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PRESIDENT'S MESSAGE

CONFRONTING THE DARK SIDE

On 19 January, all Council members of the Law Society engaged in four hours of training in unconscious bias. Staff at the Society have also availed of the training, and the programme will be made available to the entire profession by our CPD team in due course.

The issue first came to prominence in the legal profession arising from a report issued by the International Bar Association, which found that sexual harassment and unconscious bias were widespread within the profession throughout the world (see article, p48).

Generally, we are lucky in Ireland, in that societal developments tend to lag somewhat behind the curve. If, as a country, we manage our affairs sensibly by learning from others, we can avoid most, if not all, of the downsides of the challenges that face other countries.

Racial crisis

In recent months, we have been witnessing the racial crisis in the USA brought about by attitudes within society that fail to accommodate others who we perceive to be different from ourselves. While the American Civil War ended 250 years of slavery, and society moved on in many respects, in other ways it reverted to 'business as usual'. Relatively little was done in terms of a substantial or sustained effort to effect reconciliation between the white and black populations, leading to an underlying racism that persists to this day.

Racism is accepting stereotypical beliefs that separate people. The only way true equality and justice will happen is if we recognise and resist racist tendencies – our unconscious biases. It requires immense courage to stand up against injustice. Only a tiny minority do so, and normally at great personal cost and little recognition.

Irish and Northern Irish history in more modern times is a case in point, and represents a microcosm of certain aspects of US history, but with laudable positive outcomes. Our efforts at peace and reconciliation in Ireland have had positive influences in other conflict zones, including South Africa, Israel and Palestine, and the Basque Country. It shows the power and significance of good example.

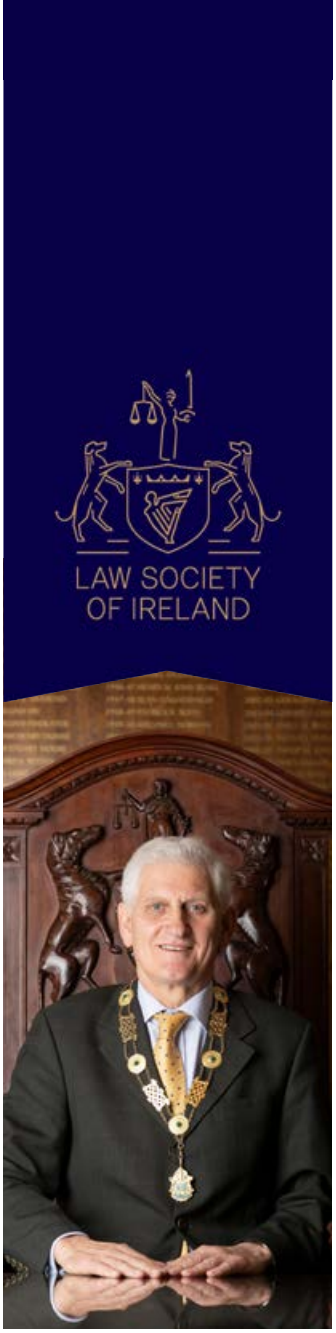
Shortcomings

What can we, as solicitors, do? First, we can recognise our own shortcomings – which is what unconscious-bias training is designed to do. The principles of diversity, inclusion, and unconscious bias are surely the same for countries and humanity as they are in our offices and communities. I therefore encourage all of you to embrace the training and do everything you can to promote these ideas at every level – both at home and abroad – in the years ahead.

> THE TRAINING BEING PROVIDED BY YOUR LAW SOCIETY HAS ENORMOUS POTENTIAL FOR GOOD

Our future depends on how we treat our fellow human beings and how we manage race relations and the issues of equality before the law. So you can see that the training being provided by your Law Society has enormous potential for good.

I wish you well, personally and professionally, in the challenging year that lies ahead. g



JAMES CAHILL,
PRESIDENT

PIC: GAZETTE STUDIO/SHUTTERSTOCK/

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Editor: Mark McDermott FIIC
Deputy editor: Dr Garrett O'Boyle
Art director: Nuala Redmond
Editorial secretary: Catherine Kearney
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FEATURES

REGULARS

THE BIG PICTURE

PARTY LIKE A RUSSIAN

Ice handprints made by Russian protesters during a rally on 23 January at Pushkinskaya Square, Moscow, mark their support for the country's opposition leader Alexei Navalny. The protests were sparked by Navalny's arrest on 17 January on his return from treatment abroad after a near-fatal nerve-agent attack in Russia in August 2020. Tens of thousands of people defied temperatures of -50C – and an even icier police presence – to join rallies in more than 70 cities. Riot police arrested more than 3,400 people across the country. Media reports indicate that a parole board could send Navalny to a penal colony within weeks

PIC: DMITRY LEBEDEV/KOMMERSANT/SHUTTERSTOCK

SLA CHRISTMAS-JUMPER APPEAL RAISES €3.6K FOR CORK SIMON

O'Flynn Exhams LLP took part in a Christmas-jumper fundraiser in aid of the homeless charity, Cork Simon Community. Participants from firms across the city and county got involved in the event, organised by the Southern Law Association on 18 December, which raised €3,650

Virtual participants from the Finders International team

JRAP O'Meara Solicitors

THREE NEW PARTNERS AT ARTHUR COX

Arthur Cox has announced the appointment of three new partners at its Dublin office, in a move that brings its percentage of women partners up to 38%. They are Sarah McCague (pensions partner), Niamh McGovern (partner in infrastructure, construction and utilities practice), and Ruth Lillis (new partner in the firm's aviation and asset finance practice). Managing partner Geoff Moore said that, while the increase in women partners at the firm was welcome, the firm was working to achieve higher targets

SOUTHERN CAPITAL'S AGM IS A SOCIALLY DISTANCED AFFAIR

For the first time in its history, the Southern Law Association held its AGM remotely on 17 November 2020. A scaled-down, socially distanced and masked council convened at Court 1 at the courthouse on Washington Street, Cork. The meeting was presided over by Robert Baker (outgoing president) and Catherine O'Callaghan (honorary secretary). The AGM was streamed live to over 100 members, who benefited from CPD points. Juli Rea (JRAP O'Meara LLP) was elected president for 2021, while Gerard O'Flynn (Gerald A J O'Flynn & Company, Solicitors) was elected vice-president. Newly appointed Law Society President James Cahill and Ken Murphy (director general) also addressed the attendees. *(From l to r)*: Gerald AJ O'Flynn (vice-president), Catherine O'Callaghan (secretary), Robert Baker (outgoing president), Sean Durcan (treasurer), and Juli Rea (newly elected president)

A&L GOODBODY INVESTS IN THE FUTURE WITH TEN NEW PARTNERS

Brian O'Malley (restructuring and insolvency, Dublin)

Noeleen Meehan (employment, Dublin)

Mark Devane (financial regulation and investigations, Dublin)

Louise Byrne (white-collar crime, Dublin)

Nicholas Cole (litigation, Dublin)

David Fitzgerald (commercial property, Dublin)

Gregory Martin (commercial property, Belfast)

Gillian McDonald (legal project management, Dublin)

Robbie O'Driscoll (finance, Dublin)

Christopher Jessup (finance, Belfast)

CYBERSECURITY – MITIGATING THE RISKS

Many media outlets have reported a substantial increase in the number of cyberattacks in the past year. Interpol has warned that cybercriminals are taking advantage of the fear and uncertainty caused by the pandemic, as well as the increased number of people working from home.

The Interpol secretary general, Jürgen Stock, has said that "cybercriminals are developing and boosting their attacks at an alarming pace", noting that the focus has shifted from individuals and small businesses to major corporations, governments and critical infrastructure. It is likely that this increased risk will continue in the short-term and possibly longer, as society adapts to a new way of working.

The Regulation of Practice Committee points out that the Law Society has continued to receive reports of successful cyberattacks resulting in a financial loss to client bank accounts. The majority of these attacks involved compromised email systems and payment redirection frauds.

Malware dangers

Email systems are often compromised by the installation of malware as a result of clicking on a link or attachment in a phishing email. This can provide the fraudster with access to the password for the account. If obtained, the fraudster can set up a rule on the account, resulting in all emails received being forwarded to the fraudster's email address without the owner's knowledge. As a result, all information received by email from a client, including personal details, bank details, passports, driving licences, details of commercial transactions, etc, will be compromised. Alternatively, unencrypted emails can be intercepted during transmission. The fraudster then creates an email address similar to both the client's and the solicitor's and covertly 'continues the conversation', before requesting that funds be sent to a fraudulent bank account. It is important to note that these frauds are not only carried out in solicitor/client communications – fraudulent activity has taken place in solicitor/solicitor and internal solicitor/accounts staff communications.

Bank details warning

Any bank-account details received in an email should be treated suspiciously and not acted upon without further verification. It is highly recommended that multi-factor authorisation be implemented on all email accounts of the practice. Also, if you are in anyway concerned, it is recommended that you request your IT suppliers to run an anti-virus and malware scan of the system and run a sweep of the email systems to ensure that no rules have been added to the mailboxes.

Top tips

Where a solicitor or client is required to transfer money to bank-account details received by email, it is imperative that the individual setting up the transfer verifies the details received via a telephone call (see point 6, below). It is also important that this individual verifies the telephone number and does not rely on the number received in the email.

The Technology Committee previously issued the following top tips to help prevent being a victim of such an attack, which should be followed at all times. Given the current pandemic and resulting restrictions, it is accepted that there will be occasions where a face-to-face meeting is not possible:

1) Only send IBANs and BICs for your accounts or other accounts by post. It may be worth advising all current clients that bank-account details should never be sent by email and that, if a client receives a request to do so, they should contact their solicitor by phone.
2) Clients should be asked for their bank details by way of a copy statement at the start of a transaction.
3) If a client does not give you copy bank documentation, then you should ask the client to write out the IBAN and BIC in full for you in their own handwriting, and sign it.
4) If another solicitor is sending you their account details, then they should do it by post, and you should still verify same with them. It is common for the fraud to involve only changing one digit or letter.
5) If you have to write down bank-account details yourself (for example, because you are getting them over the phone), then you must read the details back to the client for verification, and you must memo this on your file. This is important, because if the other person gives you an incorrect number by accident, it may cause the money to go astray.
6) If you get an IBAN and BIC by email, including in an attachment, then you must ring the person to verify the details, and you also should memo that on your file (note: it should always be the person who is setting up the electronic transfer that verifies the account details).
7) If somebody tells you that their account details have changed, this is an instant red flag. You should immediately raise a query and verify the account details through an alternative medium, such as by phone or post. In addition, let your clients know that your firm does not change its bank-account details (if this is the case). Clients should be advised not to send any money to new account details without confirming the change by talking to someone in the firm.
8) Typographical errors must be avoided. You cannot rely on the banks to verify the account name against the account number. If you put in a wrong number, then the money will go astray and may not be recoverable.
9) Any internal mail asking you to request or effect the transfer of moneys must be verified by a phone call to the sender of the mail.
10) The obligation on the client to provide accurate bank details and the risk of fraud should be mentioned in the section 150 letter and letter of engagement.
11) Also, a solicitor should consider including an email disclaimer at the foot of every email, in bold, informing all clients that they will never provide bank-account details by way of email.

Interpol boss Jürgen Stock: focus has shifted from individuals and small businesses to major corporations, governments and critical infrastructure

A solicitor should ensure that all computers in the practice (PCs, file servers, and mail servers) are protected by trustworthy internet-security business products, and are using the latest updates. Also, ensure that a firewall is turned on. Operating systems and other software should be kept up to date to ensure that there are no security gaps.

PUTTING A SPRING IN THEIR STEP

Following the success of the online career support series, the Younger Members Committee will launch the Spring Series on 16 February.

The series of online information sessions will focus on career management and associated matters, such as mental health and wellbeing. Each session is complimentary and will take place at 7pm on Tuesday evenings. It involves a member of the committee in discussion with an expert on a range of topics. The sessions are short in duration, 20 to 25 minutes long, and aim at providing summary information on each topic covered, with suggestions on how to follow-up and to pursue the matter further.

These modules will be held over Zoom, and all younger solicitors and trainees are welcome to participate. There is no charge, but you will need to register in advance in order to attend. Topics to be covered include:

- How to make partner and still have a life,
- 'Squiggly' careers and implications for young solicitors,
- Getting involved in marketing your firm,
- Living and working as a lawyer in other jurisdictions,
- Technology advances and consequences for young solicitors,
- Career management in a time of transformational change,
- Emerging work models and their impact on young solicitors,
- Excelling at video interviewing,
- How to get what you want, career-wise,
- How to create yourself a niche specialisation in law.

To register your interest, email m.rola@lawsociety.ie.

COVID ACCELERATES COURTS' TECH USE

The latest issue of *Courts Service News* details the rapid acceleration in the use of technology due to the pandemic.

A total of 2,095 virtual court hearings were heard between April and December 2020, while 10,754 video calls were held between courts and prisons (March to November). Nine video-enabled courts were built, including six new sites and three refurbished courtrooms.

Seven 'pop-up' courts were held at various locations in 2020, while additional video equipment was deployed to 28 courtrooms to facilitate social distancing. Ten 'mobile jury empanelment solutions' were also built and used across nine locations nationwide.

