THE BAR REVIEW

Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

THE INTERVIEWS 2016 - 2019

The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8
Direct: +353 (0)1 817 5025

Eilis Brennan SC, Editor
Ciara Murphy, CEO
Shirley Coulter, Director, Membership and Public Affairs
Aedamair Gallagher, Senior Research and Policy Executive

Published on behalf of The Bar of Ireland by Think Media

Interviews by Ann-Marie Hardiman, with the exception of Wayne Barnes (interviewed by Paul O'Grady), and Justice Nicholas Kearns (interviewed by Eilis Brennan SC)

Design: Tony Byrne, Tom Cullen, Niamh Short
Editorial: Ann-Marie Hardiman, Paul O'Grady, Colm Quinn

Questions and answers

In 2015, The Bar of Ireland decided to build on the good legacy of its legal journal, The Bar Review. It started by appointing a new Editorial Board and then a new publisher. This allowed us to call on three levels of expertise: the legal knowledge of the diverse range of barristers (junior and senior) serving on the Board; the strategic capabilities of the executives of The Bar of Ireland, including the Chief Executive and the Director of Membership and Public Affairs, who also sit on the Board; and, the publishing expertise of Think Media.

Each has contributed to the development of The Bar Review into a modern, progressive and relevant learned journal for our profession. A striking feature of this evolution has been the willingness of leading figures to share their views in interviews. We recently reviewed the interviews that have taken place since we commenced with the new format (February 2016) and, in doing so, felt that it would be meaningful to present them for members in a single publication.

Each interview is a snapshot in time of the issues and attitudes of the day, but all bear a relevance to our professional lives. On behalf of the Editorial Board of The Bar Review, we are pleased to present them as a collection for your reference.

Eilis Brennan SC

Editor

Contents

These interviews with important figures in the legal world and beyond were published in *The Bar Review* between February 2016 and December 2019.

THE BARNES BRIEF

Lawyers and rugby were familiar bedfellows in the days of amateurism. Now the top level of the game is professional, including the referees. Wayne Barnes is a high-profile international rugby referee, and a practising barrister. How does he do it?

First published in *The Bar Review* **February 2016**

"It would be an added bonus if Wayne Barnes refrained from refereeing like a deranged old Eton headmaster with a ferret down his pants."

Risteárd Cooper, *The Irish Times*, February 11, 2010.

The barrister and international rugby referee, Wayne Barnes, has real friends because only real friends would be in a hurry to send that quote to a mate – and he got sent it several times. It's now Barnes' favourite quote about himself, with one caveat – he didn't go to Eton.

In fact, he went to a state comprehensive in the Forest of Dean in the West Country of England, right up against the border with Wales. He describes it lovingly as a place where you were dragged up with rugby and brass bands. He comes from the village of Bream, where he played with the local rugby club from the age of seven, describing himself as "a non-tackling back row". At 15 he picked up an injury and got asked to help with some refereeing.

He did and while he continued to play on Wednesdays when in university, he refereed at the weekends. It helped him to pay his way through his law degree at the University of East Anglia. While there, at the age of 21, he became the youngest ever member of the English Rugby Union's panel of national referees. He was dedicated to his legal career, though, and had always wanted to be a barrister.

> Why law? Were there many lawyers in his family? "No, in fact, I was the first member of my family to go to university." The reason he wanted to become a barrister goes back to a teacher.

The inspiring teacher

Why law? Were there many lawyers in his family? "No, in fact, I was the first member of my family to go to university." The reason he wanted to become a barrister goes back to a teacher. (How often do special teachers inspire people?) Mrs Davies was his English teacher, but she also served as a lay magistrate in a UK court that hears lower level offences.

She encouraged Wayne, brought him to sittings of her three-magistrate court, and he subsequently got a work experience term with barristers in Cardiff. He really enjoyed it and set himself the ambition of a career as a barrister. He completed his law degree at the highly-ranked East Anglia in Norwich, and after a year as President of the Students' Union in the University, he got a position on the Barrister Vocational Course at the College of Law in London. Similar to the Master–Devil arrangement in Ireland, he underwent pupillage with a barrister for 12 months before applying for and getting a position in Chambers at 3 Temple Gardens. He practised in south-east England and in central London, defending or prosecuting in sexual offences, assaults, grievous bodily harm and similar cases. He describes it as a fantastic experience, learning a great deal and enjoying his time in court.

Twin track careers

At the very same time, his refereeing career was also developing. He got asked to referee in the 2003/'04 World Rugby Sevens series. Interestingly, so did two other referees who were coming through the world ranks at the time: Nigel Owens and Craig Joubert. That shared experience has led to the development of close friendships, something which Wayne describes as common in the refereeing community. So close are they now, that when Wayne married Polly a few years ago, Nigel Owens sang 'How great thou art' in the chapel at the wedding ceremony. Polly, by the way, is also from the Forest of Dean, sharing that rugby and brass band culture (she was a cornet player). Together they have a 16-month-old daughter, Juno.

That World Rugby Sevens necessitated four weeks away, so being self-employed was certainly a help. He could manage his time reasonably well. However, in 2006, he got appointed as a professional referee so, from that point, rugby had to take first call. Nonetheless he continued to practise a couple of days

a week. He was involved in bribery and corruption cases and developed a special interest in the area. When new regulations were introduced in the UK, they allowed barristers to form new groupings and, where appropriate, limited companies. The Bribery Act was enacted on July 1, 2011, and Wayne and a group of other barristers decided to form Fulcrum Chambers, specialising in bribery and corruption issues. The Head of Chambers is David Huw Williams QC who was instructed by the UK Serious Fraud Office in the BAE Systems inquiry (the Saudi arms deal). Based on the 25th floor of The Shard building in central London, it is a limited company, and provides advice to multinational corporations on the structure of their investigatory and administrative processes. If a firm is being investigated, Fulcrum Chambers can take over acting on that firm's behalf with the investigating body. Fulcrum Chambers includes solicitors and corporate investigators as well as barristers, and this allows Wayne to have great cover in terms of his time commitments. "It has worked out very well for us," he says. "We do mainly corporate work and advise companies that are under investigation. It fits very well with refereeing as I can do plenty of work while on a plane or in a hotel."

The routine

Wayne trains every Monday and Tuesday at Twickenham with the English referees. The two days include serious fitness work and a great deal of time in assessment and analysis. Typically on a Monday, Wayne will spend time analysing his weekend performance with his own refereeing coach/mentor, and on Tuesdays there is an assessment session, with the group of referees analysing issues in each other's games. Wayne says these sessions are very intense and that he will spend hours watching scrums and other technical aspects of the game. The referees also have rugby coaches and players (especially former props) join them for discussions of the playing and refereeing of the game. Interestingly, there is quite a deal of cross-code communication, certainly between rugby, football and cricket, in England. Through that work, he has become good friends with the football referee Howard Webb. Every weekend there is a game and normally that involves travel on a Friday. That leaves him Wednesday and Thursday for the office. He is always there on a Wednesday and can be there or out at meetings on a Thursday.

Given that he and Polly have Juno as well, it sounds like it's all a bit hectic. However, he says he absolutely loves it and given the excitement with which he spoke about refereeing in the forthcoming Six Nations ("I've got Wales vs France in the Millennium Stadium on a Friday night – I can't wait"), it's easy to believe him.

> In rugby we are extremely analytical of our performances. We get better by being honest about the need to constantly do better. And small margins can make the difference between a good performance and a great performance. That approach can help in anything you do, including the law.

Small margins

However, the criticism referees get in every sport can be overwhelming. How does he cope with that? "Criticism upsets you. I deal with it by trusting the RFU group that I work with." That group includes coaches, analysts and sports psychologists. While it seems that this process might in itself be harsh, he trusts it to become a better referee. It also helps that he is not a big press reader and is not on digital or social media at all. He is, though, a fan of the use of technology in the game. As he says: "It is about getting the big decisions right. We shouldn't leave it up to chance, but don't have to review everything".

Is there any benefit or crossover from being a referee and a barrister? "Yes, in rugby we are extremely analytical of our performances. We get better by being honest about the need to constantly do better. And small margins can make the difference between a good performance and a great performance. That approach can help in anything you do, including the law."

Wayne Barnes shorts

His favourite game

Getting to referee the Lions vs Orange Free State in 2009 is a highlight for Wayne. He says he was a huge fan of the Lions growing up. "The Lions selected a very strong side and it was almost a test. This was a very special game." How did he remain objective? "It's about the right decision not the colour of the jersey."

Backchat

Not long after appointment to the national panel in England, he had to referee Leicester including Martin Johnson – an intimidating prospect even for seasoned referees. Early in the game, Johnson didn't retreat when the opposition took a quick tap penalty and took out the runner within a metre leaving Barnes with no choice but to produce a yellow card. As he trudged away, Johnson mumbled: "I suppose you might have got that one right!"

His greatest mistake

His greatest error happened while still a very young referee and it was the result of having the red and yellow cards in the wrong pocket. He remembers enquiring of the captain as to why the hooker he thought he had sin binned hadn't come back on? "Because you sent him off ref!" came the reply.

The biggest cheer

He says the biggest cheer he ever got was when Ian Keatley kicked the ball with some force directly into his face during a Munster vs Racing Metro game in Thomond Park three years ago. He was, he says, very dazed for several minutes, and even the two team physios were laughing. He can remember the next penalty was definitely against Munster!

Pay for referees

"Well it's not as much as for barristers. We don't do it for the money; we do it to be involved. It shouldn't be as much as the players because they put their bodies on the line."

Photograph: Sportsfile©2016.

On shenanigans in the scrums

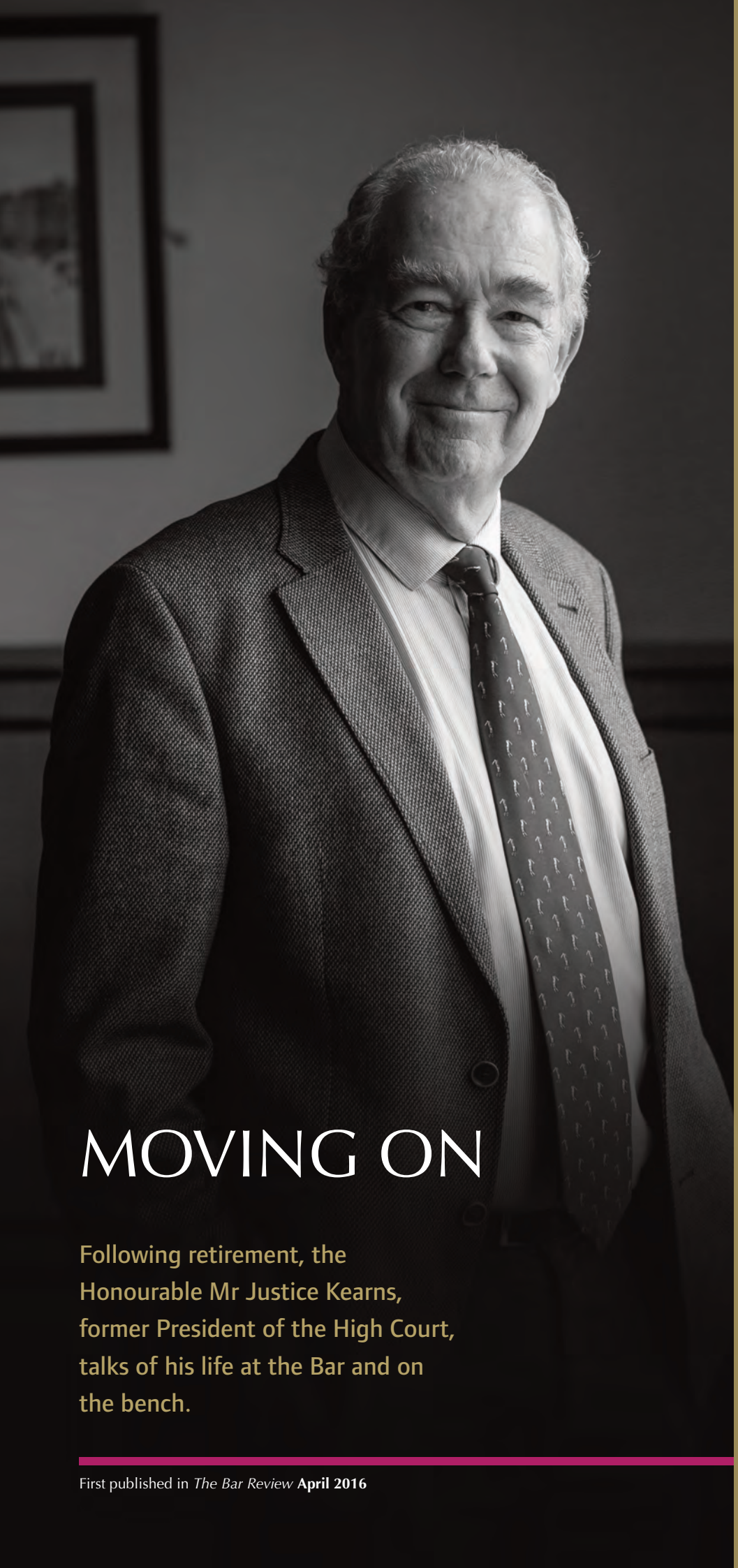
"I thought the scrums at the World Cup were great contests. They were legal, straight and at good heights. We (referees) spend a lot of time looking at scrums with experts. After games we get feedback from former props and that's always good."

On Irish players

"Players always challenge you: Paul O'Connell was very good at it. Paul O'Connell, Brian O'Driscoll, Ronan O'Gara: it was a joy to be on a pitch with these players."

Does he ever play?

Once a year, he hosts the Wayne Barnes XV vs the Bream All Stars. It's a charity match in his home village in aid of breast cancer because his wife Polly's mum died from the disease. It takes place in May and, inevitably, every year, an early hospital ball will come his way.



MOVING ON

Following retirement, the Honourable Mr Justice Kearns, former President of the High Court, talks of his life at the Bar and on the bench.

First published in *The Bar Review* **April 2016**

For his book club this month, Nicky Kearns is reading *Quicksand* by Henning Mankell. It is a bittersweet book from the creator of Swedish detective Wallander, written after he was diagnosed with terminal cancer. Reflecting on the preciousness of life, Mankell recalls in this memoir the words of fellow writer Per-Olof Enquist, who said: "One day we shall die. But all the other days we shall be alive".

The words could be a mantra for the former High Court President, who is determined to continue to be active in this new chapter to his life. As George Bernard Shaw said: "You don't stop laughing when you grow old, you grow old when you stop laughing".

Time for new challenges

While retirement for some is a chance to play golf or to tend hydrangeas, Judge Kearns has no intention of slowing down. Once as a naïve young barrister, he recalls opining that he did not want to live much past 70. Now, freed from the tyranny of schedules and repetition, he is open to new challenges where he can use the expertise he has garnered from almost 17 years of life as a judge.

Having retired from the High Court in December, Judge Kearns spent two months in New Zealand with his wife Eleanor. He spent time with his son in Auckland, watched his grandchildren climb trees, and helicoptered around the Fox Glacier. Now back in Dublin, and a stone lighter, he swims four times a week and has taken a few tentative steps to belatedly learn ballroom dancing. But, as a self-confessed workaholic, he has no plans to waltz off into the sunset or to become a five-day-a-week golfer.

Lucky man

The former president loved being a barrister and he loved being a judge. He claims to have been "extraordinarily lucky" in that he had no family or forebears at the Bar. He entered the Central Office at the High Court as a Junior Executive, having succeeded in an entrance exam undertaken on the advice of the then Secretary of the Department of Justice. He was allowed to take lectures at UCD and King's Inns while still working in the Central and Probate Office. When he was called to the Bar in 1968, there were 105 barristers and he could pick any seat he wanted in the Law Library: "It was a world I knew nothing about, I had no contacts and I was absolutely terrified". But once he settled in, "it was pure happiness".

> A highlight was the State visit of the Queen of the United Kingdom in 2011 and the State dinner in Dublin Castle. This was a proud moment for his mother, Joan, who is now aged 102, and is herself an Englishwoman.

He remembers with fondness the collegiate nature of the Bar. One of his more notorious cases was when he acted for Michelle Rocca in the now legendary High Court case where she had brought a claim for assault against the late Cathal Ryan, who was represented by Garrett Cooney SC. The case ran for six days amid a media frenzy. Judge Kearns recalls that while he and Garrett were beating each other up in court every day, he was driving Garrett home from the Four Courts after court hours because his (Garrett's) car had broken down.

To this day, he sees that aspect of life among colleagues at the Bar as exemplifying its very best qualities. His heroes at the Bar were Ernest Wood SC, Tom O'Higgins SC and Niall McCarthy SC. The qualities he admired most were "fearlessness" in court and the ability of senior barristers outside court to "show empathy to younger barristers".

President

When he first became a judge, and later President of the High Court, he was most grateful for the advice of two former Presidents, Frederick Morris and Joe Finnegan. He recalls that Judge Morris "made it look so easy when it was really so very onerous". He describes his role as President of the High Court as "the best job in the court system". He likens the job to being a team manager, and says that playing team sports as a youngster or young adult is the best training school for any leadership role. "It certainly helped me work well with colleagues," he says "and a little bit of levity along the way does no harm either". He first got into team sports when growing up beside Leinster Cricket Club in Rathmines, where he lived with his parents, three brothers and two dependent relatives – his grandfather and aunt. He recounts how he and his brothers hopped over the wall to play cricket in the Leinster Cricket Club. In later years he played golf, and one of his fondest memories is winning the President's prize at the Bar Golfing Society, when Maurice Gaffney SC was President. Judge Kearns presided over the High Court in the difficult days after the demise of the Celtic Tiger. Judicial pay was slashed and pension entitlements were altered with little or no consultation. Judges were the subject of regular negative comment in the media but, because of the strictures of judicial office, could not respond to that criticism. He recalls that those days were very difficult. At that time, Judge Kearns was one of the founding members of what was effectively a trade union for judges: "I regarded it as essential that judges had an association to give expression to their view and not be condemned to silence when being treated unfairly".

> Over the years, as President of the High Court, he said he had seen too many distressed victims of crime who feel that the justice system does not work for them.

He regrets that "a whole tranche of highly suitable barristers made up their mind that the bench is not for them and that is a big loss to the bench". However, he says that it is fortunate that every generation throws up a wealth of judicial talent and "the present court is lucky with the judges that it has".

He had the privilege of participating in a number of high-profile cases, with significant issues of public importance, such as the Marie Fleming right to die case. He recalls that "it is the human aspect that stays with you". In December 2014 he presided over the case of a young pregnant mother who was clinically dead but kept alive on life support, when her family sought permission to allow her to die. He recalls sitting up at 3.00am on Christmas morning with fellow judges, Judge Baker and Judge Costello, finalising the judgment in what was a heartrending case. He remembers the media reports at the time referring to a "cold atmosphere in the court room". He is keen to stress that the cold atmosphere was not due to the lack of empathy from the judges, but was because the heating had been turned off by the Courts Service for the Christmas holidays!

Lighter times

Judge Kearns enjoyed many light moments. He presided over the John Waters libel trial against *The Sunday Times* regarding an article written by social columnist Terry Keane. He laughs when he remembers Terry Keane being cross-examined by Garrett Cooney in a stuffy Round Hall courtroom. A fan had been turned on to give some relief from the oppressive heat. But when he noticed the fan was excessively interfering with Mrs Keane's coiffure, he had the fan turned off. She responded graciously, with a "thank you my Lord".

He also enjoyed the perks that came with being High Court President. A highlight was the State visit of the Queen of the United Kingdom in 2011 and the State dinner in Dublin Castle. This was a proud moment for his mother, Joan, who is now aged 102, and is herself an Englishwoman. Judge Kearns' wife Eleanor, who hails from County Cork, was also somewhat bemused when a Cork District Judge announced in his court in Midleton that a girl from Midleton had been to dine with the queen.

Making the system work

The former President has a very clear view of the role of judges. Echoing a theme that he explored on his last sitting day of practice in December, he warns that judges must be careful to consider the impact of their rulings on society as a whole, particularly in the area of individual rights. He believes that the scales of justice can sometimes be tipped too far in favour of the rights of individuals. Over the years, as President of the High Court, he said he had seen too many distressed victims of crime who feel that the justice system does not work for them.

Judge Kearns values brevity. As a judge, he had a horror of "long-windedness and repetition". He recalls a story told to him by Ms Justice Caroline Costello about her father Declan, who, on inquiring in chambers from his usher Mr Dixon as to who was appearing in the case about to begin outside in court, would bury his head in his hands, saying "Oh no!", when certain names were mentioned. On advocacy, he believes that the Bar should call more on retired judges to assist with advocacy training. He noted that retired judges are more than happy to give their time and expertise to improving advocacy standards. He himself prefers a succinct style – he notes that if a barrister comes in and explains that there are three basic points in the case and outlines them in a simple fashion, well then "you've got the judge hooked". He said the very worst thing you can hear as a judge is "this is a very complex case". Indeed, he believes that when one drills down into any case, it is never really that complex. He recalls that on his last sitting day, his registrar Angela Denning had recalled that a personal injury case that had been called on for two days was disposed of in just over 20 minutes in Court 4.

He believes that written submissions should be short and should not exceed five or six pages. Judgments should also be short and concise. Towards the end of his time as President, he said that he had become more averse to citing long passages from other judgments and had focused more on setting out the reasoning, ruling and the conclusion in the case. He thinks that perhaps that facility really only becomes available with experience. He said: "the greatest achievement is to achieve simplicity".

New projects

As the nominee of the King's Inns for the Legal Services Regulatory Authority, he is enthusiastic about the new role, but sees the establishment of the new body as a "mammoth task". He notes that the body will require the dedication of a substantial amount of resources and may take some time to get up and running.

He is keen that the new body will work in a harmonious fashion for the public interest, while at the same time providing the legal professions with an even-handed disciplinary body. He is currently a Trustee of the Gate Theatre, serves on the Board of Holles Street Hospital, and has been asked to serve as the Governor of another hospital. Given his voracious appetite for work, it is clear that all of this is just for starters. Kearns says that the happiest day in his legal career was his last sitting day as he "got a wonderful send-off".

On a day when all the key figures in the legal world came to pay tribute, many felt it was the speeches given by his registrar, Angela Denning, and a regular lay litigant in his court, Dr Grimes, that had a particular resonance. He cannot speak highly enough of Angela. "She is amazing. For someone coming into my court, they might have thought she was the judge and I was the registrar. Then to be thanked by a lay litigant – on behalf of all lay litigants – was something no judge could ever have expected, and I certainly didn't expect it. Indeed the President of the Court of Appeal, who was sitting beside me, leaned in to ask how I had organised that particular contribution".

He is most proud of the support he has received from Eleanor and his four sons. His eldest son, Stephen, is a busy orthopaedic surgeon in Galway. Daniel, a fashion designer, has just begun a collaboration with celebrity fashionista David Beckham in London. Simon is a busy junior at the Bar and Nicky jnr works as a financial planner in Auckland University in New Zealand. He is self-evidently proud of their achievements and adoring of his 11 grandchildren. When pressed about current and past controversies, Judge Kearns is circumspect, at least for now. But he has written it all down. An avid reader and writer, and a fan of diarists such as Alan Clark, Richard Burton, Duff Cooper and Cecil Beaton, the former president has himself been keeping a dairy for the past 12 years. It covers the years when the relationship between the judiciary and the executive was tense. "My version of those events is in the diaries," he laughs. Sadly, the former President insists that they are not for publication any time soon. "I am not sure you would publish it, while alive."

ALWAYS A BARRISTER

Peter Sutherland spoke to *The Bar Review* about migration, European integration, the vital role of the law in decision-making on these issues, and the influence of the Bar on his career.

First published in *The Bar Review* **June 2016**

In a career that began at the Bar in Dublin, and progressed through the posts of Attorney General and European Commissioner, to GATT and the World Trade Organisation, and on to BP and Goldman Sachs (see panel), Peter Sutherland has worked at the highest levels of government, business and international diplomacy.

It's perhaps no surprise then, that when then United Nations (UN) Secretary General Kofi Annan was looking for someone to take on the role of Special Representative for Migration and Development in 2005, he turned to the man for whom European and global integration has been a personal crusade.

In what he refers to as "a co-ordinating role", Peter works with the myriad agencies involved to try to formulate coherent and cohesive policies in this complex area.

"Under the instructions of the Secretary General, I helped to co-ordinate with the Global Migration Group, made up of all of these agencies. I also set up the Global Forum on Migration and Development, which meets regularly during the year to try and co-ordinate policy, as well as holding a major five-day session annually, in which up to 150 countries participate."

This is a *pro bono* role, in which Peter is supported by a small team working out of London, New York and Geneva. Further cementing his commitment to this area, he is also on the advisory board of the International Organisation of Migration (IOM), and is President of the International Catholic Migration Commission (ICMC), one of the bigger NGOs working on the ground in this area.

Crisis of our generation

The current refugee crisis, which has seen millions of people fleeing conflict in Africa and the Middle East, and has been referred to as the defining crisis of this generation, on a scale with the aftermath of the Second World War, naturally dominates Peter's work. His role is also very much concerned with how countries and communities deal with these issues in the long term, particularly the issue of economic migrants.

"The overwhelming majority of migrants are economic migrants and economic migrants seem to be defined (there's no official definition) as 'everybody who isn't a refugee'. Many economic migrants are 'survival migrants', who we would consider to be refugees from natural disasters, for example. They don't have the rights which are given to refugees under the 1951 Convention, who are entitled to claim asylum."

Having been involved in this area for over a decade now, was he shocked by the scale of the current crisis, or did he feel that it was inevitable?

"Everybody instinctively knows that the huge disparities in wealth in different regions – poverty, natural disaster and climate change – were all going to drive huge movements of people. It became obvious to me when I started studying this, that it was going to be [the case]. I've been visiting camps – I've been in Bangladesh and Sicily in the last few weeks – and it's obvious when you're on the ground that this issue is irreversible. There is no way of creating islands of isolation from the movement of people, no matter how hard some try, and even if you didn't have a humanitarian bone in your body you would recognise that the practicalities of the world in which we live require us to live with interdependence in the area of people as well as in the area of goods and services."

The thorny question of how to alleviate the current crisis, while formulating policies on migration for the longer term, is currently exercising the most influential minds in Europe. For Peter, the answers lie in the law – both existing and long-established statutes, and the need for new legislation and agreements.

Answers lie in the law

The thorny question of how to alleviate the current crisis, while formulating policies on migration for the longer term, is currently exercising the most influential minds in Europe. For Peter, the answers lie in the law – both existing and long-established statutes, and the need for new legislation and agreements.

"We have a collective and global responsibility with regard to those who are escaping persecution – refugees – to grant them asylum. That, I think, is a definable obligation. It was created in 1951 as a direct response to the failures in this area which had taken place during the Second World War, in particular the persecution of Jews. Much of the current debate is around how you implement that obligation. Do you allow the total responsibility to rest with those countries closest to the area that is giving rise to the refugees?

The Dublin Regulation, which requires the country people first go to, to be the place where they apply for asylum, creates an unfair burden, and a lot of the European debate is around this."

The other issue, of so-called economic migrants, is far more complex, and requires a range of measures.

"If people are survival migrants, we have an obligation to create some form of humanitarian visas, at least providing temporary protection. At the same time there is an entitlement to enforce a rule of returning illegal migrants to where they came from. That requires bilateral agreements with the countries of origin of these people, for example with countries in North Africa where there is stable government, to enforce the non-movement of irregular migrants, with the *quid pro quo* being an increasing number of regular migrants being authorised and some degree of financial contribution, as is being made for example with Turkey."

The recent agreement between Turkey and the EU, whereby migrants arriving in Greece will be returned to Turkey, epitomises many of the complexities of the current situation. Peter, like many others, has serious concerns.

"It is not clear whether the legalities of refugee law are complied with in returning people to Turkey. You can only do so on the basis of a prior assessment before any return as to whether or not their claims are merited or not merited in Greece. You can only do so if you have in place legal mechanisms to ensure that they will be properly treated in Turkey. The devil is in the detail here, and in the implementation. All of this is intimately connected with legal entitlements."

For him, this is the crux of the issue: how we interpret the laws that we have, and whether we bow to pressure to change them. He is adamant that we should not.

"The Danish Prime Minister has suggested that we should look again at the definition of a refugee. I don't believe that at all because the intention of such a move would not be to widen the responsibility for and definition of refugees, it would be to contract it. I think we hold firm to what we have and apply it. The uproar around the Turkish Agreement proves that this is still a major force for good."

Political reaction

There has been vocal resistance in some countries to the idea of accepting large numbers of migrants. For Peter, this has to be seen in its historical and political context.

"In the 1990s and the first decade of this millennium, we saw the enlargement of the European Union and the collapse of the Iron Curtain. That created huge movement of people in Europe, which created in its train political resistance and, in some countries, 'nativist' policies – a nationalist response to the movement of people. Then you place on top of this the conflict that has spread across North Africa, which has led to huge numbers of refugees. They're not as huge as many of those expressing populist xenophobic views would express. They are handleable, but there is a sense of an overwhelming number that creates a political reaction, some of it extreme and utterly reprehensible in my view."

How do we deal with this opposition in Europe and in our own communities?

"It is, as we've found, very difficult. Ultra-nationalist, and often xenophobic and racist, parties have an appeal – they've always had an appeal. The only way to contest it is with facts. The reality is that migrants are good for economic growth. They work in larger numbers, they have lower unemployment rates and they embrace education. The world of the migrant has always been a positive to societies where an attempt is made to integrate them."

On this question of integration, Peter agrees that more needs to be done on all sides.

"We need integrated public policy responses at national level. Often the policies in regard to migration are left in the hands of departments of justice or home affairs, who feel their primary responsibility to be border control. This requires holistic policy thinking and that's what the Global Forum is about – trying to bring together social affairs, social welfare, health, education, everything. If you don't do that you're going to end up in trouble. There is obviously also a high responsibility on the part of migrants to adhere to and accept the values of the society into which they come."

> I've always believed in the two principles of the dignity of man and the equality of man, which are at the core of what both the UN and the EU stand for. And I think that they both stand against the type of thinking that ... creates borders between people.

The European project

The migrant crisis is just the latest in a long line of issues – from the financial crisis to the Greek crisis and now 'Brexit' – that are putting considerable pressure on what might be called the European project. I ask Peter if he thinks European integration is under threat. He does, and sees the possible exit of Britain from the EU in particular as "a grave risk … both from my point of view as somebody who believes in the nobility and political purpose of European integration, and as an Irishman who believes it is imperative for the future of our country. It's not the institutions in my view that are a causative factor here, it is the reaction of some member states who do not embrace the European Union – the Central and Eastern European countries and their attitude even to European law in some cases is highly questionable."

He says he has no idea how the impending UK referendum will go, but sees it as crucial, and sees Ireland as having a role.

"The British debate in a sense is a necessarily cathartic moment – in establishing whether Britain is in or out of Europe. I think Ireland has to be publicly vociferously in favour of an integrated Europe and the continued integration of the European Union, even when sometimes we have to say hard things."

Home life

Peter has been happily married to Maruja for over 40 years and they live largely in London. They have three children, a daughter and two sons. Both sons studied law, and one is now based at the European Commission in Brussels, while the other works in financial services. His daughter studied economics and is based in Dublin. When not working to resolve the migration crisis, he plays "lousy golf", watches rugby, reads a lot, and pursues an interest in 17th Century Spanish art.

