AMICUS BRIEF

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 35810/09

Louise O'Keeffe

APPLICANT

V

Ireland

RESPONDENT

WRITTEN COMMENTS BY THE IRISH HUMAN RIGHTS COMMISSION PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND RULE 44 § 3 OF THE RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS

30 September 2011

Index to Submission

Introduction

1. The Irish Human Rights Commission ("IHRC") is Ireland's National Human Rights Institution ("NHRI"), established pursuant to the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit to promote and protect the human rights of all persons in the State. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State with regard to human rights standards deriving from the Irish Constitution and the international treaties to which Ireland is a party (which include the European Convention on Human Rights and Fundamental Freedoms ("ECHR")).[1] The IHRC is mandated to appear as *Amicus Curiae* in proceedings before the national Courts and has done so on twelve occasions to date.[2]

2. The IHRC is fully compliant with the United Nations ("UN") "Paris Principles".[3] These principles govern independent NHRIs[4] and broadly set out the competences and responsibilities of NHRIs and the criteria under which they should function, namely:

   - Independence guaranteed by Statute or Constitution;
   - Pluralism, including in membership and
   - A broad mandate covering all human rights and based on universal human rights standards.

Brief background to the application

3. By letter dated 29 August 2011, the Court granted liberty to the IHRC to intervene in *O'Keeffe v. Ireland* in the form of a written submission in accordance with Article 36 § 2 of the ECHR and Rule 44 § 3 of the Rules of the Court.

4. As set out in the Statement of Facts, the case concerns the sexual abuse of the Applicant by a school principal when she was attending primary school (otherwise known as a "national" school) in 1973. The perpetrator of the abuse was convicted in 1998 for breaches of the criminal law and given a custodial sentence. Separately the Applicant brought civil proceedings against the perpetrator and the State seeking damages for the abuse she suffered. The Applicant succeeded in her claim against the perpetrator receiving a significant award of damages which proved to be only partially recoverable. However, her claim against the State was not upheld. In addition, the Applicant received an *ex gratia* award from the Criminal Injuries Compensation Tribunal of £53,000 in 1998.

5. The Applicant claims that her rights under Articles 3, 6, 8, 14, Protocol 1 Article 2 and Article 13 have been breached by the State.

6. In summary the present submissions will comment on the structure of the Irish education system; the relevant domestic law and practice in relation to education and child protection; the vindication of Constitutional rights; the status of the Convention in the domestic legal order and the issue of delay.

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[1] Section 8(a) of the Human Rights Commission Act 2000.

[2] Section 8(h) of the Human Rights Commission Act 2000. The IHRC has previously submitted 2 amicus briefs to the Court on behalf of the European Group of National Human Rights Institutions – in the cases *DD v Lithuania (Application No. 13469/06*) and *Gauer v France* (Application No. 61521/08).

[3] *National institutions for the promotion and protection of human rights*, UN General Assembly Resolution 48/134, 1993.

[4] A NHRI is a State-sponsored and State-funded organisation with a constitutional or legal basis, with authority to promote and protect human rights at the national level as an independent agency.

Structure of the public education system in Ireland

7. Under Article 42 of the 1937 Constitution,[5] parents have a legal duty to provide for the *"religious and moral, intellectual, physical and social education of their children.*" This legal duty is enforced through legislation. In the 1970s, the relevant legislation included a statutory requirement to send one's child to primary school and failure to do so attracted a criminal sanction.[6] Coupled with this obligation on parents is a mirror obligation on the State to "provide for" free primary education to all children in the State. The fact that the State does not have a constitutional duty to provide education directly (although not under a legal impediment from doing so) explains one of the defining features of the Irish education system, that is, publicly funded education is delivered largely under the auspices of private actors, most often religious orders.[7]

8. Until the Education Act 1998 there was no comprehensive legislation governing the delivery of public education at primary and post primary level in Ireland. It is relevant to point out, however, that the structure of the Irish education system did not change remarkably over the course of the twentieth century, including since the 1970s (the period to which the Applicant's claim relates).[8]

9. The school which the Applicant attended is typical of most primary schools in the State in having a religious patron and the day-to-day management being carried out on his behalf by a nominee. The State is cast in the role of funder and policy maker rather than taking a direct role in the running of individual schools.

10. At the domestic level, the Statement of Facts records how the Applicant brought proceedings in the High Court ("the High Court Judgment")[9] and on appeal to the Supreme Court ("the Supreme Court Judgment").[10] The Supreme Court Judgment is instructive in its examination of the Irish education system. In the Supreme Court, Hardiman J identified the main feature of the system as being the almost complete denominational control of national schools, to the exclusion of the State.[11] The establishment of a Department of Education in 1924, after the State gained independence

[5] The Irish Constitution is also entitled Bunreacht na hÉireann.

[6] See below paras 28 and 29. The terms "primary" and "national" schools are used interchangeably in this submission insofar as both terms are synomymous.

[7] A Report published by the Department of Education on 3 August 2010; *Information on Areas for Possible Divesting of Patronage of Primary Schools*, indicates the following break down for primary schools in Ireland in the 2009/2010 school year: Catholic: 2888 schools, 91.25% (% of total), Church Of Ireland: 181 schools 5.72%, Presbyterian: 14 schools 0.44%, Methodist 1 school 0.03%, Jewish 1 school 0.03%, Inter-Denominational 8 schools 0.25%, Muslim 2 schools 0.06%, Multi-Denominational 69 schools, 2.18%, Quaker 1 school 0.03%. Total 3165 Schools. See also *www.education.ie/servlet/blobservlet/stat_web_stats_09_10.pdf*

[8] One commentator summed up the position as follows: "*Informality has been a singular characteristic of the Irish system of education since 1922"*. D. Glendenning, *Education and the Law*, Butterworths, 1999, at p.10. The Education Act 1998 did introduce certain changes in relation to the formal management structure of schools, admissions policies and oversight in relation to such admissions and any subsequent decisions in relation to suspensions/ expulsions (sections 28 and 29 of the Education Act 1998).

