This chapter considers family and sexual matters in Northern Ireland. It outlines how human rights in the context of family life, domestic violence, termination of pregnancy, sexual offences, human trafficking, sexual orientation and prisoners’ access to family are dealt with in Northern Ireland’s legal system. It draws primarily from domestic legislation and case law. In addition, due to the enactment of the Human Rights Act 1998, which has given the European Convention on Human Rights (ECHR) direct effect in Northern Ireland’s law, reference to ECHR rights is also frequent. The main ECHR provisions relating to family and sexual matters are Articles 8 and 12. These set out the minimum standards that are imposed upon the UK, including Northern Ireland. They state:

**Article 8**

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

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 12**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 6(1) of the ECHR, which deals with the right to a fair trial, may also be important in terms of the procedure used to make family law decisions. It states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent
strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Family Life

Protection of the integrity of the family is at the heart of the right to respect for family life, as guaranteed by Article 8 of the ECHR. Some of the factors which will be considered when deciding whether Article 8 has been engaged include the length of the relationship and whether there are children involved. Article 8 awards particular protection to the ‘inner circle’ (Niemetz v Germany, 1992) and to ‘family ties’ (Keegan v Ireland, 1994). Relationships recognised as falling within the scope of Article 8’s respect for family life include:

— a husband and wife, and children who are dependent upon them, including illegitimate and adopted children (B v UK, 1988);
— brothers and sisters, and relationships between parents and children (Moustaquin v Belgium, 1991; X, Y and Z v UK, 1997);
— civil partners (Civil Partnership Act 2004);
— parties living together outside of marriage, and their children (Johnston v UK, 1987);
— parties who have children together, but who are not living together at the time of their birth (Berrehab v The Netherlands, 1989);
— an unmarried father and his child, even if the father has not lived with the mother or had a great deal of contact with the child (Soderback v Sweden, 1998);
— a foster parent and a fostered child (Frette v France, 2002);
— adoptive parents and the adopted child, even where there has been little contact with the adopted child and where the adoption is contested (Pini v Romania, 2005); and
— in certain circumstances a child’s relationship with his or her grandparents (Vermeire v Belgium, 1993).

Relationships which are too remote to constitute family life may still be protected under the right to respect for private life contained in Article 8. These include:

— the relationship between a prisoner and his fiancée (Wakeford v UK, 1990);
— the relationship between same-sex couples who are not civil partners (X v UK, 1986); and
— the relationship between adult children and their parents.

The right to family life under Article 8 does not extend to protect the creation of a family nor does it require the state to enable a parent to look after a child at home through the provision of assistance (Andersson and Kullman v Sweden, 1986).
The Right to Marry

The right to marry is provided for by Article 12 of the ECHR. The right is limited in the sense that it is expressly subject to domestic laws relating to age, the gender of the participants or other matters. In *Rees v UK* (1987) the European Court of Human Rights (ECtHR) held that any such limitations ‘must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’. The ECtHR has not extended the protection of Article 12 to include same-sex marriages, leaving this to individual states (*Schalk and Kopf v Austria*, 2010). But recently it has held that if a state enacts civil partnership legislation for opposite-sex couples it must also do so for same-sex couples if it is to avoid a violation of Article 8 of the ECHR (*Vallianatos v Greece*, 2013).

Marriage law in Northern Ireland is founded on the historical definition set out in *Hyde v Hyde* (1866), which describes marriage as ‘the voluntary union for life of one man to one woman to the exclusion of all others’. This is further reinforced by the Matrimonial Causes (NI) Order 1978, which states that a marriage is void unless the two parties involved are male and female. While same sex marriage has been introduced in England and Wales by the Marriage (Same Sex Couples) Act 2013 and in Scotland by the Marriage and Civil Partnership (Scotland) Act 2014, there are no plans to introduce the same changes to Northern Ireland. Same sex marriages which are entered into in England and Wales or Scotland will be recognised as civil partnerships in Northern Ireland.

The law also requires that the participants in a marriage be at least 16 years of age (Age of Marriage Act (NI) 1951), although those under the age of 18 still require the consent of a parent or of a court (Marriage (NI) Order 2003). It has been held by the ECtHR that the obligation to respect the domestic law, which imposes a minimum age of marriage, does not deny the right to marriage, even in situations where the religion of the parties permits a younger age (*Khan v UK*, 1986).

The Matrimonial Causes (NI) Order 1978 further requires that the parties to a marriage must not be within the ‘prohibited degrees of relationship’. These relationships of consanguinity and affinity are set out in detail in article 18 of the Family Law (Miscellaneous Provisions) (NI) Order 1984, as amended, and have the effect of rendering a marriage between people in those relationships void.

A further impediment to marriage is that neither of the parties can already be lawfully married. Bigamy is a criminal offence in Northern Ireland punishable by up to seven years in prison (s 57 of the Offences against the Person Act 1861).