Ireland's role in the migration crisis

"With an expanding economy and the rapidly dropping rate of unemployment, I think that we are well placed to continue to contribute to the taking of migrants. I think we can do more. Again, it's a question of publicly articulating in European fora our sense of obligation to deal with this crisis – the crisis of our generation. And I think we have [that sense of obligation]. I think the fact that we haven't given rise to a racist party within Ireland is a positive – it's an expression of Irish commitment. Ireland has always been good in terms of those who are in great disadvantage because we've had our own experiences of it."

A glittering career

Peter Sutherland was born in Dublin in 1946 and educated at Gonzaga College, University College Dublin and the King's Inns. He practised at The Bar of Ireland from 1969 to 1981. In 1981 he was appointed to the post of Attorney General by then Taoiseach Garret FitzGerald, a post he held through two governments from 1981 until 1985. In 1985 he was appointed EU Commissioner, and served as Commissioner responsible for Competition Policy until 1989, and also as Education Commissioner for one year. He served as Chairman of Allied Irish Banks until 1993, before becoming the founding Director General of the World Trade Organisation, a post he held until 1995. He has served as Chairman of BP, of the London School of Economics and Political Science, and of Goldman Sachs International, a post he retired from in 2015 to take up the role of United Nations Special Representative of the Secretary General for Migration and Development on a full-time basis.

Bringing down the walls

From his work as EU Commissioner, where he was instrumental in setting up the ERASMUS foreign exchange programme among EU universities, to the setting up of the World Trade Organisation, and his current role, Peter's career has been about breaking down barriers: to trade, to travel, to the movement of people. Indeed, former US Trade Representative Mickey Kantor called him "the father of globalisation". This is clearly an issue of utmost importance to him, and has been since the beginning of his career, when he worked with the late Garret FitzGerald to advance European integration.

"We believed in it and Garret subsequently sent me to Brussels to be Commissioner because of that belief. I've always believed in the two principles of the dignity of man and the equality of man, which are at the core of what both the UN and the EU stand for. And I think that they both essentially stand against the type of thinking that mentally or physically draws lines on maps and creates borders between people. I just don't agree with that type of thinking, and that has driven me from the beginning."

Once again, he speaks of his interest in and dedication to the law as crucial in advancing this work, even influencing his preferred portfolio as EU Commissioner.

"When I took the role of Commissioner, I read the Treaty of Rome before I went for an allocation of portfolio, and I discovered to my surprise that the legal power of the Commissioner for Competition was greater than in any other area in the European Union. That brought together in my mind Jean Monnet's ideas of institutions playing crucial roles in the integration process, with the Constitutional aspects, which I was familiar with as a former barrister and Attorney General."

The project continued after Peter left the EU Commission for first GATT and then to set up the WTO, which he describes as "a highly legally based attempt to further a process of integration, which I fundamentally believed in".

The Bar

Perhaps unsurprisingly, he credits this dedication to the law, and the development of the ability to pursue these projects, to his time as a barrister in Ireland.

"Whatever limited ability I have to articulate issues in a coherent way are directly related to my experience as a barrister."

Although he says that most of his stories about life at the Bar are "unrepeatable", the memories are overwhelmingly positive.

"I had a very active career at the Bar. I was involved in the Arms Trial within a couple of years of joining. I was in some of the bigger trials at a relatively early age and took silk early and I was always a courtroom lawyer. I couldn't keep myself out of court!"

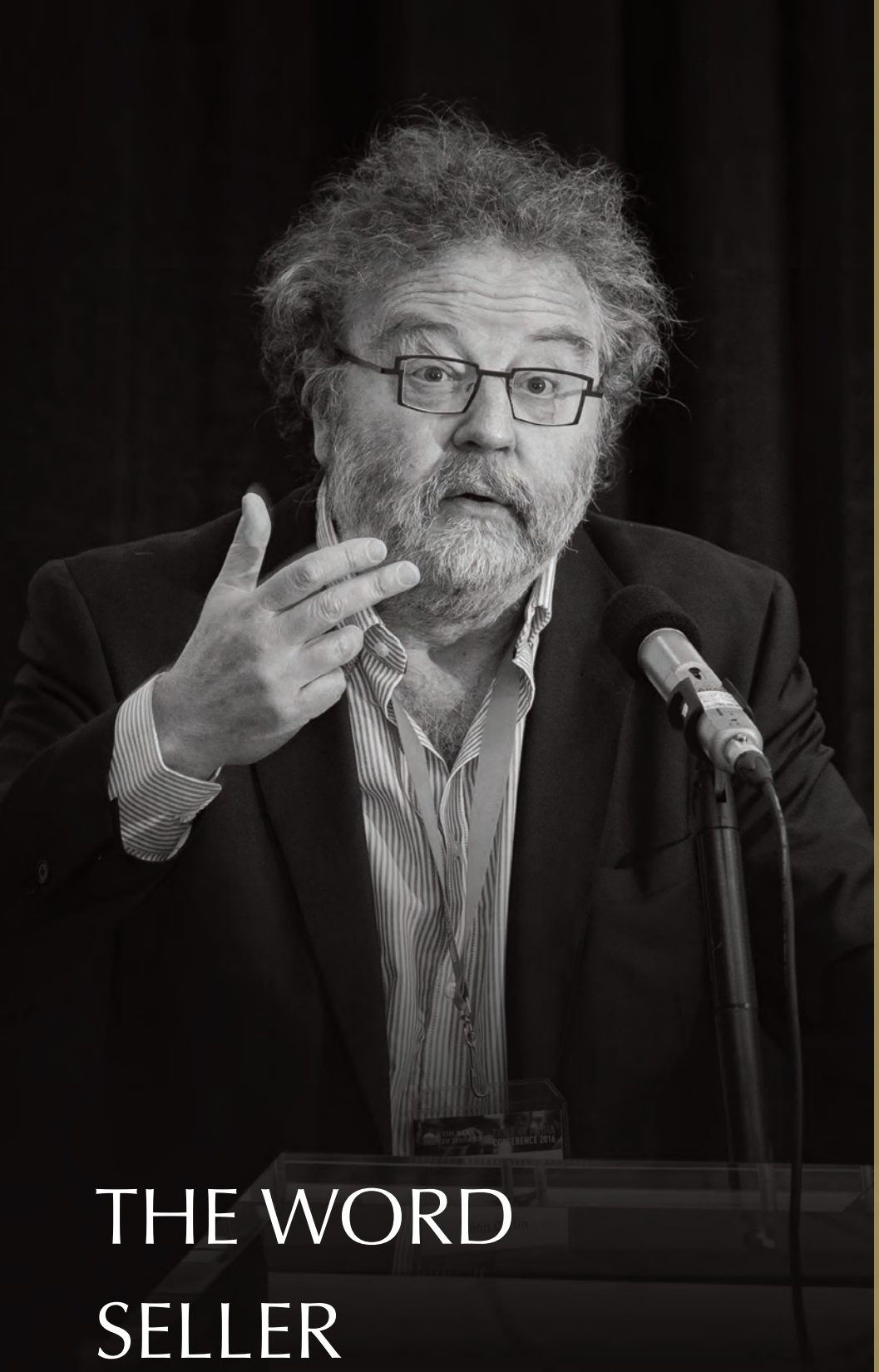
This love of the courtroom extended to Peter's time as Attorney General, and he appeared for the State in a number of high-profile cases.

I ask him if, given how much he enjoyed his career there, it was difficult to leave the Bar, even for such wonderful opportunities as came his way.

"I never thought I was leaving the Bar – I still fancy myself going back and doing a case!"

Peter remains a Bencher of the Middle Temple in London, and was a member of the New York Bar Association.

He says he would be afraid to offer advice to new entrants to the legal professions: "It's changed so much. I walked into the Law Library one day a couple of months ago – I happened to be in town for an hour – and it was a different world."



THE WORD SELLER

Journalist, author and filmmaker John Carlin talks about how living under repressive regimes in South America gave him a unique insight into South Africa as that country left apartheid behind.

First published in *The Bar Review* **July 2016**

John Carlin never planned to work as a journalist in countries where state repression and political turmoil were the norm. As he tells it, he didn't have a plan at all. His return to Argentina (where he lived as a child) after graduating from university in the early 1980s was, as he puts it, a "nostalgia trip", and it wasn't until he was planning to return to the UK after two years as an English teacher that the opportunity to work for English-language newspaper the *Buenos Aires Herald* came up.

Of course, Argentina probably wasn't on most people's list of desirable destinations at the time. The military junta had been in power for some time, and arrests, assassinations and 'disappearances' were part of everyday life.

"I never lived in a country that was more sinister and repressive than Argentina between 1979 and 1982. It was an absolute police state. Everything was at the mercy of the ruling junta. The *Buenos Aires Herald* was a most impressive publication, the only newspaper that systematically denounced the disappearances and the military regime." John wrote about film, theatre and sport, as well as writing about the disappearances ("People warned me not to but I did it anyway – I was a reckless youth."). He was still there when the Falklands War broke out in 1982, which he admits gave him his break in terms of international journalism, as he began to write for the British national press.

> Obviously the law changed, the constitution changed, and now you have black judges and so forth, but respect for the law, whatever that law may be, is something that did distinguish South Africa from some of the tyrannies that I was familiar with.

In the eyes of the law

John's experiences in Argentina had a profound effect, and played a huge part in his decision to stay in that region for a further six years, four in Mexico, and then a year each in El Salvador and Nicaragua. Perhaps for this reason, and because of a self-confessed general ignorance about the country, he did not see a posting in South Africa as a particularly bold move. Indeed, his predecessor as South Africa Bureau Chief for *The Independent* had left the post because he had, in John's words, become "bored by the ghastly predictability" of reporting on apartheid. John arrived in 1989, in time for "one full year of full-on apartheid", which gave him a context on which to base his reporting when everything changed utterly in 1990 with Nelson Mandela's release.

At first, however, John admits he "wasn't totally taken" by South Africa. What finally sparked his passion was an assignment that introduced him to the South African justice system, when he was sent to cover a remarkable trial in a remote town called Uppington.

"Twenty-six people had been charged with the murder of one policeman under a law then in existence in South Africa – 'common cause'. If you shared the will to kill that person you were as guilty as the actual perpetrator of the deed. This trial had been going on for some time, and the upshot was that 14 people were sentenced to death for the murder of one policeman, who had been killed in a confrontation between police and demonstrators. I was there in the courtroom when this white judge sentenced 14 black people to death, including a couple in their 50s who had 11 children, and they were whisked off to death row.

"I got to know the defence lawyers and the families of the people who'd been sent to death row, and I got to know the place extremely well, so that experience really hooked me."

John went on to report on a number of high-profile trials before and after the end of apartheid, which gave him, as he says "quite a lot of exposure to South African courtrooms". Interestingly, he points out that in many ways, the end of apartheid did not materially alter the South African justice system.

"For all the manifest evil of apartheid, they did have a pretty serious judicial system. One thing that struck me when I arrived from Central America was that Mandela's equivalent in El Salvador or Guatemala would have just been murdered on the spot, whereas even in the darkest days of apartheid in the 1960s, the man who was plotting the overthrow of the regime, who was leading an armed struggle, was given a fair trial. In fact, the prosecution asked for the death penalty, and a white judge decided that, on the evidence, Mandela did not deserve the death penalty, but a life sentence.

"Obviously the law changed, the constitution changed, and now you have black judges and so forth, but respect for the law, whatever that law may be, is something that did distinguish South Africa from some of the tyrannies that I was familiar with."

The price of truth

While it may be true that South Africa was a country where the rule of law applied (appallingly racist as the law was), dealing with the fallout from years of apartheid required something else. John speaks passionately about the Truth and Reconciliation Commission and its accompanying amnesty, where it might be said that the traditional approach to justice and law were abandoned for the sake of the common good, and to enable a society to move on from the horrors of its past.

"If you carried out the letter of the law, it would have made the whole business of reconciliation and laying foundations for stable democracy far more difficult. It would have increased massively the risk of a right-wing terrorist movement arising. A section of society who had relatives and friends among the victims are going to be forever resentful and bitter. But the price you pay is to relinquish some justice in the name of a messy but ultimately more beneficial political deal."

I ask him if he thinks that this process could be said to have worked. He thinks it has. "During two years, there was a public airing of all the terrible things that happened. People who had committed crimes on both sides (although overwhelmingly on the apartheid side) came forward in public – the whole thing was broadcast live on TV – and confessed to their crimes, and in many cases were confronted by relatives of victims. It was a huge catharsis."

While other issues have arisen in South Africa – accusations of corruption, or problems with the economy – John points out that very few countries are immune from these, but no one questions the nature of South African democracy. He compares this to Spain post Franco, where there was no truth commission, and the country is still very much divided along civil war lines, or to Russia, where democracy was achieved at around the same time as in South Africa.

"South Africa is far more democratic in all the fundamental respects than Russia is. You have absolute freedom of the press, freedom of speech, and an independent judiciary."

The court of public opinion

One of the most fascinating stories of the era is the subject of John's book *Playing the Enemy: Mandela and the Game that Made a Nation*, which recounts how Mandela brilliantly used the 1995 Rugby World Cup as a tool for political unity (see panel). The story is about the power of sport to move people, and to ignite tribal passions in a way that many other events do not.

Sport is also a factor in another case that John has written about in recent years: the trial of Olympic and Paralympic athlete Oscar Pistorius for the murder of his girlfriend Reeva Steenkamp in 2013 (his book, *Chase Your Shadow: The Trials of Oscar Pistorius*, was published in 2014). As we speak, the sentencing hearing is ongoing in South Africa and the final result is unclear (Pistorius was subsequently sentenced to six years' imprisonment). This case raises a number of fascinating issues, not least the decision to broadcast the entire trial live on television.

John spoke at The Bar of Ireland's Annual Conference this year, which had a theme of 'Trial by Media', so I ask him if, on balance, he is in favour of televising criminal trials in this way.

Personal life

John is based in London, where the main focus of his life is his 16-year-old son. He also loves to read, mainly fiction ("I prefer novels to the kind of books I write") and likes football "an awful lot".

"The beauty of football is that, like life, it is so cruelly unfair."

We first discuss it in the context of the South African truth and reconciliation process.

"For the truth and reconciliation process, television was a key element in the whole exercise. It was a national purgation, and the more people who saw it the better. In the case of Pistorius, it was essentially about viewing figures and entertainment, about networks making a lot of money."

He has an interesting take on the trial, bringing us back to sporting analogies.

"People watched that trial in much the same spirit as they would watch a rugby game. Most people made up their minds almost immediately after the killing about what side they were on: either that Pistorius was guilty of deliberately murdering his girlfriend, or that it was, as the phrase went, a tragic accident. It was watched as a sort of reality TV cum sports contest between the defence and the prosecution. It was televised very much in the way that sports events are. There was a special 24-hour channel created and the rights were sold abroad – just like a sports event. There was even a studio panel to analyse proceedings, sometimes even looking back at events, with action replays!"

It's a somewhat cynical take on things but one that's not too far removed from the truth. On a more serious note, he feels that there was some benefit in televising it for the South African justice system.

"It wasn't a bad thing for South Africa that the trial was televised because I think most people watching it around the world would have been quite impressed by the solemnity, propriety and seriousness, and indeed quality, of the judge and lawyers on the respective sides, and the way the whole exercise was conducted."

In this case, the defence team was most against televising the trial. Prosecution witnesses who were neighbours of Pistorius were called to testify as to noises that they claimed to have heard. These people were the nearest thing to eyewitnesses in the trial, and the defence team claimed that as they could see preceding testimony on live television, they could (unconsciously) tailor their own testimony to fit.

"My personal stance? Not being a lawyer I don't have a sufficient grasp of the legal niceties, but I am sensitive to the point the defence lawyers made about State witnesses. This is an entirely personal opinion, but I thought there was something slightly grubby about this particular case – it became a ghoulish reality TV show, and I'm not sure it brought out the best in humanity. If you were to put me against a wall, on balance I would say don't televise it."

Comfort zones

John currently earns a crust writing for Spanish newspaper *El Païs*, but also has a number of interesting irons in the fire. He's working on some projects for television, and is also immersed in research for a book. While his work is no longer physically situated in countries where military and political conflict is part of everyday life, his writing hasn't left it behind.

"I want to do a book based on a true story about my family in the Spanish Civil War. This will be outside my comfort zone as it's set during another historical period, and also because it will be fiction, although based on true events."

As someone who has worked in several media throughout his career, I ask if he has a favourite.

"I sell words in all kinds of shapes and sizes, be it in newspapers, books, TV documentaries and, these days, speeches. I guess I would say I prefer writing because that's what I've done most of. I enjoyed making TV documentaries immensely because I've always had the good fortune to work with really good people who've taught me a lot. But writing a book is what I like to do best, as painful and difficult and challenging as it is!"

Playing the Enemy

The genesis of the book *Playing the Enemy: Mandela and the Game that Made a Nation*, was not a straightforward one, and was sparked by a chance encounter in London.

"I made a documentary for PBS in the United States about Mandela as his presidency was coming to an end in 1999, and we worked the story of the Rugby World Cup Final into the end as the climax of the story. About six months later, I was having dinner with friends in London, and their babysitter (who was of Iranian extraction) watched the video of the documentary and said that she particularly enjoyed the 'rugby bit at the end'."

It struck him that if that aspect of the story had such cross-cultural appeal, it might be an idea to write a book about it. It took six more years to bring the idea to fruition, but the resulting book was adapted for cinema by Clint Eastwood into the film *Invictus*.

PULLING BACK THE CURTAIN

The Supreme Court by *The Irish Times* journalist Ruadhán Mac Cormaic is a fascinating account of the Court's history, through the lenses of its big cases and bigger personalities.

First published in *The Bar Review* **November 2016**

When Ruadhán Mac Cormaic took up the role of Legal Affairs Correspondent for *The Irish Times* in 2013, he says that he came to the post with "no preconceptions".
However, after four years as Paris Correspondent for the paper, he was interested in the job for that very reason:
"I didn't know the legal world at all, and I thought that if you wanted to have a serious understanding of how the State works, you needed to understand the legal system".

A daunting challenge

While reading his way into the brief, he was surprised to find that there had never been a book published on the Supreme Court for the general reader. He praises the groundbreaking journalism by Vincent Browne and Colm Toibín for *Magill* magazine in the 1980s, but says the fact that this work is still mentioned 30 years later speaks for itself: "I felt there was a gap. I wanted to pull back the curtain on this closed world, to look at the judges as people, and how they worked together in this extraordinary environment. But secondly I wanted to take the Supreme Court as a lens through which to look at political and social change over the last 100 years".

And therein lay the challenge: to distil almost a century of history into an accessible story without losing the essence of that story. One option that Ruadhán considered was to start with the 1960s, a period when, arguably, the Court's interrogation of the 1937 Constitution began to have a significant impact. However, in order to do that period justice, he would have to explain what came before – the destruction of the Four Courts in 1922, the hugely influential role of first Chief Justice Hugh Kennedy, the foundations laid in the aftermath of conflict to create a modern justice system. As Ruadhán admits: "That made the book a much more daunting challenge".

Although he is keen to point out that the book is not exhaustive, the process of researching it was an arduous one that took him from newspaper archives to the National Archives, the National Library, the UCD and TCD libraries, and hundreds of old judgments. It even took him on a memorable trip to the Library of Congress in Washington to read the private correspondence between Irish Supreme Court Justice Brian Walsh and William Brennan, his US counterpart (see panel).

This was followed by over 150 interviews with people in the legal profession, politics, academia, the media and, significantly, with the litigants in several of the Court's more high-profile cases (of which more later). He says it wasn't difficult to persuade people to talk to him, once he had explained the nature of the project. He offered each interviewee anonymity and almost everyone spoke off the record:

"Some people were reluctant to speak about certain things, for example about people who were still alive. Others asked that I didn't use material until they themselves were dead. The longest interview took 15 hours over three sessions, and the shortest was about 15 minutes. I have five times more material than is in the book, which I couldn't use for a variety of reasons: it was not relevant, difficult to corroborate or not usable for legal reasons".

I felt there was a gap. I wanted to pull back the curtain on this closed world, to look at the judges as people, and how they worked together in this extraordinary environment. But secondly I wanted to take the Supreme Court as a lens through which to look at political and social change over the last 100 years.

An era of judicial activism

Arguably the most fascinating period covered by the book is the 1960s and early 1970s, when the Court began, as Ruadhán puts it, to realise the potential of the 1937 Constitution, and to interpret it in ways that made enormous changes to Irish society in the longer term. Key to this process were the judges on the Court at this time, in particular Chief Justice Cearbhall Ó Dálaigh (appointed to the Supreme Court in 1953 and as Chief Justice in 1961) and Brian Walsh (who served on the Court from 1961 to 1990). Ruadhán elaborates: "We tend to overestimate the influence that any one individual can have in the Supreme Court – you can be a very strong personality, expert in an aspect of the law that the Court is working on, but unless there is agreement, or unless you can bring others round to your view, it doesn't really matter. In the 1960s there was a group of broadly like-minded judges, with broadly similar views on the importance of the Constitution and its role in the work of the Supreme Court and Irish society".

The key date is 1961, which saw Ó Dálaigh's appointment as Chief Justice and Walsh's to the Supreme Court: "We can see now that this was very significant. They had a good relationship and similar views on the Constitution and the role it should have, and they ushered in this era of judicial activism, judicial expansionism, that in many ways created the Supreme Court we have today. They signal to barristers that they should start to bring Constitutional points – that they'd be pushing at an open door. And you also have a generation of barristers who take these signals and start to press these points. It's important to remember that [the judges] can only explore the cases they are presented with".

And some of the cases were extraordinary. The decision to allow fluoridation of the water supply in Dublin might not seem very momentous to modern ears, but Gladys Ryan's case had far-reaching consequences, as it established the concept of implied or "unenumerated" rights in the Constitution, a decision that had a significant impact on how the Court operated in subsequent years.

Unsung hero(ines)

Of course, there is one more essential element to making these extraordinary cases happen – the litigants. For Ruadhán, these ordinary citizens are crucial to the story. "When I started the book, I thought that the strongest personalities would be the judges and that's true to the extent that the judges are the Court and the Court at any time is to a large extent a reflection of them, but as I went on I found that some of the most interesting people are the litigants themselves. Obviously, you wouldn't have had a *McGee* case on contraception were it not for May and Seamus McGee. You couldn't tell these stories without telling the stories of those who took the cases".

Ruadhán sought out many of these litigants and others affected by landmark cases of the Court, including May and Seamus McGee, and a woman named Mary Carmel, whose story is one of the more moving featured in the book (see panel).

"In many ways these people are the heroes of the book. And many of them were women; that's worth pointing out. It was very brave of May McGee to put herself out there in that way. She was photographed as she went into the High Court every morning. Newspapers were outside the mobile home where she lived in Skerries. It was a very difficult thing to do".

A complex group

Two years covering the courts, while also researching the book, was an immersion in the Irish legal system that few non-legally trained people experience, and I ask Ruadhán how this has shaped his views of the judiciary:

"I was really impressed by some of the earlier judges, who created this system, taking what they believed to be the best of the old regime and fashioning something new. I was impressed by the drafters of the 1937 Constitution, who produced a really innovative document with a lot of features that were radical at the time. I was struck by how in time the judges were able to appreciate the significance of that and grasp what they had at their disposal. I was also impressed by the ethic of public service that many judges have, and their sense of where the Supreme Court fits into the structure of the Irish State. At the same time it's not an unblemished history. There have been false steps – think of the Norris case, for example".

The people behind the judgments

The State (Nicolaou) v An Bord Uchtála in 1965 concerned an unmarried father seeking (and failing) to prevent the adoption of his daughter, Mary Carmel. It was a complex and tragic case, which Ruadhán felt brought together many elements of the story he was trying to tell, and also left a lasting impression on him: "If you read court judgments, the judges often seem averse to allowing too much of the human background to intrude, and it's a loss, I think. It struck me that there must be a fascinating story behind this one. So I started off speaking to some of the people who were involved, some of the lawyers, and the search led me eventually to Mary Carmel. We sat down for an afternoon and she talked me through the aftermath of that case. She has lived with the fallout all her life. She did find her mother, who was able to give insights to the case, but she has never been able to find her father."

It was a very moving conversation: "Lawyers know that case because it's the case that laid down the fact that, in law, a family is founded on marriage. People talk about that Court in the 1960s being very liberal and pioneering but it was only liberal in certain senses. The Court generally was a conservative place as regards social and moral questions – it reflected the State at the time in many ways and that was a point I was keen to get across".

Public perception of the judiciary, particularly in recent years where disputes over pay and pensions have been widely reported, has been problematic at times, and Ruadhán is, unsurprisingly, wary of generalisations:

"Often the portrayal of judges is binary – they're either accorded too much deference, or seen as out of touch. I was keen not to fall into the trap of thinking 'they're all terrible', or 'they're all great'. There's no question but that when you speak to people who've been on the Court, you gain a better understanding of what it is to be a judge of the Supreme Court, something few people will ever experience.

"In terms of the 2009-2013 disputes over pay and pensions, I covered the latter part of them for *The Times* and the relationship between the judiciary and the State deteriorated, but it was not known in public how it divided the judiciary as a group. It's difficult to ascribe traits to the judiciary. Yes they are by social background relatively homogenous, but they hold very different views on what a judge should be/how a judge should act. Some were in favour of more public confrontation, while others wanted a quieter, more diplomatic approach. The debate got quite bitter. I can see the problems that they were facing, particularly that they had no way of speaking as a group, but it was remarkable how badly they handled it at times".

He feels that the establishment of the Association of Judges of Ireland in 2011 led to an improvement in this situation.

Reform

Judges have been in the news again in recent weeks, with discussions at Cabinet level on judicial reform and comments from Chief Justice Denham criticising the lack of action on a long-awaited judicial council. Ruadhán agrees that reform is needed: "I think there is a need to change the appointments system. We don't even know the criteria through which judges are appointed. There's a lot that's good about the current system. In theory, if it was properly resourced, a structure like the Judicial Appointments Advisory Board (JAAB) could work very effectively. The problem is that it's not resourced. It's not beyond the wit of the State to come up with a system that more closely resembles the system by which we appoint senior civil servants – a system that involves assessing ability, that elevates merit, that seeks to ensure diversity".

As to taking the politics out of appointments, he acknowledges that this is a complex issue: "I agree that judges should not be appointed because they happen to know a Minister or to have a connection with a political party – that goes without saying. However, I think that at a certain stage it's important that an appointment is signed off on by Cabinet. The important point is that you limit the choice Cabinet has, so that you don't have a situation like we have now, where the Government can be presented with a list of more than 50 people. Transparency is key, and if the system was transparent people would have more respect for the judiciary".

When it comes to the need for a judicial council, he says it's a "no brainer": "Clearly you need training for judges, and ongoing training throughout a judge's career. And there should be some system through which disciplinary matters are dealt with. I think most people agree on this now and I don't think there's any excuse for not enacting a judicial council bill".

More to do

The Supreme Court has had a very positive reception since its publication. Ruadhán hopes it will lead to further work on the Court: "The book is an attempt to begin to write the Supreme Court into a story from which it has been largely absent, but there's so much more to be said, and I hope others will take it on. It would be great if judges would say more about how the courts operate. No judge has written a book about being a judge. I think they have more room for manoeuvre there than they think they do, and I think they can do it without drawing themselves into controversy or turning the Court into a more overtly political institution, which I think is what a lot of them fear".

Now that the book is out, it's business as usual for the Foreign Correspondent. When we spoke, Ruadhán was preparing to head to Washington with the enviable task of covering the final stages of the US Presidential election, and he will travel to the Middle East in December. He's looking forward to both trips, particularly as this time the flights won't be spent trying to decode Supreme Court judgments!

A treasure trove

One of the most fascinating elements of *The Supreme Court* is the correspondence between Irish Supreme Court Justice Brian Walsh and his US counterpart William Brennan. The two men met during Brennan's visit to Ireland in the early 1960s and began a lifelong friendship.

Ruadhán was anxious to find out if any documentary evidence of this friendship existed. Brennan's papers had been donated to the Library of Congress in Washington, but the material was not due to be made available to the public until 2017. Not to be deterred, he contacted the Brennan family and received their permission to access the archive. He travelled to Washington more in hope than anticipation, and was delighted with what he found:

"Within hours, I knew I'd struck gold. There were hundreds of letters, going from the early 1960s to the 1990s. You can trace how the relationship develops because they start off addressing each other as 'Dear Mr Justice Walsh', and as the years pass it becomes 'Dear Brian' and 'Dear Bill'. They start to talk about the cases they're working on so you get interesting insights into some of the major cases that I was writing about at the time. It allowed me to do something that is difficult when you're writing about that period, which is to introduce the voice of the judge outside of the judgments. It was by far the most satisfying moment I had writing the book".

A REASONABLE MAN

On a recent visit to Dublin as a guest of the Free Legal Advice Centres (FLAC), Justice Edwin Cameron spoke about fighting injustice, the South African Constitutional Court, and the impact being openly gay and HIV positive has had on his life and career.

First published in *The Bar Review* **February 2017**

For Justice Edwin Cameron of the South African Constitutional Court, the personal and the political have always been inextricably linked. His early life certainly doesn't fit the stereotype that we in Europe might have of white South African privilege during apartheid, and he experienced a profound sense of his own difference.

Coming from a poor background, he spent several years in a children's home. Education proved to be his escape in the form of scholarships to excellent schools and universities, including a Rhodes Scholarship to Oxford, but he was acutely aware that these opportunities were not offered to everyone: "I grew up with an intense sense of my racial identity contributing to an escape from poverty, and the injustice of that in an overwhelmingly black country. I also grew up with a sense from adolescence of being gay in a deeply homophobic society and then in my early thirties as a young barrister, becoming infected with HIV. So these have been the determining elements of my professional life".

Finding a calling

This powerful sense of injustice crystallised when, while studying law at Oxford, Edwin heard about the death of anti-apartheid activist Steve Biko, who died in police custody in September 1977. Up to that point, he knew very little about Biko and his fellow anti-apartheid activists: "At Stellenbosch [University, where Edwin studied before going to Oxford] one lived in a sea of exclusively white racial privilege. We were brought up not to know. Then I read Steve Biko's writings, which were pivotal in the development of my racial consciousness as a white person".

From the beginning, Edwin wanted to use the legal system to fight "the human rights atrocity of apartheid". In an interview with *The Bar Review* last year, journalist John Carlin spoke about how, for all the horrors of apartheid, South Africa had a functioning justice system that was key to reform when the time came, and Edwin agrees: "The paradox is that South African law was used to oppress people but it was a real legal system".

A number of human rights organisations such as the Legal Resources Centre, the Centre for Applied Legal Studies, where Edwin worked, and Lawyers for Human Rights, explicitly used the law to combat apartheid. The reform process was also very much led by lawyers: "All of the main negotiators – Mandela, de Klerk, Ramaphosa, Roelf Meyer, Slovo – were lawyers, so it was a lawyer-heavy transition".

For Edwin, public engagement with the law, and the public's belief that the justice system belongs to them, is also a fundamental principle that defines both the fight against apartheid and the creation

At Stellenbosch [University, where Edwin studied before going to Oxford] one lived in a sea of exclusively white racial privilege. We were brought up not to know. Then I read Steve Biko's writings, which were pivotal in the development of my racial consciousness as a white person.

of a new South Africa after its defeat: "There was a widespread sense among ordinary, mostly black South Africans, that the law could be used to fight injustice because there had been a number of significant cases. The reason why the 'Pass laws' (see panel) stopped being applied was because of a court case in the then appeal court".

