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THE BAR REVIEW

VOLUME 28 / NUMBER 3 / JUNE 2023

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By Lyndsey Keogh

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PUB DATE: FEB 2024

Domestic Violence: Law and Practice in Ireland

By Keith Walsh and Sonya Dixon

A comprehensive overview of the Domestic Violence Act 2018 with analysis of all measures contained in the Act.

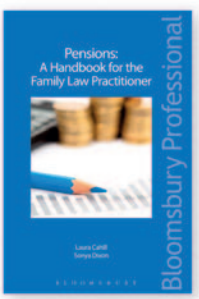
PUB DATE: DEC 2023

Irish Family Law Handbook

By Deirdre Kennedy and Elizabeth Maguire

Covers recent enactments including the Mediation Act 2017, the Domestic Violence Act 2018 and the Family Law (Divorce) Act 2019.

PUB DATE: NOV 2020



Pensions: A Handbook for the Family Law Practitioner

By Laura Cahill and Sonya Dixon

A practical, and unique, guide that deals with pensions in the context of family law in Ireland.

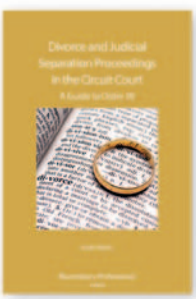
PUB. DATE: JUNE 2013

The Law of Family Formation in Ireland

By Nuala Jackson and Sarah Murray

Guides practitioners on alternatively formed family, including analysis of the law on surrogacy, adoption, fostering and Assisted Human Re-production.

PUB DATE: MAY 2024



Divorce and Judicial Separation Proceedings: A Guide to Order 59

By Keith Walsh

A practitioner-focussed guide to Order 59 of the Circuit Court Rules.

PUB DATE: NOV 2019

BLOOMSBURY PROFESSIONAL

JUNE 2023

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THE VALUE OF CONNECTION

The Bar of Ireland continues to nurture and build relationships between colleagues and other stakeholders.

Sara Phelan SC
Senior Counsel, Barrister – Member of the Inner Bar
Chair of the Council of The Bar of Ireland

Welcome back after what was hopefully a restful Whit. *Ar a scath céile a maireann muid* ('we live in each other's shadows'), the oft-used expression of President Michael D. Higgins, has resonated with me in recent weeks. A variation of the theme may very well be 'united we stand', or even 'no man is an island'.

I've recently had energising engagements with colleagues, beyond the atomised version of ourselves, but rather as part of larger groupings or purposes.

The Bar's recent partnership with the Office of Parliamentary Legal Advisors at the Houses of the Oireachtas saw a delegation of members present alongside a bench of parliamentary counsel. The themes were selected on the basis of being most relevant to Oireachtas members, their constituents and frontline staff. From an overview of Section 117 to employment law, and from assisted decision-making to planning and environmental law, it also served as an opportunity to articulate the Bar's wider policy goals. This 'public legal education' opportunity reiterated the contribution of counsel to the wider social and economic fabric of the island.

> The Council has launched a comprehensive, profession-wide survey examining demographics, education and practice-related matters.

As our Specialist Bar Associations continue their programme of annual conferences, I am honoured to participate in and witness these communities of practitioners.

Recent conferences of the Construction, Tort & Insurance and Cumman Barra Bar Associations have all done tremendous work in rebuilding the value of our collective, ably supported by Aoife, Melissa, Jenny and the wider Executive. The

Mediation Conference also provided the right platform to hear differing experiences, to reflect, and to strengthen relationships.

Restoration of fees

Now to a more pressing matter: fee restoration for criminal practitioners. One part of that campaign has been to hear, engage with and learn from our members.

A series of meetings has been held with members, and the emerging energy has been on the collective, rather than individual self-interest. The very foundation of the independent referral Bar has been our interdependence! The outcome of these meetings will be collated and no doubt members will be kept up to date with developments beyond the time of writing this message.

Across the jurisdictions

As a nation, we thrive on our links with neighbours. So too the Bar. Engagements with the four jurisdictions here in Dublin and Belfast, as well as our ongoing active participation in the fora of the Council of European Bars and Law Societies (CCBE) and the International Bar Association (IBA), all point to the value of connection, engagement and relationships.

What all these touchpoints highlight, in meeting such a range of colleagues, is that we are each coming to the table with our unique life experience. Bringing our individuality and shared values to problem solving, the system is all the better for it. It is for that reason that the Council has launched a comprehensive, profession-wide survey examining demographics, education and practice-related matters.

The results will enable us to respond, to plan and to welcome others to our dynamic profession. Do please participate.

To conclude with another expression, '*Gioraíonn beirt bôthar*' – in the company of others the journey is shortened or lightened. A useful reminder of the value of shared leadership no matter what the context!

Beir bua.

THORNY ISSUES

This final edition of the legal year contains a fascinating collection of articles.

Helen Murray BL
Editor
The Bar Review

Welcome to the final issue of *The Bar Review* for the 2022/2023 legal year.

We have a fascinating interview with award-winning journalist and author Susan McKay, who was recently appointed as Ireland's Press Ombudsman. Her writing on Northern politics is heartfelt, poignant and never jaded despite the fact that she has been covering the issues for three decades.

Deirdre Ní Fhloinn BL examines the legislation and regulatory framework of defective buildings, and offers an insightful comparison with our British neighbours in the wake of the Grenfell Tower disaster.

Sarah Jane Judge BL and James McGowan SC provide an excellent overview of juvenile justice in Ireland and in particular the pros and cons of the Garda Youth Diversion Programme. This is important reading for practitioners and in particular anyone starting out at the criminal Bar.

The thorny issue of religious speech and its potential criminalisation is placed under the spotlight by Grace Sullivan BL in her article on the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 and the Safe Access to Termination of Pregnancy Services Bill 2021.

And if that doesn't raise your blood pressure, Julia Fox's closing argument on the lack of provision for counsel in the new Legal Aid Scheme for applications under the Assisted Decision-Making (Capacity) Act 2015, definitely will.

It's time for a vacation. See you in October.

Specialist Bar Association news

Tort & Insurance Bar Association

The inaugural Tort & Insurance Bar Association (TIBA) conference took place on May 13 in the scenic locations of Kylemore Abbey and Renvyle House Hotel in Connemara. The Association was delighted to welcome keynote speaker Prof. John H. Sheperd FRCS FRCOGR, a pioneering gynaecological oncologist with over 260 published papers to his name. Prof. Sheperd was accompanied by a stellar line-up of legal experts from across the country, including Mark Harty SC, Jeremy Maher SC, Patricia McCallum BL, Deirdre Browne BL, and Aoife Beirne BL. Unsurprisingly, the inaugural conference was extremely well received by all in attendance and the Association looks forward to many more years of success.

There was a great turn-out for the inaugural Tort & Insurance Bar Association conference at Kylemore Abbey in May.

EU Bar Association

On March 23, the EU Bar Association (EUBA) partnered with Arbitration Ireland to host a seminar on '*Costello vs Ireland*: CETA and International Arbitration'. Panellists discussed the ratification of CETA under Article 29 of the Irish Constitution and the approach of the Court of Justice of the European Union (CJEU) to investor-state dispute settlement.

The EUBA was also delighted to welcome the référendaires from the CJEU to The Bar of Ireland on May 9 for a joint event addressing some evolving trends in the practice of EU law. The visiting speakers were joined by keynote speaker Mr Justice Gerard Hogan and representatives from the Law Library for an insightful exchange of expertise.

Financial Services Bar Association

On April 18, the Financial Services Bar Association (FSBA) was honoured to host renowned US trial lawyer Pierce O'Donnell, who gave an insightful talk on the dawn of bitcoin and cryptocurrency, addressing the need for global law reform to better protect crypto owners. Pierce is a decorated litigator whose 48-year legal career boasts a multitude of high-profile cases in the areas of entertainment law, environmental cost recovery, intellectual property, and more, as well as a celebrated author of six books and over 200 articles. The FSBA was delighted to have the opportunity to meet Pierce and benefit from his wealth of experience. On May 17, the FSBA held a seminar on the Central Bank of Ireland's gatekeeper function in relation to fitness and probity.

Corporate & Insolvency Bar Association

The inaugural Corporate & Insolvency Bar Association (CIBA) conference took place on March 31, 2023. The CIBA was established in 2022 with a mission to engage with Irish and international developments in the global restructuring and insolvency markets. The conference speakers included: Mr Justice Michael Quinn; Lord Justice Snowden of the Court of Appeal in England; and, James Doherty SC, Chair of the Takeover Panel, who spoke alongside a distinguished line-up of leading experts and practitioners.

James Doherty SC, Chair of the Takeover Panel, addressed the CIBA conference in March.

Climate Bar Association (Comhshaol)

On June 16, the Climate Bar Association (Comhshaol), in conjunction with the Environmental Justice Network, will hold a panel discussion featuring representatives from both the legal profession and Irish environmental non-governmental organisations (ENGOs). The purpose of this event is to facilitate dialogue between lawyers and ENGOs, and identify potential for collaboration between the groups. Keynote speaker Alex White SC will give an address entitled 'Law, Lawyers and the Climate Emergency' to kick off an afternoon of lively and constructive debate.

Irish Criminal Bar Association

On April 26, the Irish Criminal Bar Association (ICBA), in collaboration with the Irish Council for Civil Liberties (ICCL), held an introductory seminar on criminal procedure in the District Court aimed at new practitioners. The event particularly focused on the practicalities of applying for legal aid, running hearings, sentences and bail applications. The ICBA also wishes to congratulate its newly appointed officers: Chair Simon Donagh BL; Vice Chairs Ken Fogarty SC and Imelda Kelly BL; Treasurer Shaun Smith BL; and, Secretary, Jonathan Castle BL.

Cumann Barra na Gaeilge

Ar Meitheamh 1-2, beidh Cumann Barra na Gaeilge ag taisteal go Leuven, An Bheilg, do chomhdháil chun 50 Bliain de Dhlí na hEorpa a cheiliúradh in Éirinn. Beidh breis is 20 cainteoirí saineolaíocha – breithiúna, aturnaetha, abhcóidí agus acadóirí san áireamh – ag labhairt ar na topaicí seo a leanas: 'An Saoránach agus an tAontas Eorpach'; 'Cosaint an Chomhshaoil'; agus, 'Saol Nua don Phobal Dlí'. Tá súil againn go mbainfidh gach duine a bheidh i láthair taitneamh as an ocáid speisíalta seo.

Professional Regulatory & Disciplinary Bar Association

On May 23, the Professional Regulatory & Disciplinary Bar Association (PRDBA) held a sold-out joint event with Hayes Solicitors in the Distillery Building of The Bar of Ireland. This collaboration brought together a panel of experienced solicitors and barristers to share both complainant and defence perspectives.

Media, Internet and Data Protection Bar Association

Pictured at the official launch of the MIDBA on March 30 were (from left): Michael O'Doherty BL, Vice Chair; Ronan Lupton SC; Emily Gibson BL; Mark Finan BL; Claire Hogan BL, Chair; and, Claire Cummins BL.

The Media, Internet and Data Protection Bar Association (MIDBA) was officially launched on March 30 to a packed venue with over 200 attendees both in person and online. Sara Phelan SC, Chair of the Council of The Bar of Ireland, and Rossa Fanning SC, Attorney General of Ireland, joined Claire Hogan BL, the elected Chair of the MIDBA, to mark the occasion. The MIDBA will be hosting its inaugural Annual Conference on Friday, June 23, 2023, for which registration is now open. For more information on the conference line-up and how to become a member, please visit www.midba.ie.

Tax Bar Association

On May 11, Kelley Smith SC and James Burke BL spoke on the theme of expert evidence, addressing both the procedural aspects and the obligations and duties of expert witnesses. The event was chaired by Mr Justice Maurice Collins of the Supreme Court.

