

Chapter 36: Human Rights

Introduction

- 36.1 Prior to the establishment of this Commission, the Irish Human Rights Commission (now the Irish Human Rights and Equality Commission) told the Government that ‘it is critically important that any such investigation should take place within a human rights and equality framework and in particular that it conforms with the State’s human rights obligations under the Constitution and under international human rights law’.
- 36.2 The Government did not opt for that approach in its mandate to the Commission. The Commission, cognisant of the many changes that have taken place during the period of its lengthy remit 1922-1998, nevertheless has considered some aspects of such rights. In particular, the Commission is concerned to place the development of human rights norms and laws in their historical context.

A: International Human Rights

- 36.3 During the period of the Commission’s remit, successive governments have ratified various conventions and other legal instruments from the United Nations and the Council of Europe. Other conventions post-date the Commission’s remit but may have implications for future government policies. The following is a summary of the relevant aspects of the various conventions and statements, the enforcement mechanisms available and their interaction with Irish law. The Irish Human Rights and Equality Commission has published a clear guide to human rights law which explains the interaction between the Constitution of Ireland and international human rights instruments and how international human rights instruments become part of domestic law.¹

League of Nations Declaration of the Rights of the Child (original)

- 36.4 The original Declaration on the Rights of the Child was adopted by the League of Nations General Assembly on 26 November 1924. The Irish Free State had joined the League of Nations on 10 September 1923. The declaration itself was very brief, did not impose any explicit obligations on member states and had no enforcement mechanism:

¹ https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf

The child must be given the means requisite for its normal development, both materially and spiritually;

The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed and the orphan and the waif must be sheltered and succoured;

The child must be the first to receive relief in times of distress;

The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;

The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

Charter of the United Nations

36.5 The Charter of the United Nations was signed on 26 June 1945 and came into force on 24 October 1945.² It is the fundamental Treaty of the United Nations. Ireland was not one of the founding members of the UN but became a member state, and accepted the obligations contained in the charter, on 14 December 1955.

36.6 Article 2(2) of the charter binds the State at an international level to comply with the charter. While it is mainly concerned with State relations, Article 55 does provide for some individual human rights, when dealing with international economic and social cooperation:

With the view to the creation of conditions of stability and wellbeing which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples the UN shall promote:

Higher standards of living, full employment, and conditions of economic and social progress and development;

Solutions of international economic, social, health, and related problems; and international, cultural and educational cooperation;

Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

36.7 The charter does not have any specific enforcement mechanism for breaches within member states and it has not been transposed into Irish domestic law.

² <https://www.un.org/en/charter-united-nations/index.html>

Universal Declaration of Human Rights

- 36.8 The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly on 10 December 1948.³ The UDHR is not a binding treaty in itself but is clearly linked to the charter. It was adopted for the purpose of defining the terms 'human rights' and 'fundamental freedoms' contained in Article 55c (above) of the charter and setting down a common standard for the respect and observance of human rights. Despite its non-binding nature, UN member states have on a number of occasions declared that they are bound by the standards contained in the UDHR. It does not itself contain any enforcement mechanism but its norms are enforced by the covenants considered below.

Declaration of the rights of the child (expanded)

- 36.9 The expanded Declaration on the Rights of the Child was adopted by the UN General Assembly on 20 November 1959. Like the 1924 original it was a non-binding statement of principle but the preamble

calls upon parents, upon men and women as individuals and upon voluntary organisations, local authorities and national governments to recognise these rights and strive for their observance by legislative and other measures progressively taken.

- 36.10 The declaration is as follows:

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or his family.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 3

The child shall be entitled from his birth to a name and a nationality.

³ <https://www.un.org/en/universal-declaration-human-rights/>

Principle 4

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

Principle 5

The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of state and other assistance towards the maintenance of children of large families is desirable.

Principle 7

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Principle 8

The child shall in all circumstances be among the first to receive protection and relief.

Principle 9

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall

in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Principle 10

The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

- 36.11 There was no enforcement mechanism for this declaration but it did form the basis for the Convention on the Rights of the Child adopted in 1989 and which is considered below.

International Covenant on Civil and Political Rights

- 36.12 The International Covenant on Civil and Political Rights (ICCPR) is a treaty adopted by the UN General Assembly on 16 December 1966 and which came into force on 23 March 1976.⁴ Ireland signed the ICCPR on 1 October 1973 but did not ratify it until 8 December 1989. The State, as a party to the ICCPR, must:

- Ensure to all persons the rights contained in the Covenant;
- Take necessary steps to adopt laws and other measures to give effect to such rights;
- Ensure that persons whose rights under the Covenant are violated have an effective remedy determined by competent judicial, administrative or legislative authority or other authority provided for by the legal system;
- Ensure that the competent authorities enforce such remedies when granted.

- 36.13 Implementation of the ICCPR is monitored by the Human Rights Committee, a UN body of 18 independent experts from state parties. The Human Rights Committee considers reports which the states parties are required to submit when requested by the committee. The provisions of the ICCPR have not been directly adopted into Irish domestic law. The reasons for this are set out in the following passage

⁴ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

from the Ireland's 'core document' which forms part of its reports to the Human Rights Committee.⁵

In the case of Ireland, when a decision was made some years ago to accede to the International Covenants, a committee under the Chairmanship of the Attorney General was charged with examining Ireland's domestic law in the light of the Covenant to identify any possible areas in which a conflict between the two might arise. As a result of this examination a number of amendments to domestic law were identified, notably the final abolition of the death penalty which disposed of a possible conflict between Irish law before abolition and Article 6.5 of the Covenant and the introduction of a new law on incitement to hatred (the Prohibition of Incitement to Hatred Act, 1989), which was necessary to ensure compliance with Article 20.2. In certain other areas reservations to the Covenant were identified as necessary.

It was considered that the existing domestic law which is, in the context of rights referred to in the Covenant, generally contained in the Constitution is in conformity with the Covenant.

36.14 However, on ratification of the ICCPR, Ireland did accede to the first optional protocol which established an individual complaint mechanism for the convention. Under this mechanism, the Human Rights Committee has considered a number of complaints made by individuals against Ireland. For example, in *Kavanagh v Ireland* the committee found that the State had failed to demonstrate that the decision to try Mr Kavanagh in the Special Criminal Court as opposed to the ordinary criminal courts was based on reasonable and objective grounds and that his rights under Article 26 of the ICCPR had therefore been violated.