A new world

Post-apartheid South Africa found itself with a unique opportunity to craft an entirely new political and legal system, and a consensus was reached among the negotiators that the new democracy would be best served by a constitution and a bill of rights, supported by a constitutional court. Edwin is a passionate defender of this approach, for all its imperfections, and is extremely proud of the South African Constitution: "The result was by far the world's most generous-spirited and progressive constitution, which included gay rights, sexual orientation equality for someone like me as an openly gay man who'd campaigned for equality under apartheid, and a very generous equality clause".

Crucially, and unusually, the Constitution also includes social and economic rights. In Ireland, we are all too familiar with debates about whether certain rights have a place in a constitution, or whether society is better served by dealing with these issues in the legislative arena. Edwin defends the constitutional approach: "The idea that judges can't judge socioeconomic issues is wrong because judges are quite capable of making an assessment of reasonableness. In South Africa we have right of access to various social and economic goods and then there's an obligation on government to take reasonable legislative and other measures. So in the first instance it's the government's responsibility, not the judiciary's responsibility, but the judiciary can assess whether the measures taken are reasonable".

He gives a very striking example of this principle in action in a case that was very close to his heart, the right of people with HIV to access antiretroviral drugs: "I started on antiretroviral treatment in 1997 and I realised that those drugs had saved my life. I started speaking out about my own HIV a year or two later and then there was this mass crisis of black South Africans falling sick and government refusing to make the treatment available because President Mbeki was sceptical about the causes of AIDS. The Treatment Action Campaign (TAC) took him to court, and the Constitutional Court gave a judgment saying that President Mbeki's policies on AIDS were not reasonable. We eventually got the world's biggest publicly-provided treatment programme because of this magnificent Constitutional Court decision. It showed the power of the Constitution, of the rule of law, and the power, I think, of legal reasoning. We've now got 3.5 million people like me, who owe their lives to antiretroviral treatment, and it's directly attributable to the legal struggle".

> We eventually got the world's biggest publicly-provided treatment programme because of this magnificent Constitutional Court decision. It showed the power of the Constitution, of the rule of law, and the power, I think, of legal reasoning.

The truth will set you free

Edwin spoke about what it was like coming out as a gay man in the 1980s in apartheid South Africa: "It was rough. There was this great unspoken thing. Obviously there have always been people who identify as gay but to come out in apartheid South Africa and to come out in the legal profession of the early '80s was very difficult. But it was a personal necessity. I was married to a woman and we still cared for each other but it was a mistake for both of us and I realised in the marriage that I was being profoundly untruthful to myself. I resolved, just before turning 30, that I would never ever again apologise for being what I was, which was gay".

Perhaps surprisingly, he doesn't feel that he suffered a great deal of discrimination, when he came out, or later, when he spoke publicly about his HIV: "I had a very busy practice. I was dealing with a range of cases, not just political but many other cases as well, so I don't think I was discriminated against. Of course, you don't speak to the people who might be averse. When I spoke publicly about my HIV at the beginning of 1999 I had a flood of loving and positive responses. I never heard of the people who were negative about it. If there were some, they certainly never spoke to me".

As a campaigner on social justice, he says these momentous and brave decisions were "perilous, but personally imperative. It was difficult to close that gap but richly rewarding once I had closed it".

The gender gap

In Africa, where AIDS is a predominantly heterosexual disease, the fight to reduce infection is very much tied to larger issues of gender, masculinity and patriarchy, and these are issues Edwin has spoken and written about: "There's no major civilisation that hasn't been patriarchal and Africa also has many patriarchal cultures (there's no single African culture). So it's a very big problem because women bear the brunt of the epidemic. There are high levels of gender-based violence, there are high levels of sexual abuse of children and of women, so we're dealing with all of these substantial issues in the HIV epidemic".

He says two things are needed to address this: communication and change in social attitudes: "It's got to start in communities. A large part of that involves giving young women a voice, and that is being done, but there's a long way to go. We've got wonderful female role models within our country, such as the public protector, Thuli Madonsela, who just completed her office in October [2016]".

Indeed, within the legal profession in South Africa, there are specific formal measures in place to increase female participation, including a training scheme for female judicial candidates. However, the measures fall short of gender quotas, another issue that has been the subject of much debate in Ireland. While he supports embedding affirmative action measures in the system, Edwin does not feel that quotas are the answer: "In the [South African] Constitution it says that equality includes taking positive measures to undo historical injustice and I support that, but our legislation outlaws quotas and I think that's right. Quotas ultimately disregard individuals. We've got targets and it's true that there's sometimes a wafer-thin distinction between a quota and a target but it's an important distinction. I'm in favour of targets and the target must obviously be at least 50%".

He points out that his own court has three female members out of a total of 11 judges, and while this is not enough, the work continues.

"It's both a matter of justice and a matter of recognising that decision-making without representation is impoverished. In every judicial appointment there has been, and rightly so, a consciousness of how many people on that particular provincial bench are women. Are women severely underrepresented, or are they adequately represented? What will you, as a white man or a black man do? What can you bring to discount the fact that you're not bringing gender representivity? It's a legitimate question. It's one I was asked and I think it's the right question to ask a white male like myself".

He says that these measures are working in terms of representation of both black people and of women: "I think the statistics tell their own story. Within 22 years there's been a quite radical transformation of the judiciary, which is now majority black and one-third female".

A (guarded) success story

Twenty-two years isn't a long time in the scheme of things if you're talking about creating a new society, and Edwin acknowledges that there is much more to be done to, as he puts it, "eliminate the disjunct between law and justice". He firmly believes that the basis is there, however, particularly in the "Founding Values" – of citizenship, rule of law, right to equality and right to freedom – which are enshrined in the Constitution. Unlike Ireland, where Constitutional change requires a referendum, the South African Constitution can be changed by a two-thirds majority in parliament. However, changing the "Founding Values" requires a three-quarters majority – a 'super-majority' – making them difficult if not impossible to remove and giving scope for the work to continue. Perhaps more importantly, he says the South African citizenry has bought in to the concepts: "My view is that there is a widely disseminated sense of internalised constitutional agency. The constitution hasn't delivered what it should, which is clean governance, non-corruption, social and economic rights for all, dignity for all, safety and security for all. But there is a sense that we should be moving towards it and that people have an entitlement to claim those things, and that's a very important thing that a bill of rights gives people".

Pass laws

The 'Pass laws' were an internal passport system used during apartheid to segregate the population. Under these laws, all black people over the age of 16 had to carry a pass book at all times in white areas, which stated whether and for how long they were permitted to stay there. Pass books without valid entries entitled the authorities to arrest and imprison the bearer. The Pass laws were a hated symbol of apartheid and were repealed in 1986.

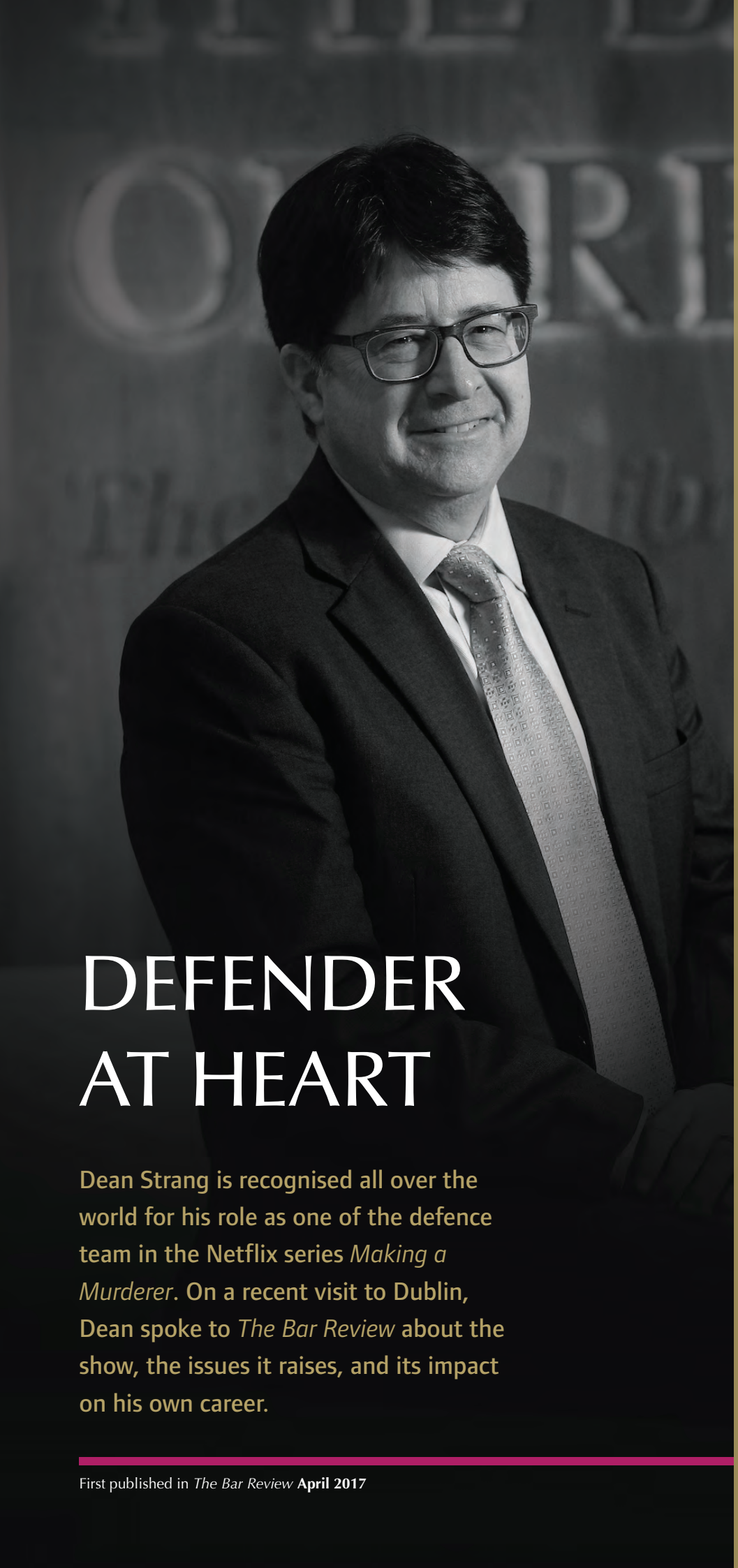
Significant cases in an extraordinary career

"The cases that were most important to me included conscientious and religious objection cases – young white men who refused to be drafted into the apartheid army. We also did cases on removal from the land – where we successfully fought for black communities not to be removed.

"We fought many cases against the Pass laws, against residential discrimination. I also represented ANC fighters who had been arrested and charged with treason. Those were the cases that stood out.

"Since becoming a judge, one Appeal Court case that stands out was when we ordered the police and a local authority to rebuild shacks they had illegally demolished. The Constitution says that no one may be evicted from his or her home without an order of court given after consideration of all circumstances. We made them rebuild the shacks, so that was a pivotal case.

"Then there are free speech cases that I recall. One of them concerned an opposition party that attacked President Zuma for 'stealing' public money to build his private residence. We held that that was protected by a broad ambit of 'protected expression' under the Constitution."



DEFENDER AT HEART

Dean Strang is recognised all over the world for his role as one of the defence team in the Netflix series *Making a Murderer*. On a recent visit to Dublin, Dean spoke to *The Bar Review* about the show, the issues it raises, and its impact on his own career.

First published in *The Bar Review* **April 2017**

Dean Strang didn't want to be a lawyer. His first choice of career was the somewhat unlikely one of political cartoonist. However, he realised that like many creative endeavours, as much as he loved it, it wouldn't be a lasting career: "I didn't have a back-up idea at that point but my Dad suggested I might be a good lawyer".

He also had no intention of pursuing a career in criminal law, preferring the area of employee benefits: "There again, it was serendipity, much like going to law school in the first place. I got a job with a large firm in Wisconsin [where he is from, and where the events depicted in *Making a Murderer* take place], and they needed someone in litigation. As a brand new associate, I didn't have much choice. I did litigation involving employee health and welfare and pension plans for over two years. Around that time, I began to socialise with a group of young public defenders, and I decided what they did was pretty interesting and important, so I decided to explore criminal law".

His first foray into criminal law was on the other side of the courtroom, as it were, as a federal prosecutor, but he felt this was a poor fit: "I wasn't cut out to be a prosecutor. I did like criminal law; I just thought I was on the wrong side".

A vacancy arose in one of Wisconsin's top criminal defence firms, and that might be said to be the point where Dean's career began in earnest. This time he stayed for years, before leaving to spend five years as the state's first federal public defender. It would be natural to assume that a public defender would have a strong social conscience, but throughout our interview Dean is resistant to the idea that his career choices are a reflection of a particular political or ideological view: "I wish I could say that social conscience had been an earlier or stronger development; I wish I could say it was stronger today. I think just as a matter of character I tend to side with the underdog".

Fate steps in

Dean finally made the decision to go back into private practice in 2005, and at this point things took an extraordinary turn. He had been back in private practice for just six months when he got a call from the Avery family to ask if he would consider defending Steven Avery (see panel), who had been charged with the murder of a young photographer, Teresa Halbach. For Dean, it was an opportunity to build the profile of his new practice: "I knew of the case, because it was receiving publicity from the outset, and thought it would be a good time for me to take it. It might not be lucrative, but would be good for the visibility of my practice".

At that stage Dean was not aware that the Avery family had agreed to let filmmakers Laura Ricciardi and Moira Demos make a documentary about the case, and he readily admits that he and fellow defence attorney Jerry Buting took a little convincing:

"I was leery, and Jerry shared my concerns, but the filmmakers had won the trust of the Averys, and a film was going to be made whether we participated in it or not. So we talked with the filmmakers and agreed that we would co-operate on condition that there was no invasion of lawyer/client privilege, and that nothing whatsoever should be made public until after both cases [of Avery and his nephew Brendan Dassey, who was also charged in connection with the murder] had gone to trial and the trial was completed".

Laura Ricciardi's own background was in law, and Dean says she and Demos readily agreed to the conditions. It was a slow process of trust building at first – the fascinating scenes where Dean and Jerry are seen sitting in an apartment discussing the details of the case were not filmed until almost a year into the process. Over time, however, he came to see that the two women were interested in broader elements of criminal justice, and were using the stories to pose bigger questions to viewers. He says the process became a reciprocal one, as his and Jerry's approach to the case was affected by the filmmaking: "Those were questions that appealed to Jerry and me, issues that we'd thought were important for a long time as well, so in the end we had a really very good relationship with the filmmakers".

Life changing

For us as viewers, *Making a Murderer* is a relatively recent phenomenon as it was first broadcast in late 2015. The events featured, however, took place a decade before, in the period from 2006 to 2007, so there was quite a lengthy period during which life went back to normal for Dean: "Years went by and we went on with our lives. The cases had garnered massive publicity in the state but not too much outside it, so I didn't know if the film would ever be sold, and I sort of forgot about it".

In fact, Dean didn't find out that the film had been sold to Netflix until just a couple of months before broadcast. Then, in late 2015, everything went crazy: "The week before it came out we had a conference call with Netflix and they said: 'You might get some media calls…'"

Having dealt with considerable media attention during the trial, Dean and Jerry felt it wouldn't be anything they couldn't handle, but even Netflix didn't fully anticipate the reaction to the series, in particular the public's interest in the two lawyers. For Dean, the impact was immediate: "The film came out on December 18, 2015, and by 6.00pm that evening I had my first email from a gentleman in South Carolina who had just watched all 10 hours".

By the middle of the following week, Dean was receiving an average of 150 emails a day, from the media and the public, "a deluge of unexpected attention", almost all of which, he says, was polite and positive: "The attitude of most people has been friendly and remarkably thoughtful – people had clearly taken time to think through what they wanted to say, what *Making a Murderer* meant to them, how it connected to their lives in some way. I can probably count on 10 fingers the number of angry, hostile or insulting messages I received".

It might come as a surprise in this era of internet trolling and 'comment culture' to hear that people can still react sensitively to the complex issues of truth and justice that the Avery and Dassey cases present, but Dean says that both online and in person (he and Jerry Buting did a tour of theatres where they discussed the case and the wider issues around it), questions and comments were often sceptical and tough, but almost always thoughtful and fair. It's hard to escape the conclusion that this has more than a little to do with Dean and Jerry's own innate decency, which is clear throughout the show, from their sensitive teasing out of the issues in those filmed case conferences, to their clear commitment to Steven Avery, to getting him the fairest possible trial, and treating him with dignity throughout.

The bigger picture

The Avery and Dassey cases were seen as raising a number of issues about the US justice system. In the case of Brendan Dassey, there was a perception that practices around the interviewing of and obtaining a confession from an underage young man of below average intellectual development were at the very least highly questionable. The programme was seen as raising wider issues too, for example the fact that the system seems to be more about pursuit of a conviction at all costs than pursuit of the truth or of 'justice'. Dean agrees with this assessment, and says it is reflected in the correspondence he's received: "Of the people who've selected themselves to write to me, about two-thirds have spoken about their reaction to what they perceive as an injustice, or a miscarriage of justice, or in some cases a perception that Steven Avery in particular might well be guilty, but that the system shouldn't work that way".

Interestingly, but perhaps unsurprisingly, the correspondence varied according to country: "Writers from some countries say it reminded them of a period in their history, or of problems they have today. Writers from other countries are shocked and dismayed that this can happen in the United States because it wouldn't happen in their country. It's a very interesting difference anecdotally, to see what level of confidence people have that their own nation's criminal justice system would or would not be capable of some of the mistakes or shortcomings they see in the film".

He mentions in particular the response from these islands: "I received more emails per capita from Ireland and the UK than from any country outside the US, and the Irish very often say this reminded

Making a Murderer

Making a Murderer follows the trials and conviction of Steven Avery and his nephew Brendan Dassey for murder. Avery had previously been incarcerated for 18 years for rape, a conviction that was overturned with the help of the Innocence Project, when DNA evidence not available at the time of his conviction exonerated him. After his release in 2003, Avery filed a civil lawsuit against Manitowoc County in Wisconsin, and against officials associated with his arrest and conviction. Two years later he was arrested and charged with the murder of Teresa Halbach. His nephew, Brendan Dassey, was also arrested and charged in connection with the case, having confessed under interrogation. Avery maintains his innocence of this second crime, and claims that he was framed in order to discredit his civil case. The series explores accusations of evidence tampering and other issues that cast doubt on the prosecution's case against him. It also focuses in some detail on Dassey's case, where issues around his treatment by the police, and by his own legal representatives, led to his conviction being overturned in 2016. Despite this, both men remain incarcerated and a second series of *Making a Murderer* will follow the developments in their cases.

them of a time in the 1970s and the 1980s. And some of them think things are much better now and some of them say that not all is rosy still. That's been a very common Irish reaction, that it touches a chord with a shared historical if not personal experience, with which the Irish are familiar".

With characteristic thoughtfulness, Dean is pleased that people are thinking about these issues and wanting something to be done, but he knows it's not that simple: "Legislators shouldn't be expected to react to any one movie. Nonetheless, I do think that we can credit the filmmakers and Netflix with spawning enough interest that in Illinois, Tennessee, and other states, legislators are looking at the interview of juveniles while they're in police custody and there has been some effort, especially in Illinois, to improve the protections of juveniles when they're subjected to custodial police interview".

He also sees *Making a Murderer* in its wider context as one of several 'true crime' documentaries, and sees this in turn as a reflection of wider social issues, particularly in the States: "We had *Serial*, the podcast that preceded *Making a Murderer*. We've had *The Jinx* on HBO, and I think you'll see others. We go through cycles of rising and falling interest in true crime stories in the United States but we're in a period of rising interest and that has been coupled with a broader public discussion about criminal justice, magnified I think by social media and also, I think, the related discussion Americans are having about police agencies and how they serve their communities. The spate of shootings of unarmed people, often people of colour, captured very frequently on smartphones, the Black Lives Matter movement, and the Blue Lives Matter counter-movement are all part of this. That discussion had its own genesis but I think has been a catalyst in some ways to expanding discussion to include not just the front end of the criminal justice system, which is to say the police investigation role, but the middle, the judicial function. I hope eventually the discussion spreads to the back end of the system, which is corrections and prisons".

When we conducted our interview, the legal system and judiciary in the US were under particular scrutiny in the wake of responses to President Donald Trump's efforts to restrict access to the US from certain countries. Dean refuses to be drawn on his personal views of the current administration, but in characteristic fashion, feels that the overarching philosophical issues raised are timely and important:

"Events of the last several years, certainly including the November election, have reminded Americans that democracy is not a passive project. It often requires active engagement, raising your voice, collective assembly. The country is divided in its viewpoints, which isn't a bad thing in itself – a diversity of viewpoints is a healthy thing in democracy, as is protest. My hope is that as we engage energetically in that active project, we don't lose altogether the ability to converse with one another, that civic protest and even civil disobedience don't replace civility and simply listening to one another. It's an exciting time – and that's not to say that it's not also a perilous time".

Returning to the quiet life

Dean is no longer directly involved in the Avery case, and as life slowly returns to normal, he has returned to his practice, and to his other main interest, legal history. Having published his first book, *Worse than the Devil: Anarchists, Clarence Darrow, and Justice in a Time of Terror*, which recounted the story of a 1917 American miscarriage of justice, he's now in the process of completing another: "It's a more ambitious research and storytelling project for me. It's the story of the largest mass trial in US civilian court history, and in many ways it's the story of the emergence of the US Department of Justice in its modern form. The Department of Justice took it upon itself to try to combat the Industrial Workers of the World, a labour union at the time, who were seen as the most organised radical opposition to America's entry to World War I. It's a fascinating story".

Apart from that, his life now is about getting back to normal: "I'd like to try to restore my law practice from a 50% caseload, where it's been for the last year, to closer to a full caseload. I'm also looking forward to spending more time with my wife and my dog, jogging more regularly, and enjoying Madison, Wisconsin, which is really a lovely place to be".

Defending the guilty

Dean Strang visited Dublin to launch The Bar of Ireland's Innocence scholarships, which fund young barristers to work with Innocence projects in the US each year. At the launch, he spoke eloquently on the topic of how lawyers deal with the ethical question: "How do we defend the guilty?" He spoke of the need to be aware of the assumptions both legal professionals and the general public can have about "those people" – the idea of the accused as "the other", and the dangers inherent in these assumptions. He felt strongly that if we can break down those assumptions, and realise that there is really no 'us' and 'them', then the question becomes: "How can I not defend my people?" It's at this point, he felt, that a lawyer will have found a vocation, even if they never actually defend in court: "If you can do that, you're a defender at heart".

DOING THE RIGHT THING

European Ombudsman Emily O'Reilly spoke to *The Bar Review* about her work, the rule of law in the EU, and the role of the Ombudsman's office.

First published in *The Bar Review* **June 2017**

After 20 years in journalism, including as the first female political correspondent for an Irish daily newspaper, Emily O'Reilly was a familiar face and voice in the Irish media, but in 2003 she exchanged this role for the post of Ombudsman and Information Commissioner, a position she held until 2013, when she was elected European Ombudsman by the European Parliament. Leaving journalism wasn't easy: "I loved it, loved writing, and when the position [of Ombudsman] was offered, it took a while to decide to take it".

But as a self-confessed "political nerd", the role, which also included being an *ex-officio* member of the Standards in Public Office Commission, the Referendum Commission, the Constituency Review Commission and the Commission for Public Service Appointments, was a fantastic opportunity to do something new, and to step into a public service role. She sees specific parallels between her current and former roles: "People often use the analogy of 'poacher turned gamekeeper', but while I'm not able to be as outspoken as I might have been, I've found as Ombudsman that you are, to some extent, in the same space as you are as a journalist: between the people and the administration".

Whatever about journalistic objectivity, the Ombudsman might be said to be the ultimate objective position: "That is your strongest power. I'm not a judge. No one has to do what I recommend (although overwhelmingly they do). The power of the office comes from its independence, but you also have to constantly demonstrate that independence, not just to the people who are complaining to you but also to the institutions that you are investigating".

The French use the term *médiateur/médiatrice* for Ombudsman, but Emily feels this doesn't adequately describe the role: "I don't see myself as a mediator in the sense that whatever's fine with people is fine with me if they both agree. You're looking at a set of principles, at the law and so on, and you're giving a decision that equates with the best practice in relation to good administration, not one that either side is going to fully like. But I think once the institutions think that you're giving them a fair shake, that you're not automatically cleaving to the complainant's side of things, then that copper-fastens your independence and makes it easier to get recommendations across the line".

Move to Europe

In 2013, the opportunity arose to stand for election to the European position, which she admits was "terrifying at the time". The role would also mean moving to Strasbourg, and Emily openly admits that as a mother of five relatively young children, it was a very difficult proposition: "I think that women in general find it more difficult to compartmentalise the different elements of their lives than men do. In the end, it was my husband who said I should stop looking at it in terms of negatives for the family and look at the positives instead".

With significant reform of the Irish Ombudsman's office during her tenure, as well as amendments to freedom of information legislation, Emily felt she had accomplished a lot, and the idea of a move to Europe was very attractive, despite the family and professional concerns, so she "plunged in": "I campaigned in a very Irish way, by meeting people, talking to them and asking them for support. I met about 80 MEPs over the course of a few months".

> I see the role of Ombudsman as balancing out the power imbalance between a complainant and the institution. We lend our knowledge, expertise and status to the complainant so that when they, through us, argue their case with the institution, they are empowered to do so.

The rule of law

It only takes a brief glance at the website for the European Ombudsman's office to see the large number of staff who have legal training. While Emily is in favour of having a diverse staff, with a range of experience and skills, she acknowledges the importance of the law both to her office and in the overall EU context: "Most of the investigative team here have law degrees. The EU generally places a high premium on law, which is understandable, as to try and keep 28 (shortly to be 27) countries together, the rule of law is very important. And obviously, when you're going head to head with the legal services of the Commission or some of the other big agencies, you have to have good, skilled, trained people there".

She points out, however, the importance of preserving the distinction between being a lawyer and being an ombudsman: "The law is an important part of good administration but it's just one part. Just because an act is not illegal doesn't mean it's not wrong in terms of administration. It can sometimes be a bit of a struggle to look at cases not as strictly legal, but to look at other issues. How was the person treated? How are people treated in similar circumstances? There are lots of things that can constitute maladministration that could never be litigated".

For Emily, the primary principle underpinning the role is fairness: "I see the role of Ombudsman as balancing out the power imbalance between a complainant and the institution. We lend our knowledge, expertise and status to the complainant so that when they, through us, argue their case with the institution, they are empowered to do so".

Well served

How citizens are treated in their interactions with the legal profession/courts is undoubtedly a benchmark of fairness and accountability in any society, and Emily's sense of the Irish system is largely positive: "I think that generally the Irish people are well served by the courts. I've never heard any significant debate about their independence or rulings. I know there's an issue about judicial appointments at the moment, and I understand that, but I've never had any sense that there was a political judiciary in the sense of making party political decisions, and I think that would be the generally held view".

She expresses disappointment that the long-mooted legal services ombudsman never came to pass. Having seen the office operating in other jurisdictions, she feels it would offer an "independent, accessible, free, impartial" option for those who might have an issue with the legal profession: "People still find the costs of going to court prohibitive, and that is a denial of justice. You also hear frustrations about the length of time it takes. The legal service generally is held in high respect but I think people do sometimes have frustrations".

The service, if it were properly audited over a period of time, would be a way to find out exactly what types of issues are arising, and how well services are working. It would also be helpful to legal professionals, she says, enabling them to look at their practices, and reform if necessary. She points out that in Sweden (where, interestingly, the office of ombudsman originates), the Ombudsman supervises the courts and judges, not in terms of their decisions, but in terms of procedures. While she admits that she and her European colleagues are sometimes quite envious of this, it's not something that would work in every jurisdiction.

She also welcomes the apparent fast-tracking of the Judicial Council Bill, which she feels will be a valuable addition to the legal system in Ireland.

The worst of times?

Our conversation took place prior to the final round in the French presidential election, which saw Emmanuel Macron comfortably defeat Marine Le Pen. However, the unprecedented nature of that election, along with other significant events in Europe such as Brexit, seem to have brought to the surface a deep-seated unhappiness with, even mistrust of, EU institutions and of the European project as a whole. While the clearly pro-European nature of the French result will no doubt have eased tensions in Brussels and Strasbourg, these larger issues remain to be addressed, and Emily says EU officials must tread carefully when addressing them: "We all have 'skin in the game' – we're all here and employed, so we have to be careful that our comments are independent. I think a lot of the criticism the EU gets is sometimes because of misunderstanding or lack of knowledge of how it actually works. When people talk about the faceless bureaucrats in Brussels making the laws and imposing them on us, they forget that the Commission proposes legislation but the co-legislators are the Parliament and the Councils made up of the heads of state and all of our domestic ministers. These drive the overall strategic vision at any time".

She understands the frustrations, particularly as they have been portrayed in discussions around Brexit: "The EU is complex. When you're trying to knit together so many different people, cultures, legal systems, languages, it's going to be complicated, and when things are complex, and they feel distant, people sometimes feel stupid if they don't understand them, and then they get angry with the people who make them feel stupid".

She says member states each have a role to play in offering a genuine answer to those who feel angry and disenfranchised. Many younger EU citizens in particular take things like freedom to travel and study across the EU, or the many social benefits of membership, for granted. Yet a narrative can all too easily arise where positive developments are credited to national governments and negative ones to "bold Brussels". Emily acknowledges that Ireland has been quite good at crediting the EU for its good works, but says she understands the same isn't true of the UK, and this was a likely contributing factor in the Brexit result – people in areas of Britain that had benefited enormously from EU financial aid simply didn't know about it. She emphasises, however, that it's not about being in "a constant state of gratitude": "The EU doesn't tell its own story well enough. I don't think the EU can stand and say defensively 'we're right and the Brits are wrong'. There's a caricature of the EU that is portrayed in the British media, and when you come back with what many people see as boring facts and the *Mail* is trumpeting something far more enticing and passionate, it's difficult. The dramatic story that begins with the Second World War – that's ancient history. A new story has to be told".

She does feel, however, that for all the upheaval, there has been an unlikely positive effect: "It has 'sexed up' the EU. People are now putting names to institutions, and they see dramas being played out. I'm not suggesting they do it long term because it's destabilising and debilitating, but it has engendered a lot more debate and interest in the EU and at some level that has to be positive. It also gives us an opportunity to really look at this project again".

Storytellers

Emily sees the Ombudsman's office as having an important role to play in telling this new story. Her office has been working on transparency in Brexit, and in other areas, such as trade negotiations: "I've tried to make the office more useful, more relevant, and give it more impact, and I think that has happened in a number of areas. I worked on an investigation into the transparency of the TTIP [Transatlantic Trade and Investment Partnership] negotiations. My work and also the input of Parliament and various members of civil society transformed the Commission's policy. The old days of doing deals behind closed doors are gone, so they transformed their communications policy and put transparency as one of the key elements. That is also manifesting itself in Brexit".

In addition, she is particularly proud of another project that highlights the excellent work done in the EU institutions: "I started an awards initiative for EU institutions to share good practice. We recently had our first ever European Ombudsman Awards for good administration. We had 90 entries, and the winner was an initiative by the Health DG and the Commission, with 24 member states, setting up reference networks across the EU to pool expertise in relation to rare diseases. This is a great example of good collaborative work. Another project was by the Environmental DG in Poland working to improve the pollution levels in the Polish region of Malopolska where levels were 20 times higher than in the city of London".

She feels that highlighting these projects is crucial to encourage better understanding of how the EU works, and how it can work: "It's about displaying good administration, and showing how collaboration gets better results".