Marriage must be based on free consent and the Forced Marriages (Civil Protections) Act 2007 aims to protect against coercion. The Act provides for a ‘forced marriage protection order’, which may be granted without a hearing, to prevent a person being married against their will or being taken abroad to do so. Contravention of such an order is a criminal offence. This measure is less intrusive than placing a young person in wardship, which was formerly often used to
Sham Marriages

Marriages of convenience, or ‘sham’ marriages, are designed to exploit marriage laws, often for financial gain or to obtain a certain immigration status. The definition of a sham marriage under EC Council Resolution 97/C382/01 is:

a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State.

The UK system designed to prevent sham marriages was the Certificate of Approval scheme, which required migrants subject to immigration control to obtain a certificate of approval from the UK Border Agency prior to being able to marry within the Anglican Church. This initially required a fee, but this requirement was suspended in April 2009 as a consequence of the challenge brought in Baiai v Secretary of State for the Home Department, 2008. The scheme was also criticised by the ECtHR in a case brought from Northern Ireland, O’Donoghue v UK (2010). The Court declared it to be incompatible with Article 14 of the ECHR (the non-discrimination provision), read in conjunction with Article 12. As a result of this ruling the whole scheme was suspended while the government prepared a remedial order under the Human Rights Act 1998 to remedy the incompatibility. The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011 came into force on 9 May 2011. Foreign nationals are still required to give notice to a designated register office prior to their marriage taking place.

Breakdown: Separation and Divorce

Separation

When a marriage comes to an end there are a number of options available. Separation can be arranged informally or with a separation agreement which outlines the arrangements for the children of the family, the matrimonial property and the finances of the family. This may include the need for maintenance to be paid by one of the spouses in favour of the other.

Parties to a marriage may also apply for a formal decree of judicial separation, which is often sought where there is a moral or religious objection to divorce.
The decree can be based on similar grounds to those available for divorce and has the effect of no longer requiring the parties to live together. But the decree does not dissolve the marriage or permit either party to enter into a subsequent marriage. Furthermore, it does not prevent either party petitioning for divorce at a later stage.

**Divorce**

The ECtHR has found that Article 12 does not extend to the right to have a marriage dissolved (*Johnson v Ireland*, 1968), although, of course, the Court accepts that divorce is allowed in nearly all states. In *F v Switzerland* (1987) the ECtHR distinguished the right to remarry from the situation in *Johnston*, holding that if divorce is provided for under national law then the right of divorced persons to remarry is protected by Article 12.

The Matrimonial Causes (NI) Order 1978 governs the law on divorce in Northern Ireland. Under that Order a party to a marriage which has lasted for at least two years may petition for divorce if he or she can show that the marriage has broken down irretrievably. This can be demonstrated by one or more of five grounds:

- the respondent has committed adultery;
- the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- the respondent has deserted the petitioner for a period of at least two years;
- the parties to the marriage have lived apart for a continuous period of at least two years and the respondent consents to the divorce; or
- the parties to the marriage have lived apart for a continuous period of at least five years.

Where irretrievable breakdown is shown to the satisfaction of the court, a ‘decree nisi’ will be granted. The petitioner may apply for the final ‘decree absolute’ once the financial elements of the divorce have been completed, and no sooner than six weeks after the decree nisi.

**Financial Provision**

**Co-habitees**

There is no specific law in Northern Ireland which covers financial provision for co-habitees when a relationship between them breaks down. The rights of couples in this situation are determined by the complex principles of property law.
Spouses

The Matrimonial Causes (NI) Order 1978 allows for a number of claims for financial provision which can be categorised as financial provision orders, property adjustment orders and pension sharing orders.

Where there is a petition for divorce a court may award ‘maintenance pending suit’ in advance of the divorce hearing. This is the only order which can be made prior to a divorce being granted. After the decree nisi has been granted the court’s powers with respect to financial provision are greater. It has the power to award periodic payments or a lump sum to a spouse, or indeed for the benefit of a child of the family.

Any financial settlement between spouses will also deal with property issues, which usually involve the marital home but also any other property and shares. A court can order a transfer of the property or adjust the proportion of ‘equity’ (ie interest) each spouse holds. Powers also extend to ordering the sale of the property or restricting disposal until a child of the family has attained the age of 18.

The final aspect of financial provision is the division of pensions, which can occur in a number of ways. A ‘pension sharing order’ provides for the transfer of a proportion of the ‘cash equivalent transfer value’ of a pension between the spouses while a ‘pension attachment order’ provides for the payment of a lump sum or periodic payment to a spouse.