36.15 The Supreme Court confirmed in *Kavanagh v Governor of Mountjoy Prison*⁶ that, given the clear position under Article 29.6 of the Constitution, the ICCPR is not part of domestic law and the Human Rights Committee views are not binding. Mr Justice Fennelly stated:

the terms of the Covenant have not been enacted into Irish law. They cannot prevail over the provisions of the Offences against the State Act, 1939 or of a conviction by a court established under its provisions. For the reasons already stated the views of the Committee cannot be invoked to invalidate that conviction without contravening the terms of Articles 29.6, 15.2.1 and 34.1 of

⁵ HRI/Core/1/ADD.15

⁶ [2002] 3 IR 97.

the Constitution. I am prepared to assume that the State may by entering into an International Agreement create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect the provisions of a statute or the judgement of a court without coming into conflict with the Constitution.

- 36.16 It should be noted that in recent years the views of the Human Rights Committee have been referred to in a number of cases, for example, *A (KE) v Refugee Applications Commissioner* [2008] IEHC 366, *McCann v Monaghan District Judge* [2009] 4 IR 200 and *Spilla v Minister for Justice* [2012] IEHC 336.

International Covenant on Economic, Social and Cultural Rights

- 36.17 The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the UN General Assembly on 16 December 1966⁷. It came into force on 3 January 1976. Ireland had signed it on 1 October 1973 and ratified it on 8 December 1989. It has not been incorporated into domestic law.

- 36.18 From the Commission's point of view the most relevant Article of this Covenant is Article 10, which states that the states parties to the Covenant recognise that:

The widest possible protection and assistance should be accorded to the family which is the natural and fundamental group unit of society particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Special matters of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reason of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

⁷ <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

36.19 The covenant requires the State to furnish reports to the Economic and Social Council (another UN body of 18 experts) on the measures it has adopted and the progress it has made in achieving the observance of the rights recognised in the covenant. Ireland issued only one such report before the end of the Commission's period of investigation.

36.20 Complaints by individuals to the Committee on Economic, Social and Cultural Rights are provided for but the protocol which gave rise to the ability to make such complaints was not opened for signature until 24 September 2009 and came into force on 5 May 2013. Ireland has signed but not yet ratified this protocol.

Convention on the Elimination of all forms of Discrimination against Women

36.21 The Convention on the elimination of all forms of discrimination against women (CEDAW) is an international treaty adopted by the UN General Assembly on 18 December 1973.⁸ It came into force on 3 September 1981 and was ratified by Ireland on 23 December 1985.

36.22 The CEDAW has not been directly implemented into national legislation but the State considers itself to be in compliance with its provisions by virtue of the provisions of the Constitution and relevant legislation.

36.23 The Convention is overseen by the Committee on the elimination of discrimination against women which is a UN body of 23 experts elected by the states parties. The State submits reports to this committee similar to the reporting under other UN instruments. An optional protocol to this convention was adopted by the General Assembly allowing for individual complaints to the Committee. Ireland signed and ratified that protocol, however it post-dates the Commission's period of investigation.

Convention against Torture and other cruel, inhuman or degrading treatment or punishment

36.24 The Convention against Torture and other cruel, inhuman or degrading treatment or punishment (Convention against Torture) was adopted by the UN General Assembly on 10 December 1984 and came into force on 26 June 1989.⁹ It was signed by Ireland on 28 September 1992 but not ratified until 11 April 2002. The

⁸ <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

⁹ <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

Convention against Torture has a similar reporting mechanism to other UN instruments (and an inspection regime introduced by an optional protocol).

36.25 While Ireland was not bound to comply with its provision during the Commission's investigation period, the Convention against Torture is regarded as an authoritative statement of human rights norms and is now frequently referenced and utilised by the courts in Ireland.

36.26 Such instruments are deemed by the UN as being of relevance to present day investigations of matters which occurred before they became binding on the states parties. This is clear from the consideration of Ireland's 2011 report under the Convention against Torture. The monitoring body, the Committee against Torture, made the following comments in relation to alleged abuse and ill treatment of women in Magdalen laundries (which predated Ireland's ratification of that convention):

The Committee is gravely concerned at the failure by the State party to protect girls and women who are involuntarily confined between 1922 and 1996 in Magdalene Laundries, by failing to regulate and inspect their operations, where it is alleged that physical, emotional abuses and other ill treatment were committed amounting to breaches of the Convention. The Committee also expresses grave concern at the failure of the State party to institute prompt, independent and thorough investigations into the allegations of ill treatment perpetrated on girls and women in the Magdalene Laundries (ARTS. 2, 12, 13, 14 & 16).

The Committee recommends that the State party introduce prompt independent and thorough investigations into all complaints of torture and other cruel inhuman or degrading treatment or punishment that were allegedly committed in the Magdalene Laundries and, in appropriate cases prosecute and punish the perpetrators with penalties commensurate with the gravity of the offences committed, and ensure that all victims obtain redress and have an enforceable right to compensation including the means for a full rehabilitation as possible.¹⁰

36.27 This makes clear that, as far as the United Nations monitoring committees are concerned, an international human rights instrument which was not binding on the

¹⁰ Committee against Torture, 46 session, 9th May – 3rd June 2011.

State during the period which the Commission is tasked with investigating may still have application to present day investigations.

- 36.28 As recently as February 2020 the United Nations decided to investigate a complaint from an individual complainant regarding her treatment in Magdalen laundries despite the fact that she had accepted compensation from the Irish State. The State has a right of reply to this complaint. Its initial view that the convention did not apply at the time she was in the laundries between 1964 and 1968 did not prevail and the State must now embark on a full defence.

Convention on the rights of the child

- 36.29 The UN Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly on 20 November 1989 and came into force on 2 September 1990.¹¹ It was signed by Ireland on 30 September 1990 and ratified on 28 September 1992. The following are its most important provisions from the Commission's point of view:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for

¹¹ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child,

either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

36.30 Article 21(d) in conjunction with the Hague Convention requires the states parties to take all appropriate measures to ensure that adoption placements do not result in any improper financial gain for any of the parties involved.