She admits that her job has its disappointments too, and mentions a case where her office investigated a complaint that secret meetings were taking place between the Commission and a tobacco industry lobbyist: "Our investigation found that while the meetings were in fact not held in secret, details of them were not proactively published. I made a decision that this didn't conform with the UN Convention on Tobacco Control, which the EU is a signatory and supporter of. I said that every meeting should be proactively disclosed but they disagreed. That was disappointing from both a transparency and a public health point of view. But it's one out of many cases. The vast majority of my recommendations are accepted".

Bound by law

We return at the end of our conversation to the law, and its relationship to the citizen. Emily feels that her role is to step into the grey area between what is legal and what is right: "That's the value of an ombudsman".

So what makes a good ombudsman? According to Emily, it takes "a certain sensibility", coupled with a mixture of instinct and experience. She analogises it to what she calls the "visceral sense of fairness" that children have: "You will hear a child say 'but that's not fair', and if you ask them why they could probably articulate it to a point but not completely. A good ombudsman knows when something isn't fair. I like to read a complaint, get a sense of it and then see if I can support my visceral sense that this is wrong. Sometimes I can, sometimes I can't. But when you're doing it that way, getting a sense of it intuitively, then I think that's the best way to work".

Ultimately, what many people want is to be listened to: "The stress is relieved simply because someone has heard you, and treated you as an individual. Even if the outcome isn't what you would have wanted, you know that you got your point across. That is a function of this office".

The European Ombudsman

The European Ombudsman is an independent and impartial body that holds the EU administration to account. The Ombudsman investigates complaints about maladministration in EU institutions, bodies, offices, and agencies. Only the Court of Justice of the European Union, acting in its judicial capacity, falls outside the Ombudsman's mandate. The Ombudsman may find maladministration if an institution fails to respect fundamental rights, legal rules or principles, or the principles of good administration.

The path to Europe

Emily O'Reilly was voted European Ombudsman in 2013. She was re-elected in 2014 for a term of five years. She served as Irish Ombudsman and Information Commissioner from 2003 to 2013. Prior to this, Emily was a journalist and author whose roles included many years as a political correspondent with prominent print and broadcast media. She is a graduate of University College Dublin and Trinity College Dublin, and was the recipient of a Niemann Fellowship in Journalism at Harvard University. A native of Tullamore, Co. Offaly, she is married with five children.

DOING THE STATE SOME SERVICE

Chairperson of the Policing Authority Josephine Feehily speaks to *The Bar Review* about holding the Guards to account in the face of controversy.

First published in *The Bar Review* **July 2017**

Over the course of a 41-year career in the civil service, Josephine Feehily, to use her own words, "went from the organisation that spent almost all the money to the one that collected it". The former, the then Department of Social Welfare, was where she spent the first half of her career, including during the recession of the 1980s: "There was no money, and unemployment was at 18%. It was a grim time".

She made the move to Revenue in the 1990s, and was appointed Chairperson in 2008, just as the country was heading into another economic crisis. She found herself introducing controversial new taxes (such as the Local Property Tax) and engaging with the IMF, while dealing with potentially catastrophic changes in her own department: "Our operating budget was slashed, and we lost huge numbers of experienced people who took advantage of the retirement scheme on offer at the time. On one Friday alone, we lost 102 people".

Josephine's reputation as a strong-minded believer in fair treatment and transparency was well known during her tenure, and it's fair to say that Revenue came out of those years still largely respected, and regarded as a section of Government that functions efficiently and well, although this didn't come easily: "We had to be single-minded, and make deliberate strategic choices, which were not necessarily understood at the time, on what posts not to fill, and to use some of the money for IT support or to keep technology current".

An unexpected challenge

Josephine retired from Revenue in early 2015, and while she intended to explore new projects, she was planning to take some time off first. However, the soon-to-be-established Policing Authority needed a Chairperson, and it was an opportunity that appealed both to her fundamental beliefs about public service, and to her professional curiosity: "I have an absolute passion for the importance of public confidence in public institutions. It's an intangible concept, but you know when you have it and when it's at risk. Also, it's not often you get an opportunity to do a 'start-up' in the public sector, to be involved in something entirely new. I knew that an opportunity as significant might not come up again".

That opportunity was no less than changing the oversight framework for the policing functions of An Garda Síochána, reducing the role of Government, and politics, in operational policing. This was never going to be an easy task, but to say the least, things have been complicated from the start: "The Garda Síochána (Policing Authority and Miscellaneous Provisions) Act was passed in December 2015 and commenced on January 1, 2016. I'd been designated a year previously, because the intention was that the Authority would be established on a shadow basis, to give us a few months to set up and get our governance, recruitment, etc., in order, but that did not happen".

The new Authority found itself dealing with a seemingly endless stream of controversies, from the treatment of whistleblowers, to staggeringly inaccurate breath test records, to the ongoing revelations about the Garda College in Templemore (to name but a few): "If I'd known the pace [of developments] I might have been more demanding of the Department of Justice in terms of our readiness".

It's hard to avoid the conclusion that Josephine thrives on the challenge, however, and she admits that she does: "As long as I can get on with it. I like to be doing!"

Driven by facts

Josephine is determined that the Authority's best response to the current circumstances is to stick to its remit, do what it was set up to do, and work steadily towards its goals. The establishing Act sets out a long list of functions, but for Josephine, the most significant are those that increase the accountability of An Garda Síochána to the Government and to the people, and that increase transparency in terms of how An Garda Síochána sets out its plans and implements them: "We set policing priorities and then approve the Policing Plan, which is prepared by the Commissioner (we are civilians so that's hugely significant). We also approve the Commissioner's strategy statement, we are responsible for the appointment of senior Gardaí, and we have put in place a Code of Ethics for the Garda Síochána". (See panel.)

For Josephine, the key to all of this is very simply to measure what's being done and set targets for what should be done: "People are great at using words – openness, transparency, accountability – but you can't have accountability without a framework within which to do it. So we've been gradually developing a performance framework that connects the Policing Plan, the Annual Report, and the monthly report the Commissioner gives us".

She describes the relationship between the Policing Authority and An Garda Síochána as characterised by "an appropriate professional tension, as there should be between the overseers and the overseen. We're not doing the job if there's not".

For example, the Plan contains a commitment to increase road policing resources by 10% by the end of the year. This is a direct result of the Road Safety Authority's concerns about rising numbers of fatalities on our roads, and is in the context of a commitment from Government to recruit an extra 800 Gardaí this year: "The Plan simply says that a certain amount of that number should be allocated to road safety. It's about setting policing priorities and the rationale behind them, making it logical and coherent, not driven by the noise in the system but based on a rationale and on evidence".

Controversy

The Authority meets monthly, and is required to hold at least four meetings annually in public, with the aim that each meeting should address particular issues set out in the Policing Plan. However, this very reasonable approach has already been complicated by events. A proposed public meeting on roads policing in April 2017 seemed like an uncontroversial choice, until An Garda Síochána held a press conference to announce that major discrepancies had been uncovered between the numbers of breath tests the guards claimed to have carried out, and the number that had actually been done (a difference of almost one million tests) and that 14,000 people had been wrongly convicted arising from traffic offences: "So suddenly what was for us a sensible way to plan our year became embroiled in controversy".

For those who might be wondering what power the Authority ultimately has to effect change in an organisation so mired in controversy, it might be worth asking the question whether such a press conference would have taken place at all if there was no Policing Authority holding public meetings. We'll never know, but as Josephine says: "There is no question that we had planned a meeting, in public, on roads policing and that this was well known to the Gardaí".

With a number of investigations ongoing, it's hard for Josephine to comment on specific controversies. Her focus is on what the Authority can do to change the culture. It's about seeing beyond the latest scandal to the bigger picture, and Josephine is clear that the Authority will not be led by what's on the cover of the newspapers: "Accountability can't only be about the latest outrage – it's too important. It is a defining activity of any State to be able to police itself and to do it with public confidence. The 'meat and potatoes' of policing is what builds public confidence – outreach to diverse communities, community policing, availability to victims, effective criminal investigations. The Gardaí have a significant track record against organised crime for example. Operation Thor in relation to burglaries has been hugely successful. They do a lot of things really well and it's too important not to keep a focus on those when you're reviewing performance".

According to the guards' own public attitude survey, public confidence in the police is consistently quite high (see panel) and Josephine says the importance of this shouldn't be underestimated: "As a State, we're lucky to have that and we have to mind it".

The Code

The new Garda Code of Ethics could have an enormous impact in terms of professionalising the Garda service, including its civilian members: "It's not about telling them how to behave. It's about having a Code that everybody in the organisation can use to guide behaviour and decision-making, but also that the community can reference to see the standards they are entitled to expect from those who work in the Garda organisation. It's about empowering citizens in their engagement with the guards, and it's about accountability". The Code of Ethics is available at www.garda.ie/Documents/User/Code%20of%20Ethics%20English.pdf.

Senior appointments

Another enormously significant change is that the Authority now has responsibility for senior appointments within the force: "In the past, the Commissioner's office ran the competition and interviews, and the Government made the appointments. Now we, a civilian body, do both. Members themselves have acknowledged the cultural shift involved in writing to the Authority to be considered for a position, rather than to the Commissioner. We have an operational reach into the Gardaí because we select and appoint their Supers, their Chiefs and their Assistant Commissioners".

This section of the Act commenced in January 2017, and at the time of writing, three Assistant Commissioners had been appointed by the Authority, appointments to Chief Superintendent posts were imminent, and the interviews for Superintendent posts were taking place.

A key element of building that confidence is guards on the street, and the Authority has a role here too, overseeing recommendations on Garda numbers and modernisation in the Service. The Government's intention is that numbers should reach 21,000 persons by 2021, comprising 15,000 Gardaí, 4,000 civilians and 2,000 reserves. This is to happen alongside incremental progress in implementing the last report of the Garda Inspectorate: 'Changing Policing in Ireland'.

Josephine says progress is being made, although not as quickly as the Authority would like: "Our recent quarterly report expressed our concern at the slow progress in engaging with the Government policy of 'civilian by default'. It's not about an ideology that says 'civilian good, guards bad'. There are sworn, trained, fully qualified police officers who could be out catching bad guys, or doing roads policing, where their specific skills, training and expertise is badly needed in communities. The Garda Síochána also needs a specific injection of professional skills such as human resources, risk management, forensic accountancy: skills that all large organisations need".

'Soft' power

So what can the Authority do if its concerns are not addressed?

"Our power is largely soft. It's the power of transparency, of meeting in public, of us expressing a view publicly. We can write to the Minister but we don't have a power of direction or a power of sanction. We can ask the Minister to issue a direction, but that would be a 'nuclear option'".

These 'soft' powers shouldn't be underestimated, however: "Sunlight is the best disinfectant. Disinfectants can sting a little but they are healthy. There is a vulnerability in being transparent that can be tricky while you're getting used to it but it is quite a significant power".

She describes the relationship between the Policing Authority and An Garda Síochána as characterised by "an appropriate professional tension, as there should be between the overseers and the overseen. We're not doing the job if there's not".

Since our interview, a new Minister for Justice, Charlie Flanagan, has replaced Frances Fitzgerald, but Josephine says the Authority's relationship with the Department is not based on personality, but rather on mutual understanding and experience: "It's maturing nicely! We have good engagement and a relationship that respects the Authority's independence".

Josephine's formidable reputation as an experienced and supremely able public servant undoubtedly contributes to this trust, although she puts it more modestly: "I know my way around the public sector system and that was an advantage in setting up the Authority. And people knew me – I suspect that helped".

A process in flux

In May of this year, the then Minister for Justice announced the membership of the new Commission on the Future of Policing in Ireland, which is tasked with examining all of the functions of An Garda Síochána, and the roles of the Policing Authority, the Garda Inspectorate and the Garda Síochána Ombudsman Commission. It is due to report in September 2018, although it is empowered to make interim recommendations, and Josephine is in no doubt that its final report will lead to changes in the way the Gardaí, and the Authority, operate: "What emerges will be different. The Authority won't have much time to mature. GSOC and the Garda Inspectorate each had 10 years to mature: we'd had 16 months when the Commission was announced so I don't think we'll reach our tenth birthday in our current form".

One thing she is certain of is that a culture of accountability and transparency will be embedded in the system: "I only see accountability and transparency going one way – more of it".

A maturing society?

Irish people are often said to have what might be called a postcolonial culture of bending the rules when it comes to tax and the law. Josephine's career might be said to give her a unique perspective on this, and her view is a little surprising: "We're getting over it. The rate of voluntary compliance has increased steadily in recent years. For example, when we introduced the property tax, we got the first million euro in before we sent out any letters! I think there was a kind of a growing up somewhere along the way".

When it comes to the law, she feels we're more law abiding than not: "We expect a lot of the guards, and when something important and significant happens to us in our lives, like a burglary or a road crash, we want them to be there. That drives compliance. It's a complex compact between the police and the policed, the old adage of 'policing by consent', which goes back to Robert Peel".

As to whether being a postcolonial nation has any bearing, the evidence might also surprise: An Garda Síochána's own public attitudes survey shows 85% of the population having a medium to high level of trust in the police force, compared to a figure of 62% from comparable UK College of Policing research.

The public servant

Originally from Limerick, Josephine Feehily held a number of positions in the Department of Social Welfare and the Pensions Board before joining the Revenue Commissioners in 1993.

She was appointed one of the three Commissioners who form the Board of Revenue in 1998, the first woman to hold that position in Ireland, and was appointed Chairman in 2008. She very much hopes that her work at the Policing Authority will take up a little less of her time next year so that she can renew her interest in painting, and spend some more time at home in Co. Meath.

THE LAWYER AT THE CENTRE

Attorney General Séamus Woulfe spoke to *The Bar Review* about his career and the challenges facing his office in the era of 'new politics' and Brexit.

First published in *The Bar Review* **November 2017**

The offices of the Attorney General on Merrion Street sit snugly in the heart of Government Buildings, and the literal and symbolic significance of their position is not lost on the newest incumbent: "Government departments are often their own little kingdoms, but this office is a hub – almost everything of major importance comes through here".

Séamus Woulfe is settling in to his new role as the chief law officer of the State: "I'm enjoying it very much. We deal with a wide range of issues across the complete spectrum of public law, and a huge volume of material comes through my desk, but I'm very lucky that there's a great professional staff in the Attorney General's office, and the quality of the work is very high by the time it reaches me".

It's all quite different to being a barrister in private practice: "A big part of the learning curve is the interaction with bureaucracy. It's not necessarily the advice you give, but when you give it, or who you give it to".

There's no such thing as an average day: "It's a combination of trying to get through the paperwork, and all kinds of meetings – with officials in this office about advisory files or legislative matters, or with Government departments or ministers, and also with the judiciary or legal bodies like The Bar of Ireland or the Law Society".

New politics

Aside from its role as legal adviser to the Government on all issues, including litigation affecting the State, perhaps the principal task of the Attorney General's office is to assist in the legislative process. This would be significant under normal circumstances, but the era of 'new politics', where the coalition Government is supported by a 'confidence and supply' arrangement with Fianna Fáil and some independents, and an unprecedented number of independents and smaller political groupings are present in the Dáil, has had a particular impact in the form of a significant increase in the volume of Private Members' Bills. This is by no means a negative development, but it poses a challenge to the system, specifically in terms of how opposition TDs might be supported and resourced in preparing these Bills: "The Government has the AG's office to prepare and advise on its legislation, but Opposition members of the Dáil and Seanad will need greater resources to help them with preparing legislation if the system is to function more efficiently. Some Private Members' Bills have a good idea, or a good objective, but the technical skill or expertise often isn't there to develop it in the best legal language, and there may be technical problems, so it's causing a clog in the system".

It's all quite different to being a barrister in private practice: "A big part of the learning curve is the interaction with bureaucracy. It's not necessarily the advice you give, but when you give it, or who you give it to".

One possible solution is the expansion of the Oireachtas' own small legal service to provide the necessary support. A former Secretary General in the Department of Communications, Energy and Natural Resources, Aidan Dunning, has prepared a report, which offers suggestions that acknowledge the wider context in which these Bills are presented: "Some Private Members' Bills are brought with the aim of voicing an issue in the Dáil, not really to change the law, so some change to the arrangements around Dáil speaking time might also help to resolve the issue".

The Office and the profession

An expansion of the legal services offered in Leinster House would be likely, of course, to lead to employment for legal professionals. Access to work emanating from the Attorney General's office, particularly for barristers at the start of their careers, is an ongoing issue, and one Séamus is keen to address: "I don't think the Office has had a specific policy in the past. Barristers can apply to be put on panels and can indicate their experience and expertise, but the difficulty for younger practitioners is a lack of experience. Part of my learning curve is trying to review the panels of counsel that are briefed by the State from the point of view of young barristers, and also of gender balance and diversity generally.

When the Council of The Bar of Ireland was looking at ways to help young barristers get started, one of the suggestions was to assist them in obtaining discovery work, and the Bar now has a discovery database. I would hope to do something similar here, perhaps by establishing discovery panels. There was also in the past a system whereby the top three candidates from King's Inns in each year would be put on some panels for State work even though they are in their first year of practice. I'm looking at renewing that".

Séamus is in no doubt that the State gets value for money from the legal professionals it engages: "People are often willing to do work for the State at lower rates than commercial fees; the work is interesting and there's an element of public service".

A place for advocates

The profession is facing into a period of enormous change with the enactment of the Legal Services Regulation Act 2015, but Séamus feels that the fundamentals will not alter: "There will always be room in Ireland for a profession of advocates who specialise in the presentation of oral arguments in court. The only question may be whether or not the Bar reduces in size as a result. Some may avail of new structures to form partnerships, and the core group of advocates might become smaller. I'm not recommending that it does, but the economic reality is that it is difficult to get started in a career at the Bar, and some may choose a different model in their early years.

"Barristers have to be good at written submissions too, and there may be more emphasis on those in future. The European Court of Justice favours a greater balance, and provides a fixed, and normally shorter, time for oral arguments. Things may go that way here, and some re-balancing may not be a bad thing".

Before taking up his current post, Séamus worked extensively in the area of regulatory law, advising the Medical Council and the Teaching Council, among others, so his perspective on the Act is contextualised by a climate of increasing professional regulation: "Personally, I always felt it was a bit unrealistic to think that the Bar could be purely self regulated. It was always going to be necessary to have some degree of external regulation, for example in dealing with very serious disciplinary cases".

The issue of judicial appointments has also, of course, been a source of considerable controversy in recent times, and at the time of writing, the Judicial Appointments Bill had passed Second Stage in the Dáil and was due before the Oireachtas Justice Committee. Séamus feels it's important to focus on the fundamental aims of the Bill: "There's a difficult balance between having external and lay involvement in the appointment of judges, and the involvement of judges themselves, who know the candidates and know what's involved in the job. Whatever system is finally enacted by the Oireachtas, the important thing is that it will be capable of attracting and selecting the best candidates. Whatever the mechanism for appointing people, the criterion expressly stated in the Act is that merit should be the decisive principle. By and large the system has served us very well, but it probably is an important substantive provision in the Bill to say that that's the decisive factor in making the appointment".

Making history

Séamus Woulfe's early career at the Bar included high-profile cases that had a formative influence on him, and on Irish society as a whole.

In 1992, along with John Rogers SC and Mary O'Toole BL, he acted for Miss X in the Supreme Court in *Attorney General v X*. It's no exaggeration to say that the "X Case" gripped the nation, as the Supreme Court deliberated on whether a 14-year-old child who was pregnant as a result of rape could be allowed to obtain an abortion on the grounds that her life was at risk from suicide. For those in the eye of the storm, however, the focus was, of necessity, narrower: "It's part of your training as a barrister to focus on the objective legal issues as much as possible. You're aware that there's publicity and a lot of noise in the background, but you're focused on the legal issues from the starting perspective of the side you're on. We had to fight on those issues from that perspective, and our client won her appeal".

He acknowledges the strange serendipity in his now being the Attorney General who will likely advise on another referendum on abortion, but is glad to have had such extensive experience of the legal issues involved.

The other major case of Séamus' early career saw him represent then Labour TD Pat Rabbitte at the Beef Tribunal, which also produced fascinating legal issues: "One issue was the question of whether politicians could be compelled to disclose their sources. Under parliamentary privilege, they couldn't be compelled to do so for what they said in the Dáil chamber, but when they repeated it in Dublin Castle [during the Tribunal], and were not physically standing in the Dáil Chamber, could they be compelled? The Supreme Court overturned the High Court and said they could not be so compelled. It was a limited exception that if it was a Tribunal established by the Dáil, it was akin to saying it in the Dáil".

These were busy times for a "fairly junior" barrister, and Séamus acknowledges his good fortune at a relatively early stage in his career: "The Bar is sometimes a very unpredictable profession, but you can get a lucky break. These cases got me a bit of a profile in a profession where you can't advertise yourself".

The big issues

Two issues in particular look set to dominate not just the Attorney General's office but the nation as a whole in the next 12 months: the proposed referendum on the Eighth Amendment of the Constitution and Brexit. Séamus is no stranger to the myriad issues around the Eighth Amendment, having acted in the 'X Case' in the early 1990s (see panel): "The challenge will be in dealing with the very complex legal issues that arise when it comes to any form of amendment, and the drafting work that would go with that, which may involve not only the text of an amendment to the Constitution, but possibly having to prepare draft legislation. I'm in no way pre-empting the decision of Government, but in recent years there has been a methodology of saying that alongside the amendment there will be legislation, and the people need to know the shape of the legislation at the time they're voting on the amendment. The Taoiseach has said that he's hoping to have the referendum in May or June of next year, which means that there will be a lot of intensive work over a relatively short period of time".

In the case of Brexit, the legal problems are potentially immense: "There are huge challenges for this Office and all of Government as we approach 2019. To take one example, I attended a conference recently on the European Arrest Warrant, and what happens to a system that's been well developed in recent years to deal with the extradition of alleged offenders. Would there have to be new arrangements between the UK and all 27 remaining member states, or will there be the potential for bilateral agreements just with the UK? Further issues arise if the UK is not willing to accept the European Court of Justice as the arbiter in disputes".

A transition period may allow for things to be done more gradually: "There will have to be rules about what happens to cases that have already started: what's the cut-off going to be and things like that. So much of industry and services are regulated and governed by European Union rules that trying to disengage the British elements of that is going to be extremely complicated".

At the table

The Attorney General has the rare privilege among unelected officials of sitting at the Cabinet table, so what is it like to be present when decisions crucial to the running of the State are made?

"It's a fascinating experience and a huge privilege for someone who's not elected by the People to be able to attend and observe and listen to the elected Government doing its business. In some ways Cabinet is like any board of a company; it has its own dynamics and personalities. For somebody with an interest in politics and government it's particularly interesting and exciting to be there and part of it."

The Bar

As a formerly active member of The Bar of Ireland, and Vice Chairman of the Council at the time of his appointment to the post of Attorney General, Séamus remains an *ex officio* member, and hopes to retain a close connection to his professional body: "I would hope to attend some Council meetings – absenting myself when the Government is under discussion, of course. It's something that a number of my predecessors have done and something I would be very eager to do".

Good sport

The son of a civil servant, Séamus grew up with a keen interest in how government, and society, is organised, but rather than heading in the direction of politics, chose to pursue a legal career. He cites the film *The Winslow Boy*, which he saw as an adolescent, as a pivotal moment: "I was fascinated by the courtroom scenes and always wanted to be a barrister rather than a solicitor".

Séamus studied law in Trinity College Dublin. A J1 summer in the US left him with a strong desire to return as a postgraduate, but an opportunity to go to Canada instead led him to Dalhousie University in Nova Scotia, the oldest law school in Canada, on a Killam Scholarship: "It's a great thing for people to get a taste of that North American positivity. The mid 1980s in Ireland was a very negative time, but in North America people leaving college still felt the world was their oyster. The trip also gave me the opportunity to play squash, which I love". Séamus is married to fellow barrister Sheena Hickey, who stepped aside from practice when their children were born but is currently considering returning to the law. His daughter Grace is in second year at secondary school, while son Alex is in sixth class. A sports lover, squash remains his first love: "When you're on the squash court, you can't think about anything else. The ball is going fast, so you clear the head".

He plays a little tennis and golf, and as a staunch GAA fan he is, of course, celebrating a wonderful year for the Dubs. He is a mentor in his local GAA club in Clontarf, where both of his children play.

JUSTICE FOR ALL

Since his appointment in July, Chief Justice Frank Clarke has advocated reform and greater openness in the way the courts do business. He spoke to *The Bar Review* about this, and how such reform will need to be resourced if it is to succeed.

First published in *The Bar Review* **December 2017**

Chief Justice Frank Clarke talks about the late 1960s, when he did his Leaving Certificate, as "a time of widening horizons". With the introduction of free secondary education in 1967, and third-level grants in 1968, it was an optimistic time, and so being the first person in his family to go to university didn't faze the Walkinstown native: "Perhaps I was naïve but I was never aware of a difference because of my background".

While clear that university was the place for him, the career that would result was by no means certain, and he completed a degree in maths and economics at UCD before an interest in politics and debating led him, through the college debating societies, to an interest in law, which eventually took him to King's Inns.

The Chief Justice has retained an interest in legal education, holding positions at King's Inns, Griffith College, Trinity College Dublin and University College Cork. He is, of course, aware that many young people still face considerable barriers in trying to access a legal career, particularly at the Bar, and supports any measures to increase accessibility: "I'm very happy to see measures like the Bar's Transition Year Programme and the Denham Fellowship, but there is always more that can be done".

For the Chief Justice, the key is to try to replicate the supports that young people from more privileged backgrounds might have in making their career choices: "A young person in a fee-paying school wouldn't need much help to meet someone who can advise them on a legal career". He has been involved in the 'Pathways to law' initiative of the Trinity Access Programme, which was set up to do just that: "We found that people going through the Access Programme were not choosing certain paths, such as law or medicine, so it was decided to have specific pathways to encourage people who perhaps mightn't have thought it was something they would be able to do, and it has been successful".

Access to justice

Chief Justice Clarke has spoken about his priorities for his tenure, and access to justice has been a particular theme. He feels there has been a consensus for some time in the profession that reforms are needed: "The bit the judiciary has control over are court procedures, so attempting to streamline and make easier the way in which court proceedings operate is the thing we can contribute. Justice Kelly's working group [the review group, headed by President of the High Court Mr Justice Peter Kelly, to recommend reforms in the administration of civil justice] will be a very important part of that".

There are certain areas where he feels strongly that reform is needed, for example in the area of discovery: "In certain types of cases, documentary disclosure has become a monster in terms of its burden on the parties, both financially and in other ways".

Of course, discovery can be a crucial element of a case, so reform needs to be proportionate and appropriate: "It's easier to state the problem than to find a solution. This needs careful consideration, and Justice Kelly's committee is going to look at this, which I very much welcome". There are also proposed reforms around more routine matters, such as the management of the procedural and administrative parts of cases.

> The primary job of a judge is to decide a case and I don't think they should be in the public domain explaining why they've decided that case that way.

In other countries, these tasks are carried out by properly qualified staff, such as masters or legal officers, making better use of judicial skills by freeing judges to run cases.

Chief Justice Clarke's second priority is indeed around the back-up given to judges in their work, such as greater access to researchers (in Ireland, judges have far fewer researchers than their colleagues in other jurisdictions). He sees the two issues as connected: "There are better procedures and better ways of doing things we could implement if we had that kind of back-up; the two are different sides of the same coin".

These things may seem straightforward, but the challenge is to identify the differing needs of various sections of the Courts Service and the judiciary, and then to figure out how to resource the necessary reforms: "It will take about six months to put a plan together. We need to identify what judges need to be able to do their job more effectively, and to present that plan to Government during the next Budgetary round. Reforms would probably be introduced over a number of years, but we need to set out a detailed plan, make a convincing case for the ways in which we think it will make things better, and cost it".

Another area where Chief Justice Clarke feels there is significant scope for improvement is in the use of information technology, which he says is far behind where it needs to be as a result of funding cuts during the recession. The first reform in this area is a pilot project to place the process of application for leave to appeal to the Court of Appeal entirely online, which will hopefully be in place in about a year's time.

Public engagement

The Chief Justice also supports greater public engagement by judges, but feels these interactions must fall within certain parameters: "There are limits – the primary job of a judge is to decide a case and I don't think they should be in the public domain explaining why they've decided that case that way. But it's important that the public understands how the courts work. Even if people do understand the system, there may be criticisms, and some may be legitimate. But if the public don't have a proper understanding of how the courts work, and why the people in them think they should work that way, then there may be criticisms that are not justified. Judges need to engage, not on our primary job, but on why the system works the way it does, perhaps to demystify it to a certain extent".

> The Court of Appeal is clearly unable with its current numbers to deal with its caseload. They could handle about 320 civil cases a year, and they're getting 600. That's not sustainable.

In the week in which our interview took place, a significant and historic step in this process of demystification took place with the first ever televisation of a Supreme Court judgment in Ireland. Chief Justice Clarke is pleased with the reception it got: "It's a baby step, and we plan to televise more judgments. The Supreme Court is a good place to start, dealing as it does with issues of public importance. If we're happy with the way it works we would hope to move on to having the actual argument filmed in due course".

In the same week, a high-profile case, heavily reported in the media, raised the issue of sentencing, specifically the perception of undue leniency. This certainly falls within the discussion of public understanding of the justice system, but Chief Justice Clarke acknowledges that it may not be possible to educate the public on the subtleties of particular cases, and that judges may not be the best people to do this: "The better course might be if legal or criminological experts got more traction in being able to explain to the public at least what the process is trying to do".

When discussions of sentencing arise, they are often accompanied by calls for more guidelines on sentencing for judges. Chief Justice Clarke is personally in favour of sentencing guidelines, if they are properly resourced: "The UK Sentencing Council has a budget in the order of €1.5m. You might say that the UK is a big country, but we would have broadly the same types of cases, so the same number of guidelines would be needed, and they would need to be constantly revised to reflect new legislation, new offences, or changes in sentencing".

Any guidelines should leave significant discretion to the judge in the case, but might provide a framework into which sentencing can fit: "People can then see why a particular sentence was [imposed] in that particular position. I think that would help judges and help public understanding, but only if it's done properly".

Judges

One area where issues around the resourcing of the Courts System are particularly visible is in the Court of Appeal. Its establishment in 2014 was, of course, meant to facilitate the aforementioned focus of the Supreme Court on matters of greater public import, and while Chief Justice Clarke feels this is broadly the case, the shortfall in appointments to the appellate court has created a backlog: "The Court of Appeal is clearly unable with its current numbers to deal with its caseload. Justice Sean Ryan [President of the Court of Appeal] said that with their current numbers they could handle about 320 civil cases a year, and they're getting 600. That's not sustainable. I'm hoping that the Supreme Court will sit in the first two weeks in December to deal with Court of Appeal return cases [the legislation allows for such transfers], but this is not a long-term solution – we need more judges".

Not all proposed reforms have been welcomed, and the issue of judicial appointments has been a source of no little controversy. Chief Justice Clarke has added his voice to the concerns of his colleagues on the bench that the proposed new process will not attract the best candidates at a time when more

Eclectic taste and robust debate

Chief Justice Clarke is married to Dr Jacqueline Hayden, who teaches in the Department of Political Science in TCD, and admits that their household is often home to "robust debate". His son has followed him into law, and is a barrister in his fifth year, while his daughter works as a carer in the Royal Hospital in Donnybrook.

His love of sports, particularly horseracing, is well known, and he still stewards at race meetings when he can ("It's nice to do something that you like that's different from the day job"). He credits this love of all things sporting to his father, and he's passing it on to his own son, as they share a love, and season ticket, for Leinster Rugby.