[9] *L.O'K. v L.H, The Minister for Education and Science, Ireland and The Attorney General*, DeValera J, 20 January 2006, [2006] IEHC 13.

[10] *O'Keeffe v Hickey, The Minister for Education and Science, Ireland and The Attorney General*, Supreme Court, 19 December 2008, [2008] IESC 72.

[11] See also *Religion and Education: A Human Rights Perspective*, Irish Human Rights Commission, May 2011, at pp 12-17.

did not break with this tradition and denominational control and management of schools continues to the present day.[12]

The Constitution

11. The State's role under the Constitution is to ensure that every child receives a certain minimum education, and in this regard to "provide for" free primary education.[13] This is done by providing aid to private and corporate educational initiatives, and when the public good so requires, providing other educational facilities. National schools come within this "private and corporate" educational initiative, which is aided by the State.

12. In *Crowley v Ireland*,[14] the Supreme Court gave a clear account of the State's constitutional position in relation to the provision of public education holding that:

> *…the State is under no obligation to educate... The Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under the control of a manager or of trustees who were not nominees of the State… the State provid[ed] financial assistance and prescribe[ed] courses to be followed at the schools; but the teachers, though paid by the State, were not employed by and could not be removed by it: this was the function of the manager of the school who was almost always a clergyman.*[15]

13. While the State is not constitutionally prohibited from establishing and managing schools itself (and indeed there are a small number of schools under State patronage) it has chosen to adhere to historical precedent and allow a system of private patronage and delegated management to prevail over direct State control.

The Right to Education

14. It may be observed at this point that the ratification by the State of the ECHR in 1953 and the subsequent incorporation of the ECHR into domestic legislation in 2003 has not brought about any specific measure or modification of domestic law in relation to education.[16]

15. The text of Article 2 of Protocol 1 provides that "*No person shall be denied the right to education"* before stipulating that the State must respect parental rights in education "*in the exercise of any functions which it assumes in relation to education and to teaching…"*.

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[12] See fn 7 above. In his Supreme Court Judgment, Mr Justice Fennelly stated in relation to the education system: "*Neither national independence nor the Constitution of 1937 led to any essential change to this structure, which, at the date of the events with which this case is concerned, had endured for more than one hundred and forty years. Following independence, there was, of course, greater emphasis on nationalism, and on Irish language and culture. But there was little or no change in the system*," at para. 19.

[13] In *Crowley v Ireland* [1980] IR 102, the obligation of the State to "provide for" free primary education was interpreted to confer a right on a child so entitled to receive primary education.

[14] *Ibid.*.

[15] In his Supreme Court Judgment, Mr Justice Hardiman refers with approval to the Judgment of Kenny J in *Crowley v Ireland* where he observes in relation to primary education: *"Thus, the enormous power which control of education gives was denied to the State; there was interposed between the State and the child the manager or the committee or board of management."* He also refers to the "*belated*" introduction of the Education Act 1998, which partially placed the provision of education on a statutory footing.

[16] Ireland also ratified Protocol 1 of the ECHR on 25 February 1953.

As already referred to the Irish Constitution does establish such a "right" to education, at least as pertains to primary education.[17]

16. The Court has previously held that the provision of education must be effective. In *Cyprus v Turkey*[18] the Court found a breach of Article 2 of Protocol 1 insofar as it was "unrealistic" to expect children to switch languages once they reached secondary school. The key point here was that the Turkish authorities "*assumed responsibility for the provision of Greek-language primary schooling"*. As stated, in Ireland, the State has responsibility under Article 42 of the Constitution in providing "for" primary education. Effectively, education provision in primary schools is almost wholly delivered through denominational schools, particularly in rural areas.

17. In *Costello-Roberts v United Kingdom*[19] the Court cited Article 28 of the Convention on the Rights of the Child in aid of its interpretation of Article 2 of Protocol 1. It held that "*the fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, no distinction being made between the two"* and that "*… the Court agrees with the Applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals*."[20]

18. The "respect" for parental (philosophical) convictions referred to in Article 2 of Protocol 1, was upheld by the Court in *Campbell and Cosans v the United Kingdom*[21] (which also concerned Article 3 rights) where the Court stated that this obligation to respect "*implies some positive obligation on the part of the State … This being so, the duty to respect parental convictions in this sphere cannot be overridden by the alleged necessity of striking a balance between the conflicting views involved, nor is the Government's policy to move gradually towards the abolition of corporal punishment in itself sufficient to comply with this duty.*"[22]

19. In the IHRC policy report, *Religion and Education: A Human Rights Perspective*, one of the important observations made was that the State should reform the education system to ensure compliance with certain human rights standards in the delivery of public education.[23] This was by reference to standards under relevant UN conventions and the ECHR, in particular Article 2 of Protocol 1 regarding religious and philosophical convictions. In addition, it was found that the present mechanisms to deal with alleged breaches of, *inter alia*, Article 2 of Protocol 1 are not sufficiently accessible and robust to deal effectively with such complaints.[24]

20. A serious question arises in the present application as to whether the State has maintained a sufficient level of control over publicly funded national schools to ensure that the rights enshrined under the Convention, namely Articles 3, 8, 13 and Article 2 of Protocol 1, are fully upheld within the education system.