36.31 The provisions of the CRC are indirectly implemented in the State in legislation, primarily the *Child Care Act 1991*, the *Children Act 1991* and the *Adoption Act 2010*.

- 36.32 Compliance with the CRC is monitored by the UN Committee on the Rights of the Child. As with the other UN conventions, the State is subject to periodic review under the CRC.

European Convention on Human Rights

- 36.33 The European Convention on Human Right (ECHR) was adopted by the Council of Europe on 3 September 1953.¹² Ireland was a founder member of that organisation and therefore was bound by the provisions of the ECHR upon its adoption. Thus, since 1953, the State has been bound, at an international level, to secure to all persons in the State the human rights provided for under the ECHR.¹³ The ECHR has probably had the most influence on domestic law of all the international human rights instruments.

- 36.34 Among its provisions with relevance to the Commission's work are:

Article 3

Prohibition of torture

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

Article 4

Prohibition of slavery and forced labour

No one shall be held in slavery or servitude.

No one shall be required to perform forced or compulsory labour...

Article 5

Right to liberty and security

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...

Article 8

Right to respect for private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

¹² https://www.echr.coe.int/documents/convention_eng.pdf

¹³ An Irish Council for Civil Liberties guide is available at: https://www.iccl.ie/wp-content/uploads/2017/11/ICCL_KYR_EURO_LR_2010.pdf

economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others...

Article 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

36.35 The ECHR is enforced by the European Court of Human Rights (ECtHR). Parties to the ECHR undertake to abide by the final judgment of the Court in any case to which they are parties. Thus, the State is obliged, as a matter of internal law, to take steps to comply with any adverse decision of the ECtHR against it. Judgments of the court are transmitted to the Committee of Ministers, an intergovernmental body of the Council of Europe which can exert political pressure where it is considered that there is an issue in relation to compliance.

36.36 Decisions of the ECtHR can require that the State take individual measures in favour of the applicant whose rights have been violated, as well as general measures, such as amendment of national legislation.¹⁴ For example, in *Johnson v Ireland*¹⁵ a claim was brought to the court, primarily under Article 8, challenging the lack of divorce in the State and the legal status of 'illegitimate' children. The applicants were a man and woman who could not marry due to his being married to another woman, and their daughter. The court did not find that the State was obliged to introduce divorce, however, as regards the child's status it held as follows:

...in the present case the normal development of the natural family ties between the first and second applicants and their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child.

Examination of the third applicant's present legal situation, seen as a whole, reveals, however that it differs considerably from that of a legitimate child; in addition, it has not been shown that there are any means available to her or her parents to eliminate or reduce the differences. Having regard to the

¹⁴ See, for example, *Airey V Ireland* (1979-1980) EHRR 305 which led to the State introducing a civil legal aid scheme.

¹⁵ (1987) 9 EHRR 203.

particular circumstances of this case and notwithstanding the wide margin of appreciation enjoyed by Ireland in this area the absence of an appropriate legal regime reflecting the third applicant's natural family ties amounts to a failure to respect her family life.

Moreover, the close and intimate relationship between the third applicant and her parents is such that there is of necessity also a resultant failure to respect the family life of each of the latter...

There is accordingly, as regards all three applicants, a breach of Article 8 under this head.

It is not the Court's function to indicate which measure Ireland should take in this connection; it is for the State concerned to choose the means to be utilised in its domestic law for performance of its obligation...

36.37 That decision played a considerable role in the enactment of the *Status of Children Act 1987* which gave equal rights to all children - see below.

36.38 In *WOR v EH (Guardianship)*¹⁶ the Supreme Court rejected a submission that it was bound to apply the ECtHR decision in *Keegan v Ireland*¹⁷ to the effect that Article 8 of the ECHR was not confined to families based on marriage. The Supreme Court found that the family referred to in Articles 41 and 42 of the Constitution was based on marriage and the concept of a de facto family was unknown to the Constitution. It stated clearly that the Keegan decision was 'not part of the domestic law of Ireland'.¹⁸ This stance is rooted in the separation of powers under the Constitution. If an adverse ruling of the ECtHR requires a change in Irish law that is a matter for the Oireachtas, not the courts.

36.39 Regardless of this, the ECHR plays an increasingly important role in the Irish courts, in particular in the interpretation of fundamental rights under the Constitution. However, an analysis of relevant case law suggests that most of the advances in this regard have taken place after the expiry of the period which the Commission is investigating. Furthermore, since the expiry of that period, the *European Convention on Human Rights Act 2003* has empowered the courts to make declarations of incompatibility with the ECHR and required them to interpret Irish law in a manner that is compatible with the State's obligations under the

¹⁶ [1996] 2 IR 248.

¹⁷ (1994) 18 EHRR 342.

¹⁸ See also *Quinn v O'Leary* [2004] 3 IR 128 and *McFarlane v Director of Public Prosecutions* [2008] 4 IR 117.

ECHR and to take account of relevant ECtHR decisions. In addition, organs of the State are now required to perform their duties in a manner compatible with the ECHR. The Act of 2003 has undoubtedly led to far more engagement with the jurisprudence of the ECHR than occurred during the period which the Commission was investigating.

European Convention on the Adoption of Children

36.40 The European Convention on the Adoption of Children (ECAC) was open for signature by the Council of Europe on 24 April 1967 and entered into force on 26 April 1968.¹⁹ Ireland had already signed and ratified it on 25 January 1968. Under Articles 1 and 2 of the ECAC, the State undertakes to ensure the conformity of its law with the provision of part two and undertakes to give consideration to the provisions set out in part three. Thus, the essential provisions of the ECAC were binding on the State at an international level for the final third of the period the Commission was investigating.

36.41 Among the main provisions of this Convention are that:

An adoption shall be valid only if it is granted by a judicial or administrative authority (the competent authority)

An adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:

- The consent of the mother and, where the child is 'legitimate', the father; or if there is neither father nor mother to consent the consent of any person or body who may be entitled in their place to exercise their parental rights in that respect.
- The consent of the spouse of the adopter;

A mother's consent to the adoption of her child shall not be accepted unless it is given at such time after the birth of the child not being less than 6 weeks, as may be prescribed by law, or, if no such time is being prescribed at such time as in the opinion of the competent authority which have enabled her to recover sufficiently from the effects of giving birth to the child;

The competent authorities shall not grant an adoption unless it is satisfied the adoption will be in the interest of the child;

Provision shall be made to prohibit any improper financial advantage arising from a child being given up for adoption;

¹⁹ For the original convention see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/058>; the convention was revised in 2008.