He's also a big music fan with very eclectic tastes, from classical to rock, and enjoys getting to concerts when he can. He recently saw the Red Hot Chilli Peppers (again with his son) and enjoys being introduced to his son's tastes, while passing on his own favourites.

judges are so badly needed: "There is a general perception that we haven't attracted as many leading practitioners in the last while as might have been the case in the past, but I think that we're getting to a stage of getting leading practitioners back. It's important to point out that you don't have to have been the best barrister in Ireland to be the best judge. But you want your share of the best – those who want to be judges and would be suitable – and we need to encourage that. One of the concerns about any appointment system is: is it likely to attract the best? It's fair to say that the judiciary is not convinced that the current proposal will improve that likelihood".

The long-awaited Judicial Council Bill is another step in this process of reform. While public discussions have focused on its disciplinary function, Chief Justice Clarke would like to see more emphasis on the issue of training for judges, which is a key element of the legislation: "There are often areas where it isn't clear what the right thing to do is. I'm not talking about how to decide a case but, for example, when should a judge withdraw from a case. Having better support and training at that level is a way to reduce the need for a disciplinary process, so I would see the two as connected but of equal importance, and I think it is unfortunate that most of the public emphasis has been on the disciplinary side and not enough on the support side".

Of course, yet again it all comes down to resources. The Chief Justice has been involved in a number of international judges' organisations throughout his time on the bench, and says that funding for such supports in Ireland falls far short of the norm. He praises the system in Scotland, where he received training when he was appointed to the High Court, as an example of the type of system that might work here. In Scotland, a sheriff (broadly equivalent to a Circuit Court judge) is seconded for a three-year period to run the training, which raises the issue of resources again: "That's another judge who is being paid a judge's salary but who is not hearing cases".

As regards disciplinary cases, he feels that debates around keeping findings against judges private originate in a lack of understanding of the differences between the judiciary and other professions: "Some of the commentary has focused on asking why shouldn't the rules for judges be the same as any other regulated profession. There is insufficient recognition of the fact that you have a readymade group of people that have lost their case before a judge, and there needs to be some care exercised in how you practically operate a disciplinary system in that way. That being said, I can see the case whereby if someone is, after a proper process, found to be guilty of something serious, that may need to be made public".

Behind the veil

Part of the public's ongoing fascination with the Supreme Court lies in the fact that very little is known about the way it goes about its business. Chief Justice Clarke points out that it's no secret but no one ever asks!

"The model in Ireland, and in the UK as far as I know, is that the most junior judge makes the first contribution, followed by their colleagues in ascending order of seniority [in the US, interestingly, it's the opposite]. Then there may be a free discussion. If there is broad consensus, then someone volunteers or is 'volunteered' [by the Chief Justice] to write the judgment. The judgment is circulated by email and judges make suggested amendments as appropriate until a consensus around the text that will be delivered is reached. Obviously if someone doesn't agree there may be a dissent, but they are dealt with on an ad hoc basis".

It's a challenging process at times, but satisfying for all that: "An engagement like that improves the quality of judgments. When someone you know and respect takes a different view, you have to accommodate why you don't agree with that in your own judgment. I think that process of interaction, in the cases where there may be different views, is very useful to the final judgments".

Brexit

There has been much discussion of the legal implications of the UK's decision to leave the European Union. Chief Justice Clarke feels strongly that as the major common law country in the EU post Brexit, Ireland needs to be represented on relevant internal committees, where up to now the UK has been active: "We're going to have to have a person at the table to voice the common law position, and even in resources terms, if there is to be an Irish judge on a lot of committees where perhaps in the past there was a UK judge, that means that judge isn't going to be at home".

Deeper involvement at a European level is likely to increase opportunities for Ireland's legal profession to benefit from Brexit, something the Chief Justice feels is a realistic aspiration, if the work is done to support it. He also points out that litigation arising from Brexit is likely to be quite complex, and will be demanding on the resources of the Courts Service, in particular the Commercial Court: "The Irish Commercial Court has a very good reputation because successive presidents of the High Court have allocated judicial resources to it. If it gets more work because of Brexit, it isn't going to be able to maintain that reputation unless more judges are allocated".

VOICE OF EXPERIENCE

Mr Justice Peter Kelly brought two decades on the bench to his appointment as President of the High Court in 2015, and now brings that considerable experience to a long-awaited review of the civil justice system.

First published in *The Bar Review* **February 2018**

President Peter Kelly's road to his current position began at the age of 12 when his father, a civil servant in the Chief State Solicitor's Office, brought him to visit the law courts. Watching the trials and listening to the eloquent arguments of leading barristers of the day, the young Peter Kelly "fell completely in love with the idea of becoming a barrister," but with no family background in law, it was necessary to take a more circuitous route:

"I took the executive officer competition after the Leaving Certificate and asked to be sent to the courts because I knew that they gave you facilities to study for the Bar. So I studied for the Bar while I was working in the central office of the High Court. It was a great experience from the point of view of getting to know the practice and procedures of the Court, and it also meant that you became known to solicitors, and therefore you weren't arriving into the Law Library as an unknown entity if you ever decided to practise at the Bar".

After four years at the High Court, he entered an open competition for the role of administrative officer and took a post in the European Law Division of the Department of Justice: "It was very exciting at the time because we weren't long members of the European Union – or the EEC as was – and they were very short of legally qualified people, so within a very short time I was off to Brussels and Luxembourg on a regular basis".

Interesting though this work was, it was serving another purpose:

"After two years I had saved enough money to take my chances at the Bar so I resigned. In those days there was no such thing as a career break – you had to sign your resignation and give up your permanent and pensionable position. That was the risk I took, and I've never regretted it".

> A judge has to decide if the plaintiff wins or loses – it's a black and white situation – whereas in a mediation the parties can fashion their own solution to their problems and an agreed solution can be better than one that is imposed.

Review of the Administration of Civil Justice

Last year, President Kelly was asked by Government to establish a group to review the administration of civil justice in the State and to recommend reforms under a number of headings. It's a long-overdue enterprise, as there hasn't been a root and branch review of the system in the history of the State (the last major changes took place in 1878). Ireland is the last country among our near neighbours to undertake such a review, with England and Wales (Lord Woolf, 1996), Scotland (Lord Gill, 2009), and most recently Northern Ireland (Lord Justice Gillen, 2017) all having undertaken a process of reform.

President Kelly feels that each of these processes can guide the Irish group. In particular, as our nearest neighbour, with whom we have perhaps most in common, Lord Justice Gillen's report in Northern Ireland might be said to have most relevance. It's a very extensive document, which has yet to be implemented, and while President Kelly acknowledges Lord Justice Gillen's work, he feels the approach of the review group here needs to be slightly less ambitious: "I think if we were to produce a similar report here it would have little or no prospect of being implemented because of cost, but it provides an interesting and useful blueprint for us and we can learn from it. I would prefer to produce a report that has a reasonable chance of being implemented, even though that might not be what you might call the ideal solution".

To this end, he welcomes the presence of representatives from the Departments of the Taoiseach and of Public Expenditure and Reform on the review group, as their endorsement of the project, and engagement with it, will hopefully assist in tailoring the recommendations with a view to implementation.

Wide ranging

The terms of reference of the review cover a wide range of issues, including looking at improving procedures and practices in the courts, and President Kelly agrees that the current rules of procedure are outdated and need adjustment to provide easier access and more efficient administration. One issue about which he feels very strongly is the undertaking to review the law on discovery: "[Discovery] is the single greatest obstacle in civil litigation, certainly in the High Court, to expeditious dispatch of business. It has become a monster. Huge amounts of time and money are expended on it because we're operating under rules that were formulated in the 19th century, at a time where for the most part you were talking about at most maybe a couple of dozen documents".

This is an area where looking at reforms in other jurisdictions might be helpful, if only to point to what hasn't worked: "Discovery has been a problem in England and Northern Ireland and the English solution, according to what I've heard, hasn't proven to be effective".

Some commentators have suggested that perhaps the time has come to abolish discovery altogether (civil law systems don't have it): "That would be a very extreme solution but something has to be done".

Encouraging methods of alternative dispute resolution also falls within the terms of the review. President Kelly points out that this is already underway, in particular in the Commercial Court, where judges can adjourn a case so that the parties can consider mediation. He cautions that work needs to be done to persuade litigants of the benefits of such an approach: "Mediation will work well if people are open to it but you can't force people – all you're doing is creating another layer of bureaucracy. If it works it can be very cost effective and can produce results which no judge can produce. A judge has to decide if the plaintiff wins or loses – it's a black and white situation – whereas in a mediation the parties can fashion their own solution to their problems and an agreed solution can be better than one that is imposed".

The austerity measures introduced by the Government during the recession take a large part of the blame for another significant topic for the review process – e-communication and the possible introduction of e-litigation: "The current electronic system in the courts is way behind the times and will require substantial capital investment to bring it up to standard".

If that happens, a number of changes to the way cases are processed may be possible, although these may face other obstacles. For example, President Kelly points out that Lord Justice Gillen's recommendations include a completely online system with claims up to £10,000, but such a development here might pose constitutional difficulties. Certainly, any such innovations would require a state-of-the-art system, which the Courts Service simply does not have at present.

Apart from discovery, the biggest issue for the review group is the cost of litigation, both to litigants and to the State. As President Kelly says: "Under the current system, as they say, the only people who can litigate in the High Court are paupers or millionaires!"

He says there are a number of things that can be done to curtail costs. One possible solution is assessment by a judge in advance of a trial: "An assessment might indicate that a case should take no more than 'X' number of days, and the costs will not be allowed to exceed 'Y'. So if the parties know they can only litigate for a specified number of days and where the cost outcome is going to be limited in advance, it may provide for a more speedy litigation and give people more certainty as to outcome". Solutions do not have to be costly or complicated. President Kelly has already implemented one change by issuing a practice directive for payment on account in respect of costs: "It's a simple procedure whereby costs on account are directed to be paid within 21 or 28 days, and that provides cashflow to solicitors, enabling them to pay expert witnesses, etc. It's very much a homemade solution, which has worked really well".

This is, of course, a review of all of the courts, and all are represented on the review group. President Kelly acknowledges that different courts have different needs, and different solutions apply: "The appellate courts don't have the logistical difficulties that trial courts have, dealing as they do mainly with written submissions and no witnesses. But perhaps introducing time limits in all courts might be useful. Public time in court is very expensive, both for litigants and the public purse".

The review group has advertised publicly for submissions, and while it has received some, at the time of our interview, the deadline of February 16 was some weeks away. Once all submissions have been received, the group will review them and begin the work towards formulating recommendations. The group has been given two years to complete its work and President Kelly expects to submit a report to the Minister for Justice in mid 2019.

Public engagement

Recent times have seen increased public engagement by representatives of the judicial

Judicial life

Originally from Dublin, President Kelly attended O'Connell School, UCD and King's Inns.

He was called to the Bar in 1973 and to the Inner Bar in 1986. He was appointed to the High Court in 1996 and was in charge of the Commercial Court from its establishment in 2004 until he was appointed to the Court of Appeal on its establishment in 2014. He became President of the High Court in December 2015.

Beautiful voices and good works

President Kelly has a wide range of interests outside of the courts. He enjoys classical music and is a Director of the Dublin Choral Foundation. For many years he was Chairman of St Francis Hospice in Dublin, and is extremely proud of his involvement in the development of the second St Francis Hospice in Blanchardstown, which opened in 2015. He is also Chairman of the Edmund Rice Schools Trust, which is responsible for running about 97 former Christian Brothers schools throughout the country, and is a member of the Council of the Royal College of Surgeons in Ireland.

> Ireland has the lowest number of judges per capita in the OECD, so judges are constantly under pressure. I've been President since December 2015 and on no day have I had a full complement of judges available to me, either because of vacancies or illness.

system in Ireland, including the recent televisation of two Supreme Court judgments. President Kelly is understandably wary of such initiatives extending to trial court. However, he feels that there is value in educating the public about how the courts work, and points out examples that he feels have been very successful: "I have judged the National Mock Trial competition for secondary schools on many occasions. It has attracted schools from all over the country; they are given a topic, and have to run a trial. Some have been really excellent in the way in which they've gone about their work".

Such programmes, he says, get young people interested in how the system works from an early age, and entrants come from a range of backgrounds, including those not traditionally associated with careers in law. He also mentions the long-running *Law in Action* programme on BBC Radio 4 as an example of how broadcast journalism can be part of the process of making legal issues clearer to the public: "The programme discusses recent decisions, and provides information as distinct from soundbites – what the case was about and what the legal issues are. These are not necessarily high-profile cases, but have an interesting element to them".

Resources

No discussion of reform of the courts or justice system can be complete without mention of the resourcing issues faced by President Kelly as he deals with the shortage of judges in Ireland: "Ireland has the lowest number of judges per capita in the OECD, so judges are constantly under pressure. I've been President since December 2015 and on no day have I had a full complement of judges available to me, either because of vacancies or illness".

Other jurisdictions have systems in place to deal with these difficulties; in England, for example, retired High Court judges or approved barristers form a panel of Deputy High Court judges, who can be called upon to sit.

One of the areas that's most demanding is the judicial review list: "It's taking up almost a quarter of the entire complement of High Court judges. I have nine judges assigned to it at the moment and it has a less than 5% settlement rate and a less than one in five success rate. It's hugely demanding of judicial resources and is something I think the review will certainly have to look at".

The Commercial Court, in which President Kelly has particular experience, is also a pinch point, particularly in the wake of Brexit: "The Commercial Court is alone in the commercial courts in these islands in that there is the possibility of public law issues being dealt with in it. Practically every judicial review of a wind farm project, and of major infrastructural projects, are now in the commercial list. They are very complex cases that take a huge amount of time. If Brexit issues are likely to be litigated, that will create further pressures".

Recent judicial appointments have gone some way to plug the gaps, but President Kelly points out that at best this keeps things running at the current level, which is not sufficient to meet the needs of the service: "There is a need for more judges to try and service the needs of the courts as they stand, and in anticipation of changes that are coming down the line in the very near future".

Responsibilities

A bewildering range of issues fall within the remit of the President of the High Court. One of the most onerous is that of responsibility for wards of court (of which there are approximately 2,700). The Assisted Capacity Act of 2015 will have a large impact, as it is intended to effectively phase out the wards of court system once commenced. However, this is likely to increase the workload in the short to medium term: "That's going to require an individual review of all 2,700 cases, so I, or more likely my successor, will be expected to deal with that, as well as provide for existing wards' needs".

Long-awaited legislation to allow for awards in the form of periodic payments passed into law in November 2017, and is welcomed, but hasn't yet been commenced.

The President of the High Court is also responsible for disciplinary matters for many professions including doctors, pharmacists, solicitors, vets, nurses, radiographers, and social workers. Latterly teachers, perhaps the largest professional group of all, have been added to the list.

"There are increases in work from my own point of view as well as increases in other areas handled by judges. If we are recommending better pre-trial procedures in this review group, there must be scope for persons who don't have full judicial status to be able to deal with elements of that. In Northern Ireland, for example, I think they have six or seven masters in the High Court and we have one here. With appropriate safeguards, we could probably use masters to deal with a lot of matters that are at present assigned to judges".

The President of course also runs the High Court with its complement of 40 judges, both in civil and criminal work, and a "really top-class staff" whom he says are under enormous pressure: "There are not enough of them, and really the IT system is so antiquated. For the last month we've had huge problems, with staff just after Christmas having to write orders in longhand because the system was down. That's a problem that really has to be addressed".

CYBER CIPHERER

Ahead of her participation in The Bar of Ireland's conference in May, cyberpsychologist Dr Mary Aiken spoke to *The Bar Review* about treating cyberspace as a specific environment, the impact of our relationship with technology on criminal behaviour and the judicial process, and protecting children in the digital age.

First published in *The Bar Review* **April 2018**

Having studied psychology in the 1980s, Mary Aiken was always fascinated by how scientific study could provide insight into the relationships between humans and technology. Two higher degrees (an MSc in Cyberpsychology and a PhD in Forensic Cyberpsychology) later, and after years of research and high-profile contributions to the field, Mary is one of the foremost experts in cyberpsychology globally.

While cyberpsychology is an established field within applied psychology, it is a relatively new concept to many. Mary explains: "Cyberpsychology focuses on the impact of technology on human behaviour. Cyberpsychologists study human behaviour mediated by technology in areas such as Internet psychology, virtual environments, artificial intelligence, gaming, social media, and mobile and networking devices. The past 20 years have seen an explosion in the development of information technology, to the point where people now spend a lot of their time in a space – 'cyberspace' – which did not exist previously".

We're all aware of the pervasive influence of the Internet in our lives, from the online case databases that make barristers' research so much easier, to our omnipresent smartphones, and the trend for sharing personal information and opinions through social media. Increasingly, the more problematic elements of this technology are becoming evident, from cybercrime and Internet trolls to problems with data protection. It's clear that many, if not all, of us behave differently when we're online. Mary says we need to start thinking about what she calls "the interdependent relationship between the virtual and the so-called real world": "There is a need to consider technology in a new way, a need for a paradigm shift to conceptualisation of cyberspace as an environment, as a place. Academic research in the field of environmental psychology supports the impact of environment on human behaviour – we now need to factor in that impact in cyber contexts".

No one's in charge

One of the most interesting questions in this context is why so many of us feel freer to break the rules online. Mary cites the "online disinhibition effect," where people may do things in the virtual world that they might not do in the real world, with or without anonymity. She talks about the concept of "minimisation of authority", whereby a person's status (as a teacher or police officer, for example) is not as readily appreciated in an online context as it is offline: "The reason we see 'cyber feral behaviour' online, from cyberbullying to trolling and online harassment, is that in cyberspace there is a perception that no one is in charge, and that is because the reality is that no one is in charge".

Mary has a particular interest in the impact of this on young people: "Psychological obsolescence, the disruptive impact of technology on youth development, is likely to produce a cultural shift which may leave present psychological, social and cultural norms behind, including respect for others, property rights, privacy, national security, and the authority of the police. What is the prognosis for a generation displaying increasing levels of narcissism and decreasing levels of empathy, inured by the consumption of illegally downloadable music, videos, software and games? What sort of criminal activities may this generation of 'virtual shoplifters' progress to?"

> Is cyberstalking simply facilitated by technology, or a new and differentiated form of criminal behaviour?

It's a scary thought, and one that Mary's specialist field of expertise – forensic cyberpsychology – encompasses. Focusing on criminal, deviant and abnormal human behaviour online, forensic cyberpsychology looks at how criminal populations present in cyber environments: "For many years efforts have focused on technology solutions to intrusive behaviour, arguably without consideration of how that behaviour mutates, amplifies or accelerates in cyber domains. I have been involved in a dozen different research silos from cyberstalking to cyberchondria, and the one thing that I have observed is that whenever technology interfaces with a base human disposition, the result is accelerated and amplified".

In the eyes of the law

Mary speaks about two types of cybercrime: crimes that pre-existed, but are aided by, technological advances; and, 'new' crimes that are only possible because of technology: "Technology has facilitated historical crimes such as fraud, and evolving crimes such as ransomware, sextortion and online child-related sex offending. Cybercrime is a growing problem in the modern world, from online insurance fraud to cyber terrorism".

Given the extraordinary pace of change in technology, it's difficult to see how police forces, and indeed legislators, can keep up with cybercrime. Mary argues that theories of crime, which of course were developed pre Internet, may need to be modified, and new theories developed, to apply to cyber environments: "Can theoretical scales or metrics developed and validated offline be empirically employed while investigating criminal behaviour manifested online? One of the most urgent areas requiring research and investigation is the classification of cybercrime; to date there has been a tendency to simply name apparent 2.0 versions by adding the prefix 'cyber'. Are bullying and cyber bullying the same underlying condition?

And importantly, is the literature on cyberbullying prior to the advent of the smartphone still relevant?"

She gives as a further example the crime of stalking: "Do real world stalkers and cyber stalkers share the same deviant tendencies? Is cyberstalking simply facilitated by technology, or is it a new and differentiated form of criminal behaviour? In the latter, observed differences include the emergence of more female stalkers, stalking of multiple victims simultaneously, and the ability of the stalker to access more of the victim's personal data".

While criminal justice systems are well aware of elements of cybercrime, from hacking and identity theft to child abuse material, IP theft/software piracy and organised cybercrime, the pace of change means it's vital to try to consider future iterations. For Mary, the key is to accept the concept of cyberspace as an actual environment and act accordingly: "The challenge for technology is perhaps to create an impression that there are consequences for the criminal use of technologies. The challenge for authorities is to replicate some semblance of real world order in cyberspace, on the surface web, and importantly on the criminal dark nets that are flourishing and thriving on the deep web".

Even if we manage this, crime in cyberspace also creates complications once cases come to the courts, not least for verification of evidence from online sources: "Verification and attribution is highly complex in cyber contexts. We understand the premise of real world staging of a crime scene, the planting or manipulation of evidence. However, it would appear that very little thought from a legal defence perspective has been given to the potential to stage a cybercrime scene. I am very concerned that we live in an era where convictions could potentially be informed by cell phone tower pings or text messages – when we know that cell towers can be hacked, and that text messages can be 'spoofed'".

Technology also has a role in detection, however: "While the barriers to participation in crime are likely to be reduced, at the same time we are fast approaching the point whereby every crime may leave some form of digital trace. In an age of omnipresent technology with cameras on practically every street corner, computers and mobile phones in every household, coupled with the propensity to generate and distribute self-incriminating images and videos, along with texts and posts on social media, it will be increasingly difficult for digital trace evidence to be entirely removed from a crime scene".

Thinking of the children

For those of us ordinary citizens who are not engaged in cybercrime, how our data is used and how we protect ourselves are vital issues, which take on particular importance in the case of children. The 'digital age of consent' refers to the age from which it is legal for data controllers to hold data gathered from minors, and the forthcoming European General Data Protection Regulation (GDPR), which comes into effect in May, will formalise age protective measures online. The EU has set the digital age of consent at 16, but each state will be permitted to decide a national age of consent. Ireland has opted for 13, the lowest age of digital consent allowed under the GDPR. Mary has been active in campaigning on this issue, appearing before the Oireachtas Joint Committee on Children and Youth Affairs just last February to provide expert opinion on the implications of cybersecurity for children and young adults.

Unsurprisingly, she has strong views on the subject: "When it comes to technology and children, the digital age of consent is both a security and a child protection issue. An arbitrary statement that every child at 13 is capable of consenting to the terms and conditions of online service providers is problematic given the potential risks they face. For example, companies can collect, record and share a child's home and school address, their location, their date of birth, their photos, phone number, their likes and dislikes, who they know, and the content of their conversations, including direct messages sent privately. Not only does this present a security risk to the individual child but, by direct association, it also presents risk to the family".

Mary is Adjunct Associate Professor at the Geary Institute for Public Policy in University College Dublin. She is an Academic Advisor (Psychology) to Europol's European Cyber Crime Centre (EC3), a member of the EC3 Academic Advisory Board, and a member of the INTERPOL Specialists Group. In January this year she was awarded a Global Fellowship at the Washington DC Wilson Center, a pre-eminent worldwide institution for in-depth research and dialogue to inform actionable ideas on global policy issues. She lectures in criminology and is a Fellow at the School of Law, Middlesex University, Fellow of the Society for Chartered IT Professionals, and has served as Distinguished Professor of the Practice of Cyber Analytics at AIRS, and Sensemaking Fellow at IBM Network Science Research Center.

She thoroughly enjoys her work, and feels it's an exciting time for the behavioural sciences, with many opportunities to help to inform policy, inform the law, and make a difference: "Relaxing will have to wait".

> Technology has facilitated historical crimes such as fraud, and evolving crimes such as ransomware, sextortion and online child-related sex offending. Cybercrime is a growing problem in the modern world, from online insurance fraud to cyber terrorism.

The Data Protection Bill 2018, which enshrines an Irish digital age of consent of 13, was submitted to the Seanad in February, and is currently under consideration. Mary points out that decisions on digital age of consent must take other legal issues into consideration: "The Irish digital age of consent must be informed by the Law Reform Commission's 2011 report 'Children and the Law: Medical Treatment'. The report recommended that when it came to persons under 16 there should not be a presumption of capacity to consent. The 2011 report involved the application of a 'mature minor' test, which has been applied in a number of states, sometimes in case law and sometimes in legislation, to a wide variety of legal areas involving decision-making capacity of children and young persons. Recent studies provide evidence that the use of certain social media platforms can negatively affect the mental health of young people – if Irish youth under 16 cannot give consent regarding their physical health, then how can they consent to online activity that may have an impact on their mental health?"

The role of parents in supporting and protecting their children in cyberspace is also crucial, and Mary feels that a higher digital age of consent would be helpful here: "Notwithstanding a young person's right to freedom of speech and to access information, the requirement for verifiable parental or guardian consent for those under the digital age of consent seems entirely appropriate and responsible. Parents and guardians know their child best, and are the primary custodians of their security and welfare. As educators we are constantly trying to engage parents in this process – a digital age of consent of 16 would mean that children aged 13, 14 and 15 would need some form of parental permission to engage with online service providers such as social media companies".

She accepts that for legislative purposes, there needs to be a focus on a specific age, but feels the Irish Government has chosen poorly: "An optimum digital age of consent can be informed by best practice in other countries: Germany and the Netherlands have both chosen 16. Ireland should adopt a protective stance, and arguably legislate towards the upper end of the relevant age band – that is, closer to 16 than 13 – in order to protect the children who are less well equipped to deal with the complexities that digital consent presents".

Non-stop

With such a fascinating field, it's not hard to see why Mary is constantly busy, travelling the world to speak on the issues, advising governments and private entities, and all the while carrying out her own research. Current projects include: an academic research proposal with members of the Europol Academic Advisory Group that will further the understanding of cyber juvenile delinquency; research regarding youth sexting behaviour conducted with INTERPOL, the LAPD, the London Met, and the Australian Federal Police; and, perhaps most interesting in light of current scandals, a white paper on algorithmic subliminal voter behavioural manipulation online, specifically in the context of election processes.

She's also still touring to promote her book *The Cyber Effect*, which was published in the US in 2016, and is on sale in over 100 countries. Her next book will focus on the impact of artificial intelligence on human behaviour, but meanwhile there is campaigning to be done: "I will continue to engage in policy debates here at home in Ireland. I was a member of the 2013 Government-appointed Internet Content Governance Advisory Group. I contributed to the 2016 Law Reform Commission's report on 'Harmful Communications and Digital Safety' and for the next few weeks, in my available time, I will be campaigning to get the Government to reconsider its position on the digital age of consent".

CSI: Cyber

Mary was involved in a research project on technology solutions to 'Technology Facilitated Human Trafficking' with the White House and this, in 2013, brought her work to the attention of the entertainment industry: "It all happened quite quickly. I was invited to meet CBS network executives in Los Angeles, a 15-minute interview turned into a two-hour discussion, and this was followed by an invitation to become a producer on a new show".

CSI:Cyber was inspired by Mary's work as a cyberpsychologist, and the lead character of FBI Cyber Crime Special Agent Avery Ryan, played by the Oscar-winning actress Patricia Arquette, was based on Mary. Mary feels the show was an excellent opportunity to inform and educate the public in an entertaining way about the risks inherent in the Internet: "Overall my experience was a very positive one. The show provided an incredible global platform and opportunity to inform and educate regarding cyber safety and security issues, to reach out and to raise awareness, and to do so in an engaging and entertaining manner. As they say in Hollywood, it's 'edutainment'".

A JUDICIAL VIEW

Ahead of his participation at The Bar of Ireland Conference 2018, Mr Justice Robert Jay spoke to *The Bar Review* about the Leveson Inquiry, the difficulty of regulating the internet, and life as a High Court judge.

First published in *The Bar Review* **June 2018**

Justice Robert Jay originally intended to follow in his father's footsteps (Prof. Barrie Samuel Jay was a consultant surgeon at Moorfields Eye Hospital in London) and pursue a career in medicine, but found that his interests lay elsewhere. An interest in history and English led to a plan to read history at Oxford University, but this changed at the last minute to law, and thus began a career that took him to the Leveson Inquiry and ultimately to the bench as a judge of the High Court of England and Wales.

Law didn't come easily at first: "I didn't find it immediately appealing. It took me a long time to begin to understand the legal method". However, it all came together "in time for the exams", and on being called to the Bar in 1981 he embarked, like so many young barristers, on a practice that encompassed a wide range of cases, from crime and family law to small personal injury claims and some commercial claims. As time went on he concentrated more on judicial review, public law, and larger personal injuries cases: "In the mid to late 1980s there were incredible amounts of work. Legal aid was still flourishing, and I acted for everybody – defendant insurance companies, plaintiffs on legal aid, plaintiffs who were funded by their trade union. There was far too much work to do, and it's difficult to say no – I think every barrister would tell you that".

In the mid to late 1980s there were incredible amounts of work. Legal aid was still flourishing, and I acted for everybody – defendant insurance companies, plaintiffs on legal aid, plaintiffs who were funded by their trade union.

He cites two successful cases as significant in his career. The first was a group action where he acted for the Ministry of Defence, who were being sued for failing to prevent, detect and treat post-traumatic stress disorder in soldiers. Covering the period from 1969-1995, soldiers involved had served in Northern Ireland, the Falklands, the first Gulf War, and in Bosnia, so there was vast detail to absorb, which was particularly interesting for a QC with an interest in history: "It was almost a uniquely fascinating case. It had everything: wonderfully interesting expert evidence, including psychiatric evidence; and, history, both the histories of the conflicts, and also of the understanding of psychological and psychiatric trauma. It had lots of legal interest and a huge amount of emotional/psychological interest. The experts in the case were intellectually extremely strong and taught me all I needed to know".

In the second case, in true common law fashion, he acted for the claimants, citizens of the Ivory Coast who claimed to have fallen ill as a result of allegedly toxic waste deposits from an oil tanker: "The challenge of that case was primarily the scientific evidence, which was complicated because it had things like sulphur chemistry and environmental modelling. Also, I was leading the barristers' team and it was quite a challenging exercise".

Leveson

By the time the Leveson Inquiry (see panel) came around, Justice Jay had extensive experience, and the UK Government's Legal Department – then called the Treasury Solicitor – was his largest client. It is not surprising then that his was one of a number of names put forward to Lord Justice Leveson for consideration, and in November 2011 he found himself acting as lead counsel in this extremely high-profile public inquiry into the culture, practices and ethics of the British press. During the course of the inquiry, Justice Jay cross-examined leading figures in the British media, politicians and celebrities, and the decision to livestream the proceedings meant that he also acquired something of an unexpected media profile, not least for his erudite vocabulary: "[Televising the inquiry] was a good idea because people could make up their own minds; it wasn't mediated by the press, who after all were the subject matter of the inquiry. However, I don't think we foresaw quite how that would work in terms of the dynamic of the inquiry". In the eye of the storm, however, things look very different, and he says that after a while, they simply forgot about the cameras: "There was just too much to think about!

One couldn't be self-conscious; [you had to concentrate] quite hard on what the witness was saying and what your next question might be – so you're not focusing on extraneous things like a camera". After many months of hearings, Lord Justice Leveson's report on part one of the inquiry made a number of recommendations, which have yet to be implemented. Part two was postponed pending criminal prosecutions concerning events at the *News of the World*, and it was announced earlier this year that it will not now take place. As campaigners on press regulation have recently been granted leave to bring judicial review proceedings regarding this decision, there's not much that can be said about that for now, but Justice Jay does endorse Lord Justice Leveson's report on part one of the inquiry, pointing out that its recommendations, which included a new independent body for press regulation with statutory underpinning, were partly inspired by the Irish model.

Challenges of modern media

Since 2012, when the Leveson report was published, things have changed radically for traditional print media. While it still retains the ability to hold the powerful to account, it does so in the context of rising costs and falling circulation: "They're all struggling. Young people do not read newspapers. My daughter is 18 and her friends get all of their news on a smartphone – and they don't pay for it either!"

