

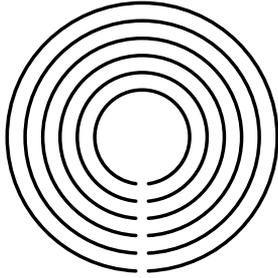


LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

ASPECTS OF INTERCOUNTRY ADOPTION LAW

[LRC 89 – 2008]



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Law Reform Commission 2008

FIRST PUBLISHED
February 2008

ISSN 1393-3132

THE LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 130 documents containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

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ACKNOWLEDGEMENTS

The Commission would like to thank in particular the following people and organisations for their assistance in the preparation of this Report.

Marian Bennett, Chairperson, Council of Irish Adoption Agencies
Hervé Boéchat, Co-ordinator, International Social Service, Geneva, Switzerland
Elizabeth Canavan, Deputy Director, Office of the Minister of State for Children
John Collins, Chief Executive Officer, Adoption Board (An Bord Uchtála)
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The Hon Mr. Justice John MacMenamin, Judge of the High Court of Ireland
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Geoffrey Shannon, Solicitor, Chairman, Adoption Board (An Bord Uchtála)

Full responsibility for the content of this Report, however, lies with the Commission.

TABLE OF CONTENTS

Table of Legislation	x
Table of Cases	xiii
INTRODUCTION	1
A The Attorney General's Request	1
B Context for the Request	1
C Outline of the Report	3
CHAPTER 1 INTERCOUNTRY ADOPTION	5
A Introduction	5
B The Concept of Adoption in Ireland	5
(1) The Effects of Adoption	7
C The Dowse case	8
B Intercountry Adoption and Terminology	11
(1) Intercountry (Hague Convention) Adoption	11
(2) Recommendation	12
(3) Domestic Adoption	13
(4) Foreign Adoption	13
(5) Bilateral Treaty Adoption	21
(6) International Adoption	21
C Intercountry Adoption in Ireland and Statistics	22
(1) Current Irish and Global Statistics	22
(2) Irish Statistics on Foreign Adoptions	24
D Guiding Principles	26
(1) Best interests of the child	26
(2) Discussion of submissions in the context of the best interests of the child	31
(3) Equality	32
(4) Presumption in favour of recognition	33
(5) Duties of the State and Issues of Practicability	36
CHAPTER 2 STATUS AND RIGHTS OF THE CHILD	39
A Introduction	39
B Cancellation of Adoption	39
(1) Cancellation of Foreign Adoption Registration	39
C Citizenship	44
(1) Interaction of citizenship and adoption law in Ireland	44
(2) Recent Developments in other Jurisdictions	47
(3) Recommendation	51
D Rights of the Child	51
(1) Overview	51
(2) Recent case law	52
(3) The international reach of Irish constitutional law	53
(4) Private international law considerations	55

	(5) Recommendation	57
CHAPTER 3	DUTIES OF PARENTS AND THE STATE	59
	A Introduction	59
	B Overview	59
	(1) Recommendation	62
	C Role of the Office of the Attorney General	62
	(1) Recommendations	64
CHAPTER 4	RELATED ISSUES	65
	A Introduction	65
	B Documentation and Guidelines	65
	(1) Irish Law	65
	(2) Hague Convention and other Jurisdictions	67
	(3) Current Irish Practices	71
	(4) 1961 Hague Apostille Convention	75
	(5) Recommendation	77
	(6) 1996 Hague Convention on the International Protection of Children	77
	(7) Recommendation	80
	(8) Independent legal advice	80
	(9) Recommendation	80
	(10) Designated High Court Judge in Adoption cases	80
	(11) Recommendation	81
	C Pre-Adoption and Post-Adoption Matters	82
	(1) Migrant Natural Mothers in Ireland	82
	(2) Post-adoption support services	85
	(3) Recommendation	90
	D Differences between Domestic and Intercountry Adoption in Ireland	90
	(1) The Child	90
	(2) Consent of Natural Parents	91
	(3) Fees	91
	(4) Statutory right for prospective adopters to assessment	92
	(5) Discussion	93
	(6) Recommendation	95
CHAPTER 5	SUMMARY OF RECOMMENDATIONS	97

TABLE OF LEGISLATION

Adoption (Intercountry Aspects) Act 1999	1999 c. 18	Eng
Adoption (Intercountry) Act 1997	1997 No. 109	NZ
Adoption Act 1974	No. 24/1974	Irl
Adoption Act 1988	No. 30/1988	Irl
Adoption Act 1991	No. 14/1991	Irl
Adoption Act 1998	No. 10/1998	Irl
Adoption and Children (Scotland) Act 2007	2007 asp 4	Scot
Adoption and Children Act 2002	2002 c. 38	Eng
Adoption Rules	SI No. 170/1990	Irl
Australian Citizenship Act 2007	No. 20/2007	Aus
British Nationality Act 1981	1981 c. 61	Eng
Child Abduction and Enforcement of Custody Orders Act 1991	No. 6/1991	Irl
Child Care Act 1991	No. 17/1991	Irl
Children Act 1989	1989 c. 41	Eng
Children and Adoption Act 2006	2006 c. 20	Eng
Children's Act 2005	No. 38 of 2005	SA
Citizenship Act (adoption) 2007	2007 C-14	Can
Civil Registration Act 2004	No. 3/2004	Irl
Diplomatic and Consular Officers (Provision of Services) Act 1993	No. 33/1993	Irl
European Convention on Human Rights Act 2003	No. 20/2003	Irl
Family Law (Hague Convention on Intercountry Adoption) Regulations 1998	1998 No. 249	Aus
Family Law Act 1975	No. 53/1975	Aus
Finance Act 2001	No. 7/2001	Irl
Guardianship of Infants Act 1964	No. 7/1964	Irl
Investment Funds, Companies and Miscellaneous Provisions Act 2006	No. 41/2006	Irl
Irish Nationality and Citizenship Act 1956	No. 26/1956	Irl
Irish Nationality and Citizenship Act 2001	No. 15/2001	Irl
Irish Nationality and Citizenship Act 2004	No. 38/2004	Irl
Law Reform Commission Act 1975	No. 3/1975	Irl
Legitimacy Act 1931	No. 13/1931	Irl
Ministers and Secretaries Act 1924	No. 16/1924	Irl

Ombudsman for Children Act 2002	No. 22/2002	Irl
Protection of Children (Hague Convention) Act 2000	No. 37/2000	Irl
Rules of the Superior Courts (Proof of Foreign, Diplomatic, Consular and Public Documents) 1999	SI No. 3/1999	Irl
Rules of the Superior Courts 1986	SI No. 15/1986	Irl
Statutory Declarations Act 1938	No. 37/1938	Irl
The Adoption (Designation of Overseas Adoptions) Order 1973	SI 1973 No. 19	Eng
The Intercountry Adoption (Hague Convention) Regulations 2003	SI 2003 No. 118	Eng

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Al Habtoor v Fotheringham	[2001] 1 FLR 951	Eng
Attorney General v Hamilton (No. 1)	[1993] 2 IR 250	Irl
B and B v An Bord Uchtala	[1997] 1 ILRM 15	Irl
B v B	[1975] IR 61	Irl
Bode v Minister for Justice, Equality and Law Reform	[2006] IEHC 341	Irl
De Gree v Webb	[2007] SCA 87 (RSA)	SA
Dharamal v Lord Holmpatrick	[1935] IR 760	Irl
Dowse v An Bord Uchtala	[2006] IEHC 64, [2006] 2 IR 507, [2007] 1 ILRM 81	Irl
Dowse v An Bord Uchtala	[2006] IEHC 65, [2006] 2 IR 535, [2007] 1 ILRM 106	Irl
Eastern Health Board v An Bord Uchtala	[1994] 3 IR 207	Irl
EB v France	Appl. No. 43546/02 (22 January 2008)	ECtHR
FN and EB v CO	[2004] 4 IR 311	Irl
Foyle Health and Social Services Trust v C and C	[2006] IEHC 448	Irl
Frette v France	[2003] FLR 9	ECtHR
In re Tamburrini	[1944] IR 508	Irl
Kearns v France	Appl. No. 35991/04 (10 January 2008)	ECtHR
Keegan v Ireland	(1994) 18 EHRR 342	ECtHR
London Borough of Sutton v M	[2002] 4 IR 488	Irl
M v An Bord Uchtala	[1977] IR 287	Irl
MacD v MacD	(1979) 114 ILTR 60	Eng
Marinos v Marinos	[2007] EWHC 2047	Eng
Mark v Mark	[2005] UKHL 42	Eng
MC v Delegacion Provincial de Malaga	[1999] 2 IR 363	Irl
McKenna v Attorney General	[1999] 1 FC 401 (CA)	Can
McLoughlin v Minister for Social Welfare	[1958] IR 1	Irl
MF v An Bord Uchtala	[1991] ILRM 399	Irl
Minister of Welfare and Population Development v Fitzpatrick	2000 (3) SA 422	SA

Netherlands v Sweden	[1958] ICJ Rep 55	ICJ
North Western Health Board v HW	[2001] 3 IR 622	Irl
Northern Area Health Board v An Bord Uchtala	[2002] 4 IR 252	Irl
PAS v FS	[2005] 1 ILRM 306	Irl
Pla and Puncernau v Andorra	Appl. No. 69498/01 (13 July 2004)	ECtHR
R (Thomson) v Secretary of State for Education and Skills	[2005] EWHC 1378 (Admin)	Eng
R v Barnet London Borough Council, ex parte Shah	[1983] 2 AC 309	Eng
Re B (Adoption Order: Nationality)	[1999] 1 FLR 907	Eng
Re K (Adoption and Wardship)	[1997] 2 FLR 221	Eng
Re K (Adoption and Wardship)	[1997] 2 FLR 230	Eng
Re the Adoption No. 2 Bill, 1987	[1989] IR 622	Irl
Re Valentine's Settlement	[1965] Ch 831	Eng
Ryan v Attorney General	[1965] IR 294	Irl
SW, applicant	[1957] IR 178	Irl
T v O	[2007] IEHC 326	Irl
The State (Goertz) v Minister for Justice	[1948] IR 45	Irl
Wagner and JMWL v Luxembourg	Appl. No. 76240/01 (28 June 2007)	ECtHR

INTRODUCTION

A The Attorney General's Request

1. On 17 November 2005, the then Attorney General, Mr. Rory Brady SC, acting in accordance with section 4(2)(c) of the *Law Reform Commission Act 1975*, requested the Commission to “consider and recommend reforms in the laws of the State” concerning:

- a. The status and rights (including citizenship rights) of a child resident outside the State who is the subject of a foreign adoption order made in favour of an Irish citizen or citizens.
- b. The most effective manner of securing the performance of the constitutional and legal duties of the adoptive parents in respect of such a child.
- c. The most effective manner of ensuring the fulfilment of the duties of the State in respect of such a child arising from Article 40.3 and Article 42.5 of the Constitution.¹

2. This Report contains the Commission's final recommendations in response to that request.

B Context for the Request

3. This Report follows a *Consultation Paper on Aspects of Intercountry Adoption Law* which was published in March 2007.² The

¹ Article 40.3 of the Constitution of Ireland states:

“1° The State guarantees in its laws to respect, and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen.”

“2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

Article 42.5 states: “In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptable rights of the child.”

² Law Reform Commission *Consultation Paper on Aspects of Intercountry Adoption Law* (LRC CP 43-2007) available at www.lawreform.ie. This will be referred to as “the Consultation Paper” throughout this Report. See also McNamara “The Law

Commission invited submissions from members of the public and is very grateful to all those interested persons and organisations that considered the provisional recommendations and prepared written submissions in response.³ The Commission also hosted a number of consultative meetings with relevant organisations and interested persons to discuss the provisional recommendations made in the Consultation Paper. Following a consideration of the written and oral submissions received, this Report contains the Commission’s final recommendations.

4. The Attorney General’s request to the Commission followed the 2006 High Court judgment in *Dowse v An Bord Uchtála*.⁴ This case concerned the adoption of an Indonesian child in Indonesia by an Irish citizen and his wife while they were resident in that country. The adoptive parents were unable to care for the child on a practical day to day basis and the child was eventually placed in an orphanage. The Indonesian adoption order was recognised as being compliant with Irish adoption law by the Irish Adoption Board and registered as a foreign adoption in the Register of Foreign Adoptions. This allowed the child to acquire Irish citizenship deriving from his adoptive father. The High Court had to consider what effect the actions of the adoptive parents had on the recognition and registration of the adoption order in Ireland. As will be examined later, a “foreign adoption” made abroad, which complies with the provisions of Irish adoption legislation, is recognised as if it is an adoption order granted in Ireland. As a result, it has the same legal effect as an Irish adoption order.

5. The Commission is conscious of the recent work carried out by the Department of Health and Children under the auspices of the Office of the Minister of State for Children, and the Office of the Attorney General in preparing the draft legislation to incorporate the 1993 *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*.⁵ The Government Legislation Programme for the Spring Session

Reform Commission’s Consultation Paper on Aspects of Intercountry Adoption Law” [2007] 4 IJFL 7.

³ See acknowledgements above.

⁴ [2006] IEHC 64, [2006] 2 IR 507. The case is reported as *Attorney General v Dowse* in [2007] 1 ILRM 81. A separate judgment was delivered by MacMenamin J which concerned the extent to which the facts of the case should be put into the public domain. Under section 7(4) of the *Adoption Act 1991*, proceedings concerning directions of the High Court in relation to the Register of Foreign Adoptions, shall, if the court so determines, be heard otherwise than in public. See *Dowse v An Bord Uchtála* [2006] IEHC 65, [2006] 2 IR 535, [2007] 1 ILRM 106. See also discussion of this case and the *in camera* rule in family law cases in the Law Reform Commission *Consultation Paper on the Consolidation and Reform of the Courts Acts* (LRC CP 46-2007) at 131-141. This Report will subsequently refer to *Dowse v An Bord Uchtála* as “the *Dowse* case”.

⁵ Available at www.hcch.net/index_en.php.

2008 lists an *Adoption Bill* which the Government expects to publish during 2008.⁶ The Commission is also aware of current developments that suggest that a referendum concerning children and their rights will be held in the near future.⁷ The proposed wording of the amendment to the Constitution currently includes a provision which would allow for the voluntary placement of children for adoption, even those of married parents.⁸

C Outline of the Report

6. In Chapter 1 the Commission discusses adoption, intercountry adoption and the decision of the High Court in the *Dowse* case. Particular reference is made to the terminology used to describe adoptions with international elements. The Commission also discusses the guiding principles which have informed its consideration of the Attorney General's request.

7. In Chapter 2 the Commission discusses the cancellation of an adoption order in Ireland in light of the *Dowse* case. The Commission provides its recommendation on the first question raised by the Attorney General, concerning the status and rights, including citizenship rights, of a child resident outside the State who is the subject of a foreign adoption order made in favour of an Irish citizen or citizens. Relevant international law is also discussed in this context.

8. In Chapter 3 the Commission discusses the duties of parents and of the State regarding an Irish citizen child who is resident in a foreign

⁶ This was previously referred to as the *Adoption (Hague Convention and Adoption Authority) Bill*. The stated aim of the *Adoption Bill 2008* is: "To provide for matters relating to the adoption of children, to give force of law to the Convention on Protection of Children and Co-operation in respect of intercountry adoption, to provide for the making and recognition of intercountry adoptions in accordance with bilateral agreements, to dissolve An Bord Uchtála and to establish the Adoption Authority of Ireland, to repeal the *Adoption Acts 1952-1998* and to make consequential amendments to other Acts". See Office of the Government Chief Whip, Department of the Taoiseach.

Available at www.taoiseach.gov.ie/index.asp?docID=2579.

⁷ See comments of An Taoiseach Mr. Bertie Ahern TD, *Irish Times* 20 October 2007 at 11. On 6 December 2007 a Joint Oireachtas Committee on the Constitutional Amendment on Children convened and it is chaired by Mrs. Mary O'Rourke TD. The Committee's task is to consider the precise wording of a proposed amendment to the Constitution concerning the rights of children. See www.oireachtas.ie.

⁸ On 19 February 2007, the Government published the *Twenty Eighth Amendment to the Constitution Bill 2007*. The text of a proposed amendment to the Constitution can be found in the Consultation Paper at 69-70, fn 144. This wording may be superseded by the forthcoming proposals of the Joint Oireachtas Committee on the Constitutional Amendment on Children.

jurisdiction and sets out its recommendations on the second and third questions raised by the Attorney General's request. These concern the most effective manner of securing the performance of the constitutional and legal duties of the adoptive parents in respect of such a child, and the most effective manner of ensuring the fulfilment of the duties of the State in respect of such a child under Articles 40.3 and 42.5 of the Constitution.

9. In Chapter 4 the Commission discusses a number of issues related to the Attorney General's request, including procedural aspects of intercountry adoption law such as proof of the validity of intercountry or foreign adoptions as well as pre-adoption and post-adoption matters.

10. Chapter 5 contains a summary of the Commission's final recommendations.

CHAPTER 1 INTERCOUNTRY ADOPTION

A Introduction

1.01 In this chapter, the Commission considers the concept of adoption in Ireland and the various types of adoption which have an international element. Part B gives an account of the particular form of adoption which has operated in Ireland since the enactment of the *Adoption Act 1952*. Part C contains a brief overview of the High Court judgment in the *Dowse* case. In Part D, the Commission discusses intercountry adoption and the terminology which is used to describe adoptions which have international elements. Part E contains a discussion of the most recent intercountry adoption statistics and international demographic research concerning the migration of children in intercountry adoption situations. In Part F, the main guiding principles which have informed the Commission in its consideration of the request are discussed.

B The Concept of Adoption in Ireland

1.02 Adoption can be described as “the institutionalised social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old one, either wholly or in part.”¹ It is a statute based social and legal concept and exists because situations may arise where it is not possible for natural parents to fulfil their role as parents, often due to difficult personal circumstances.² Therefore, parental rights and responsibilities may be exercised by other persons so that the right of the child to be cared for is enforced in practice. In the Supreme Court case *B*

¹ See JHA van Loon *Report on Intercountry Adoption* Preliminary document no.1 of April 1990, in Proceedings of 17th Session of the Hague Conference, Tome II at paragraph 26 cited in the *Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993* (LRC 58-1998) at 1.

² Adoption is also described as “a social and legal protective measure for children”. This definition is provided by the Geneva based International Social Service as referred to by the Council of Irish Adoption Agencies in its *Ethical Framework for Adoption in Ireland* (forthcoming) at 6.

and *B v An Bord Uchtála*,³ Murphy J noted that while the Adoption Acts, in particular the *Adoption Act 1991*, do not define the word “adoption”, it is presumably the concept of “voluntarily taking into a relationship a child and treating it as one’s own”, which is known and practised throughout the world. It is also worth emphasising that there is no recognisable legal or human right to adopt a child.⁴ Adoption must be a child-centred service designed to provide a child with a family, if they are in need of one. The aim of domestic or intercountry adoption must be to find the best parents for the child, and not to find the most suitable child for prospective adoptive parents.⁵ This is not to suggest that the feelings and desires of the prospective adopters are of no concern; of course, they are of great importance. Ultimately, however, the entire adoption process, the order and manner in which events occur within matching and placement so that the child is cared for by suitable parents, should reflect a model which is child-centred.⁶

³ [1997] 1 ILRM 15 at 26. O’Halloran notes that the traditional Irish word for adoption is “föesam” which means “taking into protection”. He points out that forms of adoption with kinship and allegiance motives were common under the Brehon Laws. See O’Halloran *Adoption Law and Practice* (Butterworth Ireland Ltd 1992) at 3-4. The Irish for the Adoption Board is An Bord Uchtála. “Uchtála” is derived from the verb “uchtú” which can be translated as meaning “to carry”. See Ó’Dónaill *Foclóir Gaeilge-Béarla* (Oifig an tSoláthair 1977) at 1294-1295. This phrase is now enshrined in the Constitution following the *Sixth Amendment of the Constitution Act 1979*. The amendment ensured that adoption orders made by the Adoption Board could not be declared invalid because they were not made by a court. Article 37.2 of the Constitution refers to the adoption of a person as “uchtáil ar dhuine”. For a historical perspective on adoption see Bridge and Swindells *Adoption: The Modern Law* (Family Law 2003), chapter 1. In England and Wales, which was one of the first jurisdictions in the world to introduce formal adoption in its statute law, adoption is described as: “the process by which a child’s legal parentage is entirely and irrevocably transferred from one set of adults, usually the birth parents, and vested in other adults, namely the adoptive parents”. See Lowe and Douglas *Bromley’s Family Law* (10th edition Oxford University Press 2007) at 817.

⁴ For example in *Fretté v France* [2003] FLR 9 the European Court of Human Rights observed that Article 8 (right to family and private life) of the European Convention on Human Rights did not guarantee a right to adopt a child. This was affirmed in *EB v France* Application No. 43546/02, 22 January 2008.

⁵ See Law Reform Commission *Report on the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993* (LRC 58-1998) at 2-3 and Report of the Department of Health and Children *Adoption: Legislation: 2003 Consultation and Proposals for Change* (Stationery Office 2005) at 13. Available at

www.dohc.ie/publications/pdf/adoption_legislation_2003_consultation_and_proposal_s_for_change.pdf?direct=1

⁶ See Duncan “The Protection of Children’s Rights in Inter-Country Adoption” in Heffernan (ed) *Human Rights: A European Perspective* (Round Hall Press 1994) 326 at 331-332.

(I) The Effects of Adoption

1.03 The *Adoption Act 1952*, which contains the legal framework for adoption in Ireland, sets out the effect of an adoption order in terms of parental rights and duties. Section 24 of the 1952 Act states that on the making of an adoption order:

“(a) the child shall be considered with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters born to him, her or them in lawful wedlock;

(b) the mother or guardian shall lose all parental rights and be freed from all parental duties with respect to the child.”

1.04 It has been noted that this form of adoption “effectively and comprehensively severs the legal nexus between the natural parent and child” so that the natural parent will have no rights or responsibilities towards the child.⁷ Thus, for example, a pre-existing obligation under a maintenance order would be terminated unless the natural parent is the adopter.⁸ The adopted child would cease to have rights to the estate of the natural parents on intestacy. Such rights would be enforceable against the adoptive parents. Also, once an adoption order has been made, there is no statutory provision to enable the Adoption Board or a court to make an access order in favour of a natural parent or other blood relative which might actually enhance the overall welfare of the child by having more direct knowledge about their family background.⁹ This type of adoption is sometimes classified as “full” adoption since it involves a complete termination of the legal relationship between the child and its natural parents.¹⁰ In contrast, a “simple” adoption which is prevalent in other

⁷ Shannon *Child Law* (Thomson Round Hall 2005) at 266. Note that for the purposes of the Consultation Paper and this Report the terms “natural parent” and “adoptive parent” are predominantly used. The Commission is aware of the sensitivities in the use of appropriate language in the context of adoption but notes that these terms are used in the Report of the Department of Health and Children *Adoption Legislation: 2003 Consultation and Proposals for Change* and also in the Adoption Board’s *Corporate Plan 2004-2007* available at www.adoptionboard.ie/booklets/

⁸ Section 31(1) of the *Adoption Act 1952*.

⁹ Previously, the Adoption Board has sought the option to attach a condition on an adoption order so that the non-marital father’s access continues following the making of an adoption order. See *Adoption Board Annual Report (2000)* at 7.

¹⁰ While Irish adoption law adheres to “full adoption” certain aspects of the law are more “open” in nature. For example section 222 of the *Finance Act 2001* provides that an adopted child bears to a deceased natural parent, in relation to a gift or inheritance taken on or after 30 March 2001, the relationship of a “child”. For the purposes of calculating capital acquisitions tax, the adopted child has a Group A threshold of €496,824 in respect of any gift or inheritance from their natural parent as well as their

countries does not completely sever the legal relationship between the child and natural parents. For example natural parents may still owe testamentary duties and perhaps maintenance responsibilities towards their child. Also, the adoption may be considered to be an “open” one because a certain degree of contact is permitted between the child and its natural parents.¹¹

C The Dowse case

1.05 The immediate background to the Attorney General’s request was the *Dowse* case.¹² This involved the adoption of a child in Indonesia by an Irish citizen and his wife. The adoption was recognised as being compliant with Irish adoption law by the Adoption Board under section 4 of the *Adoption Act 1991*, which allows for the recognition of a foreign adoption where either or both of the adopters was ordinarily resident for at least one year in the place where the adoption was made. The adoption was registered in the Register of Foreign Adoptions under section 6 of the *Adoption Act 1991*.¹³ The child was entitled to Irish citizenship through his adoptive father and this was granted to the child along with a passport by the Passport Office of the Department of Foreign Affairs.¹⁴

1.06 The adoptive parents claimed that the adoption was not successful due to a lack of bonding between them and the child.¹⁵ The child’s situation

adoptive parents. It is also worthy of note that the Adoption Board established a National Adoption Contact Preference Register in April 2005 to facilitate adopted children, natural parents and other relatives in locating each other. See *Report on Launch and Operation of the Register* (November 2007) available www.adoptionboard.ie/index.php. It is estimated that 7,000 people have joined the Register between 2005 and 2007. See Coulter “Almost 7,000 people apply to join the adoption register over 2½ years” *Irish Times* 22 November 2007 at 6. These legislative and administrative developments indicate that while Irish adoption remains predominantly “full” in nature, the complete sundering of the relationship to natural parents may not always apply.

¹¹ See Consultation Paper at 39-41.

¹² [2006] IEHC 64, [2006] 2 IR 507, [2007] 1 ILRM 81. For a discussion of the case see Martin “Judges, Parents and the Child: A Tale of Two Child Law Cases” *An Leanbh Óg* (2007) vol.1, issue 1 (O.M.E.P., L’Organisation Mondiale pour l’Education Prescolaire-World Organisation for Early Childhood Studies) at 22-38.

¹³ See chapter 1 of the Consultation Paper.

¹⁴ Section 11(1) of the *Irish Nationality and Citizenship Act 1956* provides that:

“Upon an adoption being made, under the Adoption Act, 1952 (No. 25 of 1952), in a case in which the adopter or, where the adoption is by a married couple, either spouse is an Irish citizen, the adopted child, if not already an Irish citizen, shall be an Irish citizen.”

