal punishment of children in the home, in foster care, in residential homes and in the care of certain childminders is not prohibited".[41]

[36] *Training Unit* at p.64.
[37] *Cork Prison* at p.91.
[38] *Ibid* at pp.93-94.
[39] See "Commission Concerned at Delay in Fulfilling Obligations to Protect Rights of Persons Involuntarily Admitted to Institutions", available at http://www.ihrc.ie/home/wnarticle.asp?NID=131&T=N&Print=>.
[40] *World Organisation against Torture (OMCT) v Ireland* (Complaint No. 18/2003).
[41] *Ibid* at para.9.

In response to the OMCT's claim the Irish Government argued that the existing legal and policy regime in Ireland provided adequate protection for children from serious assault.[42] However, the ECSR held that Article 17 required that:

> [The] prohibition of all forms of violence [against children] must have a legislative basis. The prohibition must cover all forms of violence regardless of where it occurs or of the identity of the alleged perpetrator. Furthermore the sanctions available must be adequate, dissuasive and proportionate.[43]

The ECSR found that the present Irish regime fell below the standard required by the (Rev) ESC and thus held that the State was in violation of its obligations under the Charter.[44]

The decision was welcomed by the Irish Society for the Prevention of Cruelty to Children (ISPCC), who said it should provide the impetus for the Government to introduce legislation providing for a complete ban on slapping.[45] Also in response to the decision the Committee of Ministers of the Council of Europe adopted a resolution noting the Irish Government's intention to keep the question of a complete legislative ban on corporal punishment under review.[46]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In March 2005, the Commissioner of An Garda Siochana published a *Human Rights Audit*, which had been carried out independently by a private consultancy firm.

The audit came to the conclusion that for a police service to operate in a human rights compliant manner it must:

- Respect the rights of everyone it comes into contact with: the community in general, victims and witnesses, suspects and detainees, and its own employees
- Protect the more vulnerable members of the community
- Not discriminate unfairly against any group of people
- Use police powers with the minimum use of force, in a proportionate manner and only as strictly necessary
- Be fully accountable to the community which it serves, through community involvement, observance of the law, clear and open policies, procedures and decision making and monitoring of compliance
- Be held to account by elected representative bodies
- Conduct its business in an open, honest and accountable manner at all times[47]

The audit stated that there was an urgent need to review all policies and operating procedures so that they are human rights compliant, as the current human rights protection framework, which includes the Declaration of Professional Values and Ethical Standards, 2003 and the establishment of the Human Rights Office, does not adequately deal with the issues. It stated:

> "…there do not appear to be mechanisms in place at present to allow for systematic and routine monitoring of the use of police powers in relation to human rights issues.

[42] *Ibid* at para.36.
[43] *Ibid* at para.64.
[44] *Ibid* at paras.65 and 66.
[45] *Irish Times*, 08 June 2005.
[46] Resolution ResChS(2005)9, adopted by the Committee of Ministers on 8 June 2005.
[47] An Garda Siochana, *Human Rights Audit,* p. 118 www.garda.ie

> Nor are there central, strategic mechanisms to assess the impact of existing and new policies and practices and to recommend changes as needed. As participants at the community meetings stressed, the key to the success of the Declaration of Professional Values and Ethical Standards lies in monitoring the operation of police powers and reporting openly on results."[48]

In assessing how human rights were perceived at senior levels in the police force the audit noted that there was a high degree of cynicism among members who often saw work on human rights as a "back-covering exercise" and concerns were also raised about the way in which Garda members approached the issue of juvenile and ethnic minority policing. [49] Urgent race and diversity training was recommended in order that members meet the needs of Ireland's rapidly changing and diverse society.[50]

In considering the future for human rights in the police service of Ireland, the audit stated that in five years time a situation should exist whereby:

- There are no critical reports from any source about excessive or disproportionate use of force in using police powers
- There is a flourishing network of active community support across all diverse groups
- A high level human rights advisory committee, a high profile champion and a strong management structure for human rights work is well established
- User satisfaction surveys show high levels of satisfaction with An Garda Siochana across all sections of the community
- Systems are well established for monitoring, measuring and reporting on compliance with human rights standards across all of An Garda Siochana's work
- All policies and procedures have been 'human rights proofed' and published wherever possible
- An Garda Siochana's staff more closely reflect the communities which they serve
- All staff put human rights observance at the heart of everything they do – and can be seen to do so[51]

To help achieve these goals a number of key recommendations were included in the audit, which include:

- The strengthening and enhancement of the roles of the Garda Human Rights Office and the Racial and Intercultural Office. At the time the audit was published the two offices had only three full time staff, were under resourced and not based in the same location; the audit suggests placing these offices at a more central and strategic position in the organisation
- Undertake a human rights impact assessment of all existing and forthcoming policy and operational procedures, including the Garda code, and establish systems to monitor compliance with human rights standards in operational policing. The audit found little evidence that human rights were embedded in Garda Siochana policy and where policies were in place they did not seem to have been implemented.
- Develop more effective mechanisms for consultation, promotion and dissemination of human rights information externally and internally. The audit revealed that although all staff had been given a copy of the Declaration of

[48] *Ibid.,* p. 119
[49] *Ibid.*
[50] *Ibid.,* p. 120
[51] *Ibid.,* p. 121

Professional Standards document, this had not been supported in any other way, by for example a programme of human rights promotion and training

- Develop ways to overcome language barriers. It was essential that all communities in Irish society understand the role of the police and receive adequate protection of their human rights in contact with the police. The audit recommends the improvement of language skills among members as well as providing more information in the main minority languages and establishing a network of accredited interpreters
- Identify and tackle institutional racism – "The audit has shown that the procedure and operating practices of An Garda Siochana can lead to institutional racism particularly in relation to the Nigerian community and to a slightly lesser degree at present, the Muslim community."[52] The audit recommended the establishment of systems for collecting information about the ethnic origins of those subject to police powers (suspects, witnesses and victims).
- Deal robustly with racist crime and protect vulnerable communities. Concerns were expressed during the audit about the increase in racist attacks and the lack of police action to tackle these. The audit recommended that efforts be made to encourage more reporting of race and hate crimes by promoting confidence in the communities concerned
- Encourage the recruitment, retention and progression of a more diverse police service. There are a greater amount of women becoming members but they remain at the lower levels with few women at more senior ranks. The audit also showed there are very few members of minority ethnic communities in the police force and suggests a positive action strategy to encourage more applications from members of these communities.
- Provide human rights and race diversity training for all staff. Although more training was required according to the report, it was also noted that there was a strong desire on the part of many of the members for more information and training in this area.[53]

Reasons for concern

In July, the Garda Siochana Act 2005 came into force. (This was discussed in some detail as a Bill in last year's Annual Report). During the final stages of the legislative process leading to the adoption of the Act members of the Oireachtas (parliament) raised concerns that the proposed legislation did not go far enough in ensuring police accountability. In particular, dissatisfaction was expressed about the decision to appoint a three-person Garda Ombudsman Commission, instead of the office of Garda Ombudsman (similar to that which pertains in Northern Ireland).[54] Although the Act does introduce a number of important elements into the governance of the Garda Siochana, such as the requirement for members of the force to account for their actions while on duty and increased accountability of the Garda Commissioner to the Minister for Justice, Equality & Law Reform the failure to appoint a complaints assessment body on a par with the Northern Ireland Police Ombudsman is a significant shortcoming in the new legislation.[55]

[52] *Ibid.* p. 140
[53] *Ibid.* p. 136 - 141
[54] *Irish Times*, 03 June 2005.
[55] *Irish Times*, 25 June 2005.

Article 5. Prohibition of slavery and forced labour

Trafficking in human beings

Legislative initiatives, national case law and practices of national authorities

In May 2005, Ruhama, a voluntary organisation working with women involved in prostitution, published a report which highlighted the growing number of non-Irish women who have been trafficked into Ireland for the purpose of sexual exploitation. While conceding that, because of the nature of the process, it would be impossible to put a precise figure on the number of women who may have been trafficked into Ireland for that purpose, the Report noted that Ruhama was aware of at least 80 women presumed trafficked, 22 of which Ruhama had actively supported.[56]

The majority of such women came from Eastern Europe, in particular Albania and Romania. Ruhama has argued that one important aspect in tackling the incidence of women being trafficked into the State for sex would be the closing of so-called 'lap-dancing clubs'. Ruhama identified how work in such clubs tended to be the first step along the road to further sexual exploitation of non-national women brought into the country, and advocated the closure of all such clubs.[57]

Positive aspects

In August 2005, it was reported that An Garda Siochana had established a dedicated unit to investigate the alleged trafficking of non-national women into the State for the purpose of sexual exploitation. The new unit's investigations were to focus on lap-dancing clubs, as well as known brothels, after reports that a number of non-national women had been forced, under the threat of violence, to move from lap-dancing to prostitution.[58]

Exploitation of undocumented workers

Reasons for concern

Speaking at the launch of a rights guide for domestic workers in July 2005, Peter McLoone, President of the Irish Congress of Trade Unions (ICTU), highlighted the plight of many such workers – many of whom are migrant women – in Ireland. He pointed out that some workers were earning as little as €112 a month for an 80-hour week, or 35 cent per hour. Many had their passports confiscated by employers, who would then threaten them with deportation if they complained. ICTU called for "real rights" for domestic workers and the establishment of a labour inspectorate, with the power to inspect home-work settings, to enforce these rights. In response to ICTU's calls the Minister for Labour Affairs said the government was willing to respond positively to ICTU's calls.[59]

Later in the year, in a graphic illustration of the problems alluded to by Mr McLoone, a Filipina, who had been employed as a nanny by an Irish couple, lodged papers with the Labour Relations Commission alleging exploitation. In her complaint she alleged that she was forced to work seven days per week, 8am to 9pm Monday to Friday and 9am to 9pm Saturday and Sunday. She complained that she was only paid €127.36 per month, or 22 cent per hour, that she was forbidden to leave the family home, except to perform certain services for the

[56] Ruhama, *The Next Step Initiative: Research Report on Barriers Affecting Women in Prostitution* (May, 2005) at p.6.
[57] *Irish Times*, 13 July 2005 at p.6.
[58] *Sunday Business Post*, 14 August 2005 at p.1.
[59] *Irish Times*, 13 July 2005 at p.6.

family, and that her employer had confiscated her passport. As of yet there has been no report of a decision in her case.[60]

[60] *Irish Times*, 18 August 2005 at p.3.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Detention following a criminal conviction

Legislative initiatives, national case law and practices of national authorities
In August 2005 the Minister for Justice, Equality & Law Reform, speaking at the launch of the Parole Board's Annual Report,[61] announced Government plans to introduce a system of early release incentives for sex offenders and drug addicts that underwent rehabilitative programmes while in prison. Currently, such offenders are entitled to remission equal to 25% of their sentences, but under the proposed new scheme such inmates would only be entitled to remission if they undergo rehabilitation while in prison.[62]

Reasons for concern

In the Parole Board's Annual Report the Chairman of the Board highlighted the problem of consistent under-funding of the Probation and Welfare Service (PWS). Given the extent to which the work of the Parole Board was dependant on the assistance of the PWS, under-funding of the latter was seen to be adversely affecting the work of the former. Under-funding of the PWS was also contributing to delays in the processing of individual parole applications, with adverse effects on the rights of individual applicants involved.[63] The Chairman, thus, called for an increase in resources allocated to the PWS, particularly for the provision of a sufficient number of psychologists within the prison system.[64]

Deprivation of liberty for juvenile offenders

Reasons for concern

In October, it was reported that 147 children, between the ages of 15 and 17, had been placed in adult prisons since the beginning of this year. The Ombudsman for Children, Emily Logan, said that the consistent practice of placing children in adult prisons was inappropriate and inconsistent with the State's international human rights obligations, particularly under the UN Convention on the Rights of the Child. Ms Logan also expressed concern about the fact that such institutions were excluded from her investigatory remit.[65] Minister of State for Children, Brian Lenihan, indicated that plans to end the practice of incarcerating children in the same institutions as adults were to be brought before the Cabinet shortly.[66]

Deprivation of liberty for foreigners

Reasons for concern

In November, a report commissioned by a number of Irish NGO's called for an end to the practice whereby individuals detained for immigration-related matters were held in ordinary prisons.[67] The report noted that almost 3,000 people were held in prison for immigration-

[61] The Parole Board, *Annual Report 2004* (August, 2004).
[62] *Irish Times*, 28 August 2005 at p.4.
[63] *Ibid* at pp.3-4.
[64] *Ibid* at p.5.
[65] *Irish Times*, 18 October 2005 at p.5.
[66] *Ibid*.
[67] Mark Kelly, *Immigration-Related Detention in Ireland: A Research Report for the Irish Refugee Council, Irish Penal Reform Trust and Immigrant Council of Ireland* (November, 2005).

related matters between 2003 and 2004, and that two-thirds of that number had spent more than 51 days in custody.[68] The report's author stated that "prisons are, by definition, inappropriate places in which to hold immigration detainees … in those cases where it is deemed necessary to deprive people of their liberty for an extended period under immigration legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel".[69]

In lieu of such a policy shift, the report also made a number of recommendations with respect to the rights of individuals detained for a variety of immigration-related reasons. These included, *inter alia*, that the various classes of detainees be: (i) informed in writing, in a language they understand, of the nature of their detention and of any avenues of legal recourse that may be open to them; (ii) allowed to inform a person of their choice of their situation; (iii) allowed to have access to a lawyer; and (iv) allowed to have access to medical care.[70]

Article 7. Respect for private and family life

Private life

Voluntary termination of pregnancy

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

The Irish Human Rights Commission, in its submission to the CEDAW Committee[71], proposed the Government introduce legislation aimed at regulating the circumstances when it would be lawful in this state for a woman to obtain abortion services. However, a spokesperson for the Government said that there was no plan to introduce such measures at present. [The CEDAW Report is discussed in greater detail under Article 23].

The European Court of Human Rights began a preliminary hearing as to the admissibility of the case of an Irish woman who claimed that the State's failure to provide adequate abortion services or information in relation to pregnancies affected by a lethal foetal abnormality constituted a violation of her rights under the ECHR.

The applicant, referred to only as 'D', had become pregnant with twins in 2001, however some months into the pregnancy she discovered that neither foetus would survive. D claims that the devastating effect of this diagnosis was unnecessarily exacerbated by restrictive Irish law – principally the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 – which prevents doctors from advocating abortion unless there is a risk to the life of the mother. As a consequence of the restrictive legal position in Ireland 'D' had to travel to the United Kingdom to obtain an abortion.

D claimed that the legal position in Ireland in relation to abortion for lethal foetal abnormality violated six articles of the ECHR, including her rights not to be subject to inhuman and degrading treatment, her right to privacy and family life, to receive information and to non-discrimination.

[68] *Ibid* at p.6.
[69] *Ibid* at p.56.
[70] *Ibid* at pp.59-62.
[71] ///details of submission on www///

The State is contesting the case on a number of grounds, including the claim that the applicant has failed to exhaust domestic remedies before proceeding to the EctHR. In response to this, counsel for D argued that as there was no reasonable prospect of success in the domestic legal system the EctHR was not barred from hearing the case.[72]

Legislative initiatives, national case law and practices of national authorities

In February 2005, it was reported that a non-national woman who wished to travel to the United Kingdom in order to terminate her pregnancy was refused permission to so do by the relevant authorities.[73] The woman had been referred to a clinic by a health centre in Cork, but was unable to get the necessary travel documents which would allow her to travel to the UK to avail of the service. It was reported that the woman, whose application for asylum in Ireland had failed, but who had applied for leave to stay on humanitarian grounds, was informed by the Department of Justice, Equality & Law Reform when she sought the requisite documentation to travel that she should contact her embassy and obtain an abortion in her own country.[74] A spokesperson for the Irish Refugee Council stated that while it was relatively straightforward for asylum seekers to obtain the relevant documentation to travel for these procedures, the circumstances were different for those whose asylum applications had failed and who had applied to stay on humanitarian grounds as they had, in fact, lost the protection of the state. While people in this situation are free to leave the state, they almost certainly would not be allowed to re-enter.

In August, it was reported that three Irish women, all of whom had abortions in the United Kingdom within the last year, were taking a case to the European Court of Human Rights (EctHR). The women claim, *inter alia*, that "the exceptionally restrictive nature of Irish law on abortion jeopardises their health and wellbeing" and thus violated their rights under the European Convention on Human Rights (ECHR). The women's case was supported by the Irish Family Planning Association (IFPA).[75]

In conjunction with the announcement of the initiation of the women's case a new campaigning organisation, *Safe and Legal in Ireland*, was launched. It intends to lobby the government and the main political parties to support and initiate change in the law with relation to abortion.[76]

Reasons for concern

As stated in previous reports on Ireland, Irish law on the voluntary termination of pregnancy remains unsatisfactory as the basic provisions contained in Article 40.3.3 of the Irish Constitution depend unduly on judicial interpretation in the absence of clarifying legislation or further constitutional amendment.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In June, it was reported that the Government was to designate a group of senior civil servants to develop a new privacy law for the State. The development of such a law is perceived to be linked to the Government's commitment to introduce legislation to ease the State's stringent defamation laws. However, while reform of the defamation laws appears likely to proceed

[72] *Irish Times*, 6 September 2005 and 7 September 2005.
[73] *Irish Times,* February 22nd 2005
[74] *Ibid.*
[75] *Irish Times*, 10 August 2005.
[76] *Irish Times*, 10 August 2005.

unhindered, it was reported that the Minister for Justice, Equality & Law Reform had reservations about the desirability of a new privacy law, casting some doubt on the prospects of any such proposal. Notwithstanding this the group established to develop the proposed privacy law was expected to report to the Minister by the autumn.[77]

Reasons for concern

As with Irish law on voluntary termination of pregnancy it is generally recognised that Irish law on privacy, although constitutionally guaranteed as an unspecified personal right, depends unduly on judicial interpretation and is unnecessarily vague in terms of the scope of protection afforded by the right. While this may be alleviated to some extent by the application ot he legislation to incorporate the ECHR into Irish Law, the European Convention on Human Rights Act 2003, the form of incorporation used was sub-constitutional and, therefore, any principle of Irish constitutional law on privacy – however vague – will take precedence over the Convention as amatter of domestic law.

Family life

Protection of family life

Legislative initiatives, national case law and practices of national authorities

In June, the High Court overturned an earlier order of the Information Commissioner, directing the South Western Area Health Board (SWAHB) to release, in edited form, records sought by an adopted woman seeking information about her birth mother. Evidence presented to the Court demonstrated that the woman's birth mother did not wish to have details, which she had disclosed to the SWAHB in confidence, disclosed.

Some forty years had passed since the woman was adopted, and her birth mother had since married and had a stable family life. The birth mother claimed that disclosure of the records would impinge on her constitutional rights to privacy and the protection of her family and marriage.

Mr Justice Smyth held that the Information Commissioner's order would seriously undermine confidence in the health board's ability to honour confidentiality understandings, which was essential, were women dealing with crisis pregnancies were considering giving their children up for adoption. This could, in turn, put the life of a baby at risk.

On the specific facts of the case Mr Justice Smyth held that the Information Commissioner's decision had been made in breach of fair procedures, as it had not afforded the birth mother an opportunity to make representations in relation to the release of the documents. For this reason he overturned the order. The judgment had, potentially, a much wider application and significance for the rights of parties in an adoption context.[78]

Also in June the Minister of State for Children, Brian Lenihan, announced plans to introduce legislation which would strengthen the position of parents who give children up for adoption, vis-à-vis access to the children. Mr Lenihan said that such 'open adoptions', whereby the birth parents maintained contact with the child, were considered best practice, but were presently of a voluntary character within the Irish system. He said that the proposed legislation would give natural mothers and fathers and enforceable right to maintain contact with their children,

[77] *Irish Times*, 25 June 2005.
[78] *Irish Times*, 01 June 2005.

should they so desire. The Minister's announcement was welcomed by an organisation which represents adopted people in Ireland.[79]

Positive aspects

In July, the Minister for Justice, Equality & Law Reform introduced changes relaxing the 'in camera rule' which had prohibited general reporting of family law cases. Under the new rules certain categories of people, including family mediators and certain classes of researchers (but not journalists) can apply to the Minster for Justice for permission to attend and report on family law proceedings.[80] While the changes were generally welcomed, some commentators still expressed concern over the stringency of the rules. In particular the continued blanket ban on journalistic reporting of family law matters, which, it was argued, inhibited reform in the area.[81]

In October 2005, a new Practice Direction was issued by the President of the High Court, Finnegan P., on family law proceedings. The objective of the direction is to ensure that proceedings are determined in a way that is fair, just and cost effective. An important aspect of the Practice Direction is that proceedings initiated in the High Court should be concluded within one year of the initiation of those proceedings. Another important component of the direction is that the parties should be given the opportunity to enter into discussion at the earliest possible opportunity.

Reasons for concern

While the announcement of plans to make provision for open adoptions is a welcome step, the delay with operationalising these plans would, given the sensitive issues involved and the number of people affected, certainly be a ground for concern. The plans which the Minister announced in June, had received Cabinet approval in December of 2004 and the significant delay in giving effect to the policy proposals seems regrettable.[82]

The relaxation of the in camera rule this year was certainly a welcome development but questions remain about whether or not the reforms went far enough, in particular whether or not the in camera rule in Ireland is compliant with ECHR standards, in particular the European Court's judgment in the joined cases of *B. and P. v The United Kingdom*.[83]

Right to family reunification

Legislative initiatives, national case law and practices of national authorities

Demographic changes in Irish society over the last number of years, resulting from sustained immigration, have meant that the issue of family reunification, particularly for non-EU migrant workers, has become a pressing concern. However, as the Irish Human Rights Commission (IHRC) has noted, with the exception of refugees and citizens of EU States exercising freedom of movement rights, "there is no legal right to family reunification under Irish law".[84] Instead, there is an *ad hoc*, discretionary administrative scheme for addressing

[79] *Irish Times*, 29 June 2005.
[80] *Irish Times*, 12 July 2005.
[81] Vincent Browne, "Lifting the Veil on Family Law" *Irish Times*, 13 July 2005.
[82] See http://www.dohc.ie/press/releases/2005/20050105.html.
[83] Judgment of 24 April 2001 (Applications Nos. 36337/97 and 35974/97).
[84] IHRC, "Position Paper on Family Reunification" (November, 2005) at p.6, available at http://www.ihrc.ie/documents/article.asp?NID=154&NCID=6&T=N&Print=.

applications for family reunification, which is sorely lacking in terms of both transparency and accountability.[85]

In November, the Minister for Justice, Equality & Law Reform announced his intention to introduce a scheme to allow migrant workers bring their families to Ireland, provided, *inter alia*, that they would not be an economic burden on the State.[86] Indeed the Department's Discussion Document on the proposed Immigration and Residence Bill had envisaged changes with respect to this aspect of immigration policy.[87] However, one of the shortcomings of the Minister's proposal, and indeed of the proposals in the discussion document, is that any such scheme would be a creature of ministerial discretion, and not a statutory right.

The Discussion Document notes that family reunification has been the chief form of legal migration into the EU for several years and that in most cases it accounts for 60% of migration.[88]

Key proposals on the issue of family reunification include:

- Family reunification provisions to be set out in an accessible and transparent fashion in secondary legislation or practice instructions
- A non-national entitled to reside in Ireland on a long term or permanent basis should be entitled to apply to be joined by his/her spouse and minor unmarried children where the family will be economically viable in the State, subject to public policy and security issues.
- The admission of family members in other cases should be covered by schemes made by the Minister.
- The issue of non-marital partnerships and same-sex relationships will be considered and provision could be made for schemes to deal with these in accordance with the treatment of such relationships in Irish law generally.
- A sponsorship scheme to allow unmarried children over 18 to join their family members with long term or permanent residence in Ireland is to be considered.
- Other circumstances to be covered in schemes to be made by the Minister include: admission of fiance´(e)s of persons resident in Ireland, foreign adoptions and the situation of family members in the event of the death of head of a family, marriage breakdown or in the event of domestic violence.
- Consideration is to be given as to how abuses of family reunification, including marriages of convenience, can be dealt with. Sanctions should be provided.

Children

- There should be a general requirement for proof that unaccompanied children seeking to travel to Ireland are travelling with their parents' or guardian's consent.
- To combat child trafficking, there should be provision for appropriate action to be taken to protect children where there are suspicions about the nature of the relationship of a nonnational child to the adults accompanying him/her in entering the State.
- The compulsory registration of all non-national children resident in Ireland is to be considered.

[85] *Ibid* at pp.2 and 8.
[86] *Irish Times*, 09 November 2005.
[87] Department of Justice, *Immigration and Residence in Ireland, Outline Proposals for an Immigration and Residence Bill, A discussion Document* (April, 2005) at p.79.
[88] Department of Justice, *Immigration and Residence in Ireland, A discussion document,* 2005, Summary, p. 12

Reasons for concern

The Irish Human Rights Commission has criticised the discretionary nature of proposed changes in the area of family reunification and, in its commentary on the Discussion Document, has argued that "family reunification for the various categories of immigrants should be set out clearly as a statutory right in primary legislation, and that these provisions should be subject to the full rigour of parliamentary scrutiny rather than being provided for in secondary legislation or practice directions drafted at the discretion of the Minister".[89] In this context the IHRC also argued that applications for family reunification should be assessed in light of the criteria under Articles 8 and 14 ECHR and that the category of persons entitled to enjoy family reunification should be considered broadly to include, *inter alia*, non-marital partnerships, same-sex partnerships and other adult relationships where there is a relationship of dependency.[90]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In November a number of media reports indicated that the All-Party Oireachtas Committee on the Constitution, established by the parliament to review and make recommendations on the position of the Family under the Constitution, was poised to make a number of proposals with a view to improving the position of non-traditional families within the Irish legal order. Although the Committee's report has yet to be published indications are that they will recommend, *inter alia*: (i) legislative changes to provide that unmarried couples living together in long-term relationships (including same-sex couples) should receive benefits similar to married couples in areas such as tax and social welfare; (ii) a constitutional amendment to underpin the individual rights of the child; (iii) a constitutional amendment to make Article 41.2 of the Constitution (dealing with the woman's role in the home) gender-neutral; and (iv) legislative changes to strengthen the position of natural father's before the family law courts.[91]

Article 8. Protection of personal data

Independent control authority

Legislative initiatives, national case law and practices of national authorities

In March 2005, the Office of the Data Protection Commissioner issued its Annual Report for 2004. The Report notes the continued concern on the part of both individuals and organisations regarding data protection.[92] Issues addressed in the report include:

- The review of over 240 state sector websites which revealed "to an alarming degree that the majority of them had either no or inadequate privacy statements."[93]

[89] IHRC, "Observations on the Immigration and Residence in Ireland Discussion Document" (July, 2005) at p.12, available at <http://www.ihrc.ie/documents/article.asp?NID=148&NCID=6&T=N&Print=>.
[90] *Ibid* at pp.18-19.
[91] *Irish Times*, 07 November 2005.
[92] Office of the Data Protection Commissioner, *Sixteenth Annual Report of the Data Protection Commissioner,* 2004, p. 5
[93] *Ibid.* p. 6

- Co-operation at international level in combating spam and the prosecutions which were initiated in December 2004 for mobile phone text marketing messages.[94]
- The first successful prosecutions taken since the office since its foundation in 1998[95]

The Report shows that the number of complaints received by the Office was higher in 2004 than at any other time with 385 complaints for 2004 as opposed to 258 for the preceding year. The largest areas of complaint were in the areas of right of access to data, which is protected under Section 4 of the Data Protection Act and also complaints about direct marketing, the respective share of each of these being 27 % and 42%.[96]

In Part 3 of the Report, the Office of the Data Protection Commissioner deals with the issue of data protection advice. The Department of Transport had asked the Commissioner's office whether it might be possible to use Garda speed cameras to pursue enforcement strategies against motor tax evasion. The advice in the report states that this would not be possible without a change in the law and although the Commissioner states that he is in favour of proportionate measures for detecting tax evasion, there is concern that such a measure "could be the start of a 'surveillance' society culture."[97]

Positive aspects

Part Four of the Disability Act, 2005 prohibits, *inter alia*, the processing of an individual's genetic data by employers or insurance companies. Processing of genetic data for such purposes constitutes an offence and, pursuant to s.42(4) of the Act, the Data Protection Commissioner has responsibility for determining whether or not the legislation has been breached.