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[17] *Supra* fn 13.
[18] (2002) 35 EHRR 731.
[19](1993) 19 EHRR 112.
[20] *Ibid*., at para 27.
[21] (1982) 24 EHRR 293.
[22] *Ibid* at para. 37.
[23] *Religion and Education: A Human Rights Perspective*, Irish Human Rights Commission, May 2011, at pp 104-106.
[24] The Department of Education and Skills has published guidance on its website for parents and schools in relation to dealing with complaints against teachers. However, this guidance excludes child protection issues which are dealt with separately. *Brief Guidance for Parents who wish to make a Complaint about a Teacher or other staff members of a School*, available at *www.education.ie/servlet/blobservlet/ primary_complaints.doc*

The Rules for National Schools

21. Pursuant to its constitutional obligation to ensure each child receives a minimum education, the State has sought, to some extent, to regulate the primary school sector. The current Rules for National Schools ("the Rules") were promulgated by the Department of Education in 1965 and have been updated on a number of occasions since.[25] The Rules were not been displaced by the Education Act 1998, and they operate in tandem, although the relationship between the two is not defined.[26]

22. The legal status of the Rules is, therefore, unclear.[27] The matters addressed in the Rules extend over many aspects of the functioning of national schools, from the content of the curriculum to the employment, remuneration and conduct of teachers.

23. Specifically the Rules set out the functions of the Manager and the Patron of the School (Rules 14 to 16). In relation to the Manager the Rules state: *"The manager of a national school is charged with the direct government of the school, the appointment of the teachers, subject to the Minister's approval, their removal and the conducting of the necessary correspondence."* Failure to comply with the Rules could result in de-recognition of the school by the Minister.[28]
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24. The Rules also provide for the inspection of such schools by a person nominated by the Minister (Rules 11, 161 and 162). However the scope of inspections and the powers of Inspectors are circumscribed and largely relate to the quality of the teaching rather than school administration and management. It is unclear under the Rules whether the management of a school had an obligation to inform an Inspector of suspicions regarding the conduct of a teacher, where the conduct did not relate to the professional competence of the teacher in the class room.

25. Significantly, the Rules also address unsatisfactory work and "improper" conduct by teachers and confer on the Minister disciplinary functions in this regard.[29] However, it is

[25] These amendments do not appear to be readily accessible to the public and no consolidated version of the Rules has been published. In *O'Keeffe v Hickey & Ors* [2008] IESC 72, it was stated by Hardiman J that: "*At all time prior to [the Education Act 1998], and in particular at the time to which the plaintiff's complaint relates, the role of the State, and of the Minister, in relation to the education system (such as it was) was administered by and under the Rules for national schools and a great body of circular letters issued by the Department. In this, the authorities of the modern State were carrying on the traditions established in the 19th century under the Commissioners for National Education*." (at p. 8).

[26] The Education Act 1998 does not refer to the Rules for National Schools.

[27] Although the Rules are regarded by the Courts as binding, they do not have the status of either primary or secondary legislation, and therefore the binding nature of the Rules may be quasi contractual, insofar as funding for national schools is predicated on compliance with the Rules. See *Crowley v Ireland* [1980] 1 IR 102, where it was stated that: "*The management and conduct of national schools under the Department of Education is regulated by rules made by the Minister for Education*…".

[28] Rule 30(1) provides: *"Where the manager of a national school refuses or fails to have any of the official rules, or decisions made under them made by the Minister, complied with, the Minister may, subject to the provisions of this rule, withdraw recognition from the school."* All newly appointed managers are obliged by the Rules to give an undertaking in writing that the Rules for National Schools will be complied with (Rule15(4)). Ministerial approval is required to appoint a new teacher, and the Minister is also to be notified of any change in teaching staff (Rule 18).

[29] Rule 108 states as follows: *"(1)Where the Minister is satisfied that a teacher*
(a)has conducted himself improperly, or has failed or refused to comply with the Rules or to discharge his duties under the School Attendance Act 1926…the teacher is dealt with as the Minister may determine, Penal action, including prosecution, withdrawal of recognition in the capacity in which the teacher is serving, or in any capacity

notable that the Rules make no explicit reference to abuse of a child. There is no process set out whereby a manager who is concerned about improper conduct on the part of a teacher, may report, or must report the concern to the Department of Education and Skills, An Garda Síochána (police) or relevant social services (now the Health Service Executive). In addition the Rules provide no guidance as to what process is to be followed in investigating, remedying or otherwise addressing such improper conduct.[30]

School attendance

26. Rule 64(3)(a) provides for compulsory school attendance.[31] The School Attendance Act 1926 was not repealed until 2000. That Act made clear that there was a legal obligation on parents to send their children to primary school.[32] In addition to providing for monitoring and enforcing school attendance,[33] the Act rendered parents subject to criminal proceedings, monetary fines, and the possibility of having their children taken into State care if they failed to ensure their children attended school.[34]

27. In the Supreme Court Judgment it was suggested that there was no legal obligation on the Applicant's parents to send her to the national school she attended or another similar school.[35] It is respectfully submitted that this element of the Supreme Court Judgment, (which refers to the constitutional right of parents to educate their children at home, or to send their children to a school of their choice) did not refer to the criminal penalties under the 1926 Act or indeed reflect the every day reality of the education system in Ireland. In practice, a negligible number of children are home schooled, no doubt as there are very few parents with the means, competence or desire to do so. The references, therefore, to home schooling and private schooling are far outside the norm in relation to the education of children. This passage of the Judgment does not appear to take full cognisance of the compulsory nature of education, both by reference to the Constitution and by statute as outlined above.

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as a teacher, withdrawal or reduction of salary, may be taken when in the opinion of the Minister such action appears warranted."

[30] The State established a voluntary code of practice for reporting suspected child abuse in 1999, which has since been updated on a number of occasions and will be considered further below. Separately corporal punishment is dealt with in Rule 130 of the Rules. Corporal punishment was rendered an offence in criminal law under section 24 of the Non-Fatal Offences Against the Person Act, 1997.