¹⁵ See Consultation Paper at 28, fn 3 where adoption breakdown or “disruption” is discussed. See also chapter 4 below.

became known to Irish diplomatic personnel based in the region and the Attorney General instituted proceedings in Ireland in his constitutional and legal role as guardian of the public interest. This was to ensure that the parents fulfilled their parental duties owed to their child, an Irish citizen, in accordance with Articles 41 and 42 of the Constitution. The adoptive parents instituted cross-proceedings in the High Court, designed to cancel the registration of the adoption under section 7 of the *Adoption Act 1991* as amended by the *Adoption Act 1998*.¹⁶

1.07 When the case came to hearing, the child had been reunited with his natural mother in Indonesia. The application by the parents to remove the entry in the Register of Foreign Adoptions was granted by the MacMenamin J. He found that the adoptive parents had abandoned their parental duties owed to the child under Article 42.5 of the Constitution. In deciding what amounted to parental failure, he applied the view of McGuinness J in *Northern Area Health Board v An Bord Uchtála*¹⁷ where she found that there had to be a complete failure to carry out the day to day care of the child by the parents. The *Adoption Act 1991*, as amended by the *Adoption Act 1998*, permits a number of ancillary orders to be made by the Court when an adoption registration is cancelled. MacMenamin J noted that this was so, because of the “profound effect on a child of the cancellation of the registration of a foreign adoption”.¹⁸ MacMenamin J appointed the natural mother as guardian of the child with sole custody because there was uncertainty whether the cancellation of the adoption would revive her guardianship and custody rights which were extinguished once the adoption was registered. He made an award of maintenance in favour of the child, by way of an initial lump sum and also by periodic payments until the child reaches 18. He also used the inherent jurisdiction of the High Court to ensure that the child would continue to enjoy rights to the estates of both adoptive parents as a further and residual form of protection. Most of the payments ordered, with the exception of a monthly payment to the mother,

¹⁶ After the initial adoption of the child, Indonesia changed its law so as to prohibit the adoption of a Muslim child by adoptive parents of a different faith as had occurred in the *Dowse* case. The amended law also provided that an adoption could not occur in respect of a child over 5 years of age. It was against this legislative framework that the Attorney General had to examine and determine the duties of the child’s adoptive parents, the extent of their duties and the limitations within which this State could take positive action to secure enforcement of these duties.

¹⁷ [2002] 4 IR 252 at 270.

¹⁸ [2006] 2 IR 507 at 527. In the event of a registration of a foreign adoption being cancelled, the High Court is empowered to make orders in respect of the adopted person that appear to the Court to be necessary in the circumstances and in the best interests of the person, including orders relating to the guardianship, custody, maintenance and citizenship of the person. See section 7(1B) of the *Adoption Act 1991* as inserted by section 15(b) of the *Adoption Act 1998*.

were to be paid into the High Court so that the child's long term interests would be protected.¹⁹ Finally, MacMenamin J also directed that the child's Irish citizenship should be maintained so that it would form the basis for appropriate future interventions to be made by the Irish diplomatic service on the child's behalf and entitle him to citizenship of the European Union. It was unclear what effect such retention of Irish citizenship would have on the child's Indonesian citizenship.

1.08 While these wide-ranging orders were made, it must be recognised that they could well have been ineffective but for the fact that the adoptive parents submitted to the jurisdiction of the Irish High Court even though they continued to reside abroad. In so doing they were, from their own point of view, enabled to bring their proceedings seeking the cancellation of the registration of the adoption. It must be accepted that there was, in effect, no *legitimus contradictor*²⁰ in this case, and it remains to be seen what would be the outcome of such a case if Irish parents resident outside the State did not submit to the jurisdiction of the High Court and where none of the provisions of Order 11 of the *Rules of the Superior Courts 1986* was applicable.²¹

1.09 This type of adoption, where the adoptive parents and child are not resident in Ireland, is unusual but not uncommon since Irish people who live abroad, adopt children in many parts of the world and are sometimes anxious that their children become Irish citizens. The Commission notes that some of the submissions received in response to the Consultation Paper express concerns surrounding serious allegations that were made in the Irish media concerning the manner in which the *Dowse* adoption came into being. As a result, submissions suggested that this State should investigate the circumstances surrounding the placement of the child with the adoptive parents so as to ascertain all of the facts of the case. It has also been suggested that if this particular adoption was tainted by illegality from the beginning, and it is true that the Indonesian authorities later appeared to form the opinion that no adoption existed in Indonesia, then no adoption ever existed which could have been recognised in Ireland.²² However, in Ireland

¹⁹ There is precedent for the High Court to keep and administer funds for the benefit of a child living abroad. See *Dharamal v Lord Holmpatrick* [1935] IR 760.

²⁰ A *legitimus contradictor* is a person who puts an opposing point of view before the court. See Murdoch, *Murdoch's Dictionary of Irish Law* (4th ed Butterworths 2004) at 249 and 646-647.

²¹ Order 11 allows for the service of proceedings on parties outside the State, but is subject to certain restrictions. For a discussion of Order 11 see Consultation Paper at 30.

²² See "Two arrests in adoption investigation" *Irish Times* 2 August 2005 at 6 and "Dowse denies paying for Tristan" *Irish Times* 3 August 2005 at 5.

the Adoption Board was satisfied that there was an adoption capable of recognition for the purposes of the *Adoption Acts*. The High Court also proceeded on the basis that an adoption existed which was recognised and registered in Ireland.

B Intercountry Adoption and Terminology

1.10 In this section, the Commission discusses the different terms to describe adoptions that have international elements and will incorporate statistics to illustrate these terms. Some of the submissions received by the Commission queried the appropriateness of using the term “intercountry adoption” to describe the adoption which occurred in the *Dowse* case. Therefore, it is important to state why the Commission used the term “intercountry adoption” when referring to the various types of adoptions which have an international element.

(1) Intercountry (Hague Convention) Adoption

1.11 The term “intercountry adoption” has a specific meaning in the context of the 1993 *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*.²³ It describes the change in a child’s country of residence when they are transferred from a “sending” country, also known as the child’s country of origin, to a “receiving” country, which is usually where the adoptive parents live.²⁴ The *Adoption Act 1991*, as amended by the *Adoption Act 1998*, which preceded the Convention, does not refer to “intercountry adoption”, but instead uses the term “foreign adoption”. In the Consultation Paper, the Commission noted that it would use these terms interchangeably to describe adoptions granted in other jurisdictions including the type of adoption which occurred in the *Dowse* case.²⁵ The Commission was of the opinion that the term “intercountry adoption” could be used in a global sense, in conjunction with the term “foreign adoption”, to describe adoptions with international elements, whether in the context of the Hague Convention where a child is moved between countries, or to describe a situation like the *Dowse* case,

²³ The Convention is available at the Hague Conference on Private International Law website at www.hcch.net/index_en.php?act=conventions.text&cid=69.

²⁴ Article 2(1) of the Convention states that: “The Convention shall apply where a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State (“the receiving State”) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.”

²⁵ Consultation Paper at 5, fn 1.

where the adopters are foreign nationals living in a country and adopt a child there according to domestic adoption law.

1.12 Article 1 of the 1993 Hague Convention states that its objectives are threefold:

“(a) To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his fundamental rights as recognised in international law;

(b) To establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

(c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention.”²⁶

1.13 In its 1998 *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 1993, the Commission recommended the implementation of the Hague Convention and reiterates that recommendation here. The Commission takes this opportunity to welcome the Government’s intention to ratify the *1993 Hague Convention on Intercountry Adoption* and incorporate it into domestic law. The Commission understands that the *Adoption Bill* will be published in 2008.²⁷

(2) **Recommendation**

1.14 *The Commission reiterates its previous recommendation that the 1993 Hague Convention on Protection of Children and Co-Operation in*

²⁶ Article 1 of the Hague Convention is very much a practical expression of Article 21 of the 1989 United Nations Convention on the Rights of the Child which provides that

“States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.”

²⁷ Government Legislation Programme for the Spring Session (January 2008). See Office of the Government Chief Whip, Department of the Taoiseach available at www.taoiseach.gov.ie/index.asp?docID=2579. On 12 December 2007, the United States of America ratified the Convention. The Convention will enter into force on 1 April 2008. The US is the 75th nation to ratify the Convention. See www.hcch.net/index_en.php. The growing importance and effect of international law on family law has been described in the following way: “Increasingly in recent years international law has become important. Family law presents universal problems. Quite often international conventions must be given effect or international law can influence the way contemporary courts approach the interpretation of local legislation”. See speech by Justice Michael Kirby “Opening of Family Law Chambers”, Sydney 6 May 2004 and “Chief Justice Nicholson, Australian Family Law and International Human Rights” (2004) 5 *Melbourne Journal of International Law* 200. Available at www.hcourt.gov.au.

Respect of Intercountry Adoption be ratified by Ireland and incorporated into Irish law and welcomes the impending publication of the Adoption Bill 2008 to do so.

(3) Domestic Adoption

1.15 The Commission notes that some media reports of the Consultation Paper described adoptions made in Ireland as intercountry adoptions because the natural mother is not Irish. These adoptions are of course, domestic adoptions made in accordance with the *Adoption Act 1952* as amended, although by their very nature they have a foreign connection.²⁸

(4) Foreign Adoption

1.16 The *Adoption Act 1991* was enacted to deal with the recognition of adoptions granted outside of Ireland prior to its enactment and into the future.²⁹ The term used in the 1991 Act to describe adoptions granted in other jurisdictions is “foreign adoption” and it is defined by reference to the domicile, habitual residence or ordinary residence of the adopters (discussed below). Section 1 of the 1991 Act, as amended by section 10 of the *Adoption Act 1998*, requires that a “foreign adoption” must meet the following conditions:

- The age of the child must be less than 18,
- The consent to the adoption of relevant persons, such as the natural parents, was obtained or dispensed with under the law of the foreign jurisdiction,
- The legal effect of the adoption in the foreign jurisdiction where it was made has substantially the same legal effect regarding the guardianship of the child as a domestic adoption made in Ireland,
- The law of the foreign jurisdiction where the adoption was made required an inquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian,
- The adoption was made to promote the interests and welfare of the child, and
- The adoption did not involve improper payments made by the adopters in consideration of the adoption.

1.17 The concept of “foreign adoption” is broad enough to describe an intercountry adoption under the 1993 Hague Convention where the child’s habitual residence is changed because they are transferred from the “sending

²⁸ These particular adoptions will be discussed later in Chapter 4 of the Report.

²⁹ The background to this legislation is discussed in the Consultation Paper at 15-22.

country” to the “receiving country”. In this situation, the prospective adopters are ordinarily resident in Ireland in accordance with section 5 of the *Adoption Act 1991*. The concept can also describe a situation where a domestic adoption is carried out in another country. For example, a child is adopted according to domestic adoption law and the adoptive parents are domiciled (section 2 of the *Adoption Act 1991*) or habitually resident (section 3 of the *Adoption Act 1991*) or ordinarily resident (section 4 of the *Adoption Act 1991*) in the particular country.

(a) Connecting Factors

1.18 As will be discussed in the next section, adoption in Ireland is now predominantly characterised by intercountry adoption. Since the enactment of the *Adoption Act 1952*, the *Adoption Act 1991* and the *Adoption Act 1998* have catered for this phenomenon, with the result that much of the law on adoption now constitutes private international law, in order to deal with the recognition of adoptions made in other jurisdictions. Intercountry or foreign adoptions raise issues not simply of domestic law but also difficult issues of private international law. One such issue is the nature of connection between a transaction involving a person and a legal system so that the law of that system regulates the transaction or governs the person’s behaviour. In private international law (also referred to as “the conflict of laws”), a number of legal concepts known as “connecting factors” have developed to ensure that a person has a genuine connection to a particular jurisdiction so that its legal system will apply in specific circumstances. Many of these circumstances are of a family law nature and include the validity of marriage, the recognition of foreign divorces, legal separations and nullity decrees, succession and taxation.³⁰ The recognition of foreign adoptions is no exception.

1.19 The Commission now discusses the connecting factors which are used in the *Adoption Act 1991* as amended by the *Adoption Act 1998* to define the term “foreign adoption”. These are: domicile of the adoptive parents in the state where the adoption is granted; habitual residence in the state where the adoption is granted; ordinary residence for one year in the state where the adoption is granted; and ordinary residence in Ireland by the adoptive parents who have also been assessed as to their suitability to adopt by the Irish authorities prior to adopting from abroad.

(i) Domicile

1.20 Domicile is a common law concept which means that it has been gradually developed on a case by case basis. The domicile of a person is, essentially, the country or jurisdiction where he or she intends to reside

³⁰ See Law Reform Commission *Working Paper on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* (Working Paper No. 10-1981) at 4.

permanently or indefinitely.³¹ It could also be characterised as the long-term relationship between a person and the place where they intend to live. Domicile is a complex concept because it relies on the intention of the individual for its construction which can be difficult to ascertain.³² The common law allowed for the automatic recognition of a foreign adoption if the adopter was domiciled in the foreign jurisdiction at the date on which the adoption order was made and did not require any registration of the adoption.³³ Section 2(1) of the *Adoption Act 1991* codified this rule as follows:

“A foreign adoption (whether effected before or after the commencement of this Act) effected in, or recognised under the law of, a place in which either or both of the adopters were

³¹ In the Law Reform Commission *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989) at ix, the Commission defined domicile as “the term in private international law for the territory having a distinct legal system in which a person has his or her permanent home, a connection which determines what legal system regulates many of the legal questions affecting him or her personally. These include questions of status, e.g., whether a child is to be regarded in Irish law as the child of its natural parents or its adoptive parents”. See also Dicey, Morris and Collins *The Conflict of Laws* (14th ed Sweet and Maxwell 2006) at chapter 6, Binchy *Irish Conflicts of Laws* (Butterworth Ireland 1988) at chapter 6 and the Law Reform Commission of Hong Kong *Consultation Paper on Rules for Determining Domicile* (February 2004) available at www.hkreform.gov.hk/en/index/index.htm.

³² In *R v Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309, at 345 Lord Scarman referred to “the long and notorious existence of this difficult concept in our law, dependant upon a refined, subtle, and frequently very expensive judicial investigation of the devious twists and turns of the mind of man”. See also *MR v PR* High Court (Quirke J) 8 August 2003, (discussed in Byrne and Binchy *Annual Review of Irish Law 2003* (Thomson Round Hall 2003) at 91-99) and the opinion of Baroness Hale of Richmond in *Mark v Mark* [2005] UKHL 42 (discussed in Forsyth “The Domicile of the Illegal Resident” *Journal of Private International Law* Vol. 1 No.2 [2005] at 335). As McEleavy notes, “in the UK the law pertaining to domicile has the rather dubious distinction that, although subjected to concerted criticism from commentators and law reformers alike for over half a century, it has largely remained unchanged”. See McEleavy “Regression and Reform in the Law of Domicile” 56 *International and Comparative Law Quarterly* (2007) at 453.

³³ *MF v An Bord Uchtála* [1991] ILRM 399 (decided in 1987). However in *In re Tamburrini* [1944] IR 508 the High Court refused to recognise a Scottish adoption order in the absence of domestic legal adoption prior to the enactment of the *Adoption Act 1952*. See Shatter *Family Law* (4th ed Butterworths 1997) at 510-111 and Dicey, Morris and Collins *The Conflict of Laws* (14th ed Sweet and Maxwell 2006) at 1080-1089 where the leading case of *Re Valentine's Settlement* [1965] Ch 831 is discussed. For a discussion of the common law recognition of adoptions in England and Wales see Hinchliffe “Adoption-Intercountry Aspects” [2003] *Family Law* 570 and Scarman “English Law and Foreign Adoptions” 11 *International and Comparative Law Quarterly* (1962) 635. See also Law Reform Commission *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989).

domiciled on the date on which the adoption was effected shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made on that date.”³⁴

1.21 The Annual Reports of the Adoption Board show that few foreign adoptions are recognised on the basis that domicile is the connecting factor between the adopters and the jurisdiction where the adoption was carried out. In 2005, out of the 442 foreign adoptions recognised, just 26 foreign adoptions were recognised under section 2(1).³⁵ The reason for this is most likely, to be the complexity in establishing domicile. This is evidenced by the fact that most adoptions registered in the Register of Foreign Adoptions are those where the adopters are habitually resident or ordinarily resident in Ireland or abroad.

(ii) *Habitual Residence*

1.22 The term “habitual residence” has become an important connecting factor in international family law instruments, particularly in Conventions devised by the Hague Conference on Private International Law and the more recent laws concerning children and families formulated by the European Union such as *Council Regulation (EC) No. 2201/2003*.³⁶ These organisations have not provided a definition of the concept. Instead they prefer that the term be interpreted by the courts on a case by case basis.³⁷

³⁴ Section 2(2) of the 1991 Act provides that sections 2, 3, 4, 4A and 5 of the Act are in substitution for any rule of law providing for the recognition of adoptions effected outside the State. Therefore, the common law rule of recognition based on domicile was abolished by the 1991 Act.

³⁵ See *Report of An Bord Uchtala* (Stationery Office 2005) at 30.

³⁶ *Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* also known as the Brussels II *bis* Regulation. See McNamara and Martin “Brussels Calling: The Unstoppable Europeanisation of Irish Family Law” [2006] 3 IJFL at 8.

³⁷ In the EU family law context this has created some uncertainty since the European Court of Justice has not provided a definition of the term. See Lord Justice Thorpe, Head of International Family Justice, England and Wales, “The European Court of Justice and Brussels II Revised” *International Family Law Journal* (2006) at 188. See generally, Beaumont and McEleavy *The Hague Convention on International Child Abduction* (Oxford University Press 1999) at 88-113 and Lamont, “Habitual Residence and Brussels II *bis*: Developing Concepts for European Private International Family Law” (2007) 3 *Journal of Private International Law* at 261. It should be noted that in the recent decision of the High Court of England and Wales, *Marinos v Marinos* [2007] EWHC 2047 which concerned the Brussels II *bis* Regulation, Munby J states that the term habitual residence must be defined in accordance with European Community law when the Regulation is to be applied. Therefore a person’s centre of fixed interest is more important than length of

The interpretation of the term differs from “domicile” because it does not focus on intention but on the factual situation of a person, notably in terms of evidence of long-term stay in a particular place and evidence of a person’s personal and professional life to demonstrate a connection with the place.

1.23 The attractiveness of habitual residence stems from the difficulties in construing one’s domicile particularly that of children since this is dependant on a parent’s domicile. In its *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws*, the Commission analysed the advantages and disadvantages of these connecting factors. On balance it favoured the use of habitual residence, notwithstanding that it could be difficult to determine a person’s habitual residence if they are constantly on the move and have no real or continuing connection with any of the countries through which they pass through, or the length of time which is required to deem one as being habitually resident in a particular place.³⁸ It noted that not only does habitual residence provide a more appropriate and simpler solution in most cases but it also is in harmony with trends in European private international law. The Commission stated that the habitual residence of a person is a question of fact, to be determined having regard to “the centre of his personal, social and economic interests”.³⁹

1.24 In contrast to domicile, habitual residence is not a legal term of art and should bear its ordinary and natural meaning.⁴⁰ This was affirmed by McGuinness J in the case of *MC v Delegación Provincial de Malaga* where she noted that:

residency under Community law. See discussion in Hodson “Residence, Habitual Residence, Domicile and Athens Airport” December [2007] *Family Law* 1099.

³⁸ Law Reform Commission *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* (LRC 7-1983) at 7.

³⁹ *Ibid* at 14.

⁴⁰ See Rogerson, “Habitual Residence: The New Domicile” 40 *International and Comparative Law Quarterly* (2000) at 86. In the child abduction case of *T v O* [2007] IEHC 326 by McKechnie J stated that: “The expression “habitual residence” which is not defined in either the Convention or the Regulation must be given its ordinary and natural meaning. It is not a term of art but a question of fact, and must be decided by reference to the individual circumstances of each case. It can be taken that if a person leaves Country A “...with a settled intention not to return to it but to take up long term residence in country B instead...,” then such a person may be said to have ceased been habitually resident in country A. That person however cannot become habitually resident in country B in a single day, an appreciable period of time and a settled intention will be necessary to enable him or her to do so”. In the Supreme Court case of *PAS v AFS* [2004] IESC 95, [2005] 1 ILRM 306, the habitual residence of newborn infants is discussed. See Clissmann and Hutchinson, “The Hague Convention and the habitual residence of newborn infants” *Bar Review* June 2005 at 75.

“...it seems to me to be settled law in both England and Ireland that “*habitual residence*” is not a term of art, but a matter of fact, to be decided on the evidence in this particular case.”⁴¹

She noted that a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there.

1.25 Habitual residence is quite a common connecting factor to facilitate the recognition of foreign adoptions. In its 1989 *Report on the Recognition of Foreign Adoption Decrees*, the Commission recommended that habitual residence should be used as a connecting factor to enable the recognition of adoptions made abroad. One of the reasons for this was that Irish people sometimes travel abroad, often for work-related purposes but have the intention of returning home to Ireland in the future.⁴² Therefore, they could not be said to have abandoned their domicile of origin which was in Ireland. If they adopted children while living abroad and returned to Ireland, there would have been difficulties in getting the adoption recognised. Section 3 of the *Adoption Act 1991* also codified the “habitual residence” test and provides that:

“A foreign adoption (whether effected before or after the commencement of this Act) effected in, or recognised under the law of, a place in which either or both of the adopters were habitually resident on the date on which the adoption was effected shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made-

(a) on that date, or

(b) on such commencement,

whichever is the latter.”

1.26 The Adoption Board requires that adopters who were habitually resident abroad at the time of the adoption must swear an affidavit and complete a residency questionnaire providing details of their residence abroad. The questionnaire asks about the countries and dates of residence, how long one intended to live in a particular country, whether one’s family lived with them in the particular country, whether one kept a permanent

⁴¹ [1999] 2 IR 363 at 381.

⁴² Law Reform Commission *Report on the Recognition of Foreign Adoption Decrees* (LRC 20-1989) at 30.

home in Ireland, how often one returned to Ireland, details of employment abroad, where one paid tax and the country to which one claimed domicile.⁴³

1.27 In 2005, no adoptions were recognised under this section.

(iii) Ordinary Residence

1.28 Like habitual residence, “ordinary residence” is not defined in law but is generally taken to mean that a person is normally residing in a place in the sense that they are not there for a temporary reason such as a holiday and that they are there voluntarily as part of the regular order of their life for the time being. It does not appear to require the long-term residence of habitual residence.⁴⁴ It is of some importance in relation to taxation.⁴⁵ In *The State (Goertz) v Minister for Justice*,⁴⁶ Maguire CJ stated that

“the words ‘ordinarily resident’ should be construed according to their ordinary meaning and with the aid of such light as is thrown upon them by the general intention of the legislation in which they occur and, of course, with reference to the facts of the particular case.”

1.29 Section 4 of the *Adoption Act 1991* also codifies the “ordinary residence” test by stating that:

“A foreign adoption (whether effected before or after the commencement of this Act) effected in, or recognised under the law of, a place in which either or both of the adopters were ordinarily resident for a period of not less than one year ending on the date on which the adoption was effected shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made-

(a) on that date, or

⁴³ The Commission is grateful to the Adoption Board for providing the Commission with this documentation.

⁴⁴ In a recent decision of the High Court of England and Wales, Munby J stated that a person can be “resident” in more than one country at any one time. He also stated that a person can only have one “habitual residence” at any one time and that habitual residence can be lost and gained within a day as is the case with domicile. This marks a clear divergence with Irish case law on the concept of habitual residence. See *Marinos v Marinos* [2007] EWHC 2047. See discussion in Hodson “Residence, Habitual Residence, Domicile and Athens Airport” December [2007] *Family Law* 1099.

⁴⁵ For tax purposes, ordinary residence is acquired in Ireland when 183 days or more is spent by the person in the State in one tax year, or 280 days or more in two consecutive tax years. See www.revenue.ie.

⁴⁶ [1948] IR 45 at 55.

(b) on such commencement,

whichever is the later.”⁴⁷

1.30 In 2005, out of 442 foreign adoptions recognised, 66 adoptions were recognised under section 4 of the 1991 Act. The adoption in the *Dowse* case was recognised under section 4 because the adoptive parents were ordinarily resident for one year in Indonesia, prior to the adoption of the child.

(iv) ***Ordinary residence in the State and assessment in the State prior to adopting from abroad***

1.31 Section 5 of the *Adoption Act 1991* provides that:

“A foreign adoption (whether effected before or after the commencement of this Act), other than an adoption specified in sections 2, 3, 4 or 4A of this Act, shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made-

(a) on the date on which the adoption was effected, or

(b) on such commencement,

whichever is the later, if, but only if-

(i) the adopters are persons coming within the classes of persons in whose favour an adoption order may, by virtue of section 10 of this Act, be made,

(ii) the adopters were ordinarily resident in the State on the date on which the adoption was effected....”

⁴⁷ Section 4A of the *Adoption Act 1991*, as inserted by section 12(1) of the *Adoption Act 1998* provides that: “A foreign adoption (whether effected before or after the commencement of this section) effected in a place in which neither of the adopters was domiciled, habitually resident or ordinarily resident on the date on which the adoption was effected, but not recognised under the law of the place in which either or both of the adopters were on that date domiciled, habitually resident or ordinarily resident, as the case may be, solely because the law of that place did not provide for the recognition of adoptions effected outside that place, shall be deemed, unless such deeming would be contrary to public policy, to have been effected by a valid adoption order made on that date or on such commencement, whichever is the later”. This was designed to facilitate the recognition of adoptions in Ireland when the adoptive parents were domiciled or resident in a Muslim country which does not recognise adoption. See Jackson, “Adoption Act 1998” *Irish Current Law Statutes Annotated*, at 10-16.

1.32 In 2005, out of 442 foreign adoptions recognised, 347 foreign adoptions were recognised under this section.⁴⁸ These adoptions are clearly the most common type of adoptions registered in the Register of Foreign Adoptions. They generally involve a married couple or sometimes a single person who is ordinarily resident in Ireland and have been assessed as to their suitability to adopt a child from abroad by either a registered adoption agency, or more frequently, the Health Service Executive. Once this is done, the Adoption Board provides the prospective adoptive parents with a Declaration of Eligibility and Suitability so that they can adopt a child from another country.

(5) *Bilateral Treaty Adoption*

1.33 The Government of Ireland and the Adoption Board, has occasionally entered into bilateral agreements with certain countries to facilitate the adoption of children by potential adopters resident in Ireland. A recent example of this is the *Irish-Vietnamese Bilateral Adoption Agreement*. The 1993 Hague Convention on Intercountry Adoption allows for such agreements to be made with countries that have not ratified the Convention provided that the adoptions are compliant with the terms and spirit of the Convention. The aim of this is to ensure that intercountry adoptions are ethical and that the human rights of all persons concerned by such an adoption have been protected.⁴⁹

(6) *International Adoption*

1.34 The term “international adoption” is also used to describe adoptions with international elements. UNICEF’s Innocenti Research Centre describes an “international adoption” as one applying to an adoption that involves adoptive parents of a nationality other than that of the child, whether or not they reside, and continue to reside, in the child’s country of

⁴⁸ See *Report of An Bord Uchtála* (Stationery Office 2005) at 30.

⁴⁹ Article 39(1) of the Hague Convention on Intercountry Adoption provides that: “The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument”. The Adoption Board has indicated that the forthcoming *Adoption Bill 2008* to implement the Hague Convention will provide that that it will only be possible for Irish applicants to adopt from other countries which have ratified the Convention, or from countries with whom the Board has bilateral agreements based on Hague principles. There will also be a ‘grandfather clause’ which will allow adoptions from non-Hague countries in limited circumstances, for example, where the applicants have already adopted in that country prior to the legislation being enacted and where the Board believes it to be in the best interests of the child to have a sibling from that background. See *Report of An Bord Uchtála* for 2005 (Stationery Office 2005) at 25.

habitual residence.⁵⁰ This term could also be used to refer to the adoption in the *Dowse* case.