ASK AN EXPERT FOR WELLBEING SUPPORT

Beginning with the March issue, the *Gazette* will run a monthly column geared towards assisting members with any interpersonal or wellbeing problems they are facing in the workplace, *writes Julie Breen (Professional Wellbeing Project coordinator).*

The column will be written by an expert who will respond to issues or problems shared by members, focusing on offering support, acknowledgement, tips and techniques. The issues raised by you may involve:

- **Wellbeing or psychological matters (your own, or something you've identified in a colleague),**
- **Relationships at work,**
- **Leadership dilemmas,**
- **People-development issues,**
- **Change-management issues,**
- **Office dynamics, and**
- **Coaching advice, or any other issues you and your colleagues wish to seek expert advice on.**

The column should appeal to members who might not have colleagues to bounce ideas off or share problems with, or to those of you working in larger firms where you might feel unsafe in asking questions or raising dilemmas. It can be comforting to know that you are not on your own.

Our experts include psychotherapists, executive coaches, academics, psychologists, solicitors, and others – depending on the problems raised.

All matters will be treated on a totally confidential basis, names and personal details will be anonymised (the expert providing the advice will not be provided with any personal details), and all emails will be deleted once the subject matter has been dealt with by the expert.

The column aims to give members of the legal profession the opportunity to engage with our experts in order to help them address any themes or common problems they find themselves facing on a regular basis. If we can't find an appropriate expert to address the issue you have raised, we will email you to let you know, and suggest alternative avenues for you.

The Law Society's Professional Wellbeing Project team looks forward to helping you unpack some of your most common – or uncommon – problems in 2021!

To submit an issue that you'd like to see addressed in the column, please email professionalwellbeing@lawsociety.ie.

ENDANGERED LAWYERS

ALEXANDER PYLCHENKO, BELARUS

Readers will be aware of the political protests and turbulence in Belarus (population 9.5 million) arising out of the August 2020 presidential election. The election was marred by significant irregularities and was widely condemned as being neither free nor fair. The incumbent President Lukashenko has been in power for 26 years, since 1994.

Alexander Pylchenko is a respected lawyer of 30 years' experience and a former chair of the Minsk City Bar Association. His clients included Victor Babariko, a potential presidential candidate arrested a few weeks before the election, and Maria Kolesnikova, another opposition figure. He was disbarred in the aftermath of the protests against the August election.

On 14 August, Mr Pylchenko was interviewed by local media station TUT.BY. During the interview, he was asked what actions law enforcement officials and the judiciary should take in response to unjustified violence and torture against civilians by law enforcement agencies on a mass scale. Pylchenko responded that the general prosecutor should initiate criminal proceedings in relation to reports of torture of civilians in the Minsk detention centre, and investigate reports of violations of election law in the context of the presidential elections. He stated that the authorities should disarm and detain military units whose members engaged in beatings, and keep them under restraint (pending further review of their actions). He also stated that the President of the Supreme Court should cancel orders that provided for the continued detention of alleged protesters in the Minsk detention centre, where there were widespread reports of abusive treatment of detainees. These statements would later form the basis of Mr Pylchenko's disbarment.

The Ministry of Justice's Qualification Commission declined his request for representation when it met on 15 October 2020, and issued an opinion that his statements were incompetent, misled the public about the powers of state authorities, and called for illegal action. There was no evidence cited in support of this opinion. The following day, the Ministry of Justice disqualified Alexander Pylchenko from practising law with immediate effect.

Pylchenko appealed this decision and, on 26 November, the court ordered the Ministry of Justice to submit written explanations justifying its decision, with a further hearing scheduled for 23 December. No report as to the outcome of the hearing before Christmas is available as we go to press.

Alma Clissmann is a member of the Law Society's Human Rights Committee.

REMOTE WORK REFUSAL COMPO

The Workplace Relations Commission (WRC) has ruled on the case of an office worker who had to resign during the first lockdown when she was refused permission to work remotely, *writes Mary Hallissey*.

Adjudication officer Kevin Baneham said the worker had "no real option but to resign" after the employer failed to take reasonably practicable steps to offset the virus risk. He ordered that €3,712 should be paid in compensation for the unfair dismissal.

The university-based facilities manager, who helped manage 3,200 student bedrooms, wrote to her employer saying that the refusal to allow remote working "has increased the infection risk with COVID-19 for all three operations coordinators. In the event one of us gets sick, I will be putting at risk my husband, who is an asthmatic patient."

In an email dated 17 April, the worker told her employer that she was not able to socially distance from her two workplace colleagues.

Employer response

In a letter on 4 May, the employer wrote: "Prior to COVID-19, there was never a suggestion that the roles could be performed remotely, and the same situation pertains in a post-COVID situation."

The employer said it had taken precautions, including providing PPE, changing the physical layout of the office, installing screens and warning tape, and moving desks.

The MD of the facilities management company told the WRC that they would not have allowed remote working, since the job was essential and required an on-campus presence to deal with the students, some of whom were self-isolating.

The adjudication found that the employer did not implement the rota proposals made by three office workers that would have eliminated the risk of virus transmission.

The requirement to attend the workplace without adequate consideration of the elimination of virus risk "amounts to repudiation of contract", the adjudication continues.

"As an infectious disease, COVID-19 constitutes a biological hazard. In this context, and at the centre of this case, are the duties of both employer and employee arising from the *Safety, Health and Welfare at Work Act* and the underpinning health and safety principles."

IWLA HONOURS WOMEN LEADERS

The Society has offered its warm congratulations to immediate past-president Michele O'Boyle on receiving the 'Woman Lawyer of the Year Award 2020' from the Irish Women Lawyers' Association.

O'Boyle received the award jointly with the chair of the Bar of Ireland, Maura McNally SC, at a formal online presentation ceremony on 16 December.

Congratulating Ms O'Boyle, Law Society President James Cahill said: "As the 149th President of the Law Society, and the fourth female president, Michele O'Boyle skilfully led the solicitors' profession through one of the most extraordinary years that Ireland and Irish solicitors have ever faced.

"Her appointment coincided with the centenary of women being permitted to enter the profession, but her outstanding contribution to, and impact on, the Law Society began many years ago. Having been elected to Council in 2003, and having served on all of the Society's most senior committees, Michele O'Boyle is truly a leader among her colleagues.

"On behalf of the Law Society, I warmly congratulate Michele and Maura on this wonderful achievement."

DAY OF ENDANGERED LAWYER MARKED

The 11th 'Day of the Endangered Lawyer' was marked on 24 January. This year, protests and seminars were organised in solidarity with human-rights lawyers in Azerbaijan. A petition supported by international and national lawyers' organisations around the world was presented to Azerbaijani embassies and sent to that country's government.

In the past, the Day of the Endangered Lawyer has focused on China, Colombia, Egypt, Honduras, Iran, Pakistan, the Philippines, Spain/Basque Country, Turkey, and Pakistan.

International law organisations were asked to raise awareness among the public about the number of lawyers who are being harassed, silenced, pressured, threatened, persecuted, and in some countries tortured and murdered for their work as lawyers.

The goal is to initiate or further develop a national discussion about ways to protect lawyers. For more information, visit www.dayoftheendangeredlawyer.eu.

IRLI IN MALAWI

JUDICIAL REVIEWS IN MALAWI

Clerical officer Mrs Katutu (Ntcheu Magistrate Court) and Alex Mwandira (PASI paralegal) processing orders of release with prison officers

Malawi's prisons currently operate at about 209% capacity. Prisoners sleep side by side, have very limited access to health and hygiene services, and ventilation is poor. This means that diseases like malaria, TB, and HIV are rampant. Upon the outbreak of COVID-19, the situation for people incarcerated in the world's prisons, including Malawi's, became dire. In response, IRLI temporarily refocused most of its efforts towards the urgent decongestion of Malawi's prisons.

One initiative undertaken and supported by IRLI was the use of judicial reviews. This mechanism is different from the civil action (which also exists in Malawi, as a common law jurisdiction). It involves judges using their powers under the Malawian *Criminal Procedure and Evidence Code* to review decisions or sentences handed down by magistrates in the lower courts.

IRLI coordinated with their Malawian partner organisation, the Paralegal Advisory Service Institute (PASI), to screen for vulnerable persons who should have their sentences remitted (and thus be immediately released from prison). The categories of persons screened correlated mostly with those vulnerable categories of prisoners identified by the World Health Organisation – the elderly, the sick, and women with children. We also screened for those serving sentences for minor crimes and those with little time left to serve on their sentences. Once the files were presented to the judges, they reviewed the mitigating and aggravating factors of each case to decide whether someone was deserving of release.

Before any prisoners were released, IRLI worked with PASI to develop and implement a post-release procedure. Due to a lack of resources, there is little support offered to those released from prison, nor is there a system of monitoring those granted early release. IRLI and PASI engaged with local chiefs and village social structures to discuss their concerns with regards to the return of former detainees and to ensure that they would be provided with support.

The files of about 250 people in the Eastern Region were presented to the judges for review. By 22 December 2020, a total of 114 people had been released back into their communities.

Susie Kiely is judiciary programme lawyer with Irish Rule of Law International.

CALLING ALL HEROES

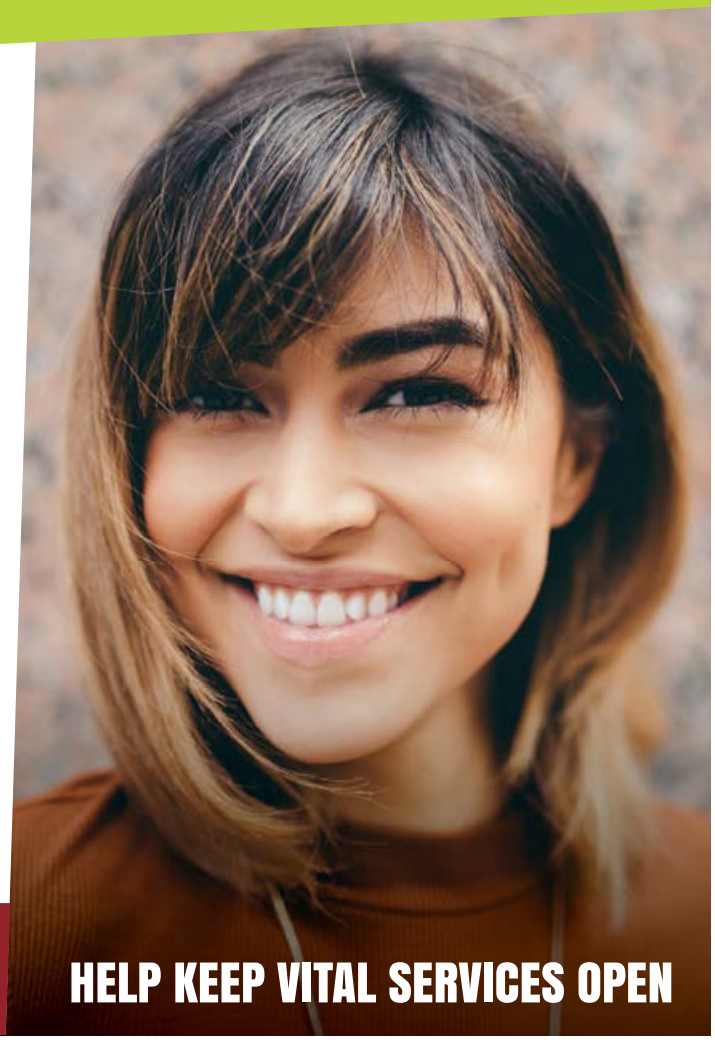
Homeless and care services across Ireland and Northern Ireland are experiencing staff shortages. **Crisiscover.ie** connects people with experience to services that need them.

You can sign up to a paid crisis relief panel for homeless and disability services if you:

- **A Qualification in social care, social work, health care, psychology or related fields or,**
- **Work experience with vulnerable groups such as: homeless people, disability, the eldery, refugees or children in care or,**
- **Experience and interest in working as a cleaner or cook**

CRISIS COVER INITIATIVE

www.crisiscover.ie
crisiscover@qualitymatters.ie



I HEAR YOU CALLING ME

From: Marcin Szulc, Rostra Solicitors, 78 Benburb Street, Smithfield, Dublin 7

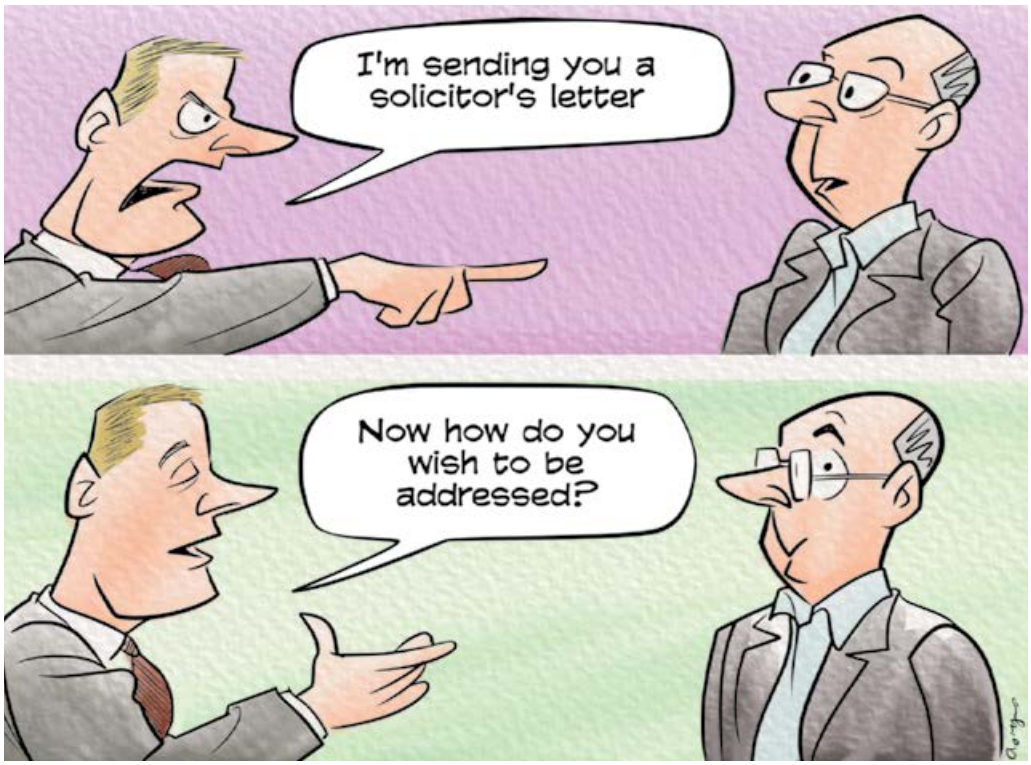
A Chara, I read with interest the opinion of Ronan O'Brien of TP Robinson regarding the discontinuation of 'Dear Sirs' (*Gazette*, November 2020, p17).