Immigration, Asylum & Citizenship Bar Association

The Immigration, Asylum & Citizenship Bar Association (IACBA) partnered with the ICBA recently to explore the legal issues related to human trafficking. The event provided an essential update for criminal and immigration practitioners alike on this specialised area of law. On May 10, the IACBA gave an instructive case law update. Aoife McMahon BL and Marie Flynn BL spoke, respectively, on free movement since the *Zambrano* judgment, and joint spouse applications after the *Gorry* decision. Both speakers addressed the practical implications of procedures adopted since each judgment.

Construction Bar Association

Pictured at the Construction Law Conference were (from left): John Trainor SC; Mrs Justice Finola O'Farrell DBE; Mr Justice David Barniville, President of the High Court; Mr Justice Denis McDonald; and, Jonathan FitzGerald BL, Chair, CBA.

The ninth annual Construction Law Conference took place on May 5, 2023. The event brought together barrister, solicitor and judicial perspectives to address three topical themes: 'Recessionary Times & the Construction Industry'; 'Alternative Dispute Resolution in Construction'; and, 'The Case for a TCC in Ireland: Only a Matter of Time?'. Fresh from the Association's visit to the Technology and Construction Court (TCC) in London in March, the final panel brought together John Trainor SC, Mr Justice David Barniville, President of the High Court, and Mrs Justice Finola O'Farrell DBE, expertly chaired by Mr Justice Denis McDonald, to share their insights and debate the implications of introducing a TCC in the Irish jurisdiction. The conference attracted a diverse audience from the broader construction sector and the Association looks forward to continuing to facilitate this highly regarded conference going into its tenth year.

Probate Bar Association

The Probate Bar Association (PBA) has continued its programme of highly regarded breakfast briefings. On March 28, Christopher Lehane BL gave a talk entitled 'Death, Debt and Beyond'. On May 23, Michael McGrath SC gave a talk on 'Proprietary Estoppel'. On June 8, the PBA collaborated on a lunchtime CPD with the Law Society, where speakers discussed tips for practitioners taking instructions and writing wills.

Sports Law Bar Association

Following on from a successful joint event with the TIBA in March, the Sports Law Bar Association (SLBA) made a formal submission to the Law Reform Commission (LRC) in response to the Consultation Paper on Liability of Clubs, Societies and other Unincorporated Associations. The Consultation Paper proposes three potential models for transforming the structure of unincorporated associations. Given that sports clubs would constitute a leading example, if not the most common of these associations, the SLBA submission addresses the LRC proposals in light of the protections afforded to volunteers of sporting organisations under the Civil Law (Miscellaneous Provisions) Act 2011.

Losing interest? Maybe you need to change banks

To combat inflationary pressures, the European Central Bank (ECB) has been raising interest rates. In May 2023, the ECB raised its three key interest rates by a further 25 basis points, one of which was the ECB deposit interest rate.
The latest rate rise has seen the deposit rate increase to 3.25%. To give some context, this rate had been negative since 2014, but in July 2022, the ECB raised it to 0% and has raised it steadily since.

Why is this rate relevant?

The ECB deposit interest rate has an impact on deposit savings account returns. So far in Ireland, the main banks have been slow to pass on rate increases. Deposit rates for one-year fixed deposits are currently between 0.5% and 1%, but there are better options available to savers if they are willing to look around.
Clinch Wealth Management states that it has helped clients to avail of higher interest rates on their deposits in a number of ways, ranging from online banking options to investing in cash funds offered by life assurance companies in Ireland via their gross roll-up investment vehicles. The company states that these options currently yield c. 3% per annum gross of fees. According to the company, as part of a broader portfolio, an increasing number of Irish investors are seeing these choices as an attractive alternative for investing their excess cash reserves.

Advanced Advocacy

Pictured at the Junior Advanced Advocacy Course, which took place on April 13 and 14 in the Four Courts, are members of the Advanced Advocacy Committee of The Bar of Ireland, together with members of faculty, participants and first-year volunteers. Future courses will include two expert witness courses – with engineers on June 6 and with doctors on November 17 – and a Senior Advanced Advocacy Course on September 28 and 29. Feedback from these courses overwhelmingly supports the Committee's view that such programmes consistently encourage everyone involved to reflect on and perfect their core skill of advocacy.

To learn more, contact Lindsay Bond, Education & Training Coordinator, at cpd@lawlibrary.ie.

Legal insights and updates at the Oireachtas

The Bar of Ireland was delighted to partner with the Houses of the Oireachtas Office of Parliamentary Legal Advisers (OPLA) on April 19, sharing legal insights and updates with TDs, Senators and political staff on common constituent and parliamentary issues.

Presentations from members of The Bar of Ireland and the OPLA covered areas such as:

- planning law;
- data protection;
- employment law;
- online harassment;
- the Succession Act;
- assisted decision-making; and,
- parliamentary ethics and conventions.

Sara Phelan SC, Chair of the Council of The Bar of Ireland, addressing the joint OPLA/The Bar of Ireland legal workshop for members of the Oireachtas in Leinster House. Mellissa English SC, Chief Parliamentary Legal Adviser, looks on.

The engagement served as an opportunity to signpost matters of practical implementation and law reform that impact on constituents.

The OPLA is the in-house legal team of the Houses of the Oireachtas, providing parliamentary legal advice to members, private members' bill legal advice, and drafting services. Their expertise includes the conduct of litigation, as well as providing advice on a wide number of areas of law.

Marking UNESCO World International Day for Cultural Diversity

The Bar of Ireland was delighted to welcome President of the High Court Mr Justice David Barniville to open our inaugural World International Day for Cultural Diversity on May 24. Counsellor Yemi Adenuga led a lively panel discussion on the importance of multicultural awareness in the delivery of justice, with insightful contributions from public representatives, legal practitioners, and educators.

Our increasingly global and multicultural society guarantees that Irish lawyers will have clients and colleagues of different cultures. The panellists discussed how essential it is that the legal profession become multiculturally intelligent to be able to respond to, and advocate effectively on behalf of different needs, and strengthen decision-making in the process. The legal profession must also strive to become multiculturally representative to ensure that it is reflective of the community it serves. As a profession we advocate for the rights of all, so it is imperative that we are a profession of 'all'. Representing the diversity of culture that currently exists at the Bar are members from Venezuela, Iran, Pakistan, Nigeria, Moldova, Zimbabwe, Malawi, and South Africa. Through targeted measures such as The Bar of Ireland's Equality Action Plan, it is hoped that this list will continue to grow.

From left: Gwendolen Morgan, Registrar at the Workplace Relations Commission; Hazel Chu, former Lord Mayor of Dublin; Wendy Lyon, solicitor with Abbey Law; David Leonard BL; Femi Deyani BL; and, Councillor Yemi Adenuga.

No celebration of cultural diversity is complete without food, music and dance! The event continued into the evening with performances from Venezuelan Roots and traditional Irish musicians from the Law Library and wonderful cuisine provided by Mama Shee and Ayla Turkish Foods Market.

Meeting of Four Bars

The Bar of Ireland recently hosted the leadership of the 'Four Jurisdictions'. This arises as part of a regular engagement with the Bar of Northern Ireland, the Bar Council of England and Wales, and the Faculty of Advocates in Scotland. Agenda topics for the working visit included the independence of counsel, experiences of reforms, and funding of respective legal aid systems, as well as priorities such as diversity, regulation and the promotion of the profession.

The meeting came in advance of the Four Jurisdictions Conference in Belfast on June 9-10, which brought together practitioners from the respective Bars.

Speaking following the engagement, Chair of the Council of The Bar of Ireland Sara Phelan SC said: "These engagements continue to strengthen the valuable relationship between our legal and judicial systems. The Bars face comparable challenges in the face of internationalisation of legal services, regulation, political developments and technology. The Four Bars reassert the importance and role of independent counsel to the rule of law and functioning democracy".

Clockwise from front: Ciara Murphy, CEO, The Bar of Ireland; Roddy Dunlop KC, Faculty of Advocates; Malcom Cree, CEO, Bar of England & Wales; Nick Vineall KC, Bar of England and Wales; Richard Masters, Chief Executive, Faculty of Advocates; David Mulholland, Chief Executive, Bar of Northern Ireland; Moira Smyth KC, Bar of Northern Ireland; and, Sara Phelan SC, Chair of the Council of The Bar of Ireland.

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IDEALISM IN ACTION

Press Ombudsman Susan McKay spoke to *The Bar Review* about her career in journalism and advocacy, the role of the Press Council and Press Ombudsman, and the challenges currently facing traditional media.

Ann-Marie Hardiman
Managing Editor, Think Media

> Sometimes a news article makes a mistake, and that's allowable provided that they tried to get the truth, that they tried to do their research properly.

Press Ombudsman Susan McKay brings to her role a wealth of experience both as a journalist, and as a community and women's rights activist and advocate. Originally from Derry, she entered her teenage years just as the Troubles were getting underway and says that this very much informed her eventual decision to become a journalist: "I grew up becoming more and more aware that I lived in a city that was called Londonderry, which was sort of the same as the city that was called Derry, but wasn't the same. It's very confusing to grow up in such a place, especially when you find that you don't necessarily fit in terribly well with the community that you happen to have been born into. It was a complicated background to come from".

She left to take up a scholarship in Trinity College Dublin in 1975, believing that she would never return, but in the end: "It's actually not all that easy to leave a place like the North. It kind of follows you". She returned in 1981 intending to do a PhD at Queen's University, but a desire to find a place where she fitted in led her in another direction: "When I was in Dublin, I had gotten involved with feminist politics through helping as a volunteer with the Dublin Rape Crisis Centre. So I got involved with a group of women and we set up the Belfast Rape Crisis Centre. It was a way of being involved with politics because I felt you couldn't live in Belfast at that time without being political. It remains one of the things that I'm very proud of, having been able to provide support for women when violence against women wasn't really properly recognised as an issue".

After a few years she moved to Sligo, where she ran a centre for young unemployed people, but realising that she wanted to be a writer, she decided to train in journalism at Dublin City University, entering the course in 1989: "I never looked back. I loved journalism – I took to it immediately. I worked for a couple of years with the *Irish Press* and the *Sunday Press*, and then in 1992, Vincent Browne gave me a job with the *Sunday Tribune*". She worked at "the Trib" for 13 years, ending up as Northern Editor during the last years of the conflict and through the peace process.

Susan has also written for *The Guardian/The Observer*, *The New York Times*, *The Irish Times*, and the *London Review of Books*, and *The New Yorker*, produced radio and television documentaries, and written a number of books, including two highly regarded books on the Protestant community in Northern Ireland (see panel). She also returned to her human rights advocacy roots for a period of time, as CEO of the National Women's Council of Ireland from 2009-2012.

> When you've got people who are not journalists doing commentary, they do need the skilled support of an editor.

Principles in practice

Susan was appointed as Press Ombudsman in October of last year, and will serve for an initial period of three years, with an option to renew her contract for two further three-year periods if she and the Press Council wish.

The Press Council is an independent self-regulatory body. Members (consisting of print and online publications who choose to join) are expected to abide by the standards set out in the Council's Code of Practice, which has been drawn up by a Code of Practice Committee made up of editors and their representatives.

The Code of Practice is a brief document that covers a multitude, setting out 11 principles (see panel) that aim to ensure accurate, fair and ethical reporting, while protecting the freedom of the press and the public interest. Where a member of the public feels that one of the principles has been breached, and that they have been directly affected, they can first approach the editor of that publication to seek a resolution of the issue. If they are not satisfied by the publication's response, they can make a complaint to Susan's office. The service is free, and aims to deal with complaints within a short timeframe. Susan's colleague, Case Manager Bernie Grogan, will attempt to resolve the complaint through conciliation, and if that process doesn't reach a resolution, the complaint comes to the Ombudsman to make a determination. "It's important people recognise that what I do when a complaint comes to me is that I apply the Code of Principles," says Susan. "It is not about my personal views on any of the issues that come up. The Code is a remarkably supple instrument. I have yet to come across a decision that could not be addressed by it."