C Intercountry Adoption in Ireland and Statistics

(1) Current Irish and Global Statistics

1.35 The changes in Irish adoption practices over the last 50 years have been profound. In this time, Ireland has gone from being a country which sent its children abroad for adoption to a country which receives children from other parts of the world through intercountry adoption.⁵¹ This turnaround places Ireland in a unique position in having experienced intercountry adoption from the perspectives of both sending and receiving countries. As noted in the Consultation Paper, intercountry adoption involves the movement of children across national borders for the purposes of adoption. A recent study of statistical data from 20 “receiving” countries shows that an estimated minimum of 45,000 children were affected by intercountry adoptions in 2004.⁵² Between 1998 and 2004 alone, numbers rose by 42%.⁵³ The greatest increase during this time occurred in Spain

⁵⁰ See *Innocenti Digest: Intercountry Adoption*, 1998, at 2 available at www.unicef-icdc.org/publications/pdf/digest4e.pdf.

⁵¹ See Consultation Paper at 6-7. From 1963 to 1974, US citizens adopted 30,000 children, the majority of which came from Korea. However, approximately 20-25% of children came from European countries, primarily from Germany, Italy, Greece, England and Ireland. See Selman, “Intercountry adoption in Europe after the Hague Convention” in Sykes and Alcock (eds) *Developments in European Social Policy: Convergence and Diversity* (The Policy Press, 1998) at 147. The Minister of State for Children, Mr. Brendan Smith TD, and the Adoption Board have recently announced the extension of information and tracing services. This will involve advertising in countries where a large number of Irish children were sent for adoption or where natural mothers live, such as the US, Canada and the UK. See Coulter “Almost 7,000 apply to join adoption register in 2 ½ years” *Irish Times* 22 November 2007 at 6.

⁵² Selman, “Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004” *Journal of Population Research* Vol. 23 No.2 (2006) at 183 and “The Impact of Intercountry Adoption on the well-being of children in Europe”, paper presented at the WELLCHI Network conference, Barcelona, 8-10 February 2007, at www.ciimu.org/webs/wellchi/conference_3/selman.pdf. See also “The Demographic History of Intercountry Adoption” in Selman (ed) *Intercountry Adoption: Developments, Trends and Perspectives* (British Agencies for Adoption and Fostering 2000) at 16 and “Intercountry adoption in Europe after the Hague Convention” in Sykes and Alcock (eds) *Developments in European Social Policy: Convergence and Diversity* (The Policy Press 1998) at 147.

⁵³ The Hague Conference agrees with such an estimate and notes that “within the next few years, the Intercountry Adoption Convention will cover the largest part of the estimated at least 40,000 children that are adopted every year, mainly from economically developing to economically more developed countries”. See Note by the Permanent Bureau entitled *Some Reflections on the Utility of Applying Certain*

which showed a 273% surge in intercountry adoptions, followed by Ireland which showed a growth of 171%.⁵⁴

1.36 Adoption in Ireland is now predominantly characterised by the adoption of children from abroad.⁵⁵ The 2005 Annual Report of the Adoption Board illustrates this by recording that of all the 600 adoption orders granted or recognised by the Board in 2005, 57.8% consist of foreign adoptions.⁵⁶ This relatively high rate of foreign adoption is often attributed to the dwindling numbers of children that are placed for adoption in Ireland and the phenomenon of prospective adopters increasingly turning their attentions to the adoption of children in foreign countries.⁵⁷ As will be discussed later in this Report, intercountry adoption in Ireland, while being an arduous process for prospective adopters, is in some ways more accessible than domestic adoption. This is because a child is generally available for adoption in an intercountry context such is the extent of

Techniques for International Co-Operation Developed by the Hague Conference on Private International Law to Issues of International Migration (March 2006) at 4. Available at www.hcch.net/upload/wop/gaf_pd08e2006.pdf.

⁵⁴ The Irish foreign adoption statistics used by Selman appear to include domestic adoptions made under the *Adoption Act 1952* and *Adoption Act 1988* which concern children brought to Ireland from abroad. This procedure where children were brought to Ireland and adopted in accordance with domestic legislation applied to Guatemala. This is because Guatemala does not provide for “full” adoption and favours “simple” adoption. Since the links between the natural parents and the child are not completely severed in simple adoption, this was incompatible with Irish adoption law and so adoptions in Guatemala could not be recognised. On 31 July 2007 the Adoption Board suspended the issuing of Declarations of Eligibility and Suitability to prospective adopters intending to travel to Guatemala. This was because of concerns about adoption practices and procedures in the country. See www.adoptionboard.ie/intercountry/whatsnew.php. The UK Government placed a similar ban on intercountry adoptions from Guatemala on 6 December 2007. See chapter 4 below.

⁵⁵ See report of the Children’s Research Centre, Trinity College Dublin *A Study of Intercountry Adoption Outcomes in Ireland* (2007) available at www.adoptionboard.ie.

⁵⁶ *Annual Report of the Adoption Board 2005* (Stationery Office 2005). In addition to this, the Board made 16 domestic adoption orders in respect of children who were placed for adoption from overseas in countries such as Guatemala, Philippines and India where simple adoption orders were made, which are not recognised under Irish law.

See www.adoptionboard.ie/intercountry/whatsnew.php.

⁵⁷ However, domestic adoption orders continue to be made. In 2005, the Adoption Board made 253 domestic adoption orders, 184 of which were made in favour of the child’s mother and her husband. 62 adoption orders were made in respect of children placed for adoption by the HSE and registered adoption societies, 16 of which were children in long-term foster care who were adopted by their foster parents. See *Annual Report of the Adoption Board 2005* (Stationery Office 2005) at 14.

deprivation in many countries, whereas in Ireland the numbers of children that are placed for adoption are very low.⁵⁸ Added to this, under Irish law the natural mother is free to revoke her consent to the placement of her child for adoption at any stage before the final adoption order is made. Also, in the intercountry adoption setting there is an automatic statutory right to assessment of prospective adopters by registered adoption agencies or the Health Service Executive whereas no such right exists in domestic adoption.⁵⁹ Another factor is that people are now more mobile across national frontiers than ever before. Contact with foreign countries is becoming much more frequent and in consequence families are becoming increasingly “international” by virtue of marriage and adoption.⁶⁰

(2) *Irish Statistics on Foreign Adoptions*

1.37 Since the enactment of the first foreign adoption legislation in 1991, approximately 4,500 foreign adoptions have been registered by the Adoption Board in the Register of Foreign Adoptions. The majority of the entries in the Register (approximately 70-75%) relate to those made under section 5 of the *Adoption Act 1991*, where the adopters are ordinarily resident in Ireland and have been assessed as to their suitability to be adoptive parents by the Health Service Executive or registered adoption societies prior to adopting a child from abroad. The remaining 25-30% of the entries made, come under sections 2, 3, 4 and 4A of the 1991 Act, where the adopters were not resident in Ireland at the time of the adoption but were domiciled, habitually resident or ordinarily resident in a foreign jurisdiction. The majority of these adoptions involve adults seeking recognition of their

⁵⁸ The Secretary General of the Hague Conference on Private International Law, Mr. Hans van Loon, has noted: “In a perfect world, without the gross inequalities of living conditions which still reign on this planet at the beginning of the new Millennium, wide scale intercountry adoption would not exist. Since our world is not perfect, however, there will continue to be large numbers of children in need of a family in the years ahead. One need only remind oneself of the devastating effect of the AIDS epidemic in Africa leaving large numbers of children without parents. Of course, the international community should in the first place intensify its efforts to improve living conditions in the countries of origin of adopted children so that they may find a home there, but we should do what we can alongside these efforts to make intercountry adoption available for children without such a home, thus giving them the opportunity to ‘grow up in a family environment, in an atmosphere of happiness, love and understanding’”. See Van Loon “Foreword” in Selman (ed) *Intercountry Adoption: Developments, Trends and Perspectives* (British Agencies for Adoption and Fostering 2000) at 1-2. See also O’Halloran *The Politics of Adoption: International Perspectives on Law, Policy & Practice* (Springer 2006).

⁵⁹ Section 8 of the *Adoption Act 1991*.

⁶⁰ See generally Stark *International Family Law: An Introduction* (Ashgate 2005) and Murphy *International Dimensions in Family Law* (Manchester University Press 2005). See also McNamara and Martin “Brussels Calling: The Unstoppable Europeanisation of Irish Family Law” [2006] 3 *IJFL* at 8.

own adoption so that they may become an Irish citizen on the basis that one of their adoptive parents is or was an Irish citizen. As a result, less than 10% of the 4,500 foreign adoptions recognised by the Board since 1991 concern the adoptions of children who are under the age of 18 at the time of registration by Irish citizens living abroad, as occurred in the *Dowse* case. It is this particular category of adoption which is the focus of the Attorney General's request to the Commission. This type of foreign adoption represents a relatively small amount of the total number foreign adoptions recognised and registered in Ireland. The Commission has borne this in mind in the following analysis where it comes to the final conclusion that cases such as *Dowse* do not merit the creation of prescriptive rules to be provided by legislation or otherwise. Rather, such cases should be dealt with by the flexibility inherent in the powers of the Attorney General which can be exercised on a case by case basis.

1.38 In the future it may be that such foreign adoptions might be more numerous, such is the extent of the Irish diaspora around the world.⁶¹ As well as this, the 2006 Census shows that approximately 10% of the Irish population was not born in Ireland and many of these people have come to Ireland from the more recent Member States of the European Union most notably Poland.⁶² It is quite possible that those from abroad who are resident in Ireland may adopt children from their home country who might happen to be relatives. The relationship between intercountry adoption and immigration requires further study and analysis. Selman notes that there is more room for exploration of the links between intercountry adoption and migration, both statistically and in terms of the different experiences of internationally adopted children, child immigrants and second generation ethnic-minority children in childhood and later, including research on their ethnic identity and importance attached to their country of origin.⁶³ Quite recently, a significant research study of children who have been adopted

⁶¹ It has been estimated that about 3 million Irish citizens live abroad. Approximately 1.2 million of these citizens were born in Ireland. See *Challenges and Opportunities Abroad: White Paper on Foreign Policy* (Stationery Office 1996) at 283-284 and more recently the Report of the Task Force on Policy regarding Emigrants *Ireland and the Irish Abroad* (2002) available at www.dfa.ie/home/index.aspx.

⁶² Statistics from the 2006 Census show that approximately 10% of the population in Ireland are not Irish nationals (419,733 people out of a total of 4,172,013). See www.cso.ie.

⁶³ Selman "Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004" *Journal of Population Research* Vol. 23 No.2 (2006) 183 at 202. For a discussion of the interaction between adoption and immigration law in Britain see Finch "Family and Immigration Cases: Implications for Practice" 37 *Family Law* [2007] at 717.

from abroad and brought to Ireland has been conducted by the Children's Research Centre at Trinity College Dublin.⁶⁴

D Guiding Principles

1.39 The Commission stated in the Consultation Paper that it was guided by a number of key principles when considering the questions posed by the Attorney General's request.

(1) *Best interests of the child*

1.40 The first of these is the *best interests of the child*.⁶⁵ It is a key principle in international law relating to children, accepted in Article 3.1 of the United Nations *Convention on the Rights of the Child*.⁶⁶ More recently, the United Nations General Assembly has reaffirmed the "best interests" principle as providing a framework for all actions concerning children particularly in the implementation of the *Convention on the Rights of the Child*.⁶⁷ In Ireland, the doctrine of the best interests of the child is encapsulated by the "welfare principle" or the "paramourcy principle".⁶⁸ Section 3 of the *Guardianship of Infants Act 1964* states that a court in assessing the guardianship issue must have regard to the welfare of the child as "the first and paramount consideration" and this is defined in section 2 of the 1964 Act as comprising the religious and moral, intellectual, physical and social welfare of an infant. The term welfare has a constitutional basis and the wording of section 2 is taken verbatim from Article 42.1 Constitution.⁶⁹ Section 2 of the *Adoption Act 1974* provides that the welfare

⁶⁴ The Report is entitled *A Study of Intercountry Adoption Outcomes in Ireland* and was commissioned by the Adoption Board. Available at www.adoptionboard.ie.

⁶⁵ Murray notes that this has become "more than an abstract ideological aspiration". See Murray "Adoption: Past and Present" in *Living Our Times* (Gill & Macmillan 2007) 266 at 270. See also speech by Justice Michael Kirby "Children and Family Law-Paramount Interests and Human Rights" delivered to the International Association of Youth and Family Judges and Magistrates XVI World Congress, Melbourne, Australia, 27 October 2002. Available at www.hcourt.gov.au.

⁶⁶ Article 3.1 of the UN Convention states that: "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". The Convention is available at www.dfa.ie/home/index.aspx.

⁶⁷ *United Nations General Assembly Resolution on the promotion and protection of the rights of children* (16 November 2007). Available at www.crin.org/index.asp.

⁶⁸ See the Supreme Court decision in *MacD v MacD* (1979) 114 ILTR 60. See also Shatter *Family Law* (4th ed Butterworths 1997) at 545 and Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at chapter 10.

⁶⁹ See *B v B* [1975] IR 54 at 61 per Walsh J. See also Ward *The Child Care Acts: Annotated and Consolidated* (2nd ed Thomson Round Hall 2005) at 24.

of the child shall be the first and paramount consideration in all decisions of the Adoption Board or any court relating to the arrangements for or the making of an adoption order.⁷⁰ Similarly, section 3 of the *Child Care Act 1991* places a duty on the Health Service Executive to promote the welfare of children who are not receiving adequate care and protection. In doing so it must regard the welfare of the child as the first and paramount consideration. Similarly section 24 of the 1991 Act directs that in any court proceedings under the Act relating to the care and protection of a child, the court shall regard the welfare of the child as the first and paramount consideration.⁷¹ The *Adoption Act 1988*,⁷² which was upheld by the Supreme Court as being constitutional, also refers to the best interests of the child in section 3(1)(III). The 1988 Act allows for the adoption of children including those whose parents are married and are deemed to have abandoned their parental duties towards their child for physical or moral reasons.⁷³ One of the considerations for making an adoption in these circumstances is that it would be in the best interests of the child to do so. Similarly, section 7 of the *Ombudsman for Children Act 2002* places a duty on the Ombudsman to promote the rights and welfare of children while section 6(2) states that the Ombudsman, in performing this duty, must have regard to the best interests of the child concerned.

1.41 While the phrase “best interests” has become widely referred to in case law and legislation, it lacks precision and there have been few attempts to define it.⁷⁴ The *National Children’s Strategy* adopts a “whole child perspective” to give a more complete understanding of children’s lives and provides a helpful reference guide in determining what constitutes the best interests of children. This approach identifies nine dimensions of childhood development as including: physical and mental well-being, emotional and behavioural well-being, intellectual capacity, spiritual and moral well-being, identity, self-care, family relationships, social and peer relationships, and social presentation.⁷⁵

⁷⁰ It is likely that this element of the *Adoption Act 1974* originates from the 1967 *Council of Europe Convention on the Adoption of Children* which Ireland signed. Article 8(1) of the Convention provides that an adoption should not be made unless it is in the best interests of the child.

⁷¹ See generally Ward *The Child Care Acts: Annotated and Consolidated* (2nd ed Thomson Round Hall 2005) at 24 and 106.

⁷² *Re the Adoption No.2 Bill, 1987* [1989] IR 656

⁷³ See Consultation Paper at 79-80.

⁷⁴ See *North Western Health Board v HW* [2001] 3 IR 622

⁷⁵ *The National Children’s Strategy: Our Children: Their Lives* (Stationery Office 2000) at 24-27 available at www.dohc.ie/publications/national_childrens_strategy.html cited

1.42 The decision as to what constitutes the best interests of the child in legal proceedings will be taken by a judge who must decide on the basis of the facts of a given case taking into consideration all of the issues which effect the individual child's well-being and development.⁷⁶ In recent years, the welfare or best interests of the child has been interpreted creatively so that the child is given the opportunity to be heard in legal proceedings affecting them and that children who are of an age and maturity to express their feelings have a personal right under Article 40.3 of the Constitution to do so. For example in *FN and EB v CO*,⁷⁷ Finlay-Geoghegan J held that the children in the case who were aged 13 and 14 were of an age and understanding to have their wishes taken into account by the court according to their personal rights under Article 40.3 of the Constitution. In this case, the maternal grandparents sought sole custody of the children but this was opposed by the children's father. The children's parents separated and following the death of their mother they lived with their grandparents in Ireland. They wanted this arrangement to continue into the future but that

in the Council of Irish Adoption Agencies *Ethical Framework for Adoption in Ireland* (forthcoming) at 25-26.

⁷⁶ The best interests test is also applied in difficult medico-legal cases and has been described as probably originating from the law of child custody. See Harmon, "Falling Off the Vine: Legal Fiction and the Doctrine of Substituted Judgment" [1990] 100 *Yale Law Journal* 1, 32-33 at fn 170. In the context of medical issues, the best interests test has been criticised as being operated in a way which is under-analysed and theoretical and can lend itself to judicial subjectivity. See Donnelly, "Decision-Making for Mentally Incompetent People: The Empty Formula of Best Interests?" *Medicine and Law* (2001) 20:405-416. For a family law critique see Sargent "Best Interest of the Child" in the USA and Europe" *International Family Law Journal* (2006) at 24. See also Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" 8 *International Journal of Law and the Family* (1994) at 1-25, Parker "The Best Interests of the Child-Principles and Problems" 8 *International Journal of Law and the Family* (1994) at 26-41, and Rodham "Children under the Law" 43 *Harvard Educational Review* at 1-26 reproduced in Freeman (ed) *Children's Rights Volume 1* (Ashgate 2004) at 29 and Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 471-472.

⁷⁷ [2004] 4 IR 311, [2004] IEHC 60. This reflects the international law approach on the matter. See, for example, Article 12 of the United Nations Convention on the Rights of the Child and Article 11.2 of *Council Regulation (EC) No. 2201/2003*. In common law countries, there is certain unease about judges interviewing children whereas in civil law countries such as Germany, this is common practice. In *N and Anor v HSE and Anor* [2006] IESC 60, McGuinness J remarked on the lack of separate representation of the two year old child in the case, by either a solicitor and counsel or a *guardian ad litem*. The need for reform of the current *guardian ad litem* system in Ireland is discussed by Shannon in *The Report of the Special Rapporteur on Child Protection* (November 2007) at 64 -67.

Available at www.nco.ie/viewdoc.asp?DocID=120. See also Wilson "The Ears of the Child in Family Proceedings" 37 *Family Law* [2007] at 808.

they have access to their father as well. The court appointed the grandparents as guardians of the two children.⁷⁸

1.43 Finlay-Geoghegan J has also stated that among the “personal rights” of the child under Article 40.3.1° of the Constitution is the right to be reared and educated with due regard to welfare including a right to have his or her welfare considered in the sense of what is in his or her *best interests* (emphasis added) in decisions affecting him or her.⁷⁹

(a) *Comparative Approaches*

(i) *Hague Conference on Private International Law*

1.44 The Hague Conference on Private International Law states that the best interests of the child is the over-arching principle which should guide all actions under the 1993 Hague Convention on Intercountry Adoption.⁸⁰ While highlighting the difficulties in providing a precise explanation of the “best interests” of the child, the Conference notes that the principle is partly observed by implementing the subsidiarity principle. This directs that a child should be raised by their birth family or extended family where possible.⁸¹ If this is not possible, other forms of permanent care in the country of origin should be explored. Only after due consideration has been given to such solutions and it is clear that the child cannot be suitably cared for in their country of origin, should intercountry adoption be considered. It is also observed by the principle of non-discrimination which requires States to “ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption”.⁸² The Conference also states that practical measures which support the “best interests” principle are: ensuring that the child is adoptable,

⁷⁸ The legal aspects of family relationships including the rights and duties (if any) of grandparents will be examined by the Commission under its *Third Programme of Law Reform 2008-2014*. See *Report on the Third Programme of Law Reform* (LRC 86-2007) at 15. Available at www.lawreform.ie.

⁷⁹ *Bode v Minister for Justice, Equality and Law Reform* [2006] IEHC 341.

⁸⁰ Article 1(a) of the 1993 Hague Convention on Intercountry Adoption.

⁸¹ Duncan notes that the weighting of the interests of the child with the interests of natural parents, which is done in Ireland, the United Kingdom and Israel, expresses the concern that the paramountcy principle of giving priority to the child’s interest be used as an excuse for social engineering, that is, to justify a more generalised transfer of children from poor to wealthy parents, or from developing countries to rich economies. See Duncan “The Protection of Children’s Rights in Inter-Country Adoption” in Heffernan (ed) *Human Rights: A European Perspective* (Round Hall Press 1994) 326 at 332.

⁸² Article 21(c) of the 1993 Hague Convention on Intercountry Adoption.

preserving information about the child and matching the child with a suitable family.⁸³

(ii) *England and Wales*

1.45 In England and Wales, section 1(3) of the *Children Act 1989* which was a product of the work of the Law Commission of England and Wales,⁸⁴ provides a comprehensive yet non-exhaustive “welfare check-list” which aids a court in determining a child’s best interests when matters concerning its upbringing arise.⁸⁵ The Law Commission recommended such a checklist “as a means of providing greater consistency and clarity in the law” and “as a major step towards a more systematic approach to decisions concerning children”.⁸⁶ This “welfare checklist” approach has been followed in the *Adoption and Children Act 2002* which applies in England and Wales.⁸⁷ Section 1(2) of the 2002 Act provides that “the paramount consideration of the court or adoption agency must be the child’s welfare, throughout his life”.⁸⁸

1.46 The merit in this approach is that it provides a clear and transparent framework for judges dealing with child and family law cases to operate within. This is important to show that decisions made in such legal proceedings have had regard to the issues provided for in the checklist and

⁸³ *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (August 2005) at 14-17. Note also the strong support for the Hague Convention by UNICEF. See press release “UNICEF’s position on Inter-country adoption” 5 October 2007. Available at www.hcch.net/index_en.php.

⁸⁴ See *Family Law: Review of Child Law: Guardianship and Custody*, Law Com No. 172 (1988). See also speech by former Law Commissioner Baroness Hale of Richmond “Law Maker or Law Reformer: What is a Law Lady For?” (2005) 40 *Irish Jurist* 1 at 6-8.

⁸⁵ See generally Lowe and Douglas *Bromley’s Family Law* (10th ed Oxford University Press 2007) at chapter 10. The Act is available at www.opsi.gov.uk/acts/acts1989/Ukpga_19890041_en_1.htm.

⁸⁶ Lowe “The Allocation of Parental Rights and Responsibilities-The Position in England and Wales” 39 *Family Law Quarterly* [2005-2006] No.2, 267 at 280.

⁸⁷ The 2002 Act came into force on 30 December 2005. The Act is available at www.opsi.gov.uk/acts/acts2002/ukpga_20020038_en_1.

⁸⁸ Section 1(2) of the 2002 Act directs a court to consider a number of factors when making a decision relating to the adoption of a child. It has also been supplemented by guidance from the President of the Family Division and Head of Family Justice in England and Wales. See *President’s Guidance Adoption: The New Law and Procedure* (March 2006). Available at www.judiciary.gov.uk/docs/adoption_final.pdf. See also Bridge and Swindells *Adoption: The Modern Law* (Family Law 2003) at chapter 7.

that decisions are not purely based on the whim of a particular judge.⁸⁹ As Lowe notes, the supreme advantage of having such a checklist in statutory form is that it enables everyone including the judge, the litigant and the advocate, to focus on the same issue at the same time.⁹⁰

(iii) South Africa

1.47 Similarly, in South Africa, section 7(1) of the *Children's Act 2005* provides a lengthy definition of the standard for "best interests of the child".⁹¹ This is significant because of the number of orphans in the country and the possibility that the Republic of South Africa will become a major sending country of children for intercountry adoption once it has ratified the 1993 Hague Convention on Intercountry Adoption.⁹² Section 256 of the Act gives the Convention the force of law in the country.

(2) Discussion of submissions in the context of the best interests of the child

1.48 In the adoption context, section 2 of the *Adoption Act 1974* specifically states that the welfare of the child shall be the first and paramount consideration in all decisions of the Adoption Board or any court relating to the arrangements for or making of an adoption order. As well as this, section 3(1)(III) of the *Adoption Act 1988* specifically refers to the best interests of the child. Some of the submissions received by the Commission have noted that there is a striking emphasis on the rights of children in the 1974 Act and the 1988 Act which might be contrasted with the more recent

⁸⁹ See Martin "Judicial Discretion in Family Law" (1998) *Irish Law Times* at 168.

⁹⁰ Lowe "The Allocation of Parental Rights and Responsibilities-The Position in England and Wales" 39 *Family Law Quarterly* [2005-2006] No.2, 267 at 280-281.

⁹¹ Section 9 of the 2005 Act provides that: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interests are of paramount importance must be applied". The *Children's Act 2005* originates from South African Law Commission *Report on the Review of the Child Care Act* (Project 110) 2002 available at www.doj.gov.za/salrc/index.htm. See van Heerden "Recent Developments in Inter-Country Adoption in South Africa" *International Family Law Journal* November (2006) at 216. The Constitution of the Republic of South Africa expressly refers to the "best interests" of children in Article 28.2. See Bonthuys, "The Best Interests of Children in the South African Constitution" 20 *International Journal of Law, Policy and the Family* (2006) at 23.

⁹² In recent years, there have been a number of cases before the Courts of South Africa where non-South Africans have attempted to adopt children from South Africa. For example in *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 the Constitutional Court found that the proscription of the adoption of a South African child by non-South Africans was unconstitutional. In the more recent cases, the courts refused such adoptions because the legislative framework was not yet in place to facilitate intercountry adoption. See *De Gree v Webb* Case No 05/25316 unreported High Court of South Africa Goldblatt J 21 April 2006 and *De Gree v Webb* [2007] SCA 87 (RSA).

Adoption Acts 1991 and 1998, which appears to shift the focus to the needs of prospective adopters. As the Commission discussed in the Consultation Paper, the origins of the 1991 Act lay in the unprecedented demand for foreign adoption recognition by Irish persons who travelled to Romania to adopt children there. This was in the absence of a legislative regime to allow for the recognition of these adoptions. Another example of how the requirements of prospective adopters have been facilitated in the 1991 Act is that there is an automatic right to apply for an assessment for foreign adoption in section 8 of the 1991 Act. This is in contrast to domestic adoption where no such right exists. This situation places great strain on financial resources and the work of social workers particularly in the Health Service Executive who are under an obligation to assess every person who applies to be an intercountry adopter. Since there is such an automatic right and no process to filter unsuitable applications, time and resources are invested in unsuitable applications. Perhaps such an investment in energy and finances could be better used elsewhere in the adoption and child welfare services, for example in post-adoption support services. This will be discussed further in Chapter 4.