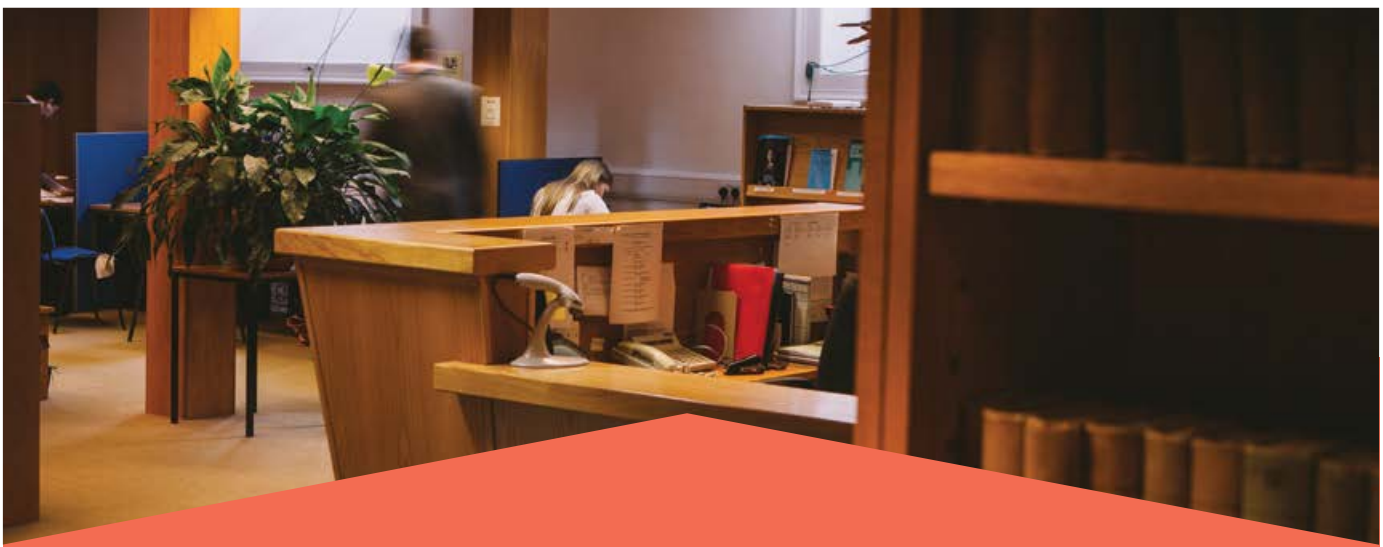
Some people take lack of sensitivity for freedom of speech.

Perhaps one might want to consider how not to offend somebody, instead of "negotiating ... a form of address" after "upsetting" them. You tread on the side of caution and politeness.

There is no room for negotiation here. You call people what they want to be called, or you are called names you would rather not be called.

Z wyrazami szacunku (yours faithfully).





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LAW SOCIETY OF IRELAND

ACCESS TO COURT RECORDS AND ORAL ARGUMENTS

In an open letter to the Chief Justice and the presidents of the courts of record, **Seth Barrett Tillman** asks them to consider five aspects of potential reform

SETH BARRETT TILLMAN IS A LECTURER AT MAYNOOTH UNIVERSITY DEPARTMENT OF LAW

THERE ARE MANY GOOD REASONS FOR THE COURTS TO PUBLISH JUDICIAL ORDERS, ESPECIALLY FINAL ORDERS DISPOSING OF CASES

This article reflects the personal views of the author. Academic affiliation is for identification purposes only

Dear Chief Justice and Presidents of the Courts of Record

I would ask you to consider the following issues relating to potential reform of the courts system in the interests of transparency and access to justice: (1) providing open access to parties' briefs, pleadings, and other filings; (2) improving parties' briefs, pleadings, and other filings; (3) terminating the practice of unpublished final orders and judgments; (4) providing a searchable bank of notices of appeal; and (5) limiting oral argument on appeal.

Access to briefs, pleadings, and filings

At this juncture, the Supreme Court and High Court now have practice directions making parties' briefs available to third parties upon request (see Supreme Court Practice Direction SC 15 and High Court Practice Direction HC 101). May I suggest that the remaining three courts consider adopting parallel practice directions – subject to well-established limitations involving national-security cases, minors, etc?

I would like to further suggest that the courts move towards automatically making parties' briefs (as well as other filings, for example, pleadings) available, as soon as they are filed, to the public and to the primary electronic legal platforms, for example, Westlaw and LexisNexis – this is standard practice in United States' federal and state courts. By contrast, policies that permit access to parties' briefs only after the filing is opened in court make it all but impossible for the public and media to understand those proceedings while they are ongoing. Such policies, post-COVID-19, where the public and media cannot access live courtroom proceedings, would seem to be even less defensible going forward.

Such a policy will have a strong tendency to disseminate and facilitate best practices in the legal profession – promising more transparency and greater competition for legal services. The Supreme Court's list and Court of Appeal's list are small enough that briefs and other filings could be made available on the courts.ie website. (The High Court of Australia and Supreme Court of the United States post all submissions the day they are filed, as searchable PDFs, online on their own websites.) Access to legal submissions – providing practitioners, educators (including those at the King's Inns and the Law Society), and students with a searchable bank of models – will raise the quality of briefing, thereby facilitating the courts' reaching timely decisions, as well as improving educators' teaching best practices. Such a policy is an investment in Ireland's litigation future.

Improving briefs, pleadings, and filings

The courts' shift to neutral citations and other standard citation practices in their judgments has been a notable (even if unnoticed) success. This practice allows judgments to hyperlink to prior judgments and scholarly authority.

May I suggest that you build on that success by rapidly moving forward with a programme in which parties' briefs fol-

PIC: SHUTTERSTOCK

low similar citation practices – allowing for briefs to hyperlink to judgments and scholarly authority in just same fashion? (United States federal practice generally requires briefs to do that, and the best practice is that briefs also hyperlink to the record, including transcripts, affidavits, declarations, etc, and to other parties' briefs.) Again, better (post-COVID-19 electronic) briefs will facilitate the courts' reaching timely decisions.

Unpublished final orders and judgments

Courts.ie lists the disposition of cases, ending with a published judgment. But only the judgment is published, not the final order. Furthermore, any number of cases have no published judgment at all, and so the public has no information how the courts disposed of specific cases.

As a result, the public and Minister for Justice see only a fraction of the work done by the courts – where many cases are disposed of by a final order (absent a published judgment) or where the case is struck out by consent of the parties.

Whether or not a case is resolved with a published judgment, there are many good reasons for the courts to publish judicial orders, especially final orders disposing of cases. One important reason is to teach the legal profession how to draft model orders for the courts and

> PERHAPS IT IS TIME TO GRASP THE ORAL-ARGUMENT NETTLE?

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registrar to adopt. But there are many other good reasons to move forward with such a policy. Another important reason is to see to it that justice is "administered in public" (*Irish Constitution*, article 34.1).

Unpublished judicial orders, along with unpublished judgments, are a direct and continuing threat to the institutional integrity of the courts. United States' federal courts once faced similar problems, which were solved when the senior judiciary identified the problem, published on the issue, and put forward timely, practical solutions – all of which were well received by the judiciary's stakeholders. (For example, *Anastasoff v United States* [223 F 3d 898 (United States Court of Appeals for the Eighth Circuit 2000), Arnold J], finding unconstitutional an appellate rule distinguishing so-called 'unpublished' judgments from published judgments.) Timely, responsible action by the judiciary made intervention by the political authorities unnecessary.

The historical justification for not publishing final orders and short non-precedential judgments (that is, judgments intended only to apply settled law) was the concrete costs associated with lengthy physical reports – for example, the *Irish Reports* – in a pre-digital age.

That historical rationale no longer exists: the official 'reporter' for the courts is an electronic reporter on a website controlled by the Courts Service. The courts' neutral citation reporter has, in effect, unlimited bandwidth capability. Today, all final dispositions (including both orders and judgments) could and should be reported online. Moreover, when a significant number of unpublished orders and judgments circulate among the legal profession, it amounts to a secret alternative justice system – where insiders and repeat players have institutional advantages over new practitioners (and their clients), thereby defeating competition for legal services, and allowing unfair advantage to be gained in ordinary litigation through surprise.

The standard treatises on several areas of Irish law are chockfull of citations to unreported cases. The fact that some such cases are cited in parties' briefs defeats the goal of transparency in the courts, and the fact that there are many such Irish cases is a gravely serious institutional problem.

No searchable bank of notices of appeal

As I understand it, there is no facility on courts.ie or elsewhere providing information whether decisions of the High Court and Court of Appeal (including written judgments) are under appeal to a higher court.

This disadvantages practitioners' preparing advice for clients and drafting briefs and other filings for the courts, because practitioners lack current information regarding the likelihood of a judgment's being reversed on appeal. Providing such a facility on courts.ie seems within reach.

In our COVID-19 world – where the Four Courts and the other courthouses around the country are effectively closed to the public, where the public cannot walk into their courtrooms and personally attend live judicial proceedings – your decision to make legal submissions, final (and other) judicial orders, notices of appeal, etc, easily accessible to all (and not just to *bona fide* members of the press and members of the legal profession) is one good way to preserve the constitutional value of administering justice in public.

Limiting oral argument on appeal

In regard to appellate civil cases, in a more streamlined system with improved briefing, parties could make their entire argument in written form – without recourse to oral arguments. Oral arguments are time-consuming for the courts, and they are expensive for the parties. And, of course, by being a bottleneck on judicial decision-making, oral arguments cause delay. Such a streamlined system would save the judiciary countless hours – where, currently, oral argument time on appeal is freely granted, if not as a matter of right, then as a matter of course. Such a system, where in many cases a party's hearing would be a 'papers-only' hearing, would systematically speed judicial decision-making.

By contrast, in the current system, parties have every incentive not to flesh out their arguments in their written filings; instead, the incentives are to delay making fully developed arguments until their in-person hearing – if only in the hope of scoring tactical victories by surprising their opponents. Surprise and justice are rarely coextensive. Moreover, to the extent that barristers continue to be paid, in significant part, based on face-time before a judge or panel, then they have every incentive to discount settlement as an option, to defer settlement, and to seek and extend oral argument time. These litigation-related incentives are truly perverse. Perhaps it is time to grasp the oral-argument nettle?

At some point in the not-too-distant future, the Chief Justice, along with other senior members of the judiciary, will approach the Minister for Justice for an increase in funding for the judiciary and the Courts Service. Would it not be helpful in 'making the case' for additional funding to have at your fingertips all the good work of the courts – and a host of non-political, good-governance-type institutional reforms – all of which are low-hanging fruit within your easy reach? g

> POLICIES THAT PERMIT ACCESS TO PARTIES' BRIEFS ONLY AFTER THE FILING IS OPENED IN COURT MAKE IT ALL BUT IMPOSSIBLE FOR THE PUBLIC AND MEDIA TO UNDERSTAND THOSE PROCEEDINGS WHILE THEY ARE ONGOING. SUCH POLICIES, POST-COVID-19, WHERE THE PUBLIC AND MEDIA CANNOT ACCESS LIVE COURTROOM PROCEEDINGS, WOULD SEEM TO BE EVEN LESS DEFENSIBLE GOING FORWARD

IS CIVIL JUSTICE REVIEW A PANDORA'S BOX?

The *Review of the Administration of Civil Justice Report* has almost 500 pages and 95 recommendations. Review group member **Stuart Gilhooly** focuses on the major issues

STUART GILHOOLY IS A PARTNER AT HJ WARD & CO, SOLICITORS, AND A PAST-PRESIDENT OF THE LAW SOCIETY

AN UNWIELDY TWO-STEP PROCESS THAT HAS WEEDED OUT ONLY THE BLATANTLY UNMERITORIOUS CASES HAS MEANT DELAYS IN HEARING THE MANY ENTIRELY REASONABLE MATTERS BEFORE THE COURTS

When the Review of the Administration of Civil Justice commenced in September 2017, the membership could have been forgiven for thinking that, like the Great War, it would be over by Christmas. And, indeed, it was concluded by December – we just didn't know it would be the most recent one. In hindsight, it shouldn't have come as a surprise. When you open a Pandora's Box of such depth and complexity, it was always going to take time and compromise to reach agreement. A lengthy report was finally produced in December 2020, after three years of meeting after meeting of the main committee and various subgroups.

The result is the most comprehensive review of the civil justice system in living memory, with sensible and (in some cases) radical recommendations for reform. It was a group whose membership was necessarily diverse, including myself as Law Society nominee. In addition to the Bar and a judge of each of the courts, representatives of the Courts Service and various Government departments were herded like a well-behaved clowder of cats by the experienced hand of then (and now former) President of the High Court, Peter Kelly.

Major issues

Nearly 500 pages of carefully crafted prose, replete with 95 specific recommendations, cannot be neatly condensed, so I will concentrate on the major issues as they affect practitioners.