[31] The Rule states: "*Every child who has attained the age of six years and has not attained the age of 14 years, and to every other child to whom the School Attendance Act 1926 is for the time being applied by virtue of an order made by the Minister, must attend school in accordance with the provisions of the Act unless there is a reasonable excuse, under its terms, for his non-attendance*."

[32] Section 4 of the Act states: "*The parent of every child to whom this Act applies shall, unless there is a reasonable excuse for not so doing, cause the child to attend a national or other suitable school on every day on which such school is open for secular instruction and for such time on every such day as shall be prescribed or sanctioned by the Minister in respect of such day*."

[33] Section 8 of the Act designated School Attendance Committees as the relevant monitoring and enforcing authorities in relation to school attendance.

[34] *Ibid*., at section 17.

[35] *Op. Cit*. Hardiman J stated: "*There is no suggestion, in this case, that Article 42.5 has any application. Considering, then, the balance of Article 42, it is asserted that children must receive 'a certain minimum education' but the parents are recognised as the natural primary educators. It is said that the parents are free to provide that education 'in their homes or in private schools or in schools recognized or established by the State'. This provision, in sub-Article 42.2, has a particular relevance because it disposes of a contention by the plaintiff that she was in some way obliged to attend Dunderrow School or a school of that type*."

28. In 1971 sexual abuse of a minor was addressed by the criminal law.[36] As indicated in the Statement of Facts, the complaint in the present case appears to centre around the fact that although the State had relevant criminal legislation in place in 1971, there was no system in place by which a school manager was required to act on a complaint of abuse against a teacher. As recorded by the Statement of Facts, the perpetrator of the abuse in this case was convicted in 1998 for 21 sample offences.[37]

The Law and Policy of the State in dealing with child protection

29. Regrettably Ireland has had a number of opportunities to consider its approach to the protection of children in the context of revelations of systemic abuse, including sexual abuse over the past number of years.[38] Most recently, the Report by the Commission of Investigation into Catholic Diocese of Cloyne[39] ("the Cloyne Report") reported on incidents of alleged sexual abuse of children by a number of priests and how the respective Church and State authorities dealt with the allegations in the period from 1996 to 2009. The Report is of relevance insofar as it highlights significant gaps in the system of child protection that persist to the present day, including the inadequacies of State measures to prevent and address child abuse.[40]

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[36] A person who sexually abused a girl under ten years of age was guilty of a felony under Section 50, Offences Against the Person Act, 1861. A differing sentence was applied to abuse of a girl under twelve years of age (Section 51) of the 1861 Act or or an attempt to engage in such abuse (Section 52). Under Section 1 of the Criminal Law Amendment Act 1935, "*defilement of a girl*" less than fifteen years was a strict liability offence (felony) while defilement of a girl between fifteen and seventeen years was a misdemeanor and could be tried summarily (Section 2). The law in relation to sexual offences has been amended significantly since that time, largely in relation to sentencing - see Criminal Law (Rape) Act 1981, Criminal Law (Rape) (Amendment) Act 1990, and the Sex Offenders Act 2001. Such amendments largely deal with imposing more severe sentences, and equalising the penalties for an assault on a boy or girl. Complaints of sexual abuse of a child by a third party (not a family member) in the 1970s could have formed the basis for a criminal prosecution, and if proved, a custodial sentence would have followed. It is noted that the constitutional protection of the marital family, and the absence of a separately enshrined constitutional protection for children, has caused difficulties for the investigation and reporting of allegations of interfamilial child abuse. See for instance *Kilkenny Incest Investigation*: Report Presented to Mr. Brendan Howlin T.D. Minister for Health (Dublin, Stationery Office, 1993), which recommended a constitutional amendment to include a statement of the constitutional rights of the child (at p. 96).

[37] It is however unclear whether the criminal charges on which the school principal was tried related to the Applicant or not.

[38] The major investigation reports in relation to the abuse of children in the State include the following: *Kilkenny Incest Investigation*: Report Presented to Mr. Brendan Howlin T.D. Minister for Health (Dublin, Stationery Office, 1993). *The Report of the Commission to Inquire into Child Abuse* (Government Publications, 2009) ("The Ryan Report"). In relation to the treatment of allegations of child abuse by the Roman Catholic Authorities and the State the following reports have been completed: *The Ferns Inquiry*, 2005, *The Report of the Inquiry into the Catholic Archdiocese of Dublin*, July 2009 and the *Report into the Diocese of Cloyne*, December 2010. For a comprehensive review of those reports and the human rights obligations of the State see also Holohan C., *In Plain Sight*, published by Amnesty International, September 2011. Available at *www.amnesty.ie*

[39] See *supra* fn 39.

[40] The report states "*The Commission considers that the health authorities have limited powers in relation to extra-familial abuse of children. It is clear that there is disagreement between the Office of the Minister for Children and the HSE about the extent of the powers available (see Chapter 6). The Commission recognises that there are difficulties in granting further powers to the HSE but it is concerned that a number of bodies, including the Church, may rely on the HSE to deal with alleged perpetrators of child sexual abuse when the HSE, in reality, does not have the power to do so effectively*." (at para. 1.69). The Report also points to legal impediments to the exchange of "soft information" in relation to suspicions of child abuse, and the failure of the Government to legislate in this area (at para. 1.70). The Report comes to the following conclusion: "… *the Commission recognises that the primary responsibility for the protection of children rests with the State and it is not convinced that the State's laws and guidelines are sufficiently strong and clear for this task.*" (at para. 1.72).