(3) *Equality*

1.49 The second principle which informed the Commission in its analysis of the law was *equality*. As was stated in the Consultation Paper, it is a well established principle that the law treats adopted children in the same manner as it does biological children. All of the submissions received by the Commission were in agreement that there should be no difference in treatment between adopted and biological children, particularly in the context of acquiring Irish citizenship. In recent times, the European Court of Human Rights has stated that discrimination between adopted and biological children is a contravention of the *European Convention on Human Rights and Fundamental Freedoms*.⁹³ For example in *Pla and Puncernau v Andorra*⁹⁴ the applicant was adopted and the Andorran courts found that he could not inherit the estate of his adoptive grandmother because her will referred to the succession of her estate by “the child of a lawful and canonical marriage”. The European Court of Human Rights (ECtHR) stated:

“In the Court’s view, where a child is adopted (under the full adoption procedure moreover) the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the

⁹³ Available at www.echr.coe.int/ECHR.

⁹⁴ Application No. 69498/01, 13 July 2004.

ground of birth out of wedlock can be regarded as compatible with the Convention.”

1.50 The ECtHR found that there was no legitimate aim or any objective and reasonable justification for the distinction made between adopted and biological children by the Andorran courts. The Commission discusses below a recent judgment of the ECtHR which deals with the non-recognition of a foreign adoption and the consequences it has for children in acquiring the citizenship of their adoptive parents.

(4) *Presumption in favour of recognition*

1.51 The third guiding principle was *the presumption in favour of recognition* of a foreign or intercountry adoption. The justification for this was that it is generally considered not to be in the best interests of a child to refuse recognition of their adoption.⁹⁵ This is particularly the case when a child has been in the custody of adoptive parents for a significant period of time. The uncertainty of legal status which non-recognition causes is problematic for adoptive parents and their children especially if they move across international borders. The recent judgment of the ECtHR in *Wagner and J.M.W.L. v Luxembourg*⁹⁶ would appear to have significant consequences for the recognition of foreign adoptions.

⁹⁵ As noted in the Consultation Paper, section 9(4) of the *Adoption Act 1991* contains a presumption, which can be rebutted, that a foreign adoption was properly made under the law of the State where the adoption was made. Provided the adoption complies with the legal definition of a foreign adoption in section 1 of the *Adoption Act 1991* as amended, and with sections 2, 3, 4, 4A where appropriate, the Adoption Board is placed under a statutory duty to make an entry in the Register of Foreign Adoptions according to section 6(2)(ii) of the 1991 Act. The Commission also noted that this presumptive approach was correct provided it can be rebutted with evidence to the contrary for example evidence which illustrates that a foreign adoption was made illegally. See Consultation Paper at 24-25 and 89-91. A state is, for example entitled not to recognise a foreign adoption if it does not comply with the term as it is understood in that particular state. It is entitled to enquire into a legal process such as adoption which has significant legal consequences. This is particularly so when adoption recognition is sought purely for immigration purposes for example to acquire citizenship of a state rather than to transfer parental responsibility. See the House of Lords decision in *Re B (Adoption Order: Nationality)* [1999] 1 FLR 907. See also Ranton “Striking the Balance-Intercountry Adoption in England and Wales” *International Family Law* April (2001) at 35 and Finch, “Family and Immigration Cases: Implications for Practice” 37 *Family Law* [2007] at 717.

⁹⁶ Application No. 76240/01, 28 June 2007. The case is available in French along with English press releases at www.echr.coe.int/echr. It should be noted that Luxembourg did not appeal the case to the Grand Chamber of the Court.

(a) *Wagner and J.M.W.L. v Luxembourg*

1.52 In this case the applicant, a single woman from Luxembourg adopted a three year old girl (also an applicant) in Peru under a Peruvian judgment in 1996. The child had been declared abandoned. The adoption could be described as a “full adoption”. The applicant wanted the adoption to be recognised in Luxembourg so that her adopted daughter could be registered for the purposes of civil registration and the acquisition of Luxembourg nationality. Under Article 367 of the *Luxembourg Civil Code*, full adoption was not available to single women in Luxembourg and so in 1999 the District Court refused the applicants’ application for an order to enforce the Peruvian adoption judgment. The applicants appealed on the grounds that this decision was incompatible with Article 8 of the *European Convention on Human Rights and Fundamental Freedoms* (ECHR) and that failure to recognise the adoption disregarded the maintenance of good international relations. In 2000 the appeal court found that the court of first instance had correctly found the Peruvian decision to be at odds with the Luxembourg legislation on conflict of laws, which required that adoptions be governed by the law of the country of which the adopter was a national. In 2001 the Court of Cassation upheld the decisions of these courts.

1.53 The adoptive mother and her daughter lodged an application to the ECtHR. First, they claimed that their right to a fair hearing protected by Article 6.1 of the ECHR had been deprived since they were not given the chance to argue that their rights to family life under Article 8 were violated. Second, they claimed that the failure of Luxembourg to recognise the family ties created between them by the Peruvian judgment of full adoption violated their Article 8 rights. Third, they relied on Article 14 (prohibition of discrimination) and claimed that they had suffered unjustified discrimination over the refusal to recognise the full adoption.

1.54 The ECtHR agreed that there had been a violation of Article 6.1. The ECtHR also found that the inability of Luxembourg law to recognise the adoption of a child by a single person amounted to an “interference” with the applicants rights to family life under Article 8 (right to respect for private and family life) of the ECHR. The ECtHR considered that it was unreasonable for Luxembourg to adopt a cautious approach in examining whether the adoption had been made in conformity with Luxembourg conflict of law (private international law) rules. The ECtHR also noted that in most of the 47 Member States of the Council of Europe, adoption by unmarried persons was permitted. The ECtHR noted that it had been the practice in Luxembourg to automatically recognise Peruvian judgments granting full adoption. The applicants were entitled to expect that the Peruvian judgment would be registered.

1.55 The ECtHR was also of the opinion that the decision not to declare the Peruvian judgment enforceable did not take account of social reality. Since the Luxembourg courts had not officially acknowledged the legal existence of family ties created by the full adoption granted in Peru, those ties could not take full effect in Luxembourg. As a result, the applicants encountered obstacles in their day to day lives and the child did not enjoy the legal protection which would enable her to fully integrate into her adoptive family. The ECtHR stated that the child's best interests had to take precedence in cases of this kind. Furthermore the ECtHR considered that the Luxembourg courts could not reasonably disregard the legal status which had been created on a valid basis in Peru and which corresponded to family life within the meaning of Article 8. Therefore, there had been a violation of Article 8 of the ECHR.

1.56 In terms of Article 14, the ECtHR noted that, as a result of the refusal to declare the judgment enforceable, the child had been subjected in her daily life to a difference in treatment compared with children whose full adoption granted abroad was recognised in Luxembourg. The child's links with her birth family had been severed and had not been replaced with full and complete links with her adoptive mother. The child therefore found herself in a legal vacuum, which had not been remedied by the fact that an open adoption had been granted in the meantime. Also, the child did not have Luxembourg nationality and so she could not take advantage of the benefits accorded to European Community nationals. For example, for over 10 years, she had to apply regularly for residence permits in Luxembourg and to obtain a visa to visit certain countries, in particular Switzerland. The applicant adoptive mother also suffered in her daily life, due to the indirect consequences of the obstacles facing her child. This was because she was obliged, among other things, to complete all the administrative formalities arising out of the failure of her minor daughter to obtain Luxembourg citizenship. In the ECtHR's view, there was no justification for such discrimination, especially since, prior to the events in question, full adoption orders had been automatically granted in Luxembourg in respect of other Peruvian children adopted by single mothers.

1.57 The effect of the decision in *Wagner and J.M.W.L. v Luxembourg* is that once a valid adoption order has been made abroad in respect of a child, failure to recognise that adoption in another jurisdiction, without good reasons, may prove to be a failure to take account of the social reality that a child has been placed with an adoptive family. This would in effect penalise the child. Therefore Articles 8 and 14 of the ECHR are significant in this regard. In Ireland, the ECHR has been incorporated into domestic law with the enactment of the *European Convention on Human Rights Act 2003*. There will of course, be occasions where a foreign adoption should not be recognised because to do so would be manifestly contrary to public policy or

perhaps the concept of adoption in the foreign jurisdiction bears no relation to its meaning in the jurisdiction where the adoption is sought to be recognised. The Commission notes that the question of foreign adoption recognition which is perhaps in the best interests of a child (particularly if they have resided with their adoptive parents for a significant period of time) and the desire to ensure that the adoption is an ethical one made in accordance with the law, is a very difficult one since competing values are at play. This will be explored in more detail in chapter 4 in the context of ensuring the validity of foreign adoption documentation.

(5) *Duties of the State and Issues of Practicability*

1.58 The fourth guiding principle referred to by the Commission in the Consultation Paper was the *duties of the State and issues of practicability*. This is particularly relevant in the context of the Attorney General's request to the Commission and that the percentage of adoption in cases such as *Dowse* (where at least one of the adoptive parents is an Irish citizen and is resident outside of Ireland with the adopted child) are relatively small, numbering around only 10% of all the 4,500 entries in the Register of Foreign Adoptions. As noted by the Commission in the Consultation Paper, the Constitution guarantees the protection of the rights of citizens by the State. However, Article 40.3 of the Constitution accepts that the State guarantees in its laws to respect and *as far as practicable* (emphasis added) by its laws to defend and vindicate the personal rights of the citizen.⁹⁷ Therefore, the protection and realisation of the rights of the citizen are very much limited by what is practically possible. This is particularly the case where a citizen is not physically present in Ireland. In circumstances such as the *Dowse* case, if an adoption breaks down outside the State, what the Irish State can do under the Constitution is limited. The primary duty of caring for a child is that of the parents whether they are natural or adoptive parents. The State's default role when the child is outside the State is not absolute in nature. Indeed it is not absolute in any case, whether the child is in Ireland or not. The manner in which the State's obligation can be applied and the practicability of performing the obligation is affected by the circumstances of the particular case. For example, in adoption cases such as *Dowse*, there are real difficulties in the State having any involvement if Irish citizens living abroad adopt children because the Irish Adoption Board has no role in prior assessment of the adoptive parents, it has no role in determining whether the natural parents have given a valid consent to the adoption, and it has no role in the adoption proceedings in the foreign jurisdiction.

1.59 Therefore, under Irish adoption legislation, the role of the State is necessarily circumscribed. Another factor which must be taken into account is that once a court order is made in a foreign country, the Adoption Board

⁹⁷ Consultation Paper at 25.

and the courts of Ireland do not possess a general jurisdiction to question the validity of that order. This encapsulates the private international law principle of comity of the courts. This is a reciprocal duty by which courts respect the authority and decisions made by their counterparts in other jurisdictions. Ireland retains the right not to recognise adoption orders from countries which, for example, are known to violate human rights. To provide for recognition, would be manifestly contrary to Irish public policy.

1.60 Also, the laws of Ireland do not normally have extraterritorial effect and cannot supplant the laws which apply in a foreign state to an Irish citizen in that state. Other practical considerations include how Ireland could reasonably be expected to police the parenting skills of Irish adoptive parents and the welfare of their children who are resident abroad. The Irish are scattered all over the world, sometimes in very remote locations which creates even greater difficulties for any meaningful role which the Irish State could be expected to play in this regard. An estimated 70 million people worldwide claim Irish descent. About 3 million Irish citizens live abroad. Approximately 1.2 million of these citizens were born in Ireland.⁹⁸ These practical considerations informed the Commission in its deliberations leading to the final recommendations in this Report.

⁹⁸ See *Challenges and Opportunities Abroad: White Paper on Foreign Policy* (Stationery Office 1996) at 283-284 and the Report of the Task Force on Policy regarding Emigrants *Ireland and the Irish Abroad* (2002) available at www.dfa.ie/home/index.aspx.

CHAPTER 2 STATUS AND RIGHTS OF THE CHILD

A Introduction

2.01 In this Chapter, the Commission sets out its recommendations in response to the first of the questions raised in the Attorney General’s request, namely, the status and rights, including the citizenship rights of a child resident outside the State who is also the subject of a foreign adoption order made in favour of an Irish citizen or citizens. In Part B, the Commission analyses the implications of the decision in the *Dowse* case, in particular, the manner in which the foreign adoption order was cancelled. Part C discusses the interaction between adoption and citizenship law and refers to recent developments in other jurisdictions. In Part D the Commission focuses on the theme of children’s rights particularly under the Constitution of Ireland.

B Cancellation of Adoption

(1) *Cancellation of Foreign Adoption Registration*

2.02 One of the significant aspects of the *Dowse* case was the manner in which the High Court cancelled the registration of adoption in the Register of Foreign Adoptions. The adoptive parents sought the cancellation of the registration. The Court was aware that, in acceding to this request, it would free the parents from the rights and duties which they owed to their child under the Constitution. Article 42.5 of the Constitution refers to exceptional cases where parents fail in their duty to their children for physical or moral reasons. In such cases, the responsibility falls to the State, as guardian of the common good, to supply the place of parents. This is to ensure that the “natural and imprescriptable rights of the child” are vindicated.¹ Section 7(1A) of the *Adoption Act 1991*, as inserted by section 15(b) of the *Adoption Act 1998*, provides that the High Court shall not give a direction to cancel a registration unless it is satisfied that it would be in the best interests of the adopted person. The section also empowers the Court to make a number of orders in the event of cancellation including orders

¹ In *Ryan v Attorney General* [1965] IR 294 at 308, Kenny J defined the word “imprescriptable” as meaning “that which cannot be lost by the passage of time or abandoned by non-exercise.”

relating to guardianship, custody, maintenance and citizenship.² As already discussed, the decision in the *Dowse* case was that the adoptive parents failed in their duties to their child under the Constitution and this justified cancellation of the adoption registration and the making of a number of ancillary orders including one giving the child succession rights to the estate of the Dowse family.

(a) Cancellation of Domestic Adoption

2.03 As was noted in the Consultation Paper, cancellation of an adoption stands in contrast to the hallmark of adoption in Ireland which is permanence.³ Under Irish law, while there are certain circumstances when an adoption might be terminated, it is clear that it cannot be set aside on the whim of adoptive parents. Adoption orders granted in Ireland are meant to last forever. Adoptive parents and indeed adopted children cannot decide to end an adoption as it is supposed to be a lifelong experience.⁴ The concept of “full” adoption has the effect of completely severing the legal relationship between the natural parents and the child. In its place, a new legal relationship of parent and child is created between the child and the adopters. The exceptions to this are worth briefly considering.

2.04 In *M v An Bord Uchtála*,⁵ the Supreme Court held that the High Court can set aside an adoption order if constitutional or natural justice has not been adhered to in the adoption process. In this case, an adoption order was found to be null and void because the Adoption Board did not inform the natural mother that she could withdraw her consent to the adoption before the final order was made. Also, if a child is adopted by one of its natural parents, the subsequent marriage of the natural parents will have the effect of “legitimizing” the child and the *Legitimacy Act 1931* will then operate. As Shannon notes, this is the only case in which an adoption order that is otherwise valid at its inception can be rescinded.⁶ Under section 29(2)(b) of the *Adoption Act 1952*, the effect of legitimation is that the adoption order shall “cease to be in force”.⁷ Section 18 of the 1952 Act also provides for the re-adoption of a child on the death of its adoptive parents, while section 22(7) makes reference to the setting aside and subsequent

² For the full text of section 7 of the *Adoption Act 1991*, as amended by section 15 of the *Adoption Act 1998*, see Appendix of Consultation Paper at 107-108.

³ Consultation Paper at 35.

⁴ This is also the position in England and Wales. See Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 867-869.

⁵ [1977] IR 287.

⁶ Shannon, *Child Law* (Thomson Round Hall 2005) at 268.

⁷ This section was referred to by the Supreme Court in *B and B v An Bord Uchtála* [1997] 1 ILRM 15 at 26.

cancellation of an adoption order from the Adopted Children Register. Re-adoption is also possible if the adoptive parents have been found by the High Court to have failed in their parental duties owed to the child under Article 42.5 of the Constitution and in accordance with the *Adoption Act 1988*. In *B and B v An Bord Uchtála*⁸, the Supreme Court's analysis of these sections led it to the conclusion that the concept of permanence as an incident of adoption is not absolute in this jurisdiction. This is because the *Adoption Act 1952* recognises that, in certain circumstances, adopters may lose the rights and duties which they acquire by an adoption order.⁹ This rationale enabled the court to recognise a foreign adoption made in China which was essentially a "simple adoption".

2.05 In some of the submissions received by the Commission, it has been remarked that the way in which the adoptive parents in the *Dowse* case were freed from their parental obligations, so that they were no longer the child's parents in the eyes of Irish law, is at odds with the provisions of the *Adoption Act 1988*. They suggest that this is because it does not appear to be as onerous. The 1988 Act is a statutory expression of Article 42.5 of the Constitution which establishes the State's default role when parents have failed in their duties, which are not confined to duties concerning the education of children.¹⁰ Section 3 of the 1988 Act provides that, before parents (including adoptive parents) can be held to have abandoned their parental rights under the Constitution, they must have failed in their duty towards the child for physical or moral reasons during the previous 12 months. This failure must be likely to continue without interruption until the child reaches 18 years of age and the failure constitutes an abandonment on the part of parents of all parental rights. Effectively, these provisions allow for the non-consensual adoption of children born to married and unmarried parents whose conduct constitutes a complete failure in disregard of their child's rights. It is arguable that while these provisions were not referred to explicitly in the *Dowse* case as a source of guidance, nevertheless the conditions which they establish were met in the case.

2.06 As was already discussed in the Consultation Paper, section 7 of the *Adoption Act 1991* as amended by section 15 of the *Adoption Act 1998*,

⁸ For a discussion of simple adoptions see Consultation Paper at 39-41. In the aftermath of this case, the *Adoption Act 1998* was enacted and provided for greater flexibility in the statutory system governing the recognition of foreign adoption orders.

⁹ [1997] 1 ILRM 15 at 26.

¹⁰ *In Re Article 26 and the Adoption (No. 2) Bill 1987* [1989] IR 656 it was held that the duties of parents to their children extended beyond the provision of education to also cater for the rights of the child in Article 41 and 42 as well as Articles 40, 43 and 44. In this decision of the Supreme Court, the constitutionality of the legislation was upheld.

takes account of the fact that a foreign adoption recognised and registered in this State may be revoked, annulled, cancelled, terminated or set aside in other jurisdictions. The Consultation Paper also pointed out that it does not follow that once such a procedure happens in the foreign country, the adoption is automatically not recognised in Ireland and the registration in the Register of Foreign Adoptions cancelled.¹¹ Irish law will determine whether or not such a foreign adoption should no longer be recognised. If it should not, then the High Court is empowered to make protective orders. The Commission is of the opinion that these legislative provisions proved to be immensely beneficial to the well-being of the child in the *Dowse* case. The action of the Attorney General and the decision of the High Court have been the subject of generally favourable comment.

(b) *Guidance from the Draft European Convention on the Adoption of Children (revised)*

2.07 While the revocation of adoption is not dealt with in the 1993 Hague Convention on Intercountry Adoption, it is referred to in Article 13 of the Council of Europe's 1967 *European Convention on the Adoption of Children*.¹² The main aim of the 1967 Convention (which Ireland ratified) is to promote a minimum level of harmonisation of the domestic adoption laws in the Council of Europe member States. The 1967 Convention is currently being revised to take account of legal developments since 1967. A revised *draft European Convention on the Adoption of Children* has been published by the Council of Europe.¹³ It takes account of more recent case law from the European Court of Human Rights which concern the consent of an unmarried father to the adoption of his child and the need for consultation of the child in adoption proceedings where appropriate.¹⁴ In addition, since 1967 two significant international conventions have been formulated concerning children, the 1989 United Nations *Convention on the Rights of the Child* and the 1993 Hague Convention on Intercountry Adoption. The

¹¹ Consultation Paper at 40.

¹² Strasbourg, April 24, 1967. See www.coe.int/legal and Irish Treaty Series No. 3 of 1968: European Convention on the Adoption of Children. See also the Consultation Paper at 38-40.

¹³ The amended revised draft Convention will be re-assessed and discussed by the Committee of Ministers of the Council of Europe in 2008. Once it is approved, the revised Convention will be opened for signature by the Member States. Note that the revised draft Convention has been referred to in a number of adoption related cases before the European Court of Human Rights. See *Wagner and JMWL v Luxembourg* Application No. 76240/01, 28 June 2007, *Emonet and Others v Switzerland* Application No. 39051/03, 13 December 2007, *Kearns v France* Application No. 35991/04, 10 January 2008 and *EB v France* Application No. 43546/02, 22 January 2008.

¹⁴ See *Keegan v Ireland* (1994) 18 EHRR 342.

aim of the revised draft Convention is to complement these conventions and contribute to a further harmonisation of adoption law in Europe. As Horgan notes, it will also ensure that

“Contracting States will be obliged to adopt the higher standards of the new Amended Revised Convention in their national law and in so doing will greatly improve the position of the child in adoptions of both a national and international character.”¹⁵

2.08 The draft Convention gives guidance on the revocation and annulment of adoption. Draft Article 14 provides that:

“1. An adoption may be revoked or annulled only by decision of the competent authority. The best interests of the child shall always be the paramount consideration.

2. An adoption may be revoked only on serious grounds permitted by law before the child reaches the age of majority.

3. An application for annulment must be made within a period prescribed by law.”¹⁶

2.09 In contrast to the 1993 Hague Convention, draft Article 11 of the draft European Convention builds on Article 10 of the 1967 Convention by dealing with the effects of an adoption. The revised draft Convention caters for both “full” and “simple” adoptions. However, as Horgan notes, the

¹⁵ Horgan, “The New Council of Europe Convention on Adoption” address delivered at Session IV: Adoption of Children, European Seminar on the Protection and Promotion of Children’s Rights, Kiev, Ukraine, 6-7 December 2007. Available at www.coe.int/t/e/legal_affairs/legal_co-operation/Family_law_and_children's_rights/

¹⁶ Draft Article 8 of the revised draft Convention, which is concerned with the possibility of a subsequent adoption, states:

“The law shall not permit an adopted child to be adopted on a subsequent occasion save in one or more of the following circumstances:

- a. where the child is adopted by the spouse or registered partner of the adopter;
- b. where the former adopter has died;
- c. where the adoption has been annulled;
- d. where the former adoption has come or thereby comes to an end;
- e. where the subsequent adoption is justified on serious grounds and the former adoption cannot in law be brought to an end.”

Professor Lowe has questioned whether these circumstances for re-adoption are too rigid. He notes that in particular, it is not clear whether it permits re-adoption following the “breakdown” as opposed to the “ending” of the first adoption. See *Report for the Attention of the Committee of Experts on Family Law (CJ-FA) Containing an Evaluation of the Council of Europe Legal Instruments in the Field of Family Law* (Strasbourg, November 2006) above at fn 12.

object of the draft Convention is to promote adoption which establishes a permanent parent-child relationship found in “full” adoption. She also points out that provision is made in the draft Convention for nuances to the total severance of the birth parent’s rights on adoption, in the case of adoption by spouses or registered partners of the birth parents. Also, a nuanced approach is taken to the severance of all links to the family of origin in some situations, for example the automatic acquisition of the adopter’s surname is not an absolute rule, and the blood link between the child and certain categories of the family of origin may remain to be an obstacle to marriage. Residual rights to maintenance in a subsidiary basis may be provided for if the adopter is unable to comply with maintenance obligations towards the adopted child.¹⁷

C Citizenship

(1) Interaction of citizenship and adoption law in Ireland

2.10 The Irish citizenship entitlements of children adopted by Irish citizens abroad was specifically raised by the Attorney General in his request to the Commission. In this regard, the Commission was mindful of the importance attached to Irish citizenship by successive generations of Irish people, particularly those living outside of Ireland. Indeed, special recognition of the Irish diaspora was incorporated in a new Article 2 of the Constitution in 1998. Article 2 of the Constitution now states:

“It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.”¹⁸

2.11 In Ireland, section 11(1) of the *Irish Nationality and Citizenship Act 1956* states that an adopted child shall be an Irish citizen if they are not a citizen already, provided at least one of the adopters is an Irish citizen.¹⁹

¹⁷ Horgan, “The New Council of Europe Convention on Adoption” address delivered at Session IV: Adoption of Children, European Seminar on the Protection and Promotion of Children’s Rights, Kiev, Ukraine, 6-7 December 2007.

¹⁸ This amendment followed from the *British-Irish Agreement* (the Good Friday Agreement) done at Belfast on 10 April 1998.

¹⁹ Section 11(1) replaced section 25 of the *Adoption Act 1952* which provided that “Upon an adoption order being made in a case in which the adopter (or, where the adoption is by a married couple, the husband) is an Irish citizen the child, if not already an Irish citizen, shall be an Irish citizen”. See also *SW, Applicant* [1957] IR 178.

Since the *Adoption Act 1991* provides that an entry in the Register of Foreign Adoptions has the same legal status as an adoption made under the *Adoption Act 1952*, a registered foreign adoption will also enable the child in question to acquire Irish citizenship. This essentially places the adopted child in a comparable position to that of the child born to its parents who acquires Irish citizenship by descent.²⁰ However, it is of course necessary to show that the foreign adoption complies with Irish adoption law prior to registration. This is to ensure that the rights of natural parents have been protected and that the adoption is in the best interests of the child. It also reflects the need to ensure that the adoption has complied with international human rights standards. This is particularly the case when the child is under 18 years of age and child welfare is of crucial importance. A situation cannot be tolerated where child-trafficking or baby-selling are involved.²¹ This is the case for all countries whether or not they have ratified the 1993 Hague Convention on Intercountry Adoption.

2.12 In the Consultation Paper, the Commission outlined the administrative practice which has developed concerning foreign adoptions such as that in the *Dowse* case.²² The Passport Office requires that a foreign adoption is firstly recognised and registered by the Adoption Board before it will grant an Irish passport to the adopted child.²³ As was already noted in the Consultation Paper, approximately 25-30% of the 4,500 foreign adoptions recognised in Ireland concern adoptions made abroad where at least one of the adopters was an Irish citizen.²⁴ About 10% concern the adoption of children under the age of 18 years at the time of the request for recognition. In these cases, the protection of child welfare is absolutely crucial. Ireland must be satisfied that adoptions made abroad are legal and are verifiable by documentary evidence which shows amongst other things

²⁰ By virtue of section 7(1) of the *Irish Nationality and Citizenship Act 1956* as inserted by section 3(1) of the *Irish Nationality and Citizenship Act 2001*. It should be noted that if it can be proven to the satisfaction of the Passport Office that a natural parent of a child adopted abroad is or was an Irish citizen then the child is entitled to be an Irish citizen by descent irrespective of their adoption. See the Consultation Paper at 42.

²¹ *Fact Sheet No. 53 Preventing Abuse and Trafficking* (January 2008). Available www.iss-ssi.org.

²² Consultation Paper at 42.

²³ The *Passports Bill 2007*, when enacted, will establish a clear legislative basis for the issuing of Irish passports by the Minister for Foreign Affairs. In the context of adoption, section 2(b) of the 2007 Bill defines a certificate of birth as including a certified copy of an entry in the Adopted Children Register maintained under section 22 of the *Adoption Act 1952*. It also includes a document purporting to be a copy of an entry in the Register of Foreign Adoptions issued under section 6(7) of the *Adoption Act 1991*.