As with all matters involving the courts system, the issue of costs is never far from the discussion. A lot of assumptions are made about the accessibility of justice in the current regime, which rarely take into account the willingness of lawyers to take on cases *pro bono* or on the basis that no charge will accrue unless the matter is successful. Indeed, this system, which is necessary due to the complete absence of a functioning civil legal-aid system, is often used as a stick to beat us with, leaving the inevitable conclusion that we will never convince the naysayers – and there is little point in trying.

Nonetheless, among the specific terms of reference was to find ways to reduce the cost of litigation. While many of the 95 recommendations did precisely that, either directly or indirectly, it was felt that a specific review of how costs were calculated was necessary.

Although the effects of the provisions of the *Legal Services Regulation Act 2015* have still to be properly evaluated, given the dearth of available data over such a short time period, the group felt that further transparency was required for the consumer in terms of what costs might be payable, in the event that the client is ultimately required to pay such costs.

Two methods

A debate ensued as to which of two methods would be fairer. The minority, consisting of representatives of Government departments, maintained that a rigid scale system (allowing for

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derogation only in exceptional, court-ordered circumstances) represented the best method of reducing costs.

The majority, consisting of all other members (excepting the Office of the Attorney General, which abstained, and the chairman, who did not express a view at that time), favoured a more flexible approach of non-binding guidelines.

The rationale behind the view of the majority was that rigid scales would ultimately be an anti-consumer measure, which would favour institutional litigants such as the State or insurance companies. They would continue to pay such costs as they saw fit to the lawyers of their choice, given the relative size of their pockets. The average consumer, however, would find themselves either unable to obtain access to justice, since the costs payable – even in no-win, no-fee cases – would be uneconomic, or they would have to be responsible for any balance of costs, either at the outset or upon successful conclusion, thus driving a stake through the concept of full compensation for the commission of wrongdoing – which would only benefit the losing party.

Non-binding guidelines

By providing guidelines of a non-binding nature, the principle of increased transparency is maintained. Costs would be fair in every instance, and routine cases that would be very much the norm would fall squarely within the guidelines. However, the minority of complex matters would receive fair costs, and the overriding requirement for equality of arms would remain in place.

It is to be expected that Government, which is committed to implementing the recommendations of the review, does so by following the specific view of the majority, and that it will not follow the anti-consumer, pro-institutional opinion of the minority.

Of course, the issue of costs was not the only one the group considered, and other matters (including discovery, judicial review and court reforms) were among the highlights of the report from the point of view of the practitioner.

Discovery

Discovery has been the bane of most litigators' lives for as long as we can remember. It is a complex and onerous aspect of the litigation process, which has been further complicated by digital communication.

The group has, therefore, recommended that the current regime be abolished and replaced by a new procedure, which will have to be provided by primary legislation. It will require production of certain documents in every matter, which is designed to obviate the need for discovery above and beyond these documents. It remains to be seen what the exact nature of this new system will look like, and it could be some time before complex primary legislation is drafted. In the meantime, the current discovery process will remain in place.

Judicial review pressure

The system of judicial review has been under pressure for some time. An unwieldy two-step process that has weeded out only the blatantly unmeritorious cases has meant delays in hearing the many entirely reasonable matters before the courts.

It can be difficult to please all litigants in situations like this and, no doubt, some will be unhappy with the recommendation that leave will only be granted where there are substantial grounds and a reasonable prospect of success at trial. It is, however, difficult to objectively argue with these criteria, which, presumably, are similar to those adopted by most solicitors before taking on such cases. In addition, entitlement to judicial review for clerical deficiencies and unintentional slips will be only allowed where rectification has been sought from the original decision-maker and wrongly refused. Both of these significant changes will also require primary legislation, and the current rules will remain in place in the meantime.

The review group also suggested a myriad of court reforms: that deputy masters should be able to preside over case-management conferences; that a single claim form should replace all the various types of originated documents in the court; and that a specialist list for medical negligence cases are among the most significant.

Case inaction

However, of most import is the proposed introduction of the automatic discontinuance of cases where no action has been taken. This measure is required to satisfy European requirements that proceedings are being concluded in a reasonable time frame. Now, if no action (either by way of setting down or other proceedings on the court record, such as motions) has been taken within 30 months, a case will be automatically discontinued. Application to reinstate, however, will be a remedy available. As this reform can be made by way of court rules, it is likely to come into being sooner rather than later.

And that is a whistle-stop tour through a very hefty tome. Please do not treat this as the definitive summary. It is far from it. The document is available on the websites of the Review of the Administration of Civil Justice and the Department of Justice and, if you are a litigator, at least familiarise yourself with the full list of recommendations in Chapter 12.

It remains to be seen how quickly Government will act on these recommendations, but seeing as they form part of the Programme for Government, they are likely, at least in some part, to see the light of day over the course of the current administration. Never a dull moment. g

THE GROUP HAS RECOMMENDED THAT THE CURRENT DISCOVERY REGIME BE ABOLISHED AND REPLACED BY A NEW PROCEDURE, WHICH WILL HAVE TO BE PROVIDED BY PRIMARY LEGISLATION. IT WILL REQUIRE PRODUCTION OF CERTAIN DOCUMENTS IN EVERY MATTER, WHICH IS DESIGNED TO OBVIATE THE NEED FOR DISCOVERY ABOVE AND BEYOND THESE DOCUMENTS

LANDLORD AND TENANT LAW: THE RESIDENTIAL SECTOR (2ND EDITION)

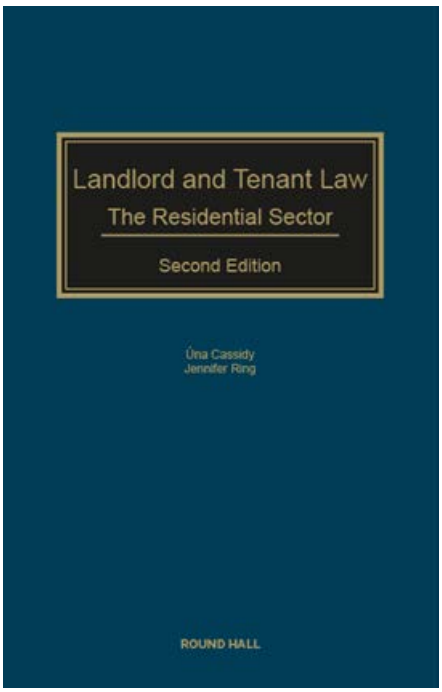
Úna Cassidy and Jennifer Ring. Roundhall (2020), www.roundhall.ie. Price: €195 (incl VAT).

Just recently released, *Landlord and Tenant Law: The Residential Sector* looks at the *Residential Tenancies Act 2004*, as amended, which is the primary legislation governing residential tenancies.

The book deals with the Residential Tenancies Tribunal under part 6 of the 2004 act on dispute resolution. It reviews decisions of the High Court on appeal on a point of law from the tribunal, which practitioners will find invaluable.

As housing continues to be a prominent societal and political issue, the legislature responded to the housing crisis with the *Residential Tenancies (Amendment) Act 2015*, the *Planning and Development (Housing) and Residential Tenancies Act 2016*, and the *Residential Tenancies (Amendment) Act 2019*. This has resulted in a significant amount of additional legislation that needs to be considered. The book looks at the various aspects of the legislation and consolidates it, summarises it, and simplifies it in dealing with various residential tenancies matters. It also deals with the new sanction regime, which was introduced in the 2019 act.

It reviews landlord-and-tenant relationships, the elements of same, and various Residential Tenancies Board cases. It considers the cases of licensees under the act and, in particular, the position of those in student accommodation. It sets out tenants' obligations, landlords' obligations, details about rent reviews, and termination of tenancies, among other matters.



It includes a significant chapter on dispute resolution. It details the practical steps of making an application to the tenancies tribunal, before dealing with the most common disputes, parties who have a right to refer a dispute, time limits, the dispute-resolution process, mediation and adjudication, redress, the determination order, and enforcement. This chapter alone would be of great assistance to any practitioner dealing with a landlord-and-tenant dispute.

Another chapter is devoted to the Residential Tenancies Board, setting out their functions, composition, appointment of mediations and adjudicators, and the appointment of authorised officers and decision-makers. It concludes with an appendix of precedents and, throughout, reference is made to case law, legislation and decisions.

The clear and concise manner in which it is written makes the book an excellent reference tool for practitioners. It is an invaluable and necessary guide, and great praise is due to the authors for producing such a practical publication.

Joyce A Good Hammond is a partner at Hammond Good in Mallow, Co Cork, and is a member of the Law Society's Conveyancing Committee.

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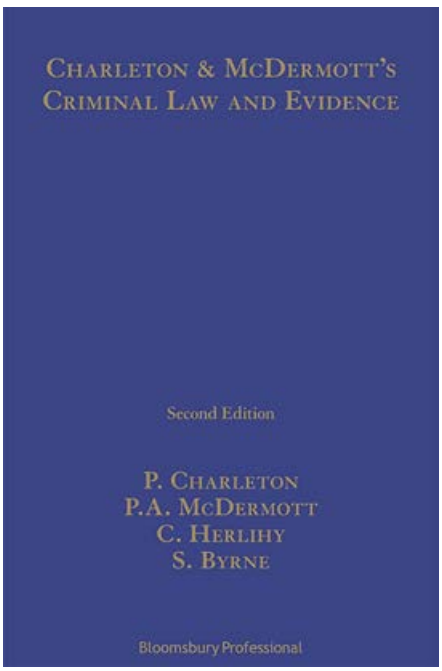
CHARLETON AND McDERMOTT'S CRIMINAL LAW AND EVIDENCE

Peter Charleton, Paul A McDermott, Ciara Herlihy, Stephen Byrne. Bloomsbury Professional (2020), www.bloomsburyprofessional.com/ie. Price: €275 (incl VAT).



The title of this book refers to it being a second edition but, as the preface notes, it would be more accurately described as a completely new book, considering the wide-scale developments in this area of law since the original edition was published 20 years ago. A cursory glance at the table of legislation examined clearly shows the extent of legislative change in the area, and underlines the importance of this edition.

While much of the legislation has been updated, the approach to the law in this book remains the same, and it is designed to be of practical assistance to practitioners. The authors acknowledge that this is a book that few will read from cover to cover. It will, however, be invaluable to practitioners who are seeking either a quick update or in-depth analysis of the criminal law in a particular area. The comprehensive and hugely practical indexing of this book assists greatly in either purpose. This, however, is not to imply that this book is merely a dry codification of the law in the field. It is far from that, and is indeed a highly readable and interesting book, which makes the law in various areas easily accessible and understandable.

It would be impossible to review this book without mentioning that one of its authors, Paul Anthony McDermott, passed away during the course of producing it, and the sense of loss felt by Paul's family and friends is clearly evident. This book serves as yet another monument on the legal landscape, again marking another of Paul's magnificent contributions to legal knowledge over the course of his career.

Dr Shane McCarthy is a consultant solicitor at FitzGerald Legal & Advisory LLP in Cork, and is a member of the Law Society's Criminal Law Committee.

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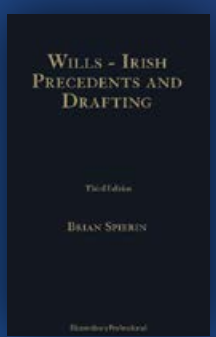

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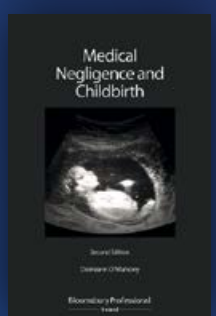

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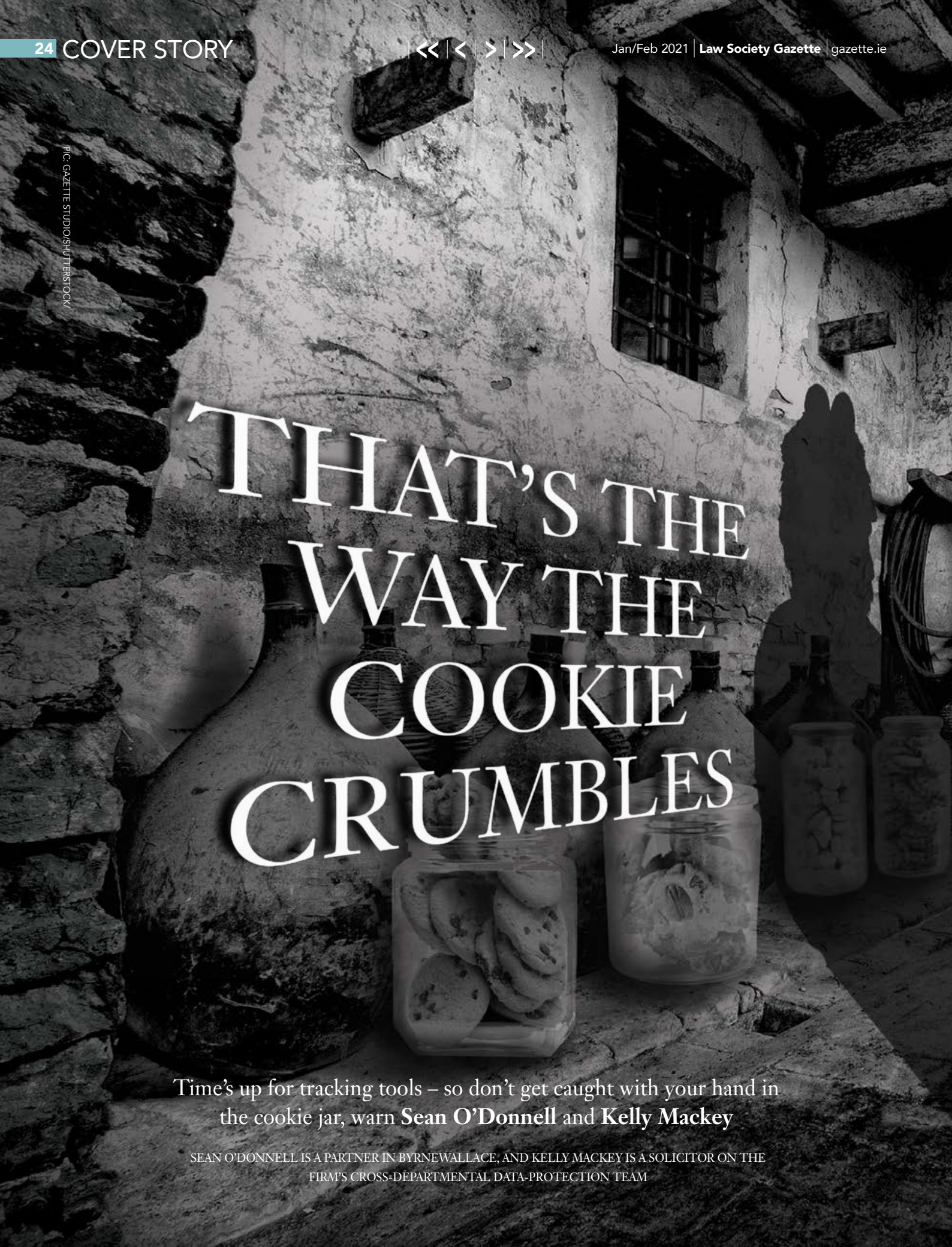