Provision should be made to enable an adoption to be completed without disclosing to the child's family the identity of the adopter;

Provision shall be made to require or permit adoption proceedings to take place in camera;

The adopter and the adopted person shall be able to obtain a document which contains extracts from the public record attesting the fact, date and place of birth of the adopted person but not expressly revealing the fact of adoption or the identity of his former parents.

36.42 A revision of the European Convention on the Adoption of Children was concluded in 2008. Ireland has not ratified the amended convention. The convention now includes provisions concerning:

- Consent to adoption by a father and by a child who has sufficient understanding to give it;
- The eligibility of registered partners and homosexual couples to adopt;
- The balance between the child's right to know his/her identity and the right of the biological parents to remain anonymous;
- Minimum age of requirements for prospective adopters.

36.43 The ECAC does not contain any enforcement mechanisms.

European Convention on the Legal Status of Children born out of wedlock

36.44 This convention came into force on 11 August 1978. It was signed and ratified by Ireland in October 1988 and became binding on the State in January 1989. It provides:

Article 2: Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.

Article 3: Paternal affiliation of every child born out of wedlock may be evidenced or established by voluntary recognition or by judicial decision.

Article 4: The voluntary recognition of paternity may not be opposed or contested insofar as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father.

Article 5: In actions relating to paternal affiliation scientific evidence which may help to establish or disprove paternity shall be admissible.

Article 6: The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock.

Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock.

Article 7: Where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone.

There shall be power to transfer parental authority; cases of transfer shall be governed by the internal law.

Article 8: Where the father or mother of a child born out of wedlock does not have parental authority over or the custody of the child, that parent may obtain a right of access to the child in appropriate cases.

Article 9: A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock.

Article 10: The marriage between the father and mother of a child born out of wedlock shall confer on the child the legal status of a child born in wedlock.

36.45 This convention does not contain any enforcement provisions.

The Hague Convention of 1993 on intercountry adoption

36.46 The Hague Convention (HC), building upon the principles set out in the CRC and other regional and international instruments, established a system of international cooperation between states to ensure that, when an international adoption takes place, it does so in the interests of the child, respecting the fundamental rights of all the parties concerned, and free of the abuses sometimes associated with intercountry adoption. It also ensures that the status of the adopted child is recognised in all convention states. The convention was concluded in 1993.²⁰ It was implemented in Irish law by the *Adoption Act 2010*.

36.47 The Convention recognises the need for the two states involved in an intercountry adoption (the state of origin of the child and the receiving state) to share responsibilities within the intercountry adoption process, utilising a system of administrative cooperation based on 'Central Authorities' located in each state or

²⁰ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>

region within a state. To this end it sets out a basic procedure for intercountry adoption - one which is child focussed. Adoption is viewed, not as a means of finding a child for a family, but as a means of finding a suitable family for a child whose family of origin is unable to provide for his or her care. The following is a summary of the convention procedure, taken from the Guide to Good practice on the Implementation and Operation of the 1993 Hague Intercountry Adoption Convention,²¹ at p. 80:

The prospective adoptive parents must apply to the Central Authority in the State of their habitual residence. The Central Authority, if satisfied that the parents are eligible and suited to adopt, prepares a report on the family, and transmits the report to the Central Authority of the child's country of origin. It is implicit in the Convention that the adoptive parents' habitual residence country will have criteria in its laws and procedures to assess that the prospective adoptive parents are eligible and suitable to adopt a child. This assessment should be done by professionals with appropriate qualifications and expertise.

The Central Authority in the State of origin should have a register of children declared adoptable through intercountry adoption. The Central Authority undertakes the matching of the adoptable child with the adoptive parents who have the qualities and skills best suited to the needs of that child. It is implicit in the Convention that the country of origin will have criteria in its laws or procedures by which to determine if a child is 'adoptable'.

If it is satisfied that the child is adoptable, the Central Authority in the State of origin prepares a report on the child, ensures that proper consents have been obtained, matches the child with appropriate adoptive parents, and determines whether the envisaged placement is in the child's best interest. The Central Authority then transmits the report on the child to the Central Authority of the receiving State, which must determine that the prospective adoptive parents agree with the proposed placement or entrustment, and may, if necessary, approve the proposed placement of entrustment. Provided that both Central Authorities have agreed that the adoption may proceed and the child has been authorised to enter and reside permanently in the receiving State, the entrustment of the child to the adoptive parents, and the adoption itself, may now go ahead, depending on the law of the State of origin. If the adoption must be finalised in the State of origin, in accordance with Article 28,

²¹ <https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf>

the legal procedures, including court procedures, for the adoption must be completed before the child is authorised to leave the State of origin.

The status of international agreements in Irish Law

36.48 Ireland has a dualist system under which international agreements to which it becomes a party are not automatically incorporated into domestic law. Article 29.6 of the Constitution specifically states that ‘No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas’.

36.49 The effect of this is set out in the following passage from the judgment of Judge Fennelly in the Supreme Court in *Kavanagh v Governor of Mountjoy Prison*:²²

The Constitution establishes an unmistakable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29, section 6 applies.

36.50 Instruments which are not transposed into domestic law do not have direct binding effect within the State. Having said that, they are binding in international law and it is the general practice of the State not to ratify an international agreement unless it considers that the provisions of the agreement are already indirectly implemented in domestic law or can be so implemented prior to ratification.²³

36.51 Unimplemented international agreements are frequently employed by the courts as an aid in the interpretation of Irish law. In addition, where an international agreement has not been incorporated into Irish law, it may nonetheless act as a constraint on administrative decision making. This further indirect effect has manifested itself through the doctrine of legitimate expectations, which has been relied upon on a number of occasions by claimants seeking to hold an administrative decision maker to the terms of an international commitment given by

²² [2002] 3 IR 97; see also *Re Ó Laighléis* [1960] IR 93 and *Application of Woods* [1970] IR 154.