²⁴ Consultation Paper at 22.

that the consent of the natural parents was given voluntarily and with the benefit of counselling.²⁵ The remaining 15-20% of entries in the Register concern applications to the Adoption Board by persons who were themselves adopted by an Irish citizen. Some examples of this would be where a young adult who was adopted by an Irish citizen resident in the United States wants an Irish passport because they are about to travel the world. Also, a more mature adult whose adoptive parent emigrated from Ireland to England might be anxious to acquire Irish citizenship during their adopter's lifetime.²⁶ In these cases, there are no child welfare concerns and the recognition of adoption and grant of citizenship is relatively straightforward. The Commission notes that the role of the Adoption Board is understandable and necessary when the adoption which requires recognition concerns a child. However, applications to the Board for recognition from adult adoptees which do not involve child welfare issues are unusual when contrasted with the practices of other countries such as the UK,²⁷ Australia,²⁸ Canada²⁹ and New Zealand.³⁰ In these countries, the relevant agency which deals with such requests is a government department concerning justice, citizenship or foreign affairs.

2.13 There may be some occasions where a foreign adoption does not comply with Irish law because the adoption law, practices or procedures in the foreign country is radically different to that in Ireland.³¹ Therefore the foreign adoption cannot be recognised and registered as a legally valid adoption in Ireland. This would bar the child from acquiring Irish citizenship in accordance with section 11(1) of the *Irish Nationality and Citizenship Act 1956*. It may be that the child is well settled in their adoptive

²⁵ Section 6 of the *Passports Bill 2007* states that an application for an Irish passport shall be accompanied by such information and documents in relation to the applicant as the Minister for Foreign Affairs may require under section 7 to ensure the identity of the applicant and that they are an Irish citizen entitled to a passport. Section 7 of the 2007 Bill provides that such documents shall be accompanied by a statutory declaration made or affidavit sworn by the applicant, to the effect that, to the best of the applicant's knowledge and belief, the information is correct in every material respect and that the applicant has taken all reasonable steps to ensure the accuracy of the information.

²⁶ See Oral Presentation of the Adoption Board to the All-Party Oireachtas Committee on the Constitution, 20 April 2005. Available at www.constitution.ie/default.asp.

²⁷ The Home Office Border and Immigration Agency. See www.ind.homeoffice.gov.uk.

²⁸ Department of Immigration and Citizenship. See www.immi.gov.au.

²⁹ Citizenship and Immigration Canada. See www.cic.gc.ca.

³⁰ Citizenship Office, Department of Internal Affairs. See www.citizenship.govt.nz/diawebsite.nsf.

³¹ For a discussion of the need for compatibility between foreign adoption law and Irish adoption law prior to recognition and registration see chapter 4.

family and to refuse Irish citizenship to such a child would be unfair. As the Commission noted in the Consultation Paper, in such a situation, it is possible that the Minister for Justice, Equality and Law Reform may grant Irish citizenship to a child who is resident abroad and of “Irish associations”, if he or she “thinks fit”.³² In the Irish Government’s *Second Report to the United Nations Committee on the Rights of the Child on the Implementation of the Convention on the Rights of the Child*, the Government acknowledged that once an intercountry adoption is recognised and assuming the adoptive parents are citizens of Ireland, the child gains an automatic right to Irish citizenship under the *Adoption Act 1952 and (emphasis added) the Irish Nationality and Citizenship Act 2004*.³³ This clearly shows that citizenship acquisition via naturalisation is an option for children who are adopted abroad.

(2) Recent Developments in other Jurisdictions

2.14 The approach taken towards the citizenship of the adopted children of Irish expatriates is one which is becoming increasingly popular in other jurisdictions.³⁴ New Zealand, and more recently, Canada and Australia have taken quite similar approaches in this respect, while other countries such as the United Kingdom and the United States require that the child has resided in their jurisdiction for a certain period of time before granting citizenship.³⁵

(a) Canada

2.15 In Canada, the *Citizenship Act (adoption) 2007* provides that Canadian citizenship will be granted on application to a minor adopted by a Canadian citizen outside of Canada after 14 February 1977, if the adoption:

- (a) was in the best interests of the child;
- (b) created a genuine relationship;

³² Consultation Paper at 45-46. Section 16(b) of the *Irish Nationality and Citizenship Act 1956*. Section 16 of the Act as amended by section 10 of the *Irish Nationality and Citizenship Act 2004* defines “Irish associations” as specifically including someone related through adoption to a person who is an Irish citizen or entitled to be one, or if they are dead, was an Irish citizen or would have been entitled to be an Irish citizen.

³³ At 81. Available at www.omc.gov.ie. (Office of the Minister of State for Children).

³⁴ For a general discussion on the acquisition and loss of nationality in the European Union see Bauböck, Ersbøll, Groenendijk and Waldrauch *Report on the Acquisition and Loss of Nationality: Policies and Trends in 15 European States-Summary and Recommendations* (Institute for European Integration Research, Austrian Academy of Sciences, Vienna, 2006) available at

www.migpolgroup.com/multiattachments/3410/DocumentName/NATAC_summary.pdf.

³⁵ Consultation Paper at 47-56.

(c) was in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen; and

(d) was not entered into primarily for the purpose of acquiring a status or privilege in relation to immigration or citizenship.³⁶

2.16 The type of adoption envisaged by the 2007 Act is one which severs all ties with the adopted person's birth parents. The 2007 Act also provides that citizenship will be granted on application to an adopted person (an adult adoptee) who was adopted after 14 February 1977 if there was a genuine relationship of parent and child between the person and the adoptive parent before the person attained the age of 18 years and at the time of the adoption; and also that the previous requirements set out above are met.³⁷

2.17 As well as improving the citizenship entitlements of the adopted children of Canadian expatriates, the 2007 Act removes the requirement that a child brought to Canada, having been the subject of an intercountry adoption, must be a permanent resident in Canada before applying for citizenship.

(b) Australia

2.18 In Australia, section 19 of the *Australian Citizenship Act 2007* allows for a child or adult to be registered as an Australian citizen, if their adoption was effected in accordance with the 1993 Hague Convention on Intercountry Adoption.³⁸ However, if the applicant's Australian citizen parent was an Australian citizen by descent, the applicant's parent must have resided in Australia for a period of two years before the application is made. The earliest date which the Hague Convention has been in force in any country is 1995. The Convention entered into force in Australia in 1998.³⁹

³⁶ Section 3. As noted in the Consultation Paper at 50, the Act represents the legislative response to the issues raised in *McKenna v Attorney General* [1999] 1 FC 401 (CA).

³⁷ See *Regulations Amending the Citizenship Regulations 1993*, which allow for the implementation of the *Act to amend the Citizenship (adoption) 2007*. See <http://canadagazette.gc.ca/part1/2007/20071103/html/regle1-e.html#reg>.

³⁸ See *Reader's Guide: Australian Citizenship Act 2007* (October 2007). Available at www.citizenship.gov.au.

³⁹ The Convention was implemented in Australian federal law via the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* and the *1998 Commonwealth-State Agreement for the Implementation of the Hague Convention on Protection of Children and Co-Operation in respect of Intercountry Adoption* because adoption law is dealt with by the individual States and Territories. See Bojorge "Intercountry Adoptions: In the Best Interests of the Child" [2002] *Queensland University of Technology Law and Justice Journal* 15 available at www.law.qut.edu.au/ljj/editions/v2n2/bojorge_full.jsp. Following a recommendation from the House of Representatives Standing Committee on Family and Human Services in its report on *Overseas Adoption in Australia: Report on the Inquiry into*

As a result, persons adopted as children by Australian expatriates in other jurisdictions such as the United Kingdom and Canada for example in the 1960s and 1970's, are still unable to acquire Australian citizenship by virtue of their adoption.⁴⁰

(c) ***International Guidance***

2.19 Article 24 of the 1966 United Nations *International Covenant on Civil and Political Rights* makes explicit reference to children:

“1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.”⁴¹

2.20 The importance of the right of a child to acquire a nationality is also emphasised by Article 7(1) of the United Nations *Convention on the Rights of the Child*.⁴² Draft Article 12 of the revised draft Council of Europe Convention on Adoption provides that States Parties shall facilitate the acquisition of their nationality by a child adopted by one of their nationals and that the loss of nationality which could result from an adoption shall be conditional upon possession or acquisition of another nationality.⁴³

Adoption of Children from Overseas (November 2005), the Australian Attorney General's Department has taken the lead role in the overall development and management of intercountry adoption programmes. See *Attorney-General's Department Intercountry Adoption Strategic Plan 2007* available at www.ag.gov.au.

⁴⁰ Certain organisations representing the Australian diaspora campaigned on behalf of such persons to be included in the 2007 Act and continue to do so. See www.southern-cross-group.org. See also Consultation Paper at 52-53.

⁴¹ See www.unhcr.ch/html/menu3/b/a_ccpr.htm.

⁴² The *United Nations General Assembly Resolution on the promotion and protection of the rights of children* (16 November 2007) at 5, urges all States to intensify their efforts to comply with their obligations under the Convention on the Rights of the Child to preserve the child's identity, including nationality.

Available at www.crin.org/index.asp.

⁴³ In 2000, the Parliamentary Assembly of the Council of Europe declared that Member States must “ensure that in an event such as the divorce of the adoptive parents, the desertion of the foreign child or the emergence of difficulties with the adoption procedure, the child's fundamental rights, such as the right to a name and to citizenship, will be respected”. See *Recommendation 1443 (2000) International adoption: respecting children's rights*. Available at

2.21 The Hague Conference on Private International Law also encourages states to facilitate the child's acquisition of its adoptive parent's citizenship. The 1993 Hague Convention on Intercountry Adoption does not explicitly deal with the issue of nationality. However, in its 2005 *Draft Guide to Good Practice under the Hague Convention on Intercountry Adoption*, the Hague Conference points out that States should avoid a position where a child would be left stateless in an intercountry adoption setting where sending and receiving countries are involved.⁴⁴ In 2000, a Special Commission of the Hague Conference on the Practical Operation of the 1993 Convention on Intercountry Adoption noted that there is merit in the child's acquisition of the adoptive parent's nationality as it would promote the child's full integration into the adoptive family.⁴⁵ It would also place the child in a similar position to that of the child who acquires citizenship by descent from the family it is born into.

2.22 However, it must be remembered that unlike Ireland, which permits multiple citizenship, some countries do not allow their citizens to possess more than one nationality. One of the negative aspects about acquiring the citizenship of adoptive parents, particular in an intercountry adoption, is that the child may lose their entitlement to the citizenship of its native country particularly if that country does not allow its citizens to hold the nationality of another State.

2.23 It is notable that all submissions received by the Commission agreed that the adopted children of Irish citizens living abroad should continue to be treated in the same way as biological children are in terms of acquiring Irish citizenship. The Commission can see no merit in imposing a residency requirement on children before they can acquire Irish citizenship. In making this recommendation, the Commission is aware that adopted and biological children must be treated equally where possible. The Commission's provisional recommendation to that effect in the Consultation Paper has been reinforced by the recent decision of the European Court of Human Rights in *Wagner and J.M.W.L. v Luxembourg*⁴⁶ where the difficulties for adopted children in not acquiring their adoptive parents

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta00/EREC1443.htm>.

⁴⁴ *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (August 2005) at 70-71. Available at www.hcch.net/index_en.php.

⁴⁵ *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, November 2000 at paragraph 81. Available at www.hcch.net/index_en.php.

⁴⁶ Application No. 76240/01, 28 June 2007.

citizenship has been held to fall foul of Article 14 of the Convention which prohibits discrimination.

(3) Recommendation

2.24 The Commission has therefore concluded that citizenship law as it relates to adopted children must continue to be tempered by the equality principle. The Commission recommends that there should be no change to the citizenship rights of a child resident outside the State who is the subject of a foreign or intercountry adoption order made in favour of an Irish citizen or citizens.

2.25 *The Commission recommends that there should be no change to the Irish citizenship rights of a child resident outside the State who is the subject of a foreign or intercountry adoption order made in favour of an Irish citizen or citizens.*

D Rights of the Child

(1) Overview

2.26 As well as citizenship rights, the Attorney General's request focuses on the status and rights of a child resident outside the State who is the subject of a foreign adoption order. In the Consultation Paper, the Commission noted that the request reflects the growing internationalisation of families and the law. The legal and constitutional rights of an Irish citizen child who is not resident in the State must be considered alongside the legal and constitutional duties of parents. The very condition of childhood means that children have to depend upon others to provide, protect and enforce their rights.⁴⁷ This is evident from the *Dowse* case where it was held that the Irish citizen child possessed rights under the Constitution of Ireland and these rights were able to be given practical effect by applying the provisions of the *Adoption Act 1991*, as amended, and by exercising the inherent jurisdiction of the High Court to ensure that the adoptive parents fulfilled some of their responsibilities towards the child.⁴⁸

⁴⁷ In *N v Health Service Executive* [2006] IESC 60, Hardiman J stated that: "A right conferred on or deemed to inhere in a very young child will in practice fall to be exercised by another on his or her behalf. In practice, therefore, though such a right may be ascribed to a child, it will actually empower whoever is in a position to assert it, and not the child himself or herself. The person actually asserting such a right may of course be a parent or guardian, but it might equally be a public authority, a stranger, or indeed the State itself."

⁴⁸ Martin notes that the *Dowse* case "unequivocally asserted the principle that the *rights of a child* in the context of adoption law (intercountry/foreign adoption) are paramount and are to be constitutionally protected and promoted". See Martin "Judges, Parents and the Child: A Tale of Two Child Law Cases" *An Leabhbh Óg*

(2) **Recent case law**

2.27 In discussing how the Constitution can apply to citizens who are not resident in Ireland as well as the interaction between private international law and constitutional principles, the Commission made reference to a number of cases which appeared before the superior courts.⁴⁹ Since the publication of the Consultation Paper, some of these issues arose in *Foyle Health and Social Services Trust v C and C*.⁵⁰ The respondent mother and father were a married couple living in the State. They came to the attention of the Health Service Executive and their six children were placed in care. The mother became pregnant with their seventh child and was aware that, once her baby was born, this child would be taken into emergency care. To avoid this she travelled to Northern Ireland where her baby was born. In that jurisdiction, the child was eventually taken into care by the local Health and Social Services Trust, but the mother continued to have access to the child. A court found that the child should be adopted. The mother objected to this, and during an access visit, took the child and returned to Ireland. The HSE took the child into care. The applicant Health and Social Services Trust sought the return of the child to Northern Ireland under the *Child Abduction and Enforcement of Custody Orders Act 1991*, the 1980 *Hague Convention on the Civil Aspects of International Child Abduction* and *Council Regulation (EC) 2201/2203* (the Brussels II bis Regulation) claiming it had custody of the child and that the child's removal was wrongful.

2.28 Article 20 of the Hague Convention provides that:

“The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”⁵¹

The respondent parents claimed under Article 20 that to return the child would breach the constitutional rights of the child and her family because of the proposed adoption in Northern Ireland. This defence to the return of a child was invoked in *London Borough of Sutton v M*,⁵² where the High Court refused the return of children to England where they would be adopted

(2007) vol.1, issue 1 (O.M.E.P., L'Organisation Mondiale pour l'Education Prescolaire-World Organisation for Early Childhood Studies) at 22-38.

⁴⁹ Consultation Paper at 59-71.

⁵⁰ [2006] IEHC 448.

⁵¹ The Convention was incorporated into Irish law by the enactment of the *Child Abduction and Enforcement of Custody Orders Act 1991*.

⁵² [2002] 4 IR 488. Finlay-Geoghegan J declined to return the children to England on the basis of Article 13(a) of the Convention. For discussion see Consultation Paper at 60.

because English adoption law allows for adoption of children born to married parents on grounds which fall far short of similar Irish law under the *Adoption Act 1988*. To do so would breach the rights of the children and their family under Articles 41 and 42 of the Constitution. The decision in *M* was followed by Dunne J in the *C and C* case. She found that there was a divergence between the law of adoption in Ireland and Northern Ireland.⁵³ In Ireland, the adoption of children of married parents is significantly curtailed by the *Adoption Act 1988* and constitutional principles relating to the family whereas in Northern Ireland, the law is not as restrictive. On this basis the judge refused the return of the child to Northern Ireland under Article 20 of the Convention.

2.29 The child in this case was entitled to dual nationality (British and Irish) as it was born in Northern Ireland and both parents were born in Ireland. This combined with the fact that the child was physically present in the State made the provisions of the Constitution directly applicable to the child. Where a child is not resident within the jurisdiction but nonetheless is an Irish citizen, the Fundamental Rights provisions of the Constitution are still applicable since the rights which they protect are universal in nature.⁵⁴ It is implicit in the judgment of Dunne J that, had the adoption occurred in Northern Ireland, it would have breached the rights of the Irish citizen child and its parents as a family within the meaning of the Constitution.

(3) *The international reach of Irish constitutional law*

2.30 The extent to which the Constitution's Fundamental Rights provisions, especially those pertaining to the Family, extend to Irish citizens and those who are not Irish citizens, whether they are resident in Ireland or elsewhere, has been analysed by Professor Binchy:

“It seems clear enough that the values underlying Articles 41 and 42 are universalist in that they reflect unambiguously a natural law philosophy regarding marriage, the family and the relationship between the family and the State. Does this mean that Articles 41 and 42 should be interpreted as protecting all families throughout the world? It does not follow from the fact that these Articles reflect a universalist philosophy that radiate to all corners of the earth. There would be nothing logically

⁵³ For a discussion of adoption law in Northern Ireland and Ireland see O'Halloran, “Adoption in Two Jurisdictions of Ireland: a Case Study of Changes in the Balance Between Public and Private Law” *International Family Law* April (2001) at 43.

⁵⁴ See Binchy, “The Implications of the Referendum for Constitutional Protection and Human Rights-Parts I and II” (2004) 22 *ILT* 154 and (2004) 22 *ILT* 166.

inconsistent about their being subject to specific restrictions such as citizenship or residence in Ireland, for example.”⁵⁵

2.31 Therefore, in general the Family provisions of the Constitution should apply to Irish citizens at home and abroad and to those who are not Irish citizens but are resident in Ireland,⁵⁶ or are outside the State but have some particular connection with the State. For example, this might apply to the child who has been adopted in a foreign country by Irish citizens but whose adoption has not yet been recognised or registered in the Register of Foreign Adoptions in Ireland.

2.32 Binchy continues to note that the language of Articles 41 and 42 gives only opaque clues as to the possible limitations. These include the character of the references to the State, notably the pledge by the State to guard with special care the institution of marriage,⁵⁷ the State’s undertaking to provide for primary education⁵⁸ and to endeavour to supply the place of the parents in exceptional cases of parental failure of duty towards their children. He states that these references are difficult to reconcile with the idea that Articles 41 and 42 were intended to embrace every family in the world. However, as occurred in the *Dowse* case, parents living abroad who fail their children under Article 42.5 of the Constitution can be held accountable by an Irish court and the State can make orders aimed at supplying the place of the parents.⁵⁹ However, it must be acknowledged that the unique circumstances of this case combined to facilitate this outcome.

⁵⁵ See Binchy, “The Implications of the Referendum for Constitutional Protection and Human Rights-Parts I and II” (2004) 22 ILT 154 and (2004) 22 ILT 166.

⁵⁶ This is particularly appropriate since the 2006 Census shows that approximately 10% (419,733 persons out of a total of 4,126,416 persons) of the Irish population are not Irish citizens. A significant proportion of these people are from other European Union countries and so are citizens of the EU and have rights under EU law while in Ireland (nearly 66% or 275,775 are from EU countries).

See www.cso.ie/statistics/nationalityagegroup.htm

⁵⁷ Article 41.1.2°

⁵⁸ Article 42.4

⁵⁹ See also *Eastern Health Board v An Bord Uchtála* [1994] 3 IR 207 discussed in the Consultation Paper at 61-62. In this case the Supreme Court held that there was nothing in the *Adoption Act 1988* which prohibited its application to a child who is not an Irish citizen, so that such a child could be found to be abandoned under the Act. It also found that the references to “parents” and “child” in Article 42.5 are not confined to Irish citizens. This allowed an Irish couple to adopt a child they brought to Ireland from India in accordance with the 1988 Act.

(4) Private international law considerations

(a) The Irish perspective

2.33 In *MC v Delegación Provincial de Malaga*,⁶⁰ McGuinness J noted that the High Court has jurisdiction to protect the rights and welfare of any child who is an Irish citizen and that the Court could assume jurisdiction even in a case where such a child is not present within the State. She cited the following views of Binchy:

“The fact that the child is an Irish national, regardless of where he or she may be living or present at the time of the proceedings appears to be a sufficient ground for exercising jurisdiction although it is reasonable that the Irish courts should do so with circumspection.”⁶¹

2.34 However, she qualified this by stating that any decision to exercise jurisdiction must be guided by whether it is appropriate or proper in the circumstances for the court to do so bearing in mind the private international law rule of the comity of courts which is a well established principle and illustrates the respect which courts of different nations must show to their counterparts.⁶² Common sense and international law dictates that the most appropriate jurisdiction to deal with issues relating to the welfare of a child is the place where the child is habitually resident.⁶³ In the

⁶⁰ [1999] IEHC 138, [1999] 2 IR 363. See Consultation Paper at 62-65.

⁶¹ *Binchy Irish Conflicts of Law* (Butterworths Ireland Ltd 1988) at 324. Nationality is an important connecting factor in many continental European countries. In its *Working Paper on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws* (No. 10-1981) at 7, the Commission noted that this connecting factor represents a person’s political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalisation, it depends essentially on the place of birth of that person or on his parentage. It was first adopted as a connecting factor in France in 1803 with the promulgation of the *Code Napoléon*, in preference to domicile. It has gained support in continental Europe as a result of the influence of Mancini in Italy and nowadays is also the basic connecting factor in some South American states and in Japan.

⁶² In *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 at 968, Thorpe LJ noted that courts in England and Wales should be extremely circumspect in assuming any other jurisdiction in relation to children physically present in some other jurisdiction founded only on the basis of nationality. See Consultation Paper at 64-65. See also Lowe “The Allocation of Parental Rights and Responsibilities-The Position in England and Wales” 39 *Family Law Quarterly* [2005-2006] No.2, 267 at 293.

⁶³ The origins of habitual residence as a connecting factor appear to have emerged from a decision of the International Court of Justice in *Netherlands v Sweden* [1958] ICJ Rep 55 known as the “Boll case” and the 1961 *Hague Convention concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants*. See Consultation Paper at 65-66.

Consultation Paper, a number of reasons were provided why the country where a child is habitually resident is more suited to making decisions as to its welfare. As Duncan notes the claim by a country which constitutes the child's current social environment to exercise jurisdiction to protect the child is a strong one, based on practicality and convenience for family members as well as a sense of responsibility which States have developed in relation to children living within their territories.⁶⁴ However, this claim is not necessarily an exclusive one. The Irish courts have a jurisdiction to be invoked by the Attorney General in the following exceptional circumstances:

“(a) Where the child is an Irish citizen albeit that the child is habitually resident in that other State.

(b) Where the courts of the foreign State (in which the child is habitually resident) have declined jurisdiction or are not, for other reasons, in a position to effectively exercise jurisdiction.

(c) Where the foreign court and the apparatus of its State are willing to co-operate with the enforcement of the Irish court order.

(d) The order of the Irish court would not in any way violate the domestic laws of the foreign State and

(e) There are no international conventions or bilateral agreements to secure the rights of the child, or

(f) Where the parents invoke the jurisdiction of the Irish court e.g. seeking to revoke an adoption order.”⁶⁵

2.35 In the Consultation Paper, the Commission noted that under current principles of international law, the State has jurisdiction in exceptional cases to exercise jurisdiction to protect the interests of children who are Irish citizens even where those children are not resident in the State.⁶⁶ In some of the submissions received by the Commission, it has been observed that there will be a strong and understandable temptation to exercise jurisdiction based on citizenship in a case where Ireland has no reciprocal arrangements with the country in which the child is habitually resident. The desire to ensure that the Irish citizen child is protected is strong, especially if the authorities where the child lives are lacking in this

⁶⁴ Duncan “Nationality and the Protection of Children Across Frontiers: The Case of Intercountry Adoption” paper delivered at the 3rd European Conference on Nationality-Nationality and the Child, Strasbourg, 11-12 October 2004.

⁶⁵ See speech of Mr. Rory Brady SC, former Attorney General, at the launch of the Consultation Paper, 28 March 2007.

⁶⁶ See Consultation Paper at 73-74.

regard. However, the exercise of jurisdiction must be tempered by practical considerations. For example, there is no guarantee that any protective orders made by an Irish court will be enforced in another jurisdiction. The Commission expressed the view that the State can most appropriately deal with the welfare of children in an international setting through the available international co-operative Conventions such as the 1993 Hague Convention on Intercountry Adoption and the 1996 Hague Convention on the International Protection of Children which will be discussed below.

(5) Recommendation

2.36 *The Commission acknowledges that a residual jurisdiction inherent in the State, to intervene in appropriate circumstances to protect the status and rights of an Irish citizen child resident outside the State who is the subject of a foreign or intercountry adoption order made in favour of an Irish citizen or citizens, should continue to be exercised in the future, taking into account the relevant principles of international law, including the comity between States which arises in such cases and the practical enforceability of any orders made by an Irish court.*

CHAPTER 3 DUTIES OF PARENTS AND THE STATE

A Introduction

3.01 In this chapter the Commission considers the second and third aspects of the Attorney General's request to the Commission. These refer to the most effective manner of securing the performance of the constitutional and legal duties of adoptive parents who are Irish citizens, in respect of their child. The Commission emphasises that this is in the context of adoptive parents and children who are not resident in the State. In Part B, the Commission discusses the practical ability of the State to have any role in supervising adoptions such as those in the *Dowse* case. In Part C the role of the Attorney General is discussed in light of the *Dowse* case.

B Overview

3.02 The child in the *Dowse* case, which formed the immediate background to the Attorney General's request, was an adopted child not resident in Ireland. Such a child's connection with Ireland arises by virtue of the fact that at least one of their adoptive parents is an Irish citizen. Once the child's adoption is recognised and registered by the Adoption Board in the Register of Foreign Births, this paves the way for the child to acquire Irish citizenship. As stated previously, such adoptions (where the child is under the age of 18 years at the time of registration) are relatively rare. They account for about 10% of the 4,500 foreign adoptions recognised and registered by the Board since the enactment of the *Adoption Act 1991*.