30. One of the earliest reports to consider sexual abuse of children was by the Carrigan Committee established in 1930.[41] Evidence was provided to the Committee by the Commissioner of the Civic Guard in relation to the prevalence of sexual crime against children and the fact that such crime was not being prosecuted in many cases:

> *"We take the following statements from the memorandum and evidence of the Commissioner…That the moral outlook of the country had changed for the worse in recent years;*
> *That there was an alarming amount of sexual crime increasing yearly, a feature of which was the large number of cases of criminal interference with girls and children from 16 years downwards, including many cases of children under 10 years;*
> *That the police estimate that not 15 per cent, of such cases were prosecuted.."* [42]

The Report cites the reasons for the low rate of prosecution as being due to; the anxiety of parents to keep the matter secret; the reluctance of parents to expose their children to the ordeal of a court case; the difficulty of proof due to the private nature of the offence and the law of evidence which negated the weight to be attributed to the uncorroborated evidence of a child.

31. What is remarkable about the Carrigan Report is not alone its contents, but also the fact that a decision was made by the State not to make it public. A report prepared for the Commission to Inquire into Child Abuse,[43] citing the Carrigan Report, argues that awareness of the abuse of children or its implications was not a new phenomenon that arose during the 1990s.[44]

32. It was not until 1999 that the first comprehensive framework for child protection in the State was put in place with the publication of the *Child First Guidelines*. However, this document has never been placed on a statutory footing and remains a voluntary code of practice.[45] The Department of Education introduced its own guidelines for primary

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[41] *Report of the Committee on the Criminal Law Amendment Acts (1880-1885) and Juvenile Prostitution* (Dublin 1931). The Committee was established to inquire into whether certain aspects of the criminal law relating to "social morality" required amendment and whether any new legislation was required to deal with juvenile prostitution.
[42] *Ibid.*
[43] The Commission to Inquire into Child Abuse was established pursuant to the Commission to Inquire into Child Abuse Act, 2000 (as amended), which reported in 2009. The Committee was established to investigate and report on allegations of abuse against children in the State's industrial schools.
[44] Commission to Report into Child Abuse, Report by Dr Diarmuid Ferriter, St Patrick's, College, DCU, June 2006. Available at *http://www.childabusecommission.com/rpt/pdfs/CICA-VOL5-07A.pdf.* Dr Ferriter's report refers to extensive historical documentation and considers the development of child protection policies by the State to have been stymied. In this regard the Report points to the fact that *"it was not until 1976 that the Department of Health instigated a report on the non-accidental injury to children, but child abuse guidelines drawn up in 1987 only addressed abuse by a family member or carer*."(at p. 36).
[45] Department of Health and Children, *Children First: National Guidelines for the Protection and Welfare of Children* (Dublin: Stationary Office 1999). These Guidelines include guidance for schools dealing with concerns about child abuse. Revised Guidelines were published in 2011, but do not make significant amendments to the reporting arrangements that were already in place. It is notable that the Report of the Kilkenny Incest Inquiry, published in 1993, included a comprehensive list of recommendations to deal with child sexual abuse. A significant recommendation of that report was the introduction of mandatory reporting of all forms of child abuse. The report identified teachers and principals of schools as key professionals in this regard. This recommendation regarding mandatory reporting requirements has been reiterated in a number of inquiries and reports concerning child abuse, but has not been implemented to date.

schools on addressing child abuse in November 1991 which has been updated on a number of occasions since.[46]

33. The Children Act 1908 was the law governing child protection in the period relevant to the application herein.[47] It was noted, in the context of the Kilkenny Incest Inquiry, that the powers of the relevant social services at the time under that Act were extremely limited.[48] In particular the Act of 1908 clearly contemplates State intervention in the form of taking a child into care, and therefore was used in the context of inter-familial abuse, not abuse at the hands of a non-family actor. It follows that in circumstances where a child was being abused outside the family, the State could do little.

34. Thus, in a typical primary school in the 1970s, while child abuse was a criminal offence, school management had no official guidance on how to deal with allegations or suspicions of child abuse; schools were under no duty to report such allegations to another authority such as the Department of Education or the police; the social services (health boards)[49] had limited powers to deal with any allegations of such abuse and children and parents faced difficulties in making a complaint of abuse.

The domestic proceedings

35. The manner in which the Irish courts considered the Applicant's claim is important when considering the ECHR rights which are apparently engaged. In relation to the Article 3 claims, the Court has stated that the responsibility of a State is engaged in cases where it fails in its obligation under Article 1 to secure to everyone within its jurisdiction the rights and freedoms granted by the Convention.[50] In a number of cases the Court has held that the State can be held responsible for failing to take measures to prevent abuse by private actors. Thus in *A v United Kingdom*,[51] the fact that domestic law did not provide an

[46] *Child Protection, Guidelines and Procedures*, Department of Education and Science, March 2001. These guidelines include guidance on how schools should deal with suspected abuse occurring outside the school as well as suspected abuse by school employees. Of note in relation to alleged abuse by a teacher is the recent decision of the High Court in the case of *P v A Secondary School & Ors*, [2010] IEHC 189. This case concerned an allegation of abuse made by a former pupil of a school against a teacher. It was noted in the judgment that although the first allegation of abuse was made in 2001, it was not until 2006 that the relevant social services (the HSE) formally notified the school of the alleged abuse. The school then took immediate action to suspend the teacher, but because of the confusion within the social services concerning how to deal with the allegation of abuse, the teacher was able to bring proceedings by which the investigations by both the school and the HSE were successfully impugned.