²³ See further, David Fennelly, *International Law in the Irish Legal System* (Dublin, 2014).

the State.²⁴ However, it is clear from the decision in the Kavanagh case that this doctrine is founded on procedural fairness and does not guarantee anything more than that. The doctrine requires that decision makers take into account the provisions of a relevant unincorporated international agreement, however it cannot be relied upon to compel a decision maker to make a substantive decision in line with the international agreement relied upon where that agreement conflicts with domestic law.²⁵

36.52 It is widely accepted that the courts have become increasingly open to unincorporated international agreements having indirect effect in domestic law. However, it should be noted that the advances in this regard have, in the main, post-dated the period the Commission is tasked with investigating.

B: Human rights issues

Submissions relating to human rights

36.53 In addition to the submission from the IHREC the Commission also received submissions from the Clann Project and One Family.

36.54 The Clann Project is a joint voluntary initiative by the Adoption Rights Alliance (ARA) and Justice for Magdalenes Research (JFMR) in association with global law firm Hogan Lovells. The stated purpose of the Clann Project is to establish the truth of what happened to unmarried mothers and their children during the 20th century from the foundation of the State in 1922 onwards.

36.55 One Family is Ireland's national organisation for one-parent families.²⁶ One Family was established in 1972 as Cherish. At that time Cherish was Ireland's first organisation for single mothers organised by single mothers and run on a human rights, rather than charity - benevolence base model.²⁷

36.56 One Family stated that it supported the implementation of the eight recommendations of the Clann Project, in particular the recommendations on access to data; inclusion of all stakeholders; redress and reparation through

²⁴ See, for example, *Fahih v Minister for Justice* [1993] 2 IR 406.

²⁵ See further, *McAlister v Minister for Justice* [2003] 4 IR 35 and *NS v Anderson* [2008] 3 IR 417.

²⁶ <https://onefamily.ie>

²⁷ Maura Richards, *Single Issue* (Dublin, 1998).

material benefit and symbolic representation; and legal remit through legal aid, extension of the statute of limitations and criminal investigation.

- 36.57 The Clann Project want a transitional justice process which would include an investigative and truth telling mandate to address institutional and structural human rights violations in Ireland since the foundation of the State generally.
- 36.58 Among their recommendations as part of Ireland's transitional justice process the State should enable the identification of the remains of children in mother and baby homes and related sites. The process they say should involve several sites containing remains including but not limited to Tuam, Sean Ross, Bessborough, Castlepollard, burial plots at Saint Finbarr's and Saint Joseph's cemeteries in Cork and the Angel plots in Glasnevin cemetery. Deaths, burials and exhumations at Magdalen laundries should form a key element of any investigation into deaths and identification of remains.
- 36.59 Furthermore they also feel that there should be a State apology, redress and reparations. In ARA's experience, for most adopted people, redress predominantly means unfettered access to the institutional records held about them.

Statutory Rights and Services

- 36.60 As part of the transitional justice process the Clann Project strongly recommends the introduction of statutory rights and services for adopted people and birth parents all of whom they say have been deeply affected by Ireland's treatment of unmarried mothers and their children. This should include:
- Access to information
 - Centralisation of adoption records
 - Access to the archive of the Commission of Investigation
 - Tracing services
 - The State should introduce statutory rights for people adopted from Ireland to the US and other countries
 - The right to know that you are adopted
 - Counselling
 - Access to the Courts. The State should amend the *Statute of Limitations 1957* to explicitly grant discretion to the courts to extend the normal limitation periods where it is in the interest of justice

- Establishment of a dedicated unit to investigate specific criminal allegations
- Memorialisation

36.61 While the Commission wishes to record its appreciation of these contributions it was disappointed that no attempt was made to quantify the costs involved.

Information Disclosure

36.62 The main issue raised by lobby groups and individuals born in mother and baby homes was information and tracing. Adopted people do not have a right to access their original birth certificate nor do they have the right to access information on their families of origin. Many adopted people have got this information but others have been unable to do so. It is clear to the Commission that many adopted people think there is considerably more information about them in institutional and other records than is actually the case. Having examined these records closely, the Commission knows that the information is very limited in many cases. The quantity and quality of the available information is not, of course, relevant to the issue of whether or not there should be a right of access.

36.63 Articles 7 and 8 of the UN Convention on the Rights of the Child established the important principle that children are entitled to the information necessary to preserve their personal identity. These Articles were considered by the Supreme Court in *IOT v B and the Rotunda Girl's Aid Society and MH v Rev GD and the Rotunda Girl's Aid Society*.²⁸

36.64 The Supreme Court recognised a person's unenumerated constitutional right to know the identity of his or her birth mother but said that that had to be balanced against the birth mother's right to privacy. It stated that neither set of rights was absolute and stated that access to adoption records might be appropriate in certain cases but it would depend on many factors including:

- The circumstances surrounding the birth mother's loss of custody of the child;
- The current status and circumstances of the birth mother and the potential effect upon her of the disclosure of her identity;

²⁸ [1998] 2 IR 321.

- The birth mother's own wishes and attitude regarding the disclosure and the reasons behind these wishes and the aforementioned attitude;
- The current age of the birth mother and child respectively;
- The attitude of the adopted child, including the reasons why he or she wished to seek disclosure of his or her birth mother's identity;
- The present circumstances of the adopted child; and
- The opinion of the adoptive parents or other interested parties.

36.65 While the Supreme Court did find entitlement to information about one's birth was compatible with the constitutional right to know the identity of one's birth mother as guaranteed by Article 40.3 of the Irish Constitution it did lay considerable emphasis on the birth parent(s) privacy.

36.66 Attempts have been made to draft legislation that would give effect to the principles set out in the Supreme Court judgement but have not succeeded. The Adoption (Information and Tracing) Bill 2016²⁹ was shelved because as the press release from the then Minister Zappone stated:

Despite everyone involved making significant efforts to reach consensus on the issues of release of birth information it has not proved possible to reach agreement at this time.

36.67 It appears that the Attorney General had advised that it was constitutionally unacceptable to allow unrestricted access to birth information for adopted people. The current government and Minister O'Gorman have committed to introducing such legislation.