Other relevant developments

Reasons for concern

Plans by the Department of Social and Family Affairs to introduce a national swipe card system to be used by people in their dealings with governmental departments have raised concern about the protection of personal data. There are concerns that the project, as envisaged, would breach the terms of the Data Protection Act, 1988,[98] or that it may become a template for a more comprehensive and invasive national identity card system, along the lines of that presently being advanced in the United Kingdom.[99]

[94] *Ibid.*
[95] *Ibid.* p. 5
[96] *Ibid.* p. 12
[97] *Ibid.* p. 34
[98] As amended by the Data Protection (Amendment) Act, 2003.
[99] *Irish Times*, 13 July 2005 at p.1.

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

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

In November the Supreme Court heard an appeal in a case taken by a post-operative male-to-femail transsexual, Ms. Lydia Foy, against a decision of the High Court refusing, *inter alia*, to alter the Register of Births to take account of her post-operative gender. The Supreme Court refused an application for a declaration of incompatibility under the ECHR Act 2003 and remitted the matter back to the High Court for consideration. At the time of writing the case is adjourned.

Positive aspects

In July, the Minister for Justice, Equality & Law Reform announced a commitment to legislating for same-sex civil partnerships. The Minister rejected the idea of the marriage analogue being used as the template for the recognition and protection of same-sex unions, insisting that civil partnership was a more appropriate model. The Minister did not give a specific timeframe for the introduction of the relevant legislation, but simply affirmed that both he and the Government were wholly committed to legislating on the issue.[100]

In furtherance of his stated commitment to legislate for same-sex partnerships, the Minster has since established a consultation forum between the Government and representatives of the gay and lesbian community in Ireland. Response to this initiative, and to the Ministers rejection of the marriage paradigm for same-sex unions, from within the gay and lesbian community was mixed.[101]

Article 10. Freedom of thought, conscience and religion

Article 11. Freedom of expression and of information

Freedom of expression and of information

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

In June 2005, the European Court of Human Rights gave its decision in the case of *Independent News and Media and Independent Newspapers Ireland Ltd. v Ireland*.[102] The case arose out of an earlier libel trial in the Irish courts, which resulted in an award of IR£300,000, in favour of a politician, Mr Proinsias de Rossa, against Independent Newspapers Ireland Ltd. In the present case, the applicants claimed that Irish court safeguards against disproportionately high libel awards were inadequate, and that this constituted a violation of Article 10 ECHR.

The EctHR held that the essential question to be addressed in the case was "whether, having regard to the size of the … award, there were adequate and effective domestic safeguards, at

[100] *Irish Times*, 29 July 2005 at p.10.
[101] *Irish Times*, 30 July 2005 at p.5.
[102] Judgment of 16 June 2005 (Application No. 55120/00).

first instance and on appeal, against disproportionate awards which assured a reasonable relationship of proportionality between the award and the injury to reputation".[103]

After reviewing the history of the earlier litigation the Court concluded that "having regard to the particular circumstances of the present case, notably the measure of appellate control, and the margin of appreciation accorded to a State in this context, the Court does not find that is has been demonstrated that there were ineffective or inadequate safeguards against a disproportionate award … in the present case". Consequently, there had been no violation of Article 10 ECHR.[104]

Responding to the decision, the Managing Editor of Independent Newspapers expressed disappointment with the judgment and argued that the decision would mean the continued inhibiting of journalism in Ireland resulting from the excessive threat of legal action.[105]

Legislative initiatives, national case law and practices of national authorities

In December 2004, the Minister for Justice, Equality & Law Reform announced plans for the formation of a national Press Council to sanction publications and journalists that violated privacy guidelines. The Minister indicated that his preference would be for the initiative in the formation of such a council to come from the media and for the government to subsequently provide statutory powers for such a body, so it that could effectively regulate the industry.[106] In February of 2005 the Minister again indicated his intention to see the establishment of such a council and emphasised that while it would be invested with statutory powers, the council would be completely independent in terms of its composition and functions. The Minister further indicated that provision for the proposed council would be made in forthcoming legislation designed to update and relax Irish law relating to defamation.[107]

In January 2005 a man charged with serious criminal offences attempted to restrain a Sunday newspaper, *The Sunday World,* from publishing material about him pending the outcome of his trial. The accused, Mr. Martin Foley, attempted to obtain an interlocutory injunction from the High Court stating that the material the newspaper wished to publish in relation to him might encourage an attempt to endanger his life or health. However, in a reserved judgment the court refused to grant the order saying that the evidence adduced by the applicant was insufficient to sustain an interference with the newspaper's right to publish facts and express opinions about the applicant's activities. Mr. Justice Kelly stated that the right to freedom of expression was to be found in Article 40 of the Constitution and Article 10 of the European Convention on Human Rights and that the courts "must be extremely circumspect about curtailing" this, particularly at the interlocutory stage.[108] The judge did, however, state that although this was an important right it could not equal or be more important than the right to life.[109]

In April 2005 the Information Commissioner criticised the "unwarranted adversarial" attitude adopted by the National Maternity Hospital with regard to access to documents on the retention of organs. [110] This arose out of a request for information on the organ retention issue from the *Parents for Justice Group*, after the Commissioner had warned the hospital to co-operate with them.

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[103] *Ibid* at para.113.
[104] *Ibid* at para.132.
[105] *Irish Times*, 17 June 2005.
[106] *Irish Times*, 14 December 2004.
[107] *Irish Times*, 03 February 2005.
[108] *The Irish Times,* January 29th
[109] *Ibid.*
[110] *The Irish Times,* April 29th 2005

In May, Mr Justice Clarke, in the High Court, refused an application seeking to restrain RTE, the national broadcaster, from airing a documentary on the care of the elderly in a private nursing home. The applicants in the case claimed, *inter alia*, that the documentary (which related to an investigation into standards of care in a particular nursing home) contained material likely to defame them and that the manner through which much of the material was obtained - secret filming - breached their privacy rights and the rights of patients.[111] In rejecting the application the judge noted that a case such as this involved the delicate balancing of competing rights and that, since the incorporation of the ECHR into Irish law, Irish courts would have to take onboard the practice of the EctHR in relation to such "prior restraints".[112]

Ultimately the judge held that the public interest in the broadcast of the documentary was decisive.[113] The judge noted that should the applicants succeed in a subsequent defamation case the issue of the surreptitious manner in which the footage was obtained may become relevant for the purposes of awarding damages, but it was not a sufficient basis on which to grant an order restraining the broadcast.[114]

In May the Supreme Court decided its first case relating to the Freedom of Information Act, 1997 (FOIA).[115] The applicant sought to overturn a decision of the Information Commissioner directing the release of certain School Inspectors' Reports. The case arose out of an application by *The Irish Times* newspaper to the Department of Education for the release of school inspectors' reports relating to five schools, in one of which the applicant was the principal. The Department of Education, relying on s.53 of the Education Act,1998 (which provides that, notwithstanding any other enactment, the Minister for Education may refuse access to any information which would enable the compilation of information relating to the comparative academic performance of students enrolled therein) refused the application.

The *Irish Times* challenged the Department's decision before the Information Commissioner, who duly set aside the original decision and ordered the disclosure of the relevant files. Mr Barney Sheedy, the principal of one of the schools concerned, then applied to the High Court for an order quashing the decision of the Information Commissioner. In the High Court Mr Justice Gilligan refused the application on the basis that the applicant had failed to demonstrate that the release of the documents sought would enable the compilation of information in relation to the comparative academic performance of the schools concerned (i.e. 'league tables').

The applicant appealed to the Supreme Court, where the majority, per Kearns, J., held that s.53 of the 1998 Act, as a result of the "notwithstanding clause", overrode the FOIA and that the Information Commissioner and the High Court had erred in law by interpreting s.53 as being confined to comparisons between exam results. Instead, refusal on the grounds of "comparative performance of schools in respect of academic achievement" included a range of other considerations in respect of which comparisons between different schools could be drawn up.[116]

In September 2005, it was reported that the Broadcasting Commission of Ireland (BCI) was seeking submissions for a proposed Code of Programme Standards in the broadcast media. The proposed code may include a list of prohibited swear words as well as new watershed

[111] *Cogley, Aherne and Sovereign Productions v Radio Telifis Eireann*, Unreported High Court. 8 June 2005, *per* Clarke J.
[112] *Ibid* at p.3.
[113] *Ibid* at pp.4-5.
[114] *Ibid* at p.25.
[115] *Barney Sheedy v Information Commissioner and Ors.*, Unreported Supreme Court, 30 May 2005.
[116] *Irish Times Law Report*, 27 June 2005.

times for the broadcast of certain types of material. It is thought that adherence to the code may be tied to the issue of broadcast licence renewal. The basis for the proposed code is found in Section 19 of the Broadcasting Act, 2001.[117]

In October 2005, the High Court dealt with a case that had major implications for freedom of expression, or more precisely freedom of the press. Mr Justice Kelly refused an application by the Mahon Tribunal - a tribunal of inquiry established to investigate irregularities and corruption in the planning process - to restrain *The Sunday Business Post* from publishing details of documents which the Tribunal deemed confidential. The learned judge held that the applicants claim failed to strike the appropriate balance, required by the Irish Constitution and Article 10 ECHR, between the Tribunal's interests and the rights of a free press. Mr Justice Kelly noted that while the right of the press to report was not absolute or unfettered, it was to be curtailed by a court order only if there was a sound legal basis for so doing. In the present circumstances he found that the order sought by the Tribunal was disproportionate and this impermissible. He thus discharged an earlier interim injunction which had been granted pending the determination of the High Court hearing.[118] The Tribunal subsequently applied for and was granted an interim order, in the same terms as that which had been discharged by Kelly J in the High Court, pending the determination of an appeal against the decision of Mr Justice Kelly.[119]

Secrecy of journalistic sources

Reasons for concern

In December 2004 a controversy arose over the refusal by Barry O'Kelly, a journalist employed by *The Sunday Business Post*, to reveal to the Mahon Tribunal the sources of information on which he had based two newspaper articles. The Chairman of the Tribunal, Judge Alan Mahon, had requested Mr O'Kelly to divulge the source of confidential tribunal documents which had been leaked to the journalist. He warned him that failure to do so could result in his imprisonment. Judge Mahon also made the point that there was no "absolute journalistic privilege" and the interests of the free press were outweighed by the interest in protecting the work of the tribunal and the good name of individuals implicated in the journalist's article. Mr O'Kelly steadfastly refused to divulge his sources.[120]

Counsel for the Tribunal subsequently applied to the High Court for an order directing Mr O'Kelly to reveal his sources, should such an order be granted and Mr O'Kelly refuse to comply with it he could be imprisoned for contempt of court.[121] In response to this case the National Newspapers of Ireland (NNI) called for the introduction of legislation providing a form of qualified privilege for journalistic sources. The NNI argued that the absence of such a law meant that Ireland was out of step with developments in most Western societies and, arguably, with the jurisprudence of the ECHR.[122]

[117] *Irish Times*, 08 September 2005 at p.3.
[118] See *Irish Times*, 05 October 2005 and *Sunday Business Post*, 09 October 2005.
[119] *Irish Times*, 08 October 2005.
[120] *Irish Times*, 10 December 2004.
[121] *Irish Times*, 17 December 2004.
[122] *Irish Times*, 11 December 2004.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Reasons for concern

In June, five men (who became known as 'The Rossport Five') were jailed for an indefinite period of time for contempt of court. The five had violated a court order restraining them from obstructing the construction of a gas pipeline by Shell E&P Ireland. The men, and their families and supporters, objected to the construction of the pipeline in proximity to their homes as they had safety concerns about the project.[123] The five men had been imprisoned on foot of committal orders sought by Shell and were only released, after spending 94 days in prison, when Shell applied to have the earlier injunction lifted.[124]

Article 13. Freedom of the arts and sciences

Freedom of research and academic freedom

Legislative initiatives, national case law and practices of national authorities

In May 2005 the Commission on Assisted Human Reproduction (CAHR) published its long-awaited report.[125] The CAHR had originally been established in March 2000 by the then Minister for Health, Micheál Martin, to report on possible approaches to all aspects of assisted human reproduction (AHR). Among the main recommendations contained in the report are:

- A regulatory body should be established by an Act of the Oireachtas to regulate AHR services in Ireland;
- The regulatory body should put in place guidelines to deal with, inter alia, (i) the freezing, storage and use of gametes, (ii) the fertilisation of ova, (iii) the freezing and storage of health embryos and (iv) delimitating the options available with respect to excess frozen embryos;
- Counselling should be provided before, during and after to people considering AHR treatment;
- Donation of sperm, ova and embryos, subject to regulation, should be permissible;
- Surrogacy, subject to regulation, should be permissible,
- Embryo research, including embryonic stem cell research, should (subject to stringent control conditions) be allowed on surplus embryos donated specificly for research;
- Human reproductive cloning should be prohibited.[126]

Among the other recommendations of the CAHR two attracted particular attention, arguably because of peculiarities of the Irish situation. They were (i) that the embryo formed by IVF should not attract legal protection until placed in the human body, at which stage it should attract the same level of protection as the embryo formed *in vivo*, and (ii) that AHR services should be available without discrimination on the grounds of gender, marital status or sexual orientation and that the provision of any such services should be subject to the terms of the Equal Status Acts 2000-4.[127]

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[123] *Irish Times*, 30 June 2005.
[124] *Irish Times*, 01 October 2005.
[125] CAHR, *Report of the Commission on Assisted Human Reproduction* (May, 2005).
[126] *Ibid* at pp.xv-xvii.
[127] *Ibid* at p.xvi.

Reasons for concern

The former recommendation is controversial because it raises difficult questions about the right to life of the unborn, explicitly protected in the Irish Constitution. Indeed, following the publication of the CAHR's report a spokesperson for the Pro-Life Campaign claimed that this recommendation, among others, was incompatible with the right to life and human dignity.[128] While the latter recommendation could prove controversial as it "[paves] the way for lesbian, gay and unmarried couples to avail of assisted human reproduction services".[129]

The government, arguably because of the political sensitivity of many of the Report's recommendations, referred the report to the Oireachtas Health Committee for consideration and will delay any action on the report pending the outcome of the Committee's deliberations.[130] However, the Chairwoman of the CAHR, Prof. Dervilla Donnelly, has since stated that the government, pursuant to an EU Directive, will have to put in place a regulatory scheme dealing with the donation and storage of human reproductive tissue by April 2006.[131]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In September 2005, a spokesperson for the Irish Playwrights' and Screen Writers' Guild, David Kavanagh, raised concerns about the impact of the proposed abolition or modification of the Artists' Tax Exemption (ATE) on the arts in Ireland. Speaking before the Oireachtas Joint Committee on Arts Mr Kavanagh argued that the abolition or significant modification of the ATE could engender a crisis in the arts in Ireland.[132]

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

In March 2005 the Government launched a new Teaching Council which is to operate in a similar fashion to other regulatory bodies for the professions in Ireland. The new council will consist of 37 members, 22 of whom will be teachers. When fully established the Council will fulfil the following functions:

- establishing a register of all teachers;
- advising the Minister for Education and Science on the minimum standards of education attainment required for entry into initial teacher education programmes;
- establishing procedures and criteria for the probation and full recognition of new entrants into the teaching profession;
- drawing up codes of professional practice for teachers and offer guidance on professional conduct as deemed necessary;
- investigating and, where appropriate, applying sanctions in relation to the professional misconduct or fitness to practice of any member;

[128] See Irish Times, 10 May 2005.
[129] *Irish Times*, 09 May 2005.
[130] *Irish Times*, 10 May 2005.
[131] *Irish Times*, 13 May 2005.
[132] *Irish Times*, 15 September 2005. In the Budget announced after the period under review, the artists' tax exemption was retained but with a cap on non-taxable earnings.

- setting out a framework for the in-career professional development of teachers;
- advising the Minister for Education and Science on teacher supply and demand.[133]

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

Article 16. Freedom to conduct a business

Imposition of certain standards, for instance standards restricting the awardance of public contracts

Legislative initiatives, national case law and practices of national authorities

In January 2005 the Quigley Report[134] was published which was commissioned in December 2004 to inquire into procurement procedures following the engagement of a PR firm by the Office of Public Works and the Department of the Environment, Heritage and Local Government. The Report concluded that in proposing the name of the PR representative, the Minister in charge, Mr. Cullen had acted inappropriately, as the procedures followed "could give rise to a perception that a supporter, associate or acquaintance of a Minister was getting special treatment or of a Minister seeking to influence a subsequent procurement process."[135] The report advised that in "all cases where a Minister suggests a person or takes initiative in relation to a contract the matter should be documented"[136] and that the "Department of Finance should arrange for the Government Contracts Committee to review the guidelines for the engagements of consultants."[137] Further steps should be taken by the Department of Finance to ensure the following according to the Inquiry:

- monitoring and recording of work done under contracts and its quality;
- how best to prepare estimates of the cost of projects so as to safeguard, as far as possible, against the value of a project exceeding the EU threshold, taking account of the legal provisions of the Directives;
- ensuring compliance with the requirement to report consultancy projects to the central database. The content of that database should also be reviewed to ensure that it captures all relevant information.[138]

Following the publication of the Report the Taoiseach, Mr. Ahern, issued a statement in which he said that the power to directly hire private-sector public relations consultants would be withdrawn from Ministers.[139]

[133] www.maryhanafin.ie
[134] The full title to report is '*An Enquiry into certain matters in relation to procurement as requested by the Taoiseach, Mr. Bertie Ahern, T.D.',* www.taoiseach.gov.ie
[135] *Ibid.* para. 4.2.1
[136] *Ibid.* para. 4.3.4
[137] *Ibid.* para. 4.3.7
[138] *Ibid.* para. 4.3.9
[139] *The Irish Times,* January 28th

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 February 2005 the Proceeds of Crime (Amendment) Act 2005 was passed (discussed further in Chapter VI). The purpose of the Act was to make further provision with regard to the recovery and disposal of the proceeds of crime. The Act changes the definition of "proceeds of crime" from that which arises out of the "commission of an offence" to that which is the product of "criminal conduct". Therefore the Criminal Assets Bureau does not now need to show that the criminal conduct was "a particular kind of criminality if it is shown that the property was obtained through conduct of one of a number of kinds each of which would be an offence."[140] The Act also allows for the definition of criminal conduct to include criminal conduct outside of the jurisdiction and for the same to apply to the definition of property. The combined changes of definitions contained within the Act have the effect of bringing within the legislation the following five scenarios:

- Where the respondent and the property are in the State and the criminal conduct occurs within the State;
- Where the respondent is situated outside the State but the property is located in the State and the criminal conduct occurs within the State;
- Where the criminal conduct occurred outside the State but the respondent and the property are situated within the State, provided that the conduct constituting the offence is also an offence in the foreign jurisdiction;
- Where the respondent is situated within the state and the criminal conduct occurred within the state but the property is located outside the State; and
- Where the property is located within the State, the respondent is situated outside the State and the criminal conduct occurred outside the State, provided that the conduct constituting the offence is also an offence in the foreign jurisdiction.[141]

Reasons for concern

See Chapter VI

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

The monthly statistics produced by the Office of the Refugee Application Commissioner (ORAC) provides a valuable information source on the level of refugee applications in Ireland. The monthly reports show (i) the number of new applications for refugee status, (ii) the number of re-applications for refugee status, (iii) the total number of cases dealt with in the month under consideration, (iv) the number of recommendations in favour of a declaration of refugee status and (v) the number of recommendations, for a variety of reasons, against the making of a declaration of refugee status.

[140] *Proceeds of Crime (Amendment) Act, 2005,* Explanatory Memorandum, www.oireachtas.ie
[141] *Ibid.*

An analysis of the statistics from December 2004 to the end of October 2005 reveals the following figures for the period under review:

New applications:	3984
Re-applications:	27
Cases dealt with:	5358
Recommendations for:	428
Recommendations against:	4549.[142]

In July 2005, Mr Justice McMenamin in the High Court, delivered a judgment which compelled the Refugee Appeals Tribunal (RAT) to allow lawyers for a number of asylum applicants access its prior relevant decisions. Prior to the decision the RAT had not published its decisions and consequently lawyers for asylum applicants could not refer to such decisions for guidance or invoke them to bolster their arguments. The judge granted a declaration that the failure of the RAT to make prior relevant decisions available to the applicants' lawyers constituted a violation of, *inter alia*, their rights to fair procedures and natural and constitutional justice under Article 40.3 of the Irish Constitution.[143]

Positive aspects

In January 2005 the Department of Justice, Equality & Law Reform issued a notice which provided details of new procedures which would be used in assessing applications for rights to stay in Ireland for the parents of Irish-born children. This followed the introduction of the Citizenship Act 2004 (passed on foot of a controversial constitutional referendum held earlier in 2004) which left approximately 11,000 non-national families with Irish-born children unsure as to whether they would be permitted to remain in Ireland under the new legal regime. Under the new procedures parents of Irish-born children had until the end of March 2005 to apply for permission to remain in Ireland. The application was to be submitted along with evidence of continuous residence in the State. If successful the applicant was granted permission to remain in Ireland for two years after which time their residency was to be reviewed. The procedure provides that if applicants have been self-sufficient and of good character they would be granted permission to stay for a further three years whereupon they could apply for citizenship based on residency. [144]

In June 2005, it was reported that the Minister for Justice, Equality & Law Reform wanted to increase the annual number of refugees accepted by Ireland under a UN settlement programme. At present, Ireland takes in approximately 40 people each year under such programmes, however the Minister reportedly wants to raise this to 200 annually.[145] While this announcement is most welcome, it appears to conflict with later reports in the year of mass deportations of failed asylum seekers. For example in July it was reported that a number of failed asylum seekers, both men and women, had been detained in prisons awaiting a mass deportation aboard a chartered flight to Lagos, Nigeria.[146] These mass deportations also included at least 16 children.[147]

Reasons for concern

Of the 5358 cases dealt with by the ORAC in the period under review only 7.9% resulted in a determination favourable to the applicant.

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[142] See http://www.orac.ie/pages/Stats/statistics.htm.
[143] *Irish Times*, 08 July 2005.
[144] *Irish Times,* 17 January 2005.
[145] *Irish Times*, 06 June 2005.
[146] *Irish Times*, 06 July 2005.
[147] *Irish Times*, 07 July 2005.

Unaccompanied minors seeking asylum

Reasons for concern

In October, a report commissioned by the Health Service Executive raised concerns about the standards of care provided to hundreds of unaccompanied children seeking asylum in the State.[148] The report highlighted a disparity in the level and standard of services provided to unaccompanied minors seeking asylum, as compared to Irish children in State care and called for a concerted effort to address such disparities.[149]

The report recommended the adoption of a comprehensive action plan, incorporating the statutory and voluntary sectors, to improve the services provided to such children. The main elements of the proposed plan include (i) a preliminary, followed by annual, multidisciplinary roundtable for all those involved in service provision to unaccompanied minors to facilitate the orientation of a coherent policy, (ii) the development of a "school retention plan" to insure that children in this category benefit from education, (iii) the delivery of information packs, relating to their medical, social and educational entitlements, to all minors and (iv) a review of actions taken to promote the reproductive and sexual health of unaccompanied minors.[150]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In *Simon and Todea v. Governor of Cloverhill Prison*[151] the applicants questioned the legality of their detention under the provisions of the Refugee Act, 1996 in light of Article 40.4.2 of the Constitution. Section 9.8 of the Refugee Act, 1996 provides that "where an applicant [for asylum] is in possession of forged identity documents, the person [may be detained] in a place of detention." The applicants were arrested and forged identity documents were discovered on their person. They subsequently applied for asylum while being detained in prison. They were then subsequently detained under section 9(8) of the Refugee Act, 1996. Their application was based on the ground that they did not possess the forged documents at the time of their application for asylum and therefore their detention was unlawful.

Peart J, finding in the applicant's favour, stated that "[t]he provisions of the Act, and in particular s.9(8) are not intended to cover a situation where, perhaps several weeks or months after an illegal entry into the State on forged documents, which are impounded, such a person then applies for asylum." He stated that the applicant's detention was unlawful and ordered their release from detention.

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

Collective expulsions

Reasons for concern

In March 2004, over thirty Nigerians were arrested and deported to Lagos in Nigeria. Among those deported were two mothers whose children were left behind as the arresting police

[148] Pauline Conroy and Frances Fitzgerald, *Separated Children Seeking Asylum, Research Study 2004 – Health and Social Education Needs* (September, 2005).
[149] *Ibid* at p.45.
[150] *Ibid* at pp.50-52.
[151] Unreported High Court, 24 December 2004, *per* Peart J.

could not locate them before the flight carrying the deportees was scheduled to take off. Despite this the deportation of the two women went ahead as well as the deportation of a number of students, one of whom, Olunkunle Eluhanla, a Leaving Certificate student. Following the deportations people from the various communities in which these people had been living up to the time of their arrests began campaigning for their return to Ireland. The plight of Mr. Eluhanla, who was due to sit his state examinations in June, garnered a lot of media attention and fellow students from his school in Palmerstown, who were said to be very distressed at the events which had occurred, protested in Dublin for his return, with the support of the Roman Catholic Archbishop of Dublin.

Initially the Minister for Justice, Equality & Law Reform refused to entertain any requests for him to reconsider his position with regard to Mr. Eluhanla, but as public pressure mounted for the young man's return the Minister relented and issued a temporary visa for the student, which would allow him to return to Ireland and prepare for and sit his exams. Officials at the Department of Justice confirmed however that there would be no question sending Mr. Eluhanla back to Nigeria once his visa expired and he had finished his exams.

Subsidiary protection and prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

Legislative initiatives, national case law and practices of national authorities

In August 2005 it was reported that the High Court had granted an interim injunction preventing the imminent deportation of a South African national, Mr. N, who suffered from HIV. Mr. N claimed that if he was deported there was a significant chance that he would not receive medical care for his illness, as, he argued, the South African authorities openly discriminated against HIV sufferers. In such circumstance, Mr. N argued, he would be faced with the prospect of dying from Aids. He argued that in refusing to consider his application for revocation of the deportation order, the Minister for Justice had failed to take into account the risk to Mr. N's life.[152]The interim injunction was subsequently extended by the High Court, pending the production of medical evidence.[153]

[152] *Irish Times*, 03 August 2005 at p.4.
[153] *Irish Times*, 23 August 2005 at p.4.

CHAPTER III. EQUALITY

Article 20. Equality before the law

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

At the commencement of the period under review the *National Action Plan Against Racism* was published, which originated from a commitment made by the government at the United Nations World Conference Against Racism in South Africa in 2001, which was affirmed in thesocial partnership agreement, *Sustaining Progress 2003-2005*. The plan aims at developing "reasonable and common sense measures to accommodate cultural diversity in Ireland"[154] and in providing strategic direction to combat racism.

The Plan recognises that racism can take different forms and impact on various groups. It states that among those who are vulnerable in Ireland are Travellers, recent migrants (including labour migrants and refugees and asylum seekers), black and minority ethnic people and Jews and Muslims (racism in the form of anti-semitism and Islamophobia).[155] The racism encountered by these groups can manifest itself through discrimination, assaults, threatening behaviour and incitement to hatred, labelling and institutional or systemic forms of racism.[156]

The core of the Plan is the Intercultural Framework which is aimed at providing a structure to combat and protect against racism. This framework includes five key objectives: protection, inclusion, provision, recognition and participation.