Principle 1 of the Code deals with the fundamental issue of truth and accuracy, which Susan says is one of the main issues about which complaints are brought to her office: "Sometimes a news article makes a mistake, and that's allowable provided that they tried to get the truth, that they tried to do their research properly. It is when that work was not done that the publication can be in trouble".

Principle 2, which deals with distinguishing between fact and comment, is particularly important, Susan says, in today's publishing environment, where newspapers increasingly rely on opinion/comment pieces to fill pages, many of which are written by people who do not have a background in journalism: "It's right that young people and people from a range of backgrounds are now being asked to do opinion pieces. However, when you've got people who are not journalists doing commentary, they do need the skilled support of an editor".

Court reporting is another area covered by the Code, and Susan has dealt with a number of complaints from members of the public who feel that reporting of a trial has been unfair or inaccurate. She feels this may sometimes be because the public don't necessarily understand the nature of such reporting: "Sometimes people get very upset because things are said in the course of a court report that they feel very strongly are untrue or unfair. But a court report is a very particular type of reporting, which is covered by privilege, and does require the reporter to give all sides of the evidence as given in court. I've had complaints where people have said 'they said that such and such a thing was true, even though it was found by the court that it wasn't'. But the reality is that the court reporter has got to say that it was said in court that this was the case. Now, they must also go on to say that the court found it wasn't the case if that is the outcome".

The Code also addresses the issue of prejudice in reporting, stating that newspapers or magazines shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of race, religion, nationality, gender, membership of the Travelling community, etc. The person or group making the complaint does not have to be directly referenced in the article: "It's important that people understand that they have the right to complain about those things. A group representing people from one of those backgrounds, for example, could say, 'our members would experience prejudice or hatred as a result of the publication of that article'".

The Code is also open to change. In recent years, following representations from groups set up to support families bereaved by suicide, an addition was made to the Code advising against giving excessive details in reporting it.

Independence

There is often criticism in Irish society of an over-reliance on self-regulation, but Susan makes the case for both the independence and the self-regulatory nature of the Press Council and her own office: "There is a risk that when governments are responsible for media regulation, they can make political

'The people I uneasily call my own'

In 2000, Susan published *Northern Protestants: an Unsettled People*: "I wanted to understand my own background better. It was partly me learning about my own people, and was also educating people in the Republic about a community in the North that I felt was very misunderstood".

She returned to the subject in 2021 with *Northern Protestants: On Shifting Ground*, and found that while many things had changed, many others had not: "After I wrote the first book, I got called a 'Lundy', which is a Protestant term in the North for a traitor, because I had written critically about my own people. But what I discovered when I went 20 years later to write my second book was that the 'Lundy' section of the community had grown dramatically. There's a lot more room for people to be different now, and I think that's absolutely wonderful. It was also really interesting to go back 20 years on from the Good Friday Agreement. There was a great deal of change, obviously, some of it good, some of it bad. And sadly, there was also a good deal that hadn't changed in areas that I'm very preoccupied with, which, notably, would be: the poorest places were still the poorest places, and neither the peace process nor the period since had really addressed those social issues. Likewise, there are still very high levels of violence against women. There's a lack of services still, despite the best efforts of community groups and feminist groups".

decisions about what they consider to be good journalism, and what they consider to be bad journalism. It's a very important aspect of the Press Council and the Office of the Press Ombudsman that we are independent of the industry and of Government. A further layer of security is that the Office of the Press Ombudsman is also independent in terms of its decision-making from the Press Council. Both complainants and publications can appeal my decisions to the Press Council. There are a lot of safeguards built in there".

The Press Council exists as part of a wider system of legislation and regulation, much of which is changing to meet the challenges of the times. Susan welcomes the new Media Commission, Coimisiún Na Meán, which was set up as a result of the findings of the Future of Media Commission: "Coimisiún na Meán is tasked, among many other things, with helping to ensure that print media survives. Within the EU context, the European Media Freedom Act is in progress and it's addressing issues to do with media ownership and editorial independence".

The Press Council and the Press Ombudsman also welcome the proposed changes to the Defamation Act, having made a submission on the Act during the review process: "We're pleased that it says that lawyers should inform their clients of the existence of the Press Council and the Office of the Press Ombudsman. It's good that people know that they don't necessarily have to embark upon costly litigation".

Susan is particularly pleased to see the issue of Strategic Litigation Against Public Participation (SLAPP) addressed. "Of course people have a right to go to law to defend their good name, but the law can be abused by powerful people with deep pockets. SLAPPs are a way of bullying journalists into silence. There's a chill effect. Editors can end up deciding to leave certain stories alone because of the risk of a SLAPP that could bankrupt their publication".

She also welcomes the advent of the Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022.

Challenges

The landscape for 'traditional' media has changed enormously in recent years, and this has created serious challenges to publications' ability to operate, and offer the standard of journalism and investigation that Susan feels is still very much needed. One such challenge is financial: "Newspaper sales have plummeted and going digital has not replaced the lost revenue. Most advertising revenue is now going to the big online media companies, the global giants. Younger people curate their own newsfeeds online and often don't turn to the traditional press. These are pretty serious problems for the press because they impact on everything - how many journalists they're going to be able to employ, the kind of work that they're going to be able to support. For example, investigative journalism can be notoriously expensive compared with, for example, opinion. So we're seeing more and more opinion in newspapers and less and less investment in the more expensive end of journalism, which of course, is absolutely vital to holding powerful people and institutions to account".

There are serious intellectual property issues too: "The big social media companies are using journalistic content, which has been written by journalists in Irish papers, and they're not paying for it. They're essentially ripping off content".

Susan welcomes the work going on at national and European level to address some of these issues: "There's a problem when those companies claim that they are not publishers, but platforms, because that means that they can't be held accountable. We are seeing a lot of very malign content on social media these days, and whereas the Press Council and the Press Ombudsman can challenge member publications when they do publish stuff which is reprehensible, those other companies are just claiming that they aren't liable. Serious efforts are being made to tackle this now, here, at EU level and indeed globally".

The rise of artificial intelligence (AI), and its possible implications for the

press, were highlighted in stark terms recently when *The Irish Times* withdrew an article after suspicions were raised that it had been produced using AI (it was later proven that it had, and that the author was also fake):. "There is a lot of work going on at the moment to try to look at the implications of AI and how people can benefit from it without it ending up being problematic and undermining journalism," Susan says. "I think when there are incidents when people don't recognise something that's artificially generated, it's clear that the industry needs to be investing in fact checking and in making sure that editorial content is properly sourced. We all have to be vigilant and it is not easy. Papers can spend a very long time building up trust, but it's much easier to lose it".

A matter of trust

Even before the advent of AI, lack of trust among some sections of the public in traditional mainstream media had been identified by some as a growing problem. Susan feels it's all the more important then that publications sign up to, and strive to adhere to, the principles in the Code of Practice: "Journalism has to hold itself to high standards in order to prove those people wrong and to prove that the press in Ireland is responsible, accountable, and is producing quality work, which is verifiable and based on facts".

She says that one of her aims as Press Ombudsman is to engage in education to try to maintain and build that trust: "One of the main things I want to do with my job is to use it to educate the public about journalistic principles. I want to do that by talking about what my office does and promoting quality journalism, which is based on adherence to the Code of Practice. I want to educate people about the fact that our press has, by and large, signed up to a set of very good professional and ethical standards, and that they've done so because they want to outlaw bad journalism. The freedom of the press and the rights of people to be both informed and respected are not in opposition".

She does however feel that Ireland is in a relatively good position in this regard: "In surveys that are done by the likes of Reuters, people report that they have confidence in the Irish print media. That is something that we should be very proud of and that we should hold on to".

There's no doubt that these are difficult times for traditional media, but Susan feels that if anything, these issues reinforce the need for a future where good journalism is maintained and protected: "I think that if anything has been demonstrated by some of the abuses of discourse that we've seen in recent times, it is that we really need our media, whether it's online or whether it's in printed newspapers. We need to maintain the tradition in Ireland of having very high quality print media. And I do feel that the Press Council and the Office of the Press Ombudsman provide a mechanism for putting idealism into action. We have a very honourable tradition of fine print journalism in Ireland, and I certainly feel very proud to be part of a system that's all about making sure that that continues. We can't contemplate a future without our press".

> **Journalism has to hold itself to high standards in order to prove those people wrong and to prove that the press in Ireland is responsible.**

Principles

The Press Council Code of Practice consists of 11 principles:

Principle 1	Truth and Accuracy
Principle 2	Distinguishing Fact and Comment
Principle 3	Fair Procedures and Honesty
Principle 4	Respect for Rights
Principle 5	Privacy
Principle 6	Protection of Sources
Principle 7	Court Reporting
Principle 8	Prejudice
Principle 9	Children
Principle 10	Reporting of Suicide
Principle 11	Publication of the Decision of the Press Ombudsman/Press Council

The Code of Practice can be read in full at https://www.presscouncil.ie/press-council-of-ireland/code-of-

Taking the sea air

Susan's career has taken her all over Ireland, and these days she enjoys visiting friends she has made over the years: "I like doing things like going off to visit a friend in Sligo when the bluebells are out or going to visit somebody in Belfast when there's a really good play on in the Lyric".

Aside from that, she loves to get out and about: "I live by the sea and I love walking by the sea with my dog. I love challenging walking like hill walking, and I have recently, in the interests of maintaining flexibility, taken up going to a gym, which was something I never thought I would do, but I'm really enjoying. There's a certain amount of white wine as well!".

DEFECTIVE BUILDINGS – UK AND IRISH APPROACHES

Recent changes in the law, particularly resulting from tragedies such as the Grenfell Tower fire, have meant that law and policy in the UK and Ireland on remedies for defective buildings have diverged significantly.

Deirdre Ní Fhloinn BL

UK and Irish law was reasonably well aligned in relation to liability for defective buildings until recently. While the essence of private law approaches to remedies for defective buildings has remained fairly similar, the legal and policy responses to the discovery of defective buildings in the two jurisdictions now diverge significantly.

This paper considers the legal context in both jurisdictions, firstly as a matter of private law, and then as a matter of regulatory law. It will be seen that the UK has had rather more intervention in private law remedies than has Irish law, and that regulation had remained on a fairly similar basis in both jurisdictions until the passage of the Building Safety Act 2022 (BSA) in England and Wales.

The introduction, in Ireland, of three different schemes to provide State-funded and comprehensive redress in respect of defective buildings since 2013 is a distinctive approach, which has not been followed in the UK. These schemes consist of the pyrite remediation scheme, provided for by means of the Pyrite Resolution Act 2013, the mica redress scheme, provided for by means of the Remediation of Dwellings Damaged by Defective Concrete Blocks Act 2022, and now the apartment defects redress scheme, for which policy details have been provided by the Irish Government, with legislation awaited.

> Private remedies – in other words, avenues for recovery in contract and tort available to Irish homeowners – are limited in a number of significant respects.

In the UK, by contrast, the combined experience of a large number of high-rise residential buildings, and the catastrophic loss of life in the Grenfell Tower fire in June 2017, has prompted a comprehensive regulatory overhaul. This is considered in the final part of this paper, and consists of two extensive considerations of the regulatory environment prior to the fire, in the form of the Hackett Review and reports (2017-2018), the ongoing Grenfell Tower Inquiry, and the main response to those investigations, in the form of the BSA, much of which came into force in June 2022.