3.03 As already noted in chapter 2, this particular type of adoption presents very real practical difficulties for Ireland in terms of controlling adoption practices in another country. The Adoption Board and Irish authorities generally have little influence over what occurs in other countries. This is even more so when a request for recognition occurs long after an adoption has been granted in another State. In the Consultation Paper, the Commission pointed out that Ireland cannot be expected to police the activities of Irish citizens all over the world who adopt children.¹ Submissions received by the Commission were in general agreement that children adopted abroad by Irish citizens should be treated equally in terms

¹ Consultation Paper at 83-83.

of citizenship. Some submissions suggested that this principle of equality should be extended to adoption practices and procedures. They suggested that the same standards of adoption practices and procedures should apply regardless of whether an adoption order was granted in Ireland or abroad, or whether or not the family is resident in Ireland. The Commission is mindful that it would be extremely difficult to achieve this admirable aim. Each State has the right to determine its own law and policies and Ireland has relatively little influence on its own to ensure that its particular procedures and policies are implemented abroad.² In recent decades, at multilateral level there has of course, been a certain amount of harmonisation of adoption policy and practice amongst States, notably where the 1993 Hague Convention on Intercountry Adoption law has been ratified. In Council of Europe member states, the revised draft European Convention on the Adoption of Children will provide for further multilateral harmonisation of standards.

3.04 The Commission reiterates its view that the 1993 Hague Convention is a good starting point in raising standards in intercountry adoption practices. The Commission greatly welcomes the forthcoming publication of the *Adoption Bill 2008* to implement the Convention and to consolidate domestic adoption law in Ireland. The Hague Convention does not and cannot eradicate all of the problems and difficulties which often beset adoptions which cross international jurisdictions. However, it establishes a set of minimum standards to which Contracting States agree.

3.05 In terms of the respective duties of parents and the State under Irish law, Articles 41 and 42 of the Constitution state that parents have responsibilities towards their children to ensure their well-being. If they fail in this duty for “physical or moral reasons” it is the State’s responsibility to ensure that the rights of the child are vindicated by ensuring that parental duties are exercised, in accordance with Article 42.5. Such state intervention is rare and will only occur in the most exceptional of cases. This is because the family is afforded a certain degree of autonomy under the Constitution and is freed from any unnecessary intrusions by the State. Indeed this is a view shared in other jurisdictions and under Article 8 of the *European Convention on Human Rights* which reinforces the status of the family. It has been noted that:

² The practical difficulty for a State to ensure that its citizens who live abroad comply with domestic adoption practices and procedures has been highlighted by Canada. See “Intercountry Adoption and Intercountry Adoption Services” *Canadian Issue: Immigration and Families* (Association for Canadian Studies 2006). Available at www.hrsdc.gc.ca/en/cs/sp/sdc/task_force/1A/abstract/page01.shtml.

“...family responsibility is obviously crucial in ensuring that children are properly looked after. There is plenty of evidence that, by and large, children do best in their own families.”³

3.06 In Ireland, state intervention in a family may take the form of foster care or residential care in the short term, with adoption as a more permanent intervention. Where the Family is concerned, the State’s role is to supplement rather than to supplant it. This position is not unique to Ireland and is also recognised in the United Nations *Convention on the Rights of the Child*.⁴

3.07 Where the child is an Irish citizen living abroad, this poses obvious practical problems bearing in mind private and public international law. The series of events which led to the involvement of the State in the *Dowse* case were unusual. Once the State became aware that one of its citizens abroad was experiencing severe difficulties, it exercised its residual role to ensure that parental duties owed to the child were fulfilled albeit in a cross-border setting. The provisions of the *Adoption Act 1991* as amended by the *Adoption Act 1998*, and the inherent jurisdiction of the High Court combined to enable protective orders to be made for the benefit of the child. This, together with the work of the Department of Foreign Affairs and the Adoption Board in determining the welfare of the child, was of immense importance. Indeed, submissions received by the Commission supported the approach of the Irish authorities in this case. It has to be acknowledged that not all cases will be capable of resolution in this way and that it is more likely to be resolved in the jurisdiction in which the child is physically present.

3.08 Another factor which must be considered is that, in the *Dowse* case, the adoptive parents consented to the jurisdiction of the High Court and agreed to abide by the orders made by the court. If this did not occur or there were no financial assets which could be accessed by an Irish court then it is very difficult to see what could have been done from a purely practical perspective. However as noted in the Consultation Paper, the Commission is

³ Baroness Hale of Richmond “Understanding Children’s Rights: Theory and Practice” delivered at the Fourth World Congress on Family Law and Children’s Rights, Cape Town, South Africa, 20-23 March 2005. Available at

www.lawrights.asn.au/html/2005_papers.html.

⁴ Article 27.2 of the Convention states that: “The parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions necessary for the child’s development”. Article 27.3 states that: “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

of the opinion that the rights and duties contained in the Constitution has extra-territorial effect and extends to Irish citizens abroad. Therefore, Irish citizen parents have responsibilities to their children which are recognised by the Constitution. Where they fail in performing these responsibilities, the State may have a residual role insofar as is practicable to ensure that such duties are fulfilled and that the rights of the child are protected. In the *Dowse* case, the High Court did this by making an array of orders which were to the benefit of the Irish citizen child and which were as a result of the intervention of the Attorney General. The State was aware of the child's situation by virtue of the registration of the child's adoption in Ireland. This provided a further connection with the State, because the intervention of the High Court in Ireland was required to remove the adoption registration from the Register of Foreign Adoptions. As to the enforcement of parental responsibilities where the parents are Irish citizens abroad, any residual duty of the State to ensure performance of these responsibilities must take practical as well as private and public international law considerations, into account. Therefore, ensuring the performance of parental duties and the protection of the rights of the child is generally a matter for the authorities of the State in which the child and parents are habitually resident.

(1) Recommendation

3.09 *The Commission acknowledges that the duty of the State to secure the performance of the constitutional and legal duties of adoptive parents who are Irish citizens resident abroad is limited by reference to practicability within the meaning of the Constitution of Ireland and private and public international law considerations.*

C Role of the Office of the Attorney General

3.10 As noted in the Consultation Paper, the role of the Attorney General in the *Dowse* case was of immense importance. The Attorney General, as the pre-eminent legal officer of the State, took initial proceedings against the adoptive parents in the High Court to compel them to carry out their parental duties. The Attorney General has a unique constitutional and legal role as “guardian of the public interest”. This is a generic term used to describe the different functions the Attorney General carries out independently of the Government on behalf of the public as a whole.⁵ In the *Dowse* case, the Attorney General acted as an officer of the public rather, than as legal adviser to the executive.⁶ It involves striving to ensure that the

⁵ See generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed Butterworths 2003) at 589.

⁶ See *McLoughlin v Minister for Social Welfare* [1958] IR 1 at 16 per Kingsmill Moore J.

interests of Irish citizens, particularly those who are vulnerable, are protected. Section 6 of the *Ministers and Secretaries Act 1924* describes this aspect of the Attorney General's functions as "the assertion and protection of public rights and all powers, duties and functions connected with same". This is a generic term used to describe the different functions the Attorney General carries out independently of the Government on behalf of the public as a whole.⁷ In the *Dowse* case, the Attorney General acted as an officer of the public rather, than as legal adviser to the executive.⁸ In addition, the Supreme Court has stated that the nature of the office charges the Attorney with the duty to uphold the Constitution in the "protection of the unprotected".⁹

3.11 The submissions received by the Commission expressed clear support for the actions of the Attorney General in the *Dowse* case. The Commission reiterates its view that it is entirely appropriate that the Attorney General would instigate proceedings in an Irish court or, if the circumstances warrant it, in a foreign court, regarding an Irish citizen child as occurred in the *Dowse* case. In the Commission's view it would not, however, be practical to place a general duty on the Attorney General to protect the rights of Irish citizen children living outside the State. Placing unreasonable investigative burdens on the State in this regard would be inappropriate. As the Commission noted in the Consultation Paper, Article 40.3.1° of the Constitution limits the State's duty in the protection of the rights of citizens so far as is "practicable", and Article 40.3.2° refers to the State's duty to do so "as best it may". The Attorney General's intervention would therefore only be appropriate in circumstances which come to the attention of the State and where it would appear that action to protect a child in a foreign jurisdiction is not forthcoming. In light of the *Dowse* case, the Commission acknowledges that a residual jurisdiction lies within the State, through the Attorney General in his role as guardian of the public interest and protector of the unprotected, to intervene in appropriate circumstances to protect the status and rights of an Irish citizen child resident outside the State, and who is the subject of a foreign adoption order. This must be tempered by practical considerations such as comity between States and the practicability of Irish court orders being enforced in a foreign jurisdiction. For example, private international family law principles place great emphasis on the concept of "habitual residence", so that ordinarily the courts of the jurisdiction where a child is habitually resident are best placed from a

⁷ See generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed Butterworths 2003) at 589.

⁸ See *McLoughlin v Minister for Social Welfare* [1958] IR 1 at 16 per Kingsmill Moore J.

⁹ *Attorney General v Hamilton (No.1)* [1993] 2 IR 250 at 282.

practical perspective to deal with a case concerning a child and to make the necessary orders to protect such a child.¹⁰ The Commission is of the opinion that it would not be desirable to set out prescriptive rules outlining the Attorney General's duties in this regard, whether by legislation or otherwise. The flexibility inherent in the powers of the Attorney General must be exercised against the background of individual cases and circumstances in the future which cannot be predicted with any great certainty.

(I) Recommendations

3.12 *The Commission recommends that in exceptional cases which come to the attention of the State, the Attorney General is the most appropriate officer of the State to initiate proceedings in the Irish High Court to secure the performance of the constitutional and legal duties of Irish citizens as parents of an adopted child resident outside the State and to ensure the fulfilment of the duties of the State in respect of such a child arising from Articles 40.3 and 42.5 of the Constitution. The Commission recommends that the Attorney General is also the appropriate officer of the State to initiate any similar proceedings in the court of another jurisdiction, taking into account relevant principles of international law.*

¹⁰ See Consultation Paper at 62-67.

CHAPTER 4 RELATED ISSUES

A Introduction

4.01 In this chapter the Commission discusses a number of related issues which arise from the Attorney General's request. As noted in the Consultation Paper, the request did not involve a wide ranging review of adoption law. Nevertheless, certain issues arise which merit consideration and discussion. In part B, the Commission examines the issue of documentation used to establish that a foreign adoption has been granted abroad. The Commission also discusses the importance of the 1961 Hague Apostille Convention in this regard and the 1996 Hague Convention on the International Protection of Children. In Part C, the Commission discusses particular pre-adoption and post-adoption matters in light of the submissions received in response to the Consultation Paper. In Part D, some of the differences between domestic and intercountry adoption in Ireland are highlighted.

B Documentation and Guidelines

(1) *Irish Law*

4.02 In the Consultation Paper, the Commission discussed the documentation presented in Ireland to establish that an adoption was granted in other jurisdictions. The current law in the *Adoption Acts 1991 and 1998* essentially provide for a presumption in favour of recognition. Section 9(4) of the *Adoption Act 1991* contains a presumption, which may be rebutted, that a foreign adoption was properly made under the law of the place where it was granted. The Adoption Board therefore has a statutory duty to register a foreign adoption in the Register of Foreign Adoptions once the adoption complies with the requirements for registration in the *Adoption Act 1991*, as amended. This is emphasised by section 6(2) of the *Adoption Act 1991* which states that "an entry shall be made in the Register" unless the relevant circumstances have changed to the extent that it would not be proper to register, having regard to section 13 of the *Adoption Act 1952* and section 10 of the 1991 Act.¹ This presumption of recognition is reinforced by the recent

¹ Section 13 of the *Adoption Act 1952* provides that the Adoption Board shall not make an adoption order unless it is satisfied that the applicant is of good moral character, has sufficient means to support the child and is a suitable person to have parental

decision of the European Court of Human Rights in *Wagner and J.M.W.L. v Luxembourg*.² Of course, not every foreign adoption must be recognised. Indeed the *Adoption Act 1991* provides that a foreign adoption should not be recognised if it would be contrary to public policy to do so.³ In this respect, it is a reality that intercountry adoption can be prone to abuse. The International Social Service notes that adoption orders issued by a court, may involve failure to comply with procedures, the falsification of documents, a declaration that the child is adoptable without evidence of parental consent and the payments of monies.⁴

4.03 It is clear that a foreign adoption must not be recognised if it does not approximate with the concept of adoption in Ireland, or there is evidence to show that it involves breaching the legal or human rights of natural parents in another jurisdiction. Constitutional fair procedures also mandate that rebutting evidence may be introduced to show that a foreign adoption does not comply with Irish adoption law. Some examples which would warrant non-recognition are:

- if the consent of the natural parents was obtained by coercive means and not freely given,
- the consent to adoption was given before the child has attained the age of six weeks,
- money changed hands or,
- the adoption involved a private placement.

4.04 This mirrors the approach in the *Adoption Act 1952*. For example, section 15 of the 1952 Act as amended by section 8 of the *Adoption Act 1974* provides that an adoption consent is not valid unless it is given after the child has attained the age of six weeks and not earlier than three months before the application for adoption. Similarly section 42 of the *Adoption Act 1952* provides that an adopter, parent or guardian of a child shall not receive or agree to receive any payment or other reward in consideration of the adoption of the child under the Act. Private adoptions are prohibited by section 34 of the *Adoption Act 1952*, as amended by section 6 of the *Adoption Act 1974* and section 7 of the *Adoption Act 1998*. The Adoption

rights and duties in respect of the child. Section 10 of the *Adoption Act 1991* deals with the marriage of the applicants.

² Application No. 76240/01, 28 June 2007. See the discussion above at chapter 1.

³ Sections 2, 3, 4, 4A and 5 of the *Adoption Act 1991* as amended. This approach implemented the recommendations of the Commission in its *Report on the Recognition of Foreign Adoption Decrees* (LRC 29-1989) at 32.

⁴ *Fact Sheet No. 53 Preventing Abuse and Trafficking* (January 2008) available at www.iss-ssi.org.

Board has recently reminded prospective adoptive parents of the need for foreign adoptions to comply with these requirements and that, if they do not do so, a refusal of recognition on the grounds of public policy may be warranted.⁵

(2) *Hague Convention and other Jurisdictions*

4.05 As the Commission noted in the Consultation Paper, Article 23 of the 1993 Hague Convention on Intercountry Adoption operates on the basis of mutual co-operation between the central authorities of the Contracting States and provides for the automatic recognition of adoptions made in accordance with the Convention in all Contracting States. Article 23 provides that when an adoption is made by the competent authority it must issue a certificate which will act as evidence that the adoption has been made in accordance with the Convention. Thus, in Australia, Regulation 3 of the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* describes the adoption document from other Hague Contracting States as an “adoption compliance certificate”.⁶ The evidential value of the adoption compliance certificate is outlined in Regulation 19 which states that:

“Subject to regulation 22 an adoption compliance certificate is evidence, for the laws of the Commonwealth and each State, that the adoption to which the certificate relates:

(a) was agreed to by the Central Authorities of the countries mentioned in the certificate; and

⁵ See public notice 5 September 2007 at www.adoptionboard.ie. In summer 2007, the Board advised those seeking to adopt from Mexico and Florida that no child should be placed with applicants prior to the granting of a Declaration of Eligibility and Suitability under section 1(iii)(II) of the *Adoption Act 1991*, that a child must not be placed for adoption until it has attained the age of six weeks and not earlier than three months before the application for adoption, that no payments should be made by an applicant until the child is placed for adoption, and that no payments should be made which contravene section 42 of the *Adoption Act 1952*. The Board advises that intercountry adoptions which are in breach of these statutory provisions may not be eligible for entry in the Register of Foreign Adoptions. In such cases the applicant(s) may have to apply to the High Court for a direction to have the adoption entered in the Register, which the High Court may or may not grant. The Board warns that this may involve considerable expense on the part of the applicants and failure to have a child’s adoption entered in the Register will result in the child not being recognised as an Irish citizen with all the attendant consequences.

⁶ The 1998 Regulations were made under section 111C of the *Family Law Act 1975*, which provided for the implementation of the 1993 Hague Convention on Intercountry Adoption.

(b) was carried out in accordance with the Convention and the laws of the countries mentioned in the certificate.”⁷

The adoption compliance certificate is also required under section 19C(2)(b) of the *Australian Citizenship Act 2007* when a child adopted from a Hague Convention country applies to become an Australian citizen. Similarly, in New Zealand, section 11(2) of the *Adoption (Intercountry) Act 1997* provides that a certificate signed by the competent authority in the State where the adoption took place and stating that the adoption was made in accordance with the Hague Convention is for all purposes prima facie evidence of that fact. Similar provisions are contained in *The Intercountry Adoption (Hague Convention) Regulations 2003* made under the UK *Adoption (Intercountry Aspects) Act 1999*, which originally incorporated the Hague Convention in United Kingdom law.

4.06 As noted in the Consultation Paper, the 1993 Hague Convention on Intercountry Adoption is concerned with the regulatory process of intercountry adoption amongst Contracting States and this offers a degree of reassurance that adoptions are in fact legally valid. The central authority system envisaged by the Convention provides another avenue to ensure that adoption practices are proper. This system facilitates communication between central authorities which can refer to each other on any questions which might arise concerning a particular adoption. In the event of serious shortcoming in an adoption, Article 24 of the Convention allows for non-recognition if recognition would be manifestly contrary to public policy taking into account the best interests of the child.

4.07 When the Hague Convention is incorporated into Irish law in accordance with the imminent *Adoption Bill 2008*, prospective adoptive parents will continue to be assessed for intercountry adoption as currently applies. They will then travel to adopt a child in a Hague Convention country or a non-Convention country with which Ireland has signed a bilateral treaty in accordance with Article 39 of the Convention. Therefore, this State will have a certain degree of control over the process to ensure that adoption practices are ethical. Irish people living in Hague Convention countries may adopt children in these countries through the domestic adoption law process of those countries and, because they are Convention countries, the adoptions will most likely be entitled to recognition in Ireland. However, it must be remembered that where Irish people adopt in a non-Convention country the Adoption Board in Ireland may still be requested to recognise such an adoption for citizenship purposes.

⁷ This is subject to regulation 22 which allows for a refusal of recognition of a Convention adoption if to do so would be manifestly contrary to public policy taking into account the best interests of the child.

4.08 Some countries, once they have incorporated the Hague Convention into domestic law, may provide for recognition of Hague Convention adoptions only. Others may continue to recognise non-Hague Convention adoptions once they abide by adoption law in the country of recognition. In New Zealand, the *Adoption (Intercountry) Act 1997* provides for the recognition of adoptions made in Hague Convention countries, but also continues to allow adoptions undertaken by people resident overseas in non-Convention countries to be recognised in New Zealand.⁸ Similarly in Scotland, section 67 of the *Adoption and Children (Scotland) Act 2007* permits the recognition of an “overseas adoption”, defined as a non-Hague Convention adoption or an adoption effected under the law of any country or territory outside the British Islands.⁹

4.09 In England, Wales and Northern Ireland, the term “overseas adoption” is also used to describe adoptions which may be recognised but which are not Convention adoptions.¹⁰ The *Adoption (Designation of Overseas Adoptions) Order 1973* provides a list of the countries whose adoptions will be recognised in the United Kingdom. They are mainly Commonwealth countries, British Dependant Territories and European countries many of which have since ratified the Hague Convention. The considerations which underpin recognition of adoptions made in other countries are, as Bridge and Swindells point out, likely to include:

- (a) confirming that the law in the overseas country ensures that the child has been freely given up for adoption and that this has not been induced by payment or compensation of any kind;
- (b) confirming that the overseas country has made attempts to place the child in a family in that country;
- (c) confirming that intercountry adoption is in the child’s best interests;

⁸ See www.hcch.net/upload/adostats_nz.pdf and the Consultation Paper at 47-48.

⁹ See Rodgers “The Adoption and Children (Scotland) Bill: Adoption with a Foreign Element” *International Family Law* (2006) 218 discussing the Bill which became the 2007 Act.

¹⁰ Sections 66(1)(d) and 87 of the *Adoption and Children Act 2002*. As Murphy notes this category of recognisable foreign adoption creates “a strong presumption (but not guarantee) of recognition”. This is in addition to the common law rules of recognition based on the domicile of the adopters in the foreign jurisdiction as established in *Re Valentine’s Settlement* [1965] Ch 831. See Murphy *International Dimensions in Family Law* (Manchester University Press 2005) at chapter 7.

(d) requiring that the domestic and intercountry adoption arrangements are the same; and

(e) ensuring that profit is not made from the process.¹¹

4.10 The validity of an overseas adoption cannot be impugned in proceedings in any court in England and Wales,¹² except where the High Court orders it to cease as being contrary to public policy or that the authority that purported to authorise it was not competent to do so.¹³

4.11 The England and Wales *Children and Adoption Act 2006* complements the 2002 Act by enabling the relevant Minister to make a declaration of special restrictions on adoptions from abroad. This would apply to any country, including a Convention country, if the Minister has reason to believe that it would be contrary to public policy to permit the entry of a child from such a country into the UK because of certain adoption practices in the particular country.¹⁴ It has been noted that:

“...in many nations, the challenge in relation to overseas adoption is to ensure that it is used appropriately to supplement the procedures of the Hague Convention on Intercountry Adoption. In some countries the experience is that adopters are using the

¹¹ Bridge and Swindells *Adoption-The Modern Law* (Family Law 2003) at 314-315.

¹² Section 89(4) of the *Adoption and Children Act 2002*.

¹³ Section 89(2) of the *Adoption and Children Act 2002*. Note that while children of an overseas adoption are treated as the children of their adoptive parents they do not necessarily acquire British citizenship and may be subject to immigration rules. Where an overseas order has been obtained by UK citizens, the child has a right of entry and may apply for British citizenship under section 3(1) of the *British Nationality Act 1981*. See Consultation Paper at 51-52 and Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press) at 877.

¹⁴ Section 9 of the 2006 Act. The first country to be placed on the list was Cambodia in 2004. This was because of concerns centred on evidence relating to the systematic falsification of Cambodian official documents related to the adoption of children; evidence relating to the extensive involvement of adoption facilitators in the adoption procedure in Cambodia even though Cambodian law expressly forbids facilitators participating in the adoption process; evidence relating to the procurement of children for intercountry adoption by facilitators, including by coercion and by paying birth mothers to give up their children; and concern about the prevalence of child trafficking and corruption generally in Cambodia. This restriction predated the 2006 Act and the decision was judicially reviewed by prospective adopters from that country, in *R (Thomson) v Secretary of State for Education and Skills* [2005] EWHC 1378 (Admin). It was held that the Secretary of State could in extraordinary circumstances prevent adoptions because of unsatisfactory procedures in the country from which the child came.

overseas adoption rules to circumvent Convention constraints by adopting children in countries that have not ratified it.”¹⁵

4.12 In this regard, in Australia, foreign adoptions are categorised as either “Hague” or “non-Hague” adoptions. Adoptions by Australian citizens or permanent residents who have lived overseas for 12 months or more and have adopted a child through an overseas agency must prove that they were not living overseas for the purposes of bypassing the legal requirements for the entry of adopted children in Australia, and that they have lawfully acquired full parental rights in adopting the child. The child is then required to have a visa specific to adoption in order to enter Australia. In 2005-2006, there were 99 such visas from 34 countries issued for children whose adopted parents were overseas for 12 months or more. This was the highest number recorded since 1998-1999 and was a three-fold increase from 2004-2005 when just 35 visas were issued.¹⁶

(3) *Current Irish Practices*

4.13 In the Consultation Paper, the Commission expressed concern that a good deal of faith has to be placed by the Adoption Board in the foreign adoption documents presented to it, without any precise guidelines on the particular aspects of the documentation which should be subjected to stringent examination. The Commission noted that section 9(3)(a) of the *Adoption Act 1991* allows the Minister for Health and Children to make Regulations relating to the proof of adoptions granted outside the State. To date, no such regulations have been made in relation to any particular country. In the Consultation Paper, the Commission noted that the Board ensures that the law of a particular country is compatible with Irish adoption law. In September 2006, the Adoption Board began a process of review which is designed to ensure that the adoption laws of foreign countries are in line with Irish adoption law.¹⁷ This is not a purely administrative exercise.

¹⁵ O'Halloran *The Politics of Adoption: International Perspectives on Law, Policy & Practice* (Springer 2006) at 265.

¹⁶ See *Adoptions Australia 2004-2005* and *Adoptions Australia 2005-2006* (Australian Institute of Health and Welfare, Canberra). Available at www.aihw.gov.au.

¹⁷ In August 2007, the Adoption Board decided to temporarily suspend issuing Declarations of Eligibility and Suitability to adopt from Guatemala. In October 2007, the Board decided as a precautionary measure to suspend granting Declarations of Eligibility and Suitability in respect of Ethiopia and Rwanda. For the particular reasons for these suspensions, see www.adoptionboard.ie. On 23 January 2008, following a review of Ethiopian adoption law by the Board, it was announced that Ethiopian adoptions have the same legal effect with regard to guardianship as required by section 1(b) of the *Adoption Act 1991*. Therefore, such adoptions now qualify for entry in the Register of Foreign Adoptions. See also the Hague Conference on Private International Law *Report of a Fact-Finding Mission to Guatemala in relation to Intercountry Adoption* (26 February-9 March 2007) available at www.hcch.net/index_en.php.

It illustrates how important and committed Ireland is to ensuring that intercountry adoption is conducted in an ethical manner and takes account of all of those involved in the adoption process such as the natural parents, the adoptive parents and, most importantly of all, the child.¹⁸ The Board also investigates the situation of adoptive parents who are obliged to swear an affidavit that they are domiciled, habitually resident or ordinarily resident in the foreign jurisdiction and that no payment was made in consideration for the adoption of the child. Adopters must also complete a residency questionnaire outlining the factual details of their residency or domicile in the foreign country.

4.14 The Adoption Board has also recently begun to issue a series of guidelines concerning different aspects of intercountry adoption including the foreign adoption documentation which must be presented to it. For example in September 2007, the Board issued guidelines on foreign court judgments. It stated that such judgments must include information necessary to demonstrate that the child for whom an entry in the Register of Foreign Adoptions is sought is the child placed with the adopters. It states that foreign judgments should include the following details:

- “1. The child’s birth name (both first name and family name),
2. The child’s date of birth,¹⁹
3. The child’s gender,
4. The name of the adoptive parents,
5. The new name of the child (if appropriate).”

The Adoption Board notes that this notice is intended to support prospective adopters so that their adoption is carried out in a “legal and transparent way”. Such information about documentation and other matters is valuable

¹⁸ Social Workers in Ireland have highlighted the need for each internationally adopted child to be issued with a document such as an “evidence statement” from their country of birth. This would include: information as to the reasons why the child was placed for adoption, documentation proving that the consent of the birth mother was obtained or a copy of a court order dispensing consent. See *A Study of Intercountry Adoption Outcomes in Ireland* (2007) at 328. Available at www.adoptionboard.ie.

¹⁹ An inability to demonstrate a child’s exact date of birth may prevent recognition of a foreign adoption. It has been reported that an Ethiopian adoption would not be recognised by the Board because the Ethiopian adoption documentation did not include a date of birth. In this particular case the Irish adopters argue that this is because it is not considered something of significance in Ethiopian culture. The adopters began proceedings in the High Court in order to compel the Board to register the foreign adoption. See *Irish Independent* 27 November 2007 at 12.

in helping prospective adopters and social workers in Ireland know how a foreign adoption should be effected. For this reason, the Commission reiterates its provisional recommendation in the Consultation Paper that the Adoption Board continue to prepare guidelines regarding the validity of adoption documentation from foreign countries. This is especially the case regarding countries which have not ratified the 1993 Hague Convention on Intercountry Adoption.