Under the Matrimonial Causes (NI) Order 1978, in the exercise of its powers a court must have regard to the matters listed under article 27. Primarily, regard must be had to the welfare of any minor children of the family, which involves consideration of their financial needs, their own financial resources, any physical or mental disability and the manner of their education. As regards the parties to the marriage the court will consider: their income and earning capacity and their respective needs and financial obligations; their standard of living and age; any disability; any contribution they have made to the welfare of the family; their conduct; and any financial benefit which they may lose as a result of the divorce.

Issues Relating to Children

The Children (NI) Order 1995 governs matters relating to the welfare of children such as residence and contact, child protection, and the position of children who are in care or ‘looked after’.

In Northern Ireland it is presumed that a man is the father of a child where he was married to the child’s mother between the child’s conception and birth (Family Law Act (NI) 2001, s 2(1)(a)). The same presumption applies where a man has been registered on the child’s birth certificate (s 2(1)(b)). Where the parentage of a child is in doubt, the courts have the power to direct a test of
parentage to be taken. This was confirmed by the ECtHR in *Kalacheva v Russia* (2009) although the Court’s analysis of the matter was that the establishment of paternity should be dealt with under Article 8 of the ECHR (the right to private and family life).

Parental responsibility is automatic for the mother of a child and for the father where the parents are married. For unmarried fathers, parental responsibility can be acquired by being registered as the father, by a parental responsibility order being granted by a court, or by a parental responsibility agreement being entered into with the mother. A step-parent may also make an application for parental responsibility under the Family Law (NI) Act 2001 (s 1(3)). A Health and Social Care Trust will gain parental responsibility where a care order is in force, but this does not extinguish the rights of those persons who already have responsibility for the child.

A Family Proceedings Court (which is a branch of the magistrates’ courts) can make a number of orders in respect of a child under article 8 of the Children (NI) Order 1995. These are:

— A ‘residence order’, which determines the arrangements for where a child will live. Such an order can be made in respect of one or more persons, who need not live together.

— A ‘contact order’, which requires the parent who has residence to allow contact between the child and another person. Defined contact orders are often sought which detail the precise arrangements for the named children. The court also has the power to make a ‘no contact’ order, but this will be issued only in exceptional circumstances and otherwise may not be justifiable under Article 8 of the ECHR (*Görgülü v Germany*, 2004). Children are entitled to maintain contact with both parents under Article 9 of the UN Convention on the Rights of the Child 1989 and, although this is not enforceable domestically, it is often used as a supporting argument in court decisions.

— A ‘specific issue order’, which gives directions for determining a specific question that has arisen in connection with parental responsibility. Examples of situations where such an order is used are decisions with respect to medical treatment or schooling.

— A ‘prohibited steps order’, which prevents a parent from exercising his or her parental responsibility in a manner prohibited by the order without the consent of the court. These orders usually deal with issues such as a name change or removing the child from the country.

In granting the above orders the welfare of the child is paramount and the court must have regard to the ‘welfare checklist’ in article 3 of the Children (NI) Order 1995. It is also important to note that such orders can be made only in respect of a child under the age of 16, unless there are exceptional circumstances.

The financial support of children is dealt with by the Child Maintenance and Enforcement Division (formerly the Northern Ireland Child Support Agency), acting under the Child Support (NI) Orders 1991 and 1995. The Division
assesses and recovers payments of child maintenance from an absent parent. Failure to pay child maintenance will lead to legal action in the form of an application to the court for a 'liability order', which will allow for the recovery of the unpaid sum.

In the course of divorce proceedings, the court has a duty towards any children of the family. A statement of arrangements must be provided in respect of any minor children and the court must be satisfied with these arrangements prior to the granting of the decree nisi. The court retains jurisdiction to exercise its powers under the Children (NI) Order 1995 and may do so if it is not satisfied with the proposed arrangements in respect of the children.

Adoption

Article 12 of the ECHR does not include a right to adopt or a right to create a family (X v Belgium and Netherlands, 1974), but the ECtHR has held that the relationship between adoptive parents and their child does fall within the scope of Article 8 (X v France, 1986; Pini v Romania, 2005).

Adoption law in Northern Ireland is governed primarily by the Adoption (NI) Order 1987. The Order's provisions in respect of unmarried couples and civil partners have recently been interpreted by the courts. In 2011 the Northern Ireland Human Rights Commission brought judicial review proceedings against the Department of Health, Social Services and Public Safety on the compatibility of the Adoption (NI) Order 1987 with Articles 8 and 14 of the ECHR. The Order permitted only married couples or individuals to apply to adopt a child, thus excluding unmarried couples, whether same sex or opposite sex, and civil partners. The High Court ruled that preventing couples who are not married or in a civil partnership, from applying to adopt a child was discriminatory and that all individuals and couples, regardless of marriage status or sexual orientation, should be eligible to be considered as adoptive parents, and this ruling was confirmed by the Court of Appeal (Re Northern Ireland Human Rights Commission's Application, 2013).