Objective one is protection and is concerned with "effective protection and redress against racism, including a focus on combating discrimination, assaults, threatening behaviour and incitement to hatred."[157] Under this section it is recommended that measures be taken to:

- Ensure effective protection and redress against discrimination through an enhanced equality policy framework.
- Develop a new multi-facetted strategy to provide a more effective and coordinated response to racist incidents.
- Ensure effective protection against incitement to hatred.
- Enhance the role of the Gardaí to provide protection against racism.
- Develop effective monitoring and analysis of data on racist incidents.
- Develop Anti Racism and Diversity Plans (ARD) at city and\or county level.
- Maximise participation in policy developments at European and global levels to combat racism.
- Maximise cooperation to combat racism within Ireland on a north/south basis and between Ireland and Britain.[158]

[154] NCCRI, *National Action Plan Against Racism,* 2005-2008, p. 27
[155] *Ibid.* p. 29
[156] *Ibid.*
[157] *Ibid.* p. 30
[158] *Ibid.*

The second objective of the framework contained within the plan is that of inclusion, which deals with economic inclusion and equality of opportunity for minorities with a focus on the workplace and poverty. The Plan seeks to secure the following outcomes under this heading:

- Inclusion through macro-economic and social policy planning.
- Inclusion through employment rights, responsibilities and workplace policy.
- Inclusion through public service modernisation.
- Inclusion through national plans and programmes that tackle poverty and social exclusion.
- Inclusion of migrant workers, consistent with the requirements of policy on immigration, employment and equality.
- Inclusion through vocational training and employment service strategies.
- Inclusion through the development of a comprehensive approach to social and equality statistics.

Objective three is entitled provision and is aimed at the accommodation of cultural diversity in service provision with a particular focus on certain areas including health, education, social services and childcare, accommodation and the administration of justice, which are all dealt with at length under this section. The desired outcomes in the areas of provision are as follows:

- Develop a template for service providers to underpin the National Action Plan Against Racism.
- Build an intercultural dimension into the Public Service Modernisation Programme as part of the equality/diversity theme.
- Mainstream/develop anti-racism and intercultural training in all government departments and statutory agencies.
- Develop the business case for diversity in the private sector.
- Develop targeted initiatives focussing on access to key public services, for Travellers, refugees and migrants.
- Develop a comprehensive framework of social and equality statistics to meet policy and service provision needs.
- Develop a clear policy on how diverse external customers/key stakeholders will be consulted on policy and service provision on an ongoing basis.

Objective four deals with the raising of awareness of cultural diversity and racism and is entitled ‘Recognition’. The section deals with raising awareness particularly through the media, arts sports and tourism and the outcomes which are sought by the Plan under Objective four include:

- Consolidate and evolve national anti-racism and intercultural awareness-raising strategies.
- Work with the media to combat racism, promote interaction and to raise awareness and understanding of cultural diversity.
- Develop the potential of arts/culture policy to promote interaction and understanding of cultural diversity.
- Develop the potential of sports and leisure to promote interaction and understanding of cultural diversity.
- Develop the potential of tourism to promote interaction and understanding of cultural diversity.[159]

[159] *Ibid.* p.34

The final Objective is entitled Participation and is concerned with full participation in Irish society for all groups with a particular focus on the political, policy and community levels. The following outcomes are expected:

- Ensure as far a possible that elections are conducted in a manner that does not contribute to racism.
- Enhance the participation of cultural and ethnic minorities in political processes.
- Enhance the participation of cultural and ethnic minorities in policy consultative forums and research.
- Develop an Intercultural Forum to give further consideration of issues related to cultural diversity in Ireland.
- Enhance the participation of cultural and ethnic minorities in community and local development.[160]

The final section deals with the implementation of the plan. The key stakeholders listed in the plan are the Government and the Oireachtas, Government Departments, local authorities, specialised and expert bodies, state agencies, the social partners, including the community and voluntary sector, cultural and ethnic groups and research policy bodies.[161] The plan is to be monitored by a High Level Strategic Monitoring Group with the support of the Department of Justice Equality and Law Reform.

The Annual Report of the Equality Tribunal – the specialist tribunal that deals with complaints of discrimination taken under equality legislation – published in June 2005, revealed that the number of cases decided by that body in 2004 increased by 28% on the number decided in 2003.[162] The report also revealed a:

- 53% increase in Employment Equality (EE) cases on grounds of age
- 46% increase in EE cases on grounds of race
- Employment Equality referrals up 21% on 2003
- Number of EE decisions made up 50% on 2003
- Claims in Equal Status (ES) rise on grounds of disability, gender and age
- Equal Status claims on grounds of age up 61%.[163]

[160] *Ibid.* p.35
[161] *Ibid.* p.35
[162] The Equality Tribunal, *Annual Report 2004* (June, 2005).
[163] *Ibid*.

Statistics produced by the Tribunal show the following breakdown of cases taken to the body under the various grounds of non-discrimination:

Employment Equality Acts:

Gender:	53.
Traveller Community:	5.
Race:	51.
Disability:	38.
Age:	49.
Marital Status:	4.
Family Status:	10.
Sexual Orientation:	4.
Religion:	4.
Multiple Grounds:	71.
No Grounds Listed:	8.
Total No.	297.

Equal Status Acts:

Gender:	7.
Traveller Community:	26.
Race:	21.
Disability:	52.
Age:	29.
Marital Status:	4.
Family Status:	4.
Sexual Orientation:	4.
Religion:	0.
Multiple Grounds:	35.
No Grounds Listed:	3.
Total No.	185.[164]

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

Legislative initiatives, national case law and practices of national authorities

In the period under review, a roundtable on hate crimes was organised jointly by the Irish Human Rights Commission and Amnesty International (Irish Section) and, since then, a research project based in the Law School of the University of Limerick has been

[164] See http://www.equalitytribunal.ie/index.asp?locID=80&docID=183.

commissioned by the Department of Justice, Equality & Law Reform to study the feasibility of legislating for hate crimes.

Remedies available to the victims of discimination

Reasons for concern

In its Annual Report for 2004, published during the period under review, the Equality Authority raised a number of concerns about remedies available before the Equality Tribunal in the fifth year of its existence.[165] In particular, it complained of low levels of awards, privacy concerns in relation to certain grounds of discrimination, delays, problems of enforcement, excessive written notification requirements and procedural difficulties (including those connected with the mediation process).

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

In the period under review, the Equality Authority commissioned a report on the new positive action provisions introduced in amendments to the equality legislation in 2004. The report is due to be published in June 2006.

Positive aspects

In September 2005, the Department of Enterprise, Trade and Employment launched a project to help entrepreneurs from ethnic minority groups launch and sustain businesses. Members of ethnic minorities had identified a number of obstacles in the way of members of their communities wishing to begin a business, including the absence of a comprehensive government policy to assist them and difficulty accessing finance and information. Over the next two years 340 entrepreneurs will take part in the programme.[166]

Good practices

In the period under review, the Minister for Justice, Equality & Law Reform announced an initiative aimed at encouraging the recruitment of people from ethnic minority groups into An Garda Siochana (the state police force).

Protection of Gypsies / Roma

Legislative initiatives, national case law and practices of national authorities

In the period under review, a report entitled *Review of the Operation of the Housing (Traveller Accommodation) Act 1998* was published by the Minister of State for Housing and Urban Renewal. The review was carried out by the National Traveller Accommodation Consultative Committee and assessed the provision of accommodation for Travellers by local authorities in the preceding five years. The Report made a number of important recommendations which should be implemented to improve the provision of this essential service to members of the Traveller Community. These include:

[165] *The Equality Authority Annual Report 2004*, pp53-56.
[166] *Irish Times*, 20 September 2005 at p.4.

- Improving the methods for the collection of data, which would lead to more accurate figures for assessing the needs of the Traveller Community in terms of housing[167]
- Local authorities when conducting reviews of their programmes should be required, as a minimum, to involve in a meaningful way both their Local Traveller Accommodation Consultative Committees (LTACC), and all those parties who had contributed to the preparation of their original Traveller accommodation programmes[168]
- Local authorities be required, in their Traveller accommodation programmes, to set realistic and achievable annual targets for the number of units of accommodation to be provided for Travellers in each year of the programmes
- Effective consultation between the local authority and the prospective tenants plays a large part in the success of Traveller-specific accommodation schemes. In this regard it is recommended that local authorities adopt mechanisms for ensuring the effectiveness of such consultation. The LTACC should be consulted for its advice in relation to determining the appropriate mechanism to be adopted. This mechanism should, *inter alia*:

    - outline a timescale within which such consultation will be completed,
    - provide for specific objectives for each stage of the consultation (e.g. agreeing on type Halting Site or Group Housing),
    - provide for the "signing off" of each stage, and
    - set out the steps by which the local authority will make a final decision on the accommodation to be provided[169]

It recommended that:

- The use of land as a transient halting site for a specified number of weeks per year should be prescribed as exempted development under Section 4 of the Planning and Development Act 2000, subject to satisfactory local arrangements[170]
- The Guidelines to be issued by the Department of the Environment, Heritage and Local Government should provide that Development Plans should clearly state the local authority policy on the development of halting sites, including the development of private halting sites[171]
- Local Authorities, as far as practicable, not request the Gardaí to use their powers under the 1994 Act to remove families who are on local authority lands and are awaiting accommodation from the local authority. Where there are exceptional circumstances, and a family has to be moved, it should be done under the powers available to the authority under the Housing Acts[172]
- Use of the Public Order legislation is not a ground for and should not result in a family losing its position on the housing list or being removed from it[173]

A report published in June 2005, highlighted the fact that hundreds of Roma children resident in Ireland were failing to receive an education.[174] While the report highlighted a number of factors which contributed to such educational disadvantage, including language difficulties and differing cultural attitudes to education, the report highlight the sense of insecurity

[167] National Traveller Accommodation Consultative Committee, *Review of the Operation of the Housing (Traveller Accommodation) Act 1998,* para 2.14 www.environ.ie
[168] *Ibid. para 4.11*
[169] *Ibid.* para. 5.12
[170] *Ibid.* para 6.10.1
[171] *Ibid.*
[172] *Ibid.* para 10.7.1
[173] *Ibid.*
[174] Louise Lesovitch, *Roma Educational Needs in Ireland: Contexts and Challenges* (June, 2005).

experience by families in the asylum process as being one of the principal contributory factors.[175] At the launch of the report the Minster of State for Education, Sile de Valera, said that she had recently established a steering committee within her department to address the educational needs of minority communities within Ireland.[176]

Reasons for concern

As a result of changes introduced by the Intoxicating Liquor Act 2004 (discussed in the Annual Report for last year) there has been a steady reduction in the number of cases taken under the Equal Status Acts 2000-2004 by members of the Traveller Community. The import of the change was to transfer discrimination cases against licensed premises from the Equality Tribunal to the District Court. While some cases decided by the District Court during the period under review have been decided in favour of Traveller complainants the reduction in the number of cases taken in the absence of any compelling evidence of a reduced incidence of discrimination remains a cause of concern.

Other relevant developments

Reasons for concern

In August 2005, the Central Statistics Office (CSO) released results from the "Quarterly National Household Survey" pertaining to the issued of equality.[177] The survey had been conducted in the fourth quarter of 2004 and it reveals some very interesting trends in relation to experiences of discrimination in Ireland. The main findings of the survey are:

- Almost 382,000 (or 12.5% of persons aged 18 and over) felt they had experienced discrimination in the period prior to the survey;
- Of this number the vast majority (271,300) felt they had been discriminated against more than once in the two year period prior to the survey;
- People from "other ethnic groups" reported the highest proportion of discrimination, with 31% of interviewees from that background indicating that they felt discriminated against;
- Of the other groups surveyed the following also reported high levels of discrimination: unemployed persons (28.8%), non-nationals (24.4%), non-Catholics (21.6%) and persons with a disability (19.6%);
- The most common context in which discrimination was experienced was in the context of using the services of banks, insurance companies and other financial institutions, with 112,500 respondents reporting this form of discrimination;
- The second most prevalent context, reported by 100,500 of respondents, was in the work-place;[178]

Two other important points emerge from the statistics, and indeed they may be viewed as a cause for some concern. First, of all those who reported experiencing discrimination 150,000 were classified as "other" (although in the survey this category included a small number of people who reported discrimination on the grounds of sexual orientation, religious belief and

[175] *Ibid* at p.72.
[176] *Irish Times*, 16 June 2005.
[177] Central Statistics Office, *Quarterly National Household Survey – Equality* (August, 2004), available at: http://www.cso.ie/releasespublications/documents/labour_market/current/equality.pdf.
[178] *Ibid* at pp.1-2.

membership of the traveller community),[179] which means that they did not come within the standard grounds of the states Equality legislation.

Second, almost 20% of those who had reported experiencing discrimination indicated that they had no understanding of their rights under Irish equality law. Even more significantly, 42.1% of persons classified as "other ethnic backgrounds" (which, as was noted above, had experienced the highest reported incidence of discrimination) stated that they had no understanding of their rights under Irish equality law. Taken together these statistics lend themselves to the conclusion that those in most need of the protections of Irish equality law are the very ones benefiting least from it.[180]

As stated in last year's Annual Report, plans by the Government to decentralise the Equality Authority to Roscrea, Co. Tipperary despite the fact that no staff of the Authority have applied to participate in the initiative remain a cause of serious concern.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

Reasons for concern

In the period under review, two reports examining the experience of Protestants living in the souther border regions were published.[181]

Protection of linguistic minorities

Legislative initiatives, national case law and practices of national authorities

In his first Annual Report the Irish Language Commissioner called for a public debate on the how Irish is taught in schools in Ireland and the amount of investment that is provided by the State for this purpose. [182]

The Commissioner stated that "it is estimated that almost 1,500 hours of tuition in the Irish language is provided to school pupils over a period of 13 years, from their first day at primary school to the end of secondary level. This clearly raises the question: is the State getting value for money from this investment, if it is true that so many are going through the educational system without achieving a reasonable command of the language – even in the case of students who succeed in getting a high grade in Irish in their final examinations?"[183]

Other relevant developments

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

In March 2005, the Committee on the Elimination of Racial Discrimination issued its Concluding Observations on the initial and second periodic reports of Ireland. Amongst the positive aspects noted by the Committee in its Observations were the recent adoption of the

[179] *Ibid* at p.2.
[180] *Ibid* at p.3.
[181] more info – Locus Research / Combat Poverty ; The Emerald Curtain / ADM
[182] An Coimisinéir Teanga, *Tuarascáil Tionscnáimh 2004 (Inaugural Report 2004),* www.coimisineir.ie
[183] *Ibid.* p. 7

National Action Plan Against Racism (as outlined above) and the establishment of institutions in Ireland to deal with issues in the field of human rights, such as the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism and the Equality Authority.[184] Other measures introduced by the Government which were welcomed by the Committee include a comprehensive legislative framework dealing with discrimination, which incorporates the Employment Equality Acts 1998-2004 and the Equal Status Acts 2000-2004 and the initiatives taken thus far with regard to the Traveller Community, which include the National Strategy for Traveller Accommodation and the Traveller Health Strategy.[185]

The Committee, however, expressed a number of concerns and made specific recommendations with regard to these:

- The Committee raised the point that the CERD had not yet been incorporated into the domestic legal order and invited Ireland to consider taking this step.[186]
- The existence of a diverse NGO sector in Ireland was recognised by the Committee and once again the establishment of independent institutions in the field of human rights and non-discrimination was welcomed, but the provision of adequate funding and resources to these newly created bodies was urged in order that they efficiently and effectively exercise their duties and function.[187]
- The exploitation of migrant workers, which has long been raised by various sectors in Ireland, was recognised in the Concluding Observations and Ireland is encouraged in the Committee's Recommendations to "ensure full practical implementation of legislation prohibiting discrimination in employment and in the labour market. In this context the State party could also consider reviewing the legislation governing work permits and envisage issuing work permits directly to employees."[188]
- Notwithstanding the efforts which have been made by the Garda Siochána regarding human rights training and with the establishment of the Garda Racial and Intercultural Office and the appointment of Garda Ethnic Liaison Officers, the Committee expressed concern about allegations of discriminatory behaviour by the police force towards members of minority communities and recommended that the Ireland set up an "effective monitoring mechanism to carry out investigations into allegations of racially motivated police misconduct. [189]
- With regard to religious diversity the Concluding Observations note that virtually all schools are run by Roman Catholic groups with non-denominational or multi-denominational schools representing less than 1% of primary education facilities. With this in mind the Committee recommends the establishment of such facilities and the amending of the existing legislative framework to ensure that no discrimination occurs in access to school places on the grounds of religious affiliation
- On the issue of the traveller Community the Committee expressed concern that the State refuses to recognise Travellers as a distinct ethnic group and recommended the State do so at the earliest convenience as well as take appropriate measures to implement the recommendations of the Task Force on the Traveller Community in taking all necessary steps in ensuring better access to all levels of education, employment, health care and accommodation suitable to the lifestyle of Travellers.

[184] Committee on the Elimination of Racial Discrimination, *CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, Concluding Observations IRELAND,* 2005, p. 2
[185] *Ibid.*
[186] *Ibid.*
[187] *Ibid.* p.3
[188] *Ibid.* para 14
[189] *Ibid.* para 17

Legislative initiatives, national case law and practices of national authorities

In January 2005, the Garda Siochana (the police force of Ireland) issued its Corporate Strategy 2005-2007. Section 6 of the document provides an outline of the initiatives the Gardai intend to pursue in improving relations in the area of ethnic and cultural diversity. The overall strategy which the force intends to implement is the development of "services which are responsive to the unique needs of ethnic and culturally diverse communities, with a view to earning their trust and protecting their rights."[190] The Statement proposes charging the Garda Intercultural Office and network with implementing its strategic goal.[191] As well as developing language skills and competencies of staff in the policing of a multi-cultural society the Statement proposes exploring "mechanisms to attract members of ethnic minority communities into An Garda Siochána."[192]

Positive aspects

In March 2005 Galway city in the west of Ireland became the first Irish city to adopt an anti-racism strategy - the strategy aims to embrace diversity, eliminate racism and promote interculturalism.

Reasons for concern

Most of the issues of concern raised in the CERD Concluding Observations remain a cause for concern.

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 March 2005 the Irish Human Rights Commission published its Submission to the Committee on the Elimination of Discrimination Against Women in respect of Ireland's 4th and 5th periodic reports. The submission focused on a number of key areas where it is felt that Ireland was not adhering to its international obligations. These included the following:

1. After reviewing[193] the Constitution from a gender equality perspective, the Commission suggested changes which could be made in order that this document be harmonised with Ireland's obligations under the Convention. Of particular importance was Article 41.2 of the Constitution, which the Commission stated was "based on a stereotypical view of the social roles of women as homemakers and mothers, thus retaining a biological determinism in the Constitution which is offensive to women and ascribes to them a limited and dependent role." The Commission believed that the language in the Irish Constitution was sexist and male-oriented and made the following recommendations in this regard:

[190] An Garda Siochána Corporate Strategy 2005-2007, www.garda.ie
[191] *Ibid.*
[192] *Ibid.* p. 12
[193] Irish Human Rights Commission, Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women, 2005, p. 2

Immediate consideration should be given to holding a referendum within a specific time-frame to amend the Constitution in a number of specific areas identified in the submission. In particular:

- Article 41.2 of the Constitution which, in the view of the IHRC, was in violation of Articles 2 and 5 of CEDAW should be amended;
- Article 40.1 of the Constitution should be amended to prohibit direct and indirect discrimination on the basis of gender, race, colour, age, disability, sexual orientation, religious belief, membership of the Travelling community, language, political opinion, property, birth or other status. Discrimination by both public and private non-state actors should be prohibited;
- The sexist language and terminology of the Constitution should be replaced by gender-inclusive language.[194]

2. The Submission also addressed the requirement that Ireland should monitor the situation of groups of women and compile comprehensive and up-to-date data. The following recommendations were made –

    - The National Women's Strategy should be produced as a matter of priority and should contain a comprehensive set of time-bound gender equality targets and specific gender equality indicators to measure the progressive realisation of gender equality.
    - The gaps that have been identified in gender sensitive data should be filled. In particular, data on the value of women's unremunerated work in the home and whilst caring should be gathered; the time-use of women and men should be examined; gender-disaggregated income and wealth data should be compiled; and specific statistics on diverse groups of women and men who experience multiple discrimination should be gathered.
    - All gender equality indicators used should be comprehensive and should be monitored on an ongoing basis.
        - The Central Statistics Office and other mainstream producers of statistics should have the main responsibility for the production of comprehensive gender sensitive data and indicators in a long-term and sustained manner that adequately reflects the realities of women's lives.

3. Section four of the Submission looked at the issue of women and poverty focusing on the factors that contribute to female poverty in Ireland. It stated that:

    "Women in Ireland are at a higher risk than men of living in relative income poverty (23.2%) and consistent poverty (4.9%). The overall proportion of people living below the relative income poverty line has increased significantly since 1994, as has the differential poverty rate between women and men. Specific groups of women in Irish society are at a particularly high risk of living in relative income poverty and consistent poverty including, older women, women in home duties, female lone parents, disabled women, Traveller women and rural women."[195]

[194] *Ibid.* p. 3
[195] *Ibid.*

The following recommendations were made:

- Targeted measures should be put in place to reduce and prevent the risk of poverty for specific groups of women in particular, older women, female lone parents, Traveller women, women with disabilities and carers.
- Increased funding should be provided as a matter of priority to ensure that adequate and affordable childcare is available to facilitate women's long-term participation in employment and training. Special childcare schemes for groups of women with a low level of participation in the labour force and who are at a high risk of poverty should be provided.[196]

4. Another aspect of the submission was the attention given to the treatment of migrant women and women from racial and ethnic minorities, including women who are members of the Traveller Community. The report pointed out that women in this last category were particularly disadvantaged in terms of their health status and their access to education and employment.[197] The submission also addressed the problems encountered by female migrant workers and criticised the work permits scheme in operation in Ireland for leavin workers in a very vulnerable position. The submission also pointed out that female migrant workers are often found working in isolated sectors, such as private households, which leaves them open to exploitation and unfair treatment. It recommended:

   - Comprehensive and up to date gender-disaggregated data on women in the Traveller Community should be gathered in a regular and sustained manner.
   - Specific measures should be put in place to protect vulnerable groups of migrant workers, such as domestic workers in private households who are predominantly women. In particular, enforcement mechanisms such as the Labour Inspectorate and the Employment Rights Unit of the Department of Enterprise, Trade and Employment should be given the adequate resources and staff to effectively monitor the area.
   - The Office of the Refugee Applications Commissioner and the Office of the Refugee Appeals Tribunal should adopt specific public guidelines to deal with asylum claims which are based on gender specific persecution.
   - A long-term integration strategy should be put in place to foster the integration of refugees which identifies the specific needs of refugee women in terms of access to education, employment and health care.
   - Specific legislation should be put in place without delay to suppress the trafficking of women for the purposes of sexual exploitation and to ensure the victims of trafficking are protected.[198]

(There were also sections on the problems faced by older women and women with disabilities which are dealt with in other sections of this report dealing with the rights of the elderly and people with disabilities).

From July 5 to 22, 2005, the United Nations Committee on the Elimination of Discrimination Against Women (UNCEDAW) held its 33rd session, at which the Irish Government presented its combined fourth and fifth periodic report on the State's compliance with the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

[196] *Ibid*. p. 4
[197] *Ibid*. p. 5
[198] *Ibid*. p. 6

Before the Committee the State's representative, Minster of State at the Department of Justice, Equality & Law Reform, Mr Frank Fahey, insisted that Ireland had made great strides towards gender equality over a relatively short period of time, but conceded that their was still a lot of work to be done. Furthermore, he appeared to accept that the wording of the Constitution would have to be reviewed to better reflect the position of women in modern Irish society.[199]

In its concluding comments on the State's report, the Committee, after highlighting a number of positive developments in the State (including the adopting of the Equal Status Act, 2000 and the increase in the level of employment for women between the ages of 15 and 64), raised concerns about a number of issues within Irish society and made proposals for improvement. Among the main points raised by the Committee were:[200]

- that the persistence of traditional stereotypical views about the social roles of women, which were reflected in the "male-orientated" wording of Article 41.2 of the Constitution, were adversely affecting women's education choices and employment patterns. In response to this the Committee recommended that the State take additional measures to eliminate such attitudes, including through ongoing awareness-raising campaigns aimed at both women and men. The Committee also recommended that the All-Party Oireachtas Committee on the Constitution take the CEDAW into account in considering any changes to Article 41.2 of the Constitution;[201]
- the high levels of violence against women and girls, the low prosecution and conviction rates of offenders, the high withdrawal rates of complaints and the inadequate funding for organisations that provide support and services to victims. In response to this the Committee recommended that the State take "all necessary measures to combat such violence", including the sustained training and awareness for public officials and improved monitoring of the incidence of violence against women;[202]
- the trafficking of women and girls into Ireland, coupled with the absence of sufficient statistical data on the problem, and the lack of a comprehensive policy to tackle it. In response to this the Committee recommended that the State adopt a comprehensive policy to tackle the problem, such a policy should include appropriate legislation to punish those involved in such trafficking;[203]
- the "significant under-representation of women in elected political structures", in responses to which the Committee recommended that the State adopt sustained measures, including affirmative action, to combat;[204]
- the consequences of the State's "very restrictive abortion laws", which the Committee urged the State reassess through facilitating a "rational dialogue on women's right to reproductive health". The Committee also urged the State to further strengthen family planning services and make them more widely available.[205]

Responding to the Committee's findings and recommendations Minister of State Frank Fahey said that he was committed, where possible, to implementing the Committee's recommendations. However, he did express reservations about the extent to which it was possible to move some issues forward.[206]

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[199] *Irish Times*, 14 July 2005 at p.7.
[200] UNCEDAW, Concluding Comments: Ireland, adopted on the 22 July 2005 CEDAW/C/IRL/4-5/CO.
[201] *Ibid* at paras.24-25.
[202] *Ibid* at paras.28-29.
[203] *Ibid* at paras.30-31.
[204] *Ibid* at paras.32-33.
[205] *Ibid* at paras.38-39.
[206] *Irish Times*, 03 August 2005 at p.6.

In September, the European Court of Justice (ECJ) delivered its decision in the case of *North Western Health Board v Margaret McKenna*.[207] The issue for determination in the case was whether or not the Health Boards sick leave policy, which made no distinction between sick leave resulting from pregnancy – which Ms McKenna had occasion to avail of for an extended period of time – and sick leave resulting from 'ordinary illness" violated the basic Community principle of equal pay for equal work between men and women.[208]

At first instance, before the Equality Officer, Ms McKenna's claim that the Health Board's policy violated the principle of equal pay for equal work was successful, the Health Board subsequently appealed to the Labour Court, who stayed the proceedings and referred a number of questions to the ECJ for a preliminary ruling. In essence the Labour Court was seeking clarification of two key points from the ECJ: (i) whether a sick leave scheme which treats in the same way female workers suffering from pregnancy related illness and other employees suffering from 'ordinary illness' in the same way comes within the remit of the principle of equal pay for equal work and (ii) if so, whether a scheme such as that is contrary to the principle of equal pay for equal work.

The ECJ answered the first of these questions in the affirmative.[209] However, with regard to the second question the ECJ held that, while the scheme in issue in the main proceedings did come within the broad remit of the principle of equal pay for equal work, a proper construction of the relevant Treaty articles and Directives meant that a scheme, such as the one in issue, did not result in discrimination on the grounds of sex.[210]

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.[211] 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%);
- 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;

[207] Case C-191/03.
[208] This principle, as was argued in the case, is derived from, *inter alia*, Article 141 EC, Council Directive 75/117EEC of 10 February 1975 and Council Directive 76/207/EEC of 9 February 1976.
[209] Case C-191/03 at para.35.
[210] *Ibid* at para.69.
[211] *Women and Men in Ireland*, CSO 2004 – available at www.cso.ie/

- 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.