4.15 The Commission is conscious of the difficulties associated when a foreign adoption is not recognised in Ireland. The immediate difficulty is that the child cannot acquire Irish citizenship (provided one of the adopters is an Irish citizen) through the interaction of adoption law and section 11(1) of the *Irish Nationality and Citizenship Act 1956*. As noted in the Consultation Paper, this can be overcome if an application is made to the Minister for Justice, Equality and Law Reform so that the adopted child can become a naturalised Irish citizen in accordance with section 16 of the *Irish Nationality and Citizenship Act 1956*, as amended by section 10 of the *Irish Nationality and Citizenship Act 2004*, which enables the Minister to grant Irish citizenship to a child.²⁰ As well as this, and perhaps more critically, the legal relationship of parent and child is not recognised under Irish law and the child and adopters are in effect strangers to each other. It may also be the case that the child has been placed with the adopters for a significant period of time and that he or she has bonded with the adoptive parents. In such a situation, it may be questioned why the adoption should not be recognised and that a refusal to recognise the adoption is unfair to the adopters but, most importantly of all, the child. In the Consultation Paper, the Commission noted non-recognition may not be an effective means of ensuring that proper standards are maintained in the adoption process and that, by the time the question of recognition is raised, the child may have established *de facto* ties within the adoptive family. In many instances, the question of recognition arises long after the adoption has taken place.²¹ The legal status of the child may change on the crossing of national borders so that the adoption is effectively a “limping” adoption if it remains unrecognised.²² These have been described as *fait accompli* adoptions because courts are placed in a difficult position and will generally recognise the adoption so that the child is not penalised by non-recognition.²³ In the

²⁰ See Consultation Paper at 41-46.

²¹ Duncan “Conflict and Co-Operation. The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption” in Lowe and Douglas (eds) *Families Across Frontiers* (Martinus Nijhoff 1996) 577 at 584-585.

²² McClean and Patchett “English Jurisdiction in Adoption” 19 *International and Comparative Law Quarterly* (1970) 1 at 17.

²³ Triseliotis “Intercountry adoption: global trade or global gift” *Adoption & Fostering* Vol. 24 No. 2 2000 45 at 46-47.

UK, welfare considerations regarding the child will predominate over public policy issues when a placement is a *fait accompli*, even if it arose by improper means, because non-recognition may cause a second wrong to the child concerned.²⁴ It has been stated that a sense of proportion is required by authorities when faced with such “non-compliant” intercountry adoptions so that the welfare needs of the child are met:

“The unscrupulous behaviour of frustrated ‘non-compliant’ adopters, who have knowingly turned a blind eye to regulations, should not bring so much retribution on the substitute parents as to disadvantage the well-being of the child.”²⁵

4.16 In Ireland, where a child has been brought to Ireland, he or she may be re-adopted under domestic Irish adoption law, under the *Adoption Act 1952* or the *Adoption Act 1988*.²⁶ This may remedy some cases, but in others the issue of recognition of an overseas adoption remains. The Commission notes that, while generally there is a presumption in favour of recognition if it can be shown that this is in the best interests of the child, there are some valid reasons for non-recognition. This might be because the adoption law in the foreign country fails to respect the rights of natural parents to consent freely to the adoption of their child or if unfair practices emerge or serious breaches of fundamental human rights are uncovered. In such cases, it would be manifestly contrary to public policy to recognise

²⁴ For example, where the adoption was used as an improper means to bypass immigration law in the United Kingdom. See Bridge and Swindells *Adoption: The Modern Law* (Family Law 2003) at 326-333.

²⁵ Cameron “Trading in Children”, paper presented at the 3rd World Congress on Family Law and Rights of Children and Youth, Bath, England, 20-22 September 2001. Available at www.lawrights.asn.au/docs/cameron2001.pdf. See also Cretney, Masson and Bailey-Harris *Principles of Family Law* (7th ed Sweet and Maxwell 2003) at 800. In *Re K (Adoption and Wardship)* [1997] 2 FLR 221, where there was a “plethora of irregularities going to the heart of the adoption process”, the intercountry adoption was set aside by the English Court of Appeal but the child remained with the family under wardship. See also *Re K (Adoption and Wardship)* [1997] 2 FLR 230, a rehearing of the case before the Family Division of the High Court.

²⁶ In 2005, the Adoption Board made 16 domestic Irish adoption orders in respect of children who were placed for adoption overseas, 12 from Guatemala, 2 from the Philippines and 2 from India. One child was placed by a UK authority and was adopted under the terms of the *Adoption Act 1988*. In Guatemala, prospective adoptive parents are only granted simple adoption orders which are not recognised under Irish law and so a child must be adopted under the *Adoption Act 1952* where the natural parents consent to the adoption, or under the *Adoption Act 1988* where parental consent is dispensed with by the High Court. In India and the Philippines prospective adoptive parents are granted guardianship by the foreign courts but must then be adopted under Irish law so that the legal relationship of parent and child is formed. See *Report of An Bord Uchtála for 2005* (Stationery Office) at 15.

adoptions granted in these countries.²⁷ This is not to make the adoption process difficult for Irish based intercountry adopters. Jordan has emphasised that ethics are central to adoption but notes that the law faces a difficulty in this respect with international adoption. He notes that:

“Creating an ethical climate for adoption is important given the fact that so much of the personal impact of adoption is beyond the reach of law, regulation and policy. Ethics always lies outside of law and policy, informing it, challenging it, and coming into play when new situations are encountered. It is never easy for law to regulate right behaviour, and in the area of adoption it will never get it entirely right.”²⁸

4.17 The Commission is of the opinion that a balance must be achieved between on the one hand in the best interests of a particular child who has already been placed with Irish adoptive parents and, on the other, promoting good standards in international adoption practice. The notices already issued by the Adoption Board in relation to certain countries are an important step in this regard. Ensuring that the adoption process is ethical and transparent from the time prospective adopters express their interest in intercountry up to the time the child is placed with them is crucial in promoting the overall welfare of the child into the future. This must involve meaningful co-operation between sending and receiving countries.²⁹

(4) 1961 Hague Apostille Convention

4.18 In the Consultation Paper, the Commission made reference to the 1961 *Hague Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents*, commonly known as the Apostille Convention. The Hague Conference on Private International Law has stressed the usefulness of linking the application of the Hague Convention on Intercountry Adoption with the Apostille Convention.³⁰ The Apostille

²⁷ Article 24 of the 1993 Hague Convention on Intercountry Adoption permits a Contracting State to refuse recognition of an adoption if it is manifestly contrary to public policy, taking into account the best interests of the child. Sections 2, 3, 4, 4A and 5 of the *Adoption Act 1991* also allows for this.

²⁸ Jordan “Beyond Rights, Who Cares?: Ethical Issues in Adoption” paper delivered at the 7th Australian Adoption Conference, Hobart Tasmania, 16 May 2000. Available at www.teresajordan.id.au/ROARE/adoptiontj2.htm. See also Triseliotis “Intercountry Adoption: global trade or global gift” *Adoption & Fostering* Vol. 24 No. 2 2000 at 45.

²⁹ See the comments of Law Society of Ireland Law Reform Committee on unregulated adoption in its report *Rights-based Child Law: The case for reform* (March 2006) at 182-184.

Available at www.lawsociety.ie/documents/committees/lawreform/childreport06.pdf.

³⁰ See Consultation Paper at 91-93. Ireland ratified the Convention in 1999. See *Rules of the Superior Courts (Proof of Foreign, Diplomatic, Consular and Public*

Convention provides for the simplification of the series of formalities which often complicate the use of public documents, such as adoption orders, outside the country in which they are granted. This Convention does not cure all the problems associated with trying to ensure the validity of adoption documentation, but it does attest the authenticity of the signature, the capacity in which the person signing the document has acted and the identity of the seal or stamp which it bears.

4.19 The Commission notes that the Oireachtas has recently indicated its intention that foreign documents such as statutory declarations validly made abroad before a person authorised to do so under the foreign law, and which are to be presented in Ireland, have been produced in accordance with the Hague Apostille Convention. Section 60 of the *Civil Law (Miscellaneous Provisions) Bill 2006*, which is modelled on section 6 of the *Investment Funds, Companies and Miscellaneous Provisions Act 2006*, states that the provisions of the Apostille Convention with regard to authentication shall apply to statutory declarations, including the procedures for verification of any matter where serious doubts, with good reason, arise in respect of that matter.³¹ Such recent legislative provisions reinforce the growing emphasis on the model of authentication based on the Hague Apostille Convention.

4.20 The Commission is of the opinion that once the 1993 Hague Convention on Intercountry Adoption is implemented under the imminent *Adoption Bill 2008*, it could be used in conjunction with the Apostille Convention and act as a further safeguard in ensuring the validity of documentation. The Commission notes that a number of countries have taken this approach. However this will all depend on whether the particular sending country has ratified both the Hague Intercountry and Apostille Conventions. In respect of countries who have signed up to neither of the Hague Conventions, it is very important that the veracity of documents emanating from such countries is ensured through notarisation and legalisation procedures.

Documents) 1999 SI No 3 of 1999. See *Report on the Hague Convention abolishing the requirement of Legalisation for Foreign Public Documents* (LRC 48-1995) which recommended ratification of the 1961 Convention.

³¹ Section 60 involves inserting a new section 3A into the *Statutory Declarations Act 1938* which is concerned with the making of statutory declarations outside the State. The 2006 Bill was amended at the Committee Stage of the Select Committee on Justice, Equality, Defence and Women's Rights on 12 December 2007. Available at www.oireachtas.ie. See also section 5 of the *Diplomatic and Consular Officers (Provision of Services) Act 1993* where certain Irish diplomatic staff may administer oaths, take affidavits and do any notarial act outside the State as if they have been done in this State.

(5) Recommendation

4.21 *The Commission recommends that the Adoption Board should prepare guidelines regarding the validity and authentication of adoption documentation from foreign countries, especially those which have not ratified the 1993 Hague Convention on Inter-country Adoption.*

(6) 1996 Hague Convention on the International Protection of Children

4.22 The protection of children when more than one state is concerned can be problematic. The situation is very different when states have an agreement on the exercise of jurisdiction by their respective authorities and where co-operative arrangements exist to help ensure effective protection of the child in a cross-border situation. An example of such an agreement is the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children*, usually referred to as the Hague Convention on the International Protection of Children. This replaced the 1961 Convention³² and habitual residence remains the central connecting factor in Article 5. The objects of the Convention are set out in Article 1.1 as follows:

“(a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;

(b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

(c) to determine the law applicable to parental responsibility;

(d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;

(e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

2. For the purposes of this Convention, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.”

³² 1961 *Hague Convention concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants.*

Available at www.hcch.net/index_en.php?act=text.display&tid=1.

4.23 These measures may deal in particular with the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence; guardianship, curatorship and analogous institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;³³ the supervision by a public authority of the care of a child by any person having charge of the child; the administration, conservation or disposal of the child's property.³⁴ However, as noted in the Consultation Paper, the Convention does not apply to the establishment or contesting of a parent-child relationship; decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child; maintenance obligations; trusts or succession; social security; public measures of a general nature in matters of education or health; measures taken as a result of penal offences committed by children; decisions on the right of asylum and on immigration.

4.24 In broad terms it provides common jurisdictional rules and consequent provisions for the recognition and enforcement of judgments concerned with child protection. For these purposes, "protection" is a widely defined term referring to both private and public law measures taken by judicial and administrative bodies to safeguard children.³⁵ The procedures and opportunities for co-operation and the sharing of information which the Convention offers would be of immense benefit in a case similar to that of *Dowse* where the protection of a child in a cross-border case is in issue. The attractiveness of this Convention is that in contrast to the 1993 Hague Convention on Intercountry Adoption, it applies to *kafala* and fostering. Therefore, it has the potential of global reach to include Islamic States which do not provide for adoption in their law. The co-operation provisions are contained in Chapter V and Articles 8 and 9. They combine

³³ *Kafala* is an Islamic concept akin to fostering but short of adoption. One of the great successes of the Convention is that a predominantly Muslim state such as Morocco has signed the 1996 Convention on International Child Protection. See Duncan "Editorial" *The Judges' Newsletter: Special Focus on the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children* (Volume X / Autumn 2005) at 4-14.

Available at <http://hcch.e-vision.nl/upload/autumn2005.pdf>.

³⁴ Article 3.

³⁵ Lowe and Douglas *Bromley's Family Law* (10th Oxford University Press 2007) at 28.

to offer the authorities of the State of which a child is a national the opportunity, in terms of jurisdiction, to co-operate with the authorities of the country where the child is habitually resident and even to assume jurisdiction in certain cases. This recognises that in some situations, the place of the child's habitual residence is not necessarily the best place or appropriate forum (*forum conveniens*) to decide on matters concerning the child. Article 8 allows for the State which has jurisdiction to decide on that matter to decline jurisdiction on the grounds of *forum conveniens* in favour of the more appropriate jurisdiction. This may very well be the State of which the child is a citizen, or a State which the child has a substantial connection with.³⁶ Such a State can then exercise jurisdiction to protect the child's person or property acting in their best interests.

4.25 This Convention provides a template for co-operation between different Contracting States on the exercise of jurisdiction by their authorities to ensure the protection of a child in a cross-border situation. Submissions have noted that unilateral attempts to resolve cross-border child protection difficulties can sometimes only be partially successful. They suggest that the most effective long-term way of securing the rights of Irish children living abroad is by entering co-operative arrangements with other States. Ireland signed the 1996 Convention and went one step further by enacting the *Protection of Children (Hague Convention) Act 2000* to incorporate the Convention in domestic law.³⁷ However, no commencement order has yet been issued. Indeed, the Convention is not in force in most of

³⁶ “1. By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

2. The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

- (a) a State of which the child is a national,
- (b) a State in which property of the child is located,
- (c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
- (d) a State with which the child has a substantial connection.

3. The authorities concerned may proceed to an exchange of views.

4. The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.”

³⁷ The implementing Act was formulated before Ireland signed the Convention on 1 April 2003.

the European Union Member States. The European Community became a Member of the Hague Conference on Private International Law on 3 April 2007.³⁸ Since the Treaty of Amsterdam, the EC has acquired its own legislative competence in the field of private international law. Unfortunately, due to political disagreement between Spain and the United Kingdom regarding Gibraltar, this has hindered the ratification of the Convention by all Member States.³⁹ In order to strengthen the protection of children in cross-border difficulties, the Commission encourages efforts within the European Union to remove the political impediment to the ratification of the Convention by all EU Member States.

(7) Recommendation

4.26 *The Commission welcomes the enactment of the Protection of Children (Hague Convention) Act 2000 and looks forward to its implementation and the ratification of the 1996 Hague Convention on the International Protection of Children by all of the Member States of the European Union.*

(8) Independent legal advice

4.27 The Commission also reiterates the provisional recommendation in the Consultation Paper and considers that the Adoption Board must have appropriate, independent legal advice at its disposal to advise it on the wide range of intercountry adoptions which are now occurring.⁴⁰ This is particularly the case so as to ensure that foreign adoption law is compatible with Irish adoption law.

(9) Recommendation

4.28 *The Commission recommends that the Adoption Board should have appropriate, independent legal advice at its disposal when considering the compatibility of foreign adoption law with Irish adoption law for the purposes of recognising foreign or intercountry adoptions.*

(10) Designated High Court Judge in Adoption cases

4.29 Such is the extent of intercountry adoption in Ireland and the movement of people between different jurisdictions, it is likely that complex cases of international adoption will continue to emerge for consideration by the Adoption Board, and, on some occasions the High Court since decisions

³⁸ See Schulz “The Accession of the European Community to the Hague Conference on Private International Law” 56 *International and Comparative Law Quarterly* (2007) at 939-950.

³⁹ Lord Justice Thorpe “Interdisciplinarity and Internationality in Modern Family Justice Systems” November *International Family Law* (2007) 165 at 168.

⁴⁰ See Consultation Paper at 95-96.

of the Board may be reviewed by the Court.⁴¹ The Commission is of the opinion that there is merit in appointing a designated High Court judge to deal with all adoption cases so that they can develop expertise in the area and that a coherent body of case law will emerge and give certainty in this particular area of family law.⁴² This already applies in child abduction cases. Indeed in 2005, Thorpe LJ was appointed Head of International Family Justice in England and Wales due to the volume of family law cases with European and international law dimensions.⁴³ In the Netherlands, two liaison judges have been appointed to deal specifically with international family law cases.⁴⁴ The appointment of a particular judge to deal with international family law cases in Ireland may be particularly appropriate in light of the changing nature of Irish society and its diverse families who have ever increasing links with other countries.

(11) Recommendation

4.30 *The Commission recommends that consideration be given to the appointment of a designated High Court judge to deal with all adoption cases.*

⁴¹ Section 7 of the *Adoption Act 1991*. For discussion on the internationalisation of family law see Lowe and Douglas *Bromley's Family Law* (10th ed Oxford University Press 2007) at 22-35.

⁴² In the 1996 *Report on Family Courts* (LRC-52 1996), the Commission recommended the establishment of regional family courts located in about 15 regional centres, operating as a division of the Circuit Court. These courts would be vested with unified and comprehensive family law jurisdiction to include adoption proceedings under the *Adoption Acts 1952-1998* and child abduction proceedings under the *Child Abduction and Enforcement of Custody Orders Act 1991*. The Working Group on a Courts Commission (chaired by Mrs. Justice Denham) recommended that family law divisions be established in the District Court, Circuit Court and High Court as a short term measure but agreed that the recommendations of the Commission provided a long term solution. The Reports of the Working Group are available at www.courts.ie. See also Martin "The Denham Commission Reports: A Critical Analysis" [1999] 4 *IJFL* 18. More recently the *Report to the Board of the Courts Service regarding the Family Law Reporting Pilot Project* by Dr. Carol Coulter (October 2007) at 61 reiterated the Commission's recommendations made in 1996. Also available at www.courts.ie.

⁴³ More recently, the Office of the Head of International Family Justice has been given its own secretariat to deal with the volume of work and to co-ordinate judicial co-operation within Europe and beyond. See *Family Law* September [2007] at 856.

⁴⁴ See Lord Justice Thorpe "Interdisciplinarity and Internationality in Modern Family Justice Systems" *International Journal of Family Law* (2007) 165 at 169.

C Pre-Adoption and Post-Adoption Matters

(I) *Migrant Natural Mothers in Ireland*

4.31 In the Consultation Paper, the Commission discussed the issue of migrant women who come to Ireland and place their children for adoption. While this cannot be described as an intercountry adoption it raises important issues about adoptions in Ireland with foreign elements. The Commission noted that a relatively small number of women are involved each year but that it is a cause for concern that such women may place their children for adoption for reasons relating to their immigration status in Ireland. If they are illegally resident in Ireland and need to work to survive financially but have no family support in the country, they may consider adoption of their children as the only option available to them. Irish adoption law provides that the consent to adoption must be a full, free and informed one.⁴⁵ While the courts have stated that the understandable and ordinary worries of a natural mother in this regard are not enough to later invalidate her consent to adoption,⁴⁶ the circumstances of a woman whose decision could be overborne by her status as an illegal immigrant arguably places her in a particularly difficult category. The Commission considers that the consent to place a child for adoption solely on the basis of immigration difficulties is not a full, free and informed one.

4.32 Submissions received by the Commission raised a number of other issues which perhaps require further investigation by the relevant bodies. These include whether a child born to an illegally resident natural mother can be said to “reside” in the State for the purposes of adoption in accordance with section 10(a) of the *Adoption Act 1952*. On a perusal of the Oireachtas debates on the 1952 Act, it is clear that the legislature’s intention was that “reside” would mean that a child is physically present within the State with no reference to their citizenship status.⁴⁷ Another issue raised related to concerns about the role of the General Registry Office and whether it has the right to refuse registration of the birth of any child born in Ireland, and how this would affect a prospective adoption. The *Civil Registration*

⁴⁵ See *G v An Bord Uchtála* [1980] IR 32.

⁴⁶ See Shannon *Child Law* (Thomson Round Hall 2005) at 288-300.

⁴⁷ The House of Lords has recently interpreted “habitual residence” as including an illegal residence in the UK. See *Mark v Mark* [2005] UKHL 42 in particular the opinion of Baroness Hale of Richmond. Following the Twenty-Seventh Amendment of the Constitution in 2004 and the enactment of the *Irish Nationality and Citizenship Act 2004*, children born to parents from outside of Ireland would not be entitled to automatic citizenship in certain circumstances. See the Consultation Paper at 46-47, fn 66. However, if the child is placed for adoption in Ireland and is adopted by an Irish citizen, the child is entitled to Irish citizenship in accordance with section 11(1) of the *Irish Nationality and Citizenship Act 1956*.

Act 2004 makes no distinction between children born in Ireland to non-Irish nationals and children born to Irish citizens regarding birth registration. All children born in the State are entitled to be registered in the Register of Births. However there are certain circumstances where this can be difficult to do. For example, in a small number of cases where the mother does not have valid identification or uses a false name or there is confusion as to where the child was born if it was not born in a maternity hospital in the State, this may cause difficulties in registration. A final issue raised is the need for clarity on deportation orders served on women who under adoption legislation must be in Ireland for 6 months until an adoption order is made. The Commission has concluded that these issues could be explored in further detail in the context of the *Immigration, Residence and Protection Bill 2008*, currently before the Oireachtas.⁴⁸

4.33 In response to the provisional recommendations, the Commission received information from professionals working in the field of adoption which gives a clearer picture of the actual situations of women who find themselves in this position. Many of these women, and sometimes their partners, come from eastern European states which became members of the European Union in 2004 and also Asian countries. The experience of social workers is that social conditions including poverty and the stigma of a birth outside marriage continue to influence the decision to place a child for adoption.⁴⁹ In the Consultation Paper, the Commission noted the need for culturally appropriate counselling services for such women. This would include the availability of information on crisis pregnancy and adoption in an array of foreign languages and also the provision of approved and registered interpreters to facilitate counselling between social workers and natural mothers. The Commission also pointed to the need for research on this particular type of pre-adoption scenario.

4.34 Since the publication of the Consultation Paper, one such study has emerged in a report by the Immigrant Council of Ireland Independent Law Centre *The Feminisation of Migration: Experiences and Opportunities*

⁴⁸ *Immigration, Residence and Protection Bill 2008*. See speech by Mr. Brian Lenihan TD, Minister for Justice, Equality and Law Reform who stated that “one area that I haven’t dealt with in this Bill is citizenship. I intend to address this through separate legislation following a review of our current laws, taking into account also the new provisions in this Bill with regard to long-term residence”. See “Address by the Minister for Justice, Equality and Law Reform at the launch of the *Immigration, Residence and Protection Bill 2008*” 29 January 2008 available at www.justice.ie.

⁴⁹ Socio-economic factors continue to have a bearing on the decision of natural/birth mothers to place their children for adoption. See Loughran and Richardson *Crisis Pregnancy Agency Report on Mixed Method Adoption Research* (2005) available at www.crisispregnancy.ie/overview15.htm.

in Ireland.⁵⁰ It highlights the difficulties migrant women experience in accessing health and other services in Ireland. Their social isolation and vulnerability when pregnant is further compounded by the lack of English language skills which is an obstacle to understanding health and adoption information.

4.35 In the Consultation Paper the Commission provisionally recommended that adoption information should be provided in an appropriate written form in different languages other than English. It also recommended that guidelines be drafted by the Adoption Board which would give guidance as to how pre-adoptive counselling and supports should be administered with particular reference to natural mothers who are not Irish citizens and do not understand the English language.⁵¹ The Commission notes that the Adoption Board is supportive of these recommendations. Acting with the Council of Irish Adoption Agencies, the Board is committed to having a list of approved persons providing interpretative services and that all of the statutory forms used for adoption purposes are translated into different foreign languages.⁵² However, the English language version of the consent form remains, under current law, the official consent form and must be duly signed and authenticated and the interpreter must also sign the form to confirm that they were present when the consent was given by the natural mother.

4.36 Effective communication between health and social care professionals and those accessing health services is vital.⁵³ In a survey

⁵⁰ At 80-85. Mr. Conor Lenihan TD, Minister of State with special responsibility for Integration Policy, has stated that the provision of English language classes will be one of his priorities in ensuring that migrants are not socially isolated and marginalised while in Ireland.

⁵¹ In *Kearns v France* Application No. 35991/04, 10 January 2008 the applicant was an Irish woman, who travelled to France to give birth to her daughter and to place her for adoption anonymously. A nurse and a doctor with knowledge of English were made available by the maternity hospital to act as interpreters. The Cour d'Appel annulled the adoption and ordered the return of the child to the applicant but the Cour de Cassation overturned this decision. The applicant claimed that her ECHR Article 8 right to family life and Article 14 right to be free from discrimination were breached as a result. The European Court of Human Rights found that there was no violation since the French authorities provided the applicant with sufficient and detailed information, they afforded her with linguistic assistance not required by law and they ensured that she was informed as thoroughly as possible of the implications of her choice and of the time-limits and procedures for withdrawing consent. The underlying basis for the Court's approach is, the Commission notes, the need for a method of appropriate interpretative communication of information.

⁵² The statutory forms are Form 10 or the Initial Consent to Placement and Form 4A or the Final Consent Form contained in the *Adoption Rules 1990* (SI No. 170 of 1990).

⁵³ See McNamara "Let's Talk: The Need for Effective Communication Between Doctor and Patient" [2005] COLR IV. Available at

carried out by the Irish College of General Practitioners in 2003, the lack of interpreters in the health system was identified as the single greatest barrier to offering quality medical care to migrants in Ireland.⁵⁴ The Commission also notes and welcomes the imminent publication of the *Intercultural Health Strategy* by the Health Service Executive. The strategy will recommend the establishment of a national interpretation service to improve services provided to immigrants across the State. This proposed national service will use trained and accredited interpreters. With regard to women's health, the strategy points to the need for greater awareness of the specific problems faced by female migrants including trauma experienced by asylum seekers and a fear of contact with official services. The strategy will suggest more effective ways of reaching out to minority ethnic women since there is a low uptake of antenatal and postnatal care programmes, with expectant mothers presenting in maternity hospitals in advanced stages of pregnancy. The strategy also envisages the translation of important information about healthcare and services into various languages as well as the use of simplified English.⁵⁵ Also, since some people from minority backgrounds may not be literate within their own languages, there will be a greater emphasis on the communication of information through visual and spoken means.

(2) *Post-adoption support services*

4.37 The *Dowse* case highlights how some adoptions can be fraught with difficulty and are prone to breakdown or disruption.⁵⁶ This aspect of the *Dowse* case emphasises the importance of appropriate pre-adoption counselling and post-adoption support services as is outlined in Article 9(c) of the 1993 Hague Convention on Intercountry Adoption. This is to ensure that an adoption is supported and ultimately successful. The prevention of

www.ucc.ie/colr/index.php?option=com_frontpage&Itemid=1.