PIC: GAZETTE STUDIO/SHUTTERSTOCK/

THAT'S THE WAY THE COOKIE CRUMBLES

Time's up for tracking tools – so don't get caught with your hand in the cookie jar, warn **Sean O'Donnell** and **Kelly Mackey**

SEAN O'DONNELL IS A PARTNER IN BYRNEWALLACE, AND KELLY MACKEY IS A SOLICITOR ON THE FIRM'S CROSS-DEPARTMENTAL DATA-PROTECTION TEAM

AT A GLANCE

- Cookies can identify and track users as they browse the net
- The grace period for websites and apps to comply with the law governing the use of cookies and similar tracking technologies expired in October 2020
- The DPC has renewed its focus on cookies compliance
- So what do practitioners and clients need to do to ensure compliance, and what enforcement measures can be expected?

The Data Protection Commission's (DPC) six-month grace period for websites and apps to comply with the law governing the use of cookies and similar tracking technologies expired on 6 October 2020.

The deadline was announced in the DPC's guidance note *Cookies and Other Tracking Technologies*, published on 6 April 2020. The guidance sets out measures that data controllers can take to comply with their consent and transparency obligations, and was produced following a 'cookie sweep' in autumn 2019.

A sample of 38 websites were surveyed in the sweep, representing a range of organisational size and sectors. This included media and publishing, retail, restaurants and food-ordering services, insurance, sport and leisure, and the public sector. Of the 38 organisations surveyed, only two were found to be in substantial compliance.

One-quarter of the websites used pre-ticked boxes for consent to cookies, a practice expressly disavowed by the Court of Justice of the European Union (CJEU) in *Planet49* (C-673/17) in October 2019. Overall, the DPC identified compliance issues in the majority of those examined, due to cookies being deployed without any engagement with the user, classifying cookies as being exempt from consent requirements where this was not the case, and reliance on implied consent.

In March 2020, the DPC stated in its annual report that its renewed focus on compliance in this area emanates from "the pervasive nature and scope of online tracking, and the inextricable links between such cookies and tracking technologies and adtech" (p50).

Chocolate chips

Cookies are small data files stored on the user's device that can identify and track users as they browse the web. They are typically classified according to their purpose (for example, functionality, performance, analytics, social media, etc), duration (for example, expiry at the end of the browsing session, after three months, etc), and origin (that is, first party or third party).

PIC: GAZETTE STUDIO/SHUTTERSTOCK/

> THE DURATION OF ANY COOKIE MUST ALWAYS BE PROPORTIONATE TO ITS PURPOSE. A COOKIE REQUIRED FOR REMEMBERING INFORMATION IN A USER'S ONLINE SHOPPING CART SHOULD NOT HAVE AN INDEFINITE EXPIRY DATE

Cookies are one of a number of device-based tracking technologies. Other examples include local storage objects (LSOs), software development kits (SDKs), pixel trackers or pixel gifs, 'like' and social-sharing buttons, and device fingerprinting technologies.

These tools can serve as short-term memory aids between pages or visits to enhance the user's online experience but, left unchecked, can also be used to build behavioural profiles on users. Many EU supervisory authorities recently scrutinised their use in COVID-19 contact tracing apps.

Ginger nuts

Two pieces of legislation apply to cookies and similar tracking technologies:

- The *ePrivacy Regulations 2011* (SI 336 of 2011), which transpose the *ePrivacy Directive* (2002/58/EC) (as amended), and
- The *General Data Protection Regulation 2016/679* (GDPR) and *Data Protection Act 2018*.

Regulation 5(3) of the *ePrivacy Regulations* specifies that tracking technologies can only be used where the subscriber or user has:

- Given his or her consent to that use, and
- Has been provided with clear and comprehensive information that
  a) Is both prominently displayed and easily accessible, and
  b) Includes, without limitation, the purposes of the processing of the information.

The GDPR and *Data Protection Act* also apply where cookies contain identifiers that may be used to target a specific individual, or where information is derived from tracking technologies that may be used to target or profile individuals (recital 30 and article 4(1) of the GDPR).

On the interplay between the *ePrivacy Directive* and the GDPR, the European Data Protection Board (EDPB) has opined they are intended to coexist and are governed by the principle of *lex specialis derogate legi generali* – special provisions prevail over general rules. In practice, this means that the directive and, by extension, the regulations, serve to particularise and to complement the

provisions of the GDPR in circumstances where both apply (Opinion 5/2019, pp 13-14.)

Hob nobs

The CJEU clarified in *Planet49* that the standard for consent under the *ePrivacy Directive* is that found in the GDPR – that is, website operators wishing to store cookies on a user's device must obtain active, freely given, specific, informed and unambiguous consent, indicated by a statement or clear affirmative action, and such consent must be as easy to withdraw as it was to give (article 4(11) and 7 of the GDPR).

The court further noted that the directive does not distinguish between personal and non-personal data where consent is required and noted its purpose is "to protect the user from interference with his or her private sphere, regardless of whether or not that interference involves personal data". As such, the act of storing or gaining access to information on a user's device by a tracking tool requires GDPR-standard consent, regardless of whether the information involved is personal data.

Chocolate fingers

The guidance reinforces the requirement for the GDPR standard of consent and provides practical direction on how to achieve it when implementing cookie banners or consent management platforms.

Consent must be:

- *Active* – all tick-boxes should be unchecked and all 'radio buttons' and sliders should be set to 'off' by default. Similarly, consent cannot be implied by continuing to scroll through a website, a view which is also the opinion of the EDPB but differs among supervisory authorities across the EU.
- *Informed* – users must be provided with "clear and comprehensive information", which (in *Planet49*) the court held included information on the lifespan of the cookies used and any third parties that can access the user information gleaned by the cookies. If processing involves personal data, then transparency requirements under articles 12-14 of the GDPR apply. The interface used must not 'nudge' the user to accept cookies by giving unequal prominence to the options to 'accept' or 'reject'.
- *Freely given* – use of the website or app cannot be conditional upon the user accepting cookies. This practice is known as a 'cookie wall'. Some supervisory authorities have identified situations where cookie walls may be permissible. While the DPC did not expressly condemn cookie walls in the guidance, the EDPB is opposed to the practice, as it does not present a genuine choice to users (*Guidelines 05/2020 on Consent Under Regulation 2016/679*, paragraph 39.)
- *Granular* – consent must be sought for each purpose (not each cookie) for which cookies are used.
- *Unbundled* – consent cannot be bundled with other items, such as terms and conditions or privacy notices.
- *Refreshed* – consent must be reaffirmed at least once every six months.

Jammy dodgers

There are two exemptions from the requirement to obtain consent and provide clear and comprehensive information under regulation 5(5) of the *ePrivacy Regulations*. These are known as the 'communications' exemption and the 'strictly necessary' exemption.

The communications exemption applies to cookies whose sole purpose is for carrying out the transmission of a communication over a network. The 'strictly necessary' exemption applies to an online service that has been explicitly requested by the user, and the use of the cookie must be restricted to what is strictly necessary to provide that service.

These exemptions are narrowly defined and do not avail many categories of cookies. In its guidance, the DPC clarified that analytics cookies always require consent – a position that differs from that taken by supervisory authorities in France and Germany. An example of strictly necessary cookies could include those that record a user's country or language preference.

Kimberley

In its guidance, the DPC stressed that the duration of any cookie must always be proportionate to its purpose. For instance, a cookie required for remembering information in a user's online shopping cart should not have an indefinite expiry date and should be set to expire once it has served its function or shortly afterwards.

Mikado

In its July 2019 judgment in *FashionID* (C-210/16), the CJEU held that web operators could be joint controllers of any data, such as IP and browser-related data,

> AS COSTLY TO ANY WEBSITE CONTROLLER IS THE RISK OF REPUTATIONAL DAMAGE AND NEGATIVE PUBLICITY. CONTROLLERS THAT DO NOT COMPLY WITH ENFORCEMENT NOTICES FROM THE DPC ARE LIKELY TO FIND IDENTIFYING DETAILS OF THEIR NON-COMPLIANCE PUBLISHED

> THE ACT OF STORING OR GAINING ACCESS TO INFORMATION ON A USER'S DEVICE BY A TRACKING TOOL REQUIRES GDPR-STANDARD CONSENT, REGARDLESS OF WHETHER THE INFORMATION INVOLVED IS PERSONAL DATA

that constitutes personal data gathered on a website and disclosed to third parties whose plugins, buttons, or trackers are hosted on the website. Operators are advised to assess their relationship with all third parties whose assets are used on their website or app.

Coconut cream

Regulation 17(4) of the *ePrivacy Regulations* provides the DPC with the power to issue enforcement notices. The DPC is empowered to pursue summary prosecution of web operators that fail to comply with an enforcement notice, and a successful prosecution can result in a Class A fine (up to €5,000). Where compliance with the regulations is the responsibility of a body corporate then, pursuant to regulation 25, an officer of the organisation may also be prosecuted where an offence has been committed with that officer's consent or connivance or due to neglect on their part. 'Officer' includes a director, secretary, manager or anyone purporting to act in such capacity, and members where they manage the affairs of the corporate entity.

These powers have not been invoked previously in relation to cookies, but the DPC has used this same power to prosecute offences of unsolicited marketing on ten occasions in 2018 and 2019.

Elsewhere in Europe, there are examples of significant fines being issued for cookie infractions. For example, the Spanish supervisory authority fined the airline Vueling €30,000 in October 2019 for failing to provide users with options to accept, reject or withdraw consent to cookies in a granular way. Similarly, the Belgian supervisory authority fined a legal news website €15,000 in December 2019 for insufficient provision of information about cookies and failure to obtain consent for certain non-essential cookies.

Rich tea

If an operator uses any cookies that access users' personal data, the DPC also has recourse to its extensive powers under the *Data Protection Act 2018* and the GDPR in order to enforce compliance. These include inspections, audits, investigations, and requiring the suspension of personal data processing under the act, while non-cooperation with the DPC can be met with a fine of up to 2% of global turnover or €10 million under article 31 of the GDPR.

As costly to any website controller is the risk of reputational damage and negative publicity. Controllers that do not comply with enforcement notices from the DPC are likely to find identifying details of their non-compliance published in the DPC's annual report.

The law concerning cookies and other tracking technologies is not harmonised across the EU, and reform in that regard has been rumbling along for some years. The much-anticipated EU *ePrivacy Regulation* has been the subject of intense lobbying, and it is not yet clear when it will be introduced or what its final text will say – the most recent draft would introduce a 'legitimate interest' ground for using cookies in addition to the consent ground. In its guidance, the DPC warns operators from taking guidance from laws not yet agreed or enacted and underscores that, for now, the *ePrivacy Regulations* remain the touchstone for tracking technologies and cookie compliance in Ireland. g

LOOK IT UP

CASES:

- *FashionID* (C-210/16)
- *Planet49* (C-673/17)

LEGISLATION:

- *Data Protection Act 2018*
- *ePrivacy Directive* (2002/58/EC)
- *European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011* (SI 336 of 2011)
- *General Data Protection Regulation 2016/679*

LITERATURE:

- Data Protection Commission (2020), *Annual Report* (1 January to 31 December 2019)
- Data Protection Commission (2020), *Cookies and Other Tracking Technologies*
- European Data Protection Board, *Guidelines 05/2020 on Consent Under Regulation 2016/679*
- European Data Protection Board, *Opinion 5/2019 on the Interplay between the ePrivacy Directive and the GDPR*

ALL PICS: CIAN REDMOND

THE TITLE KEEPER

Justine Carty's career has been driven by a strong work ethic and love of learning. **Mary Hallissey** meets the property law guru and Law Society Council member

MARY HALLISSEY IS A JOURNALIST AT THE *LAW SOCIETY GAZEETE*

"I love a good title," laughs Justine Carty. "I really like a complex conveyance!"

When she reflects on her career, the Offaly-born Council member notes that her love of learning, teaching, and sharing knowledge has been a continuing theme.

As a property specialist solicitor at the Property Registration Authority, Justine works on title investigations. What is more remarkable, however, is how diverse her overall work life has been, ranging from small country practices to a top-ten firm, and now the public sector. "I have had a diverse career so far," she agrees.