36.68 During the course of its investigation the Commission took evidence from people engaged in both sides of the argument. Those advocating a legal right to know one's identity relied heavily on the UN Convention on the Rights of the Child. While the Convention does not provide children with the specific right of access to their biological information the Convention Committee did make a recommendation in the case of Bulgaria that it should legislate to guarantee children a right to know their origins.³⁰

²⁹ <https://www.oireachtas.ie/en/bills/bill/2016/100/>

³⁰ Concluding observation of the Committee; Bulgaria, UN doc CRC/CBGR/CO 3-5 paragraph 37 (d).

36.69 The matter was also considered by the Grand Chamber of the European Court of Human Rights in the case of *Odievre v France* (2003).³¹ In that case the applicant had been abandoned by her mother at birth. The mother did not want her identity revealed to her. She was placed in care and some years later she sought information about her birth and her birth parents and any siblings she may have had. The Court took the view that the applicant had been given non identifying information about her natural family which allowed her to trace her roots to some extent without violating third party rights. Article 8 of the European Convention of Human Rights was considered in the context of this case but the judgement was that the right had not been violated.

View of birth mothers

36.70 A number of social workers who had contact with birth mothers gave evidence to the Commission about the ramifications of their privacy rights being eroded if birth information was revealed without their consent.

36.71 They told the Commission that, when recent statistics gathered by them were analysed, it was noted that over 50% of birth mothers contacted as part of a search by an adoptive person did not wish to engage with their service. Many of the women told them of their terror at the prospect of the proposed legislation on tracing being implemented. They told the Commission that this group of women were a very vulnerable cohort and that their views were not being heard. One of the social workers produced a letter from one such woman which stated as follows:

I am writing this in a secret place so as no one will see me. I implore you and beg you now not to get in touch with [name of husband] he doesn't know about this as I could not tell him. He was in England at the time and I went through it on my own. I could not tell anyone then, I can't tell anyone now. I am going through this on my own now. I was promised that no contact would be made. I am in a terrible dark place with no way out. This is putting me over the edge and I pray every day that it is all a nightmare and maybe Jesus will get me out of it. Please help me, I am desperate now. I was promised there would be no contact. I have nowhere to turn but to kill myself I can't tell anyone.

36.72 The concerns of the social workers were also brought to the attention of the Commission by the Council of Irish Adoption Agencies:

³¹ Application number 42326/98 [2003].

There is a cohort of women about whom we know very little, and for whom we must have great concern. These are women who we, as social workers, believe were so shamed at the time of pregnancy and birth by the system and by those from whom they might have wished for support that they have never told anyone (including husband and other children) of the child or children to whom they gave birth and who live in fear of being found out and feeling their lives could be destroyed.

- 36.73 It is important to stress that the social workers who gave evidence to the Commission said that they were wholeheartedly in favour of the release of birth certificates and recognised the importance of this for adopted people who were equally their clients. They believe that the onus should not be placed on the birth mother to have to object to the release of a birth certificate. This was placing the woman in a position where she has to reject her child for a second time. Instead they suggested that, at minimum, a birth mother should be contacted and informed by an adoption social worker once a request is made. While she may not have a right to prevent the information being released she can be afforded the time to manage her feelings and her life circumstances around this with social work support offered.
- 36.74 They suggested that there be a 12-month consultation period after an individual request for the release of a birth certificate. This would give time to engage with the birth mother and provide the necessary counselling and support prior to her identity being released. Such an approach would afford women dignity and better facilitate both a holistic approach to family relationship building and a balance of rights for all. Among their recommendations were that people have at least three sessions of counselling with an accredited adoption agency prior to the release of identity information. Affording this measure would work to enhance the sensitive building of family relationships and prevent rejection and family breakdown. Their view was that historically the State had perpetrated an imbalance of rights in respect of the women in the cohort on whose behalf they were advocating. It was their view that such a position should not continue to be enshrined in legislation in the 21st century.

The Commission's view

- 36.75 The Commission is of the view that adopted people have a right to their birth certificates and associated birth information and recognises that a person's right to his or her identity is an important human right and should only be denied in exceptional circumstances. Medical information and adoption records compiled at the time of the adoption should also be available. If a mother, following support from social workers as expressed above, is still of the view that her privacy rights are being seriously eroded then the matter should be brought before the Circuit Court to determine the issues. The proceedings should be held in camera and both the birth parent(s) and the adopted person should have the right to legal representation and legal aid should be provided for all parties if required.
- 36.76 The issue of a birth mother's and father's (if available) subsequent medical history would in the Commission's view have to be matter of negotiation between the parties in the first instance. However if access to information on medical grounds is sought then the sections of the New Zealand *Adult Information Act 1985* (as amended) dealing with this issue should provide useful guidance.
- 36.77 Developments in DNA should be helpful in this regard and consideration should be given to financially assisting those born in mother and baby homes/county homes who wish to avail of such a test. The development of technology and the existence of numerous ancestry sites has meant that access to birth information has become much easier to obtain for both mother/father and child. There can be problems for people who find very important information in this manner and who do not have any support system in place. It is important that legislation provide for such a support system. The Commission is of the view that the 12-month waiting period suggested by the social workers is too long and six months would be more appropriate.
- 36.78 If, as seems likely, a referendum is required to allow for the necessary legislation, then one should be held.
- 36.79 The Commission also considers that there should be a central repository of the records of institutions and adoption societies so that information can be obtained from one place. The Commission's database of individuals could be expanded by adding adoption records to it. The Commission is aware that there is considerable criticism of the Child and Family Agency's (Tusla) approach to information and

tracing. This criticism is, in the Commission's view, unfair, as Tusla is implementing the law as it stands and cannot change it and any other agency would have to do the same.

Right to know where family members are buried

- 36.80 The report by Dr Geoffrey Shannon entitled *Human Rights issues at the former site of the Mother and Baby Home, Tuam*³² examines in detail the issue of the rights of families to information about burials. There are no clear absolute rights. The Commission understands the wishes of family members to know more. If such rights were established, there would need to be a clear statement of what family members were entitled to this information; it is difficult to see how any such rights could extend beyond siblings. In cases where the mothers were in the homes when the child died, it is possible that they knew the burial arrangements or would have been told if they asked. It is arguable that no other family member is entitled to that information.
- 36.81 The Commission considers that there would be enormous practical difficulties in establishing and implementing such rights. The costs involved would probably be prohibitive.