He feels that, despite these challenges, the essentials of print media's responsibilities to truthful reporting remain unchanged, although it can be helpful to put this in a historical context: "I think their responsibilities have remained constant since the 18th century, or the 17th century when the press started. People forget how much more scurrilous in many ways the press was in the 17th and 18th centuries – completely outrageous and of course there wasn't any regulation. The obligations remain the same and most journalists adhere to them, and want to". Essentially, while it faces significant challenges, traditional print media is still subject to a range of laws and standards. The bigger issue these days is what happens online. While it's no longer revolutionary to say that social media and online communication have irrevocably altered our concept of privacy, it's also true that society, and the law, have yet to come up with an adequate regulatory response. Justice Jay has particular concerns: "It's not just the absence of regulation, it's the power that social media seems to give people. People wouldn't say certain things to your face, but they'll put it online and say completely outrageous things, which really there's no justification for. Because it's such an instant form of communication, you lose sight of the fact that it's also an indelible form of communication. These are all things which are very concerning because all of the responsibilities that attach to journalism do not attach to people who are blogging or commenting informally. There's no discipline, there are no rules: they can do what they like". He acknowledges that applying the law of defamation in these instances is difficult, in particular as, up to now, Facebook and Google, etc., have relied on the fact that they are classified as content managers rather than publishers to avoid litigation. Once again,

Romantic

Justice Jay lives in London with his wife Deborah, who is a writer, and his daughter. When not writing judgments, he likes to cycle, and plays golf (although not as much as he used to). He also enjoys cooking and reading, and is very interested in music and opera, particularly Verdi, Puccini and Wagner.

Playing the role of judge

Justice Jay was appointed to the High Court of England and Wales in 2013, and says he enjoys life on the bench, not least because of the lack of pressure: "There's almost a complete absence of stress because there are no clients, few deadlines, and you are in control of what you do.

"And by the same token there's no adrenaline, which, if you can control it, can be intoxicating. Any advocate will tell you, if she or he is starting up in a case, full of adrenaline, addressing a jury in an important criminal case, or maybe addressing the court of appeal in a complex point of law, it is a wonderful feeling, particularly as your mind and your mouth begin to work in harmony and one is not racing ahead of the other".

Life on the bench is very different: "I'm not alone – I've discussed this with my colleagues and they all say the same. You don't have to psych yourself up. It has its own satisfaction and there is an element of performance because you're still playing the role of the judge, but it's a different sort of presentation".

> It's not just the absence of regulation, it's the power that social media seems to give people. People wouldn't say certain things to your face, but they'll put it online and say completely outrageous things, which really there's no justification for.

Justice Jay is reluctant to give a view on whether this should change as he may one day find himself adjudicating on just such an issue in court, but he acknowledges that if we are not to designate them as publishers, then regulation will remain challenging: "I think one has to take it in stages. There are a large number of systemic issues: stories, and thereafter dissemination of data which is private. I think the public is more concerned about that aspect than the aspects of what users are saying about other users or about the world at large online. That I think is the first question and I think it is being considered, or has been considered, in a number of cases".

Big data

The recent revelations about Cambridge Analytica's use of Facebook have introduced yet another layer of invasion of privacy, with the concept of companies mining data without knowledge or informed consent. On one level, Justice Jay feels this has limited importance: "It depends who you are and how sensitive you are. When I go on certain websites, they seem to know what I've been buying and so they target their advertising and tailor it to me, which isn't telepathy of course: they have ransacked my data. "That's the only part of my data they're interested in – what I'm buying. If you've got unusual tastes or tastes you'd rather people didn't know about, then you proceed at your peril, because someone out there does know about it!"

Things get a little more worrying, however, when we consider the fact that we now know that our data can be used in order to influence the political process at home and abroad. Again, Justice Jay feels it's important to put things in a historical context: "It's not the first time this sort of thing has happened: targetting of particular groups, particular elections, operating in certain jurisdictions within a community, paid by the government to sow discord, disinformation and everything else for a political objective. In the past, political advertising was regulated to some extent – it still is regulated to some extent on the television. It's not particularly regulated in the traditional press, but online virtually anything goes".

So how can we deal with this? Justice Jay believes that only a collaborative approach has any chance of success, but even that has limits: "There could be a pan-European solution, imposed, or rather voted upon, by the traditional institutions of the EU. But realistically, people will be operating outside that, whether in the United States, the Russian Federation or China".

As yet, there has not been enough case law to indicate how the courts will deal with these issues, although Justice Jay points out that these days, virtually every defamation case involving the press will also be an online case because the publication will also be online, and in that instance the online material will probably be dealt with in the same way as the print: "Apart from Mr Justice Warby's case about Google and the right to forget, there hasn't been much of wide-ranging interest. I think in the next three or four years there's bound to be a lot".

CHANGING THE SYSTEM

Chief Commissioner of the Irish Human Rights and Equality Commission, EMILY LOGAN, spoke to *The Bar Review* about the Commission's work to advocate for human rights and equality.

First published in *The Bar Review* **November 2018**

Emily Logan's interest in human rights began early in her career when, as a paediatric nurse in Dublin's Temple Street Children's Hospital in the early 1980s, she witnessed evidence of child neglect and abuse at first hand: "I saw very severe poverty and neglect. One of my earliest memories was of a child that was brought into the accident and emergency department with what was called an NAI (non-accidental injury). The infant had been burnt on a cooker to stop it crying. That was very formative for me in terms of my concept of social justice".

A move to the NHS in the UK followed, and she spent 10 years in Great Ormond Street Hospital in London. On her return to Ireland, Emily became the youngest ever Director of Nursing at Crumlin Children's Hospital, and followed this by taking the same position in Tallaght Hospital. In 2004, the opportunity arose to apply to be Ireland's first Ombudsman for Children, a post she held until taking up her current role in 2014.

During Emily's time as Ombudsman, she dealt with a number of high-profile cases, most notably investigations into the deaths of children in care. She says that this issue was initially brought to her attention by a solicitor, the first of many positive interactions she has had with legal professionals: "There are a number of legal scholars and legal practitioners who were extremely good to me when I began – it was a small office but I had plenty of people who were willing to meet me and give me advice".

The legal side of human rights and equality

The Irish Human Rights and Equality Commission (IHREC) was established in November 2014 after the amalgamation of the Equality Authority and the Irish Human Rights Commission. An independent Commission, with 15 members appointed by the President of Ireland and accountable to the Oireachtas, its stated role is to "protect and promote human rights and equality in Ireland and build a culture of respect for human rights, equality and intercultural understanding in the State". Within this wide remit, the Commission engages in a long list of activities, including a sizeable, and significant, legal element.

The Commission can intervene as *amicus curiae* in the superior courts in Ireland: "We are a neutral party bringing in information that may be of assistance to the court, such as international jurisprudence, either from the European Court of Human Rights or commentary and standards that apply in international human rights law".

A recent and significant case where the Commission took this role was *NHV v Minister for Justice and Equality*, regarding the right to work of people in direct provision (see panel): "The International Protection Bill was going through the Oireachtas and the Commission has a statutory power to give its views on draft legislation, and the implications for human rights and equality. We had recommended that people in direct provision should be given the right to work because we were one of only two countries in Europe where that didn't happen, so that's why we intervened as *amicus* in this case".

Under Section 40 of the Commission's enabling legislation – the Irish Human Rights and Equality Commission Act 2014 – the Commission can also offer legal assistance or representation to individuals or groups who contact it directly for assistance. Emily says that these generally refer to cases before the Workplace Relations Commission (WRC) or the courts (see panel): "We are guided by the legislation and our team must decide if the matter raises a question of principle or if it would be unreasonable to expect a person to deal with the matter without some kind of assistance".

By the very nature of the Commission's work, many of the people who contact it are among the most marginalised and vulnerable in society, so this is a crucial concern.

Emily raises some concerns about recent changes to the legislation governing the WRC and discrimination cases: "There is no statutory requirement that decisions of the Workplace Relations Commission, arising from complaints of discrimination, are published in anonymised form, and we would like to see more visibility on that. It would allow the Commission to communicate with people about what discrimination is, what kind of cases arise, and they would know to come to us. It would also allow us to generate greater public debate about discrimination".

Emily draws particular attention to what are known as 'Section 6' cases, which deal with declarations of incompatibility with the European Court of Human Rights: "When legal practitioners are undertaking a case that is incompatible with the European Convention on Human Rights, they're obliged to inform the Commission. I would strongly encourage them to please do so because that's one of the mechanisms by which we can identify high-impact *amicus curiae* cases, and is a critical mechanism for the Commission".

The Commission also has own volition powers of enquiry under Section 35 of the legislation, but these come with an onerous threshold: "There has to be a serious violation of human rights or equality of treatment; a systemic failure to comply with human rights or equality of treatment; the matter is of grave public concern; and, in the circumstances [it is] necessary and appropriate to do so. We have to meet all four criteria".

The Commission has yet to invoke such an inquiry, but Emily says it has concerns about a number of "egregious issues", from human trafficking to Traveller accommodation, and constantly monitors to see if its intervention would be appropriate.

Changing the system

Aside from these very visible examples of its advocacy, the Commission also develops policies to help change cultures of inequality and discrimination both in the private sector and in public and semi-State bodies. It is developing a number of codes of practice in areas such as sexual harassment, family-friendly work environments, and equal pay for like work: "These will serve as formal guidance to employers for how they should interpret employment and equality law". The Commission has also partnered with the ESRI over the last two years in a number of research projects to help develop an evidence base for its policy recommendations. A number of these have already been published, covering areas such as discrimination and equality in housing, attitudes to diversity, and research into who exactly is experiencing discrimination in Ireland.

Of course, carrying out research, and writing reports and guidelines, while laudable, bring no guarantees of change. For public bodies at least, this is where the Public Sector Equality and Human Rights Duty comes in. The Duty is also part of the Commission's founding legislation, and sets out the responsibilities of public bodies in Ireland to promote equality, eliminate discrimination and protect the human rights of employees, customers, service users, and everyone affected by their policies and plans. The Commission is engaged in pilots with six organisations – Monaghan County Council, Cork City Council, University College Cork, The Probation Service, the Irish Prison Service, and the Community Action Network – to develop systems that will help them to achieve these aims. Says Emily: "We have to have two relationships. We have the monitoring, or oversight, of human rights and equality, and that's a more difficult and formal role, and then there are occasions like this where you're working with public bodies to try and set up exemplars of good practice".

Current issues

The Commission's next major project will focus on discrimination against people with disabilities. The Irish State ratified the United Nations Convention on the Rights of Persons with Disabilities earlier this year, and will report to the UN in two years' time. The Commission is setting up a Disability Advisory Committee this autumn, and aims to have at least half of its membership comprised of people with disabilities.

Older issues are ongoing too. Emily says that discrimination on the basis of race and gender remain huge concerns. Housing also remains a priority. The Commission is particularly concerned with two aspects of the housing crisis: increasing reports of people being discriminated against in the rental sector because they are in receipt of Housing Assistance Payment (HAP); and, ongoing issues around Traveller accommodation.

Another area of concern is the human rights and equality implications of Brexit: "There is a Joint Committee as part of the Good Friday Agreement made up of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. Up to now, the Brexit debate has been dominated by trade issues, but we're working in the background on human rights and equality across the island of Ireland. What's called the equality acquis, the case law on equality, is protected, but we are concerned about human rights mechanisms such as access to the Court of Justice of the European Union for individuals living in Northern Ireland".

Making human rights and equality Government policy

While the Commission is answerable to the Oireachtas, the relationship is a two-way street: "We can comment on draft legislation – we interact at heads of bill stage to comment on the human rights and equality implications. We can also circulate commentary to members of the Oireachtas ahead of presentation of legislation to see if we can influence through the legislature if there's something that we think could be stronger".

In the past the Commission has been invited to give its views to the Committee on the Eighth Amendment of the Constitution, and has been very active in the transposition into law of the judgment on the right to work for those in direct provision. Most recently, it has made a submission on the proposed changes to Article 41.2 (the place of women in the home). Asked if she feels the views of the Commission are listened to, Emily answers in the affirmative: "Our credibility is growing. In the case of Article 41.2, we didn't ask the Oireachtas to go in, we were invited. We have very good access to Government ministers, to all members of the Oireachtas, and to senior officials who are drafting legislation".

The joy of work

Emily holds an MSc in psychology, an MBA from the Smurfit Business School in UCD, and an LLM from Queen's University: "I've always studied while I worked".

She's part of a book club, and a "culture club" ("We take trips to interesting places, and are planning a trip to Berlin"), and enjoys walking, hiking and travel. For Emily though, the line between work and home is a thin one. "I'm a person who gets a lot from my work. For some people if you enjoy your work it can really contribute to your identity and sense of self. I've been very lucky in all of the jobs I've had that I've found them really fulfilling".

Moving forward

The Commission is currently in a consultation process for its second strategy statement for 2019-2021. Emily says that the new strategy will refine its strategic priorities: "I think we weren't far wrong in terms of some of the areas that we prioritised [in our first strategy]: we prioritised socioeconomic rights, so housing has dominated most of our case work, and also the right to work".

Emily's five-year term as Commissioner will be up next year, and she plans to reapply for a second term: "When you're creating an organisation like this the first two years are taken up by internal organisational issues. While it's very exciting to be able to mould that, I sometimes feel impatient to move to a point where we're getting results, having an impact".

A new Ireland

Emily says that in comparison to many other jurisdictions, Ireland has strong legislation to protect human rights and equality: "But where we're weak is in implementation". In the week in which our interview took place, the Scally Report into issues around cervical screening was published. Claims of misinformation, withholding of information and misogyny are all very serious, and strike to the heart of the Commission's work in trying to change institutional cultures and their approach to human rights and equality. One could be forgiven for thinking that these systemic issues will be difficult, if not impossible, to resolve, but Emily believes that real change can happen: "I'm an inveterate optimist, and we in the Commission are a group of determined people. Changing culture is a long-term project but we can be encouraged by incremental changes, not least that Ireland at the moment seems to be bucking the trend in parts of Europe and the US, where human rights are being rolled back". Recent years have indeed seen extraordinary social change in Ireland, with referendums on marriage equality and abortion leading to much discussion on Ireland's move from being perceived as one of the most conservative societies in Europe to seemingly one of the most socially liberal:

"There has been a shift in terms of awareness of social justice. We see ourselves as compassionate. There has been no negative political discourse here – no movement to take away rights – and I am very encouraged by that".

> I'm an inveterate optimist, and we in the Commission are a group of determined people. Changing culture is a long-term project but we can be encouraged by incremental changes.

Sample cases where the IHREC has had a role

NHV – Proposals on the right to work of people in direct provision

The Commission exercised its function as *amicus curiae* in the landmark Supreme Court case on the right of an individual living in direct provision to earn a livelihood. As *amicus curiae* the Commission's core submission to the Supreme Court was that non-citizens, including those seeking asylum or subsidiary protection, are entitled to invoke the right to work or earn a livelihood guaranteed under article 40.3.1 of the Constitution. The case was also significant as, by the time of the hearing, the person at the centre of the case had been granted refugee status; however, the Supreme Court decided to proceed stating that: "this case is plainly a test case supported as it is by the Irish Human Rights and Equality Commission, and therefore, the circumstances will recur. It is probably desirable that it should be dealt with now rather than to wait for another case to make its way through the legal system".

The 'P Case' – Protection for victims of human trafficking

The Commission appeared before the High Court as *amicus curiae* in the judicial review proceedings entitled *P. v Chief Superintendent of the Garda National Immigration Bureau and ors*. The case concerned a Vietnamese woman who was discovered by the Gardaí locked in a cannabis "grow house" and who was charged with drugs offences. The woman claimed she was a victim of trafficking and that the failure of the Garda to recognise this deprived her of her right to avail of the protection regime for such victims. The Commission's submissions questioned the adequacy of the protection regime for persons who claim to be victims of human trafficking and, in particular, the administrative scheme for the identification of such victims, and whether it met relevant human rights standards. The Court found that the State's administrative scheme for the recognition and protection of victims of human trafficking was inadequate to meet its obligations under EU law aimed at combatting trafficking in human beings.

A Family v Donegal County Council

The Commission provided legal representation to a Traveller family in judicial review proceedings against Donegal County Council. The legal challenge focused on the Council's decision to defer the family's housing application, with an emphasis on the decision-making process, including the fact that the decision was taken without any opportunity for input from the family concerned.

An Applicant v A Limited Company

The Commission provided legal representation to a woman in her successful challenge of discrimination under the Equal Status Act (ESA)'s housing assistance ground. The WRC determined that the woman had been directly discriminated against on the housing assistance ground, and ordered compensation to be paid. The WRC also instructed that employees acting as the company's estate agents be provided with appropriate training in relation to all provisions of the ESA.

PROTECTING OUR PRIVACY

The New York Times has called Helen Dixon "one of tech's most important regulators". Ireland's Data Protection Commissioner spoke to *The Bar Review* about the landscape post GDPR and whether the big tech companies can ever really be regulated.

First published in *The Bar Review* **December 2018**

Helen Dixon spent the first decade of her career working for large US IT companies with Europe, Middle East and Africa (EMEA) bases in Ireland, and it's a background that has been very useful in her role as Ireland's data protection regulator: "It taught me that compliance is taken very seriously in US companies. I also learned that no matter how devolved and delegated the functions are, the US HQ is always pulling the strings, so I go to the US with my senior staff a couple of times a year to make these companies aware of the laws they have to comply with in the EU".

The General Data Protection Regulation (GDPR), which came into effect in May, gives the EU the strongest data protection laws in the world. There is no equivalent framework in the US, so it's important to keep the US HQs informed, not least about the tougher enforcement regime that now applies: "It's been difficult for US management to grasp what the bite is in EU data protection laws in the absence of these large fines that have now grabbed everyone's imagination".

The work of the Data Protection Commission (DPC) reaches into all sectors of Irish society, so Helen is anxious that it is a trusted entity: "I want us to be seen as expert in our area, relevant in this digital era, and as fair".

> It's been difficult for US management to grasp what the bite is in EU data protection laws in the absence of these large fines that have now grabbed everyone's imagination

Organisations (both public and private) and members of the public can go to the Commission's website for a wealth of information about compliance with the GDPR, how to protect ourselves online, and what our rights are in relation to our personal data: "I want the public to know that we're here, and that where they can't get any joy with an organisation they're dealing with, we are happy to receive their complaint and will seek to amicably resolve it as efficiently as possible. "For companies, the public sector and charities, our Annual Report includes case studies that we hope are instructive. We also need organisations to know that the DPC is an enforcer, and where necessary we will initiate inquiries, apply corrective measures and take enforcement actions, including fines, but that in conducting these inquiries, we will follow fair procedures".

Six months in

Given that the legislation underpinning the GDPR requires mandatory reporting of data breaches, it might be expected that the numbers of reported breaches – and of complaints to the Commission – would have increased in the six months since it came into force, and that has indeed been the case. At time of going to print, 3,313 breaches, and 2,316 complaints, have been notified to the Commission since May – almost double the amount for the same six-month period in 2017. The number of consultations has increased too, as companies and Government departments look to the Commission for assistance in meeting their statutory obligations. Helen says the Commission is "incredibly busy", but with an increased budget of €15m for 2019, and a staff of 120 highly skilled investigators, legal experts and technologists (up from 28 when Helen took up her post in 2014), she feels they are equal to the task. Mandatory reporting has also resulted in a wider range of breaches coming to the Commission's attention, but the most significant number are still a result of human error, such as once-off incidents where the wrong letter is put into an envelope, although they are also seeing a significant number caused by coding errors. In terms of complaints, those regarding requests for access to personal information are still the most common, whether it's an organisation ignoring a request for access, giving incomplete access, or poorly trained staff who do not understand their obligations. Unauthorised disclosure is the second most prevalent cause for complaint, although Helen says requests around rights to erasure are on the rise.

The DPC also has the power to initiate own-volition enquiries (indeed it had this power prior to the GDPR): "As a data protection authority that's independent of Government, civil society bodies and industry, we pursue what we identify as the areas of risk in line with our statutory remit". Assistant Commissioner Tony Delaney heads up a special investigations unit, which is currently conducting investigations into data protection issues around the Public Services Card, and in relation to CCTV automatic number plate recognition. The Commission is also conducting an own-volition enquiry into a recent breach notification from Facebook, where timeline data was accessed and up to 30 million users were affected: "These own-volition enquiries are extremely important to our office and some of the biggest successes we've had in protecting data subject rights have arisen out of those".

Depending on the results of these investigations, which Helen expects will be concluded in the coming months, the DPC has access to a range of corrective measures: "We can order the halting of processing. We can point out non-compliance and require that it is brought into compliance. We can fine. In fact we're obliged where we find infringements that would cause us to apply a corrective measure, to also consider applying a fine".

The road to compliance

Helen is broadly happy with the level of awareness and compliance in Irish organisations post GDPR; she refers to a recent survey by McCann Fitzgerald and Mazars, which reports high levels of optimism among Irish companies about their compliance. The survey sounds a note of caution too, she says: "As enforcement starts to kick in, as the DPC concludes the inquiries it has, and as individuals begin taking civil actions in the courts for damages, perhaps the optimism will wane, but it's presenting a very positive picture".

She points out that this will be a long road: "Because [the GDPR] is principles based, it will always require in-context interpretation and application. I think we're going to learn through case law both at home and through the Court of Justice in the European Union, and through our own case studies".

Helen feels that public engagement has been good too, but there's some way to go in terms of helping us to fully understand the risks we take when we allow entities to use our data. The options currently offered by many companies don't help: "There is a growing awareness from members of the public that signing up to things is a matter of choice. But for us as a regulator, we think the choices still aren't good enough. There's still a little bit too much 'you either get off the platform or you use it as it's offered to you' and there's very little choice in the middle". She's also aware that many organisations, whether by accident or design, are not making it easy for users to choose: "We are seeing evidence of some websites and apps that are purporting to provide new consent options that are clearly cumbersome to use. I think that we as a data protection authority, with our fellow authorities in the EU, need to become clear about the standard that we say is necessary in this area and about standards that simply don't comply".

Taking on big tech

Helen's position is a unique one. With the European headquarters of the world's biggest internet platforms based here, breaches and complaints concerning those companies from anywhere in the EU are routed through Ireland. The question has been asked more than once if these companies can every truly be regulated, and if so, how? Helen is quietly confident that they can, but points out that it's not purely a data protection issue: "A data protection authority like the Irish DPC ends up the *de facto* regulator of an entity like Facebook because there may be no competition regulation in terms of whether there is a dominant position, and an abuse of a dominant position, but there are also other aspects of regulation of these platforms that need to be looked at, for example whether they need to be regulated as media companies. That is for policymakers and lawmakers to decide. In Ireland, there's been quite a long debate about whether a digital safety commissioner would be introduced and that's a whole area of regulation that the Law Reform Commission called out in its 2016 report".

While these issues don't fall within the definition of personal data processing, and thus within the remit of the DPC, other issues obviously do, and Helen believes that the GDPR gives her office the power to make a real difference: "If we can enforce the principles of minimisation, of privacy by design and default, those alone will make a huge difference. Some of the inquiries that we have underway are exactly targeted at analysing what the objective standards the platforms need to reach in these areas are. And I think we will start seeing results arising from that".

Because [the GDPR] is principles based, it will always require in-context interpretation and application. I think we're going to learn through case law both at home and through the Court of Justice in the European Union, and through our own case studies.

She doesn't expect it to be easy: "The decisions we make will undoubtedly end up in court. Controllers are entitled to challenge the validity of decisions, and ensure that the courts are in agreement with the process we followed and the outcomes we reach. The stakes are high and that's fine. Companies have to bear up the reputational issues when they challenge decisions and we will be hoping our decisions will be as unimpeachable as possible. But I don't think they're going to be taken lying down".

Obviously Helen can't comment on ongoing cases, but she refers to None of Your Business (noyb), the NGO founded by online privacy activist Max Schrems, which has published details of the complaints that he has lodged in Europe, and which are being handled by the Irish DPC. She describes his high-profile complaint against Facebook as "one of the significant investigations that we have underway", and says it is raising fundamental issues: "The complaint asks the question: if we've consented to the terms of service that embed a privacy policy, are we essentially saying we're consenting to all of the personal data processing? And if so, is that the quality of consent, with all the specificity and well-informed nature of consent, that would be anticipated under GDPR?"

An individual's right to choose not to read the terms and conditions – to just 'click ok' – also has to be taken into account, but not as a way to avoid responsibility: "I think about it in terms of nutrition labels on food. How far does the company need to go in terms of ensuring any of us have read them? What we have to decide is: if a company meets the objective standards set out in the GDPR for concise and intelligible information, and the provision of all that's required in articles 13 and 14, is it the concern of the company whether individuals read it or not?"

She clearly feels that to some degree it is: "There should be comfort when we eat something that even if we haven't read the nutritional information, it wouldn't be for sale if it was toxic. Equally, when we click into an internet service we should, whether we've read every detail of the privacy policy or not, have a minimal expectation of our safety, and we have to ensure that that's the point we get to under the GDPR".

Thoughtful user

With all the information at her disposal, and the cases her office comes into contact with, Helen could be forgiven for developing a healthy paranoia about using the internet, but she tries to take a balanced approach: "All of us need to benefit from the utility of the technologies and applications that are available.

But equally I like to be thoughtful about it in terms of being conscious of when I am giving my data, when I am going to end up profiled. But I think being overly paranoid doesn't help any of us".

She sees her own personal use as part of the bigger picture of data protection: "What I'm trying to balance personally is also the job of data protection authorities, which is to try and make sure that while we are benefiting from these new technologies, they are applying the GDPR principles and protecting us at the same time.

"This is important when we think about what's coming down the tracks with more and more facial recognition type applications, artificial intelligence and machine learning".

It's something we all need to be aware of: "These technologies signify an outsourcing of thinking and decision-making to technology. But where will that leave us as human beings? I think all of us need to be thoughtful around the bigger questions of our interaction with technology, and keep that ability to think for ourselves. Use the technology but keep other resources and outlets in your life".

Renaissance woman

Helen Dixon completed an undergraduate degree in applied languages, followed by a master's in European Economic and Public Affairs. She spent a decade working for two US IT multinationals in Ireland, before becoming the first ever externally appointed Assistant Principal Officer in the Irish civil service, where she worked in the Department of Jobs, Enterprise and Innovation, first in the area of science, technology and innovation policy, and then in economic migration. She was Registrar of Companies for five years before taking up her current post in 2014.

She has a master's in governance, a postgraduate diploma in computer science, and a postgraduate diploma in judicial skills and decision making, and successfully passed all eight subjects of the FE-1 Final Examination of the Law Society of Ireland in one year. She says that she has very little free time, as she travels extensively as part of her work, but is a keen long-distance runner, enjoying mountain running and ultrarunning, and has recently taken up gymnastics.

Children's rights

The DPC has a specific role under the 2018 Act in encouraging organisations to develop codes of conduct around the protection of children, and it's a role it takes very seriously: "We're rolling out a very significant consultation at the end of this year. We're proposing a series of issues that we will seek views on around how children should exercise their rights, and when they are competent to exercise their own rights independent of their parents".

The DPC will be making lesson plans for schools available in January, which will aid the discussion and education around the issues. The plans were piloted in three schools earlier this year, and the results were interesting, for example around what children themselves have to say on the age of digital consent (recently set by Government at 16): "We found that children gave different answers depending on their stage of development: 10 to 11 year olds said the age of consent should be 20 or 21, 14 year olds tended to say it should be about 16, whereas 16 year olds said it should be 14!"

The aim is to publish guidance for organisations, and for children, that will lead to the generation of codes of conduct within the industry: "It's important for the Irish DPC to do this because we supervise the big internet companies, so this won't only affect children in Ireland, it will hopefully positively impact children across the EU".

ON GOOD AUTHORITY

LSRA CEO Dr Brian Doherty talks to *The Bar Review* about a very busy year in the Authority, and the tasks ahead.

First published in *The Bar Review* **February 2019**

Brian Doherty has had quite a busy year and a quarter in the Legal Services Regulatory Authority (LSRA). The Legal Services Regulation Act 2015 set out an onerous list of statutory deadlines for the fledgling Authority to meet, and it's Brian's job as CEO to steer that process.

A former barrister who moved from practice to spend 17 years working first for the Police Ombudsman for Northern Ireland and then the Garda Síochána Ombudsman Commission, Brian brings a wealth of experience to his role. But why would anyone want to take on such a task?

Since taking on the role in September 2017, he and his small team of 12 staff have completed reports on legal partnerships and multidisciplinary practices, a report under Section 120 of the Act into various matters relating to barristers, and a report on education and training in the legal profession. They've also set up the Roll of Practising Barristers, and are working on the development of frameworks for legal partnerships and limited liability partnerships, new regulations on personal indemnity insurance, a code of practice for barristers, and on the Authority's complaints function, which will be operational later this year.

Setting up a brand new body like the LSRA is a pretty daunting task, with the professions, the public, and the Government, in particular the Departments of Justice and Public Expenditure and Reform, watching avidly to see how things progress. A former barrister who moved from practice to spend 17 years working first for the Police Ombudsman for Northern Ireland and then the Garda Síochána Ombudsman Commission, Brian brings a wealth of experience to his role. But why would anyone want to take on such a task?

"I'd done 17 years in policing, and thought I could do some good in a different regulatory sphere. It is a challenge, but the most interesting time periods in both the Police Ombudsman and the Garda Ombudsman were the first couple of years when we were getting set up and everything was new. As well as that, putting together and motivating a team of people was one of the things I enjoyed most, trying to inspire a culture of independence, with proportionate investigations, and proper care for both the complainant and those that were being investigated, keeping in mind their welfare. The idea of doing that again from scratch was of great interest".

Uphill task

Because of the strictures contained in the Act, not least of which is the requirement that the LSRA will remain an independent body, all of the Authority's work has been done while Brian and his team try to formulate what their longer-term resourcing and funding needs will be: "There was a series of statutory deadlines that we had to meet, so even as we were trying to define what size the Authority should be, and trying to build things like the IT infrastructure and good governance, we've had to work to hit these deadlines. For reasons of independence the Department of Justice couldn't just open us up a building and hand us 30 staff; we've had to start small and grow. As well as that, because ultimately we are to be funded by a levy on the professions, we're very mindful of spending. We have been defining what our staffing needs are, and we will be requesting sanction from the Department of Public Expenditure and Reform, as is envisaged in the Act, before we go to full recruitment".

There are also plans for some staff to transfer from the Law Society, and that process is underway. It's still unclear exactly how the levy on the professions will operate, but Brian is anxious to emphasise a strong focus on financial oversight: "To date we've been receiving advances in funding from the Government, obviously in anticipation of the levy being implemented. We've been living within those means, so it's not a culture of spending. We've been very careful to make sure we're spending only what is necessary".

Barristers might wonder whether such funding is best spent on, for example, a disciplinary function, when the professions have their own disciplinary processes. Brian clarifies: "We will take over quite a bit of that function. For example, the Law Society will stop taking complaints in relation to the areas covered by the Act: inadequate service; excessive fees; and, misconduct. The LSRA will be the independent investigator. However, the Act and the section related to complaints actively promotes and puts on a statutory footing that there should be efforts to informally resolve complaints and promote mediation and informal resolution, and encourages the legal practitioner to engage with those efforts. It encourages a proportionality built within the Act itself, that where possible most things can be resolved, but still allows for misconduct to be directed appropriately".

The complaints function will be operational from July of this year, and the Authority is currently working to ensure that resources such as staff and IT infrastructure will be in place to meet this challenging deadline.