As a gay woman, Justine says she doesn't have a dramatic or exciting 'coming-out story' or, indeed, any bad experiences to share.

She firmly believes that diversity should not be a tokenistic box-ticking exercise, but a kaleidoscope through which to show the huge and wonderful variety of career and personality types that the legal profession supports. "We are all different," she says. "We can show the

> I DO BELIEVE THAT IF WORK ENVIRONMENTS ARE OPEN AND INCLUSIVE, PEOPLE WILL KNOW THEMSELVES THAT IT'S NOT AN ISSUE IF THEY CHOOSE TO COME OUT AND SHARE THEIR PERSONAL LIFE AT WORK

breadth of opportunity and the diversity of the profession without ticking boxes.

"I've never thought of myself as any different from anybody else. I only expected to be judged on my own personality, how I get on with my colleagues, my work ethic, and the quality of my work.

"[Being gay] wasn't something I hid, as I am comfortable in myself and in who I am, and I let people take me as they find me."

Town and country

A convent-educated native of Shannonbridge, Co Offaly, Justine has a very typical and relatable rural Irish background – her late father was a farmer, while her mother ran a guesthouse.

The youngest of five, she credits her parents for instilling a great love of education and for always providing her with opportunities to learn and improve herself through extra-curricular activities, whether playing the piano or horse-riding. "I have a great work ethic, and I definitely would attribute that to my parents, watching them juggle the farm, B&B, and five children."

Justine studied law at the University of Limerick but believes that her love of law really ignited when she began her training contract in Castleblayney, Co Monaghan, in Mallon's Solicitors, a small general practice. "Once I started working, everything just clicked, between the theoretical side of law and the practical side. That's when I really started to love the law, and my job," says Justine.

She qualified during the 2008 recession, which crystallised her sense of privilege at being kept on after her traineeship, as she watched colleagues and friends losing their jobs and emigrating.

Attention to detail

She loved her time in Monaghan and credits her training solicitor, Seamus Mallon, with giving her advice and guidance throughout her traineeship and career.

"Seamus acted as a mentor to me, even though it wasn't a formal mentoring relationship. I don't think he was aware that he was a mentor to me!

"Solicitor Sinead O'Brien in the practice put a great emphasis on the technical side of the law and attention to detail. I remember her always spending the time to teach and explain. Only when I matured myself, I thought wasn't she great to take the time out of her day to make sure that I received a thorough training. I was very fortunate to get a very practical hands-on training," she recalls.

She spent ten years in Monaghan, eventually moving to work at the Office of the State Solicitor, Barry Healy, as her reputation for hard work grew.

It was during this time that she met her partner of ten years. They registered their civil partnership in June 2012, with both of their families present to enjoy the day.

A move to Dublin in 2015 made practical sense, given that Justine's partner was working in Dublin. "Had I not met my partner Davina, I probably would have gone on to open my own practice in Monaghan. I'd been ten years there, and I had a reputation built up. Monaghan has everything you'd need from a town – good restaurants, good pubs, gyms, a cinema. Everyone was just so friendly and very welcoming."

Change of heart

"Hand on heart, I've never received any different treatment. It never was an issue. We are lucky that Irish society, in general, has progressed so much in the last number of years, and that many firms and organisation have embraced the idea of diversity and inclusion."

She says that she did initially avoid questions about her personal life. A chance meeting with her boss one weekend, while with her then girlfriend, prompted a change of heart.

"On the Monday morning, I went straight into Seamus and said that I had something to tell him – that the girl he saw me with at the weekend was actually my girlfriend. Seamus just smiled at me, and said that he'd figured that one out for himself, asked me all about her, said very good, then moved on to ask about the files for court.

"That was literally the end of it. It was a relief to me because it was out there. A big effort was made to always invite me and my girlfriend to all social events. Looking back, it was an inclusive workplace and community without having any formal policies in place."

Mover and shaker

Good time-management really stood to her for her next move – to corporate firms in Dublin – first Gartlan Furey and then ByrneWallace.

"At ByrneWallace, the property department was led by a strong leadership

team in the form of Michael Walsh and Alison O'Sullivan. I enjoyed the challenge of being a transaction property lawyer.

"The firm has an inclusive culture where diversity, as well as integrity and excellence, are embraced. I think that was one of the reasons why I loved working there."

She believes that coming from a country practice to Dublin gave her a more well-rounded legal experience.

The principles of conveyancing are the same, no matter where you are, she notes. "In the country, it's called a list of closing documents; in Dublin, it's 'completion deliverables'!" she laughs.

Council calls

In 2013, she got a call from Law Society Council member James MacGuill, who asked her whether she would consider standing for election. "I didn't see it as seeking out a leadership role in the Law Society – it just happened naturally, as I had been so active in the Monaghan Bar Association."

Justine was duly elected, though admits now that she was naïve as to the procedural formalities involved compared with running a local bar association. "I probably prefer the work on committees, which are more practical and hands on," she says. "I enjoy a good project."

This year, Justine is chair of the Guidance and Ethics Committee, which has been tasked with updating the guide to good professional conduct (last updated in 2013), which is a fundamental part of solicitor education and practice.

She urges solicitors of all backgrounds to get involved in the profession's leadership, with their local bar association as an obvious starting point. She is also anxious to dispel any perception that the Council is male-dominated or in any way non-inclusive: "Everybody's opinion is valued, is heard, and is listened to on Council, and people from diverse backgrounds are genuinely welcome in the decision-making space. Everyone contributes in their own way and each contribution is valued. You don't have to bark the loudest to make a valued contribution to the Law Society," she notes.

"The Law Society is fortunate to have a macro view of the profession and the structures that exist within it," says Justine. "It's great to see that it has embraced the concept of diversity – diversity of opinion is critical for success. I don't think any captain would field a team where everyone had just one skill or strength. It's the same for the Law Society, so I encourage those from a country practice to get involved."

She also encourages all firms to sign the Law Society's diversity and inclusion charter, to show their commitment to supporting those qualities in their firm.

The time commitment is real, however, for either Council or committee work.

"We do need to make it easier for people to get involved in leadership roles in the Law Society, as we are all time poor. The use of technology can enable a more efficient way of working and attending meetings, which would allow for a more geographically diverse Council and committees."

Confidence builder

Several years on, Justine reflects that being 'out' at work meant, for her, getting on with things with confidence. "You can

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- **Enforcement of Judgments, Enforcement of Contracts & Civil Litigation Jurisdictional issues**
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SLICE OF LIFE

■ *Main influence?*
I have been hugely influenced by Ailbhe Smyth's work on both the marriage equality and repeal campaigns, and her long-term commitment to issues such as women's education.

■ *Current read?*
Dr Marie Cassidy's *Beyond the Tape: The Life and Many Deaths of a State Pathologist*.

■ *Favourite story?*
So far, it's Michelle Obama's autobiography. I was impressed by her honesty and frankness, which is not something you always get from a 'celebrity' autobiography. It's a very inspiring read.

■ *Silver-screen favourite?*
Gravity for the film – while it was a simple story, it was edge-of-the seat the whole time, and it was great to see a female astronaut as the central character. *Titanic* for the memories. I remember going to see it with my late Dad in the cinema in Tullamore. There was a 15-minute interval during the film, and then my Dad fell asleep and let out a loud snore as the ship went down!

■ *Earworm?*
Casefile – it's a true crime podcast. I'm also listening to the *IFI Podcast* series from the Irish Film Institute. It has really interesting guests and great film recommendations.

■ *Currently streaming?*
I just watched *The Trial of the Chicago 7*. It's a brilliant take on a regular courtroom drama.

■ *Cats or dogs?*
I love cats but don't have any, as I couldn't live with the cat hair in the house and I wouldn't have the heart to let a cat sleep outside.

■ *Secret addiction?*
I have a secret fondness for 1990s boybands – NSYNC, Backstreet Boys and Westlife. I think it's the smooth key changes and cool manoeuvres that do it for me! Then again, it could have been the ridiculous music videos and hair.

build better relationships because you are no longer concentrating on watching where a conversation is going.

"Coming out can be exhausting for some people, particularly at work, because you might not want to share your personal life in your work environment," Justine reflects. "I think that there are several stages of coming out. The first is personal acceptance, that you are happy with who you are. For me, that was in college in Limerick, in my early 20s, but there was no dramatic announcement.

"After that, there is social acceptance, that you are actually happy being who you are socially, and that you're not hiding that part of your life from your family or friends.

"The third part is professional acceptance, but not everyone chooses to come out at work or chooses to share personal information about their home life, regardless of whether they are gay or not, or from a minority group or not. You have to respect those people as well, who choose not to share their personal life for whatever reason.

"However, I do believe that if work environments are open and inclusive, people will know themselves that it's not an issue if they choose to come out and share their personal life at work."

> SHE ENCOURAGES ALL FIRMS TO SIGN THE LAW SOCIETY'S DIVERSITY AND INCLUSION CHARTER, TO SHOW THEIR COMMITMENT TO SUPPORTING DIVERSITY AND INCLUSION IN THEIR FIRM

Holding the course

Lockdown prompted Justine to begin a master's in education and training in DCU. "It's one side of my job that I really enjoy, giving Law Society tutorials and teaching and training. So I thought this year was perfect timing to undertake a course."

She reflects that, in her college experience, case law didn't seem very relevant – but good teaching in the practical, technical side of the law made all the difference.

"I've never left a Law Society Council or committee meeting without learning something, be it positive or negative. That's one of the things I really like about it," she reflects. "I love the collegiality, on the Guidance and Ethics, and on the In-House and Public Sector Committees.

"It's a great way of meeting new colleagues – and if you ever need to pick up the phone to somebody, you have a network of people to call on. I like that colleagues know that I sit on committees and the Council, and that they can reach out for guidance or a steer in the right direction if needed."

Justine recognises that it can be hard to be a trailblazer for diversity – for example, as the first woman on a board or the only gay person in a group. "What we learn can make the path easier for the next person. This is why I felt it was important for me to do this interview, even though I have no dramatic stories to tell.

"I think I have a personal responsibility, that if there is somebody coming up the ranks, who might like to get involved, to reassure people that everybody's voice and contribution is valued in the Law Society, be it on Council or on the committees." g

AT A GLANCE

- Solicitors advising clients on issues relating to parole and the detention of people with mental-health issues are working within an expanding arena
- To advise clients appropriately, they will need to take account of the provisions of the *Parole Act 2019* (when commenced), the *Criminal Law (Insanity) Act 2006* and the *Mental Health Act 2001*, as well as the various provisions of the wards of court system

ON PAROLE

A recent Supreme Court case brought focus to the respective roles and functions of the Parole Board and the Mental Health (Criminal Law) Review Board, write **Shane McCarthy** and **Patricia Hickey**

SHANE MCCARTHY AND PATRICIA HICKEY ARE MEMBERS OF THE LAW SOCIETY'S MENTAL HEALTH LAW AND CAPACITY TASK FORCE

The Parole Board in Ireland currently operates on an advisory, non-statutory basis. This is a situation that will change on the commencement of the *Parole Act 2019*. Currently, the Minister for Justice is empowered by section 2 of the *Criminal Justice Act 1960* (as amended) to make rules allowing for the temporary release of prisoners.

The minister has very wide discretion in this regard, and the courts have stated that the exercise of such executive powers can only be criticised by the courts if they are carried out in "a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way" (as stated by Finlay CJ in *Murray v Ireland* (1991) and cited with approval by Hardiman J in

PIC: ALAMY

SOLICITORS ADVISING CLIENTS WILL NEED TO BE AWARE OF THE PROVISIONS OF THE *PAROLE ACT 2019* UPON COMMENCEMENT

2001 in *Kinahan v Minister for Justice*).

In exercising the discretion to grant temporary release to prisoners serving long sentences, the minister is frequently advised by the Parole Board. The board currently only considers the cases of prisoners serving life sentences or determinate sentences of eight years or longer. In relation to prisoners serving shorter sentences, the minister frequently grants temporary release without any reference to the board.

This position will change when the *Parole Act 2019* is commenced. That act establishes a statutory Parole Board that will decide on parole applications, rather than making recommendations, and the eligibility criteria will be quite different to that currently pertaining.

Criminal Law Review Board

Section 3 of the *Criminal Justice Act 1960* allows for temporary release from the Central Mental Hospital (CMH) of 'criminal lunatics' held there. 'Criminal lunatics' are defined as those detained in the hospital "by warrant, order or direction of the Government" and, if he or she is serving a sentence of imprisonment, whose sentence has not expired.

On occasion, prisoners who have been deemed fit to stand trial and been convicted of an offence have subsequently been transferred from prison to the CMH. These transfers are made pursuant to medical certification that the prisoner is suffering from a mental disorder for which they cannot be afforded appropriate care or treatment within the prison.

Once transferred to the CMH, the prisoner is entitled to have their case reviewed every six months by the review board, leading to an order directing that the prisoner be transferred back to prison or that the prisoner continue to be detained in the hospital.

Overlap

The Parole Board does not review the cases of prisoners detained in the CMH. Prisoners who are engaged in the parole process and who are subsequently transferred to the CMH have their Parole Board review(s) suspended while they are detained in the CMH. The *Parole Act 2019* retains this position.

This situation gives rise to a number of practical considerations. The 2020 Supreme Court case of *M v Parole Board and the Minister for Justice and Equality* considered the issue of whether a person detained in the CMH, while serving a sentence, could compel the Parole Board to consider their application for temporary release or parole in the same manner as a prisoner detained in prison. Various arguments were made, including one based on equality, and that a prisoner detained in the CMH should be treated in the same manner as a prisoner detained in a prison. Further equality arguments were advanced, setting out that the minister and the Parole Board would consider the case of a prisoner receiving medical treatment in a hospital, and it was inequitable that they would then refuse to consider the application of a prisoner in the CMH for parole.