Illegitimacy

- 36.82 The existence of the status of 'illegitimacy' until 1987 was an egregious breach of human rights. It blighted the lives of the people concerned. This was the case for all 'illegitimate' people not just those born in mother and baby homes.
- 36.83 The following are extracts from evidence given to the Commission by people who were affected by being labelled 'illegitimate':

I was never allowed to serve mass; the parents weren't married. There would be mass in the local house every Lent - called the stations. I wasn't allowed to serve mass in that house and my school mate a neighbour would do it. How degrading was that?

I was an outcast.

The sad thing is not what happened to you but as soon as you mention the word 'illegitimate' you are labelled, they clamp up. You are not judged as a

³² <https://assets.gov.ie/25217/0abb576368b14e2081c447b417544fb2.pdf>

person but you are judged as who you were. Illegitimate has a connotation 'she is good for nothing'.

My mother said there is no way she is raising a bastard in her house.

I was called a bastard - if you go to the pub, there could be three seats and they would go up along the side even the old men. You were classed as a thing and a bastard, that is the nothing lad.

I was considered by the Roman Catholic Church to be the spawn of the Devil, by the State to be illegitimate and by society to be a bastard.

A woman was told by her father when she wanted to take the baby home 'there is no bastard coming to stay in this family'. Another woman said that when she told her husband that she was 'illegitimate', it changed his view of her. He thought less of her and it changed their marriage entirely.

- 36.84 These are just some of the quotes from a number of men and women who as children were resident in mother and baby homes within the Commission's remit and who to this day remember the impact of their 'illegitimacy' on their lives.

Abolishing the status

- 36.85 The concept was well established in most countries and legal systems for some time but it remained in existence for longer in Ireland. Serious discussions about its abolition started in the 1970s. At that stage, it had been abolished in other countries such as Norway, Sweden, Denmark, Germany and New Zealand.

- 36.86 In October 1974 Cherish, an Association of Unmarried Parents, ran a conference on 'The Unmarried Parent and Child in Irish Society' where the concept of 'illegitimacy' was discussed. The conference was held against a backdrop of rising rates of births outside marriage and greater use of abortion services in the UK by pregnant Irish women. The prevailing trends were described by Dr Dermot Walsh:

The number of illegitimate births in this country has risen steadily since 1959 and by 1971 had reached 1,842 births. In effect the number of illegitimate births in Ireland has roughly doubled between 1961 and 1971, and the illegitimate birth rate per 1,000 single and widowed women now stands at 6.3 as against 3.3 in 1961. This represented 2.6% of total births in 1971. In 1971

there were a further 1,510 illegitimate births to Irish-born women in the United Kingdom but we do not know the length of residence in the United Kingdom of those mothers and accordingly we cannot state how many of the conceptions leading to those births occurred in Ireland. There was no comparative data on illegitimate births in Britain by mothers' birthplace in 1961. Additionally, in 1971 there were 577 legally induced abortions on women giving the Irish Republic as their usual residence. By 1972 the number of terminations had doubled to almost a thousand, and it is interesting to reflect that the rate of termination of pregnancy among women who gave their normal place of residence as the Irish Republic in the age-group 25-29 almost equalled the number of live births to unmarried Irish women in Ireland in that same age-group. Put another way, of all conceptions to Irish unmarried in the 25-29 age-group not ending in spontaneous abortion and not leading to birth outside the country, 43% were terminated in England, a remarkably high proportion compared with only 29% of English unmarried pregnancies in the same age group.

The data indicate clearly that there has been a doubling of the illegitimate fertility, a recourse to legal termination of pregnancy in Britain with the introduction of 1967 Abortion Act, and the inevitable conclusion, since conception is the consequence of sexual activity, that there has been a considerable rise in extra-marital or pre-marital sexual activity in this country. Therefore the problem of the unmarried mother and her child is one that is now twice as great as it was in 1961, and the question arises whether the measures to cope with it have been doubled in this decennium, making the unlikely supposition that they were adequate then.

Historical background

36.87 Dr William Duncan (who is a member of this Commission) who also spoke at the Cherish conference outlined the historical basis for the disabilities attaching to 'illegitimacy'. He said that the disabilities attaching to 'illegitimacy' had their origin in common law which itself appeared to have been influenced by the canon law of the Roman Catholic Church.

The Canon law initially did not regard illegitimacy as a defect. But during the middle ages Canon law doctrine underwent a change. The moral basis for this change is supposed to have been a desire on the part of the church to protect the institution of the family and in particular the institution of marriage. Fornication was a sin and adultery was an even greater sin because it was

forbidden in the Ten Commandments and because it involved a violation of the holy sacrament of marriage. The church decided therefore to draw a distinction between children born within and children born outside wedlock thus discouraging fornication and adultery. In the council of Poitiers 1087 sons of priests and others born of fornication were forbidden to be promoted to sacred orders, unless they either became monks or led a regular life in economical congregation.³³

36.88 Dr Duncan went on to say that the development in moral thinking was 'conspicuous for its absurdity'. The moral argument was in essence as follows:

The child born out of wedlock must suffer discrimination because his parents have done wrong, and his suffering will be an example to other adults to deter them from sin. The child is seen as an object to be used in instilling more moral behaviour in others. The innocence of the child and any rights which he may have as an individual are ignored. This curious concept of deterrence had reached its observed culmination in modern Irish society which on the one hand stigmatises the illegitimate child as a social leper and on the other hand regards adultery and fornication as non-criminal forms of conduct.

36.89 He argued that there was little doubt that these rules of canon law influenced the development of the common law but they also 'played a part in breeding into successive generations a non-critical acceptance of discrimination against illegitimate children'.

36.90 However, he pointed out that the Council for Social Welfare which was a Committee of the Catholic Bishops Conference had made an important contribution to the debate on illegitimacy in a report on family law issues published in 1974. This report had outlined the lack of legal situation of 'illegitimate' children and made detailed proposals for change. It provides a summary of the legal problems arising from the status of 'illegitimacy':

The child of an unmarried mother is considerably disadvantaged under our present legal system. For example, the child of an unmarried mother cannot have his paternity established; he has no rights of succession against the

³³ During the debate on the *Adoption Bill 1952*, Archbishop McQuaid wanted a clause inserted which would force the GRO to disclose information about the adoption of a person 'as illegitimacy is a bar to Holy Orders, without a dispensation from Rome, His Grace considered it desirable that there should be some simple procedure for disclosure of information in proper cases.'

property of his natural father, and only a limited right to succeed to the property of his mother, notwithstanding the changes introduced by the Succession Act, 1965; the law does not enforce effectually the maintenance responsibilities of putative fathers; such maintenance as the Court may award ceases when the child reaches 16 years of age.