The UN Convention on the Rights of the Child requires the welfare of the child to be a paramount consideration in any decision concerning a child and this principle is reflected in the Adoption (NI) Order 1987. There are certain limits in place to ensure that the best interests of the child are served, namely:

- adopters must be over 21 years of age, or 18 if one of the couple is the birth parent;
- adopters must have the finances and space to adequately support the child;
- health and well-being play a part in the assessment process, but an individual will not be automatically disqualified for being disabled, a smoker, overweight or having a medical condition; and
— a criminal record will not automatically disqualify an individual from adopting, but the law prohibits anyone from adopting or fostering if they, or a member of their household, has been convicted or cautioned for offences against a child.

When making a decision on whether to permit an adoption the court will consider the safety and welfare of the child, the stability of the family, and the wishes and feelings of the child, in accordance with his or her age and maturity. Unless the mother is deemed unfit by a court order, her consent is required for an adoption to take place. The consent of the unmarried father of a child is not required, which raises issues under Articles 6 and 8 of the ECHR. In *Keegan v Ireland* (1994) it was held that, where the father wished to have a say, proceeding with an adoption without his knowledge or consent violated those Articles. The child’s consent is not required, although this too may breach Articles 6 and 8 if the child is old enough to participate and provide his or her views on the adoption decision. The participation of the parents in the process itself is also important, the ECtHR finding a violation of Article 6 in the case of *P, C and S v UK* (2002) where the mother did not have access to the court. Once an adoption is finalised the adoptive parents will automatically obtain parental responsibility for the child.

With regard to international adoptions, the Adoption (Intercountry Aspects) Act (NI) 2001 gives effect to the international standards under the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1995.

### Domestic Violence

The Domestic Proceedings (NI) Order 1980, as amended by the Family Homes and Domestic Violence (NI) Order 1998, empowers the court to grant orders to protect persons suffering from domestic violence. The orders at the disposal of the court are:

— ‘occupation orders’ (art 11 of the 1998 Order), which permit the court to prohibit a person from occupying or entering the home itself or the vicinity.
— ‘non-molestation orders’ (art 20 of the 1998 Order), which prohibit a person from using or threatening violence against the applicant and from instructing, encouraging or in any way suggesting that another person should do so; the respondent is also forbidden to intimidate, harass or pester the applicant or to encourage anyone else to do so.

Occupation orders and non-molestation orders are available to spouses, co-habitees and ‘associated persons’ (persons who ‘live or have lived in the same household, otherwise than merely by reason of one of them being the other’s employee, tenant, lodger or boarder’). The orders may be made ‘ex parte’ (ie without the
respondent being told), thereby enabling the application to be made in an emergency or where there is a risk that the respondent may attempt to prevent an application being made. The application will subsequently be listed for a full ‘inter partes’ hearing so that the respondent may enter a defence. Legal aid for applications related to domestic violence has recently been extended to those in waged employment. If the respondent contravenes a court order, he or she commits an offence under article 25 of the Family Homes and Domestic Violence (NI) Order 1998 and can be punished with up to six months’ imprisonment. Contravention of the Order is also an arrestable offence.

The ECtHR has ruled that a state can be held accountable for failing to investigate reports of domestic violence and failing to provide enough protection for victims (Opuz v Turkey, 2009). In 2004, the Violence, Crime and Victims Act was enacted to provide police with greater powers of arrest, to focus more attention on perpetrators and to provide better protection for victims. The Act is complemented by the Law Reform (Miscellaneous Provisions) (NI) Order 2005, which gives added protection to victims of domestic violence, takes into account human rights issues and increases the criminal penalties for breaching protective civil orders.

Furthermore, UK homicide laws have changed with the aim of protecting female victims of domestic violence, although the new provisions are not gender specific. In 2010 the partial defence of provocation was abolished (Coroners and Justice Act 2009, s 56) and replaced by the new partial defence of loss of control (Coroners and Justice Act 2009, s 54). The new defence removes the requirement for the loss of control to be sudden, which was required by the defence of provocation. For the loss of control defence to be engaged there are three requirements that must be satisfied—it must be established that the defendant lost self-control, there must be a qualifying trigger and ‘a person of [the defendant’s] sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of [the defendant], might have reacted in the same or in a similar way to [the defendant]’ (s 54(1); see also R v Camplin (1978); Attorney General for Jersey v Holley (2005). The qualifying triggers are defined as constituting ‘circumstances of an extremely grave character’ and/or causing the defendant ‘to have a justifiable sense of being seriously wronged’ (s 55(4)). In deciding whether a qualifying trigger has been engaged the judiciary is to disregard the defendant’s ‘fear of serious violence’ and ‘sense of being seriously wronged’ if the defendant ‘incited [it] to be done or said for the purpose of providing an excuse to use violence’ (s 55(6)). The defendant’s ‘sexual infidelity’ is also to be disregarded (s 55(6)).