On a Roll

One of the most significant projects the Authority has undertaken is the establishment of the Roll of Practising Barristers, and this has now been completed with, according to Brian, great liaison and engagement from The Bar of Ireland. The Roll does not just include barristers who are members of the Law Library, and Brian is confident that it is now a comprehensive document: "We've done a huge amount of work to publicise it and to publicise people's obligations in relation to it. We intend to publish the Roll on our website, and hopefully, if there is anyone that should be on it that's not on it, that would serve as an incentive. It will be a criminal offence to provide legal services as a barrister when you're not on the Roll, so that should be another very clear incentive".

The Roll will not be a static document: "People will come off it and come on it again. As well as that under the Act we can enhance the Roll. We can issue regulations and include additional information. Our goal was really to establish the Roll first and then to examine whether it should be enhanced at a later date. We're pleased at the moment with the numbers. We are aware that there may be one or two people that we still need to reach and efforts are continuing".

Another issue of significant interest to the professions has been the Authority's work on education and training. With the assistance of consultants from outside the State, the LSRA completed its Section 34 report on education and training in September; this contains 14 proposals for change, which Brian describes as a "huge commitment" and "far reaching". The Authority feels that further consultation is needed, and plans a symposium during 2019. They've also received a number of informal submissions on the report since its publication, which Brian welcomes: "It's been a healthy process and very informative. And the fact that people have made unsolicited submissions post the publication of the report shows you the level of interest. Education is very personal. It's a big investment that takes you away from home and family life. There's a financial commitment and it's something people take very seriously and have a very strong viewpoint on".

No authority is an island

Brian is very happy with the engagement from the professions so far, and is mindful of the Authority's obligations in this: "I've had some very productive engagement with professional bodies and we've engaged in such a way that respects the independence of the Authority. In our strategic plan we listed a set of values and we included in those that the Authority would be transparent and accountable. One thing I'm very keen to do as Chief Executive Officer, and hopefully the Roll of Practising Barristers was one of the first steps in this, was to try and provide as much information as possible, that will assist people in fulfilling their obligations".

One of the most significant projects the Authority has undertaken is the establishment of the Roll of Practising Barristers, and this has now been completed with, according to Brian, great liaison and engagement from The Bar of Ireland.

He makes the point that independence does not and should not preclude engagement and collaboration: "Independence does not require that you live in isolation, or that you act forever in secret. The idea should be that we provide enough information for the consumer to understand their rights and how the system is going to work, and also for the legal practitioner that might receive a complaint, so that they can approach it in the appropriate way".

Engagement with the Department of Justice has also been positive overall, he says: "There are always issues in which not everyone can be 100% aligned, but I find that we're able to work through those in a reasoned way. The Act itself has some challenges in its drafting and it's been important that both ourselves and the Department have an understanding of what each other's interpretation is".

Brian draws on his experience in the Police Ombudsman for Northern Ireland to come to a very clear interpretation of independence in these circumstances: "Independence was the cornerstone of that. But it wasn't a nebulous construct. It was independence through independent evidence gathering, independent decision making and independent reporting. You kept going back to those principal tenets. I'm very proud of the work that we did, and I've taken it wherever I went".

Engagement with the public is also part of the Authority's remit, particularly in relation to the complaints function, but this is in very early stages: "The profile of the Authority itself will rise over the coming year. We're doing some work at the moment, to decide what that should look like. We're meeting shortly to look at very simple things like how the Authority is branded".

He's confident, based on public interaction with the Authority so far, that they can meet the public service remit: "I'm very encouraged by the public consultation we did for the section on education and training: we had 38 submissions from organisations and I think there were 730 different pieces of evidence ultimately gathered. So the profile is starting to rise, but it's more useful for us to to review when the complaints function starts, so that those people who may need the service provided by the LSRA know about it and can access it".

Challenges

So what have been the biggest challenges facing the Authority in this first year as a fully operational entity?

"One of the strengths of the Act is that it demands that we do a lot. That's a challenge. It's also a strength because it gives a broad remit to the LSRA, which means that when it's fully established, the LSRA will have a real relevance. But that's a challenge".

While the Authority has met all of the statutory deadlines set by the Act thus far, it's definitely a case of 'a lot done, a lot more to do': "Sitting in 2019 and mapping out what we have to achieve could be considered daunting and it's certainly a challenge to achieve everything within the year. There are more deadlines within the Act, and some of them are annual. So that drives forward constant momentum to try and achieve".

Recruiting staff to make all of this happen is likely to be a challenge too: "The LSRA exists within the legal services market in Ireland, so some of the same things that are impacting upon that market, for example recruitment of lawyers, impact on us. And we've got to go to the Department of Public Expenditure and Reform for sanction for the level of remuneration; others in the marketplace are not restrained in such a fashion".

There have been frustrations too: "The biggest frustration for me has been a perception that seems to have grown that we're not as active as we actually are, that we're not producing anything. People think that because the Act commenced in 2015, that by now we're four years old. But the actual Authority itself wasn't established until October 2016, and I didn't start until September 2017".

He sees this period of establishment as a positive though: "It's an exciting time, those periods of time trying to build the team – it's great fun".

Working with his team has been one of the most positive aspects of the past year: "Despite some challenging deadlines – we had staff working on New Year's Eve to ensure the Roll was as up to date as possible within the calendar year – they've just been superb".

He's also been particularly happy with his interactions with solicitors and barristers: "There has been a real debate about the emergence of the Authority, but very little by way of resistance. Some people do come at it from a different viewpoint, but for most, when you talk them through it and explain what we're here to do, there have been a lot of very positive, welcoming comments".

"We're all working at this, so I want to try and bust the myth that we're this huge organisation that isn't producing anything – we're a very small organisation that's been doing a lot".

Guitar man

Dr Brian Doherty was called to the Bar in 1996, and initially practised in Belfast. He joined the Office of the Police Ombudsman for Northern Ireland when it was set up in 2000 as one of the first civilian investigators, working on allegations of misconduct against the then RUC, later the PSNI. In 2007 he moved to the Garda Síochána Ombudsman Commission as a senior investigating officer, and had progressed to the role of acting deputy director of investigations by the time he returned to the Northern Ireland Police Ombudsman in 2014 to run the Current Investigations Directorate. He remained in this role until September 2017, when he returned to Dublin to take up the post of LSRA CEO.

Brian is married to Kathryn, and they live in Rush in north Co. Dublin with their two daughters, Tess (10) and Maeve (6). An active member of the Rush Tidy Towns Committee, weekends are often spent with his daughters taking part in the Rush beach clean. Brian's also a keen musician, with a collection of electric and acoustic guitars, and is teaching himself to play piano.

AS JUSTICE REQUIRES

Claire Loftus, Director of Public Prosecutions, talks to *The Bar Review* about the challenges of dealing with the digital age, improving services for victims, and moving with the times.

First published in *The Bar Review* **April 2019**

Director of Public Prosecutions (DPP) Claire Loftus refers to her career in criminal law as a "natural progression from an accidental start". A brief period of post-qualification experience in private practice ended when she took a post in the Chief State Solicitor's office in 1993 and, apart from a period working on the Finlay Tribunal into the infection of the blood supply with hepatitis C, she remained there in the Criminal division until 2001, when she was appointed as the State's first Chief Prosecution Solicitor within the DPP's office.

In 2009 she became Head of the Directing Division, and two years later she was appointed DPP. Coming from a long line of public servants, including her father, who was a public sector solicitor, she values the opportunity to offer public service: "It's a huge privilege to have this job – it's been an honour. I also find the area very interesting and professionally satisfying.

Obviously there are many very tragic dimensions to it; an awful lot of it is generated from the misfortune of victims. But at the end of the day our objective is to prosecute on behalf of the people of Ireland, present the case and hopefully ensure that justice is served both in favour of the victim and the accused".

> A pre-trial process would be easier for juries, but also provide greater certainty for the victim and witnesses, who are often left waiting for days or even weeks while legal argument goes on. It would be a much less traumatic process

Time to trial

One of the most significant challenges facing the DPP's office is the length of time it can take for a case to come to trial. While the relevant courts and their Presidents are working to address this (seven Central Criminal Courts are sitting at the moment, a court sits almost continuously in Munster at Central Criminal Court level, and great efforts are also being made at Circuit Court level), delays persist in some areas – for example the current waiting period in the Dublin Circuit Criminal Court stands at 17 months. The Director points out that this is partly attributable to a number of exceptionally long trials recently, such as the banking trials, but she is very conscious of the impact of such delays on all concerned. Her view is that a pre-trial hearing process would have a significant impact: "If we could take all, or a lot of, admissibility arguments out of the trial itself, if we could get pretrial rulings in relation to admissibility of evidence or various other things, that would make trials more efficient. Court time would be used less, and issues would crystallise sooner, including in relation to disclosure. The volume of disclosure in criminal cases is growing all the time, partly because of the growth of social media. There are also issues in relation to material and records held by third parties. We have worked hard over the last several years to streamline our disclosure processes to try to ensure that we have all the relevant material well before the trial. However, we cannot disclose material to the defence until we have it ourselves, and we cannot deal with supplementary requests for disclosure from the defence until we receive them.

"This is what I mean about crystallising issues – if we had proper pre-trial case management for every case, all parties would have to engage sooner and the defence could set out what further disclosure material they feel is relevant. Where records relate to victims, perhaps very vulnerable victims, there can be particular challenges. Vulnerable victims who have suffered trauma sometimes engage with a number of services, whether social services, or medical or psychological support. It can be very difficult to ascertain after many years the full extent of access to such services. Those most vulnerable often have had their lives extensively documented as a result. In such cases our disclosure obligations are more onerous and greater sensitivity must be shown when seeking informed consent to the release of such information. "A pre-trial process would be easier for juries, but also provide greater certainty for the victim and witnesses, who are often left waiting for days or even weeks while legal argument goes on. It would be a much less traumatic process".

A criminal procedures bill containing a pre-trial provision, which was first published in 2015, has been given priority by Government: "I've been saying since I was appointed that this was the most important thing, in my view, that would help the system to work more smoothly. I think in everybody's interests, but particularly victims' interests, it would make an awful lot of sense".

Deluge of documents

The Director has spoken on numerous occasions about the impact that processing huge volumes of digital evidence has on her office. This was most strikingly evident in the banking trials, just one of which produced over 800,000 documents. While technology can of course make processes more efficient, there's no doubt that it's adding to the workload in preparing cases, but they are working on solutions: "In terms of digital evidence, the case law is developing now so that we have some ground rules. We've just rolled out an e-disclosure pilot, which means that both our barristers and defence practitioners can access the entire disclosure on a case electronically, through an encrypted portal. This is a huge step in the right direction, and has been very well received by defence solicitors. There's also a criminal justice hub, a project being developed at Department of Justice level to streamline information and have better information sharing (within data protection rules, obviously). We're looking all the time at new ways of working, and developing expertise on the digital side of things, such as cybercrime. We have to stay ahead of the curve".

Hard borders

The increase in digital material has also contributed to an increase in the need to request evidence from abroad under mutual legal assistance. The Director feels that some development of the law in relation to how digital evidence is viewed would be helpful here. The Law Reform Commission has made recommendations, and the Director is waiting to see what is proposed in light of these: "It might reduce, for example, the number of mutual legal assistance requests that we need to go abroad for". Another border issue with the potential to create significant problems is, of course, Brexit. As we go to press, there is still no clarity as to whether the UK's departure from the EU will be a hard or soft one, but the Director's office is doing what it can to prepare for "all eventualities": "There is a Bill going through at the moment [now signed into law] to deal with a possible alternative procedure in place of European Arrest Warrants, which is the most important thing from our point of view because about 80% of our extradition requests go to the UK".

Supporting victims

The Criminal Justice (Victims of Crime) Act 2017 transposed the EU Victims' Directive into Irish law. While the DPP's office has been working for some time to improve the levels of liaison with victims, the Act has undoubtedly raised awareness among the public of their rights in relation to requesting reasons for decisions not to prosecute and reviews of those decisions, and this has naturally led to an increase in such requests: "We always gave reviews of our decisions not to prosecute requested by the victim; there were certain limited exceptions but that's been there for a very long time. We were doing things like pre-trial meetings with victims and liaison with the Gardaí, meeting the various victim support groups – all of that was going on for many years before the Directive. But the Directive and the Act have raised awareness. They've meant that we now give reasons in all cases, rather than just fatal cases, subject again to some limited exceptions that are provided for, and we're getting a huge number of requests for reasons every year. Likewise with reviews, we've had about 650 requests for reviews since the Directive came into effect in 2015. That's on a caseload of about 9,000 cases a year, and we would not prosecute around 40%. It's not a huge number, but it shows that there is an awareness out there and that the process is working".

She praises her office's Victims' Liaison Unit: "They have done massive work in providing training to the Gardaí, liaising with the Gardaí about their important role in being the frontline communicators with victims, their obligations in terms of carrying out assessments on victims to see if they're vulnerable or require particular measures, and have carried on the task of liaising with the various victim support organisations and other Government agencies". It remains the role of the DPP's office to maintain a balance between the victim's rights and the needs of the justice system as a whole: "We take the victim's views into account; that view may not be determinative, and we make that clear to them. A complainant may not be aware of all of the factors surrounding a decision, but they certainly have that right to be heard, both in court and by us in terms of our decision making".

Reform

Along with its own ongoing efforts to reform and streamline its operations, the DPP's office is of course impacted by reforms in other areas of the justice system, and one of the most significant is the process currently underway as a result of the recommendations of the Commission on the Future of Policing. One in particular could be game changing: the proposal that An Garda Síochána would step back from presenting cases in court and also withdraw from making prosecution decisions. The Government has decided to accept this recommendation in principle and the Director is watching developments closely: "There are inspectors and superintendents appearing in every district court around the country and managing the prosecutions in their district. And then there is the decision-making that's currently done by the Gardaí. If you consider that there are over 200,000 district court summonses issued in the name of the DPP every year, it gives you a sense of the volume. The implications of this require careful consideration, to understand the scale of what would be involved in any change to the current system, how it would be implemented, including a cost–benefit analysis, the question of whether it is necessary in each and every instance". She sees it in the context of ongoing review of a system that never sits still: "I can see that 20 years after the whole of the prosecution system was looked at by a working group, arising out of which a number of changes were implemented, there is certainly merit in looking at it again".

It's clear that while these changes have placed increased demand on the DPP's office, it's something that she is personally supportive of: "We have some very good people in that area who over the last number of years have really developed our processes. My mission in terms of the Act is to make sure that we have consistency of approach. Everybody understands what their obligations are so it's a question of making sure that wherever the victim is, they get the same service and the same special measures in the courts that they might get if they were in the CCJ, for example".

Pride

In the seven-and-a-half years since her appointment, a number of highlights stand out for the Director: "I was appointed during the downturn and like the rest of the civil service the office experienced severe cuts. I am proud of how the staff in my office responded to the challenges this presented. I'm very proud of how we responded to the banking cases in terms of dealing with their scale, and developing new techniques to manage all of the consequences, like handling huge amounts of disclosure, electronic presentation of evidence, all of that. And I'm proud of the very dedicated staff working on those cases and, may I say, very dedicated counsel. I'm also proud of the work we've done in responding to victims' needs, particularly around giving reasons in every case where requested.

"In terms of significant developments, what comes to mind is the 2015 Supreme Court case of *JC* dealing with the exclusionary rule. That has made a big difference because JC can be deployed in cases in a legal argument about admissibility, where previously the case might not even have been directed for prosecution if we thought that evidence may have been inadmissible because of some error or other insurmountable problem. I think it's fair to say our exclusionary rule is probably still the strictest rule in the common law world, but what it does do is rebalance the right of the community and society to prosecute and to see justice done, with the right of an accused to have a fair trial. It was a very significant milestone in my time".

Resources

All of these changes require resources, from staff and training to technology: "Over the last couple of years we've received extra staff for things like the development of the Victims' Liaison Unit, and for more capacity in the area of international work, particularly European Arrest Warrants, extradition and mutual legal assistance. But there are constant pressures, pressures of courts and additional courts sitting at various levels. We're very demand led. We try to plan and project but at the end of the day we can't turn work away".

Issues have also arisen in recent times regarding fees for counsel, as barristers seek to have the cuts made in line with the Financial Emergency Measures in the Public Interest (FEMPI) Act unwound: "We've been saying for many years that the fees we pay to counsel are very good value for money. They were very good value for money before the downturn. We've been liaising with Department of Public Expenditure and Reform (DPER), and The Bar of Ireland would have been involved in this as well, in terms of their case to unwind some of those FEMPI cuts. We have supported the Bar's request that an extra 10% cut outside of the FEMPI process should be reversed. We have told the DPER that we accept that the Bar has, as far as prosecution counsel are concerned, certainly been flexible, and they have taken on additional types of work, such as greater obligations to victims. Cases have also become more complex on a number of fronts. We feel that they have done what is required in order to unwind those cuts. But ultimately it's a matter for Government.

"I can't emphasise enough the great service we get from our counsel. We have about 180 counsel on our panels, across all of the different types of work that they do for us. We get a very good service across the country".

The court of public opinion

From the DPP's point of view, the process does not always end with a verdict. If the Director feels that a sentence is unduly lenient, there is a process to follow: "The sentence given by the court is a matter for the courts. I've said before that I recognise that trial judges are the ones who see the accused in court and are hearing all of the evidence, the mitigation, and all of the material that's presented during the sentencing process. My only role is to assess whether the sentence, from a legal standpoint, is unduly lenient. We have averaged over the last number of years approximately 50 reviews for undue leniency a year, on total indictment numbers of about 3,500 or thereabouts".

Sentencing is only one area where the DPP's office comes under scrutiny. Public understanding of how the different arms of the justice system operate can be limited, and high-profile or controversial criminal cases are inevitably judged by the court of public opinion. Like all those in similar positions, the Director is aware of a responsibility to maintain public confidence in her office: "We've worked very hard to promote our independence, or at least publicise our independence, in order to foster confidence in the fact that we take our decisions without fear or favour. We publicise what we do as much as we can: we have a website and we publish our Annual Report, and information booklets for victims and witnesses, and I speak occasionally. But getting decisions right, and prosecuting or not prosecuting as justice requires, is the biggest confidence-building measure.

The first DPP, Eamonn Barnes, used to talk about the double duty of the job, that not only did you prosecute the people who should be prosecuted, but that you very definitely didn't prosecute people where there wasn't enough evidence, that you didn't give in to perception or pressure. I hope that people accept that that is what we do". Although the Director had no initial ambition to work in the area of criminal law, it quickly became a labour of love: "I couldn't imagine at this stage how my career wouldn't have been devoted to crime. You get to deal with the most novel and technical points of law and interesting policy issues, and obviously very traumatic cases in many instances. But there is no end of variety in criminal law. It's a very satisfying area to work in".

INVENTING A 21st CENTURY CIVIL SERVICE

As Secretary General of the Department of Justice and Equality, Aidan O'Driscoll is presiding over the most significant restructuring of a Government Department in the history of the State. He spoke to *The Bar Review* about this, and about the other work his Department is undertaking.

First published in *The Bar Review* **June 2019**

With a background in economics and policy analysis, rather than in law, Aidan O'Driscoll has been on a steep learning curve since moving from the Department of Agriculture (where he was also Secretary General) to Justice and Equality last summer, but he's enjoying the process: "It's an enormous change, particularly in terms of subject matter, but I've very good and enthusiastic teachers among the staff here".

Radical change

The focus for his first year is leading a major programme of change in the Department, inspired by the report of the Effectiveness and Renewal Group. It's hard to overstate the significance of this process, which Aidan refers to as a "transformation", as it seeks to completely reorganise how the Department does its job: "Traditionally, Irish Government departments are built around a divisional model based on subject matter. We are transitioning to a functional model based on what we actually do as civil servants. We have now established two executive pillars: one focused on criminal justice, and the other on civil justice and equality (including immigration). I have two outstanding deputy Secretaries General – Oonagh McPhillips in Criminal Justice and Oonagh Buckley in Civil Justice and Equality – leading these two pillars. Then in the middle, as it were, there is the Corporate pillar, and we are going to create a new transparency function".

Instead of the traditional subject-based model, the pillars will be organised around a broader suite of functions: policy; legislation; governance; and, operations and service delivery. Aidan explains: "If you take the policy area, for a number of years we have committed ourselves to be more evidence based in our policy work, and also to be more joined up, in other words not to see the issue within a very narrow frame. But this has been very difficult to do in a subject-based model, where you are looking at it in the narrow frame of the subject for which you are responsible. The people in this unit, their responsibility will be for all criminal justice policy, so when they are looking at a policy issue, whether cybercrime or drugs policy, they will look at it in the broader frame. They will be policy specialists".

The same is true for the other functions. Justice produces far more legislation than any other Government department, with 11 bills currently with the Oireachtas, 10 more in the priority list for the summer session, and a further 24 behind those. The legislative experts in the Department will now be able to devote themselves to this process, thus making the best use of their specialist skills. The governance function covers the 25-plus agencies that fall within the ambit of the Department, from An Garda Síochána to the Film Classification Office. Some of these are largely independent of the Department (such as the Garda Síochána Ombudsman Commission), while others, like the probation and prison services, work more closely with it. Operations and service delivery covers the areas where services are delivered directly to the public, the most obvious example of which would be immigration. Aidan says the gains from this reorganisation will be significant: "We will be a much more resilient organisation because there's not just one person who knows everything about the issue".

Transparency and timelines

One of the central functions, spanning both pillars, is transparency: "For many years now the civil service has, rightly in my view, been under pressure to be more open and transparent. I think we've moved an enormous amount in the last 10 or 20 years, but we haven't moved enough. This function will help us to proactively get our message out there about what we are doing, why we are doing it, and interacting with all our customers, stakeholders, and those who are interested in our work. We now live in a world of 24-hour media cycles, and a very demanding, and sometimes somewhat aggressive, public discourse. It's not that we will enter an aggressive public discourse, but we must become much better at explaining ourselves, while embracing the accountability that goes with it".

He doesn't underestimate the challenges involved: "The civil service has been doing it the other way for a hundred years, so it is genuinely an enormous change and it does have huge risks attached to it. We will make mistakes, but I hope people, even those who are maybe a little skeptical, will see the genuine intent and purpose behind this, and will be supportive of us as we go forward and try to implement it".

He finds the process personally very invigorating: "What we're doing here is reinventing the civil service for the 21st century in Ireland. It gives me a huge sense of purpose and energy. I really and truly believe very strongly in the mission of the civil service, and this is a once in a multi-lifetime opportunity to shape the future of that service". The process is being closely watched by other departments as a potential template for reform across the civil service, and the timeline is tight. The Group's first report was submitted to the Minister in June 2018, and the structural reform is due to be completed by October of this year. Aidan is happy with progress so far, and confident that targets will be met: "So far we're on schedule. However, the truth is that the next few months are going to be the toughest in terms of implementation. So I'm not congratulating us just yet. I am confident that we will do this in or around the time we have said".

Diving in

Aidan O'Driscoll has spent most of his career in the civil service, mainly in the Department of Agriculture, but also in the Department of Finance, and for a time in the Irish Embassy in Rome. With a background in economics and policy analysis, he worked in Africa in the development area for eight years. Immediately prior to taking on his current role, Aidan was Secretary General of the Department of Agriculture, Food and the Marine.

Aidan is a keen cyclist, and cycles to work in St Stephen's Green every day ("I find it a huge benefit and I'm a strong believer that we're going to turn back into a cycling city, as we were in the past and as the Dutch are today"). He tries to fit some hillwalking into his busy life, and enjoys scubadiving, which he learned to do in Africa, when he goes on holiday. He's recently begun to use Twitter, and is trying not to spend too much time there!

Minding the day to day

While the business of managing a major transformation within the Department progresses, day-to-day work continues, and Aidan is keen to draw attention to a number of projects the Department has either initiated, or is centrally involved in. One of the most important is the reform of policing arising from the report of the Commission on the Future of Policing in Ireland (CoFPI) (panel), but there are many others. As mentioned previously, the Department's legislative agenda is extensive, ranging from legislation on the judiciary to land conveyancing and the gender pay gap. In keeping with its second major remit, the Department also has a strong equality agenda, with strategies on women and girls, migrant integration, and a Traveller and Roma strategy all being implemented. The work on LGBTI+ issues is something Aidan is particularly proud of, and he is delighted that in this year's Pride parade, An Garda Síochána will march in uniform for the first time, and that the civil service will also take part formally as a group for the first time. A new LGBTI+ Strategy will be launched shortly by the Department. After a high-profile campaign on domestic violence, the Department has just launched an advertising campaign on sexual harassment and sexual violence. Featuring a range of scenarios, with voiceover from focus groups discussing the ads, Aidan is keen to see how the 'No Excuses' campaign is received: "This is very subtle stuff – we're not beating people over the head with a conclusion. It also shows another side [to what we're doing]. This is still criminal justice. This is still about prevention of harm, about protecting the vulnerable, but in a completely new way".

Immigration is, of course, a major focus of the Department. On the one hand, this encompasses the rising numbers of passengers coming through our airports, all of whom hand their passport to a Department of Justice official for inspection. It's a growing responsibility, but a positive one in terms of tourism and economic growth. The Irish Naturalisation and Immigration Service (INIS) of the Department is also responsible for processing over 250,000 applications annually for visas, registration of non-EEA nationals, residence permissions and citizenship.

On the other side is the often controversial issue of international protection and refugees. Although the numbers in relation to the Irish population as a whole are relatively small, there has been an increase in the number of asylum seekers in recent years. Aidan points out that this is an area where an inter-agency approach is vital, but says that in Justice they view issues around immigration, and indeed the vital process of integration, as positive. Even in the area of direct provision, where he agrees that more needs to be done, particularly in terms of reducing the amount of time people spend in the system, he feels that much of the negative reporting has been misdirected: "We have to develop new and better ways of dealing with issues in the direct provision system, and that will be a very important area of work over the coming years. However, the experience of the Department with regard to migrant accommodation centres, and this is absolutely consistent, is there can be unease at first, but once it's up and running, Irish people are welcoming. The kind of people who articulate racist or extremely hostile views are not the mainstream".

Brexit

Like everyone else, the Department has put a tremendous amount of work into preparing for Brexit, and while the recent confirmation of the Common Travel Area eases some concerns, there are many uncertainties yet to be faced: "There are a lot of criminal justice issues thrown up by Brexit, and family law issues in the civil justice area. There are also data sharing issues that weren't there previously. We worked very hard to prepare ourselves for the no deal back in April/May, and we had a whole plan ready to go. In fact we had a minute-by-minute plan for the hours just before and after Brexit, as to what the Minister had to sign, what letters I had to sign to my British opposite number. If we do move to a deal in the future, the bad news is that's only

Policing reform

The reform of policing arising from the CoFPI report is being managed through a multi-department structure chaired by the Department of the Taoiseach, and Aidan says that it encompasses a much broader view than has heretofore been the case: "It underpins a conception of policing that is much broader than just criminal justice, but recognises that a lot of people who get tangled up in the criminal justice system are in fact very vulnerable. The CoFPI report talks about having a focus on prevention of harm and a strong inter-agency approach based on human rights. I'm new to this but this seems to me a new and really important way of looking at what we do. We've talked about joined-up government, whole of government approaches, but this is on a grand scale around a very important issue".

One concrete example of this is the Joint Agency Response to Crime (JARC) programme, through which different agencies – the Guards, the Probation Service, the Department of Justice and Equality, social services, and so on – work together to identify groups of people who were involved in high levels of crime but who were suitable, or who were thought to have potential, to go in a different direction, and concentrating resources on them. Aidan says the results so far have been striking: "You're concentrating on people who were involved in high levels of crime, so it has an actual impact on crime levels".

Aidan is working closely with Garda Commissioner, Drew Harris, in all of this; indeed, they were appointed on the same day: "I think Drew Harris is doing a tremendous job. I'm glad to say we get on extremely well, as do our senior teams. An implementation plan has been produced [for the reform process]. It's very specific. It's time bound. I am very optimistic that that process will work through on time and on budget".

the beginning of the process. Then we have the negotiations on the new arrangements, and we will have a very deep interest in those and will be very deeply involved".

Building the evidence

All of these projects, and indeed the transformation of the Department as a whole, rely on a rigorous approach to data management and evidence, and this is something Aidan feels very strongly about: "I was trained as a policy analyst so this is something I believe in passionately. What we are doing is specifically designed to facilitate that, particularly in the policy and governance functions, to develop the evidence base we need to give really good, evidence-supported policy advice to our ministers and to the political system. At the end of the day we live in a democracy and it's our ministers and the Oireachtas who decide policy, not civil servants. But we have to give the absolutely best policy advice we can, and to me that means stacking up the evidence. For example, we have the crime statistics, but we also have the attitudes to crime survey. So we know both what the level of crime is, but also what people think the level of crime is, and what their attitude to that is. We have now commenced a series of carefully focused research projects to inform further policy work".

Aidan stepped into his role at a time when the Department had seen significant controversy, and public and political criticism. Managing public perceptions is a necessary part of the job, and one he accepts, but he feels that the work of transformation will help to change attitudes: "I think this department has taken quite a pummeling in the past few years, and I have great admiration for my colleagues who were here then and who kept the ship sailing because that was difficult. We're now in a new space. We have a big story to tell. The civil service has often taken a lot of criticism, although surveys still show a very high level of trust in the civil service, which I take great heart at. But that's no longer enough. We have to be able to explain ourselves to the public and the political system. We have to get better at that".

He is proud of his Department, and of what it stands for: "The vision of this Department is for a safe, fair and inclusive Ireland. We want people in this country to be safe. To feel they're being treated fairly and inclusively. We want them to be treated in that way and also to feel they're being treated in that way. In reinventing the civil service for the 21st century I hope we're reinventing it in a way that engages in a new way with the political system also. That the civil service, by being the best it can be in support of our democracy, makes that democracy stronger".

THE ROAD TO RECONCILIATION

Sir Declan Morgan, Lord Chief Justice of Northern Ireland, reflects on 10 years in his post, on the soon-to-commence legacy inquests process, and the challenges caused by the current political impasse.

First published in *The Bar Review* **July 2019**

Less than a year after Sir Declan Morgan was appointed Lord Chief Justice of Northern Ireland in July 2009, the justice function in the jurisdiction devolved to the local administration, and this very much informed his approach to the role: "I was conscious of the fact that the role of the judiciary was going to change in terms of its engagement in the public space. I saw it as my role to be alert to establishing relationships with the politicians who were responsible for the criminal justice system, but also with the other elements, such as the PSNI, the DPP, the Police Ombudsman, Probation Service, and others. My priority was to change the perception of the judiciary as being rather remote and unconnected, to a judiciary that was entirely independent, but that didn't regard that as some form of isolation".

It's an ongoing task, but one he feels has had some measure of success: "I think we're in a different place from where we were 10 years ago certainly. We as a judiciary now have a role in promoting changes to the criminal, civil and family justice system in this jurisdiction. We have a role, which we didn't necessarily ask for but which has come to us, in terms of dealing with some of the very difficult issues of the past. We also have a role now as a result of the development of the Human Rights Act of dealing with some of the most sensitive social issues in our jurisdiction".

Highs and lows

One project that Sir Declan is particularly proud of from the last decade is the Women in Law initiative, which he began in 2012 to address that fact that Northern Ireland had never had a female High Court judge, and while numbers of women entering the profession were high, the number taking silk was limited, and senior levels of the profession remained heavily male dominated: "These things don't just happen on their own; they're the product of leadership and some kind of process. What we did was to establish a series of lectures and meetings. We set up a mentorship scheme, and made sure that the lectures were on areas outside family law, where women traditionally were strong, to demonstrate the skills that were there".