In August 2005, the Women's Health Council published its annual report, in which it was critical of gender-neutral health policies which erroneously assumed that men and women are affected equally or in a similar manner by ill health. Instead the report insisted that women "as a group not only experience different types of health issues than men, they also experience the same health problems differently to men".[212]

As a consequence of this the Council recommended that the issue of gender be taken into account in the formulation of all policies, so as to ensure that "they are inclusive and that the needs of both women and men are targeted".[213] The report also called for the provision of affordable childcare and improved parental leave arrangements so as to facilitate women's participation on the work force.[214]

In September, it was reported that an Italian woman, who had been working as a geologist on the construction of the Dublin Port Tunnel, was awarded €15,000 for unfair dismissal by the Employment Appeals Tribunal. Although the facts surrounding the woman's dismissal were disputed by her former employer, the tribunal accepted that her dismissal was related to her informing her employer that she had become pregnant and would, therefore, be unable to continue with many of the duties that she had previously performed.[215]

Positive aspects

In the period under review the Minister of State for Equality instructed all State boards to put in place measures to ensure that at least 40% of its members were women, which comes as part of a Government decision to ensure equal gender representation on State boards.[216] While welcoming the move by the Government, the National Women's Council of Ireland stated that the Government should look at the issue of greater participation of women in non-State boards and in politics.[217]

Good practices

In the period under review, the national broadcaster, *RTE*, broadcast a series of six radio programmes on the topic of gender on national radio, *RTE Radio One*, as part of a

[212] Women's Health Council, *Annual Report 2004* (August, 2005) at p.4.
[213] *Ibid* at p.9.
[214] *Ibid*.
[215] *Irish Times*, 03 September 2005 at p.4.
[216] *The Irish Times,* 22nd April 2005
[217] *Ibid.*

documentary series, *The State We Are In*. The programmes were presented by the CEO of the Equality Authority, Mr Niall Crowley, and included interviews from diverse representatives of civil society.

Reasons for concern

Most of the issues raised in the aforementioned IHRC submission to CEDAW remain a cause of concern.

Gender discrimination in the access to goods and services

Legislative initiatives, national case law and practices of national authorities

In June, the High Court ruled that a golf club (Portmarnock) which confined eligibility for full membership to men was not acting in a discriminatory manner, contrary to s.8 of the Equal Status Act 2000, as it came within the terms of an exception provided for in s.9 of the Act. Mr Justice Kevin O'Higgins held that s.9(a)(i) of the Act, which exempts from the general scheme of the Act clubs which have as there principal purpose meeting the needs of a particular gender, religious or ethnic group, meant that the golf club's policy was not an instance of impermissible discrimination. The Chief Executive of the Equality Authority, which had taken the case against the club, expressed dissatisfaction with the High Court decision as it tended towards the maintenance of an "unsatisfactory status quo".[218] The decision is being appealed to the Supreme Court.

Reasons for concern

While the outcome of the Portmarnock case was disappointing it is significant that the Attorney General, as notice party in the case, relied on the equality guarantee contained in Article 40.1 of the Irish Constitution as the foundation for the equality legislation. The judge confirmed, *obiter*, that the state was free to introduce stronger legislation to achieve equality and that nothing in the Constitution inhibited the advancement of such legislative reform.

Participation of women in political life

Positive aspects

Under the National Development Plan (*Equality for Women*) a novel scheme to promote the inclusion of women in the work of political parties was funded during the period under review.

Reasons for concern

See findings of CSO Report from December 2004 (above).

Other relevant developments

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

In the period under review, the European Commission published a study which claimed that Irish women were more at risk of suffering from poverty than their counter-parts in other EU member states.[219] The report found that 23% of Irish women are at risk of poverty, which is

[218] *Irish Times*, 11 June 2005.
[219] Find Report

defined as occurring where one's disposable income is less than 60% of the national median disposable income. The Report also found that Ireland had a smaller proportion of parliamentarians than all but four other EU member states.

Article 24. The rights of the child

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

Legislative initiatives, national case law and practices of national authorities

In January 2005, the High Court overturned two orders which had been made in 2004 prohibiting the publication of details relating to a child who was 15 when he pleaded guilty to stabbing a 22 year-old man.[220] It had been argued that Section 93 of the Children Act 2001 prohibited the publication of the names of children involved in proceedings before the Circuit Court and not just the Children's Court. However, Ms Justice Dunne held that Section 93 of the Act was confined to the Children's Court and that it was inappropriate that the proceedings involving the 15 year-old child were held in camera.

Other relevant developments

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

In July the National Children's Office (NCO) produced, on behalf of the government, Ireland's second report on the implementation of the UN Convention on the Rights of the Child (UNCRC).[221] Some of the main points made in the report are:

- Since the consideration of the States' first report by the UN Committee on the Rights of the Child (CRC) in 1996, Ireland has adopted a National Children's Strategy, *Our Children – Their Lives* (November, 2000), which, according to the report, is the main vehicle through which the government has sought to implement the UNCRC at a domestic level;[222]
- The report notes that the Children Act 2001 makes provision for increasing the age of criminal responsibility, but that this has note yet been commenced;[223]
- With respect to the issue of Guardians ad Litem (GAL), the report notes that while the Children Act 1997 makes provision for the appointment of GAL's in all private law proceedings, it has not yet been commenced, in consequence there is "not yet full provision for appointment of a GAL to report on the child's articulated views and independently to assess the child's best interests as part of the court's deliberations";[224]
- With respect to corporal punishment, the report notes that there have been a number of important advances in this respect since Ireland's first report to the CRC, including the abolition of the courts power to impose a sentence of corporal punishment, however, the report also notes that legislation has not been introduced to prohibit corporal punishment in the family home, but notes that this is an are which the government is keeping under constant review;[225]

[220] *The Irish Times,* January 15th 2005
[221] NCO, *United Nations Convention on the Rights of the Child: Ireland's Second Report to the UN Committee on the Rights of the Child* (July, 2005).
[222] *Ibid* at p.4
[223] *Ibid* at p.7.
[224] *Ibid* at p.8.
[225] *Ibid* at pp.9-10.

- The report notes that suicide, particularly among young people, is a "serious social problem", and indicates that the government has allocated significant funding for suicide prevention programs;[226]
- The report highlights the effort the government has made to reduce childhood poverty, and indeed the advances that have been made in this regard to date. The report also sets a government target to reduce consistent childhood poverty to 2% by 2007;[227]
- The report also highlights the number of structures which have been put in place that are geared towards the greater protection of the rights of the child, including the NCO, the Ombudsman for Children and the National Children's Advisory Council;[228]

A commendable element of the report is that during its preparation the NCO consulted widely with NGO's concerned with the welfare of children and children's rights. The report includes a summary of the issues which emerged from this consultation, including:

- The NGO's highlighted the need for improved data, in particular disaggregated data, on the situation of children in Ireland;[229]
- On a related point the NGO's indicated that the absence of such data facilitated misunderstanding of the actual status of children's rights in Ireland. In particular they felt that "this lack of date, combined with general statements on policy and legislative measures, underplays the lack of progress actually being achieved in certain areas";[230]
- The NGO's specifically called on the Government to adopt the recommendations of the 1996 Constitution Review Group, which had recommended the explicit recognition of the rights of the child in the Irish Constitution;[231]
- The NGO group called for the immediate increase of the age of criminal responsibility from 7 to 13, as provided for in the Children Act, 2001;[232]
- The NGO group stated their complete opposition to the proposed introduction of Anti-Social Behaviour Order's (ASBOs) in Ireland, they argued that such measures were contrary to stated government policy which sought to emphasise diversionary and restorative approaches to juvenile justice;[233]

Finally, the NGO group made a number of specific recommendations for actions which the government should adopt in the short term, including, *inter alia*, (i) a commitment to give express constitutional protection to the rights of the child and to incorporate the UNCRC into domestic law, (ii) a commitment to prohibit corporal punishment in the home, (iii) introduce a new child income support for families on social welfare and low incomes, (iv) implement Part 5 of the Children Act, 2001 (which would increase the age for criminal responsibility) and (v) do not introduce ASBOs.[234]

Legislative initiatives, national case law and practices of national authorities

In the period under review the Office of the Ombudsman for Children issued its first public submission since the office was established in 2004. The submission to the Oireachtas Committee on the Constitution recommended a constitutional amendment which would give provide express protection to the rights of child. The submission also recommended that in

[226] *Ibid* at p.14.
[227] *Ibid* at p.15.
[228] *Ibid* at p.27.
[229] *Ibid* at p.45.
[230] *Ibid*.
[231] *Ibid* at p.46.
[232] *Ibid*.
[233] *Ibid* at p.48.
[234] *Ibid* at pp.48-49.

defining these express rights "the Committee should consider the rights enumerated in the 1989 United Nations Convention on the Rights of the Child."[235] The Ombudsman particularly emphasised the need for an amendment which would "ensure the right of children to have their welfare protected"[236] and given the "paramountcy" it deserves. The submission also notes that the incorporation of the ECHR at a sub-constitutional level in the ECHR Act 2004 ensures that child rights remain subordinate to parental rights.[237]

In the period under review the EU survey on income and living conditions was published, which classed over 9% of the population as consistently poor, with a further 23% at risk of poverty. The survey found that people who live on their own or who are lone parents were most at risk, with 15% of young people living in consistent poverty. Ireland is the first EU member state to complete the survey, which was carried out by the Central Statistics Office and will be used to assess progress in achieving targets set out in the National Anti-Poverty Strategy. The survey also revealed that the top income group had almost five times more income than the bottom. The survey clearly demonstrates the discrepancy in equality between the varying socio-economic groups in Ireland.

Serious concerns have been raised about the psychiatric services provided for young people. One expert in the field had described the current waiting times before a child could access specialist psychiatric services in the State as "tragic", with some children having to wait anything from 6 to 18 months before accessing essential services.[238]

In July the Social Services Inspectorate (SSI) raised serious concerns about the case of a 13-year-old girl in State care, with severe behavioural problems, who had been detained in an adult psychiatric hospital on a number of occasions. On one such occasion the girl was held in the adult unit for more than 3 months. The head of the SSI, Michelle Clark, said that the rights of the child had been violated by placing her in an institution designed for adults, which could not adequately address the needs of a child. Also commenting on the case the Children's Ombudsman, Emily Logan, said that the practice of placing children in adult psychiatric hospitals may constitute a violation of the UN Convention on the Rights of the Child.[239]

In September a report published by the Irish College of Psychiatrists, highlighted further the deficiencies in current State provision for children and young people with psychiatric problems. The report noted that there were only 20 beds in the State for children and adolescents under the age of 16 who require inpatient treatment and that this was grossly inadequate. The report also highlighted the shortage of specialists in the field of child psychiatric care, which often resulted in children being placed in adult psychiatric units, which again was entirely inappropriate for children's needs. The report calls for the provision of special outpatient and inpatient services for children, as well as specialist services for children with conduct disorders and problems with substance abuse.[240]

A report published by the Irish Association for the Study of Delinquency (IASD) raised serious concerns about the delays in the processing of cases in the Children's Court.[241] The report examined the files of 50 young people brought before the Courts and highlighted delays in the processing of their cases ranging from 6 months to 2 years. Such delays adversely affect the position of the accused as it can result in a number of subsequent chares being dealt with at the same time as the original charge, which increases the likelihood of a

[235] Submission to the All Party Oireachtas Committee on the Constitution, www.oco.ie
[236] *Ibid.*
[237] *Ibid.*
[238] *Irish Times*, 16 July 2005 at p.7.
[239] *Irish Times*, 18 July 2005 at p.3.
[240] See the *Irish Times*, 19 September 2005 at p.7.
[241] *Dublin Children Court: A Pilot Research Project* (July, 2005).

severe sentence being imposed on the person if convicted. Such delays also militate against the possibility of changing the young persons offending behaviour.[242]

Reasons for concern

A number of the abovementioned issues covered in reports are reasons for concern.

Article 25. The rights of the elderly

Participation of the elderly to the public, social and cultural life

Positive aspects

The Government's promise to give permanent financing each year to the Rural Transport Initiative has been welcomed by the non-governmental organisation, *Age Action*. The scheme mainly benefits older people, and there had been concern that it might end.

Age Action stated: "This scheme is one of the best things to happen to older people and its permanency is very much welcomed. Many older people had not been able to use their bus pass, simply because there were no buses. We hope the scheme can be extended even further."

The scheme was set up four years ago to help end rural isolation in areas that do not have public transport. There are now about 34 projects under the scheme. Kerry Community Transport, for example, has 67 different routes.

Additional funding of €1 million is being made available this year bringing the total amount to €4.5 million. Next year the figure will be €5 million.

Age Action reported that the Central Statistics Office had informed them that international trips by the over -70s in the first quarter of 2005 increased by 56 per cent compared with the first quarter of 2004.

The possibility for the elderly to stay in their usual life environment

Legislative initiatives, national case law and practices of national authorities

The Combat Poverty Agency published figures on 5th October, 2005 regarding the elderly, poverty and pensions[243]. The Report found that 7% of the elderly in Ireland were in consistent poverty and 87% of excess winter deaths in Ireland were of people aged over-65 years[244]. Pensions were found not to have kept in line with average wage growth in Ireland over the last decade. Expenditure on pensions was 4% of national income in 1980 by comparison with 2.2% of national income in 2004. Pensions were highly reliant on occupation – 86% of those in public service covered by pensions, 71% or professionals covered by pensions compared with 12% in agriculture. The study found a strong causal relationship between poor housing, fuel poverty and adverse health. The Agency also forecast that the over-65's will double in population by 2036 to encompass 20% of the Irish population.

[242] *Ibid* at p.3.
[243] *Older People In Ireland: Policy Pointers from Recent Research*, Combat Poverty Agency, 5 October 2005
[244] *Ibid.*

The Minister for Social Affairs, Mr. Seamus Brennan T.D., gave an address to *Age Action* on 5 October 2005[245] on the subject of older people and poverty. He stated that the Government was spending nearly four billion euro on welfare for the elderly this year. He stated that the Government was committed to raising pensions to two hundred euro per week by 2007. He stated that the amount of older people suffering from consistent poverty had fallen from 8.4% to 3.9% between 1997 and 2001.

Positive aspects

On 29th September 2005, *The Irish Times* reported a major initiative, including new grants and tax measures, to encourage older people to be cared for in their own homes rather than in residential institutions is to be introduced by Tanaiste (Deputy Prime Minister) and Minister for Health & Children, Mary Harney[246].

The package, which was to be reflected in the Budget and the Book of Estimates, was likely to include reductions in stamp duty for older people who want to move to more suitable accommodation[247]. It was anticipated that there would also be a significant increase in the income and asset thresholds for qualification for State subventions for nursing home care[248].

Specific measures of protection for the elderly

Reasons for concern

In January 2005, the Irish Woman Lawyer's Association held a conference which focused on law and the elderly. At the conference, Ms Patricia Rickard-Clarke, who is a member of the Law Reform Commission stated that the provisions in place to prevent abuse of the elderly were "simply inadequate."[249] In her address Ms Rickard-Clarke criticised the absence of legislation to set out minimum standards of care which has led to errors on the part of staff, particularly in the administration of drugs. The conference heard that older people who are cared for in public nursing homes are the most vulnerable as the Nursing Home Act 1990 only applies to private nursing homes and even this legislation is "inadequate, ambiguous, undefined and non-specific."[250] It was recommended that legislation similar to the Care Standards Act in the UK be implemented to provide adequate protection for the elderly in this area.

Other relevant developments

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

Section 7 of the Irish Human Rights Commission Submission to the CEDAW Committee focused on problems facing elderly women in Irish society. The report stated that 50.2% of women are at high risk of living in relative income poverty and that a further 4.4% were at risk of consistent poverty. The point was made that there was a chronic lack of support for older women to help them live independently in the community, as well as concerns as to access to long-term care for those who require this support. The following recommendations were made:

[245] The entire address may be accessed on the Age Action webpage www.ageaction.ie
[246] *The Irish Times,* 29 September 2005
[247] *Ibid.*
[248] *Ibid.*
[249] *The Irish Times,* January 24th 2005
[250] *Ibid.*

- Targeted measures should be put in place to address the poverty and deprivation older women are experiencing. In particular, the Government should ensure that the non-contributory old age pension is adequate and is indexed to average earnings growth in the economy.
- The support services for older women living in the community should be put on a statutory basis and, in particular, should be adequately funded, given the large percentage of older women that live alone.
- A rights-based approach should be adopted in relation to the provision of long stay care for older people. Policy in relation to the creation of long stay care places should be informed by the principles of equality of treatment and non-discrimination. The entitlement to long stay care should be clarified and specified in legislation. Adequate information should be made available to people on their entitlement to long stay care in the public and private sectors.[251]

Reasons for concern

An edition of RTE's *Prime Time* current affairs programme on May 30th 2005 showed mistreatment of many of the elderly residents of the Lea's Cross nursing home in Swords, Co. Dublin. (The attempt by the owners of this private nursing home which has since closed to prevent the broadcasting of this programne is discussed under Article 11)

The programme noted poor hygiene standards and management, abusive behaviour by staff, and poor treatment of medical needs.

Following RTE' Prime Time programme, new staff were sent to the home by the Health Service Executive. A statement said that the addition of the new staff was agreed with the home's management. Besides the fresh staff, a clinical governance committee in the home was established.

The Health Service Executive found that the Lea's Cross nursing home was not in compliance with regulations. The HSE made alternative arrangements for the 24 public patients it has placed in the home or funds through subventions. The HSE also advised private patients.

A voluntary agreement was reached between the home's owners and the HSE for new management structures. In the aftermath of the scandal, politicians stated that they were horrified at the revelations and there was an outcry from organisations, including *Age Action*, at what was seen as an abuse of older people.

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

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

The IHRC Submission to the CEDAW Committee considered the situation of women with disabilities and the Government's response in dealing with this. The submission stated:

> "In general, women with disabilities have low levels of educational attainment and low levels of participation in the labour force due to physically and socially

[251] Irish Human Rights Commission, *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women,* 2005, p. 6

> inaccessible educational and working environments. Women with disabilities are particularly vulnerable to violence. However, this remains largely a hidden problem. The ability of disabled women to leave their violent situation is often limited due to geographically, physically and socially inaccessible refuges and other services for women experiencing violence."

The Commission recommended the following measures to deal with some of the issues affecting women with disabilities:

- Comprehensive data should be gathered on women with disabilities and should be regularly updated.
- In accordance with General Comment 25 of the CEDAW Committee specific temporary special measures should be put in place to increase the participation of women with disabilities in education and employment.
- Research should be carried on the issue of violence against disabled women.
- Specific funding should be allocated to bodies working with women experiencing violence in order to enable them to make their services accessible to women with disabilities.[252]

Legislative initiatives, national case law and practices of national authorities

In February 2005, the Labour Court made a landmark ruling in awarding €60,000 to a man who had lost his job because he suffered from a mental illness. He was admitted to hospital suffering from a psychiatric illness in April 2002. He returned to work some time after he was released, but was told that he would no longer be able to deal with clients and that his work would be monitored.[253] Mr Niall Crowley CEO of the Equality Authority said that this was a significant decision noting that this was one of the first cases to raise the issue of mental health under the disability ground of the Employment Equality Act 1998, as amended by the Equality Act 2004.

In February 2005, a public meeting held in Dublin to discuss the Government's proposed Disability Bill (discussed in detail in last year's Annual Report) heard that it was seriously inadequate and would "force disabled people into a 'bureaucratic nightmare' in the search for essential services."[254] Disability groups who spoke at the conference listed what they said were ten flaws in the Bill that they wished to see removed. These included:

- The lack of a clear right to an independent assessment of need for every person with a disability;
- the need for an independent appeals and complaints procedure so disabled people have a right of redress in any situation where essential services are denied to them;
- meaningful targets in relation to employment and access to buildings and services;
- a wider definition of disability which would include people with mental health problems.255

[252] Irish Human Rights Commission, *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women,* 2005, p. 5
[253] *The Irish Times,* February 4th 2004
[254] *The Irish Times,* February 9th 2005
[255] *Ibid*

Reasons for concern

A report published in June highlighted the significant exclusion and disadvantage experienced by people with disabilities in Irish society.[256] Among the key findings of the report were: (i) that half of those who were ill or disabled in Irish society have no formal educational qualification, as compared to one fifth of other adults,[257] (ii) that individuals with a chronic illness or disability were unlikely to be in employment and that those who were in employment received significantly lower hourly rates of pay than the general population,[258] (iii) that people living with an illness or disability were twice as likely as the rest of the population to be living either at risk of poverty or in consistent poverty.[259] The report also found that people with an illness or disability lived more secluded lives, as they were far less likely to be involved in social clubs, or interact regularly with neighbours, friends and relatives.[260]

Also in June, it was reported that more than 300 people with autism and other intellectual disabilities were being accommodated in psychiatric hospitals because there the State was not providing services appropriate to their needs. This practice persisted notwithstanding Government pledges to have completely abolished what they concede is an inappropriate practice by 2006.[261]

Reasonable accommodations

Positive aspects

In the period under review, the Equality Authority established a practice initiative with networks of local service providers to develop and promote guidance and implementation measures on reasonable accommodation. The Network included the National Library Council, the Pharmaceutical Union, two local authorities, the Irish Bankers' Federation and the retailers' body, RGDATA.

Other relevant developments

Positive aspects

The Minister of State for Housing and Urban Renewal announced on 6 June 2005 funding totalling €70 million to local authorities for the payment of disabled persons and essential repairs grants in 2005. The Minister's Department recoups two-thirds of expenditure to authorities with the balance being funded from the authorities' own resources[262].

Announcing the allocations, the Minister said: "It will assist local authorities in meeting the needs of those in the community who are elderly or who have mobility problems".

"The Government have made much progress in meeting the needs of disabled and elderly persons over the last few years", he said. The Minister outlined the significant increases in the levels of funding provided under the schemes in recent years. Funding for the schemes

[256] Brenda Gannon and Brian Nolan, *Disability and Social Inclusion in Ireland* (June, 2005).
[257] *Ibid* at p.9.
[258] *Ibid* at p.10.
[259] *Ibid*.
[260] *Ibid* at p.11.
[261] Irish Times, 18 June 2005.
[262] Press Release from the Department of Environment, Heritage and Local Government, 6 June 2005, and can be accessed on www.environ.ie

from 2000 to 2004 totalled some €270 million with almost 37,000 grants paid. "That is 37,000 projects completed which will allow disabled and elderly persons to remain in their own home and enjoy improved housing conditions which many of them would otherwise have been unable to afford" he said.

In addition, funding of €16.5 million is being made available under the Special Housing Aid for the Elderly Scheme (SHAE) in 2005. This will enable still further progress to be made in addressing the accommodation needs of elderly persons.

CHAPTER IV. SOLIDARITY

Article 27. Worker's 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

In July 2005, the Employees (Provision of Information and Consultation) Bill 2005 was introduced in the Oireachtas. The main purpose of the Bill is to implement the provisions of EU Directive 2002/14/EC by establishing "a general framework setting our minimum requirements for the right to information and consultation of employees in undertakings with at least 50 employees".[263] The original Directive sets out minimum requirements for employees to be informed and consulted by their employer about developments in the business. The proposed legislation addresses how employers and employees may establish a framework within which that information and consultation will take place.

The provisions of the proposed legislation apply to all public and private undertakings carrying on an economic activity, whether or not operating for gain, and thus will affect private businesses, semi-state and many public sector bodies. However, the information and consultation obligations are not automatically effective. An employer may initiate the process to negotiate an information and consultation arrangement or the employees may request that the employer enter into negotiations. A minimum of 10% of the workforce (subject to a minimum of 15 and a maximum of 100) must make the request. Absent either party taking action, the information and consultation obligations do not arise.

The main provisions of the Bill are:

- section 3, which establishes that employees in undertakings with 50 or more employees have a right to information and consultation within that undertaking, this section also stresses that the proposed legislation is without prejudice to pre-existing arrangements relating to the provision of information for employees and acts as a supplement to, rather than a replacement of, such pre-existing rights and instruments;
- section 4, which sets out the number of employees that must be employed in an undertaking in order for it to come within the remit of the legislation, it also sets out the phased role out procedure for the application of the legislation, which will progressively apply to undertakings of differing sizes at different points in time;
- section 7, which provides for the "trigger mechanism" that will lead to the negotiation of an information and consultation agreement between the employees and employer, it provides that at least 10% of the employees of an undertaking, subject to a minimum of 15 and maximum of 100 employees, must request the establishment of an information and consultation arrangement;
- sections 15-19, which set out the provisions for resolution of disputes relating to the establishment and operation of information and consultation agreements, as well as mechanisms for the enforcement of the proposed legislation and offences and penalties under the proposed legislation;

Reaction to the publication of the Bill has been mixed, with employer's representatives expressing broad satisfaction with the proposed legislation. However, the response from workers' representatives has been markedly hostile. For example, the Irish Congress of Trade

[263] Employees (Provision of Information and Consultation) Bill, 2005: Explanatory and Financial Memoranda at p.1.

Unions accused the government of adopting a minimalist approach to transposing the Directive and said that in its current form the Bill was untenable.[264]

Reasons for concern

EU Directive 2002/14/EC should have been transposed into domestic law by the 25 March 2005. However, it is only now in Bill form and, given the lack of consensus on the current proposals, is likely to be subject to further delays before actually being enacted in this regard.

Article 28. Right of collective bargaining and action

Social dialogue

Legislative initiatives, national case law and practices of national authorities

In July, the Labour Court published its Annual Report for 2004.[265] The Report highlighted the fact that referrals to the Court had risen by 21% over the previous year, and that this increase was mainly attributable to a 75% increase in the number of complaints alleging non-compliance with Registered Employment Agreements, principally in the construction industry. These are legally-binding agreements on pay and conditions negotiated by unions and employers.[266] The Chairman of the Court noted that, notwithstanding the overall increase in referrals to the Court, "the number of days lost due to industrial disputes remains at historically low levels".[267] Of the 1,484 referrals to the Court 88.7% came under the Industrial Relations Acts, 5.8% under the Organisation of Working Time Act, 1997, 3.7% under the Employment Equality Acts and 1.8% under various other Acts.[268]

Article 29. Right of access to placement services

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In the period under review FAS (the state training agency) produced its Statement of Strategy for 2006-2009. It includes, *inter alia*, a number of goals to which the organisation will be committed in the coming years, one of which is a commitment to social inclusion, equality and diversity. The goal is stated as in the following terms

"To promote the removal of barriers, and help provide supports which ensure access to programmes, services and employment for individuals and groups experiencing exclusion, discrimination and labour market disadvantage."

In order to implement this goal the Statement of Strategy commits FAS to:

- Analyse and highlight the barriers preventing individuals from taking up training and employment opportunities

[264] See European Industrial Relations Observatory Online, "Information and Consultation Bill Provokes Mixed Reaction" at http://www.eiro.eurofound.eu.int/2005/08/feature/ie0508203f.html.
[265] The Labour Court, *Annual Report 2004* (July, 2005).
[266] *Ibid* at p.2.
[267] *Ibid* at p.3.
[268] *Ibid* at p.8.

- Work with other agencies and Government departments to review policies and practices that act as barriers and assist with developing new policies to enable access to and participation in the labour market
- Implement programme and service changes within FÁS to address identified training and employment barriers and gaps in provision
- Develop and promote supports and incentives for employers to recruit marginalised individuals
- Promote specific employment measures and career progression supports for people with disabilities and other groups experiencing inequality across the nine grounds covered by equality legislation
- Raise awareness among employers of the contributions that persons from diverse backgrounds can make to their enterprise
- Develop positive action measures, as allowed under equality legislation, for specified target groups
- Provide the necessary training, development and supports to enable staff to champion social inclusion, equality and diversity
- Implement the FÁS Equal Status Framework
- Equality-proof all FÁS Programmes and Services to embed inclusiveness, equality and diversity in the development and delivery of services and programmes
- Set targets for participation of specific groups within FÁS Programmes and Services
- Promote a policy of mainstreaming marginalised people into the labour market.

Finally, in order to measure progress towards the realisation of this goal FAS will monitor the following: (i) Number of Programmes and Services equality proofed, (ii) levels of participation and outcomes for targeted groups on FÁS Programmes and Services, and (iii) FÁS Equal Status Framework developed and implemented.[269]

Article 30. Protection in the event of unjustified dismissal

Remedies against the decision of dismissal and compensation due in the event of an unjustified dismissal

Legislative initiatives, national case law and practices of national authorities

In two cases in 2005 the Employment Appeals Tribunal (EAT) made substantial awards in favour of applicants for unfair/unjustified dismissal. In the first the respondent had experienced a severe drop in profits during the financial year of 2003, and consequently decided to seek redundancies.[270] The claimant worked in the finance section and the respondent decided that her role was to be made redundant.