The Central Mental Hospital

The manner in which a prisoner is detained in the CMH is an issue that also received much scrutiny before the Supreme Court. It was argued that the clinical director of the CMH has a discretion to grant a programme of leave to a 'patient' in his care, but not to a 'prisoner', whose only recourse was to the review board process. The Supreme Court, however, held on this point that there was no distinction between other patients in the CMH and 'transferred prisoners'. It was held that the clinical director of the CMH might consider temporary release to be as appropriate for a transferred prisoner as for a patient, and these were matters best left to the judgment of the clinical director, subject to the consent of the minister.

It was accepted, however, that the powers to grant temporary release to a transferred prisoner could not go beyond limited periods of release before the question of a return to prison would arise in one of the review board's regular reviews. It was the view that, once a person was well enough not to require in-patient treatment in the CMH, then they should be transferred back to prison. Subsequent review and progress towards release should take place pursuant to the Parole Board process.

Discretion

In considering the issue of parole, the Supreme Court reaffirmed that the early release of prisoners was an exercise in clemency, which was to be seen as a privilege rather than a right. This approach affords the minister a very wide discretion. The courts had next to determine whether the minister had a discretion to consider the applicant for parole, with the argument having been made that even if the minister had a very wide discretion in the decision he could make, he would be acting in an *ultra vires* fashion if he failed to consider the application, as he obviously would not have acted within his discretion. The Supreme Court determined that section 2 of the *Criminal Justice Act 1960* (as amended) was never intended to apply to prisoners transferred to the CMH and, accordingly, the minister did not have a discretion to consider the applicant for parole.

This will be an evolving area, and there are additional factors to consider when the patient transferred to the CMH is a prisoner serving a determinate sentence. Matters likely to create further analysis include the interaction with the *Mental Health Act 2001*, where, on the completion of a sentence, a prisoner might be detained in an approved centre/psychiatric facility under the provisions of that act. Another recent case (*AM v HSE*) illustrated the growing importance of this field of law. In that 2019 case, a prisoner serving a determinate sentence was transferred to the CMH upon diagnosis of a mental illness. Shortly before he was due for release on the expiry of his sentence, he was made a ward of court for the sole purpose of seeking an order for his continued detention in the CMH because, among other things, there was no other psychiatric treatment facility available that could provide a sufficient level of scrutiny.

Wards of court

With increasing frequency, wardship cases bring to light cases where a vulnerable person is being detained in prison on

> WITH INCREASING FREQUENCY, WARDSHIP CASES BRING TO LIGHT CASES WHERE A VULNERABLE PERSON IS BEING DETAINED IN PRISON ON REMAND DUE TO A LACK OF APPROPRIATE CARE FACILITIES BEING AVAILABLE IN THIS JURISDICTION

remand due to a lack of appropriate care facilities being available in this jurisdiction. All too often, District Court judges are faced with impossible situations where they continue to detain a vulnerable person on remand because releasing the prisoner on bail would result in immediate homelessness and safety concerns.

The wards of court and the *Mental Health Act* systems operate side by side. A ward of court is not detainable under the mental health legislation, as wards are excluded from the *Mental Health Act* (section 283 of the 1945 *Mental Health Act*). Therefore, a ward of court, if deprived of liberty, is detained under the jurisdiction of the Wardship Court.

Some recent cases illustrate this alignment. In the first case, a person who was detained on remand for many months was brought to the attention of the High Court by his solicitors in a District Court case. On a visit by the court's medical visitor – an independent consultant psychiatrist – serious concerns were raised about the psychiatric and medical care being afforded to the prisoner. On a successful application to the Wardship Court, the man was declared a ward of the court, was released from prison, and transferred by order of the court to a residential care facility.

In another case, a prisoner was not suffering from a mental disorder as defined under the mental-health legislation, yet the prisoner was vulnerable and suffering from a condition that rendered him incapable of managing his affairs. He was on remand for summary offences for many months, as the concerns were such that, to release him on bail would result in harm to himself or others. Ultimately, an application was made to the Wardship Court to bring him under the protection of the court to facilitate a transfer outside the jurisdiction to a facility that could provide therapeutic care and rehabilitation. An application was made for bail conditions to be amended to permit his transfer to Britain for treatment, and the ward was successfully admitted to a psychiatric facility in England for therapeutic treatment, with regular reviews being held before the Irish court.

In a further case, a prisoner was held on remand; however, he was detainable under the mental-health legislation, as he was suffering from a mental disorder as defined. Failures to previously detain him in a psychiatric unit were brought to the attention of the District Court judge, who – due to her concerns for his safety and welfare – was not agreeable to releasing him on bail. The District Court judge contacted the President of the High Court, raising concerns that a vulnerable man continued to be held on remand due to a lack of appropriate care facilities, and that he may be an appropriate person to be brought under the protection of wardship, as he lacked capacity to make decisions based on the medical reports available. The court directed an inquiry into wardship under section 11 of the *Lunatics Act 1891*, and an application to bring the gentleman under wardship jurisdiction was listed before the Wardship Court. Although the respondent met the criteria for the test for capacity to be admitted to wardship, it was deemed that he did not meet the criteria for necessity of wardship. This was based on the fact that the respondent suffered from a mental disorder and was detainable under the mental-health legislation. An application was made to the High Court for bail, which was granted, and the gentleman was detained to a psychiatric unit for his safety and protection under the mental-health legislation, with reviews under the mental-health tribunals.

It is clear, that solicitors advising clients in this expanding area will need to be aware of the provisions of the *Parole Act 2019* upon commencement, the *Criminal Law (Insanity) Act 2006* and the *Mental Health Act 2001*, as well as the various provisions of the wards of court system before they will be able to advise their clients appropriately. g

LOOK IT UP

CASES:

- *AM v HSE* [2019] IESC 3
- *Kinahan v Minister for Justice and Law Reform* [2001] IESC 16; [2001] 4 IR 454
- *M v Parole Board and Minister for Justice and Equality* [2020] IESC 24
- *Murray v Ireland* [1991] WJSC-SC 999; [1991] ILRM 465

LEGISLATION:

- *Criminal Justice Act 1960*
- *Criminal Law (Insanity) Act 2006*
- *Lunatics Act 1891*
- *Mental Health Act 1945*, section 283
- *Parole Act 2019*

AT A GLANCE

- COVID has thrown a spanner in the familiar workings of the courts in dispute resolution
- The process of mediation provides a solution
- In the current climate, mediation has significant advantages in terms of costs, 'ownership', pressure, flexibility, confidentiality, and social distancing

A MOMENT ON THE LIPS

The pandemic has transformed how our courts are run and has forced us to be innovative in how we conduct our businesses. Mediation has an even more important role in this new reality than it had before, says Patrick Moylan

PATRICK MOYLAN IS PRINCIPAL OF O'KELLY MOYLAN SOLICITORS AND IS AN ACCREDITED MEDIATOR

The COVID pandemic has caused the entire legal system to look at itself and find new ways of doing things. Courtrooms are cordoned off with warning tape and signs to govern social distancing. The ability for parties to a dispute to spend the day in a courthouse negotiating the terms of settlement is gone. What cases are still going on for hearing are doing so within a completely new rules structure. Parties must arrive at a certain time, enter the courthouse in a certain way, and leave in a certain way. If settlement is to be attempted in these cases, it will be done in the most pressurised of circumstances. If settlement is reached and a party is subsequently unhappy with that settlement, then they will often criticise their legal advisors for allowing them to settle in that way – yet every lawyer knows the value of a settlement in circumstances where the outcome of a court hearing is unknown.

The solution

While this dilemma unfolds, there exists a potential solution in the *Mediation Act 2017*. Section 14 of the act requires a solicitor to provide a client with certain information regarding mediation prior to the issuing of legal proceedings and to certify the provision of same when issuing proceedings. So, the question arises as to whether this suggestion of mediation to resolve the dispute has become just another box that must be ticked in the pre-litigation process, or whether it is really something that can benefit a client and the client's legal representatives.

The courts have long since seen the benefits of alternative dispute resolution. When a case is heard

PIC: ALAMY

> THE MEDIATION PROCESS ENCOURAGES THE PARTIES TO CONSIDER ALL SOLUTIONS AND TO BE CREATIVE AND OPEN-MINDED. THIS CAN OFTEN LEAD TO A MUCH MORE TAILORED SOLUTION TO A PROBLEM THAN MIGHT OTHERWISE BE ENVISAGED

in court, a judge must make a decision that will usually be in favour of one party or the other. It is a case of 'all duck or no dinner'. Methods of alternative dispute resolution, and in particular mediation, can soften that edge somewhat. A mediated settlement agreement will usually have some compromise on both sides. It is very much akin to the traditional type of settlement that used to be thrashed out over the course of a day in the court building, but which can, for the moment at least, no longer occur. A mediation, on the other hand, can still take place in a socially distanced setting while ensuring health-and-safety guidelines are adhered to.

The process

For those solicitors that have not been involved in an actual mediation – and, from the scarcity of mediated settlements, there must be many – the following is a brief overview of the process from within. To assist in this regard, the mediation process may be broken down into a number of stages.

Pre-mediation

This is the stage of the process that occurs in the lead-up to the actual mediation itself. The mediator is chosen, usually by the parties' solicitors. The venue is chosen and is normally neutral, with at least three rooms available: one room for each side and one for the mediator. The size and location of those rooms is a matter for the parties and can be arranged to work in our new COVID reality. Experts and advisors can be available to the parties via telephone, Zoom etc.

PIC: SHUTTERSTOCK

Other than the logistics of the mediation, the other real objective of this stage is to determine the nature of the information and documentation that is to be exchanged by the parties in advance of the mediation, and the mediator will guide the parties in this regard. This is done through the solicitors and is a non-pressurised, structured way of preparing a case. You also get a good insight into the other side's case.

Opening joint session

This is the first part of the mediation itself. Most mediations begin with an opening meeting at which the parties, their representatives, and the mediator is present. Many hotel meeting rooms are of sufficient size that this meeting can be done in a safe manner. The parties will usually make an opening statement regarding the dispute, and the mediator will set out the ground rules for the mediation.

> THE FORUM AND THE STRUCTURE OF A MEDIATION PROVIDES THE PARTIES WITH GREAT INPUT AND OWNERSHIP OF THE PROCESS AND THE OUTCOME

Private sessions

In this stage, the mediator meets privately with each party and attempts to help them reach clarity on what exactly is in dispute and what the potential solutions might be. These meetings are entirely confidential, and no information is given to the other party unless expressly agreed. There may be many rounds of these private meetings to distil the dispute and any potential matters that might assist in reaching an agreement. The best and worst alternatives to a negotiated agreement may be explored.

Negotiation

At this stage, the parties attempt to negotiate a settlement of the dispute with the assistance of the mediator, who challenges the parties to explore their strengths and weaknesses. Working groups can be set up – for example, having the parties' engineers liaise with one another to work on a solution.

Closing joint session

If a mutually acceptable settlement is reached, the mediator invites the parties' lawyers to draw up the legally binding mediated settlement agreement, which is then signed by the parties. The mediator will usually then call a closing joint session.

At this session, the mediator will outline the agreement in broad terms, and the parties will often close the mediation in a positive manner – historically with a shake of hands, but perhaps with some other form of acknowledgement in the current circumstances. The process may sound quite procedural (and in some ways it must be) but, in fact, when one is involved in a mediation, it more resembles a courthouse-type negotiation. Substitute the courthouse meeting room for the private socially distanced sessions, and they are not that different.

Obviously, up until COVID, the courthouse settlement was a mediation that happened as a matter of course. COVID has put paid to that. Mediation can now provide the solution by way of a properly explored and negotiated settlement that is done in a less pressurised environment.

The benefits

There are multiple benefits to mediation.

Time

In the new COVID world in which we live, a party may enter a courthouse at 2pm and leave at 3.30pm, having had their case heard

THE MEDIATION ACT PROVIDES THAT, ONCE A MEDIATED SETTLEMENT AGREEMENT HAS BEEN CONCLUDED AND ENTERED INTO BY THE PARTIES, THEN IT IS A LEGALLY BINDING CONTRACT BETWEEN THOSE PARTIES

and determined by a judge. The judge will no doubt provide as much opportunity as possible for the parties to 'talk'. Some judges are accommodating this by operating two courtrooms simultaneously but, nonetheless, the judge has to ultimately determine the case. That is, after all, why he or she is there. Often the parties will have had years when they could have negotiated but, without the forum, never did. The forum used to be the courthouse on the day of hearing. That is no longer the case. Mediation can step into that void and provide the parties with a structured forum within which to negotiate and attempt to resolve their differences.

Ownership

The forum and the structure of a mediation provides the parties with great input and ownership of the process and the outcome. There is a certain time pressure, such as the limit of the hours in a working day. This is good, as it prevents procrastination by the parties but, at the same time, there is not the extraordinary pressure that the COVID-era courtroom could place on parties trying to settle a case within such a short period of time, while they are effectively at hearing, with a judge checking in on them.

Costs

Litigation is costly. Mediation is less so – but there are still costs. The parties must prepare for the mediation, often as they would for a case, and they must pay for the mediator and the venue, the costs of which are usually shared equally.

Flexibility

The mediation process encourages the parties to consider all solutions and to be creative and open-minded. This can often lead to a much more tailored solution to a problem than might otherwise be envisaged. The process is also somewhat flexible, and elements can be added to suit the case, such as a site visit with the engineers if the dispute centres on physical property, for example, or consultation with experts via conference call or Zoom.