[47] This legislation was not fully repealed until 2007 and was replaced by the Children Act 2001. Section 5 of the Children Act 2001 repealed the whole of the Children Act, 1908. Section 5 was partially commenced in 2004 by *The Children Act 2001 (Commencement) Order 2004 (S.I. No. 468 of 2004)* which repealed certain provisions of Part II of the Children Act, 1908 (sections 94, 96, 98 to 101, 102(1), 102(2), 111, 113 to 115, 121 and 123). The remainder of the Children Act 1908 (to the extent not previously repealed) was repealed in 2007, when the entire Children Act, 2001 was commenced by *The Children Act 2001 (Commencement) (No. 3) Order 2007 (S.I. No. 524/2007)* which provided that: "*The 23rd day of July 2007 is appointed as the day on which the Children Act 2001 (No. 24 of 2001) shall, in so far as it is not already in operation, come into operation*".

[48] *Op cit*. at pp 26-27.

[49] The Health Act 1970 established a number of regional authorities (health boards) to provide health and social services to the public. The Health Act 2004, established a central executive (the Health Services Executive) which assumed the functions of the previous health boards.

[50] *Costello-Roberts v UK* (1993) 19 EHRR 112; at para 26.

[51] (1998) 27 EHRR 611.

adequate deterrent to prevent abuse of a child by his step-father in the home constituted a breach of Article 3."[52]

36. This was repeated in *Z and others v United Kingdom*[53] (failure to place children on child protection register) and *E and others v United Kingdom*[54] where the question before the Court was "*whether [the local authority] took the steps reasonably available to them to protect [the children] from that abuse*."[55] In that case, the Court concluded that "*the pattern of lack of investigation, communication and co-operation by the relevant authorities must be regarded as having had a significant influence on the course of events and that proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered*".[56] The Court found that "*..failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State."*[57]

37. In a case concerning risk of abuse to children in a residential institution under Article 8, *Scozzari and Giunta v Italy*,[58] the Court held that knowledge of the perpetrator's criminal history should have prompted an increased level of supervision by the domestic court which had sanctioned the placement of the children. In another case the Court held that where there is no evidence that suspicion of child abuse was brought to the attention of the relevant authorities (such as complaints being brought) there will be no violation of Articles 3, 8 or 13.[59] The key test therefore involves prior knowledge of previous abuse or prior knowledge of claims of abuse which would require the State to take "*measures designed to ensure that individuals* [read children] *within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment".*[60]

38. Further, it is clear that a State may not avoid its obligation to safeguard Convention rights in its jurisdiction through delegating its functions to private bodies such as school patrons.[61] In *Costello-Roberts v United Kingdom* the fees of the pupils attending the private school were not supported by State funding, nor did the school receive any direct financial aid from the Government, but State responsibility for an alleged breach of Convention rights was nonetheless engaged.[62]

39. According to the Statement of Facts, the domestic proceedings in this Application were instituted in 1998, following the criminal conviction of the principal of the school on 21 sample charges. The Judgment of the High Court accepted that the proceedings were not statute barred. The facts of the case were not disputed. As noted, the manner in which the domestic proceedings were considered is of significance. In accordance with the jurisprudence of the Irish Courts, any constitutional claim against the Minister for

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[52] *Ibid*. The Court stated: "…*Article 1 …, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."* (at para. 22)
[53] (2001) EHRR 3. The Court found breaches of Articles 3 and 13.
[54] (2002) ECHR 769.
[55] *Ibid*. at para 92.
[56] *Ibid.* at para 10
[57] *Ibid.* at para 99.
[58] (2002) 35 EHRR 12.
[59] See *D.P. and J.C. v United Kingdom*, (2002) ECHR 663.
[60] *A v United Kingdom*, (1998) 27 EHRR 611.at para.22.
[61] *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, at para 27.
[62] *Ibid*. at para 7.

Education would have been considered last and only if necessary.[63] Further, the main constitutional claim took the form of a negligence action against the Minister. The Convention was not incorporated into Irish law at the time (nor directly since) and following the precedent in *W v Ireland (No.2)*,[64] there was no other constitutional remedy readily available, as it was accepted by the High Court, that "*the right to bodily integrity, is protected by the extensive provision in the law of tort"*.

40. In considering the claim under the law of tort, it is noted that neither the High Court nor the Supreme Court considered the Applicant's claim that the State (Minister for Education) was negligent "*arising out of the State's purported failure to put in place appropriate measures and procedures to detect and prevent sexual abuse by the first defendant.*".[65] Therefore the possible constitutional responsibility of the State for preventing or addressing sexual abuse in schools was never considered by the domestic Courts. The only claim that was considered against the State was that based on vicarious liability, largely a matter of private rather than public law and which does not directly depend or engage the constitutional obligations of the State.

41. While the Constitution recognises the rights to bodily integrity, privacy and primary education, all of which rights may be regarded in substance as having a counterpart in Articles 3, 8, 13 and Article 2 of Protocol 1 of the ECHR, the question arises as to whether domestic law (the Constitution, as supplemented by the law of tort) provides an adequate remedy for a breach of ECHR rights.

Remedies for breach of constitutional rights

42. While the Constitution is traditionally regarded as placing a fetter on the State from interfering with the individual's rights, it has also been recognised that there may be a cause of action for the interference with constitutional rights by a private individual. However, direct reliance on the Constitution to ground a cause of action has been circumscribed in a number of respects and there is a line of jurisprudence dealing with claims for damages against the State for alleged breaches of constitutional rights which is instructive in the present context.