Domestic Violence and Children

The ECtHR, in considering the physical punishment of children in the case of A v UK (1998), did not view the defence of reasonable chastisement to be sufficient to prevent a breach of Article 3 of the ECHR (the right not to be tortured
or subjected to inhuman or degrading treatment or punishment). In order to amount to inhuman or degrading treatment or punishment the action must reach a minimum level of severity, and such an assessment will take into consideration factors such as the duration of the treatment, the physical or mental effects on the victim and the sex, age and state of health of the victim (Ireland v UK, 1978). The ECtHR has also found violations of Article 3 where the state has failed to protect children from long-term sexual abuse (E v UK, 2002) or neglect (Z v UK, 2001). Where an allegation is made that a breach of Article 3 has occurred, the state is required to conduct an effective, official investigation. The UN Convention on the Rights of the Child and the UN Convention Against Torture both protect children from torture, inhuman and degrading treatment, also requiring that prompt and impartial investigations are carried out into allegations.

Where the state has to intervene in the family life of a child, by virtue of violence or neglect, any decisions made by a Health and Social Care Trust or a court must be in accordance with the best interests of the child. The procedures for making such decisions must be compliant with the fair trial obligations of Article 6 of the ECHR. The participation of the child in any decision is an important factor under Article 12(1) of the UN Convention on the Rights of the Child. The views of the child must be given due consideration in line with his or her age and maturity.

**Termination of Pregnancy**

Medical termination of pregnancy was legalised in Great Britain by the Abortion Act 1967. This Act does not extend to Northern Ireland. Northern Ireland’s position continues to be governed by sections 58 and 59 of the Offences against the Person Act 1861 and by section 25 of the Criminal Justice Act (NI) 1945.

Medical termination of pregnancy is legal in Northern Ireland only in exceptional circumstances, where the life of the mother is at imminent risk and where there is a long-term or permanent risk to the mother’s physical or mental health. In 2012 the first private clinic to offer terminations was opened in Northern Ireland. Prior to this, terminations in Northern Ireland were carried out only by the National Health Service. An example of a situation where termination of pregnancy would be permitted in Northern Ireland is provided by the case in England of a 14-year-old girl who was gang-raped by a group of soldiers and fell pregnant. The courts ruled that forcing her to continue with her pregnancy would have threatened her mental health (R v Bourne, 1938). A ‘lawful’ termination can therefore be carried out if the woman would otherwise be a ‘physical and mental wreck’ or if there is a risk to the life of the woman if the pregnancy were to continue. However, a woman in Northern Ireland cannot obtain a termination of pregnancy on the grounds of rape alone. In December 2013, the Justice Minister announced consultation on changing Northern Ireland’s termination of pregnancy laws to
allow pregnant women carrying babies with fatal foetal abnormalities to have a termination, as well as on changes to the current position on terminations in the case of rape or incest.

The ECtHR has reaffirmed that states have a broad margin of appreciation where termination of pregnancy is concerned. It has clarified that Article 8 of the ECHR does not provide for a right to a termination, but it has emphasised that, where the right does exist in a state, guidelines concerning the termination of pregnancy must be made clear (A, B and C v Ireland, 2010). In 2004 the Court of Appeal of Northern Ireland confirmed that the Department of Health had a statutory duty to provide guidelines on the termination of pregnancy (Family Planning Association of NI v Minister of Health, Social Services and Public Safety, 2004). Further guidelines issued in 2011 continue to be debated.

Under section 1 of the Abortion Act 1967 a medical termination of pregnancy is permitted in Great Britain where the pregnancy poses a risk to the physical or mental health of the pregnant woman or any existing children of her family, or where there is a substantial risk that if the child were born ‘it would suffer from such physical or mental abnormalities as to be seriously handicapped’. The Human Fertilisation and Embryology Act 1990 lowered the legal time limit for terminations in Great Britain from 28 to 24 weeks and it clarified the circumstances under which a termination could be obtained at a later stage.

Cases based on Article 10 of the ECHR (the right to freedom of expression) have indicated that state authorities should not restrict the provision of information to women on how to travel elsewhere to obtain a termination (Open Door and Dublin Well Woman v Ireland, 1992). The Court has also ruled that prosecuting an individual who was campaigning against terminations for distributing leaflets prior to a general election was a violation of the campaigner’s right to freedom of expression (Bowman v UK, 1998).

**Sexual Offences**

The main legislation in Northern Ireland governing sexual offences is the Sexual Offences (NI) Order 2008. It replaced the legislation stemming from the Victorian era (the Offences against the Person Act 1861, the Criminal Law Amendment Act 1885 and the Vagrancy Act 1898). Amendments have also been made by the Sexual Offences (NI) Order 1978, the Homosexual Offences (NI) Order 1982 and the Criminal Justice (NI) Order 2003.