While a Building Safety Fund has been established in the UK to provide finance for leaseholders whose buildings require replacement of external cladding,[1] a significant part of the UK Government's approach has been to force the hand of homebuilders to remediate their own developments. This has led to 39 major housebuilders (to date) signing up to the Government's

remediation scheme and contract, with 11 yet to sign as of mid-March 2023. Developers were threatened with being barred from Government contracts and having planning permission and building control approvals denied to them if they failed to sign.[2]

Ireland – private law remedies

Private remedies – in other words, avenues for recovery in contract and tort available to Irish homeowners – are limited in a number of significant respects. As a matter of contract, most new homes in Ireland will be sold by means of a combined transaction of the land transfer, which, in the case of an apartment, typically consists of a long lease and a building contract. The same process is followed for the sale of a house, where the transfer is usually of the freehold.

Many older estates, as conveyancing practitioners will know, were assembled and sold by means of long leaseholds during the 1950s and 1960s, particularly in Dublin, and many of these leaseholds persist. The passage of the landlord and tenant legislation, which entitles those long lessees to buy the freehold at a nominal fee, has rendered the persistence of these titles more a matter of administrative inconvenience than a substantive problem for those homeowners.[3]

With regard to the standard form building contracts, with which practitioners may be familiar from commercial developments, this standard building contract has not changed substantially since it was originally agreed and introduced between the Law Society and the Construction Industry Federation (CIF) at the end of the 1980s.

There is limited jurisprudence in relation to remedies for home defects from the Irish courts that followed from the introduction of the standard form residential building contract, due in part to its provision for arbitration. The decision in *Healy v Whitepark Developments Limited and anor*[4] is an unreported *ex tempore* decision of Kelly J., the content of which is set out in a 2018 practice note of the Law Society Conveyancing Committee. The parties had entered into the Law Society/CIF standard form building agreement in connection with the construction of a new home, and the defendant was a member of the CIF, which was at the time one of the joint appointing bodies for an arbitrator pursuant to the contract.

Kelly J. refused to stay proceedings to arbitration, and held that to require the plaintiff to submit to arbitration in circumstances where one of the appointing bodies for the arbitrator was a representative body of the defendant builder "offended the notion of natural and constitutional justice, and further that it fell foul of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995".[5] The 2018 practice note reports that the Law Society, in light of the decision, agreed an amended form of clause 11 with the CIF, which refers to the Law Society only as appointing body for an arbitrator in default of agreement.

Among the other features of the building contract that would differ from what a commercial landowner would expect is that the homeowner typically has no right to access the site or to instruct a professional to inspect the works in the course of construction, and there is no possibility of liquidated damages for delay in completing the home. The Building Control (Amendment) Regulations 2014 provide for mandatory inspections, but the usual model is that the developer/seller will appoint the professional to inspect and certify the works, giving rise to the potential for conflicts of interest.

In 2001, the Director of Consumer Affairs, with the support of the Law Society, obtained a High Court order prohibiting the use of a list of unfair clauses in building agreements.[6] Despite the order, the Law Society has issued practice notes on two subsequent occasions, most recently in 2016, to warn practitioners that the prohibited clauses continue to be included in building agreements for new houses and apartments.[7]

Leaving aside these fairness considerations, a remedy in contract should be available, in principle, in the event of home defects. Two significant problems remain for homeowners in accessing this remedy, however. Firstly, it is likely that the building company will be a special purpose vehicle established by the original developer, which will have no assets, and which will have no insurance in respect of defects.

Instead, the model adopted in Ireland for the past 40 years or so has been to encourage homeowners to purchase their own warranties in relation to home defects. A fuller consideration of the scope of the HomeBond warranty is contained in the 2021 book of which I was the Irish contributing author, *Residential Construction Law* by Philip Britton and Matthew Bell.[8] The HomeBond warranty has changed its form on a number of occasions during the years since it was first introduced at the end of the 1970s, but it contains a number of

> The Building Control Act establishes powers but not duties in relation to administration of building control.

significant limitations on recovery and does not respond to many of the significant defects that have in fact emerged, in apartments in particular, during the last 20 years (such as pyrite damage).

Other problems facing the homeowner in accessing a remedy for breach of contract include the rules as to privity of contract, by which only the first purchaser will be entitled to rely on that building contract, and the rules in relation to limitation, which take as the starting point the date of breach of contract, which may have occurred years before the resulting damage comes to light.

With regard to the law of tort, it is often possible to pursue an action against the architects and engineers responsible for design or inspection of the building, based on the line of authority that permits recovery for negligent misstatement, but significant hurdles arise in seeking a remedy in negligence against the builder, for which UK law has certainly shut the door in a number of decisions.

Ireland – regulatory environment

With regard to the regulatory environment, then, for the purposes of my PhD, I examined the Building Control Act and, in particular, its genesis in earlier draft building regulations. I also considered the recommendations of the report by Keane J., as he then was, following the inquiry into the Stardust disaster.[9] The Building Control Act 1991 came into effect in June 1992 and provides for the making of both Building Regulations, which are the technical aspects of our building code, and Building Control Regulations, which deal with the administration of the building control system by local authorities.

The Building Control Act establishes powers but not duties in relation to administration of building control, and provides for an escalating sequence of enforcement actions by the building control authority, which can commence with an enforcement notice issued under section 8 of the Act in the event that a breach of building regulations is occurring on a site. In contrast to the homeowner not having the entitlement to access the site or to have a professional inspect the works in the course of construction, it is notable that authorised persons appointed by a building control authority have such power. They also have an escalating sequence of enforcement powers, which can include prohibition orders on application to the High Court.

The Act also provides for personal liability on the part of directors or managers of a company that is found to be in breach of building regulations. This model of regulation essentially involves the building control authority acting as an (effectively unpaid) compliance consultancy rather than a regulatory body with robust enforcement powers and a reputation for using them when appropriate. Formal enforcement powers appeared to be rarely used, at the time that I conducted my research around five years ago. I did not come across, in the course of four years of research, a single instance of a conviction under the Building Control Act for failure to comply with Building Regulations. When that is taken in tandem with what we now know about thousands of houses contaminated by mica in Donegal and Mayo, over 10,000 houses contaminated with pyrite in various counties, and the majority of all apartments built between 1991 and 2014 apparently having serious defects,[10] it is striking that there are few, if any, recorded convictions for breach of the Building Regulations.

This suggests that there is a significant cultural problem with the use of enforcement powers by building control authorities. This problem, in my view, is compounded by the fact that we do not have a national regulatory authority that can provide oversight of local authorities to ensure that the regulation is effective. Oversight is regarded as being fundamental to the effectiveness of regulatory bodies in all of the international research on the topic of regulation, and that oversight is a foundation stone of the new approach to regulation set out in the English Building Safety Act, to which we now turn.

Hackitt Review and Grenfell Tower Inquiry led by Mr Justice Martin Moore-Bick

On June 14, 2017, a fire broke out at Grenfell Tower in west London, resulting in the tragic loss of 72 lives and multiple injuries. In Ireland, on February 14, 1981, 48 people lost their lives in the Stardust disaster and over 200 were seriously injured. Each of these disasters led to significant regulatory responses in both jurisdictions.

The UK Government estimates that there are 12,500 buildings that fall into the Building Safety Act's definition of a "high-risk building", and that will now be subject to an entirely new safety risk assessment regime under the supervision of a new Building Safety Regulator. Thousands of these are in urgent need of remedial works to remove unsafe cladding.

In some cases, residents must organise their own 'waking watch' to try and make sure that they become aware of a fire before it spreads. Waking watch consists of having individuals on site to monitor high-risk buildings to make sure that any small fires are identified and contained rapidly. The maintenance of waking watch continuously in unsafe buildings comes at an enormous cost and is often undertaken by residents directly for that reason. In the case of *Martlet Homes Ltd. v Mulalley & Co. Limited* [2022] EWHC 1813, Davies J. considered, as part of an overall claim of £8m in respect of defective cladding works, the amount of

£2.9m claimed in respect of providing two fire marshals for a 24-hour waking watch. The Court dismissed arguments that the period over which the waking watch was maintained was unreasonable, but considered that one fire marshal rather than two would have been sufficient in respect of the five towers at issue.

Shortly following the Grenfell Tower fire, two lines of investigation were opened. One was the Grenfell Tower Inquiry, which is concerned with the events leading up to the fire, the role of the various entities, such as the London Fire Brigade, and the designers and subcontractors who undertook the refurbishment of the tower a number of years before the fire. While the Inquiry has considered the role of Building Regulations, the technical enquiry, and the recommendations needed to address deficiencies in that system, was principally the focus of Dame Judith Hackitt, appointed in July 2017 by the UK Government to undertake an independent review of Building Regulations and fire safety. The Hackitt Review was undertaken between 2017 and 2018, and an interim[11] and then final report[12] was published in May 2018 setting out observations, conclusions and recommendations for change. One of the principal recommendations for change was referred to in the final report as the "golden thread" of responsibility for information and decision-making in relation to high-risk buildings.

The essence of the "golden thread" is that information, and accountability for the quality of that information, is prioritised on an ongoing basis from the design of the building, through the construction stage of the building, and throughout the lifetime of the building in use. The Hackitt Report encourages us to change the perception of buildings as one-off finite processes for which the principal regulatory input concludes at completion and handover of the building. Instead, the Report recommends that buildings should be seen as a system, to ensure that interventions in the building at a later stage of the life cycle take account of the design information, maintenance information, and the qualities of that building before an intervention is made that may result in a significant safety risk.

This is what happened with Grenfell Tower, when the cladding applied to the building was installed without consideration of how it would perform in the event of a fire, and is cognisant of other compounding factors, such as the fact that the London Fire Brigade operated a stay put policy for much of the building. In the executive summary of Phase 1 of the Grenfell Inquiry, the chairperson, Moore-Bick J., commented with regard to the Building Regulations as follows:

"…there was compelling evidence that the external walls of the building failed to comply with Requirement B4(1) of Schedule 1 to the Building Regulations 2010, in that they did not adequately resist the spread of fire having regard to the height, use and position of the building. On the contrary, they actively promoted it".[13]

England and Wales – Building Safety Act 2022 (limited application in Wales)

The BSA was introduced in April of last year and most of its parts came into force in June of last year. The Act is a wide-ranging piece of legislation running to almost 300 pages.

What is particularly interesting from the Irish point of view is to remember that our Building Control Act and system of Building Regulations and Building Control Regulations are built according to the same design and chassis as the English legislation. That legislation has now been demonstrated not to be fit for purpose and a comprehensive overhaul has been introduced via the BSA. There are three areas of particular interest to Irish practitioners.

First, a new Building Safety Regulator is established. Rather than creating a new regulatory body, the Health and Safety Executive is designated as the Building Safety Regulator. The Regulator is given extensive powers in relation to the formulation of policy, and supervision of building control authorities and building control inspectors. It is also charged with establishing resident liaison structures that allow residents and interested persons to raise safety concerns in relation to higher-risk buildings.

The Act defines higher-risk buildings as those above 18m in height or seven storeys tall, together with such buildings as may be prescribed as higher risk buildings. For those types of buildings, the building control function has been taken away from building control authorities and vested directly in the new Building Safety Regulator. The enforcement regime is shared between the Building Safety Regulator and building control authorities, who retain responsibility for all other buildings within their functional areas.

Significant sanctions are provided for in the BSA for failure to comply with Building Regulations, and a section of particular interest is Section 98, which creates an active obligation on the Building Safety Regulator to enforce the provisions of Part Four of the BSA in relation to higher-risk buildings. This marks a legislative

shift from permissive legislation towards directive legislation by actively requiring the Regulator to enforce the legislation instead of merely empowering the Regulator to do so.