The respondent met with the claimant on the 24th of July, 2003, outlined the difficulties that the company was facing, and told her that her post was being made redundant. The company

[269] See http://www.fas.ie/information_and_publications/strategy/sos_eng/goal_6.htm.
[270] *Fiona O'Driscoll v. Siebel Systems Emea Limited* (Case No: UD1257/2003, Date of Determination 25/01/05 Chairman: Mr J. Sheedy).

referred to the fact that there was another employee working in the same section, who was better qualified, and as that employee only worked four days a week, the employee in question was also more cost efficient.

The claimant stated in evidence that she knew that the company had to make redundancies, but she felt the method of selection for redundancy used by the company was unfair. The issue of redundancy had not been raised with her prior to the meeting on the 24th of July 2003, nor had she been advised of her right to bring any representation with her to the meeting. The claimant also stated that in October 2003 the company advertised for a vacancy, whose job description covered over 40% of her old position.

The EAT held that there was no consultation process undertaken by the company in respect of the claimant's proposed redundancy. In addition, the Tribunal held that role and job description of the claimant's position was not made redundant and the methods used to terminate the claimant's employment were tantamount to summary dismissal. It found that a genuine redundancy position did not exist in respect of the claimant's position and that she had been unfairly dismissed. As a result the Tribunal made an award of €60,000 to the claimant.

Consequently, the complete failure of the respondent employer to enter into an appropriate consultation process in regard to the proposed redundancy with the claimant employee proved to be a very expensive oversight on its part. In addition, this case demonstrates the need for an employer to show that there is a genuine redundancy situation within the company, something that the respondent employer completely failed to do.

In the second case, the claimant was an area manager for the respondent company.[271] The company had a booklet on management policies and procedures, which was issued to the claimant during her Induction Process with the respondent company. There was a cash theft in the respondent's Donaghmede store within the claimant's management area, and it transpired that the claimant had not followed the relevant policies and procedures in respect of the theft.

The respondent began their own investigation in to the theft after the Gardai completed their enquiries. Evidence was given that the respondent formally interviewed all the staff, and that the staff were informed that notes of the interview would be taken, including details of all questions and answers. As a result of the investigative process, it was decided by the respondent that the claimant manager should be suspended on full pay, primarily on the basis that the appropriate policies or procedures had not been implemented by the claimant.

Subsequently, the respondent then held a disciplinary hearing with the claimant. The claimant manager was not offered the right to representation, nor was she informed of the potential implications of the hearing, in particular the possibility of dismissal. No one was allowed to speak on her behalf at the hearing, at which it was decided that she was to be dismissed from the company. The claimant felt that overall she was not afforded due process and fair procedure.

The EAT held that the procedure used by the respondent company was flawed and that the claimant should have been informed that dismissal was an option open to the disciplinary hearing. In addition, it found that the respondent was highly culpable in failing to offer the claimant the right to representation at the hearing. The Tribunal held that the claimant was unfairly dismissed but also that she contributed to her own dismissal. She was awarded €13,000.

[271] *Tracey Adams v. Nature's Way Limited* (Case No.: UD1522/2003 Chairman: Ms. G. Small B.L. Date of Determination: 07/02/05).

This case demonstrates the need for an employer to afford due process and fair procedure to any employee who is subject of the Disciplinary Procedure, even in the event that employee may appear to be culpable and have contributed to their dismissal.

Other relevant developments

Positive aspects

The Civil Service Regulation (Amendment) Act, 2005 significantly extended the scope of application of the Unfair Dismissals Act, 1977 and the Minimum Notice and Terms of Employment Act, 1973. Previously a person employed "by or under the State" had been excluded from the protections afforded in each of these Acts, however Part 6 of the 2005 Act extends the Unfair Dismissals Act to almost all civil servants and Part 7 extends the Minimum Notice and Terms of Employment Act to all civil servants.

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

In July 2005, the Safety, Health and Welfare at Work Act, 2005 came into force. The main provisions of the Act include the following:

- A legal definition of "competency", linked with the qualification system being currently developed by the Further Education and Training Awards Council, FETAC;
- The first ever statutory definition of "reasonably practicable";
- An expanded general duty on employers, which now includes a duty to "manage" work activities so they do not endanger persons at work (whether employees, contractors, contractor's employees, members of the public etc.);
- A change in the employer's duties to make it an offence to require an employee to work in conditions exposing them to serious and imminent danger, and for the employer or to engage in harmful conduct (which seems to cover stress and bullying);
- A legal requirement on the employer to train employees where risk assessments state that such training should be a requirement;
- A provision requiring that employees, whilst at work, must not be under the influence of "an intoxicant" which includes illegal drugs as well as alcohol;
- Incorporation into the 2005 Act of many of the provisions currently in the General Application Regulations 1993 and 2003, such as the requirement that risks assessments be in writing and periodically evaluated;
- A requirement that the Safety Statement specify how safety is managed, and that it be reviewed annually;
- A provision for joint safety and health agreements between the social partners;
- A major change in the manner in which dispute resolution about safety and health and welfare at work will be dealt with, for example, in the event of disagreement at workplace level, appeals may be brought to a Rights Commissioner and the Labour Relations Commission;
- Failure to comply with many of the general duties in the 2005 Act carry the potential penalty of a prison term of up to six months, even on conviction in the District Court, with up to two years imprisonment and/or a maximum fine of up to €3 million on conviction on indictment; and

- On the spot fines of up to €1,000 have also been included in the 2005 Act.

In August 2005, the Expert Advisory Group on Workplace Bullying, which had been established by the Government in 2004, published its report. Some the main findings and recommendations in the report were that:

- workplace bullying was a growing problem;
- to date the States response to this problem had been insufficient and ineffectual;
- employers should be required to include anti-bullying policies in their safety statements and the Health and Safety Authority should be charged with ensuring that this requirement is enforced;
- formal structures should be put in place for dealing with specific complaints of workplace bullying and the Labour Relations Commission should be the single State authority for dealing with such complaints;
- the LRC or the Employment Appeals Tribunal (EAT) be designated the court of final appeal for decisions of a rights commissioner, and that the decisions of this body be legally enforceable through the courts.[272]

Responding to the Reports findings the Minister of State for Labour Affairs said that he hoped to advance the reports proposals "within a year or so".[273]

Reasons for concern

In May, the Chief Executive of the Health and Safety Authority (HSA), John Deegan, expressed concern over the rise in work-related fatalities in the first four months of 2005. Up to that point 23 people had been killed in work related accidents, however by the end of the year figures on the HSA's website show that the total number of work related fatalities for the year was in the region of 68.[274] These figures, the majority of which are accounted for by the construction and agricultural sectors, indicate significant failings/deficiencies in the current national health and safety regime.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In April 2005, the Department of Justice, Equality & Law Reform published a discussion paper on possible changes that should be made to the immigration system currently in place.[275] (This is discussed in an earlier section of this report).

In May a number of Turkish workers who had been involved in a high-profile dispute with Gama Construction, over that companies failure to respect labour standards, voted in favour of a Labour Court recommendation which sought to resolve the dispute. The Labour Court recommended that Gama pay a lump sum of €8,000 for every year of service for each worker. Speaking after the workers decision Noel Dowling, the national industrial secretary of SIPTU, said that the case of the Gama employees highlighted the need for increased supervision and enforcement of existing labour legislation and for special attention to be paid to vulnerable migrant workers.[276]

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[272] *Report of the Expert Advisory Group on Workplace Bullying* (August, 2005) at pp.9-10.
[273] *Irish Times*, 18 August 2005 at p.8.
[274] See <http://www.hsa.ie/publisher/index.jsp?&1nID=93&2nID=105&nID=395&aID=1214>.
[275] Department of Justice, *Outline Policy Proposals for an Immigration and Residence Bill*
[276] *Irish Times*, 28 May 2005.

Notwithstanding the resolution of the instant dispute, the Department of Enterprise, Trade and Employment indicated that investigations would continue into further allegations against Gama and that action would be taken against the company if breaches of employment legislation were uncovered.[277]

Reasons for concern

In April 2005, in a report compiled by the Department of Enterprise, Trade and Employment, Labour Inspectors, who are charged with investigating breaches of employment laws as outlined (above) in relation to the Gama case, made clear their position that lack of resources in terms of staff training and support were making it impossible for them to carry out their functions correctly.[278] The report was prepared as part of the Government's commitments under the *Sustaining Progress* Agreement and relied heavily on information provided by Inspectors working within the Department. Issues addressed by the paper include:

- Inspectors have confusingly different roles under different legislation.
- They lack confidence as a result of "haphazard" training.
- A lack of resources and staff is a "severe impediment" to the delivery of targets.
- Their powers under legislation such as the Organisation of Working Time Act are severely limited.
- A computer system introduced in 2003 is slowing them down.
- They have no regional presence except in Cork.
- Penalties are inadequate and, in some cases, employers can benefit from ignoring the law.[279]

One of the crucial problems faced by the Labour Inspectorate in performing its functions is the chronic understaffing that persists in the office. At the time the report was written there were 21 Labour Inspectors employed by the Department, which given the size of the Irish workforce at nearly 2 million people seems wholly inadequate. But exacerbating this problem is the fact that often the office does not even enjoy its full staff complement as some members have been seconded to other offices or are absent due to ill-health or maternity leave:

"Until this lack of a critical mass of inspectors is addressed no significant improvement in the current performance of the inspectorate can be envisaged."[280]

The Report advocates the number of Inspectors be raised to between 38 and 51 and that a comprehensive training scheme be introduced to allow Inspectors to carry out their tasks competently and that proper support services be put in place in order to retain staff in this area, which has been a recent problem.

In response to the report and growing concerns about the treatment of migrant workers in Ireland the Minister for Enterprise, Trade and Employment announced the appointment of a further 10 labour inspectors, which would be followed by further increases in staffing and resources for the Inspectorate.[281] The announcement was made at a meeting with union leaders and coincided with an escalation of calls for justice from the Turkish workers who had been exploited by the Gama Corporation.

[277] *Irish Times*, 16 June 2005.
[278] *The Irish Times,* 8th April 2005
[279] *Ibid.*
[280] *Ibid.*
[281] *The Irish Times,* 13th April 2005

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

Protection of minors at work and monitoring of the protection

Legislative initiatives, national case law and practices of national authorities

In July, a Dublin District Court Judge fined a publican €66,500 and accused him of having engaged in "child exploitation". The fine and admonition related to 35 separate breaches of the Protection of Young Persons (Employment) Act, 1996, which took place in two separate establishments, both of which were owned by the respondent in the case, a Mr Noel Smyth. One incident involved a 15-year-old girl working in a bar until 1.30am, some five and half hours after she should had finished. The respondent indicated that he would appeal the decision.[282]

On the same day the judge also imposed fines totalling €18,000 against the Portmarnock Hotel and Golf Links, for twelve breaches of the same legislation involving two boys aged 16 and 17 who, on certain occasions, had worked almost 15 hours in one day.[283]

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

In September 2005, the National Economic and Social Forum (NESF) published a report calling on the Government to provide one year's free childcare for every child before they enter primary school. The report highlighted the many advantages that would accrue from investment in such a plan. Also in relation to childcare the report recommended that minimum standards for staff should be agreed and that a single accreditation body for such staff should be established The report also recommended that maternity leave be increased by two weeks a year over the next five years, which would ultimately result in women being entitled to 26 weeks of paid maternity leave.[284]

On the 28 November 2005, the Adoptive Leave Act, 2005, other than sections 9 and 10 thereof, came into operation.[285] The main provisions of the 2005 Act are as follows:

- Adoptive leave is extended by a further 2 weeks, bringing the adoptive leave entitlement to 16 consecutive weeks. Additional adoptive leave remains at 8 weeks;
- Paid leave to attend pre-adoption classes or meetings which the employee is obliged to attend;
- Termination of additional adoptive leave where the employee is ill, whereby the employee can transfer onto sick leave, and the employee is treated in the same way as would be usual where the employee is absent due to illness;
- Postponement of either the adoptive leave or additional adoptive leave where the adopted child is hospitalised. The postponed leave may then be taken on a continuous basis commencing not later than seven days after the child is discharged from

[282] *Irish Times*, 01 July 2005 at p.4.
[283] *Ibid*.
[284] *Irish Times*, 26 September 2005 at p.5.
[285] The date for the Act's coming into force was set by the Adoptive Leave Act 2005 (Commencement) Order 2005, S.I. No. 724 of 2005.

hospital. Procedures in relation to notification in the event of an employee choosing to postpone leave are set out in Section 9 of the Act;

- Where the employee returns to work having postponed relevant leave but then becomes absent from work due to illness, the employee will be deemed to have recommenced the leave which the employee had postponed unless the employee notifies the employer that they do not wish to begin the postponed leave. In such circumstances the employee is treated in the same way as would be usual where the employee is absent due to illness however the postponed leave is forfeited.
- During additional (unpaid) adoptive leave, save for remuneration and superannuation benefits, employment rights continue to accrue.
- Relevant sections of the Unfair Dismissals Act 1977 are amended to take account of the new rights to take time off to attend pre-adoption classes or meetings. In addition, Schedule 3 of the Redundancy Payments Act 1967 (as amended by the Redundancy Payments Act 2003) is amended by specifying periods which do not breach continuity of employment to incorporate periods of absence in attending the said classes or meetings.

Disputes relating to entitlements connected with adoptive leave should be referred to a Rights Commissioner. The compensation payable is a sum not exceeding 20 weeks' remuneration as is deemed just and equitable in all the circumstances. There is a six month time limit to make a claim. Appeals from a decision of the Rights Commissioner are made to the Employment Appeals Tribunal and thereafter there is a right to appeal on a point of law to the High Court.

Positive aspects

Although outside the period under reiew it is worth noting that a number of family-friendly and childcare initiatives were announced by the Government in its Budget in December 2005.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

In the period under review, the Social Welfare and Pensions Act 2005 came into force with the object of introducing a number of the measures which had been announced in the area of social welfare in the previous budget. The Act also makes a number of amendments to the Pensions Act 1990 to implement EU Directive 2003/41/EC on the activities and supervision of the Institutions for Occupational Retirement Provision.

Changes to the Child Benefit Scheme were introduced so that the lower rate was increased from €131.60 to € 141.60 per month and the upper rate for the third and each subsequent child was increased from € 165.30 to € 177.30 per month. Significant changes werealso introduced in the area of disability benefit

In May 2005, the High Court ordered a local authority to comply with its legal obligations and provide accommodation for two Traveller families.[286] The families had been living in two separate locations in Athy in Co. Kildare for five years by the side of the road. This was the first time that members of the Traveller Community had legally challenged a local authority

[286] *The Irish Times,* May 2nd 2005

for not complying with its obligations under the Traveller Accommodation Programme.[287] In his judgment O'Neill J described the families' living conditions 'depressing and precarious' and called for an "urgent solution to the accommodation needs" of the families.[288] He also noted that as the families had been assessed under the accommodation plan as being eligible for access to housing then "in my [O'Neill J] view the local authority are bound by that duty" and that "it simply could not be said that they could allow the delay or to leave them in the hazard for the lengthy period of time gone by so far."[289] The council had proposed moving the families to a location some 20 kilometres away from the town in which they had been resident, but the judge held that this would interfere with the educational arrangements of the children involved and that "There is a heavy duty on all the organs of the State, including me in this case, and also the respondents, to vindicate their rights to their primary education."[290]

Social security in favour of persons moving within the Union

Legislative initiatives, national case law and practices of national authorities

In August 2005, the Social Welfare Appeals Office (SWAO), in its annual report, raised concerns about government restrictions on welfare benefits for non-Irish persons.[291] The measures, known as the 'habitual residency condition' (HRC), had been introduced by the Government in 2004 amid fears that the large number of new accession States to the EU would lead to 'welfare tourism'. Under the conditions a person may not receive a number of social welfare benefits, including unemployment assistance and Child Benefit, unless they can show that they have been resident in the State for at least two years. In particular the report raised questions about whether or not the HRC was compatible with EU law and, is it related to the Child Benefit Scheme, the UN Convention on the Rights of the Child.[292]

Indeed, it has subsequently been reported that the European Commission had been in contact with the Government to express concerns about the compatibility of the HRC with EU law. The Commission reportedly issue a "notice of infringement" to the government over the extent to which welfare benefits are being denied to EU citizens.[293] Subsequently, following emerging evidence that the HRC was resulting in hardship and poverty for a number of migrant workers and in response to the Commissions communication, it was reported that the Government proposed to relax the current regulations.[294]

The case against the continuance of the habitual residency condition (HRC), at least in its present incarnation, was strengthened by the publication of figures in October, which show that only 1% of the EU accession state nationals who have travelled to Ireland since May 2004 have applied for unemployment benefits. The figures revealed that 133,248 people from accession countries have moved to Ireland between May 2004 and September 2005, of this figure only 1,300 had applied for unemployment benefit or unemployment assistance, and of this number only 625 were in receipt of such benefits. The figures indicate that concerns of 'welfare tourism', which animated the decision to introduce the HRC in the first place, were misplaced or exaggerated.[295]

[287] *Ibid.*
[288] *Ibid.*
[289] *Ibid.*
[290] *Ibid.*
[291] *Irish Times*, 30 August 2005 at p.3.
[292] SWAO, *Annual Report 2004* (August, 2005) at p.10.
[293] *Irish Times*, 23 September 2005 at p.8.
[294] *Irish Times*, 30 September 2005 at p.1.
[295] *Irish Times*, 24 October 2005 at p.4.

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities

In January 2005, the Supreme Court of Ireland gave its decision on the constitutionality of the proposed *Health (Amendment) Act (No.2)* 2004[296], which had sought to make lawful the practice which had persisted for over 30 years in Ireland of charging elderly medical card holders for long-term residential care in private nursing homes. The court held that the proposed legislation would constitute an unjust attack on people's property rights, particularly where those whose rights were affected were among the most vulnerable sections of society. The property right in question was the right to sue for restitution of the monies unlawfully deducted to cover the cost of private nursing residential care.

Following the Government's failure in enacting this legislation, a report was commissioned to investigate how such illegal activities could have continued over such a long period without coming to the notice of those responsible in the Department of Health. The report which was called the Travers Report was published in March 2005 and found that the situation was known at the Department as for back as 1976 and that since that period there had been failure at the highest levels to deal with it effectively:

> "The only reasonable conclusion, at this time, is one of overall systemic corporate responsibility and failure within the Department of Heath and Children at the highest levels over more than 28 years,"[297]

The Secretary-General in charge at the Department of Health resigned from his post following the publication of the Report.

Article 36. Access to services of general economic interest

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

ECJ Judgements involving IRELAND:

Waste Management

Commission of the European Communities v. Ireland[298]

On 26th April 2005 the ECJ found Ireland in breach of its obligations under EC law for failure to take all measures necessary ensure a correct implementation Articles 4, 5, 8, 9, 10, 12, 13 and 14 of Council Directive 75/442/EEC of 15 July 1975 on waste as amended by Council Directive 91/156/EEC of 18 March 1991. The Court also declared that by failing to respond to

[296] This Bill had been referred by the President of Ireland to the Supreme Court pursuant to Article 26 of the Constitution to test its constitutionality before promulgation.
[297] *The Irish Times,* March 10th 2005
[298] C-494/01

a request for information dated 20 September 1999 relating to waste operations at Fermoy, Co. Cork, Ireland has failed to fulfil its obligations under Article 10 EC. The case focused on 12 different complaints received by the European Commission between 1997 and 2000, involving some 18 waste disposal incidents in Ireland.

The Minister for the Environment, Heritage and Local Government, responded to the ECJ judgement in the following terms[299]: "The findings of the Court are a timely reminder of the consequences of poor past waste management practices and of the urgent necessity to put in place a modern waste infrastructure. Since the period covered by these complaints, Ireland's waste regulatory regime has been brought up to modern EU standards. This was acknowledged by the OECD in its 2000 Environmental Performance Review of Ireland which praised Ireland for having a 'modern and coherent body of environmental law'. In addition, we have made major progress in modernising our waste infrastructure and services, including our capacity to deliver effective enforcement. In this regard a particular watershed was the establishment by the Government of the Office of Environmental Enforcement just over one year ago". He continued "the judgement makes it clear to me that we must get on with the task of constructing a fully integrated waste management system, incorporating policies and infrastructure to support waste reduction, recovery and recycling right through to energy recovery so as to reduce greatly our reliance on landfill."

The Minister concluded that he wanted to acknowledge the very positive reaction which had been received from the European Commission in the context of this judgment: "Over recent days, there have been closer contacts between the Commission and my Department than on any previous occasion where a judgement is coming through the system. The level of engagement has been positive and helpful, and it is my intention to build on this. I have had a number of personal contacts with EU Environment Commissioner Dimas. I will be leading a team at senior level from my Department and local authority management to Brussels shortly to establish a closer working relationship with Commission officials than we have had in the past across the whole range of environmental issues. In this regard I believe that better clarity of the issues involved and maximum transparency in the process will be of benefit in resolving differences between the Commission and Member States. I have been assured at the highest level that the Commission will engage constructively with us and I very much welcome this."

Water Pollution

Commission of the European Communities v. Ireland[300]

On 2 June 2005 the ECJ found Ireland in breach of its obligations under EC law for its failure to take all of the measures necessary to ensure a correct transposition and application of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. This judgement originated from a 1990 complaint. The ECJ held Ireland has failed to comply with its obligations under Article 7 of that directive but held that no breach of Article 9 of the directive had been proven by the Commission. The Commission had alleged that the adoption of measures for transposition of the directive actually resulted in increased pollution of Irish waters.

[299] Press Release from the Department of Environment, Heritage and Local Government, 26 April 2005, and can be accessed on www.environ.ie

[300] C-282/02

The main findings of the judgment were that Ireland has failed to fulfil its obligations under the Directive by failing to:

- set adequate water quality standards in relation to phosphorus
- stablish pollution prevention programmes in relation to certain dangerous substances.
- establish water quality objectives / standards in relation to a sufficient number of dangerous substances
- establish a licensing system for certain discharges to waters by local authorities e.g. storm overflows, discharges from drinking water treatment plants.

As mentioned above, the judgement originated in a 1990 complaint regarding failure to forward summaries of certain pollution reduction programmes. Many of the breaches found by the court are essentially technical, for example, that the Regulations dealing with 14 dangerous substances, which came into force in 2001, were 4 months behind deadline.

The Minister for the Environment, Heritage and Local Government responded on 2 June 2005 to the judgment given by the ECJ regarding Ireland's implementation of the Dangerous Substances Directive[301]. He said that: "Ireland will continue to add to the very stringent measures in place for protection of water quality in particular in relation to the substances which pose greatest risk to Irish waters. In addition the Government will continue to liaise with the European Commission to close the gaps identified by today's court judgment. My Department is continuing to put in place significant measures to combat eutrophication caused by excess phosphorus and nitrates in Irish waters," the Minister said, "including unprecedented investment by my Department in waste water treatment facilities – almost half a billion Euro this year alone."

He added that "Ireland's Action Programme under the Nitrates Directive, which will apply countrywide, will also go a long way towards reducing and preventing pollution resulting from nitrates and phosphorus from agricultural sources. Substantive measures to deal with dangerous substances in water are being progressed in the context of implementing the Water Framework Directive. A comprehensive Dangerous Substances Screening Programme, funded by my Department, commenced in March 2005. This programme will establish the relevance (or irrelevance) of over 200 dangerous substances in the context of Irish waters. We are committed to achieving the ambitious targets set in the Water Framework Directive, which in many respects supersedes the Dangerous Substances Directive, of ensuring no deterioration of water status and of achieving at least "good status" for all waters in Ireland by 2015."

On 29th July 2005, the Minister for the Environment, Heritage and Local Government announced the submission of Ireland's National Action Programme, under the Nitrates Directive, to the European Commission.

The Nitrates Directive (91/676/EEC) which was adopted in 1991 has the objective of reducing water pollution caused or induced by nitrates from agricultural sources and preventing further such pollution, with the primary emphasis being on the management of livestock manures and other fertilisers.

The action programme provides for a range of measures to strengthen the application of good agricultural practice countrywide, and will be implemented on a phased basis commencing 1 January 2006. These measures include –

[301] Press Release from the Department of Environment, Heritage and Local Government, 2 June 2005, and can be accessed on www.environ.ie

- the timing and procedures for the land application of fertilisers,
- limits on the land application of fertilisers that are consistent with good agricultural practice,
- storage requirements for livestock manure, and
- general provisions on storage management.

A national Nitrates Action Programme had previously been sent to the European Commission on 22 October 2004 but was rejected by the Commission as inadequate and in need of strengthening in certain respects.

'The current revised action programme,' according to the Minister, 'responds to the concerns expressed by the Commission and incorporates appropriate revisions to the programme sent in October 2004. The main farming organisations have been informed by me of the main amendments the EU Commission considered necessary.'

Legislative initiatives, national case law and practices of national authorities

The EPA published its annual report for 2004 in May 2005. It stated that Ireland's environment is in a relatively healthy condition, though serious problems remain. The main problems were identified as the over-enrichment of our waters, the challenge to meet our international obligations on limiting air emissions and waste management, especially the problem of illegal dumping on both sides of the border.

The report also stated that as of 2003, Ireland's greenhouse gas emissions, while down 3.3%, were still 25% above the 1990 level. Ireland is committed to limit its greenhouse emissions to 13% above the 1990 level under the Kyoto Protocol.

In a Press Release, on 15 February 2005 to mark the coming into force of the Kyoto Protocol, the Minister for the Environment, Heritage and Local Government, stated that he welcomed the entry into force of the Protocol. "The fact that the Kyoto Protocol is entering into force is a milestone in the international response to climate change and an occasion to be celebrated", he said[302].

Under the terms of the Protocol, which enters into force following the decision of the Russian Federation to ratify it last October, industrialised nations (including Ireland) have agreed to limit their emissions of six greenhouse gases, which cause global warming and climate change, during the period 2008 – 2012. The EU has agreed to reduce its overall emissions to 8% below 1990 levels.

Mr. Roche stated, "Ireland will meet its Kyoto Target and will play a full and constructive role in creating the international architecture to build on Kyoto's achievements" the Minister said.

Under the terms of an EU "burden-sharing" agreement, Ireland's target for the period 2008-2012 is to limit greenhouse gas emissions to 13% above 1990 levels. The Press Release stated that "The National Climate Change Strategy" provides a comprehensive framework for reducing greenhouse emissions in the most efficient and equitable manner, and for ensuring that Ireland meets its Kyoto target.

On the issue of penalties, the Minister said that "as a party to the Kyoto Protocol and a Member State of the EU, Ireland certainly will face financial and other penalties if we fail to meet our 2008-2012 target. Our objective and the focus of our efforts is to avoid that

[302] Press Release from the Department of Environment, Heritage and Local Government, 15 February 2005, and can be accessed on www.environ.ie

situation. In this regard, I want to make it quite clear", the Minister stated, "that I am not negatively focused on avoiding penalties – I am positively focused on honouring our commitment under the Kyoto Protocol as an important contribution to the international effort to combat climate change."

The EPA had already anticipated and implemented most of the requirements of the EU Directive on Integrated Pollution Prevention and Control, which replaced the old Integrated Pollution Control Licensing scheme in July 2004. The IPPC increases the emphasis on prevention regarding reducing emissions and using energy efficiently. In 2004 the EPA carried out an administrative review of the licences it had issued over the last 10 years to ensure compliance with the IPPC Directive. Overall thirty-seven IPPC licences were granted in 2004 and four were withdrawn.

The EPA issued 32 waste licences in 2004. The EPA report stressed that licences are only issued when the most stringent conditions are met to ensure that the potential environmental impact is strictly controlled.

The report states that the EPA was involved in two concerted enforcement actions in 2004 regarding illegal waster trafficking to Northern Ireland and the evidence obtained has been sent to the DPP with a view to taking legal proceedings.

The EPA received 711 complaints regarding IPPC facilities and 336 complaints regarding waste facilities. However 81% of IPPC facilities and 68% of waste facilities received no complaints. Odour was the most common cause of complaints.