The Criminal Justice (NI) Order 2003 abolished the presumption that a boy under the age of 14 cannot engage in sexual activity. The Sexual Offences (NI) Order 2008 criminalises any sexual activity by anyone with a person who is under the age of 13 (arts 12–15) and sexual activity by anyone with a person whom he or she does not reasonably believe to be 16 or older and who in fact is younger than 16 (arts 16–21). Meeting a child following sexual grooming is an offence under
article 22 of the 2008 Order and there are special provisions criminalising sexual activity with children by persons who are in a position of trust towards them (arts 23–29). A person can consent to sexual activity when he or she reaches the age of 16. While it is not an offence for a girl to have sexual intercourse under the age of 16, and while it is possible for such a girl to obtain contraception if she understands the treatment being given to her, a male having sexual intercourse with her will be acting unlawfully unless he reasonably believes her to be 16 or older.

Rape and Other Serious Sexual Offences

Rape is defined as ‘any act of non-consensual intercourse by a man with a person’ (Criminal Justice (NI) Order 2003, art 18) and is committed where A intentionally penetrates the vagina, anus or mouth of B with his penis, B does not consent to the penetration, and A does not reasonably believe that B consents (Sexual Offences (NI) Order 2008, art 5). The victim can be a male or female. A House of Lords decision in 1991 held that a wife cannot always be presumed to have consented to sexual intercourse with her husband (R v R), and legislation has since confirmed this. The perpetrator of rape can only be male, but women can be convicted of conspiring to commit rape, inciting rape or ‘assault by penetration’ (Sexual Offences (NI) Order 2008, art 6).

The maximum penalty for rape (or incitement to rape etc) is life imprisonment, but the courts in Northern Ireland tend to follow the Sentencing Guidelines in England and Wales, which suggest a starting point of five years for an offence where there are no aggravating features and eight years where there are aggravating features. The starting point for attempted rape is seven years (Attorney General’s Reference No 2 of 2004, 2005). The Court of Appeal of Northern Ireland has suggested that the minimum sentence for rape should be seven years where the case is contested (R v McDonald, 1989).

It has been established that legislation that interferes with consensual sexual behaviour between individuals is incompatible with Article 8 of the European Convention on Human Rights (Re McR’s Application for Judicial Review, 2002). As a result, the Sexual Offences (NI) Order 2008 deals with the issue of consent and differentiates between consensual and non-consensual sexual activity.

Sex Offenders Register

Part 2 of the Sexual Offences Act 2003 provides for notification orders, otherwise known as the Sex Offenders Register. The aim of these orders is to protect the public. Individuals who have been convicted or cautioned in respect of sex offences, or found not guilty by reason of insanity, can be subject to such orders. They extend to persons who aid and abet, or procure another to commit, a sexual
Monica McWilliams, Rhyannon Blythe and Hannah Russell

offence. Those subject to such orders are required to notify the police of their name, home address, date of birth, national insurance and passport details. The notification order can stretch from two years to indefinitely, depending on the sentence received or action taken against the recipient.

Incest

Articles 32 and 33 of the Sex Offences (NI) Order 2008 prohibit sexual activity with a family member under the age of 18 (or inciting a family member to engage in such sexual activity). The maximum penalty for these offences is 14 years' imprisonment but it decreases to five years if the defendant is also under the age of 18.

Indecency Offences

The Sexual Offences (NI) Order 2008 creates various indecency offences. For example, indecent exposure is an offence under article 70, article 71 criminalises voyeurism, and article 75 deals with sexual activity in a public lavatory. The offence of committing gross indecency with a child under the age of 14 is governed by section 22 of the Children and Young Persons Act (NI) 1968. In addition, indecent behaviour in a public place is an offence under section 9(1) of the Criminal Justice (Miscellaneous Provisions) Act (NI) 1968.

Prostitution and Pornography

Buying the sexual services of an adult is legal across the UK, including Northern Ireland. However, a person who pays for the sexual services of a prostitute who is, or has been, subjected to force has committed a crime in Northern Ireland (Sexual Offences (NI) Order 2008, art 64A; Policing and Crime Act 2009, s 15). Paying for the sexual services of a child is illegal under section 47 of the Sexual Offences Act 2003. Section 6 of the Human Trafficking and Exploitation (Further Provisions and Support of Victims) Bill 2013 proposes criminalising paying for the sexual services of a person in all circumstances in Northern Ireland. At the time of writing this Bill had reached the Committee Stage in the Northern Ireland Assembly.