If an unmarried mother is granted an affiliation order there are no means whereby she can require the putative father to contribute to her own upkeep and maintenance while she is rearing the child.

The Church acknowledges that there is a moral obligation on fathers to support their children whether legitimate or illegitimate.

Other countries have procedures to permit the voluntary acknowledgement of their child by a father and mother who do not intend to, or who cannot, marry. This permits paternity to be proved and the child to be given the same status as a legitimate child.

We are concerned with the rights of all children and that they should be treated equally. We regard it as unchristian that children born out of wedlock should, as a result of the actions of their parents, be victimised by legal distinctions between them and children born to married parents. Consequently, we wish to urge that the legal disabilities imposed on these children should be removed.

We would recommend that -

1. There should be no distinction between children before the law;
2. The law be amended to allow voluntary acknowledgement of a child born out of wedlock. It is considered that power to object to such an acknowledgement should be given to the spouse of either parent;
3. Children born out of wedlock be given rights of succession;
4. Provisions be enacted whereby the single mother could formally recognise her child so that if she were to marry a man other than the father of the child, that child would have equal rights of succession to her property with any legitimate children the couple might have. This equates the position of a child born out of wedlock to that of a step-child;
5. The procedure of voluntary acknowledgement should be extended to the wife who has an extra-marital child;
6. Children of a void or voidable marriage should not be bastardised but should continue to be regarded as legitimate offspring of the parties following a decree of nullity;

7. The Illegitimate Children (Affiliation Order) Act, 1930 be amended in the following respects:

The time limit during which a mother may bring affiliation proceedings against the father of her child should be extended from 6 months to 3 years;

Maintenance in respect of the child should continue until he has finished full-time education and not cease, as at present, at 16 years;

Consideration be given to the introduction of genetic testing to establish paternity. Such tests have now become so sophisticated that the margin of error is minimal.

36.91 In her introduction to the conference report (published March 1975), the former President of Ireland, Mary Robinson, who was then a senator and president of Cherish, stated that the people of Ireland had failed to uphold the constitutional guarantee that 'all citizens shall as human persons be held equal before the law'. Children born out of wedlock were not equal before the law:

These young citizens are discriminated against in that they do not have property and succession rights to their father; in that their family relationship is not given full recognition and protection; and in that they are burdened with the social stigma implied in being called 'illegitimate'.

36.92 Senator Robinson had introduced the *Illegitimate Children (Maintenance and Succession) Bill* 1974 but withdrew it in February 1975 because of an undertaking she believed was given by the then Minister for Justice, Patrick Cooney, that a *Family Law Reform Bill* on the subject was at an advanced stage of drafting and would be introduced soon. The necessary legislation did not become law until 1987.

Law Reform Commission Report on Illegitimacy

36.93 In 1982 the Law Reform Commission produced a comprehensive report on 'illegitimacy' and said that a law that denies substantial rights to innocent children needed radical reform.³⁴ This report led to the passing of the *Status of Children Act 1987* which finally abolished 'illegitimacy'.

³⁴ <https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/30550>

36.94 During the Dáil debate on the *Status of Children Bill 1986*, politicians made a number of remarks, such as ‘the child born outside marriage - the illegitimate child as exists in Irish law today - is discriminated against in substantial areas’.³⁵ Another expressed disappointment that the bill could not succeed in totally abolishing ‘illegitimacy’ because marriage was enshrined in the constitution and ‘all our attitudes are debated along the idea of the family’ which meant that there has always been a difference between the social position of a child born within and outside marriage. It was important to afford ‘equal rights to children born outside marriage as are afforded to those born within marriage’. It was remarked that it was good that the emphasis was now shifting towards caring for the child:

who is a completely innocent party in society. This Bill reflects a new perception about the status of children born outside marriage and reflects a new perception of the position of children and their treatment in society...If the social thinking of the last decade or so in relation to this legislation, and this legislation is a part of that thinking, is maintained we can look forward to the day when the distinction will be eliminated. I hope the social thinking of society will lead to this position.

36.95 Another criticised the insidious discriminations associated with illegitimacy and that it followed children right ‘into the heart of the homes of two parent families and is not just confined to the single parent family’. Another politician said that it had no place in the society that they wished to see in Ireland and that it was a stigma from which many Irish children suffered. One example was that many adoptive parents felt embarrassed and angry at first communion time because birth certificates were required by schools and these showed that the children were ‘illegitimate’ and it caused some upset for people. This politician welcomed the bill ‘which seems to remove the shameful tag of illegitimacy which has attached to so many children for far too long’. Another politician welcomed this desire to remove ‘the stigma of illegitimacy and regarding it as a duty on Members of the House through legislation to provide effective statutory provisions to place children in a position of legal equality and give mothers of children born outside of marriage as much protection as possible but are regarding the fathers of children born outside marriage in a somewhat different position’.

³⁵ <https://www.oireachtas.ie/en/debates/debate/dail/1987-05-20/19/>

- 36.96 Another said: 'We fully support the abolition of the stigma and concept of illegitimacy. Children born out of wedlock have been for far too long the victims of major acts of legal and social injustice. They have been the butt of cruel jokes, they have been discriminated against in the job market and, indeed, up to recently they were discriminated against in Church law'.
- 36.97 There were some who objected to the language used in the bill. For example, they was concerned that the proposal to remove the word 'illegitimate' and replace it with 'non-marital' was replacing an old offensive term with a new offensive term. Another said there had been an effective apartheid and stigma attached to unmarried others. They said that this was 'society's way of stating that the proper way to bring up a child was in the loving care and relationship of a father and mother and I have no doubt that that is still the best way to bring up a child. For that reason, society frowned on the situations where it was other than this'.
- 36.98 While the Dáil and Seanad debates on the bill were for the most part constructive, the Commission thought it striking that nobody thought to say sorry to all those, who as children and young adults, were so cruelly discriminated against by both society and state authorities because of the circumstances of their birth.