The EPA (Office of Environment Enforcement) published its report *The Nature and Extent of Unauthorised Waste Activity in Ireland* in 2005. Eight illegal landfill sites containing household waste were reported – three in both Co. Monaghan and Co. Wicklow and one in both Co. Cork and Co. Meath. Approximately 80% of all local authorities identified backyard burning as being a significant issue, but one more prevalent in rural communities than in urban communities. Nationally, on average 21& of households (287,000 tonnes from 265,624 households) are either not provided for or not availing of a waste collection service. The assumption made by the report is that many of these households are burning their waste. Illegal waste shipped to Northern Ireland has been estimated as “tens of thousands of tonnes” but the report stated that this has become more sporadic recently due to greater vigilance on both sides of the border.

However, the report stated that a great deal of construction and demolition waste has mismanaged. The report says that there is a lack of reliable information on the subject because of misunderstanding as to what is “waste”. The report states that in 2001, an estimated 500,000 tonnes of soil was accepted at unauthorised facilities.

On 15 September the Minister for the Environment, Heritage and Local Government responded to the publication of the report making the following points[303]:

> “It is completely unacceptable that a number of waste transfer stations and waste processing facilities were found to be without the proper waste management authorisation. This was a criticism of the European Court of Justice and I am particularly concerned to learn that some of these facilities are owned and operated by local authorities. I expect immediate action by the OEE concerning these authorities.

[303] Press Release from the Department of Environment, Heritage and Local Government, 15 September 2005, and can be accessed on www.environ.ie

> No facility should be allowed to operate outside the law and the OEE should seek to end this situation now. These facilities must be regularised or closed down.
>
> Backyard burning of waste, illegal fly-tipping and use of illegal waste collectors also need to be urgently targeted. The report's findings illustrate the dangers to the environment and, particularly in the case of low temperature burning, to human health of these practices. People are not only acting irresponsibly in disposing of their waste in these ways but also leaving themselves open to prosecution and I urge the enforcement authorities to use the powers available to them to increase enforcement. In this regard it is worth noting that over 300 local authority personnel are engaged in enforcement activities.
>
> I am concerned that there is no information on where the waste from up to 21% of households is actually going. I have asked my Department to pursue this aspect with the EPA and the local authorities.
>
> The findings on the management of construction and demolition waste need to be urgently addressed. These findings would appear to conflict with data previously made available to the EPA. This is a huge industry which must take on the responsibility for getting its house in order. I expect the National Construction and Demolition Waste Council to urgently examine the findings to see where improvements can be made.
>
> On the positive side it is clear that a lot has happened and continues to happen. Ireland's waste regulatory regime has been brought up to modern EU standards. In addition, we have made major progress in modernising our waste infrastructure and services, including our capacity to deliver effective enforcement. It is clear that the establishment by the Government of the Office of Environmental Enforcement nearly 2 years ago has been a major success and this has been backed up by significant extra funding from my Department to the local authorities for greater enforcement.
>
> I particularly welcome the OEE proposal to set up a national information hotline to deal more comprehensively with illegal activities."

In 2004 the EPA brought 17 cases against licensees before the District Court. 16 cases resulted in a conviction and the one remaining case resulting in a charitable donation. This year, the EPA undertook 14 prosecutions between 10 January 2005 and 17 October 2005. Of the 2005 cases, fines were imposed in all but one case.

Positive aspects

A joint Ireland-Wales initiative on Integrated Constructed Wetlands as a Potential Waste-Water Solution for agriculture, agribusiness, rural communities and the environment was announced on 1 February 2005 [304].

The right to access to information in environmental matters

Legislative initiatives, national case law and practices of national authorities

The Minister for the Environment, Heritage and Local Government ,on 24 October, 2005, launched the European Direct Information Relay Service in Blanchardstown Library,

[304] Press Release from the Department of Environment, Heritage and Local Government, 1 February 2005, and can be accessed on www.environ.ie

Dublin[305]. He stated that the European Direct Initiative is an attempt to help the general public and the business community be better informed about EU policies. It is also an attempt to increase the general level of interest and involvement in European Union affairs among the general public. The flagship libraries for the European Direct Information Relay Service are Blanchardstown, Longford, Letterkenny, Dooradoyle, Carraroe, Ballinasloe and Macroom. This may have an impact on environmental matters, especially in areas largely governed by EC Directives.

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

In April 2005, the Consumer Strategy Group (CSG), a body established by the Minister for Enterprise. Trade and Employment in March 2004, published its report.[306] The CSG's remit was twofold, it was asked "to examine how the consumer voice could be better heard and to make an assessment of the validity or otherwise of consumers' concerns".[307]

Having reviewed the available empirical data the CSG concluded that there was a significant price differential between many consumer products in Ireland as compared to the EU15. The CSG argued that while a certain increase in prices in Ireland was explicable with reference to the buoyancy of Ireland's economy over the last number of years and to factors such as increased wages, retail rents, waste management and transport costs, the current discrepancy could not be explained by objective factors alone.

In such circumstances the CSG concluded that Irish consumers were not getting a fair deal and that future governmental policy must be directed towards "redressing the current imbalance which exists, at empowering consumers and at delivering a better deal for consumers in the future". The CSG thus put forward a number of recommendations with a view to facilitating the development of such a policy.[308]

In all the CSG made 33 individual recommendations for the improvement of the situation of consumers within Ireland,[309] touching on a number of discrete areas, however two are of particular note. First the CSG proposed that the 1987 Groceries Order, which prohibits retailers selling products below cost price, be revoked. The CSG held that while the Order may have been introduced for laudable reasons – protecting small retail outlets from the predatory practices of larger undertakings – changes in the market had rendered the Order obsolete. Consequently the principle result of the Order at present was to drive grocery prices higher than they would otherwise be, this is completely inimical to consumer's interests and so the CSG recommend the immediate revocation of the Order.[310]

The second recommendation of note which the CSG made was for the establishment of a new National Consumer Agency (subsuming the existing Office of the Director of Consumer

[305] Press Release from the Department of Environment, Heritage and Local Government, 24 October 2005, and can be accessed on www.environ.ie

[306] *Make Consumers Count: A New Direction for Irish Consumers* (April, 2005).
[307] *Ibid* at p.ix.
[308] *Ibid* at p.16.
[309] For a summary see, *ibid* at pp.99-102.
[310] *Ibid* at pp.80-81.

Affairs). The proposed new body would be independent of the Government and have responsibility for a range of functions designed to strengthen the position of the Irish consumer. These functions cover six broad categories, comprising (i) advocacy, (ii) research, (iii) information, (iv) enforcement, (v) education and (vi) awareness.

The facilitate the work of the proposed NCA the CSG report recommended a number of changes, particularly in relation to the NCA's enforcement role, such as the power to impose mandatory fines in cases where there was a failure to meet straightforward requirements and to apply to the courts for closure orders in respect of flagrant violators of consumer legislation.[311]

In response to the CSG's report the Minister for Enterprise has since established an interim NCA, until legislation can be prepared to place the NCA on a statutory footing. However, with regard to the politically sensitive issue of the Groceries Order, the Minister opted instead to initiate a two-month consultation period on the future of the Order, before making a definitive decision about its status.[312]

In July of this year the Office of the Director of Consumer Affairs (ODCA) published its Annual Report for 2004. The report revealed that, in general, compliance with consumer legislation was quite high. However, over the course of the year the ODCA had undertaken 1,500 investigations arising out of consumer complaints and 3.000 "pro-active" investigations and surveys to insure continued compliance with consumer rights legislation. The report also revealed that the ODCA had brought 27 successful prosecutions in the District Court against establishments and individuals who failed to comply with consumer legislation.[313]

In a more detailed breakdown of the statistics the report revealed that, among other things, the ODCA had:

- undertaken 55 pro-active investigations, responded to 621 specific complaints and taken five successful prosecutions in relation to the making of false or misleading statements about goods, services or prices, contrary to the Consumer Information Act, 1978;[314]
- investigated 128 allegations of misleading advertising, contrary to s.8 of the Consumer Information Act, 1978 and investigated 5 complaints under the Misleading Advertising Regulations, 1988;[315]
- investigated 254 complaints and brought 3 successful prosecutions in relation to false or misleading price indicators, contrary to s.7 of the Consumer Information Act, 1978;[316]
- responded to 104 individual complaints, proactively investigated 600 premises and brought 8 successful convictions against licensed premises for failing to display price lists, contrary to the Retail Prices (Beverages in Licensed Premises) Display Order, 1999.[317]

The report also revealed that throughout the year the ODCA helpline had received 32,000 calls from consumers and that the ODCA website received 71,000, all of which was taken to indicate growing consumer awareness of and confidence in their rights.

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[311] *Ibid* at pp.84-97.
[312] *Irish Times*, 19 May 2005 at p.9.
[313] ODCA, *Annual Report 2004* (July, 2005).
[314] *Ibid* at p.6.
[315] *Ibid*.
[316] *Ibid*.
[317] *Ibid* at p.7.

In November, after a protracted period of consultation and deliberation, the Minister for Enterprise, Micheál Martin, announced Government plans to abolish the controversial 'Groceries Order'. Minister Martin argued that the Order had been anti-competitive and had artificially inflated the cost of groceries. The Minister stated that he expected significant benefits, in the form of cheaper groceries, to accrue to consumers as a result of the abolition of the Order, although he would not be drawn on the levels of price difference envisaged or the timeframe within which they would be realised. The Minister also indicated that the abolition of the Order would be accompanied by changes in competition law, to prohibit predatory and anti-competitive practices by large multiples, which could adversely impact on small and independent traders. Legislation to give effect to the new policy is expected to be introduced in Parliament by Easter 2006.[318]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In March 2005 an Oireachtas committee made the following recommendations with regard to below cost selling and prices:

- A comprehensive quarterly survey should be carried out on shopping basket prices in multiples, voluntary and independent stores by the office of the director of consumer affairs or similar organisation to inform consumers of best value.
- The necessary resources should be allocated by the EU statistics service, Eurostat, to ensure that the member state price level index surveys provide accurate comparisons of retail prices in each state.
- The development of the artisan and speciality food sector should be facilitated by the Minister for Agriculture.
- The ban on below-cost selling of grocery products should remain in place.
- The prohibitions on the giving of advertising allowances and "hello money" by supermarkets and wholesalers should continue to apply.
- Fresh products should not be subject to the ban on below-cost selling at this time.
- There should be no change in the cap on the size of supermarkets contained in the retail planning guidelines and the cap should not be subject to change by ministerial decision.
- The retail planning guidelines should be examined with a view to removing any misunderstanding in relation to discount food stores.
- The planning guidelines should specifically emphasise the importance of competition between retailers and of a choice of retail outlet being available to consumers.
- The Minister for Enterprise should establish a costs group to bring about a reduction in business overheads.
- The CSO should prepare a quarterly index of movements in business overhead costs (both goods and services).
- Companies operating in important sectors of the economy such as the grocery trade should be required to publish turnover and net profit statistics.

The labels of all food products sold in Ireland should show the country where the product was produced and where it was processed (if different).[319]

[318] See *Irish Times*, 09 November 2005 at pp.1, 8 and 18.
[319] *The Irish Times,* date ?

CHAPTER V. CITIZENS' RIGHTS

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

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In November 2005 the Government introduced the Electoral (Amendment) (Prisoners Franchise) Bill, 2005. The principal purpose of the proposed legislation is to facilitate the exercise by individuals detained in State prisons of their electoral franchise. To this end s.3 of the Bill amends s.14 of the Electoral Act, 1992, by extending the categories of individuals entitled to a postal vote to include prisoners. Section 5 of the Bill places a duty on prison governors to facilitate the prisoner's exercise of his franchise.

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

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.

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 residence

Article 46. Diplomatic and consular protection

CHAPTER VI. JUSTICE

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

Access to a court and, in particular, the right to legal aid / judicial assistance

Legislative initiatives, national case law and practices of national authorities

In January, the Supreme Court gave a ruling in *Tomlinson v Criminal Injuries Compensation Tribunal*[320] on the exercising of judicial discretion in the granting or refusing of leave to apply for judicial review when an alternative procedure is available to the applicant. The case concerned an application to the Criminal Injuries Compensation Tribunal for compensation under the Scheme of Compensation for Personal Injuries Criminally Inflicted. The individual's application was considered by a member of the Tribunal and the applicant was informed that she came within the scope of the scheme. However, an issue arose regarding the decision of the tribunal to deduct a sum of money from the overall sum of compensation. The applicant was informed of her right of appeal and that the appeal would be heard by three members of the tribunal and that it was a hearing *de novo*. Instead, the applicant applied for judicial review and was granted leave to apply to the High Court. Kelly J. in the High Court, refused the application stating that it was not appropriate for the court to interpose itself by way of judicial review prior to the mechanism for dealing with such matters within the tribunal was exhausted.

Before the Supreme Court, Denham J. concluded, in allowing the appeal and remitting the matter back to the High Court for substantive judicial review, that:

> "[t]he existence of the alternative remedy does not prevent the Court from exercising its discretion as to whether or not to grant judicial review. While a court would lean towards requiring that the remedies available under the scheme be exhausted, the ultimate decision depends on the circumstances of the case. In this case, the core issue is the jurisdiction of the respondent to make the decision, thus the right of an alternative remedy is not so weighty a factor as to exclude the applicant from the court."[321]

In *Carmody v. Minister for Justice Equality and Law Reform*[322] the plaintiff sought a declaration that the absence of a right to have representation by counsel as well as a solicitor funded by the State in District Court proceedings was unconstitutional and in breach of the European Convention on Human Rights by virtue of the European Convention on Human Rights Act 2003. He argued that section 2 of the Criminal Justice (Legal Aid) Act, 1962[323]

[320] Unreported Supreme Court, 19 January 2005, *per* Denham J
[321] Unreported Supreme Court, 19 January 2005, *per* Denham J at p.7.
[322] Unreported High Court, 21 January 2005, *per* Laffoy J.

[323] Section 2 of the Criminal justice (Legal Aid) Act 1962 states: If it appears to the District Court – (a) that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid, and (b) that by reason of the gravity of the charge or of exceptional circumstances, it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it, the court shall, on application being made to it in that behalf, grant in respect of him a certificate for free legal aid (in this Act referred to as a legal aid (District Court) certificate) and thereupon he shall be entitled to such aid and to have a solicitor and (where he is charged with murder and the court thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act. (2) A decision of the District Court in relation to an application under this section shall be final and shall not be appealable.

was unconstitutional and offended Article 6 of the ECHR as it did not provide for legal counsel to assist in the conduct of the accused's defence which denied him effective representation and offended the principle of "equality of arms."

In the High Court, Laffoy J., dismissing the plaintiff's case, stated that it had not been established that section 2 did not fulfil obligations under Article 6 of the European Convention on Human Rights. The District Court is a court of first instance and summary jurisdiction and a qualified solicitor can appear on behalf of an individual in that court as in every court in the State. It could not be established that a solicitor from the legal aid panel could not provide effective representation on behalf of the accused in the District Court.

In February 2005, the High Court gave its ruling in *Declan O'Brien v The Personal Injuries Assessment Board* as regards the applicant's right to take a claim before the newly-formed Personal Injuries Compensation Tribunal with the assistance of his solicitor. The PIAB was established in 2004 and is an independent statutory body which assesses the amount of compensation due to a person who has suffered a personal injury. An assessment is made by the Board on claims for compensation without the major costs associated with such claims, including solicitor, barrister and expert fees. All claims for personal injury must be submitted to the PIAB under the Persona Injuries Assessment Board Act 2003.[324] The PIAB had previously refused to communicate with the applicant through his solicitor and argued that a requirement that it do so would be contrary to the objectives sought to be achieved by the enabling legislation. When the matter came before the court however, McMenamin J. held that if indeed the intention had been the exclusion of lawyers from dealings between the Board and the claimant, then the Act might have said so. He found however, that there was no such provision made in the Act, but instead that the practice of not communicating through lawyers was one which had been initiated by the Board itself. The judge decided that the Board had not shown how its "interference with the lawyer/client relationship is necessary, expedient or incidental to its functions."[325]

Mr Justice McMenamin said that in reaching that conclusion, he had had regard to several significant features of the current case, including (a) the fact that the matters in issue before the board are truly ones of substance, relating to the applicant's property right in his cause of action in tort. They were connected (albeit indirectly) with his constitutional right of access to the courts; (b) the arrogation by the board to itself of the power to prescribe firstly the form of authority, and secondly the manner in which communication shall take place between itself and claimants and/or their solicitors; (c) the absence of an express authority permitting of the adoption of such an approach; (d) the specific recognition within the terms of the Act of the rights to legal advice which highlights the potentially serious legal consequences of the entire procedure for a claimant and (e) the gravity of the consequences of the procedures and their significance for the claimant, which is underscored by the fact that in certain circumstances, such as in respect of vulnerable claimants (section 29) and withdrawal of applications (section 47), the issues arising are of such seriousness that the Act recognises the desirability of claimants obtaining legal advice before further steps are taken.[326]

Positive aspects

During the period under review the Government announced significant increases in funding for the scheme of civil legal aid administered by the Legal Aid Board.

[324] This excludes claims for medical negligence.
[325] *The Irish Times,* February 14th 2005
[326] *Ibid.*

Reasons for concern

Deficiencies in the system of civil legal aid were detailed in a major report published by the Free Legal Advice Centres (FLAC) Ltd., during the period under review.[327]

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

In the period under review the High Court decided on the judicial review proceedings initiated by Circuit Court Judge Brian Curtin, who was the subject of removal proceedings in parliament initiated at the behest of the government. Judge Curtin had been charged with criminal offences connected with downloading child pornography from the internet as part of a Garda operation, *Operation Amethyst*. He was acquitted 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. A motion to remove the judge was put before the Houses of the Oireachtas in May 2004 and this matter was adjourned pending the outcome of proceedings of a Select Committee set up to investigate the alleged misbehaviour. Curtin sought judicial review in the High Court of the mechanism set up by the Houses of the Oireachtas to investigate and gather evidence on his alleged misconduct.

In the High Court proceedings, Judge Curtin claimed that the Oireachtas could not remove him from office, in the manner proposed, under Article 35 of the Constitution which deals with judicial independence and the removal of a judge from judicial office for "stated misbehaviour" or incapacity. He sought a declaration that the standing orders of the Dail and the Seanad which set up the Select Committee were unlawful, unconstitutional and of no legal effect.

In dismissing Judge Curtin's application, Smyth J. found that "the Oireachtas has not only the right, but the duty, to ensure public confidence in the justice system; it is inconceivable that it could not take what measures it saw fit to ensure that confidence, provided that the judge's rights to fair procedures and constitutional justice were not compromised. He pointed out that the judge had the right to appear before the committee and be represented, to call witnesses, and to have other witnesses cross-examined. He would have an opportunity to offer an explanation as to why his computer contained images of child pornography… If representations made by him were not accepted by the committee set up to collect evidence, he would have the opportunity to make these representations again to the Houses of the Oireachtas."[328] Smyth J concluded that Judge Curtin's constitutional rights were adequately protected.

Smyth J., while mindful of judicial independence and the separation of powers, emphasised that the nature of the office imposed certain limitations on the public and private lives of judges. He also implied that there were higher standards expected of members of the judiciary than of ordinary citizens.[329]

The appeal against this decision by Judge Curtin was heard by the Supreme Court in October 2005 and the seven-judge court reserved judgment on the challenge. A decision is expected in early-2006.[330]

[327] The report can be accessed via www.flac.ie/
[328] *The Irish Times*, 5 May 2005.
[329] *Ibid.*
[330] *The Irish Times*, October 28, 2005.

Publicity of the hearings and of the pronouncement of the decision

Legislative initiatives, national case law and practices of national authorities

In the *People* (*DPP) v Dermot Laide and Desmond Ryan*[331] the Court of Criminal Appeal considered the impact of adverse media publicity on the applicant's right to a fair trial. Laide and Ryan, together with two other accused persons, were charged with two counts, manslaughter and violent disorder contrary to section 15 of the Criminal Justice (Public Order) Act 1994 arising from a highly publicised outside a night-club in Dublin city. Laide was found guilty of manslaughter and both Laide and Ryan were found guilty of violent disorder. The case attracted extensive media coverage throughout the trial. McCracken J. stated that the trial judge has wide discretion regarding whether the accused gets a fair trial where adverse publicity is involved. McCracken J., citing with approval an earlier case of some significant controversy, *People (DPP) v Nevin*[332], stated that judicial discretion on this matter should not be interfered with unless such discretion was clearly and wrongly exercised. The discretion exercised in this case was held to be proper and fair. The Court found that Laide's conviction for manslaughter was unsafe on a different ground and directed a retrial in respect of that offence. His conviction for violent disorder was upheld. The Court allowed the appeal by Ryan against his conviction for violent disorder and did not order a retrial.

Reasonable delay in judicial proceedings

Legislative initiatives, national case law and practices of national authorities

In December 2004 the High Court considered the issue of prosecutorial delay in *Jackson and Walsh v. DPP.*[333] Jackson and Walsh were 15 and 16 years of age respectively when the offences were alleged to have occurred in 2000. Although there were factual differences between their cases, they relied on the same ground in support of their claim for relief. They alleged that the prosecution were guilty of inordinate and inexcusable delay in prosecuting the accused and that the reasons they had advanced for excusing the delay were wholly inadequate. In particular, the applicants argued that, as they were children at the time of the commission of the alleged offence, there was a special duty on the authorities to bring about a speedy trial and that the failure to do so was of enough significance to warrant the prohibition of the furtherance of criminal proceedings against them, even in the absence of evidence of prejudice.

Quirke J., in examining this issue, stated that:

> "It is no secret that persons in their late teenage years have particular vulnerabilities. These vulnerabilities can be compounded by difficult or deprived family or social circumstances and by a variety of other causes. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them. The interests of the community will surely be better served by efficient action on the part of the State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal activity."[334]

Finding in favour of the applicants, Quirke J. stated that:

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[331] Unreported Court of Criminal Appeal, 29 June 2005, *per* McCracken J.
[332] [2003] 3 IR 321.
[333] Unreported High Court, 3 December 2004, *per* Quirke J.
[334] *Ibid.,* at p.16.

> "…where a criminal offence is alleged to have been committed by a child or a young person there is always a special duty upon the State authorities (over and above its fundamental duty), to ensure a speedy trial of the child or young person in respect of the charges preferred."[335]

Quirke J. stated that although no specific prejudice had been demonstrated by the applicants there was a presumption of prejudice by virtue of the applicant's age at the time of the commission of the alleged crime.

In July in *Robert Byrne v. DPP*[336] the High Court made statements in relation to delays in summary prosecutions. The applicant sought an order in the High Court restraining any further prosecution of a charge of assault causing harm under section 3 of the Non Fatal Offences Against the Person Act 1997. Two years and four months had elapsed between the alleged offence and the date set for the hearing. The applicant submitted that such a delay created a substantial risk of an unfair trial and the applicant's ability to defend himself had been prejudiced to such a point that it was constitutionally impermissible. Peart J. found that the delay in the case could not be attributed to the applicant. He asserted that "the dividing line… involves the extent to which actual prejudice must be established by the applicant, especially in a case where the length of the delay and all the circumstances in which it arose do not give rise to an inference of prejudice."[337]

Peart J. adverted to the duty on the State to ensure that a hearing is held within a reasonable time and that all organs of the state have a duty to ensure the vindication of the accused's constitutional rights. He noted that it is not the occasional "mishap" or "hiccup" in the system that will constitute an interference with the accused's constitutional rights. He found that where there is such a culpable delay the Court may infer prejudice even in a situation where the applicant did not attempt to demonstrate any. He stated that "there has been a breach of the applicant's right to an expeditious hearing of the charge, a right independent of the right to a fair hearing, such that his further prosecution ought to be restrained."[338]

Importantly, Peart J. stated that the right to an expeditious trial which is included in the right to a fair trial is an independent right which did not require specific prejudice against the applicant to be made out. He opined that "it is hard to see why the onus should be on the person charged to establish prejudice in order to have that right to an expeditious hearing vindicated, as opposed to his or her right to a fair trial."[339] The judge also made reference to the presumption of innocence and the fact that an individual accused of a crime has a "life to lead" and a criminal matter should not be unnecessarily prolonged.

In March the Supreme Court heard the case of *Blood v. DPP*[340], an appeal against a judgment of the High Court refusing the applicant's judicial review application for an injunction to restrain the DPP from prosecuting the applicant in criminal proceedings initiated against him on the grounds that the delay between the commission, of the alleged offences and the return date for trial was a violation of the applicants constitutional right to fairness in procedure and his right to constitutional and natural justice. The applicant was charged with two offences under section 27A(1) of the Firearms Act 1954.[341] There was a delay of almost seven years between the date of the alleged offence and the return date for trial.

McGuinness J. noted that while there had been a succession of cases dealing with delay in criminal proceedings, the majority of cases related to delay in sexual abuse cases. This case

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[335] *Ibid.,* at p.18.
[336] Unreported High Court, 22 July 2005, *per* Peart J.
[337] *Ibid.,* at p.4.
[338] *Ibid.*
[339] *Ibid.,* at p.6.
[340] Unreported Supreme Court, 2 March 2005, *per* McGuinness J.
[341] As inserted by section 8 of the Criminal Law (Jurisdiction) Act 1976 and amended by section 14 of the Criminal Justice Act 1984.

did not come within that category and presented a very different factual background. The Court divided the period in question into two parts. The first period, which lasted almost three years, related to the continuing investigation of the accused. McGuinness J. held that the reasons provided for this delay by the DPP were "tenable" and "justifiable." McGuinness J. did note that by reason of the fact that there was such a considerable delay in the first period it was the duty of those concerned to proceed with all reasonable speed. She stated, in relation to the second period of delay, that it "…was inordinate or excessive and that the respondent has failed properly to excuse this delay."[342]

The issue arising from this excessive delay was whether that delay was sufficient to require the prohibition of any further prosecution of the applicant. McGuinness J. stated that the applicant's right to a fair trial is a superior right to the community's right to have such alleged crimes prosecuted. The Court found that cases involving delay are to be decided on an *ad hoc* basis based on the particular circumstances of the case and that the delay in this case amounted to a denial of the applicant's right to an expeditious trial and allowed the appeal.

In June in *T.S. v DPP*[343] McCracken J. in the Supreme Court stated, on examination of the caselaw on delay in sexual abuse cases and the necessity for the applicant to demonstrate prejudice of a risk of an unfair trial when seeking an order to restrain any further prosecution, that:

> "[t]here is no doubt that, the longer the delay, the greater the danger of prejudice and the more readily a court will infer prejudice. However, that does not mean that in all cases an unfair trial would result."[344]

Hardiman J. made comments referring to his judgment in *P.L. v. Her Honour Judge Buttimer*[345] and the issue of demonstrating prejudice by the applicant of a real and serious risk of an unfair trial. He stated that in "…certain cases at least, it is the result of sheer chance and the vagaries of fortune that prejudice can be demonstrated at all."[346] He stated that "when lapse of time is measured in decades, and perhaps even after shorter times… one must not fail to consider that the final prejudice to accrue may be that of not being able to *demonstrate* prejudice."[347] [emphasis in original]

Reasons for concern

In some of the foregoing cases individual judges appear to suggest that a special jurisprudence has evolved in relation to sexual offence cases where there has been prejudicial delay. The law in this area requires some clarification by the courts as there would appear to be some judicial disagreement as to the precise principles applicable in different categories of cases.[348]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In December 2004, the Minister for Justice, Equality and Law Reform announced that the government had approved a proposal to establish a second non-jury Special Criminal Court in order to expedite trials pending before that court. The Special Criminal Court was established

[342] *Ibid.,* at p.17.
[343] Unreported Supreme Court, 22 June 2005, per Hardiman J., Fennelly J., McCracken J.
[344] *Ibid.,* at p.8.
[345] Unreported Supreme Court, 20 December 2004, *per* Hardiman J.
[346] Unreported Supreme Court, 22 June 2005, per Hardiman J., Fennelly J., McCracken J at p.3.
[347] *Ibid.,* at p.4.
[348] See, for example, the comments of Fennelly, J. in T.S. v. D.P.P.

under section 38.1 of the Offences Against the State Act 1939. Michael McDowell stated that "[t]he speedy resolution of trials before the Special Criminal Court will serve to demonstrate the State's resolve to seriously deal with any activity which is a threat to the State and its people."[349] Once the issue of delay is dealt with the Minister will consider the continued operation of the Special Criminal Courts.[350]

In *D.S. v. the Minister for Health and Children and the Hepatitis C Compensation Tribunal*[351] the applicant appealed the outcome of the Tribunal to the High Court. The applicant applied to the Hepatitis C Compensation Tribunal for loss of consortium and for compensation for losses incurred as a carer under section 4 of the Hepatitis C Compensation Act 1997. He was successful in his claim relating to loss of consortium, however his claim for compensation as a carer failed. The applicant appealed this decision to the High Court at which point the Minister for Health and Children raised the issue of whether the respondent was entitled to cross examine the applicant on appeal. O'Neill J stated that proceedings such as the one at hand had proceeded on the basis that the respondent was not entitled to cross-examine the applicant. This had been an accepted position by all parties for a significant period. On examination of the Hepatitis C Compensation Act 1997 and the relevant sections therein O'Neill J found that while cross-examination was prohibited by the legislation in respect of the Tribunal hearing, there was no mention of such a prohibition either in legislation or statutory instrument when an appeal to a superior court arose. O'Neill J concluded that it would be impermissible to construe the relevant legislation to prohibit the entitlement of cross-examination in light of the protections under the Constitution for such procedures.