Second, the BSA also creates a New Homes Ombudsman. This had been a recommendation of the report of the All-Party Parliamentary Group on Housing Defects published in 2016. The New Homes Ombudsman is given various powers and should allow homeowners to access a low-cost route for dealing with complaints against builders, which can result in orders of compensation in their favour.

The third element of the BSA that is of particular relevance to Ireland is that section 38 of the Building Act, 1984, by which a private civil remedy is established for breaches of Building Regulations, is finally to be activated after 38 years on the statute book. Practitioners and commentators have speculated for many years about the availability of civil remedies in respect of Building Regulations breaches, and Irish practitioners will be familiar with section 21 of the Building Control Act, which bars actions for statutory duty arising from breach of the Act. The activation of section 38 of the 1984 Building Act in the UK may prompt the Irish legislature to reconsider section 21, and whether it is appropriate that the action for breach of statutory duty would continue to be barred in Ireland.

Redress

There remains the question of what happens to legacy buildings in both jurisdictions. As noted previously, a number of schemes have been introduced in Ireland to provide redress. These schemes will run to billions by the time they are fully implemented. While they provide for a form of statutory subrogation in favour of the Pyrite Resolution Board[14] and the Minister for Housing,[15] they cannot, in my view, be seen as anything other than a step-in by the Irish Government to underwrite private law liabilities in circumstances where the remedies are not available.

In my view, the response of the UK Government, and the BSA, makes quite clear that the only way to deal with building defects on the systemic level seen in Ireland is by means of a very robust regulatory system. It is also striking that the UK Government is not stepping up to finance the remediation of all of these buildings, and instead has secured commitments from the major homebuilders to rectify dangerous cladding defects in building works for which they were responsible. It seems that in Ireland we have the worst of both worlds, where we have no significant regulatory reform and the taxpayer is footing the bill. The UK model demonstrates that it is possible to advance ambitious regulatory reform, while imposing significant costs back on to the home building industry.

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LEGAL UPDATE

VOLUME 28 / NUMBER 3 / JUNE 2023

A directory of legislation, articles and acquisitions received in the Law Library from March 10, 2023, to May 5, 2023.
Judgment information supplied by vLex Justis Ltd.
Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

ADMINISTRATIVE LAW

Statutory instruments

National Cultural Institutions (National Concert Hall) (Amendment) Act 2023 (commencement) order 2023 – SI 130/2023

ANIMALS

Library acquisitions

Fasel, R.N., Butler, S.C. *Animal Rights Law*. United Kingdom: Hart Publishing, 2023 – A66

Statutory instruments

Animal Health and Welfare Act 2013 (application to specified diseases) order 2022 – SI 745/2022

Notification and control of diseases affecting terrestrial animals (no. 2) regulations 2016 (amendment) regulations 2021 – SI 746/2022

Avian influenza (precautionary confinement of birds) regulations 2022 (revocation) regulations 2023 – SI 179/2023

AVIATION

Statutory instruments

Irish Aviation Authority (flying displays) order 2023 – SI 23/2023

Irish Aviation Authority (unmanned aircraft systems (drones)) order 2023 – SI 24/2023

Irish Aviation Authority (upper airspace and rockets) order 2023 – SI 25/2023

Air Navigation and Transport Act 2022 (section 69) (commencement) order 2023 – SI 65/2023

Irish Aviation Authority (noise certification and limitation) order 2023 – SI 102/2023

Irish Aviation Authority (unmanned aircraft systems (drones) (amendment) (no.2) order 2023 – SI 103/2023

BANKING

Abuse of process – Statute barred – National Asset Management Agency Act 2009 s.182 – Applicant seeking leave in accordance with s.182 of the National Asset Management Agency Act 2009 to issue proceedings against the respondent – Whether the applicant's application was frivolous or vexatious and wholly misconceived, had no reasonable prospect of success, was an abuse of process, and/or was statute barred or otherwise out of time – 24/03/223 – [2023] IEHC 151

Byrne v National Asset Management Agency

Acts

Central Bank (Individual Accountability Framework) Act 2023 – Act 5/2023 – Signed on March 9, 2023

Statutory instruments

Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (investment firms) regulations 2023 – SI 10/2023

Central Bank (Individual Accountability Framework) Act 2023 (commencement of certain provisions) order 2023 – SI 176/2023

Central Bank Act 1942 (service of notices and other documents) (amendment) regulations 2023 – SI 177/2023

Central Bank Reform Act 2010 (procedures governing the conduct of investigations) regulations 2023 – SI 190/2023

BUILDING CONTRACTS

Articles

Fitzpatrick, R., Finucane, A. Implied terms in construction contracts. *Commercial Law Practitioner* 2023; 30 (2): 23-31

Statutory instruments

Regulation of Providers of Building Works and Miscellaneous Provisions Act 2022 (appointment of registration body) order 2023 – SI 8/2023

CHILDREN

Statutory instruments

Institutional Burials Act 2022 (establishment of Office of Director of Authorised Intervention, Tuam) order 2023 – SI 87/2023

CIVIL LAW

Statutory instruments

Civil Law (Miscellaneous Provisions) Act 2022 (section 4(2)) (scheme termination date) order 2023 – SI 138/2023

COMMUNICATIONS

Statutory instruments

Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (commencement) order 2023 – SI 97/2023

COMPANY LAW

Lease – Rent – Duration – Applicants seeking an order compelling the receivers to grant him a lease – Whether the appellant was entitled to bring and pursue the application – 19/04/2023 – [2023] IECA 89

Morrissey v Allied Irish Bank Pls and others

CONSTITUTIONAL LAW

Constitutional law – Election of members to Seanad – Ss. 6 and 7 of the Seanad Electoral (University Members) Act, 1937 – Article 18.4.2 - 31/03/2023 - [2023] IESC 7

Heneghan v Minister for Housing and ors

Unlawful detention – Inquiry – Article 40.4.2 of the Constitution – Applicant seeking an inquiry into the lawfulness of his detention pursuant to Article 40.4.2 of the Constitution – Whether the applicant had been unlawfully detained – 21/03/2023 - [2023] IEHC 147

M.W. v Clinical Director of St Stephen's Hospital

CONSUMER LAW

Articles

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For up-to-date information, please check the following websites:

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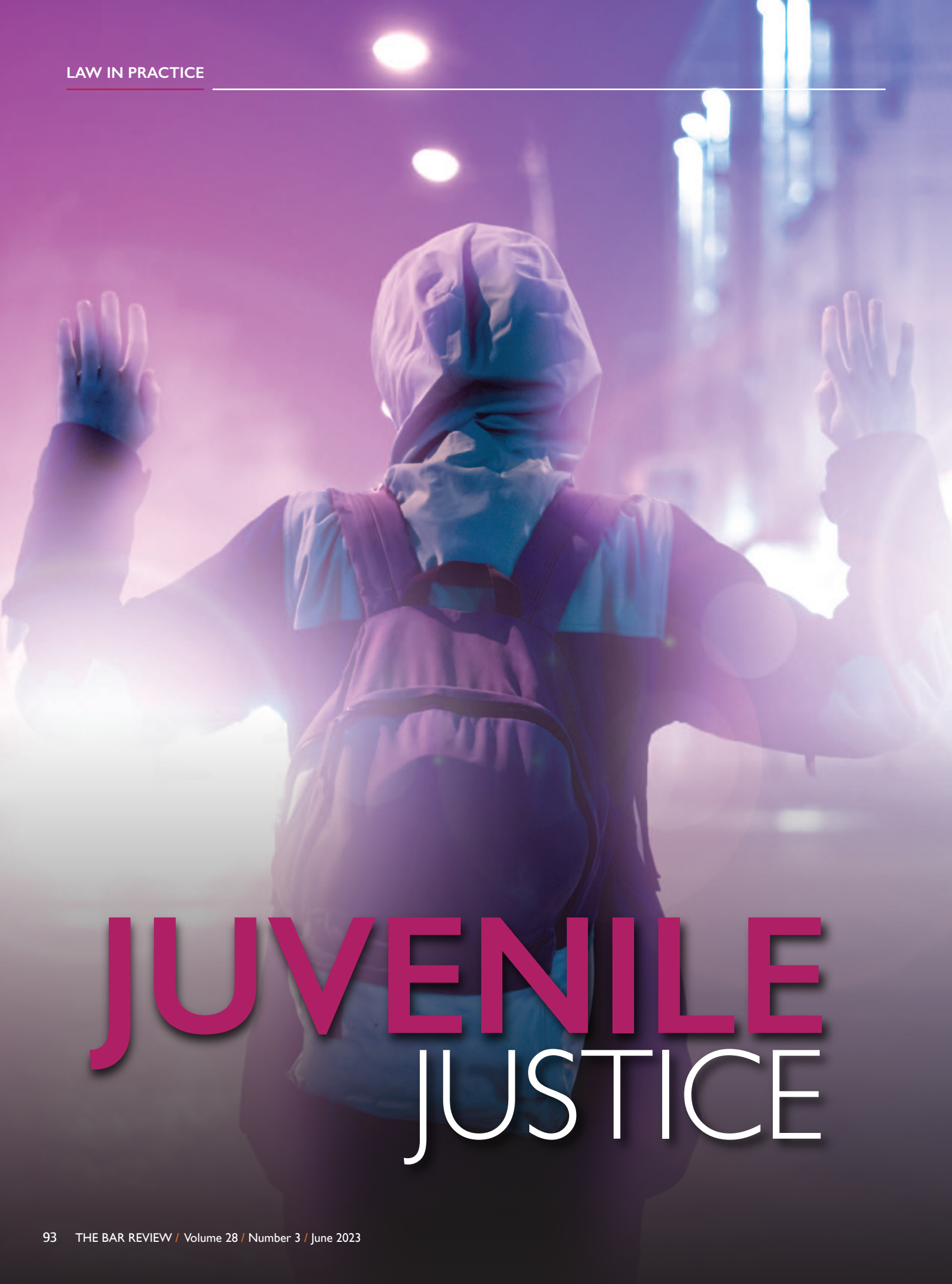
For up-to-date information, please check the Courts website:
https://www.courts.ie/determinations



JUVENILE JUSTICE

James McGowan SC Sarah Jane Judge BL

The Garda Youth Diversion Programme exists to support the diversion of young offenders from criminal prosecution in Ireland. A number of recent issues have arisen in respect of the Programme, which are of interest to practitioners.

The informal, community-based and often restorative justice ethos of many diversion programmes can assist in addressing the underlying factors that contribute to young offending.

Diversion of young offenders from the formal criminal justice process is a fundamental component of all modern youth justice systems. Diversionary models and mechanisms seek to counteract the child's criminogenic orientation, which may arise from his/her involvement with formal criminal justice institutions, agencies, and processes. Furthermore, the informal, community-based and often restorative justice ethos of many diversion programmes can assist in addressing the underlying factors that contribute to young offending.

Somewhat ironically, diversion of young offenders in Ireland is provided and managed by the Irish police force. While the formality associated with An Garda Síochána (AGS) cannot be denied, the Gardaí are the first and primary contact for children with the criminal justice process. Therefore, they may be well placed to divert children away from same. The Children Act 2001 (2001 Act) placed the Garda Youth Diversion Programme (GYDP) on a statutory footing. This served as a clear recognition by the Oireachtas of the importance of diversion in relation to young offending.

Today, the GYDP has a long and well-established record of diverting children from criminal prosecution in Ireland. The most recent figures available provide that 18,567 referrals were made to the GYDP in 2019 with 9,842 children being referred.[1] However, in recent years, litigation has arisen in respect of children who have been deemed unsuitable for the GYDP and the transparency of such decisions by the Programme Director of the GYDP. Furthermore, there appears to be confusion regarding the role of investigating Gardaí when deciding a child's suitability for the Programme and the correlation between entry to the Programme and any admission(s) made by the child regarding his/her involvement in the relevant offence(s). In addition, amendments made to the Programme by the Criminal Justice Act 2006 have a particular bearing on a child's decision to take part in the Programme.