Selling the sexual services of an adult is also legal across the UK. However, it is a crime to solicit the services of a prostitute (eg by kerb-crawling, running a brothel or pimping) (Sexual Offences (NI) Order 2008, arts 60–64; Policing and Crime Act 2009, s 20). It is also illegal to cause, incite, control, arrange or facilitate child prostitution or pornography (Sexual Offences Act 2003, ss 52–53A).
It is an offence to be in possession of ‘extreme pornographic images’ (Criminal Justice and Immigration Act 2008, s 63). The Protection of Children (NI) Order 1978 and section 70 of the Criminal Justice and Immigration Act 2008 also provide special provisions to deal with indecent images of children. Classification of pornographic video recordings is regulated by the Video Recordings Acts 1984 and 2010.

**Human Trafficking**

Human trafficking is defined as the movement of a person with deception or coercion into a situation of forced labour, servitude or slavery-like practice (Article 3(a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons 2000). In Northern Ireland it is classified as a crime under sections 57–59 of the Sexual Offences Act 2003, section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, and section 66 of the Sexual Offences (NI) Order 2008. Section 58 of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, as amended by sections 6 and 7 of the Criminal Justice Act (NI) Act 2013, also make it an offence to traffic people outside the UK (including Northern Ireland) for the purposes of exploitation.

The UK has ratified the 2011 EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, which demands a more proactive and victim-centred approach to tackling human trafficking. However, as at August 2014 changes to bring the UK into line with the non-mandatory provisions of this Directive have been minimal. The Human Trafficking and Exploitation (Further Provisions and Support of Victims) Bill 2013 (see above) claims to provide Northern Ireland with a more robust legal framework in relation to the prosecution of traffickers and those subjecting people in Northern Ireland to conditions of slavery, the provision of improved support for the victims of trafficking, and tackling the demand of trafficking. The Bill is currently receiving a mixed reception.

The Northern Ireland courts delivered their first human trafficking convictions in 2012 (R v Matyas Pis; R v Rong Chen). The English courts have also set precedents for compensating victims. In AT v Dulghieru (2009) an English court awarded aggravated damages to women who were trafficked into Northern Ireland. It took into account the length of their ordeal and the extent of identified ongoing post-traumatic stress.

**Sexual Orientation**

Law in the UK concerning lesbian, gay, bisexual and transgender (LGBT) rights has experienced a gradual turnaround since the 1980s. *Dudgeon v UK* (1982)
challenged the nineteenth-century legislation which criminalised homosexual acts taking place in public or in private, whatever the age or relationship of the participants involved, and whether or not the participants consented. The ECtHR ruled that there was no ‘pressing social need’ and thus no ‘sufficient justification’ to criminalise such acts. Consequently, the domestic legislation was amended. Under the Homosexual Offences (NI) Order 1982 a man over the age of 20 was allowed to conduct consensual homosexual acts in private. The Criminal Justice and Public Order Act 1994 reduced the age of consent for such acts to 18 and the Sexual Offences (Amendment) Act 2000 reduced it further to 17. By the Sexual Offences (NI) Order 2008 the age of consent for homosexual practices was brought down to 16 in Northern Ireland, as it is in the rest of the UK.

Homosexual sadomasochist acts conducted in private between consenting adults are still unlawful in the sense that they can give rise to prosecution for assault. The European Court has found the prohibition to be ‘necessary in a democratic society … for the protection of health and morals’ (Laskey, Jaggard and Brown v UK, 1997; ADT v UK, 2000). For more information on discrimination based on sexual orientation see Chapter 17.

Transgender Issues

The Gender Recognition Act 2004, which applies throughout the UK, introduced the right to change one’s legal gender. It was enacted following the ruling by the ECtHR in Goodwin v UK (2002), where the UK’s failure to recognise the applicant’s new gender was held to be a violation of Articles 8 and 12 of the ECHR. The House of Lords had already ruled in Bellinger v Bellinger (2000) that the legislative requirement that parties to a marriage be of different genders as determined at the time of the birth was incompatible with the ECHR. Transgender people are now permitted to apply for a gender recognition certificate, which also makes provision for a new birth certificate. If an individual applies for a gender recognition certificate after marriage they will have to end their marriage, as it is still against the law to be married to someone of the same sex (Marriage (NI) Order 2003). To retain their legal rights, the couple are required to register a civil partnership, which was introduced to Northern Ireland in 2005 (Civil Partnership Act 2004). The family rights of transgender people in Northern Ireland are decided on the individual facts of the case, balancing those rights against the best interests of any children involved.

Transgender operations are provided by the National Health Service for people with gender dysphoria. There are a number of stages and requirements which must be satisfied before an individual can obtain such treatment free of charge. Decisions are made by the Gender Recognition Panel and on average the process takes four to five years if conducted through the NHS and three to four years if conducted privately. The ECtHR has noted that individual circumstances should
be taken into account, so in certain circumstances a very long waiting period could amount to a violation of Article 8 of the ECHR (Schlumpf v Switzerland, 2009). The Sex Discrimination (Gender Reassignment) Regulations (NI) 1999 prevent discrimination on the grounds of gender reassignment in any aspect of employment. This includes pay and training.