Reasons for concern

Section 47 of the Offences Against the Person Act 1939 allows the Director of Public Prosecutions to refer cases for a non-jury trial in the Special Criminal Court without the requirement that a reason be provided for such a referral. This power – which is, effectively, unreviewable – has been found to be in breach of the entitlement to equality before the law as guaranteed by Article 26 of the International Covenant on Civil and Political Rights by the Human Rights Committee.[352] Any proposal to increase the use of the Special Criminal Court is of concern as it perpetuates, extends and normalises the use of a non-jury criminal court in a criminal process where trial by jury is the norm. For this reason, the decision to establish a second panel of that court was a cause of some concern when announced at the end of 2004 although the view was posited that it may have been necessary to do this as a prelude to ending the jurisdiction of the Special Criminal Court in order that any cases pending before it be dealt with expeditiously.[353]

[349] "Minister announces establishment of second Special Criminal Court" available at www.justice.ie last visited on 3/12/2005.
[350] *Ibid.*
[351] Unreported High Court, 2 May 2005, *per* O'Neill J.
[352] *Kavanagh -v- Ireland*, UN Human Rights Committee, 4 April 2001.
[353] See : O'Connell, 'Case for a second non-jury court needs to be explained', *The Irish Times*, 15th January, 2005.

Article 48. Presumption of innocence and right of defence

Presumption of innocence

Legislative initiatives, national case law and practices of national authorities

There have been a number of legislative developments in the area of civil forfeiture. The practice of pursuing criminal assets through the civil domain raises several civil liberty concerns including an adverse effect on the presumption of innocence.

The Proceeds of Crime (Amendment) Act 2005 was implemented to make further provision for the recovery and disposal of assets. The Act amends the Proceeds of Crime Act 1996, Criminal Assets Bureau Act 1996, Criminal Justice Act 1994 and the Prevention of Corruption (Amendment) Act 2001. The Act extends the powers of the Criminal Assets Bureau to enable it to deal with transnational criminal activity and provides for measures to deal with white collar and enterprise criminal activity.

The Criminal Assets Bureau was established in 1996. It is empowered to seek interim and interlocutory orders from the High Court to preserve, or where appropriate, dispose of property. It is a mechanism of civil forfeiture, allowing the removal of property that is linked to criminal activity without obtaining a criminal conviction. If an interlocutory order is in force for seven years the rights of the respondent to the property are extinguished. The burden of proof for such orders is the civil standard, i.e., on the balance of probabilities, and where the Criminal Assets Bureau tenders evidence that an individual is in possession or control of property which constitutes the proceeds of crime, the High Court must make the order sought. It is for the respondent to introduce evidence to the contrary. There are a number of provisions in the legislation of importance:

- Part 2 of the Act amends the definition of the "proceeds of crime" to include conduct and property in foreign jurisdictions. The definition of "criminal conduct" ensures that foreign criminality is included where the proceeds of that criminality are within the State. The definition of "property" provides for the inclusion of property situated outside the State where there is a link with this jurisdiction. An amendment to the definition of "respondent" allows for the inclusion of individuals outside of Ireland.

- Section 18 inserts sections 14(a), (b) and (c) into the Proceeds of Crime Act 1996. Section 14(a) allows a Criminal Assets Bureau officer[354] to seek an order from the court making material available for the purpose of an investigation into whether an individual is linked, in some manner, with the proceeds of crime. Section 14(b) creates a "tipping off" offence modelled on the offence of prejudicing an investigation under section 58 of the Criminal Justice Act 1994. Section 14(c) enables the Criminal Assets Bureau or the Revenue Commissioners to seek disclosure of the identity of individuals who hold property in trust where there is an investigation regarding whether an individual is connected with the proceeds of crime.

- Section 12 inserts section 16(b) into the principal Act allowing for the making of a "corrupt enrichment order." This amendment is designed to deal with a situation where an individual benefits from enhancing the value of property legally acquired because of "corrupt conduct".[355] Where an individual has become corruptly enriched the court may make a corrupt enrichment order requiring the individual to pay the

[354] This member must also be a member of An Garda Siochana.
[355] "Corrupt conduct" is defined as conduct amounting to an offence under the Prevention of Corruption Acts 1889 to 2001, the Official Secrets Act 1963 and the Ethics in Public Office Act 1995.

amount by which he or she benefited, as determined by the court, to the Minister for Finance or any other person that the court specifies. Section 12(3) creates a presumption of corrupt conduct where "(a) the defendant is in a position to benefit others in the exercise of his or her official functions, (b) another person has benefited from the exercise, and (c) the defendant does not account satisfactorily for his or her property or for the resources, income or source of income from which it was acquired." Section 12(8) applies the civil standard of the balance of probabilities to the proceedings involved.

- Section 23 of the Act inserts new sections into the Prevention of Corruption (Amendment) Act 2001 allowing for the seizure of any gift or sum of money that the Garda Siochana believe to be as a result of a bribe in an act of corruption or criminality.

The Criminal Justice (Terrorist Offences) Act 2005 also contains provisions on civil forfeiture:

- Part 4 of the Act deals with the suppression of the financing of terrorism. It inserts into the Criminal Justice Act 1994 a procedure for confiscating or freezing funds that are the proceeds of terrorism or funds used or to be used for the funding of terrorism. Part 4 also introduces a scheme based on similar provision in the Proceeds of Crime Act 1996 allowing for confiscation, freezing and restraint of funds through a court order where funds are being used for or intended for use in a terrorist offence or an offence of financing terrorism. The sections providing for the forfeiture of assets in the Proceeds of Crime Act 1996 are mirrored in the Criminal Justice (Terrorist Offences) Act 2005.

- Section 51 inserts a new procedure into section 22 of the Offences Against the State Act 1939 allowing for the seizure and confiscation of the property of unlawful organisations other than those held in banks. This is modelled on the provisions of the Criminal Assets Bureau Act 1996.

- Section 54 re-enacts section 2 of the Offences Against the State Act 1985 which empowers the Minister for Justice Equality and Law Reform to forfeit moneys held in bank accounts which are the property of an unlawful organisation. Forfeiture is not dependent on the initiation of criminal proceedings.

The Criminal Justice (Mutual Assistance) Bill 2005 was published in December 2005. Part 4 of the Bill gives effect to the Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. Part 5 addresses the enforcement of confiscation and forfeiture orders.

In January 2005, the Court of Criminal Appeal gave its decision in *People (DPP) v. Colm Murphy*[356], an appeal from the Special Criminal Court of a conviction for conspiracy to cause an explosion contrary to section 3 of the Explosive Substances Act 1833. The offence was connected to the Omagh bombing which caused the death of 29 people, injuring over 300 others in 1998.

At the trial stage the Special Criminal Court had regard to the accused's previous convictions despite the fact that he had not lowered his 'evidential shield' so as to permit the consideration of such evidence in accordance with the Criminal Justice (Evidence) Act 1924. The accused had not given evidence and had not put his own good character into question.

[356] Unreported Court of Criminal Appeal, 21 January 2005, *per* Kearns J.

The issue on appeal related to a particular section of the judgment of the Special Criminal Court which stated:

> "The accused is a republican terrorist of long standing having been convicted of serious offences of that nature in this State and in the United States of America, for each of which he served sentences."[357]

The Special Criminal Court had become aware of the convictions during a *voir dire* (trial within a trial) in relation to the legality of the arrest and detention of the accused. The Court of Criminal Appeal stated in relation to the statement in issue and the effect the information had, that:

> "…such can only be seen as a significant erosion of the presumption of innocence, whether couched in terms which go to corroboration or in terms which suggest that previous convictions are probative in some way of the guilt of an accused person in relation to a specific offence."

The Court of Criminal Appeal stated that the Special Criminal Court had erred in having regard to the previous convictions where no admissible evidence was presented before them. The Court found the conviction of the accused unsafe and unsatisfactory, set aside the conviction and directed a retrial on this basis.

Reasons for concern

The Proceeds of Crime (Amendment) Act 2005 targets transnational criminal activity based on the experience of the Criminal Assets Bureau since 1996. Provided there is an Irish dimension to the proceeds of crime those assets can be targeted irrespective of the location of the individual or the asset. This legislation widens the power of the Criminal Assets Bureau in an attempt to address the growing tendency of those with assets that are the proceeds of crime to remove themselves or their assets beyond the reach of the Criminal Assets Bureau. While the use of civil forfeiture can be seen as an effective weapon in targeting organised crime and criminals, it has also attracted considerable criticism and the concerns regarding the compatibility of such procedures with rights such as the presumption of innocence and the privilege against self-incrimination is well documented. It has also been criticised for circumventing the normal due process standards applicable within criminal justice system through the application of civil standards of evidence.

The Irish Human Rights Commission raised concerns in relation to Part 4 of the Criminal Justice (Terrorist Offences) Act 2005, in the following terms:

> "One is that there is a major difference between assessing what are the proceeds of crimes already committed, which can usually be done by examining payments into bank accounts after the event, purchases of property or expenditure greatly in excess of known income, and trying to assess the intended use of funds, which may have been quite legitimately acquired."

> "The second ground is that we do not feel that reliance on opinion evidence by Gardai is sufficient in an area where there is room for considerable misunderstanding as to whether funds collected are for victims of conflict, legal defence of persons charged with terrorist offences, or to support political opposition in, situations where there is also armed resistance going on. As we have suggested above, we believe that opinion evidence and rebuttable presumptions about the intended use of funds are

[357] *Ibid.,* p.30.

inappropriate in this context and traditional standards of proof should be relied upon instead."

Section 54 provides the Minister for Justice, Equality and Law Reform with wide-ranging powers which are open to question. When the Offences Against the State Act 1985 was originally enacted it was for a specific purpose and its draconian nature was recognised at the time by the imposition of a three-month time limit on the statute. Although this legislation had a short life-span it can be seen as the starting-point for the development of civil forfeiture techniques in Ireland. Since then civil forfeiture has been normalised under the Acts discussed above in a manner that raises real and genuine due process concerns.

The rules governing the evidence in criminal matters

Legislative initiatives, national case law and practices of national authorities

Section 10 of the Proceeds of Crime (Amendment) Act 2005 places on a statutory footing the Supreme Court decision of *McK & D*[358] that section 11(7) of the Statute of Limitations 1957 does not apply at any stage of proceedings initiated by the Criminal Assets Bureau under the Proceeds of Crime Act 1996. Section 11 of same amends section 9 of the Proceeds of Crime Act 1996 to ensure that an affidavit of income or property made by a spouse of a respondent is not admissible as evidence in a criminal proceeding against that respondent or spouse unless the proceeding is for perjury arising from statements contained in the affidavit. Section 12 inserts sections 16A into the Proceeds of Crime Act 1996 rendering admissible evidence of any fact within certain documents in any proceedings of which direct oral evidence would be admissible in any proceedings under the Principal Act without further proof.[359] Section 12(2) of the Act inserts a safeguard stating that a document is not admissible where the interest of justice so requires. Section 16B as inserted by section 12 of the 2005 Act creates a corrupt enrichment order and applies the civil standard of proof to the proceedings where such an order is sought. Section 12(5) allows for the admissibility of hearsay evidence in court by an applicant under oath making a corrupt enrichment order where the applicant makes a statement under oath that the defendant benefited from corrupt conduct, is in possession of property related, directly or indirectly, to corrupt conduct and where the Court has reasonable grounds for such a belief.

In the Criminal Justice (Terrorist Offences) Act 2005 section 51 inserts sections 22A – 22I into the Offences Against the State Act 1939 and provides for a new procedure for the recovery of assets and property other than those held in banks which are liable to be forfeited by the Minister under section 22 of the Act. In particular section 22E (which is based on section 5 of the abovementioned Offences Against the State (Amendment) Act 1985) provides that the production in court in any proceedings of a document that is signed by the Minister stating that the property would have been the property of an unlawful organisation save for the operation of section 22 shall be evidence of that fact unless the contrary is shown.

The Criminal Justice (Mutual Assistance) Bill 2005, which was initiated in the period under review, proposes to introduce a number of provisions dealing with mutual assistance in the provision of evidence between States in Part 6. Part 6 is largely modelled on provisions

[358] [2004] IESC 32

[359] Explanatory Memorandum, the Proceeds of Crime (Amendment) Act 2005: The documents concerned are (i) a document which consists of part of a record of a business, or a copy of that document, (ii) a deed, and (iii) a document which purports to be signed by a person on behalf of the business and which states that either (a) a designated document or documents constitute the record or part of the records of the business or a copy or are copies of such a document or documents or (b) there is no entry or other reference in the records to a specified matter, provided that, in both those instances, the person has personal knowledge of those matters.

contained in the Criminal Justice Act 1994. The Irish Human Rights Commission raised a number of concerns regarding the assistance in obtaining and sharing of evidence between States.[360]

In December 2004 the Court of Criminal in *People (DPP) v. Keith O'Donovan*[361] found the judge's charge to the jury regarding identification evidence defective. The applicant and another man were identified by two Gardaí close to where an armed robbery had occurred earlier that day. There was a dispute as to precisely how long after the commission of the offence the two individuals were identified by the Gardaí. The identification evidence was central to the prosecution's case. The applicant argued that the trial judge gave the warning in a stereotypical manner and that the judge failed to mention factors tending to make identification difficult. The Court found the direction inadequate with Hardiman J. stating that "…there must, for example, be some reference "to the possibilities of mistake in the case before them" and we do not see this here."[362]

The Supreme Court quashed the conviction and ordered a retrial. The decision sets an important benchmark in relation to directions made by trial judges to juries regarding identification evidence.

In the aforementioned decision of the *People (DPP) v Colm Murphy*[363] the Court of Criminal Appeal also made a decision on the admissibility of mobile telephone evidence. Part of the prosecution case rested on the use of mobile telephone records and one aspect of the appeal from the Special Criminal Court was that the court had erred in admitting the such evidence. The Special Criminal Court accepted the telephone evidence and this had not been challenged by the defence. The Court of Criminal Appeal held that admissibility of the evidence is not affected by virtue of the fact that the recording is produced mechanically without human intervention.[364] The Court said that such evidence came within section 5(1) of the Criminal Evidence Act 1992 which states that information in a document is admissible in criminal proceedings of any fact contained within of which direct oral evidence would be admissible if the information: "(a) Was compiled in the ordinary course of a business; (b) was supplied by a person who had, or may reasonably be supposed to have had personal knowledge of the matters dealt."[365]

The Court of Criminal Appeal also ruled on the legality of the arrest and detention of the appellant where interview notes of statements allegedly made by the appellant were admitted in the Special Criminal Court. There was evidence that the Gardaí had tampered and altered the interview notes. In quashing the conviction and ordering a retrial, the Court of Criminal Appeal stated that the Special Criminal Court had a duty to assess such evidence in an extra critical manner when it had emerged that the Garda evidence was tainted and perjured. There was also a requirement that the Special Criminal Court states in its judgment that it is doing so.

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[360] Observations on the Scheme of the Criminal Justice (International Co-operation) Bill, May 2005.
[361] Unreported Court of Criminal Appeal, 10 December 2004, per Hardiman J.
[362] *Ibid.,* at p.9.
[363] Court of Criminal Appeal, January 21 2005, Kearns J., MacMenamin J. and Clarke JJ.
[364] Citing *Statute of Liberty; The Sapporo Maru M/S (owners) v Steam Tanker Status of Liberty (Owners)* [1968] 1 W.L.R. 739.
[365] The Court of Criminal Appeal cited with approval the decisions of *R v Wood,* [1982] 767 Cr. App. Rep. 23, and *Castle v Cross,*[1985] 1 All E.R. which related to the admissibility of evidence from computer results and intoximeter evidence respectively. Both cases finding that the evidence was not hearsay and should be treated as real evidence. The Court also noted that the authorities cited with approval needed to be viewed in light of *R v Corcoran*[365] which ruled that prior to determining whether the evidence is real or hearsay, appropriate authoritative evidence is required. The Court of Criminal Appeal ruled the evidence admissible, in the absence of human intervention.

Also in January 2005, the Court of Criminal Appeal allowed an appeal on the basis that a charge relating to identification evidence was inadequate in the *People (DPP) v. George Christo.*[366] The case dealt with interracial recognition and the identification of the accused by the injured person in the week following the commission of the offence. The Court found that the direction to the jury lacked the neutrality required of a trial judge in relation to controversial facts in the case that were for the jury to decide. The statement tended to favour the identification of the accused rather than highlighting the evidential difficulties of relying on such evidence as required in the judgment of the *People (DPP) v Casey (No.2).*[367] McGuinness J. found that as the issue of cross-racial identification was raised during the trial and that there was a possibility for added difficulty of making such an identification, the warning was inadequate. Thus a trial judge when charging a jury on identification evidence must expressly refer to the difficulties associated with inter-racial recognition, where appropriate.

In February 2005, the Court of Criminal Appeal in *Brian Willoughby v DPP*[368], after examining caselaw in Ireland, set out principles to be applied where there is an application to introduce fresh evidence before it. The applicant had been contacted by a Professor of Pathology who had followed his trial in the Central Criminal Court through reports in the media and had concern as to the actual cause of death of the victim. The applicant then sought to have additional evidence submitted in the Court of Criminal Appeal. The principles were set out as follows:

> "(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.
> (b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.
> (c) It must be evidence which is credible and which might have a material and important influence on the result of the case.
> (d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."[369]

In April in the *People (DPP) v Martin Kelly*[370] the Court of Criminal Appeal adopted the principles applicable in relation to an appeal in civil actions and as enunciated by McCarthy J. in *Hay v. O'Grady*[371] as equally applicable to appeals from judges of the Special Criminal Court in criminal proceedings.

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[366] Unreported Court of Criminal Appeal 31 January 2005, *per* McGuinness J.
[367] [1963] I.R. 33. In this case, Kingsmill Moore J., delivering the judgment of the Supreme Court stated: "We consider juries in cases where the correctness of an identification is challenged should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification, they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identification on a parade or otherwise, which identifications were subsequently proved to be erroneous; and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence in the case, they feel satisfied beyond reasonable doubt of the correctness of the identification they are at liberty to act upon it." at p.39-40.
[368] Unreported Court of Criminal Appeal, 18 Febrauary 2005, *per* Kearns J.
[369] *Ibid.,* at p.13.
[370] Unreported Court of Criminal Appeal, 29 April 2005, *per* McCracken J.
[371] [1992] 1 I.R. 210

They can be stated as follows:

> "(1) An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence, but also observes the manner in which it is given, and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
>
> (2) If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them. The truth is not the monopoly of any majority.
>
> (3) Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact.[372] I do not accept that this is always necessary so. It may be that the demeanour of a witness in giving evidence will itself lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact, where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."[373]

In April 2005, Hardiman J. delivered the judgment of the Supreme Court in the case of *J.F. v. DPP*.[374] The applicant was given leave from the High Court to apply to restrain the respondent from proceeding with the prosecution against the applicant, by means of judicial review. The case related to two counts of indecent assault against an individual alleged to have taken place in 1988. As there was a significant delay in bringing proceedings against the applicant the prosecutor stated:

> "Insofar as there has been any delay in the making of the complaints as a result of which the applicant has been charged, that delay arises as a consequence of the effect of his acts upon the complainant and the reason why he failed to make an earlier complaint in respect thereof."[375]

In support of this an affidavit by a clinical psychologist who had six "clinical interviews" with the complainant and had produced a twenty-two page report in support of this was submitted to the court. The applicant's solicitor wrote to the Chief Prosecution Solicitor to seek permission to have an expert conduct an assessment of the complainant however the complainant refused to do so.

The applicant argued that he must be provided with the opportunity to counter the prosecutor's expert and this requires assessment of the complainant by the expert nominated by the applicant. The opinion of the applicant's expert would be of assistance in the cross-examination of the respondent's expert's evidence and in providing the court with another, possibly differing, professional opinion. The applicant argued that to refuse such an assessment would place the DPP at an unjustifiable advantage and the applicant at a significant disadvantage. The DPP argued that it was "standard practice" for such an assessment to occur and that the report is that of an independent expert.

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[372] See the judgment of Holmes LJ in *Gairloch* [1899] 2 IR 1 cited by O'Higgins CJ in the *People (DPP) v. Madden* [1977] IR 336 & 339.
[373] Unreported Court of Criminal Appeal 29 April 2005, *per* McCracken J at p.10.
[374] Unreported Supreme Court 26 April 2005, per Hardiman J.
[375] *Ibid.*, at p.2.

Hardiman J. rejected the argument made implicit by the prosecution that "it is only where there is some reason to doubt the independence or objectivity of one side's expert exists that the other has a right to deploy expertise of its own."[376] He further rejected the contention that an "expert called by [the prosecutor] is entitled to some presumptive superior status."[377] Hardiman J. stated that it is obvious that where there is a conflicting view on a psychological matter, the expert who has assessed the individual involved is at a distinct advantage.

The Supreme Court cited with approval comments made by O'Dalaigh J in *Re Haughey*[378] in relation to the applicant's entitlement to fair procedure and minimum protection. Of particular relevance to this case is the entitlement of the accused to give rebutting evidence. Hardiman J. also made reference to the concept of "*égalité des armes*" or "equality of arms"[379] citing *Steel and Morris v. United Kingdom*[380] in which the European Court of Human Rights stated:

> "The adversarial system… is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality… the Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of fair trial in civil as in criminal proceedings that a litigant is not denied the opportunity to present his or her case effectively before the Court and that he or she is able to enjoy equality of arms with the opposing side…".[381]

Hardiman J. held that the refusal to allow for an assessment by an expert of the applicant's choosing of the complainant deprived the applicant of the right to be allowed to rebut evidence as stated in *Re Haughey* as rebutting evidence cannot be formed without an actual assessment of the complainant. He also stated that such a refusal subverts the right to cross-examination:

> "In a case with a significant issue of expert evidence this process of preparation will take place in consultation with the party's own expert. If this expert is at a disadvantage *vis a vis* with the other side's expert, counsel will be at a disadvantage in conducting the cross-examination."[382]

In May in the *People (DPP) v Tyndall*[383] the accused was arrested under S.30 of the Offences Against the State Act 1939 which provides that an individual may be arrested where a member of the Garda Síochana suspects that he or she has been involved in committing specific offences. The issue to be decided was whether the arrest was valid in circumstances where no evidence was produced relating to the suspicion that the individual committed a scheduled offence at the time of the arrest and whether the court could infer this suspicion. A further issue arose as to whether direct oral evidence is necessary by the arresting officer of such a suspicion.

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[376] *Ibid.,* at p.6.
[377] *Ibid.,* at p.6.
[378] [1971] IR 217.
[379] In *Bonisch v. Austria* [1985] 9 EHRR 191 it was held that: "The principle of equality of arms inherent in the concept of a fair trial requires equal treatment between a court appointed expert and witnesses for the defence".
[380] ECHR, unreported 15 February, 2005.
[381] Paragraphs 50 and 59.
[382] Unreported Supreme Court, 26 April 2005, *per* Hardiman J at p.9.
[383] Unreported Supreme Court, 3 May 2005, *per* Denham J.

Denham J, delivering the judgment of the Supreme Court, stated:

> "Suspicion is not defined in the Act. It should be *bona fide* and not irrational. It is a fact to be proved by direct evidence, or it may be inferred from the circumstances. It is an essential proof. There must be circumstances other than the arrest itself by a member of the Garda Síochána from which the suspicion of the arresting member may be inferred."[384]

Denham J concluded, allowing the appeal, that "[t]he wording of s.30 of the Act of 1939 requires proof of the existence of the suspicion of the arresting member of the Garda Síochána which may be proved by direct evidence or indirect evidence arising in all the circumstances."[385]

In May 2005 the Court of Criminal Appeal gave judgment on the admissibility of fingerprint evidence and the conditions required to be fulfilled where an individual consents to the taking of fingerprints by a member of the Garda Síochána in *DPP v. Daniel Cleary*.[386] Section 6 of the Criminal Justice Act 1984 states that "[w]here a person is detained pursuant to section 4, a member of the Garda Síochána may –(d) take, or cause to be taken, his fingerprints and palm prints." Section 6(2) states that "[t]he powers conferred by subsection (1)…(d) shall not be exercised except on the authority of a member of the Garda Síochána not below the rank of superintendent."

Also of relevance is article 18 of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (S.I. No. 119 of 1987) which provides:

> "Fingerprints, palm prints, or photographs shall not be taken of, or swabs or samples taken from, a person in custody (otherwise than pursuant to a power conferred on a member by law) except with his written consent and, where he is under the age of 17 years, the written consent of an appropriate adult.
> (b) A consent shall be signed and be recorded in the custody record or a separate document."

The appellant argued the fingerprint evidence was inadmissible as the Garda did not fulfill the conditions set out in s.6 of the 1984 Act. In particular it was argued that the Garda did not seek the authority of a member of the Garda Síochána not below the rank of Superintendent. Further, it appeared that the appellant had not been cautioned that fingerprints may be used against him in subsequent proceedings. It was argued that this practice did not adhere to the principle of fairness of procedure and was a partial violation of the constitutional right to bodily integrity. Furthermore, at the trial the prosecution had not produced the consent form which the applicant allegedly signed prior to the giving of his fingerprints.

McGuinness J. held that as the applicant had consented to the taking of fingerprints, authority from a member of the Garda Síochána was not also required. McGuinness J. went on to state that while it is desirable that an individual should be informed of the purpose of the taking of the fingerprints in this case it was hard to believe that he did not understand the reason the fingerprints were being taken.

In May, the Court of Criminal Appeal decided on the case of *DPP v. Marc Lacy*[387]. The issue to be determined was whether the prosecution must call a witness once a statement by that

[384] *Ibid.,* at p.8.
[385] *Ibid.,* at p.9.
[386] Unreported Court of Criminal Appeal, 2 May 2005, *per* McGuinness J.
[387] [2005] IE CCA 7.0

witness is included in the Book of Evidence prepared by the prosecution. Denham J. cited with approval the principles enunciated in the English case of *Joseph Francis Olivia*[388] by Parker L.J.:

> "The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and, if they refuse, there is the ultimate sanction in the judge himself calling the witness."

Denham J. adopted these principles in the instant case stating that at the root of every criminal trial is the constitutional right to fairness of procedure and justice and that where the requirements of a just and fair trial requires the trial judge may intervene in the prosecution exercising discretion as to whether a witness is called.

Denham J. distinguished the case of *The People (D.P.P.) v Casey and Anor* [389] where the witness was described by the prosecution and affirmed by the Court of Criminal appeal as "wholly unreliable." As the witness in this case was entirely consistent in his statements it was unfair to the applicant to delist the witness and for him not to be called as a prosecution witness merely because his version of events was not entirely consistent with other witnesses called by the prosecution from the Book of Evidence and that the witness came to the attention of the Garda Siochana through the applicant.