43. The Courts have asserted that they have the power to assure rights through enforceable remedies. In *Byrne v Ireland* Walsh J expressed the view that:

> *"Where the People by the Constitution create rights against the State or impose duties on the State, a remedy to enforce those must be deemed to be also available."*[66]

44. However, despite this broad endorsement of the ability of the Courts to fashion a remedy for alleged breaches of constitutional rights, the development of this line of case law, it is submitted, has been less emphatic and indeed significant reservations exist, for reasons

[63] The rule was set out by O'Higgins CJ in *M v An Bord Uchtála* [1977] 2 I.R. 286 where he stated: "… *as a general rule the court should consider first whether the relief sought can be granted on the ground which does not raise a constitutional validity*".
[64] *W v Ireland (No.2)* [1997] 2 I.R. 141.
[65] *L. O'K v L.H., The Minister for Education and Science, Ireland and the Attorney General*, Judgment of Mr Justice de Valera, 20 January 2006.
[66] *Byrne v Ireland*, [1972] I.R. 241 at p.281.

discussed hereafter, as to the plenitude of the judicial remedial response in every case where a person's individual fundamental rights are alleged to have been breached.[67]

45. *Meskell v CIE* [68] appears to represent the clearest expression of the domestic courts' willingness to provide remedies for a breach of constitutional rights. In that case the Court found that a "horizontal" remedy could be granted against a private individual for breach of constitutional rights:

> *"….if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right that person is entitled to seek redress against the person or persons who have infringes that right."*

This case is illustrative of the Court "fashioning" a remedy to vindicate the individual's fundamental rights. As such, *Meskell* provides strong protection to an individual whose fundamental rights are infringed in circumstances where the State has failed to protect "protectable" rights.[69] However, it is generally accepted that the courts have been slow to give full force to the line of reasoning in *Meskell*. Arguably under *Meskell*, a claim that the State did not protect a "protectable" right, would fall to be considered not only under negligence and vicarious liability, but also by reference to the State's overriding obligation to vindicate constitutional rights. As noted in the Statement of Facts, this does not appear to have occurred in this case.

46. Indeed, in a number of cases following *Meskell* the Courts have been slow to provide separate remedies, outside the law of tort, for an alleged breach of constitutional rights. The most relevant case in the context of this application is that of *W v Ireland (No.2)*[70] which concerned a claim that the Attorney General (i.e. the State) had, *inter alia*, breached the plaintiff's constitutional right to bodily integrity by the failure of that Office to process an extradition warrant expeditiously. In considering the claim under the Constitution Costello P. accepted there was a right to bodily integrity, but considered that the State did not owe the Plaintiff the constitutional duty she contended for. However, Costello P. went on to consider whether, if such a constitutional duty did exist, an action for damages for its breach could be claimed:

> *"In approaching this issue (essentially one of constitutional construction) constitutionally guaranteed rights may, as the court's decisions show be divided into two distinct classes (a) those which, independently of the Constitution, are regulated*

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[67] For instance the leading text book on Irish Constitutional law states that *" In the aftermath of Meskell v CIE and in particular Walsh J's remark therein that constitutional rights can be protected or enforced by action 'Even though such action may not fit into any of the ordinary forms of action in either common law or equity', it was speculated that nominate torts such as assault, battery, libel and false imprisonment might disappear, to be replaced by 'innominate claim for infringement of personal rights'. In fact nothing so dramatic has occurred; instead the courts have tended to take the view that the law of tort generally provides adequate protection for personal rights and that it is only in those cases where common law remedies are inadequate or non-existent that an action based directly on the Constitution would arise*." Hogan & Whyte, *JM Kelly: The Irish Constitution*, 4th Ed,(Butterworths 2003) at p 1311.

[68] *Meskell v CIE* [1973] I.R. 121.

[69] Thus in *McKinley v Minister for Defence* [1992] 2 I.R. 333, the Supreme Court extended the medieval tort for action for loss of consortium to allow for a wife to sue in addition to a husband, on the basis of the right to equality under Article 40.1 of the Constitution. In *Walsh v Ireland*, Unreported, Supreme Court, 30 November 1994, the Court allowed the Plaintiff (a victim of mistaken identity) to sue the State for breach of constitutional rights after his arrest, charge and detention, without reference to tort law; see *also Conway v Irish National Teachers Organisation* [1991] 2 I.R. 305.

[70] *W v Ireland (No.2)* [1997] 2 I.R. 141.

and protected by law (common law and/or statutory law) and (b) those that are not so regulated and protected. In the first class are all those fundamental rights which the Constitution recognises that man has by virtue of his rational being antecedent to positive law and are rights which are regulated and protected by law in every State which values human rights. In this country there exists a large and complex body of laws which regulate the exercise and enjoyment of these basic rights, protect them against attack and provides compensation for their wrongful infringement…… the right which is in issue in this case, the right to bodily integrity, is protected by the extensive provision in the law of tort."[71]

47. In the context of the present application this line of reasoning was clearly followed, as recorded in the Statement of Facts, insofar as the possibility of a remedy in tort for breach of the Applicant's right to bodily integrity and privacy was sufficient to dispose of her claim against the State. Therefore, the issue became one based on the narrow concept of vicarious liability, rather than the possibly broader duty of the State to vindicate the fundamental rights of a child (such as the rights to bodily integrity, education and to be free of inhuman and degrading treatment) in the public education system. This in turn raises the question whether in fact the law of torts as applied in the High Court and the Supreme Court was adequate to protect the substance of the Applicant's rights under the Convention, to the extent that the substance of those rights is purported to be protected under the Constitution.[72]

48. The approach adopted in *W v Ireland (No.2)* has been criticised as possibly setting the bar too high for a potential plaintiff seeking to vindicate their constitutional rights through the Courts:

"The present state of Irish law is less then ideal. The courts having established the principle that the infringement of constitutional rights, by the State or by private individuals, warrants a remedy in the form of damages or an injunction, have baulked at the prospect of replacing the pre-existing statutory and common law remedies by a new constitutional remedial regime but they have not repudiated the principle. Instead they have sought to mitigate its practical effects by looking to the pre-existing law as the medium through which the constitutional remedy should be channelled in most cases. The result is that all the conceptual difficulties relating to the principle are left unanswered (though their range of application has been reduced), whilst new difficulties arise on sub issues as when a particular tort 'is basically ineffective to protect [the plaintiff's] constitutional rights'." [73]