⁵⁴ MacCormaic "HSE set to endorse immigrant interpreter strategy" *Irish Times Health Supplement* 11 December 2007 at 1. See also www.icgp.ie/index.cfm/loc/6-3-6.htm.

⁵⁵ In the United Kingdom, the Government has issued guidelines to local authorities to spend less financial resources on translating official documents and channelling the finances towards the provision of English classes on the basis that translation can become a barrier to integration. However, essential healthcare information must continue to be translated. See www.communities.gov.uk/corporate.

⁵⁶ See Consultation Paper at 28, fn 3. See also Argent and Coleman *Dealing with Disruption* (British Association for Adoption and Fostering 2006). There have been reports of a Korean child who was adopted by a Dutch diplomatic couple initially living in South Korea, then Indonesia and finally Hong Kong. After seven years they placed the child in state care with a view to re-adoption in Hong Kong. They claimed that the adoption did not work out. See "Korean anger over return of adopted girl after 7 years" *Irish Times* 13 December 2007 and "Diplomat 'dumped' his adopted child because she did not fit in" *The Times* 14 December 2007.

such an occurrence can also be aided by ensuring that children and potential adoptive parents are suitably matched.⁵⁷ The Hague Conference on Private International Law notes that intercountry adoptions sometimes disrupt and Article 21 recognises that an intercountry adoption which is to be completed in the receiving state need not be completed if this is in the child's best interests. This is known as a pre-adoption breakdown. The Conference states that appropriate care mechanisms should be in place to deal with such an event and the receiving country must communicate and consult with the country of origin in finding a new care arrangement. Returning the child to their state of origin should only be done in rare cases since the country of the child's current habitual residence must decide on the care of the child, and only after "all measures to find alternative care in the receiving state having been exhausted and any prolonged stay of the child in that state no longer being for his or her welfare and interests". The Convention does not provide procedures for the breakdown of completed intercountry adoptions. The adopted child must be protected in the same way as any other child, by the measures of care and protection available to children in the country of their current habitual residence.⁵⁸

4.38 In Ireland, there is at present no official statistics compiled in relation to intercountry adoption disruptions. The Commission notes that in one Health Service Executive area alone, 13 adoptions including domestic and intercountry have disrupted, with the children no longer living with the parents who adopted them. Some of these children are in the care of extended family members and others are in the care of the HSE.

4.39 In the context of post-adoption research and support services the Commission welcomes the publication by the Children's Research Centre, Trinity College Dublin of the *Study of Intercountry Adoption Outcomes in*

⁵⁷ See Valdez and McNamara "Matching to Prevent Adoption Disruption" *Child and Adolescent Social Work Journal* Vol. 11, No. 5, October 1994 at 391. See also the International Social Service September 2007 editorial, "What if, despite all efforts, the adoption does not succeed?" available at www.iss-ssi.org. For related research see Rutter and the English and Romanian Adoptees (ERA) Study Team, "Developmental Catch-Up, and Deficit, Following Adoption after Severe Global Early Privation" (1998) *Journal of Child Psychiatry* Vol. 39, No. 4 at 465-476, Rutter at al, "Recovery and deficit following profound early deprivation" in Selman (ed) *Intercountry Adoption: Developments, Trends and Perspectives* (British Agencies for Adoption and Fostering 2000) at 107, Lowe et al *Supporting Adoptions: Reframing the Approach* (British Agencies for Adoption and Fostering 1999) at chapter 12 and Cameron "Trading in Children" paper presented to the 3rd World Congress on Family Law and the Rights of Children and Youth, Bath, England, 20-22 September 2001. Available at www.lawrights.asn.au/docs/cameron2001.pdf.

⁵⁸ See *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption Implementation* (August 2005) at 84-85. Available at www.hcch.net/index_en.php.

Ireland, which was commissioned by the Adoption Board.⁵⁹ This provides a better understanding as to how children adopted from abroad and brought to live in Ireland are adjusting to their new environment. Indeed the study was commissioned with reference to Article 9(c) of the 1993 Hague Convention on Intercountry Adoption which requires that central authorities, such as the Adoption Board, take all appropriate measures to promote the development of adoption counselling and post-adoption services.⁶⁰ The Hague Conference on Private International Law suggests that the professional assessment of prospective adoptive parents, their preparation for the adoption and the matching of the child and family by experienced social workers is crucial to a successful adoption and the prevention of an adoption breakdown or disruption.⁶¹ The Trinity Report provides a generally positive picture of the experiences of the children and their families who agreed to be involved in the study. However between 25-30% of children experience some health, learning and psychological difficulties ranging from mild to severe and are in need of access to post-adoption support services.

4.40 At present post-adoption support services are not provided for by the State.⁶² O'Halloran notes that this is due to the essentially private nature of adoption, because once an order has been made then public intrusion ceases.⁶³ Also, the constitutional primacy of the family based upon marriage places limits on the extent to which intervention can be made once the child becomes a member of a family.⁶⁴ The Department of Health and Children has noted that once an adopted child becomes a member of the adoptive

⁵⁹ Available at www.adoptionboard.ie and www.tcd.ie/childrensresearchcentre.

⁶⁰ The term post-adoption support service is a broad one which includes counselling, advice and information.

⁶¹ *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption Implementation* (August 2005) at 84. Available at www.hcch.net/index_en.php.

⁶² The children's organisation Barnardos and the PACT adoption society provide post-adoption support services to those who seek it on a voluntary basis.

⁶³ O'Halloran *The Politics of Adoption: International Perspectives on Law, Policy & Practice* (Springer 2006) at 191.

⁶⁴ See the Commission's *Consultation Paper on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993* (LRC CP 11-1997) at 48, Duncan "Decision Making Relating to Children in the Republic of Ireland-Restraints on Introducing New Models" in Eekelaar and Katz (eds) *The Resolution of Family Conflict: Comparative Legal Perspectives* (Butterworths 1984) at 389 and Duncan "The Constitutional Protection of Parental Rights: A Discussion of the Advantages and Disadvantages of According Fundamental Status to Parental Rights and Duties" in Eekelaar and Šarčević (eds) *Parenthood in Modern Society: Legal and Social Issues for the 21st Century* (Martinus Nijhoff 1993) at 431.

family, the normal arrangements for health and social services apply as they do to all children, with the exception of post-adoption reports carried out by HSE social workers in respect of children adopted from countries of origin which demand them.⁶⁵ However, some children adopted from abroad experience difficulties, as a result of post-institutionalisation.⁶⁶ The *Dowse* case highlights the regrettable fact that not all adoption placements are successful. One of the key findings of the *Study of Intercountry Adoption Outcomes in Ireland* was that there is a need for a well resourced post-adoption service, to be staffed by professionals with full and up to date knowledge of all the pertinent issues in intercountry adoption. The Report notes that this service should include specialist medical, health, psychological and social services for adoption issues and that it would be of particular benefit to afford immediate assessment of children upon arrival in Ireland. The availability of post-adoption support services, including counselling and psychological services which are sensitive to the particular needs of children adopted from abroad, is needed to ensure that the welfare of children is protected and that adoptive families are supported.⁶⁷ In light of the position of the family in the Constitution, it could not be a mandatory requirement that adoptive families access these services; rather, the services would be available to be used by families who decide to access them. The Commission notes that in other jurisdictions such as the United Kingdom⁶⁸

⁶⁵ *Adoption legislation: 2003 consultation and proposals for change* (Stationery Office 2005) at 43.

⁶⁶ See *Study of Intercountry Adoption Outcomes in Ireland* at chapter 5 and chapter 9. Similarly, a recent study by ChildONEurope Secretariat, a European Union non-governmental organisation, has highlighted the importance of post-adoption support services. See *Guidelines on Post-adoption Services* (September 2007). For a related study see *Report on National and Intercountry Adoption* (January 2006). Available at www.childoneurope.org/index.htm. See also Report by the Law Society's Law Reform Committee *Adoption Law: The case for reform* (April 2000) at 54.

⁶⁷ In light of recent developments to facilitate adoption tracing and information services for domestic adoption in Ireland, (see chapter 1, fn 10) consideration must also be given to the provision of such services for children adopted through international adoption. Article 30 of the Hague Convention requires the competent central authorities of a contracting state to retain information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as medical history. See McK. Norrie "Adoption and the Child's Right to Identity" paper presented to the 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, 20-23 March 2005. Available at www.childjustice.org/docs/norrie2005.pdf.

⁶⁸ Sections 3 and 4 of the *Adoption and Children Act 2002* (England and Wales). See also section 1(4)(e) of the *Adoption and Children (Scotland) Act 2007*. The Northern Ireland Department of Health, Social Services and Public Safety has recently announced its intention to provide a comprehensive range of statutory adoption support services such as counselling, advice and information which will continue to be available after the adoption process has been completed. See *Adoption the Future*

and the individual States and Territories of Australia⁶⁹ such services are made available.

4.41 The International Social Service notes that access to qualified post-adoption support services should be made available to the child, the adoptive parents and siblings, as well as the birth parents, whether in a domestic or intercountry adoption setting.⁷⁰ It makes the point that countries must be careful in ensuring that the services provided in domestic adoption do not lag behind those provided in intercountry adoption.⁷¹ The Hague Conference on Private International Law points out that there should be no distinction in services offered for domestic and intercountry adoption as this would be discriminatory.⁷²

4.42 In the Consultation Paper, the Commission endorsed an earlier recommendation of the Commission that section 6 of the *Child Care Act 1991*⁷³ should be amended to place a statutory duty on the HSE and accredited intercountry adoption agencies to provide post-adoption services including counselling for both domestic and intercountry adoption.⁷⁴ Submissions received by the Commission also point out that there is a need for an independent post-adoption service which would be available to adoptive families to provide them with advice and support should they require it. The role of the State in facilitating intercountry and domestic adoption is crucial to the formation of families based on adoption. It has been suggested that as a result of the “direct action” by the State in this

(2006) at 31 and *Adopting the Future Consultation Final Report* (2006) at 58-62. Available at www.dhsspsni.gov.uk/index.htm.

⁶⁹ See *Intercountry Adoption Program: Information Booklet Queensland* (October 2007). Available at www.childsafety.qld.gov.au/adoption/documents/adopt-eoi-kit-intercountry.pdf.

⁷⁰ See *Brochure No. 1 The Rights of the Child in Internal and Intercountry: Ethics and Principles Guidelines for Practice* at 6 and *Fact Sheet No.47 Intercountry Adoption Post-Adoption Follow Up* (October 2007). Available at www.iss-ssi.org.

⁷¹ International Social Service / International Reference Centre for the Rights of Children Deprived of their Family, *Monthly Review No. 2/2005*, February 2005. Editorial: “One child is equal to another: The principle of non-discrimination applied to adoption”. Available at www.iss-ssi.org/Resource_Centre/Tronc_DI/documents/Edito.2005.2.eng.pdf.

⁷² See *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption Implementation* (August 2005) at 16. Available at www.hcch.net/index_en.php.

⁷³ Section 6 of the *Child Care Act 1991* makes provision for an adoption service to be provided by the Health Service Executive (formerly the regional Health Boards).

⁷⁴ *Report on the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993* (LRC 58-1998).

regard, it therefore has a responsibility to provide support services.⁷⁵ In the Commission's view, this is reinforced by Article 9(c) of the 1993 Hague Convention which provides that Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to promote the development of adoption counselling and post-adoption services in their States. Accordingly the Commission reiterates its recommendation in the Consultation Paper that post-adoption services including counselling be made available on a statutory basis for both domestic and intercountry adoptions.

(3) Recommendation

4.43 *The Commission recommends that section 6 of the Child Care Act 1991 be amended to provide that post-adoption services including counselling be made available on a statutory basis for both domestic and intercountry adoptions.*

D Differences between Domestic and Intercountry Adoption in Ireland

4.44 A striking feature of some of the submissions made to the Commission in response to the Consultation Paper is the disparity between certain aspects of domestic adoption in Ireland and adoptions which are granted abroad involving Irish based adopters. The differences centre on the ability of Irish authorities to have an input and control on the domestic adoption process in Ireland which stands in contrast to what happens in other jurisdictions. The major differences centre on the following issues and are worthy of consideration.

(1) The Child

4.45 Submissions have pointed out that, pending the implementation of the 1993 Hague Convention on Intercountry Adoption or where bilateral intercountry adoption agreements do not apply, there is real uncertainty about a number of issues concerning children. These include: whether children who are available for intercountry adoption in certain countries are actually abandoned; whether attempts have been made to find alternative care in their country of origin (as is mandated in the preamble of the Hague Convention and Article 21(b) of the United Nations *Convention on the Rights of the Child* - the subsidiarity principle);⁷⁶ whether children of

⁷⁵ Jordan "Beyond Rights, Who Cares?: Ethical Issues in Adoption" paper delivered at the 7th Australian Adoption Conference, Hobart, Tasmania, 16 May 2000.

Available at www.teresajordan.id.au/ROARE/adoptionj2.htm.

⁷⁶ In 2005, the 4th World Congress on Family Law and Children's Rights issued a Communiqué, which, while noting the tension between the Convention on the Rights of the Child and some aspects of international adoption, stated that international

marriage have been placed for adoption in a foreign country; and whether this has constitutional implications in Ireland, since children of marriage cannot be placed voluntarily for adoption by their parents in this country. Also, social workers in Ireland have no role in matching a child (who is in another jurisdiction) with adoptive parents ordinarily resident in Ireland.⁷⁷

(2) *Consent of Natural Parents*

4.46 In domestic law, the consent of natural parents to the adoption of their child, in particular the natural mother, is accorded high priority. The consent must be full, free and informed. It must be made with the benefit of professional counselling and advice and ample time must be given to the natural mother in which to make her decision before the final adoption order is made. Where an adoption is made in a foreign jurisdiction, it is difficult for this State to be fully sure that the consent of natural parents abroad has been aided by counselling and time for reflection and has not been procured by illegal means such as the payment of money.⁷⁸ This is particularly so if the country in question has not ratified the 1993 Hague Convention on Intercountry Adoption or has not entered into a bilateral treaty with Ireland. As noted already, recent guidelines issued by the Adoption Board in relation to the consent of natural parents have been helpful in stating what documentation and procedures are required to ensure intercountry adoptions are carried out ethically.

(3) *Fees*

4.47 Submissions received by the Commission have also queried the appropriateness of significant amounts of money being spent on what are sometimes euphemistically referred to as “fees” in certain countries to facilitate intercountry adoption. Submissions are of the opinion that this is contrary to the spirit of Article 21(d) of the Hague Convention which directs that States Parties shall take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it. It is also contrary to domestic Irish legislation, since section 42 of the *Adoption Act 1952* provides that the only fees which may be paid in the context of adoption in Ireland are for the maintenance of the child and professional legal services. Therefore expenses for the medical

adoption has a place, even as a last resort, provided it is properly regulated for the protection of orphaned and refugee children. See 4th World Congress on Family Law and Children’s Rights, Cape Town, South Africa, 20-23 March 2005. Available at www.childjustice.org/html/2005.htm.

⁷⁷ Some of these issues were raised by social workers in the Trinity College *Study of Intercountry Adoption Outcomes in Ireland* at chapter 10.

⁷⁸ See generally Selman (ed) *Intercountry Adoption: Developments, Trends and Perspectives* (British Agencies for Adoption and Fostering 2000).

treatment of the child or legal services would be considered to be reasonable. Submissions note that only reasonable expenses properly incurred during the process should be permitted. This is to ensure that improper payments are not made by intercountry adopters. The New South Wales Law Reform Commission has noted that the trafficking and sale of children can be easily held to be at the extreme end of the “improper” scale.⁷⁹ Naturally, there are difficulties in trying to decide when a payment borders on improper. For example if adoptive parents make a donation to the child’s orphanage, which might be compulsory in some sending states, it is difficult to decide on which side of the line this falls.

4.48 The 2005 *Special Commission on the Practical Operation of the Hague Convention on Intercountry Adoption* reaffirmed the following recommendations in this regard which were agreed at the 2000 Special Commission:

“Prospective adopters should be provided in advance with an itemised list of the costs and expenses likely to arise from the adoption process itself. Authorities and agencies in the receiving State and the State of origin should co-operate in ensuring that this information is made available. Information concerning the costs and expenses and fees charged for the provision of intercountry adoption services by different agencies should be made available to the public. Donations by prospective adopters to bodies concerned in the adoption process must not be sought, offered or made.”⁸⁰

(4) *Statutory right for prospective adopters to assessment*

4.49 As already mentioned, prospective intercountry adopters have an automatic right to apply for an assessment for foreign adoption in section 8 of the *Adoption Act 1991*. This is in contrast to domestic adoption where no such right exists. This situation places great strain on financial resources and the work of social workers particularly in the Health Service Executive who are under an obligation to assess every person who applies to be an intercountry adopter. Indeed, as the *Study of Intercountry Adoption Outcomes in Ireland* states the pressure in HSE areas to undertake

⁷⁹ *Report 81 (1997) Review of the Adoption of Children Act 1965 (NSW)* at chapter 10. Available at www.lawlink.nsw.gov.au/lrc. See also Bojorge “Intercountry Adoptions: In the best interests of the child?” [2002] *Queensland University of Technology Law and Justice Journal* at 15.

Available at www.law.qut.edu.au/ljj/editions/v2n2/bojorge_full.jsp.

⁸⁰ At 34. Available at www.hcch.net/index_en.php.

assessments is intense.⁸¹ Submissions received by the Commission have also noted that such a statutory right may be interpreted by some applicants as a right to a positive outcome. In this context, when HSE staff make a negative recommendation in an assessment, this can, and is often, not accepted by the Adoption Board. The Study reports that the actual number of failed recommendations is small, probably less than 5%. Submissions received by the Commission and the feedback to the Trinity College Study from Principal Social Workers question whether the best interests of children are adequately protected within such a system. Since there is an automatic right and no process to filter unsuitable applications, time and resources are invested in unsuitable applications. Such an investment in energy and finances could be better used elsewhere in the adoption and child welfare services for example in post-adoption support services. In jurisdictions such as the States and Territories of Australia, the process is divided into a number of stages beginning at the expression of interest in intercountry adoption stage to the final stage where permission is granted to adopt abroad. Certain matters such as the prospective intercountry adopters' medical and criminal history (particularly the perpetration of sexual offences), attendance at educational courses and the capacity to value a child's cultural heritage are enshrined in legislation to ensure that the welfare of children is protected into the future.⁸² Fees are charged at various points in this process, which is not the case in Ireland.⁸³

(5) *Discussion*

4.50 At present there are some differences between domestic adoption and intercountry adoption in Ireland. Article 21(c) of the Hague Convention

⁸¹ At 319. Related to this is the grant of the Declaration of Eligibility and Suitability to Adopt. The Adoption Board grants this to prospective intercountry adopters who have been deemed as suitable to adopt. Between 1991 and 2005, the Board granted 3,415 such declarations and in 30 cases refused to grant the declaration. See *Adoption Board Annual Report 2005* at 63. Available at www.adoptionboard.ie.

⁸² The imminent *Adoption Bill 2008* to implement the Hague Convention on Intercountry Adoption in Ireland may include such matters. See *Adoption legislation: 2003 consultation and proposals for change* (Stationery Office 2005) at 104.

⁸³ For example in Queensland the *Adoption of Children Regulation 1999* prescribes the following fees: Aust \$60 fee for an expression of interest in intercountry adoption, \$3,500 for an assessment and \$1,500 for post-placement services. No fees are charged for the attendance at information or education sessions or the preparation of documents. See www.childsafety.qld.gov.au/index.html. Section 66 of the *Adoption and Children (Scotland) Act 2007* empowers the Scottish Ministers to charge a fee for services provided for intercountry adoption. The Commission previously recommended that prospective intercountry adopters who can afford to do so may be asked to make some contribution towards the administrative costs of the agency or HSE concerned with the adoption. See *Report On the Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993* (LRC 58-1998) at 35.

on Intercountry Adoption provides that State Parties shall ensure that the child concerned by an intercountry adoption enjoys safeguards equivalent to those existing in the case of national adoption. The Commission is of the opinion that in general the same standards be applicable to both types of adoption. The Commission notes that some submissions have stated that prospective adoptive parents for both domestic and intercountry adoption should be prepared and assessed for their eligibility and suitability to adopt in accordance with both the *Standardised Framework for Intercountry Adoption Assessment (2000)*⁸⁴ and the forthcoming *Standardised Framework for Adoption in Ireland* which will focus on domestic adoption. This would ensure a certain amount of harmonisation between domestic and intercountry adoption practice and procedures.

4.51 One method of ensuring such harmonisation is the creation of accredited bodies or mediation agencies who work with and guide intercountry adopters while they are in the sending country (the adopted child's country of origin) provided this country grants such bodies permission to do so. The Hague Convention on Intercountry Adoption provides for accredited bodies or mediation agencies and defines their role, which is fulfilled in conjunction with the role of the central authorities.

4.52 Article 10 of the Convention states that accreditation shall only be granted to bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted. Article 11 provides that an accredited body shall be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and be subject to supervision by competent authorities of that State as to its composition, operation and financial situation. Article 12 states that an accredited body may act in another Contracting State only if the competent authorities of both States have authorised it to do so.⁸⁵

4.53 The Adoption Board has noted that there are compelling reasons for such bodies to be in operation and why the current system of intercountry adoption in Ireland needs to be changed.⁸⁶

“Clear benefits would accrue from the establishment of mediation agencies working under the Adoption Board’s supervision in

⁸⁴ See www.dohc.ie/publications/pdf/adframe.pdf?direct=1.

⁸⁵ See *A Discussion Paper on Accreditation Issues* (August 2005) and the *Draft Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption* (August 2005). Available at www.hcch.net/index_en.php.

⁸⁶ *Adoption Board Requirements for the Registration of Adoption Mediation Agencies* (2004) at 7. Available at www.adoptionboard.ie/booklets/Intercountry/Mediation%20Requirements.pdf.

Ireland in the area of adoptions. There would be added protection of the rights of children and the prevention of abuses against children, birth families and adoptive parents and the assurance that the adoption is in the best interest of the child. There would be a significant improvement in the state's ability to assist Irish citizens seeking to adopt children from abroad, and residents from other countries seeking to adopt children from Ireland.”

4.54 Once the 1993 Hague Convention is incorporated into Irish law when the promised *Adoption Bill 2008* is enacted, accredited mediation agencies could be established to ensure that intercountry adoptions have a child-centred focus and that intercountry adopters are supported while they are in foreign countries. Submissions received by the Commission have highlighted the importance of such bodies in ensuring that illegal practices are prevented and that the welfare of children is paramount. The International Social Service notes that prospective intercountry adopters are often not very familiar with the environment, language, culture, habits, and food of the child's country of origin when they arrive there to meet the child. The assistance on the part of the representative of the accredited body with whom they have built up a relationship of confidence, or on the part of a specialist professional from the competent authority of the state of origin, is a very favourable element in helping them reduce such pressure.⁸⁷ Accredited bodies would operate in Hague Convention countries from where Irish based adopters adopt children. They could also operate in countries with which Ireland has signed a bilateral intercountry adoption agreement. Their involvement would be crucial in giving some reassurance that natural parents have been counselled, that children have been properly placed for adoption and that adoption documentation is proper and legal and not falsified. Combined with this, the Adoption Board will become the Central Authority in accordance with the Convention and it will have an important role in communicating with its counterparts in sending countries to ensure that intercountry adoptions are legal and ethical. Therefore the Commission recommends the creation of accredited bodies and mediation agencies on a statutory basis as envisaged in the 1993 Hague Convention on Intercountry Adoption.

(6) Recommendation

4.55 *The Commission recommends the creation of accredited bodies and mediation agencies on a statutory basis as envisaged in the 1993 Hague Convention on Intercountry Adoption.*

⁸⁷ International Social Service *Fact Sheet No. 46 The Preparation of Prospective Adoptive Parents, the Assistance in the Country of Origin and the Adoption Order* (September 2007). Available at www.iss-ssi.org. See also Darling “The Changing Face of Adoption” [1999] 4 IJFL at 2.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

5.01 The recommendations of the Commission may be summarised as follows:

Chapter 1 Intercountry Adoption

5.02 The Commission reiterates its previous recommendation that the *1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* be ratified by Ireland and incorporated into Irish law and welcomes the impending publication of the *Adoption Bill 2008* to do so. [Paragraph 1.14].

Chapter 2 Status and Rights of the Child

5.03 The Commission recommends that there should be no change to the Irish citizenship rights of a child resident outside the State who is the subject of a foreign or intercountry adoption order made in favour of an Irish citizen or citizens. [Paragraph 2.25].

5.04 The Commission acknowledges that a residual jurisdiction inherent in the State, to intervene in appropriate circumstances to protect the status and rights of an Irish citizen child resident outside the State who is the subject of a foreign or intercountry adoption order made in favour of an Irish citizen or citizens, should continue to be exercised in the future, taking into account the relevant principles of international law, including the comity between States which arises in such cases and the practical enforceability of any orders made by an Irish court. [Paragraph 2.36].

Chapter 3 Duties of Parents and State

5.05 The Commission acknowledges that the duty of the State to secure the performance of the constitutional and legal duties of adoptive parents who are Irish citizens resident abroad is limited by reference to practicability within the meaning of the Constitution of Ireland and private and public international law considerations. [Paragraph 3.09].

5.06 The Commission recommends that in exceptional cases which come to the attention of the State, the Attorney General is the most appropriate officer of the State to initiate proceedings in the Irish High Court to secure the performance of the constitutional and legal duties of Irish citizens as parents of an adopted child resident outside the State and to

ensure the fulfilment of the duties of the State in respect of such a child arising from Articles 40.3 and 42.5 of the Constitution. The Commission recommends that the Attorney General is also the appropriate officer of the State to initiate any similar proceedings in the court of another jurisdiction, taking into account relevant principles of international law. [Paragraph 3.12].

Chapter 4 Related Issues

5.07 The Commission recommends that the Adoption Board should prepare guidelines regarding the validity and authentication of adoption documentation from foreign countries, especially those which have not ratified the 1993 Hague Convention on Intercountry Adoption. [Paragraph 4.21].

5.08 The Commission welcomes the enactment of the *Protection of Children (Hague Convention) Act 2000* and looks forward to its implementation and the ratification of the 1996 Hague Convention on the International Protection of Children by all of the Member States of the European Union. [Paragraph 4.26]

5.09 The Commission recommends that the Adoption Board should have appropriate, independent legal advice at its disposal when considering the compatibility of foreign adoption law with Irish adoption law for the purposes of recognising foreign or intercountry adoptions. [Paragraph 4.28].

5.10 The Commission recommends that consideration be given to the appointment of a designated High Court judge to deal with all adoption cases. [Paragraph 4.30].

5.11 The Commission recommends that section 6 of the *Child Care Act 1991* be amended to provide that post-adoption services including counselling be made available on a statutory basis for both domestic and intercountry adoptions. [Paragraph 4.43].

5.12 The Commission recommends the creation of accredited bodies and mediation agencies on a statutory basis as envisaged in the 1993 Hague Convention on Intercountry Adoption. [Paragraph 4.55].



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€15

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