In May, in the *DPP v. AC*[390], Denham J. in the Court of Criminal Appeal collated principles derived from previous caselaw on the late disclosure of evidence by the prosecution and fairness of procedure stating the principles as:

> "1. The court should consider, by reference to the principles already established in respect of cases where evidence emerges subsequent to trial, the materiality of the new evidence;
> 2. By analogy with the principles already established in such cases, the court should consider the extent to which the unavailability of the evidence in question until a late stage in the criminal process was contributed to, on the one hand, by any default on the part of the prosecution, and, on the other hand, any failure on the part of the defendant; and
> 3. Where some of the failure to ensure that the relevant evidence was available in a timely fashion is attributable to the defence and/or where the defence may been culpable, notwithstanding the late disclosure of availability of such evidence, in failing to utilise such evidence, the court should consider the extent to which it may be reasonable to infer that the failure to call or exploit such evidence may have been due to a tactical decision on the part of the defence."[391]

[388] (1965) 49 Crim. App. R. 298 at p. 309.
[389] Unreported Court of Criminal Appeal, 14 December, 2004.
[390] Unreported Court of Criminal Appeal, 11 May 2005, *per* Denham J.
[391] Ibid., at p.7.

As a result of the late disclosure of material evidence requested by the defence the Court of Criminal Appeal found that the trial was "unsafe and unsatisfactory."

In July 2005 the Supreme Court delivered an important judgment in the case of *The Director of Public Prosecutions v John Diver*.[392] The case arose out of an appeal by the defendant, Mr Diver, against his conviction in November 2000 for the murder of his wife in 1996. The principal issue for the Supreme Court to decide was whether or not, having regard to breaches of the custody regulations, the trial judge correctly exercised his discretion in admitting a number of statements made by the applicant while in custody under s.4 of the Criminal Justice Act, 1984.[393]

Standards for the treatment of persons in Garda (Police) custody are set out in the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987.[394] The present case turned on breaches of these regulations, specifically in relation to interviews conducted with Mr Diver in 1996, and on whether or not statements obtained in breach of these regulations should have been admitted at trial.

The breaches of the regulations are set out in the Supreme Court decision. In all the defendant was interviewed five times, none of which was audio-visually recorded, while in Garda custody on the 8 December 1996, for two of these interviews there was no record whatsoever, which Hardiman J characterised as a "manifest breach" of Regulation 12(11)(a).[395] However, it was conceded by the investigating Gardai that during the unrecorded interviews the defendant consistently denied involvement in his wife's death. Hardiman J concluded that the "failure to record this interview can only be regarded as a gross deliberate and conscious breach of regulations".[396]

Of the interviews for which there were written records the judge highlighted numerous deficiencies in both form and content, including failures to record the times at which interview began and ended, failure to date and time signatures on statements and a failure to distinguish between questions and answers in the interviews. In none of the interviews did the defendant make an explicit admission of guilt; however he did make a number of ambiguous statements, which could be considered consistent with guilt.[397]

Hardiman J then turned to consider whether, in view of the numerous breaches of the custody regulations, the trial judge had properly exercised his discretion in admitting the statements, notwithstanding the breaches. Judicial discretion in this regard is derived from s.7(3) of the Criminal Justice Act, 1984, which provides

> A failure on the part of any member of the Garda Siochana to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.

Hardiman J held that the operative words in this respect were "of itself" and that the trial judge failed to apprehend the correct meaning of these words in exercising his discretion.

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[392] Unreported Supreme Court, 29 July 2005, *per* Hardiman J.
[393] *Ibid* at p.3.
[394] S.I. No. 119/1987.
[395] This regulation provides that "A record shall be made of each interview either by the member conducting it or by another member who is present. It shall include particulars of the time the interview began and ended, any breaks in it, the place of the interview and the names and ranks of the members present".
[396] Unreported Supreme Court, 29 July 2005, *per* Hardiman J at p.4.
[397] *Ibid* at p.5.

Based on a number of authorities,[398] Hardiman J held that the words "of itself" could be construed in two distinct ways

> The first … is that the facts should be analysed to see if the breach of the regulations in question has led to a prejudice to the accused. The second … suggests that the facts should be analysed with a view to seeing whether the breach of regulations was of so trivial and inconsequential a nature as not to afford a sufficient ground for treating the detention of the person as unlawful or statements made by him [as] inadmissible.[399]

Having regard to the facts of the present case Hardiman J was of the view that

> [The] breaches of regulations in this case, and in particular the total failure to record exculpatory statements and the failure to make any proper attempt to record the entire context of ambiguous statements which are nonetheless consistent with guilt, cannot be regarded as trivial or inconsequential. They are, on the contrary, grave, obvious and deliberate. The explanation tendered for failure to record exculpatory remarks is incapable of rational belief.[400]

The learned judge then went on to note that the

> Gardai are not entitled to exercise total editorial control in recording what has been said. Nor are they entitled to cherry-pick what is to be recorded. In this case, the omission of a series of denials is utterly unacceptable. It is not that the Gardai are required, when they are relying on written notes of an interview with an accused, to record what an interviewee has said verbatim. Regulation 12 requires that the record of the interview be "as complete as practicable". It must be a fair record of what was said and it is important to provide sufficient context to allow for an evaluation of what is said, especially where, as here, the accused was allegedly making ambiguous or inconclusive verbal statements, and manifesting symptoms of distress. Audio visual recording is, of course, infinitely superior.[401]

Hardiman J then went on to describe the appropriate role for a trial judge when there has been a manifest breach of the custody regulations, which he described as being to

> [Determine] whether in all the circumstances, the effect of the failure to observe the regulation has prejudiced the fairness of the trial of the accused other than by the fact of a breach of the regulations in themselves. The issue is not so much whether or not the breach of the regulations was of a "trivial and inconsequential nature", although that is a factor to be taken into account, but whether the fairness of the trial of the accused would be prejudiced by the admission of statements made by him or her in respect of which the regulations were not followed.[402]

Having regard to all of the facts of the case Hardiman J concluded that that the trial judge had not adopted the correct approach to the issue of admissibility of statements obtained in breach of custody regulations.[403] Consequently, he quashed Mr Diver's conviction and ordered a retrial.[404]

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[398] Specifically *DPP v. Spratt* [1995] 1 IR 585 and *DPP v. McFadden* [2003] 2 IR 113.
[399] Unreported Supreme Court, 29 July 2005, *per* Hardiman J at p.7.
[400] *Ibid*.
[401] *Ibid* at p.8.
[402] *Ibid*.
[403] *Ibid* at p.16.
[404] *Ibid* at p.18.

In July, the Court of Criminal Appeal in the *People (DPP) v. M.K.*[405] made a ruling in relation to corroborative evidence in sexual offence cases. The applicant was convicted of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 and assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861. The issue at trial was not whether the complainant was sexually assaulted but whether the applicant had perpetrated the assaults. During the trial judge's charge to the jury he gave the customary corroboration warning. One of the grounds of appeal by the applicant was that the trial judge erred in his charge to the jury on the issue of corroboration.

The applicant argued that the reference to corroboration was ambiguous in that it suggested to the jury that corroborative evidence might be found in the evidence produced in court. McGuinness J. in the Court of Criminal Appeal stated that the corroboration warning was no longer mandatory by virtue of the Criminal Law (Rape) (Amendment) Act 1990 however, it is sometimes desirable and appropriate to give such a warning to the jury in sexual offence cases. The Court of Criminal Appeal noted that the direction to the jury to "look for other evidence" may have suggested to the jury that there was indirect corroboration available to them and that this may have given rise to confusion in the minds of the jury. McGuinness J. stated that it was:

> "…essential that a clear definition of the principle of corroboration be given but it is also of great importance that it be clearly and unequivocally pointed out to the jury what, if any, of the evidence before them is capable of amounting to corroboration as defined."[406]

Therefore, a trial judge must direct the jury to evidence capable of having corroborative value. An open direction in relation to corroboration similar to the one given in this case will amount to a misdirection.

In October, the Court of Criminal Appeal in the *People (DPP) v. Keith Kirwan*[407] considered the appellant's contention that the prosecution did not comply with the requirement in section 1 of the Non-Fatal Offences Against the Person Act 1997 as required for a conviction under section 4 of same for assault causing serious harm. The appellant perpetrated the assault in a nightclub in Dublin. According to prosecution evidence, the appellant, without provocation, pushed a drinking glass into the victim's face causing lacerations to the victim's eye, nose and lip.

Serious harm is defined by section 1 as meaning "injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."

Finding that the term "serious harm" does not require proof of protracted or long-term consequences, Kearns J stated:

> "It is interesting, however, to note that the wording which appears in the legislation as enacted does not contain either the words *"permanent"* or *"protracted"*, from which one may infer that the Oireachtas was quite consciously abstracting or removing requirements of permanence or even long term consequences from the definition of 'serious harm', requirements which, had they been enacted, might have been seen as requiring that proof of such matters was necessary to constitute the offence of 'assault causing serious harm'."[408] [emphasis in original]

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[405] Unreported Court of Criminal Appeal, 19 July 2005, *per* McGuinness J.
[406] Ibid., at p.31.
[407] Unreported Court of Criminal Appeal, 28 October 2005, *per* Kearns J.
[408] *Ibid.,* at p.8.

However, Kearns J stated that when considering the degree of disfigurement "the outcome of any medical treatment must be taken into account as it would be unreal to hold that someone was 'disfigured' if in fact and in the aftermath of medical treatment that was not the case."[409]

In relation to the appropriate direction by a trial judge to the jury on assault causing serious harm Kearns J stated the trial judge should:

> "… tell the jury about the various alternative circumstances in which serious harm as defined in the Act may arise and to further direct the jury that the words in each of the circumstances identified in the statutory definition be given their natural and ordinary meaning. In addition it would seem appropriate in cases where 'disfigurement' is to be considered by a jury that the jury be told that the outcome of any medical treatment actually given or received, and not just the appearance of the injury in the immediate aftermath of the assault, must be taken into account when assessing whether or not there has been "serious disfigurement". However, where "substantial impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ" is concerned, a jury should be told that no requirement of permanent or protracted impairment of the mobility of the body or of the function of any particular bodily member or organ is required, provided they are satisfied beyond reasonable doubt that such impairment was or is 'substantial'."[410]

In November 2005 the Law Reform Commission published a *Report on the Establishment of a DNA Database*.[411] The report examines the establishment of a DNA Database, the constitutional and human rights issues arising from the use of same, the use of DNA evidence, its probative value and the presentation of the evidence at trial. The Commission notes that DNA evidence has been used successfully in many cases in Ireland but its use as a means of criminal investigation and subsequent evidence at trial has been limited "by the absence of a permanent collection of reference profiles to which samples obtained at a crime scene could be compared."[412]

The following is a summary of the findings and recommendations of the Law Reform Commission's report:

- The DNA database should be limited rather than comprehensive. The Commission stated that a comprehensive database involving all individuals in the state was unjustifiable. The Commission state that such a database would involve disproportionate interference with an individual's right to privacy and bodily integrity and would not meet the standard that such a measure is necessary in a democratic society as set out in the European Convention on Human Rights.
- The purpose of the use of a DNA database should be prescribed in primary legislation. Any subsequent change to the purpose or scope of the database should be prescribed in primary legislation also.
- The Commission recommends that the database be used for criminal investigations or proceedings and that this should be set out in legislation.
- That an explanation should be provided to the individual for taking the sample in an understandable manner.
- A code of practice should detail safeguards and protections akin to those recommended by the Irish Human Rights Commission in respect of taking bodily samples.
- The use of force in the taking of a sample should be reasonable and safeguards should be implemented to ensure that the reasonable force is not used arbitrarily.

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[409] Ibid., at p.11.
[410] *Ibid.,* at p.12.
[411] The report follows a consultation paper on same published in March 2004.
[412] *The Law Reform Commission Report on the Establishments of a DNA Database*, at p.5.

- The DNA profiles of individual suspects may be temporarily retained but the suspects profile must be removed from the database and the sample destroyed where proceedings have not been instituted against the individual in a 12 month period or where a suspect has been acquitted of the offence, discharged or the proceedings are discontinued.
- If an individual is convicted of the offence the profile may be retained on the database indefinitely.
- An individual convicted of an offence, where the detention provisions of Offences Against the State Act 1939, the Criminal Justice Act 1984 or the Criminal Justice (Drug Trafficking) Act 1996 apply, may be required to give a DNA sample. This sample can be obtained with or without the consent of the individual and may be retained indefinitely.
- Failure to consent to a sample being taken should be a reasonable ground that can be used to justify compulsorily taking a sample.[413]
- Samples from individuals other than suspects should not be taken.
- A missing persons and unidentified person index should be maintained on the database.
- A statutory body named the Forensic Science Agency should be established to be the custodian of the database.
- Where DNA evidence is used in a trial it is up to the judge to decide whether to direct the jury regarding the probative value of the evidence.
- It should be a matter for the trial judge to decide whether to warn the jury regarding the dangers of convicting on the basis of DNA evidence without other supporting evidence.
- Where the DNA evidence has been obtained illegally but not in breach of an accused's constitutional rights then it should be a matter for the trial judge to decide whether that evidence is admissible.

The Law Reform Commission include in the report draft legislation which places the recommendations of the Commission in a statutory format which they envisage being adopted.

Positive aspects

In 2005 the report of the *Third Report of the Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons* was made available by the Minister for Justice Equality and Law Reform (although completed in September 2004). The Report noted that 229 interview rooms in 132 Garda Stations were equipped with audio-visual recording systems. There are 167 detention for questioning facilities in the country. The Committee noted that during the period January – November 2003 96% of interviews were recorded audio visually.

The right to freely choose one's defence counsel and the right to an interpreter

Legislative initiatives, national case law and practices of national authorities

In May 2005, the Supreme Court made an important decision on the pre-trial right of reasonable access to legal advice. The case of *O'Brien v. DPP*[414] raised the issue of whether evidence obtained through the effective denial of access to legal advice is admissible in court.

[413] See section 2, Criminal Justice (Forensic Evidence) Act 1990.
[414] Unreported Supreme Court, 5 May 2005, *per* McCracken J.

O'Brien was arrested under s.4 of the Criminal Justice Act 1984 and was detained for questioning at a Garda station. He requested access to a solicitor although he could not name a solicitor. The Gardaì recommended a solicitor that was a considerable distance away from the station. There was a significant lapse in time prior to the arrival of the solicitor and by the time the solicitor had arrived the accused had made inculpatory statements. After receiving legal advice from the solicitor the interview with the Gardaì continued during which O'Brien made further inculpatory statements. The trial judge found that the Gardaì knew that the solicitor was busy and therefore must have foreseen that there would be a significant delay in the arrival of the solicitor. O'Brien was found guilty of conspiracy to defraud.[415] He appealed to the Court of Criminal Appeal and subsequently, to the Supreme Court.

The Supreme Court found, affirming the decisions of the Court of Criminal Appeal and the Circuit Court, that there was a deliberate and conscious breach of the accused's constitutional right to pre-trial legal advice. The Supreme Court held that the statements made prior to the arrival of the solicitor were inadmissible. However, the statements after the arrival of the solicitor were admissible. The Supreme Court examined *People (D.P.P.) v Finnegan*[416] and *People (D.P.P.) v Buck*[417] the judgments of which stated that where there was a deliberate and conscious breach of the accused's constitutional rights it would render an arrest lawfully made under the Criminal Justice Act 1984 unlawful.

McCracken J. stated, citing with approval the judgment in *Buck,* that there would have to be a causative link between the breach and the statement for it to be deemed inadmissible. McCracken J. held that the statements made after O'Brien's solicitor had arrived were admissible as there was no causative link in existence. At the point that the solicitor arrived there was no longer a breach of his constitutional rights and therefore the subsequent statements were admissible. No causative link was found between the breach of the accused's constitutional rights and the admissions made after legal advice. McCraken J. concluded that once the breach of the constitutional right ceased, the detention was no longer unlawful and therefore the inculpatory statements made after the provision of legal advice were admissible.

In July, the Court of Criminal Appeal considered an issue relating to the right to an interpreter in *DPP v Yu Jie*[418]. The appellant was detained under section 4 of the Criminal Justice Act, 1984 and while in custody in a Garda Station was interviewed by members of An Garda Sìochana. The interpreter provided by the Gardai for this purpose was a Chinese police officer who was working for *Interpol* at the time. The appellant took exception to this in his appeal as he claimed not to be aware that the individual was a member of the police during the period in which he was detained. While the Court did acknowledge there were some omissions in the translation by the interpreter, he did not act in a biased manner. Further, there was evidence that the appellant's solicitor was aware that the interpreter was a police officer. The Court found there was no impropriety in relation to this matter.

Positive aspects

The Criminal Justice (Legal Aid) (Amendment) Regulations 2005[419] provide for an increase in the fees payable under the criminal legal aid scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court. It also provides for an increase in fee in

[415] contrary to the common law and possession of a document relating to an offence under the *Larceny Act, 1916*.
[416] unreported, Court of Criminal Appeal, July 15, 1997.
[417] [2002] 2 IR 268.
[418] [2005] IECCA 95.
[419] Statutory Instrument 389 / 2005.

respect of necessary visits to prisons and places of detention.[420] It also includes increases for bail applications.

Reasons for concern

In the aforementioned *O'Brien* case, although the Supreme Court stated that there was no causative link between the breach of the accused constitutional rights and the admissions made after legal advice the Court did not consider that the provision of legal advice may not have fully remedied the original breach of the accused's rights. If inculpatory statements made prior to legal advice are referred to in inculpatory statements made post legal advice and have an impact on the subsequent admissions the breach will not have been remedied and may be prejudicial to the accused. Generally, the O'Brien case highlights the problem of accessing legal advice while being detained in a Garda station. There is no duty solicitor scheme in place in Ireland and a recent report by the Criminal Legal Aid Review Committee concluded that the establishment of such a scheme would lead to a lack of continuity for clients.[421] The Committee believed that an individual detained should be entitled to choose a solicitor rather than having a solicitor that happens to be available on the day.

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

Legality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

In March 2005, in the *People (DPP) v. Liam Campbell*[422], the applicant was charged with being a member of an unlawful organisation known as the Irish Republican Army (IRA). Membership is an offence under section 21 of the Offences Against the State Act 1939 as amended by section 2(6) of the Criminal Law Act 1976. One of the arguments made by the applicant before the Court of Criminal Appeal was that in reality he was being charged with membership of the "Real IRA" which was distinct from other IRA groups. As the organisation only came into existence in 1997 it could not be covered by the Suppression Order of 1939. This argument was rejected by the Court of Criminal Appeal with McGuinness J stating that although there had been disagreement between different organisations in the IRA, the structure, style and philosophy were the same and terms such as "real", "official", "continuity" and "provisional" were not relevant in considering the ambit of the Suppression Order of 1939.

In October the Supreme Court made a ruling in *Michael Cummins v Judge Patrick McCartan and the Director of Public Prosecutions*[423] on the legality of the applicant's conviction for assault. The applicant argued the offence he was convicted of, assault contrary to common law, was not an offence of which he could be convicted as that offence was abolished at the date of his conviction by section 28 of the Non-Fatal Offences Against the Person Act 1997. This Act abolished the common law offences of assault and battery and replaced them with the statutory offences of assault and assault causing harm. McGuinness J., referring to the decisions of *Grealis v. The Director of Public Prosecutions* and *Corbett v. The Director of Public Prosecutions*[424], found that the common law offence of assault was abolished on August 19, 1997 and there was no express or implied transitional period provided for in the

[420] Other than Garda Stations.
[421] *Final Report of the Criminal Legal Aid Review Committee* February 2002 (Chapter 3)

[422] Unreported Court of Criminal Appeal, 4 March, 2005, *per* Kearns J.
[423] Unreported Supreme Court 25 October 2005, *per* McGuinness J.
[424] [2001] 3 IR 144.

legislation. McGuinness J stated that although the return date to the District Court predated August 19, 1997 it did not affect the fact that the offence no longer existed. Therefore, the prosecution against Cummins could not continue and to prosecute would be a breach of due process and fundamental constitutional principles.

Reasons for concern

Section 42 of the Criminal Justice (Terrorist Offences) Act 2005 enables the Minister for Finance to implement regulations of the European Union concerned with combating the financing of terrorism. Breach of the regulations constitutes an offence. The section sets out penalties to be imposed where an individual breaches an offence which has yet to be created through regulations. The Irish Human Rights Commission in their comments on the Bill were concerned that this provision "usurps the role of the Oireachtas and would place impermissibly broad powers in the hands of the Minister for Finance."[425]

Proportionality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

Section 7 of the Criminal Justice (Terrorist Offences) Act 2005 contains penalties for terrorist offences created under the Act. The sentences are correlated with the "corresponding offence" in criminal law which does not have the intent referred to in the legislation for terrorist offences.[426] Individuals convicted of offences where there is the necessary element of terrorism are to be punished in relation to the gravity of the offence: to a sentence of imprisonment fixed by law where the equivalent offence is committed under criminal law; to imprisonment for life where the corresponding offence in criminal law is one in which the maximum sentence is imprisonment for life; to a term not exceeding two years more than the maximum term of imprisonment where the maximum term of imprisonment is ten years for the corresponding offence in criminal law; and for a term of imprisonment not exceeding one year more where the corresponding offence is less than ten years imprisonment. Section 48 of the Act increases the maximum penalty for membership of an unlawful organisation from seven to eight years. Section 49 creates a new offence of providing assistance to an unlawful organisation. The maximum penalty on conviction and on indictment is the same as section 48.

In July, in the *People (DPP) v Peter O'Dwyer*[427], the applicant was convicted of the offence of careless driving but he was found not guilty of dangerous driving. He was sentenced to one month of imprisonment. An individual died as a result of the road traffic accident in which the applicant was involved. The pertinent issue was whether the trial judge can refer to the death resulting from the accident and whether it could be treated as an aggravating factor.

Denham J. noted that this issue had not come before an Irish court prior to this case. Counsel submitted caselaw from England and Northern Ireland in support of their case however she found that they were of limited assistance as the offences differ between Ireland and the jurisdictions that the cases relate to. Denham J. did cite with approval the case of *R v King*[428] where Mackay L.J. stated that reference could be made to a death at the accident although the

[425] Comments on the Criminal Justice (Terrorist Offences) Bill 2002, March 2004, at http://www.ihrc.ie/documents/documents.asp?nav=3&Search=&NCID=6&Print=.
[426] Section 7.3 states: "In this section, ''corresponding offence'', in relation to a person convicted of an offence under *section 6(1)(a)*, means the offence for which the person would have been liable to be convicted had the act constituting the offence under that section been committed in the State in the absence of the intent referred to in *paragraph (b)* of the definition in *section 4* of ''terrorist activity''."
[427] Unreported Court of Criminal Appeal, 28 July 2005, *per* Denham J.
[428] [2001] E.W.C.A. Crim. 709

primary job of a judge is to assess culpability. Culpability should be determined by the judge in the first instance and in considering the extent of the carelessness of the driver a death may be a factor that could be taken into consideration. Denham J. stated:

> "A rigid adherence in sentencing to an approach which excludes any reference to the death in itself as an aggravating factor, despite the many and various differences in the degrees of careless driving, would not be proportionate. While the fact of a death occurring may be a separate factor in itself, it should not be so in every case where there is a death. The occasions on which it becomes a factor must depend upon the finding of the court on the primary issue of the degree of carelessness and therefore of the culpability of the driving."[429] [emphasis in original]

Denham J stated that it would be disproportionate to regard the death in this particular case as an aggravating factor. The Court of Criminal Appeal substituted the disproportionate sentence of imprisonment with a fine.

Positive aspects

In September, the Law Reform Commission published a report entitled the Court Poor Box: Probation of Offenders. The "Court Poor Box" is a practice where a court may order a defendant in a criminal case to pay money to a charity on the basis that no criminal conviction will be recorded against him or her. Requirement to pay into the "Court Poor Box" is frequently accompanied by a dismissal under section 1 of the Probation of Offenders Act, 1907. The Court Poor Box is a non-statutory scheme used on an *ad hoc* basis. While the Commission document a number of positive aspects in the use of the "Court Poor Box" there were a number of concerns. In particular, it emerged that the "Court Poor Box" was, at times, being used by judges as a sanction in addition to imposing a criminal conviction. Further, the Commission addressed the issue of whether the "Court Poor Box" was allowing more affluent individuals to "buy" their way out of a conviction or term of imprisonment. Although, the Commission did not accept the validity of this argument, it was recognised that there was a perception that this might be the case.

The Commission recommended that the scheme be placed on a statutory footing and should not be used once a conviction has been recorded. To ensure proportionality and to ensure that the "Court Poor Box" scheme is proportionate to both the offence and offender the Commission list factors to be taken into consideration when utilising the "Court Poor Box" as a sanction. Further, the Commission recommends that a limit on the amount capable of being paid should be enacted however they recommended that no minimum limit should be contained in legislation. These recommendations attempt to ensure consistency and proportionality in the use of the "Court Poor Box" as a criminal sanction.

Reasons for concern

The IHRC criticise the extension of penalties for terrorist-type offences in section 7 of the Criminal Justice (Terrorist Offences) Act 2005 without any apparent justification.

In relation to sections 48 and 49, the IHRC state:

> "No reason is given for increasing the already substantial penalty for membership and it appears to be simply in response to the Framework Decision. We are concerned that sentences should be arbitrarily fixed by such a process. We would also reiterate our view that if new provisions are to be added to the OAS Acts, then at a minimum, the very modest changes proposed by a majority of the Committee appointed by the

[429] Unreported Court of Criminal Appeal, 28 July 2005, *per* Denham J at p.24.

Government to review these Acts should be implemented as well, and the opportunity should be taken to amend Section 47 of the OAS Act, 1939 to avoid further breaches of Ireland's obligations under the International Covenant on Civil and Political Rights as found by the UN Human Rights Committee in the *Kavanagh* case."[430]

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Part 2 of the Criminal Justice (Terrorist Offences) Act 2005 defines "terrorist activity" and terrorist linked activity" incorporating the offences included in the Framework Decision. Part 3 of the Act gives effect to the Conventions dealing with Suppression of Hostage-Taking, Terrorist Bombing and Crimes Against Internationally Protected Persons and creates offences to give effect to these Conventions. Part 4 creates an offence of financing terrorism. Part 6 of the Act makes a number of amendments to the Offences Against the State Act 1939 including creating an offence of knowingly assisting an unlawful organisation in the furtherance of an unlawful objective.

Reasons for concern

The Irish Human Rights Commission highlighted a number of concerns in its observation of the Criminal Justice (Terrorist Offences) Bill 2002 in March 2004.[431] It noted that it was, in essence, emergency legislation to deal with terrorist-type offences. Considering that Ireland already had substantive legislation to deal with these matters the IHRC questioned the need for further legislation. The Bill was a significant expansion of the powers of police and law enforcement agencies and the IHRC recommended that a specific time limit should be placed on its operation.

Specific concerns highlighted by the Commission were:

- The definition of "terrorist offences" and "terrorist groups" is unnecessarily broad and includes in the terrorist category activities that would not necessarily be commonly understood as being a form of terrorism.[432]

- The offence of financing terrorism contained in section 13 highlights the problem of the broad definition of terrorist activity as it can include a broad range of activities. The IHRC perceive that it could include for example militant anti-globalisation, anti-war, environmental protests or funds raised for groups opposing dictatorial regimes.

- The IHRC recommend that the legislation should be subject to an annual review by an independent expert to assess the necessity for the continued use of the legislation.

[430] Comments on the Criminal Justice (Terrorist Offences) Bill 2002, March 2004, at http://www.ihrc.ie/documents/documents.asp?nav=3&Search=&NCID=6&Print=.
[431] Human Rights Commission : Comments on the Criminal Justice (Terrorist Offences) ACt 2005, March 2004.
[432] The IHRC state : "the definition adopted is impermissibly wide and runs the risk of categorising groups opposing dictatorial or oppressive regimes, anti-globalisation, anti-war or environmental protestors, or even militant trade unionists, as terrorists, with all the legal consequences envisaged by the other provisions of the Bill then attaching to them." at p.3.

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

Right not to be tried or punished twice

Section 46 of the Criminal Justice (Terrorist Offences) Act, 2005 states that "[a] person who has been acquitted or convicted of an offence outside the State shall not be proceeded against for an offence under this Act consisting of the acts that constituted the offence of which that person was so acquitted or convicted."