This article seeks to provide practitioners with an overview of some of the recent issues that have arisen in respect of the GYDP. Particular emphasis is placed on examining recent dicta of the High Court regarding the unsuitability of children for the Programme. This is followed by a brief discussion of other miscellaneous issues that practitioners should be aware of when advising a child and his/her guardian in respect of his/her involvement with the GYDP and the implications of same.

What is the GYDP?

According to AGS, the Garda Youth Diversion Bureau (GYDB) has responsibility "for overseeing and developing the Programme nationally".[2] It "supports a network of JLO Sergeants and JLO Gardaí distributed across every Garda division, countrywide".[3] The Programme Director holds the rank of superintendent and his/her role is set out in the 2001 Act.

Section 19 of the 2001 Act provides that the objective of the GYDP is to "divert any child from committing further offences or engaging in further anti-social behaviour".[4] This objective shall be achieved "primarily by administering a caution to such a child, and where appropriate, by placing him or her under the supervision of a juvenile liaison

All children must first be considered for the GYDP before any formal prosecution before the courts.

officer and by convening a conference to be attended by the child, family members and other concerned persons".[5]

Statutory criteria for admission to the GYDP

Section 23 of the 2001 Act provides that a child may be admitted to the GYDP where he/she accepts responsibility for his/her criminal behaviour, having had a reasonable opportunity to consult with his/her parents or guardians, and having considered any legal advice sought by or on behalf of the child. The child must consent to be cautioned and, where appropriate, to be supervised by a juvenile liaison officer (JLO). The child must also be of or over the age of criminal responsibility and under 18 years of age.

The process for GYDP admission

Upon detection of an offence allegedly committed or believed to have been committed by a child, the child will first be interviewed by the investigating Garda in the presence of his/her parent, guardian, or another appropriate adult.[6] According to the Monitoring Committee for the GYDP, an incident is created on PULSE where the child is recorded as a suspect.[7] The incident is reviewed by the district officer[8] and an authorisation is given to create a youth referral.[9] This referral is made by the Garda Information Services Centre (GISC), which is reviewed by GISC and is given the title 'new'[10] before being received by the GYDB.[11]

A lack of transparency is evident regarding the role of the investigating member and the JLO regarding the admission of the child to the Programme. Section 22 of the 2001 Act provides that:

"The member of the Garda Síochána dealing with the child for that behaviour may prepare a report in the prescribed form as soon as practicable and submit it to the Director with a statement of any action that has been taken in relation to the child and a recommendation as to any further action, including admission to the Programme, that should, in the member's opinion, be taken in the matter".[12]

Unfortunately, the 2001 Act does not specify whether "the member" referred to in Section 22 is the investigating Garda or a JLO. It appears that a suitability report in respect of the child is completed by the JLO and a skeleton file and/or cover report is prepared by the investigating member. Kilkelly explains:

"If the child fulfills the eligibility criteria for admission to the Programme [...] the JLO may recommend to the Director of the Programme at the National Juvenile Office that the child be admitted to the Programme".[13]

The suitability report together with the skeleton file are then forwarded to a more senior ranking officer for transmission to the GYDB. It is reasonable to assume that this documentation will also detail whether the child has satisfied the required statutory criteria for admission to the Programme. This information is then considered and a recommendation is made regarding the suitability or unsuitability of the child for admission.[14] The recommendation is then signed off by the Programme Director.[15]

The 2001 Act does not provide for any right of appeal of the child against the decision of the Programme Director that the child in question is unsuitable for the Programme.

If a child is deemed to be unsuitable for admission or a suitable child refuses the relevant caution, a certificate is issued to the local district officer who must consider initiating a prosecution and forwarding the file to the Director of Public Prosecutions (DPP). The file is accompanied by a certificate from the Programme Director regarding the unsuitability of the child in question for the GYDP.[16]

All children must first be considered for the GYDP before any formal prosecution before the courts. Therefore, it is essential that all practitioners representing children in any subsequent court process seek a copy of the certificate regarding the child's unsuitability for the Programme and the suitability report as part of disclosure pertaining to the offence(s) in question.

Statutory criteria for admission to the GYDP

In considering admission, the Programme Director must be satisfied not only that the statutory criteria for admission have been complied with but also that the admission of the child to the Programme would be appropriate, in the best interests of the child, and not inconsistent with the interests of society and any victim.[17] Any views expressed by any victim in relation to the child's criminal behaviour shall be given due consideration but the consent of the victim shall not be required for such admission.[18]

The discretion of the Director to refuse admission

The 2001 Act does not place any obligation on the Programme Director to provide reasons pertaining to his/her decision regarding a child's suitability for the Programme. However, recent judgments of the High Court in *S. (identity protected) v Director of Garda Juvenile Diversion Programme* [2019][19] (*S.* case), and *L.A. (a minor)* v *The Director of the Garda Juvenile Diversion Programme and the Director of Public Prosecutions* [2022][20] (*L.A.* case) have decided that the Programme Director is required to provide reasons and also set out the parameters of this requirement. Some of the salient issues for practitioners wishing to assess a decision of unsuitability by the Programme Director have been distilled from those two judgments and are discussed below:

Reasons for refusal of admission/unsuitability must be provided by the Programme Director

In the *S.* case, the Programme Director declined to give any reasons whatsoever for his decision to refuse admission of the applicant to the GYDP. Clearly distinguishing the role of the Programme Director from that of the DPP, Simons J. was of the opinion that the Programme Director does not benefit from the same standard of attenuated judicial review as that applicable to the DPP. Simons J. concluded that while a juvenile offender does not have a right to be admitted to the GYDP, he/she does have an obvious interest in ensuring that the decision has been reached in accordance with the relevant statutory provisions.

While reasons are required, the Programme Director is entitled to curial deference

Although Simons J. in the *S* case stated that there is a requirement for the Programme Director to provide reasons for his/her decisions regarding suitability, the learned trial judge qualified this requirement, stating that it is not 'open season' in respect of decisions made by the Programme Director under Part 4 of the 2001 Act:[21]

"The Programme Director, as with any other public authority charged with the exercise of a statutory discretion, is entitled to curial deference. A court will not intervene to set aside a decision on the merits unless an applicant for judicial review can establish that the decision is 'unreasonable' or 'irrational' in the sense that those terms are used in *O'Keeffe v An Bord Pleanála* [1993] 1.I.R 39, and *Meadows v Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 01. An applicant for judicial review will have to hurdle this very high threshold before he or she could succeed in setting aside the decision on the merits".[22]

In the *L.A.* case, Heslin J. held that the Programme Director is "by no means at large in relation to his/her decision to admit, or not, a child (as defined) to the Programme". Heslin J. referred to what Simons J. described as "a margin of discretion" on the Programme Director and the curial deference afforded to him or her:

"In my view, showing the requisite curial deference precludes this court from subjecting the Director's decision to microscopic analysis as regards how he expressed himself as opposed to looking at the substance of his decision".[23]

Reasons provided by the Programme Director may be in short form

Addressing the particularity of the reasons to be provided, Simons J. outlined that the reasons can be in "short form and there is no obligation on the Programme Director to provide a discursive explanation". In the *L.A.* case, Heslin J., echoing the findings of Simons J., stated:

"It seems to me that the Director, when giving his reasons, was not obliged to refer to, or explain how he had engaged with the documentation or information considered by him in order to reach his decision be that (i) the contents of the report prepared on the child, as required by s.22 of the 2001

It is imperative that practitioners engaged in the representation of children are aware of the implications for the child of involvement in the GYDP.

Act; or (ii) the contents of the file prepared by the Juvenile Liaison Office, including the views of the Executive Officer; or (iii) the written submissions […] as furnished by the applicant's solicitor.

What was required was for the Director to provide reasons, which however succinctly put, were clear and intelligible and sufficient for the applicant and those advising her to know why. On this occasion, the Director declined to admit her into the Programme. This was done and the absence of any obligation to provide a discursive explanation means, in my view, that the reasons, which were in fact provided by the Director were adequate, despite the submission made on behalf of the applicant. […] On the facts in the present case, the submissions were considered, as was other relevant material and clear intelligible reasons were given which were in fact understood".

The rationality or reasonableness of the decision of the Programme Director regarding suitability

From the dicta in *S.* and *L.A.*, it would appear that, in order to challenge the decision of the Programme Director regarding the unsuitability of a child, the reasons provided must themselves be shown to be irrational or unreasonable as opposed to the particularity of the reasons given. However, with the curial deference afforded to the Programme Director as recognised by the High Court, it appears that any alleged irrationality or unreasonableness of the Programme Director's decision will require significant starkness and substantiation by any possible applicant.

Regarding the type of reasons that may "pass muster"[24] as reasonable and rational when refusing a child admission to the Programme, Hedigan J. in *Kelly v Director of Public Prosecution*[25] (*Kelly* case) referred to a number of criteria including: the serious nature and aggravating circumstances of the offences; the racial undertone of the offences; the failure of the first applicant in the case in question to make a full admission to the offences; and, the fact that the second applicant had benefited from the Programme on several previous occasions.[26] Heslin J. in the *L.A.* case stated that the Court in the *Kelly* case did not intend the list of factors to be "an exhaustive list. Nor was it suggested that, in order to be adequate, there must be a multiplicity of reasons".[27]

The Criminal Justice Act 2006 and the GYDP

The Criminal Justice Act 2006 (2006 Act) expanded the remit of the GYDP to include those less than 12 years of age. Children aged between 10 and 18 years of age can now be considered for admission to the Programme.[28] The 2006 Act further provided for evidence of any involvement in the GYDP to be admissible in any other criminal proceedings the child may face as a juvenile.[29] Arguably, allowing such evidence to be admissible renders previous involvement in the GYDP a form of previous criminal record for children, something counter-intuitive to the fundamental concepts of diversion. Evidence of previous involvement with the Programme will only arise should the child appear before the courts for prosecution on a further occasion while still a child. The possibility of the disclosure of this previous involvement in further prosecutions should be explained to all children when considering their involvement in the Programme.

The interview of the child and admission to the Programme

In recent years, confusion has arisen regarding the role of admission made by the child relating to his/her involvement in the relevant offence(s) and his/her subsequent entry to the GYDP. Any assurances given by the investigating member to children and their parents or guardians that admissions to offences will later ensure entry to the GYDP are vacuous and outside the remit of an investigating member. The decision to admit the child to the GYDP is that of the Programme Director only.

The admission of a child who is later deemed unsuitable

Section 48 of the 2001 Act provides that: "in civil or criminal proceedings against a child, evidence shall not be admissible of any acceptance by the child of responsibility for criminal behaviour in respect of which the child has been admitted to the Programme,[30] that behaviour,[31] or the child's involvement in the Programme for that behaviour".[32]

The 2001 Act is silent regarding the admissibility of any admissions made by a child in the context of consideration for the GYDP in circumstances where the said child is subsequently deemed unsuitable for the Programme and the matter proceeds to prosecution. This arguably allows for a situation where such an admission, under caution, can be used against the child in the said prosecution. This is compounded by the lack of any clarity regarding the exact caution given by a JLO to a child in advance of such admissions by the child. Furthermore, it is unclear what assurances JLOs are directed to give to children or whether this varies between individual JLOs. This, again, goes to the overall lack of transparency regarding the operation of the Programme.