**Fertility Treatment and Surrogacy**

The Human Fertilisation and Embryology Act 2008 provides equal access to the donation of sperm, eggs and embryos and to surrogate pregnancy for couples and individuals. This includes allowing couples, regardless of their marital status or sexual orientation, to be named as parents on the birth certificate. The Human Fertilisation and Embryology Authority’s code of practice sets out regulatory principles and guidance on the use, storage and research of sperm, eggs and embryos for the whole of the UK.

In relation to fertility treatment, up to six cycles of *in vitro* fertilisation (IVF) are available on the NHS if certain criteria are met, although availability and criteria vary depending on the demand in the different health trusts. The ECtHR has opted to categorise the issue under Articles 2, 8 and 14 of the ECHR, as opposed to Article 12 (Evans v UK, 2007; Dickson v UK, 2007; SH v Austria, 2010).

The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 removed anonymity from egg, sperm and embryo donors. Under this legislation any child conceived through donation after 1 April 2005 can apply to the Human Fertilisation and Embryology Authority, on reaching the age of 18, for access to a range of information, including the identity of the sperm, egg or embryo donor.

**Immigrants, Refugees and Asylum Seekers**

The UK is under an obligation to ensure that the Article 8 right of asylum applicants are adequately protected (see, eg Article 37(c) of the UN Convention on the Rights of the Child 1989 and Council Directive 2003/9/EC). Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a requirement on UK Visas and Immigration to safeguard and promote the welfare of the child in the UK when carrying out its existing functions. State authorities have a duty to ensure that those who fall within the remit of the 2009 Act experience:

— fair treatment which meets the same standard a child with British or Irish citizenship would receive;
— consideration for the best interests of the child;
— no discrimination of any kind;
— prompt response to asylum applications; and
— identification of those that might be at risk of harm.

Generally speaking, the children of asylum seekers will be kept with their parents on the basis that this is in accordance with the interests of family unification and the best interests of the child. Children have consequently been detained in detention centres with other adults. Keeping families together satisfies Article 8 of the ECHR but raises concerns under Article 5 (the right to liberty). Issues have also arisen under Article 14 in relation to the standards of living to which asylum seekers, immigrants and refugees are subjected.

Victims of domestic violence who are dependent on their partner’s visa in order to reside in the UK are eligible to apply for indefinite leave to remain. They can also claim a number of other exemptions, such as not having to demonstrate knowledge of the English language or of life in the UK. For more information about the rights of immigrants see Chapter 7.

Prisoners’ Access to Their Family

Prisoners’ visitation and correspondence rights are governed by the Prison and Young Offenders Centre Rules (NI) 1995 and rule 68A of the Prison and Young Offenders Centre (Amendment) Rules (NI) 2009. Limitations on prisoners’ access to family through visitations and correspondence can be justified if the reasoning is proportionate and falls within the scope of the exceptions set out in Article 8(2) of the ECHR (X v Netherlands, 1966; X v Germany, 1966; Ostrovar v Moldova, 2005).

To accommodate Article 8 rights, a number of schemes have been set up for prisoners and their families. Child-centred visits have been established for parents or grandparents and extended schemes are available for mothers in prison to visit with their children. There may be cause for a prisoner’s correspondence to be interfered with by the authorities, but these limitations must be reasonable and proportionate if they are not to violate Article 8(2) of the ECHR (Faulkner v UK, 2002; Re John Byers’ Application, 2004). For further information on prisoners’ rights see Chapter 6.

Useful Contacts

Bryson-Intercultural (formerly the Multi-Cultural Resource Centre) 9 Lower Crescent
Belfast BT7 1 NR
tel: 028 9023 8645
www.mcrc-ni.org

Equality Commission for Northern Ireland
Equality House
7–9 Shaftesbury Square
Belfast BT2 7DP
tel: 028 9050 0600
www.equalityni.org

Northern Ireland Council for Ethnic Minorities (NICEM)
Ascot House, 3rd floor
24–31 Shaftesbury Square
Belfast BT2 7DB
tel: 028 9023 8645
www.nicem.org

Northern Ireland Human Rights Commission
Temple Court
39 North Street
Belfast BT1 1NA
tel: 028 9024 7844
www.nihrc.org

Northern Ireland Prison Service
Prison Service Headquarters
Dundonald House
Upper Newtownards Road
Belfast BT4 3SU
tel: 028 9052 5065
www.dojni.gov.uk/index/ni-prison-service.htm

Women’s Aid Federation (Northern Ireland)
129 University Street
Belfast BT7 1HP
24 hour Domestic Violence Helpline: 0800 917 1414
tel (admin): 028 9024 9041
email: info@womensaidni.org
www.womensaidni.org