The initiative has led to improvements (the first two female High Court judges were appointed in 2015), but Sir Declan acknowledges that there is more to do: "It sent a message to women that they shouldn't feel excluded. The principal thing we were trying to do was to make sure that we dealt with what was obviously a 'chill factor' in relation to women coming into these posts. There's still under-representation of women at the most senior levels in the legal professions. We have to continue to work to change that".

In terms of low points, undoubtedly the current political impasse in Northern Ireland (there has been no functioning Executive since January 2017) has had a significant chill factor of its own, effectively preventing much-needed reform of the criminal, civil and family justice systems: "It has been a huge impediment. Last Friday we met with a number of the political parties and provided them with an overview of where we thought substantial improvements could be made, but it is very frustrating to find that people are talking to us about these things, saying that they are things that undoubtedly improve the quality of justice within Northern Ireland, and then they all walk away because there's nothing anybody can do about it".

It's not a problem that can be easily solved: "Even when we get back to the process of having an active government in Northern Ireland, the pressures in terms of the build-up of things that haven't happened mean that it's going to take years to put this right, and that is deeply frustrating, particularly if, like me, you've only got about two and a half years to go".

> Even when we get back to having an active government in Northern Ireland, the pressures in terms of the build-up of things that haven't happened mean that it's going to take years to put this right.

> One has to be realistic about these things in terms of ensuring that there is sensible co-operation where that doesn't in any way undermine the independence of the judiciary in either jurisdiction.

Facing the legacy of the past

One issue that is finally being addressed is that of legacy inquests. After confirmation that the Northern Ireland Department of Justice will provide £55m in funding over six years to deal with 52 legacy inquests involving 93 deaths during the period of the Troubles, Mrs Justice Keegan, the Presiding Coroner, will begin preliminary hearings in September with a view to the first inquests commencing in April of next year. Sir Declan is of course pleased that the process has finally begun, and is confident that the chosen approach is the best available: "We certainly believe that we have a process which can deliver what we said we could deliver, which is that we would complete the outstanding legacy inquests within a five-year timeframe".

He is keen that the inquests should not be conducted in an isolated fashion, but with an awareness of the wider context and highly complex sensitivities that exist in Northern Ireland: "Fundamentally, legacy should be focused upon reconciliation. When you've had a divided society like ours, reconciliation is really what the aim has got to be. And reconciliation of course is a process that is bound, given the hurt that has been caused over the last number of decades in this jurisdiction, to take a long time".

Indeed, there has already been criticism by, among others, campaigners on behalf of those killed while in the service of the State, who do not feel represented by this process. Sir Declan agrees: "I don't think the process so far is enough. I think we have failed a lot of people within our community by the fact that we have not dealt with this much earlier. This is something that, if we'd been able to do it, should have been addressed back in 1998. But we didn't address it because it was considered that it should be put into the 'too difficult' box. I think the effect of that has been that this has been a running sore now for the last 20 years and, like many running sores, it tends to get worse rather than better".

The challenge now is to move beyond the inquests through a process that respects and faces up to the horrors of the past, but with a clear objective of working towards a better future: "We need to think through how we're going to contribute to helping the others who've been affected by the past but who as yet see no concrete steps being taken in relation to trying to address their concerns. The purpose, as I say, is reconciliation, and part of that is about spending more time looking to the future than we have so far done. I don't mean by that that we should in any sense forget the past. What I want to do is to try to do something in relation to the past, which will enable us to spend a bit more time thinking about the future of our children in particular, in terms of education, health, and quality of life".

In the end, while the legal system has a crucial role to play, it's the politicians and the wider community who have to decide how they want things to proceed: "My priority is to make sure that the rule of law is upheld in this jurisdiction and that people are confident about that. It's the politicians who need to think through what's going to work, and I will work with them in any way that I can".

Future plans

As he approaches the final years of his tenure, Sir Declan speaks of moving from getting things done to getting things started; however, this doesn't mean that work is slowing down. The legacy inquest process is obviously a priority, but a number of other projects are also in train: "There are changes that we want to make to our criminal justice system, which I think is much too slow and doesn't provide our community with the service that it deserves. We have also been looking at exposing the work of the family courts to the public eye somewhat. There is sometimes a suggestion, particularly from disappointed litigants, that the family court is not in the public eye and that in some way or other it is a secret court. We are in the course of a pilot project in the High Court in having media access to family cases".

A business and property court has also recently been established, influenced by similar courts in England and Wales, and also by the work of Mr Justice Peter Kelly in the Commercial Court in the Republic. Structural changes to how the courts system is managed are also on the agenda, although once again the current political situation is inhibiting progress: "We would like to structurally move into the same sort of approach that you have in the Republic of Ireland and Scotland, where you have a non-ministerial department, which is judge led, and runs the courts and the support for the courts, leaving the policy functions with the Department".

Brexit

The prospect of a no-deal Brexit still looms large at the time of writing, and this has obvious implications for north-south co-operation in legal matters. Measures have been put in place to try and deal with some of the most pressing, such as family law and enforceability of contracts, but Sir Declan acknowledges that the full impact is not yet apparent. He is confident, however, that the good relationship that exists between the judiciaries in the two jurisdictions will continue: "It is important, if there are issues arising, that we make sure that we do our best to deal with those and, where necessary, draw them to the attention of our governments. I think that is part of our role. We both recognise our separate independence and roles, but we also recognise that there are areas in which the work of one jurisdiction affects the other. One has to be realistic about these things in terms of ensuring that there is sensible co-operation where that doesn't in any way undermine the independence of the judiciary in either jurisdiction".

Acting on Gillen

The manner in which cases of alleged rape and sexual assault are dealt with in the courts has long been a source of controversy, but the enormous publicity surrounding the so-called 'Belfast rape trial' last year led the authorities in Northern Ireland to commission a review of how these offences are dealt with in that jurisdiction. Sir John Gillen's comprehensive report was published in May, and contains a number of recommendations, which Sir Declan welcomes: "John did a tremendous job in the report. It's clear that he looked at this from every possible angle. He's made a lot of recommendations, which I think will be very valuable to all of us. About 60 are related to the judiciary. They refer to things like better case management and judicial training, and the way in which we deal with complainant witnesses in particular and child witnesses when they come into the courts. We have already started work in relation to quite a lot of this".

The nature of these cases means, however, that there's no easy fix: "It is very difficult to see how you can make these cases easy, because they are cases which involve such an emotional impact on, particularly complainants, but also from time to time defendants depending upon the circumstances. We can do things to ameliorate the position. We can seek to ensure that complainants feel as though they are being respected when they come to court, we can seek to ensure that questioning is confined to appropriate issues, that the period of time people spend in the witness box should be no more than is absolutely necessary, that cross-examination should not be oppressive or bullying, but it's still going to be a difficult experience for people insofar as we continue to have an adversarial court system".

Social conflict

The Belfast trial also highlighted the influence of social media, both in terms of evidence, and of coverage of and comment on the trial. The enormous cultural change brought about in recent years by our almost constant access to and hunger for information is something justice systems have struggled to deal with, and for Sir Declan, this is because of a fundamental conflict: "There's a huge conflict between a society which is geared towards the fact that it can have all the information it wants at the touch of a button, and a criminal law process where you're told that you can't look at any information other than that which is put in front of you in the trial … The public out there, who are not actually given the strictures that the jury will be given, as a matter of almost instinct are perfectly happy to express their views about anything and everything that comes their way".

Obviously this is not a problem confined to these islands, and various solutions, such as fining social media companies if they fail to remove items from their platforms, have been suggested, but as yet no concrete solution has presented itself, and this poses serious problems: "The real worry is that these cases are not being tried in the jury room any more, they're being tried in the media. We probably need to look at this on an international basis if we're going to do something about it, or are we really going to leave it to Facebook or others to regulate the way in which this information is shared?"

He agrees that education of the public has a role to play, and regularly visits schools to try to address this: "It is remarkable how engaged the children are and how greedy for an understanding of how the justice system works within their community. I've always been hugely impressed by that but I've also realised more and more during my time as Chief Justice how important that is in encouraging people to understand and respect the rule of law".

Luck and happenstance

Sir Declan did not originally intend to pursue a career in law; indeed, when he went to Cambridge in 1970 (one of the first pupils from St Columb's College in Derry to attend Oxbridge), he began by studying mathematics, switching to law in his second year. After graduation, he tried accountancy in the City of London, before coming back to Derry and deciding to take the Bar exam: "It was only when I started to practise that I realised I really enjoyed it. So in my case there was an element of luck and happenstance in relation to my ending up in law". He credits Cambridge with widening his view of the world: "It changed my perspective completely and utterly from that of a rather narrow background in the northwest of Ireland to a much broader experience of a range of people from very different backgrounds".

In his free time, Sir Declan enjoys spending time with his family, walking and cycling. He has also been taking evening classes in German for the last three years, and looks forward to putting them into practice when he visits Germany this summer.

IRELAND'S OPPORTUNITY

The Bar Review spoke to former Taoiseach John Bruton, Chair of the new Implementation Group for the promotion of Irish legal services post Brexit.

First published in *The Bar Review* **December 2019**

Brexit poses any number of challenges to Ireland and the Irish economy, and while at the time of going to press, yet another extension has been granted to the UK Government, and no further developments are likely until after the December 12 general election, preparations continue across all sectors for whatever the impact – deal or no deal – may be. The legal profession is no exception, and has in fact proposed that there are significant opportunities in promoting Ireland globally as a leading centre for international legal services post Brexit.

The legal profession is no exception, and has in fact proposed that there are significant opportunities in promoting Ireland globally as a leading centre for international legal services post Brexit.
After a lengthy process of consultation, The Bar of Ireland, the Law Society and the wider legal community presented a proposal to Government on how these benefits might be realised, and in January 2018 the Minister for Justice, Charlie Flanagan TD, formally announced the Government's support of the initiative.

Getting started

An Implementation Group has now been established to bring these proposals to fruition. The group is made up of representatives from the legal profession, Government, the IDA, and others (see panel), and former Taoiseach and European Union Ambassador to the United States John Bruton has been appointed as Chairperson. The Group met for the first time in October 2019, and John Bruton says it was an opportunity for the members to get a sense of what is envisaged by the project, and what needs to be done: "We had a presentation from The Bar of Ireland, which identified a number of areas of opportunity. One of these would be in ensuring the enforceability of judgments, because non-EU states don't have the capacity to enforce judgments in the EU in the same way. Another would be persuading people who are writing new contracts to write them in the law of an EU state, i.e., Ireland, rather than in the law of a non-EU state, i.e., the UK. Guaranteeing the right of appeal to the Court of Justice of the European Union in the event of disputes would be another area, and also emphasising the effectiveness of the Commercial Court in Ireland, which I think is seen as one of the big positive achievements of the reforms in the court system in recent times".

He makes the interesting point that legal education has moved on in the three and a half years since the Brexit referendum, and the way in which lawyers are trained inside and outside the EU is now also a significant factor: "There are a lot of young people in the profession and they will have been trained in EU law, whereas it is the case that fewer and fewer UK lawyers are being trained in EU law".

The Group has identified a number of areas where advances might be made, such as aviation law, finance law, banking, funds-related law, corporate bonds, insurance, and intellectual property. But they are also aware of a need to watch for opportunities that have not yet become apparent: "The things that we think may be advantageous may not be as advantageous as other things, so we need to keep an open mind".

The Group is also aware that a number of Irish-based law firms already have operations outside Ireland, and hopes to build on that intellectual capital to support this initiative.

Government support

The Government's support is obviously vital and very welcome; Government departments are strongly represented among the membership of the Implementation Group. John Bruton has experience of the importance of this from his time as Chair of the Irish Financial Services Centre: "One of the successes of the Irish Financial Services Centre was the existence of a clearing house group, where all the people directly involved were around the table. It was very heartening to see the high level of representation around the table [of the Implementation Group] from Government departments. We will be a place where concerns on the part of those who are practitioners can be raised and heard by Government, not just by the Department of Justice, by all the Government departments that might have anything to say about it. I think that is a very important advantage for the legal profession, that there will be a place where one can get ideas and concerns across to the entirety of Government in one place, in one meeting, in one hour".

> John Bruton's long and distinguished career in politics is well known, but what might be less well known is that he originally trained as a barrister, although he never practised, and this contributed to his decision to accept Minister Flanagan's invitation to chair the Implementation Group.

Action plan

The Group's next task is to draw up an action plan for its three-year term, which will set out a range of activities, such as setting up a website, and identifying international events that could be targeted to promote Ireland's legal skills. John Bruton is aware, however, that they are not starting with a blank slate: "We're building on activity where the Attorney General and a number of members of the judiciary have already attended events in the United States. That sort of activity will now be supported and co-ordinated by the Group".

While this initiative is still at a relatively early stage, one task for the Group is to identify any barriers to its success: "Obviously for people who are making the decision to write contracts in Irish law, or to make the Irish courts the place where issues would be arbitrated or judged, they will be looking at the efficiency and the costs of the Irish system. So anything that can enhance the effectiveness of the Irish legal system, investment in technology for example, in the right technology, would be very positive. That is of course a matter for Government and the Courts Service, but we would I think be taking an interest in it and passing on any concerns".

Legal interest

John Bruton's long and distinguished career in politics is well known, but what might be less well known is that he originally trained as a barrister, although he never practised, and this contributed to his decision to accept Minister Flanagan's invitation to chair the Implementation Group: "I have an interest in the law, some instinctual knowledge of it. I was asked by the Minister, and my natural reaction was positive".

He obviously brings a wealth of knowledge and experience to the role of Chairperson: "I have chaired Government successfully I think, and I led a parliamentary party for over ten years. You can get a sense of a meeting and where a consensus might be found or whether it's better to leave the issue over to the next meeting. I also have the capacity to convey things in the public media, at meetings, speeches and so on, which again was a skill I had to have in politics. Obviously I have five years' experience as an ambassador in the United States, and the United States is going to be one of the big markets for this initiative".

He retains a great respect for the values of the Irish legal profession, which he believes are also vital to this initiative and should be promoted just as strongly as any other qualification: "I know many members of the profession. I am an honorary Bencher of the King's Inns. Certainly in my training to be a barrister, the ethical considerations were impressed upon me – that it wasn't all about just making a good living, but that there were certain obligations, obviously to your client, but also to other barristers, to help new barristers find their way. It wasn't all about how well one was spending one's own time, or one's own income requirements. That certainly was what was inculcated when I was in training. I think that's important because certainly you see in other countries, notably the United States, a legal ethos that's rather more self-serving. I think that's something to be avoided and I think the social capital that's represented by an ethical profession is something that cannot be quantified, but is exceptionally important, and is one of the things that hopefully we will be able to showcase through this initiative – that the Irish profession, both solicitors and barristers, have a very strong ethical sense, and they're not just good lawyers".

He doesn't regret not practising, however: "It would have been because I had lost my seat in the Dáil if I had done so! I never thought about practising as well as being a TD; I felt that the role of representation in our system is so all-absorbing that one could not really pursue any other activity, and I think that was the right decision".

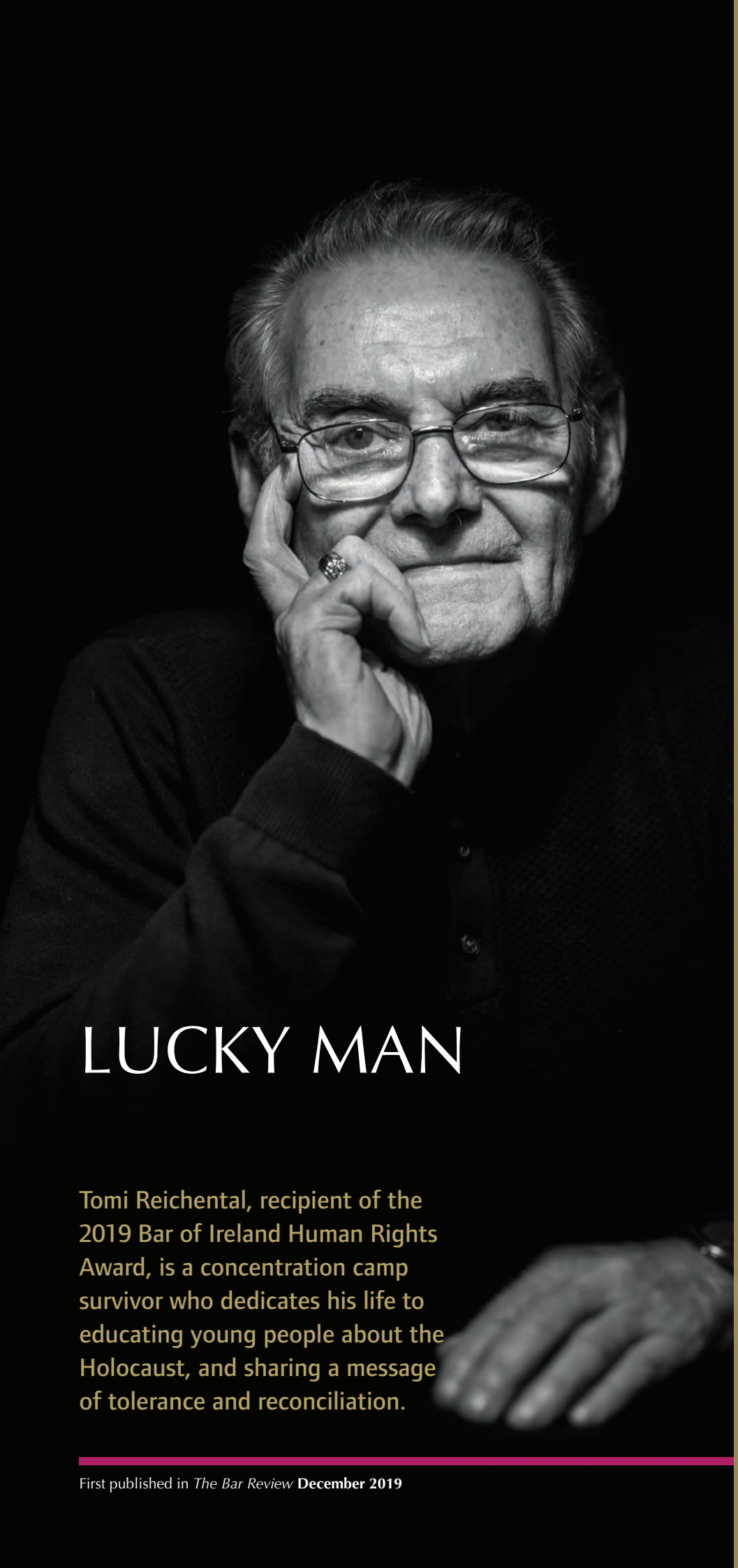
"I never thought about practising as well as being a TD; I felt that the role of representation in our system is so all-absorbing that one could not really pursue any other activity, and I think that was the right decision.

Brexit…

Given the purpose of the Implementation Group, and John Bruton's enormous political experience, it would be foolish to let the interview pass without asking his view on the current chaos in the British political system. At the time of our interview the general election had not yet been announced, but was looking likely, and he agrees that everything now hangs on its outcome. The electoral system in the UK is also, he says, a significant factor: "It's now going to be decided in a general election under an electoral system that is deeply imperfect, the UK straight vote system, which means that a party with 33 or 34% percent of the vote can in certain circumstances have an overall majority. Britain doesn't have a proportional system. It doesn't have a culture of coalitions, although the Conservative/Lib Dem coalition was relatively successful. That's going to be a problem. Literally anything could happen. This will be 600 different elections, with the voters in each different constituency having to make a tactical decision depending on which side of the argument they support on EU matters".

As to his own view on what will happen: "I don't know. I think if you have any form of coalition you'll probably have a referendum. If you have a single party government you'll probably have Brexit. Those who want to stay in the EU should be hoping for a hung parliament".

In the meantime, it's hard not to feel that there has been a lack of awareness, to say the least, in certain quarters in the UK, as to the impact of leaving the EU. This initiative on the part of the legal professions is an example of that possible fallout: "I think an initiative like this, to the extent that it gets any notice [in the UK], reminds people that there are costs to Brexit. And I think the problem in Britain over the last three and a half years is that they have never really faced up to the costs".



LUCKY MAN

Tomi Reichental, recipient of the 2019 Bar of Ireland Human Rights Award, is a concentration camp survivor who dedicates his life to educating young people about the Holocaust, and sharing a message of tolerance and reconciliation.

First published in *The Bar Review* **December 2019**

How does one describe the indescribable? How does one tell a story that is utterly unbelievable, and yet is entirely true? These are the tasks that Tomi Reichental has taken on for over a decade now, as he travels to schools all over Ireland and abroad to talk about his experiences in Bergen-Belsen concentration camp, and the lessons that must be learned from the Holocaust.

> The people on the right side went to Buchenwald and Sachsenhausen. When we said goodbye to them we had no time to put our arms around them. We just waved and said 'when it's all over, we will be reunited'. But we never saw them again.

Tomi was born in Piestany in Slovakia in 1935. Slovakia was not occupied by the Nazis at first; however, the puppet government was sympathetic to Nazi ideology, and deportation of Jews began in early 1942. Over a six-month period, approximately 58,000 Jews were deported from Slovakia, mainly to the gas chambers of Auschwitz, including 30 members of Tomi's extended family. In 1944 an uprising in Slovakia finally brought the Gestapo to the country, and Tomi's family went into hiding. His father stayed behind on the family farm, but was arrested. Miraculously, he escaped from the transport that would have taken him to Auschwitz, and spent the war fighting with the partisans, but all Tomi and his family had was a card received shortly before their own capture, which said "I'm alive. Don't worry".

When the Gestapo finally came for the rest of Tomi's family, 13 of them were taken on the same day and brought to the Sered detention camp. Here, the "selection" took place: "It was very cruel – separating the families, the husband from the wife, the children from the father. Seven went to the right side, and six of us, my grandmother, one of my aunts, one of my cousins, my mother, my brother and myself, to the left. The people on the right side went to Buchenwald and Sachsenhausen. When we said goodbye to them we had no time to put our arms around them. We just waved and said 'when it's all over, we will be reunited'. But we never saw them again".

Sitting in Tomi's comfortable and welcoming home in Dublin, he speaks calmly and without embellishment of the seven-day journey by cattle train to Bergen-Belsen: "One moment we were standing before the carriage as civilised people, fed and clothed. The next moment the door closed behind us and we were no longer civilised people – we were like animals. We had no hygiene because the water we had was drinking water. The stench became unbearable. On the seventh night, the door opened and there were SS soldiers with weapons and Alsatian dogs, shouting. We were taken on a march through a forest that lasted about two and a half hours. On the horizon suddenly we saw this chimney, with a glow of fire coming out. You can imagine what the adults among us were thinking. The children, we didn't know, but they knew already about the gas chambers. They thought that was where we were going. I remember only when my mother squeezed myself and my brother, because what went through her mind must have been just terrible".

Hell on earth

Tomi often talks about the fact that he and his brother had been protected from the terrible knowledge of what was happening in the camps, but there was no protecting them from a place where those horrors were before their eyes day and night. Bergen-Belsen had no gas chambers, but cold and starvation, with the inevitable illness and disease, meant that over 70,000 people died there. Tomi's own words tell the story best: "The only word for it is a hell on earth. This is something that you couldn't imagine. When we came to our part of the camp we didn't even know if we were in the women's camp or the men's camp because you saw these skeletons, shaved heads, in the striped uniform; you couldn't see any attribute, if they were women or men. So only after several days we discovered that we were in the women's camp. As children we used to play outside and these women used to walk around and they were just skeletons, walking very slowly; they were mortally sick. Occasionally they would fall down. We would stop playing and watch: 'will she get up or no?' Because we knew if she gets up she has another day to live. But in most cases she never got up. We saw people dying in front of our eyes.

"Our day started with roll call, which was in freezing cold. We didn't have warm clothes. The temperature would drop to minus 15 or 20. We had to stand there for an hour till our supervisor came. These [supervisors] were young women in their twenties. They went according to the proverb that if you show compassion it's a sign of weakness, so they exercised their brutality all the time. We were not allowed to talk directly to these women. One of the women [prisoners] got very annoyed and approached this SS woman. We had to stand around as she beat her and beat her until she fell down. I don't know if she survived. But we had to be witness to it as an example that if you do something out of the ordinary, this is what you have to expect".

The abuse and indignity did not end with death: "There were men with a cart with two wheels and they would go to each hut and ask them if anybody died during the night. They would pick the corpse up and throw it on the cart. Once the cart was full it would be brought to the mortuary, and then in the evening to the crematorium. Constantly you smelled the burning of flesh. But we got used to it. We eventually didn't even smell it".

The inmates in the camps, while they were predominantly Jews, came from many backgrounds: "There were not only Jewish people; there were gypsies, Jehovah's Witnesses, gay and lesbian people, German political prisoners, and they were not treated any better". The toll of this suffering and brutality cannot be measured. While Tomi believes that his age protected him to some extent from the worst psychological trauma, others in the camp were driven to terrible extremes: "In the night, they would climb the perimeter. Of course the guard – every 300 metres was a watchtower – would shoot them. We used to hear the shots being fired during the night and in the morning we would see the corpses on the barbed wire. These women didn't want to escape. They couldn't escape, but they just wanted to end it. This used to happen every day, all over the camp".

Bergen-Belsen was liberated in April 1945, but one month before, Tomi's family experienced further tragedy: "When I woke up I saw my mother and my aunt crying, and they told me that my grandmother had passed away. That morning we sat on the bed, five of us, and two men entered the room, they picked up my grandmother. They stripped her – she was just like a little baby. One picked her up by the hands, one by the legs. She was thrown onto the cart, then wheeled outside and thrown on the pile of corpses. We sat there for a couple of minutes. Nobody cried because we didn't have any tears anymore".

Tomi says that on April 15 every year, the anniversary of their liberation, "I take a glass of wine and I say 'Aleichem'".

On the morning of our interview, Tomi had given a radio interview where he was asked, as he often is, how he answers those who deny that the Holocaust happened at all. For the first time in this measured retelling, he becomes exercised: "The Holocaust did happen. I was there. I saw the corpses. And it did happen. People must know that it's the truth".

Tomi lives in Dublin with his partner Joyce, who is a source of tremendous support to him in his work. He has spoken to over 120,000 schoolchildren in Ireland, and has travelled to South Africa, the US, and all over Europe, including Germany and Slovakia. In June 2015, on his 80th birthday, he gave a speech at the Blanchardstown Mosque. He gave a TedX talk in Trinity College Dublin in March 2018, and has addressed the Harvard University Law School and the Cambridge Union. He is the recipient of numerous awards for his work, including the Order of Merit of the Federal Republic of Germany, and honorary degrees from TCD, DCU and Maynooth University. His autobiography, *I was a Boy in Belsen*, was published by O'Brien Press in 2011, and a children's book, *Tomi*, was published in 2018. Tomi has also featured in a series of three documentary films – *I was a Boy in Belsen*, *Close to Evil*, and *Condemned to Remember* – which follow him as he confronts his past, and seeks to address the rise of the far right in Europe and beyond.

Building a future and facing the past

The surviving members of Tomi's family were finally released from the camp, and were reunited with his father. They travelled back to Slovakia, but by then the Eastern Bloc countries were in the grip of Communism, and Jews were no more welcome than they had been before: "We considered ourselves Slovak, but [to the Slovak population] we were Jews first and then we were Slovak".

The family eventually made the decision to emigrate to the newly formed state of Israel, and settled there in 1949. Seven years later, 21-year-old Tomi made the extraordinary decision to travel to Germany to study. I ask him how he could have considered returning to a place that had such horrendous associations, and he smiles:

"You know, after the war the Germans were very helpful to Israel. When people were saying to me how can you go to Germany, I said I will tell you how: when Ben-Gurion [the Israeli Prime Minister] is going on an official visit, he has side riders on motorbikes, and the motorbike is BMW, made in Germany, and if Ben-Gurion agrees that German motorbikes can accompany him, I can go to Germany to study, because I wanted to study engineering and of course the Germans were the people to go to".

From Germany he travelled to Ireland in 1959, when he was employed by a German industrialist to set up a factory in Dublin. For over forty years he made a happy life here, married, raised a family and ran his business. But in all of that time, he never once spoke about what had happened to him. His wife died in 2003 without ever knowing Tomi's history.

It was only when he retired that Tomi began to write about what had happened. His articles attracted some media attention, and he was approached by the Holocaust Education Trust Ireland, who asked him if he would speak to school groups. A first he refused: "I couldn't do it, but eventually I realised that I owe it to the victims that their memory is not forgotten. I have to speak".

Thus began a new chapter in Tomi's life, speaking to schools, colleges, governments and organisations, telling his story, and explaining its meaning and message to generations for whom this is just another history lesson: "The teachers tell me 'Tomi, if you speak to them they will remember'. Not only do they remember, they come home, they tell their parents, they tell their friends. So it's not only the 200, 300 that know my story. There's a thousand others".

At first the process was incredibly difficult, as the act of telling not only brought back memories, but also forced him to see what he had suffered as a child through an adult's eyes: "Each time I was speaking I was reliving my past. I was talking about the time we had to wear a yellow star, and I had a yellow star and I put it on. Suddenly I broke down. When I was told to wear the yellow star, I didn't even ask why, I just wore it. It didn't mean anything to me; I was only nine years old. Now I felt the humiliation, and that humiliation made me cry. But now you know I'm more used to it. It's a job that I think is very important that I have to do".

I made peace with my past so it doesn't spoil my present. When people ask me about hatred, I say I have no hatred because hatred is a type of trauma. If you carry hatred you suffer, and the person that you are hating, he doesn't give a damn anyway. So I put it behind me. I'm looking forward, not backward. I'm a happy person. I'm very lucky.

Tomi's attitude to what he has suffered is one of extraordinary tolerance and strength: "I made peace with my past so it doesn't spoil my present. When people ask me about hatred, I say I have no hatred because hatred is a type of trauma. If you carry hatred you suffer, and the person that you are hating, he doesn't give a damn anyway. So I put it behind me. I'm looking forward, not backward. I'm a happy person. I'm very lucky".

Dangerous times

Tomi's message is more important than ever now, as the growing international migrant crisis, and the rise of right-wing political groupings, require an urgent response from governments and society as a whole. In Ireland, protests at proposed Direct Provision centres, and racial abuse on social media, have received extensive media attention, and Tomi is angered and bewildered that the message of the Holocaust has to be relearned, generation upon generation. The number of Jewish refugees accepted into Ireland during and after World War II was pitifully low, and he says our approach to refugees now is no different: "Of course I criticise that Ireland doesn't take more refugees. This is history repeating itself, you know? Today there are different people, tomorrow it might be you".

Naturally, he supports the campaign for stronger hate crime legislation, citing Germany as an example, where Holocaust denial is a crime. With a general election almost certain in 2020, he asks that people raise this issue on the doorsteps: "We talk about what individuals can do and what governments can do. We need to say to people if they canvass us on the doors: 'we need hate crime legislation: what would your party do?'

I always say you know here in Ireland, we are a democratic country. You have a voice and when you are exercising it, think about it very carefully".

He believes in our power as individuals to counter racism, abuse and discrimination in our day-to-day lives, and this is also a message he brings to the children and young people he speaks to: "If you see something like this – bullying because they are foreign or because they have different colour skin or because they are a different religion, don't become a bystander. Stand up to these bullies and if they don't stop, go to the teacher, go to the police. This has to stop. We can't let it go".

"The Holocaust did not start with the gas chamber. The Holocaust started with whispers, and then abuse and finally murder. We have to stop it at the time of the whisper, because if we don't, it might be too late".