In circumstances where such an admission was made on foot of assurances made by the investigating member regarding entry to the GYDP, the child's representative may seek to argue that any such admission was only garnered on foot of such assurances by the investigating member and thus were made

on foot of an incentive or possible duress. However, practitioners will be aware that the majority of criminal proceedings regarding child defendants occur in the Children's Court. Therefore, the arguments regarding the inadmissibility of any such confession by the child will likely occur before the same judge who may later determine the guilt or innocence of the child even if the admission is deemed inadmissible. While all judges are well placed to disregard the existence of such admissions by defendants, the client or his/her parents or guardians may instruct that an application be made that the presiding judge recuse him/herself if he/she is aware that the child had previously made certain admissions. This will inevitably delay matters, which may be a particular concern for a child nearing the age of majority.

Conclusion

Elements of the youth justice system in Ireland often come under fire in light of the due process rights of accused children and possible breaches of same. However, it is clear that the GYDP provides an important service and, for the large part, is effective in diverting children away from the court process.

However, issues of transparency regarding the Programme's operation and the uphill battle that children may face in overturning the decision of the Programme Director are concerning. Therefore, it is imperative that practitioners engaged in the representation of children are aware of the implications for the child of involvement in the GYDP.

Furthermore, in cases where the child is close to the age of majority, expediency is required in considering the child for diversion, and if unsuitability arises, the court process, if required, should be instigated as quickly as possible.

However, the unrelenting issue of delay throughout the Irish youth justice system and its impact on the treatment of the child in the courts system may require elaboration and discussion elsewhere.

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SPEAKING FREELY?

Grace Sullivan BL

The creeping criminalisation of aspects of religious speech in Ireland may mean that society's 'offence' will write individual criminal records.

> The Constitution of Ireland guarantees, subject to public order and morality, "freedom of conscience and the free profession and practice of religion…"

A rare redemptive element of the injustices of the past is the possibility of utilising history's lessons to avoid traversing the same ground again. The contribution of the Irish story to the annals of historical wisdom was costly and its importance cannot be underestimated. The story tells of the misuse of the law, which in the right hands acts as an effective tool for the protection of rights and imposition of responsibilities. Instead, legislation commonly referred to as the 'penal laws' were used to repress a significant portion of the Irish population. Such laws "to prevent the further growth of Popery" included the use of coercive measures to prevent public gatherings such as pilgrimages in certain locations on the grounds that "the peace of the public is greatly disturbed".[1] Other laws provided that only individuals who had been a Protestant since the age of 14 could be an attorney/solicitor.[2] While no attempt is made to compare current laws/legislative attempts with the paradigm of the penal laws in the seventeenth and eighteenth centuries, the point remains clear: Irish political and legal history demonstrates the vast importance of protecting the free practice of religion. Considering this importance, certain troubling trends towards the criminalisation of aspects of religious speech in recent months in Ireland, however offensive such speech may be to some, begs examination.

The importance of the freedom of speech

The Constitution of Ireland guarantees, subject to public order and morality, "freedom of conscience and the free profession and practice of religion…",[3] "the right of the citizens to assemble peaceably…",[4] and "the right of the citizens to express freely their convictions and opinions".[5] It does not protect the right to live 'unoffended'. The nature of a society that values freedom of speech, thought and opinion, remains one in which 'offence' will be inevitable. The free market of ideas and thoughts will necessarily carry with it speech inspired by ideas that offend the sensibilities, strongly held beliefs and individual experiences of others. This is a risk that free democratic societies deem worth taking.[6] A keenly astute commentator on the dangers of authoritarian control of government and restrictions on free speech, George Orwell, succinctly stated: "If liberty means anything at all, it means the right to tell people what they do not want to hear".[7] The converse has been clearly documented by history. The hallmarks of autocratic governments include the suppression of political opposition and the imprisonment of dissenters. Criminal law is deployed to control the masses and silence opposition.[8]

The outplaying of autocratic regimes is not consigned to the cobwebs of history. The Russian invasion of Ukraine has invited the united vocal indignation of nations around the world, including that of Ireland.[9] Europe rushed to open its doors to Ukrainian refugees.[10] World leaders openly condemned Russian actions.[11] The International Criminal Court scrambled to open an investigation into potential international crimes taking place in Ukraine.[12] Meanwhile, the press reported on Russian dissidents who spoke out about the regime being imprisoned and silenced. Human Rights Watch reported that Russian authorities had "filed over one hundred criminal cases on charges of dissemination of 'false information' about or 'discreditation' of Russian armed forces…" and that opposition politician Ilya Yashin was charged with violating "Russia's… censorship laws" by the "dissemin[ation of] false information", which was "motivated by political hatred".[13] *The Guardian* reported that Yashin was convicted in Moscow's Meshchansky district court of "expressing hatred of the political system of the Russian Federation…."[14]

It is argued that free speech protections are rendered impotent if they only cover speech that is endorsed by the majority.

There is no paucity of modern-day examples where the West has condemned countries for heavy-handed responses to free speech. In Belarus, a recent heavily contested election resulted in the escape of the opposition leader, Sviatlana Tsikhanouskaya from the country in fear of her life.[15] *The Journal* reported in August 2020 that Taoiseach Micheál Martin spoke on the phone with the opposition leader, expressing Ireland's solidarity with her and the people of Belarus.[16]

In December 2021, Tsikhanouskaya's husband Siarhei Tsikhanouski was sentenced to 18 years in prison for "inciting hatred" and "social unrest".[17] Meanwhile, *Politico* reported on October 21, 2022, that legal proceedings had been launched against Sviatlana Tsikhanouskaya, including for "inciting social hatred".[18]

The foregoing illustrates a troubling willingness to use 'hate speech' laws to silence political opposition in various regimes across the world. This trend has been wholeheartedly condemned by the West. However, in Ireland, recent legislative developments reveal a concerning parallel trend towards criminal restrictions on free speech, particularly religious speech.

An impending Bill curtails speech that is "likely to incite…hatred" on "protected characteristics" such as, *inter alia*, "religion".[19] The Bill also includes a defence to such speech, which would be considered to "incite hatred", if "the material concerned or, insofar as appropriate, the behaviour concerned consisted solely of — (a) a reasonable and genuine contribution to literary, artistic, political, scientific, religious or academic discourse".[20]

By its inclusion of a defence for "religious…discourse" in the legislation, one could argue that this defence implicitly acknowledges its potential to restrict religious speech.

Another impending Bill has gone so far as to criminalise in some form prayer outside "termination of pregnancy services providers".[21] In totality, these actions demonstrate a concerning trend towards the deployment of the heavy hand of criminal law to silence religious speech that does not incite violence, harass, or intimidate, but has the capacity to 'offend'. Section III examines these two Bills. It is admitted that certain religious speech may be considered offensive by many in modern society; however, it is argued that free speech protections are rendered impotent if they only cover speech that is endorsed by the majority.

Trends towards the use of law enforcement measures to restrict elements of religious speech

Hate Offences Bill

The Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 (hereinafter the Hate Offences Bill) provides for an offence under section 7(1)(a)(i) of:

"communicating material to the public or a section of the public … that is likely to incite violence or hatred against a person or a group of persons on account of their protected characteristics … "

The *mens rea* required under section 7(1)(b) is "intent to incite violence or hatred against such a person or group of persons on account of those characteristics … or being reckless as to whether such violence or hatred is thereby incited". This offence is both summary and indictable, and on indictment carries a maximum prison sentence of five years. The legislation goes further to criminalise possession of written material; section 10 criminalises "preparing or possessing" material:

"likely to incite…hatred…with a view to the material being communicated to the public…whether by himself or herself or another person".

Section 7(3) provides that it is a defence to prove that the material consisted solely of "(a) a reasonable and genuine contribution to…. religious … discourse". A "reasonable and genuine contribution" is defined with a questionable level of clarity in section 6(1):

"'reasonable and genuine contribution', in relation to literary, artistic, political, scientific, religious or academic discourse, means a contribution that is considered by a reasonable person as being reasonably necessary or incidental to such discourse".

Section 11 of the proposed legislation contains a provision on "protection of freedom of expression". It states:

"Any material or behaviour is not taken to incite violence or hatred against a person or a group of persons on account of their protected characteristics or any of those characteristics solely on the basis that that material or behaviour includes or involves discussion or criticism of matters relating to a protected characteristic".

The threshold for criminal activity

Existing legislation criminalises the use of "insulting" language under certain circumstances. Section 6 of the Criminal Justice (Public Order) Act 1994 criminalises "threatening, abusive or insulting words or behaviour" in a "public place".[22] However, this speech must reach the additional threshold of "with intent

to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned". High Court jurisprudence requires that a breach of peace "implies conduct that goes beyond boisterousness … a situation which imminently threatens a person".[23] The criminalisation of inciting/stirring up "hatred" is not a new concept in Irish legislation. The Prohibition of Incitement to Hatred Act, 1989, in section 2, criminalises publishing materials that "are threatening, abusive or insulting and are intended or … are likely to stir up hatred". While said legislation does not require intent or recklessness to provoke a breach of the peace, there is an additional threshold that the material is "threatening, abusive or insulting".

The Hate Offences Bill goes further than its previous counterparts. There is no requirement that the speech be with intent/recklessness that a breach of the peace be occasioned. There is no requirement that the material be threatening, abusive or insulting. There is no requirement that the speech occasion a victim of hatred, section 9(1) providing that an offence is committed "irrespective of whether the communication of material or behaviour the subject of the offence was successful in inciting another person to … hatred". Considering that there is no external requirement of harm suffered by another individual whatsoever within the proposed legislation, the pertinent question arises: what language reaches the threshold of the offence "inciting hatred"? Section 2(1) of the Bill lends little clarity to the matter in its explanation that "hatred means hatred …", and purports to protect individual(s) not even present in the jurisdiction. The apparently low threshold for prosecutorial success leaves the uncomfortable impression that the legislation is criminalising speech that is simply likely to cause 'offence' to someone somewhere.

Protected categories and religious freedoms

The need for clarity regarding the threshold for speech criminalised by this proposed legislation becomes even more pressing considering the potential clashes with religious speech. Portions of the Bible (a document upon which an oath is daily sworn in courtrooms around the country) contain statements on some of the "protected characteristics", such as sexuality,[24] which are, to say the least, inimical to mainstream cultural mores. Certain statements in the Bible directly conflict with the definition of "gender" provided in the Hate Offences Bill.[25] Would religious speech, including public proclamation of certain texts in the Bible, qualify as hate speech?

The claim reported in *The Irish Times* that "church sermons condemning abortion or homosexual activity, or refusal to acknowledge the preferred gender of trans people, will not qualify as 'hate speech'",[26] is nowhere replicated in the legislation. Section 11's protection of "discussion or criticism of matters relating to a protected characteristic" does not in any way purport to protect speech within the four walls of a church. Indeed, the proposed legislation specifically provides for a "defence" for religious discourse, underlining the clear warning that those exercising religious speech regarding "protected characteristics" do so facing the risk of criminal litigation, to which a defence must be successfully raised to avoid criminal sanction.

The defence for religious discourse

The foregoing inspires the further pertinent question: how would the defence of "reasonable and genuine contribution…to religious discourse" be interpreted? The importance of clarity in criminal statutes and consistency in their application is well documented in jurisprudence. The High Court, in the case of *Douglas v DPP*,[27] found that the offences of "causing scandal and injuring the morals of the community"[28] were "hopelessly and irremediably vague"[29] and unconstitutional, as "they lack any clear principles and policies in relation to the scope of what conduct is prohibited and they intrinsically lend themselves to arbitrary and inconsistent application".[30] The defence in the Hate Offences Bill could raise legitimate concerns of a paucity of clarity for a number of reasons. First, it is unclear what speech would meet the standard of being "reasonably necessary or incidental…to [religious] discourse". "Necessary" is undoubtedly a high threshold. Would expert evidence be required to determine same? Further, placing a value sifting power over religious speech in the hands of the "reasonable person" is arguably antithetical to free speech protections. It is questionable whether the defence in totality could be satisfactorily and consistently applied by the 12 members of a jury or a judge in a courtroom setting.