49. The same authors go on to observe that the law of tort is not well suited to vindicate the individual's rights as tort focuses "*on the defendant's conduct rather than the plaintiff's rights*."[74] In cases such as the present, at the domestic level the various duties arising from relationships as recognised in tort law (negligence and vicarious liability) may be definitive in relation to the obligations of the State, rather than ensuring separate

[71] *W v Ireland (No.2)* [1997] 2 I.R. 141.
[72] The separate issue of whether the ECHR could be pleaded or relied on the domestic law is considered briefly below.
[73] McMahon and Binchy, *Law of Torts*, 3rd Ed., (Butterworths, 2000), at para. 1.60. See also Ward P., *Tort Law in Ireland*, (Wolters Kluwer 2010), at pp 26 to 30.
[74] *Ibid*. at para. 1.70

consideration of the nature of the relationship between the State and the individual under the Constitution where fundamental rights are invoked.[75]

50. The Court has previously held that there will be a violation of Article 13 where an individual does not have available to them an appropriate means of obtaining a determination of their allegations against a State authority nor the possibility of obtaining an enforceable award of compensation for the damage suffered as a result of the breach of their Convention rights.[76]

51. It is recalled that in *McFarlane v Ireland*,[77] the State, in its defence, referred to the possibility of the Applicant in that case seeking a remedy for a breach of his Constitutional rights. However, in its analysis the Court found that although the remedy existed in theory the State could not point to an example of the remedy operating in practice and on that basis determined that it was not effective for the purpose of Article 13 when read in conjunction with Article 6. The emphasis in that case was on the possibility of an Applicant, in seeking to vindicate constitutional rights, being able to pursue a remedy that was realistically available and not in practice illusory.

52. In relation to any claims concerning delay, it is recalled that the Grand Chamber in *McFarlane v Ireland* addressed the presence or absence of "*a specifically introduced remedy for delay*" in a constitutional system.[78] As noted in *McFarlane*, Judges by virtue of their constitutional independence enjoy immunity of suit from any claim for damages for delay, this immunity being further extended to the State. The "*17-month period required to approve the High Court judgment*" in that case was found to be blameworthy under Article 6 § 1.[79] The Court further found that the constitutional remedies advanced by the State in its defence were theoretical rather than practical under Article 13.[80]

53. The State has indicated it is committed to addressing the issue of judicial delay in its Action Plan submitted to the Committee of Ministers in response to the Court's Judgment in *McFarlane*. Notwithstanding this welcome response, it is noted that the length of proceedings as recorded in the Statement of Facts in this case lasted 10 years and was ultimately unsuccessful. Further, at the time of the Superior Court hearings and judgments in the period 2004 to 2008 (when the Supreme Court Judgment was handed down), Article 35(2) of the Constitution continued to be the relevant provision providing as it does for the independence of all judges who are "*subject only to this Constitution and the law*." Statute law is subject to this constitutional provision and only indirectly addresses judicial delay in civil proceedings under Section 46 of the Courts and Court Officers Act 2002 which provides that a register of "postponed" Judgments be maintained. Otherwise, the issue is not directly addressed under Irish law.[81]

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[75] See also discussion of *Meskell v CIE* above.
[76] *Z and others v United Kingdom, op. cit.,*
[77] *McFarlane v Ireland*, Grand Chamber, 10 September 2010.
[78] *Ibid.* at paras 120 and 121.
[79] *Ibid.* at para 121.
[80] See para. 117 of the judgment where the Court stated that: *"the proposed remedy has therefore been available in theory for almost 25 years but has never been invoked and recent judicial dicta…would indicate that the availability of this remedy remains an open question*." *McFarlane* followed a number of other delay cases involving the State including *Doran v Ireland* [2003] ECHR 417, where the Court found a violation of Article 6(1) and Article 13 in respect of civil proceedings for negligence which lasted 8 years and 5 months.
[81] While the Minister for Justice, Equality and Defence may make regulations under Section 46 of that Act, such secondary legislation is again on a sub-constitutional basis.

54. Although not directly relevant to the Application before this Court, for completeness it is noted that although Ireland ratified the Convention in 1953, it did not give effect to the Convention in domestic law until 2003.[82]

[82] The European Convention on Human Rights Act 2003 (ECHRA) came into effect in the Irish domestic legal order on 31 December 2003. Prior to 2004, a Plaintiff could thus not place direct reliance on the ECHR to ground a claim against the State, or an emanation of the State. It is also significant to consider the manner in which the ECHR was incorporated into Irish law and the remedies available thereunder for an alleged breach of the ECHR. Sections 3 and 5 are the only provisions of the 2003 Act which may be directly pleaded before the Courts and there would be serious barriers to doing so if the respondent is not considered to be an "*organ of the State*". Section 3 of the 2003 Act poses significant difficulties for a Plaintiff in a similar situation to the current Applicant, as it is not clear whether a national school would be regarded as an organ of the State within the meaning of Section 1 of the Act by the Courts, and where the availability of any other remedy in damages would be sufficient to exclude a remedy under the Act. In addition, the one year time limit under the Act (unlike the time limit for bringing an action in tort for personal injuries), does not begin to run from the date of accrual of the knowledge of the cause of the injury. Under section 3, a case must be taken within one year of the alleged contravention, although this may be extended by the Court in the interests of justice. Section 5 refers to declarations of incompatibility, (which do not impact on the validity or application of the legislation or rule of law concerned in domestic law) similar to the United Kingdom's Human Rights Act 1998. As set out by the Court in *Burden and Burden v United Kingdom, Judgment 12 December 2006* such declaratory relief does not constitute an effective remedy.