The danger of leaving the interpretation of religious doctrine in the hands of the judicial branch of Government is recognised in United States jurisprudence. The First Amendment of the United States Constitution simply states in relation to religious freedoms: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …".[31] In the context of church property litigation, the United States Supreme Court has recognised that First Amendment values are jeopardised when such litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.[32] How much more do these principles hold weight, when the interpretation of religious doctrine/discourse by a 'civil' court has the potential to lead to a criminal conviction?

Safe Access Bill

The Safe Access to Termination of Pregnancy Services Bill 2021 (Safe Access Bill) progressing through the Dail[33] criminalises in section 3(a) the expression or demonstration of support for or opposition to a person's decision to access an abortion, and under subsection (b), seeking to influence a person's decision to access, provide or facilitate the provision of termination of pregnancy services, within 100 metres around (section 2) a provider of a termination of pregnancy services (termed a "designated premises" by the Bill – section 1). Under section 3(2)(f) "express or demonstrate" includes the act of "advising, persuading or informing, or attempting to … any person concerning issues related to termination of pregnancy services … by any means including … prayer or counselling". This

> A free society will be one in which unpopular and offensive concepts will be aired publicly.

offence can be prosecuted summarily or on indictment, and on indictment carries a potential prison sentence of five years (section 3(3)). Failure to comply with a Garda direction to immediately leave the place and vicinity, when said Garda suspects that an individual is about to breach the provisions of section 3, is an offence punishable by one month in prison or a fine of €1,000.

The surprising aspect of this Bill is not the criminalisation of harassment or intimidation, though a separate Bill for these offences is arguably unnecessary, as the criminal law already covers such activities.[34] This proposed legislation, in its current draft form, provides for the criminalisation of entirely peaceful activities within 100 metres of a designated premises. However, it must be pointed out that the proposed legislation does not distinguish between information that is either for or against termination services.[35] Under the legislation, it will presumably become a criminal offence to offer prayer to a woman entering a designated premises. It is unclear whether the legislation has gone further. Is the Government tacitly and somewhat surprisingly endorsing the power of prayer to persuade a woman to change her mind and therefore prohibiting such activity within 100 metres of a designated premises in totality? This question loses any element of the ridiculous in light of recent reports from the United Kingdom, where it is reported that prosecutions for standing outside of service providers silently praying have been pursued.[36] The offence under section 3(2) of "observing, persistently, continuously or repeatedly, a designated premises …" could criminalise the act of standing outside a designated premises praying.

The threshold for criminal activity

The Irish constitutional provision guaranteeing free profession and practice of religion to every citizen is subject to "public order and morality".[37] Section 3(2)(f) of the proposed legislation does not include any threshold of a potential breach of the peace, or any level of fear or insult suffered by the woman in question. It does not require that the "advising, persuading or informing" be "threatening, abusive or insulting", as required by the 1989 hate speech legislation. The legislation by its title purports to protect "safe access" to a designated premises; however, this provision arguably goes much farther than this. It is questionable how the act of standing praying 75 metres from a designated premises, or indeed, offering a woman a leaflet, could prohibit her safe access to said premises. Rather, it appears that "safe" is synonymous with being shielded from unwanted speech proximate to the provider's locus.

Balancing in a conflict of rights situation

If the potential situation arising outside a designated premises is pitted as a dichotomy between a woman's right to privacy and another's right to freedom of religion, could it be said that the balancing exercise in a proportionality analysis endorsed as a "valuable assessment method"[38] in Irish jurisprudence in a conflict of rights situation has been satisfactorily deployed? It should be recalled that rights must be "impaired as little as possible"[39] within a proportionality analysis. Has this test been met where the criminal law is utilised to completely prohibit peaceful religious activities within a public area, such as offering prayer or leaflets, or simply standing praying?

Conclusion

The sections in the Bills considered above are not controversial for their criminalisation of incitement to violence (section 7 of the Hate Offences Bill), or for the criminalisation of threatening, intimidating or harassing persons accessing designated premises (section 3(2)(c), (d) and (e) of the Safe Access Bill). Both Bills go further to criminalise religious speech, even potentially where there is no identifiable victim.

Under the hate speech legislation, it is an offence simply to incite hatred on certain topics upon which religious speech could be implicated, without any need to prove that hatred has been incited. Under the Safe Access Bill, activity such as "advising, persuading or informing … by … prayer" is a criminal offence. Neither Bill requires that there be an individual who has suffered harm or even insult. Both Bills on their face curtail religious freedoms through the heavy hand of the criminal law: one through its recognition of the obvious clash with religious freedoms by the inclusion of a nebulous 'defence' to speech contributing to religious discourse, and the other because it criminalises the act of public prayer.

The examples cited in section II should provide ample material to demonstrate the importance of protecting freedom of speech. Various concepts and doctrines inspired by texts such as the Bible may be offensive to many in modern society. The goal of a liberal society, which respects and values human rights, is not to forcefully by the criminal law require every citizen to think (and thereby speak) the same.

A free society will be one in which unpopular and offensive concepts will be aired publicly. It is axiomatic that the use of police powers should be exercised with caution when curtailing important human rights protected under the constitution.

Should the proposed legislation examined above become law, those exercising certain religious freedoms will do so under the potential threat of criminal litigation. The country whose history tells of a complex battle to liberation from religious persecution is approaching the situation in which the criminal records of some individuals who act upon their religious convictions will be written by the 'offence' of others.

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35. Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022, Section 6 (2) (a).
36. Evans, C. Woman arrested while praying silently outside abortion clinic charged with 'intimidation'. *Catholic News Agency*, December 30, 2022. Accessed March 14, 2023. Available from: https://www.catholicnewsagency.com/news/253187/woman-arrested-while-praying-silently-outside-abortion-clinic-charged-with-intimidation.
37. Constitution of Ireland, Article 44.
38. The proportionality doctrine was termed a "valuable assessment method" by the Supreme Court in *Minister for Justice and Equality v Ostrowski* [2013] 4 IR 206.
39. See proportionality test set out in *Heaney v Ireland* [1994] 3 IR 593, p. 607.

LACKING CAPACITY

The legal aid model for the new Assisted Decision Making (Capacity) Act 2015 contains no schedule of fees for the appointment of counsel, and thus may significantly disadvantage already vulnerable persons.

Julia Fox BL

April 26, 2023, saw the commencement of the Assisted Decision Making (Capacity) Act 2015. The Act establishes a new framework for supported and representative decision-making. The Circuit Court is empowered to make a declaration in respect of a person's capacity to make specific decisions and, if absolutely necessary, to enable another to make decisions on that person's behalf. Challenges to the suitability of a co-decision maker or claims of coercion, fraud, or undue influence in the creation of an enduring power of attorney will also come before the Circuit Court. Certain applications, for example those in respect of life-sustaining treatment, organ donation and the capacity of an existing ward, must be determined by the High Court.

Legal aid

Following approval by the Ministers for Justice and Public Expenditure of Terms and Conditions of the Assisted Decision Making Solicitors Panel, the Legal Aid Board established a panel of solicitors willing to provide services to legally aided persons in respect of applications pursuant to the Act. It is the general intention of the Board that a portion of the work will be undertaken directly by its law centres (about 20%), while the remainder will be undertaken by private solicitors registered on the Panel.

Where counsel is briefed by a law centre, payment will be in accordance with rates contained in the Terms and Conditions of the Barristers Panel generally applicable in civil legal aid matters in the relevant jurisdiction.

However, the Terms and Conditions for the Assisted Decision Making Solicitors Panel make no provision for specific fees for counsel, with the Board adopting a 'split-fee model' in both Courts. The fee payable to the solicitor is "inclusive of any fee that might be paid to a barrister" and, where a barrister is retained, the solicitor and barrister are to come to an arrangement as to the barrister's remuneration. Having regard to this provision and to their own professional judgment, it is a matter for the individual solicitor, in accordance with the client's instruction, to decide whether counsel should be retained. Fees payable on appeal will be the same as those at first instance, and the services of senior counsel must be justified and specifically authorised by the Board. The Board says it anticipates that counsel will be briefed in a significant number of cases.

Disadvantage

The legal aid model, it appears to me, will ultimately disadvantage persons whose capacity is in question and undermine a principal purpose of the new legislation: to enhance such persons' rights. For example, the fees payable by the Board for a fully contested capacity application are to cover all work undertaken by the solicitor (and barrister, if engaged). The fee also covers stamp duty and there are no additional travel expenses allowed. The fee structure is likely to discourage solicitors from engaging counsel, even though the work is complex and has significant implications for the fundamental rights of individuals, many of whom will be very vulnerable and have limited financial means. As a novel piece of legislation, it is likely to throw up difficult legal questions, where gaining the assistance of counsel will benefit the effective administration of justice. Furthermore, it seems likely that where the Health Service Executive is making applications in respect of persons whose capacity is in question, it will brief counsel, at least much of the time. What then, for equality of arms?

Deserving of representation

The Civil State Bar Committee has raised, through correspondence with the Board, its concerns regarding the absence of a schedule of fees for counsel in the legal aid scheme. Unfortunately, the Board has opposed any amendment to provide for this. For many years, the High Court (in particular, the President) has been entrusted with making decisions regarding capacity. These cases demand care and attention, and involve the application of a body of law, both domestic and international, that is not without its challenges. Where there are people with impaired decision-making ability, there is a risk of power imbalance and exploitation. Judges, solicitors and barristers play an important role in identifying and mitigating against abuse. The fact that many of these decisions will now be made in the Circuit Court as well as the High Court, makes them no less significant or the relevant persons less deserving of robust legal representation.

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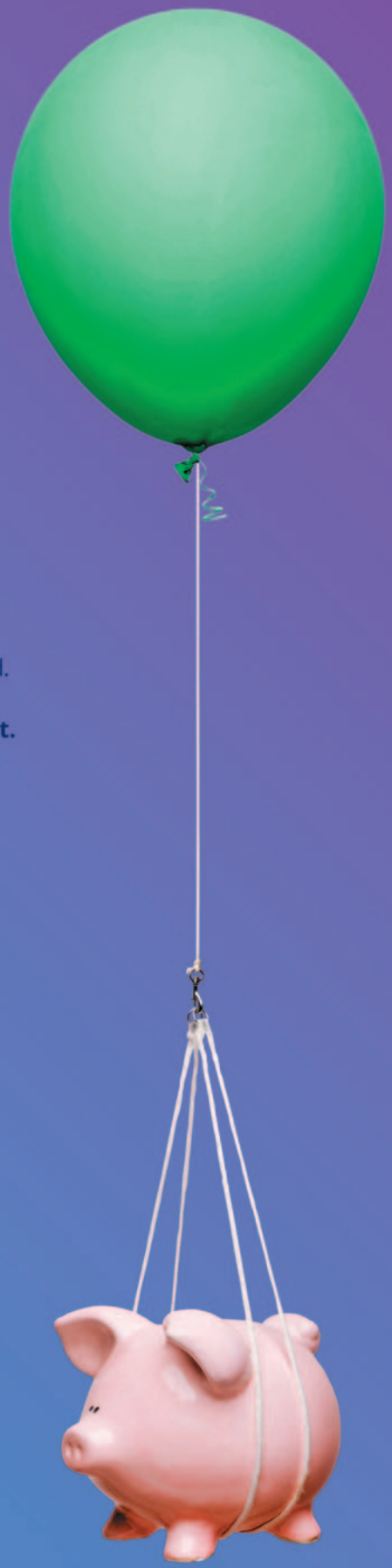

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