Confidentiality

When you probe a client, what they often fear most about litigation is the publicity of a court hearing. Clients do not realise that most cases are not reported on in any way, and even pre-COVID, there were very few members of the public in court.

People by their nature like to keep their disputes private. Many dread giving evidence, and in their minds visualise courtrooms filled to the rafters with everyone enjoying the spectacle of cross-examination. All of these fears, justified or unjustified, are allayed and avoided by the mediation process. There is no need to give evidence. There is no cross-examination. There is no public. The whole process is private, and the outcome is private.

The settlement

Section 11(2) of the *Mediation Act* provides that, once a mediated settlement agreement has been concluded and entered into by the parties, then it is a legally binding contract between those parties. The main caveat in this regard is in respect of family-law mediated settlements, which must be ruled by the court in judicial separation and divorce cases – where, of course, the court retains its discretion as to whether or not the settlement represents proper provision for the parties, and where the best interests of children may be involved.

The statute

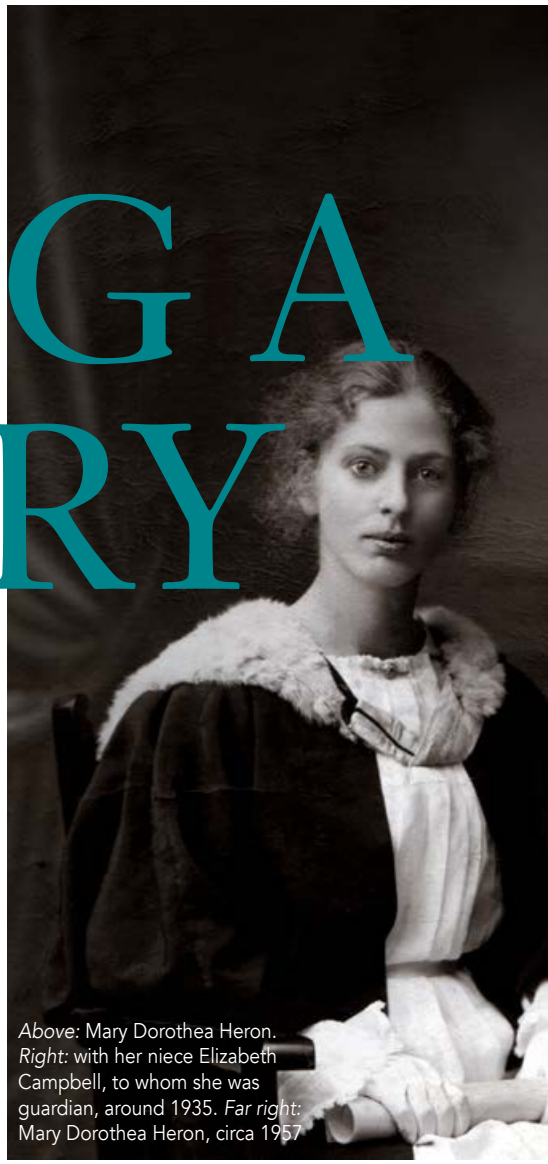
Section 18 of the act provides that the period beginning on the day on which an agreement to mediate is signed, and ending on the day that is 30 days after either a mediated settlement is signed by the parties and the mediator, or the mediation is terminated, whichever first occurs, shall be disregarded in reckoning the time period for the purposes of a limitation period specified by the *Statute of Limitations*.

The conclusion

The COVID-19 pandemic has had a huge effect on the world and how we live. It has transformed how our courts are run and has forced us to be innovative in how we conduct our businesses and progress our cases. Mediation has an even more important role in this new reality than it had before.

It can provide parties with a safe forum or process in which a properly explored and negotiated settlement can be reached for the benefit of the parties, which will ultimately benefit us as their lawyers in having satisfied clients. For mediation, the time has come. g

HITTING A CENTURY



Above: Mary Dorothea Heron. *Right:* with her niece Elizabeth Campbell, to whom she was guardian, around 1935. *Far right:* Mary Dorothea Heron, circa 1957

AT A GLANCE

- The *Sex Disqualification (Removal) Act 1919* removed the prohibition of women entering the solicitors' profession
- Mary Dorothea Heron was the first woman to qualify as a solicitor in Ireland after the passing of the act
- Eleanor O'Shea (née Murray) was the 43rd woman to qualify, in 1938

Just over 100 years since the solicitors' profession was first opened to women, the *Gazette* is delighted to augment previously published accounts with additional biographical details of two of these women pioneers

December 2020 marked the 101st anniversary of the removal of the discriminatory ban on women joining the professions. The Law Society published a booklet last year with the biographies of some of these women, as well the cover story of the January/February 2020 *Gazette*. These are now enhanced by additional biographical detail on the first woman solicitor (Mary Dorothea Heron), and Eleanor O'Shea (née Murray), the 43rd woman to qualify as a solicitor, in 1938.

This information was contributed by Mary Dorothea's niece, Linda Roberts, and by solicitor Joan Byrne (O'Flynn Exhams LLP, Cork) on behalf of Eleanor's family.

These biographies further enrich the Law Society's institutional archive and add to our appreciation of the first 100 women solicitors.

First woman solicitor

Mary Dorothea Heron was born on 19 August 1896 at 68 Harcourt Street, Dublin, the home of her maternal grandparents, *writes Linda Roberts.*

Dorothea's mother was Mary Lyster Jameson, who graduated with a first-class honours degree in classics from the Royal University of Ireland in 1894. Mary married James Heron on 9 August 1895, at Rathgar Presbyterian Church, with Rev Prof James Heron, father of the groom, officiating.

Mary Jameson was one of four surviving children of William Jameson (1826-1897), a solicitor, and Henrietta Dorothea Jameson (1837-1926), the daughter of the Bishop of Meath, Rev Joseph Henderson Singer. Mary had three brothers, one of whom, Claude, was also a solicitor. After her husband's death, Dorothea Jameson – known as Dora – moved to Greystones, and there was regular contact with (and visits to) the Jamesons after Mary's marriage.

James Heron was county surveyor of Co Down. He was the eldest of 13 children. His parents were James Heron (1836-1918) and Margaret Turrettin (1837-1915). His father was a Presbyterian minister, who was later professor of church history at the Assembly's College, Belfast, and Moderator of the General Assembly of the Presbyterian Church in Ireland from 1901-1902. He wrote *The Celtic Church in Ireland* and other books. He was from Rathfriland, Co Down, and was the first person in his family to attend university.

Dorothea, known as 'Deasy' within the family, spent her childhood in Downpatrick. She was the eldest of five surviving children. Her brother James was born in 1899, Pauline in 1903, Patrick in 1907, and Faithful in 1911. All of the children were brought up as Presbyterians. Dorothea was precocious and, already, in the 1901 census, before she was five, she could read. I have a copy of an illustrated edition of *The Lays of Ancient Rome*, by Lord Macaulay, inscribed '*Mary Dorothea Heron, from her Father and Mother, August 19th 1901*'. This was for her fifth birthday. In 1905, she received Longfellow's *The Song of Hiawatha* as a Christmas present. I am glad to say that her beloved Dublin grandmother, Dorothea Jameson, gave her *The Book of Dragons* by Edith Nesbit for her Christmas present in 1903, so she did also enjoy lighter reading!

Exceptional student

Dorothea attended Victoria College in Belfast, where she was an exceptional student. Both sides of her family encouraged her and the younger children to believe that education and earning your living were vital for both men and women.

The school was a major influence on Dorothea. It had been founded in 1859 by Margaret Byers, the first cousin of Dorothea's grandfather, Rev Prof James Heron. Margaret was a passionate advocate of women's education. She offered her female students academic courses in subjects such as history, philosophy, and science, as well as

the classics, necessary for university entrance. She encouraged her students to aim for higher education and the professions.

Dorothea enjoyed learning, and it came easily to her. In 1913, she was awarded a full set of the Brontë books for Latin composition, and a complete set of Shakespeare for her performance in classics, French, English and maths at the examinations held at Easter 1914.

Dorothea went up to Queen's University, Belfast, in 1914. In 1918, she gained a second-class honours degree in classics. In 1921, she was awarded a first-class degree in law. Like many women of her generation, her chance of marriage had gone with the losses of the First World War.

She began working for her uncle Thomas Heron at his Belfast practice, TM Heron, from 1923 (the year she qualified as a solicitor) until 1946. Thomas had played rugby for Ulster. Dorothea worked as an assistant solicitor, specialising in probate.

Her nephew Ian Brewster, who worked in Belfast in the early 1960s, observes that Dorothea was a woman ahead of her time, and that, at the time she was working, most clients of solicitors were men and expected to have a male solicitor. Dorothea's sister, Faithful, felt that her talents and intelligence were not used to their full potential.

Devastating blow

Within a year of her starting work, the family had the devastating blow of the death of both parents. Mary Heron died on 9 November 1923, and James Heron on 16 February 1924. Faithful, who was only 12 when her parents died, remembered this as a very difficult time, and believed that she owed a great deal to Dorothea. James had completed his civil engineering degree, but Pauline was part-way through her medical degree, and Patrick and Faithful were at school.

It says a great deal for Dorothea's strength of character that she kept the family together and encouraged her three younger siblings to complete their education. Pauline gained a first-class honours degree in medicine at Queen's. Patrick was awarded a degree in civil engineering, while Faithful was the first woman graduate in agriculture in Ireland. James and Patrick set up their own civil engineering firms. Thus, Dorothea was juggling work and family responsibilities decades before it was ever talked about.

The bonds between the five siblings were close. Jane Stevenson (James's daughter) recalls that Dorothea used to visit James and the family at Acton Bridge, Cheshire, occasionally during the years of the World War 2. Jane has clear memories of Dorothea between the ages of four and nine, and remembers her aunt's voice and face, always smiling, and of her very pleasant personality. In hindsight, she feels that, in personality, Dorothea was very like her father James and their brother Patrick.

Increased responsibilities

By 1946, Dorothea's family responsibilities increased again. This may explain her retirement from work. The return of Michael Heron, Thomas Heron's son, from the RAF to his father's legal practice in 1946 may also have been a factor. For many years, Dorothea had shared a house in Stranmillis, south Belfast, with her uncle, Samuel Heron, an architect who worked in the city with Hobart and Heron. A moving population of student members of the extended family came and went, as her niece Elizabeth Addis recalls.

After the untimely deaths of Elizabeth's mother Pauline (in 1931), and of her father John Campbell, Elizabeth went to live in 1943 for ten years with her guardian Dorothea and her great uncle Samuel Heron. From their house, she attended school and college. Elizabeth remembers rationing and a shelter under the stairs during World War 2. She recalls that Aunt Deasy was very exact in all her arrangements and, of course, looked after all of Elizabeth's affairs until she reached maturity. She describes Aunt Deasy as a very private person and that, even after ten years under the same roof, she did not know her well, although they were very fond of each other.

My parents, Faithful and James Brewster, and their eldest son Ian joined the household after my father's discharge from the RAF in 1945, while he undertook a postgraduate diploma in public health at Queen's. A second son, Hugh, was born in November 1946. The house had four bedrooms, and it must have been a busy one. Ian remembers meeting his Great Uncle Sam off the tram along the Stranmillis Road on his return from work. He also remembers Dorothea corresponding with the extended family, including her Uncle Claude and Aunt Emily Jameson, by then living in Bath.

Elizabeth recalls weekend visits, first by train during the war, and later in Great Uncle Sam's car, to the farm belonging to Great Uncle Sam at Newtown, near Rostrevor, Co Down. Newtown was a base for visits from the extended family and for meeting up with the Heron cousins who still lived in the Rathfriland and Rostrevor area. The whole family enjoyed picnics, and there are many small, faded photos of large groups of the extended family with a picnic basket at various favourite sites.

Rostrevor retirement

About 1954, Samuel Heron retired to Newtown. Dorothea went, too, to look after him. Samuel's brother Thomas (Dorothea's former employer) and his wife Norah also retired to Rostrevor. Faithful and James Brewster, my three brothers and I used to spend our holidays with Aunt Deasy and Great Uncle Sam. Various cousins would visit or call in, and Elizabeth rejoined the household.

Winifred Smith, Patrick's elder daughter, remembers visiting when staying with her maternal grandmother in Rostrevor. She recalls that her Aunt Deasy was kind and thoughtful and would cook her roast chicken and boiled onions, and take her up the garden to pick raspberries for pudding. She felt that Aunt Deasy was careful not to rush her, but would let Winifred come to her, and then be glad to show her things.

After her Uncle Sam died in March 1957 at the age of 85, Dorothea moved to Portstewart, to be near her sister Faithful and family, who lived near Coleraine. My brothers and I remember visits to see her, Ian on his bicycle. We were always made welcome. My first ever overnight stay away from home was with Aunt Deasy, who made me feel safe, and encouraged my love of reading. Her bookshelves included the classics, novels, plays, poetry, biographies, theology, philosophy and detective stories. Family picnics with Aunt Deasy at the seaside were also enjoyed. Alas, Dorothea did not have long to enjoy her retirement. She died on 9 October 1960, aged 64.

Fittingly, Dorothea is buried with her Uncle Samuel in Clonallan Parish Graveyard, Warrenpoint, Co Down. The simple inscription reads:

Heron
Samuel Mayne Reid
Newtown, Rostrevor
And his niece Mary Dorothea Heron

What themes come out of these recollections of Dorothea's nephews and nieces? All agree on a strong sense of family duty and loyalty. She had a high moral code. She was quiet, unassuming and modest, and never

ELEANOR'S AMBITION WAS TO STUDY ARCHITECTURE; HOWEVER, HER MOTHER WAS NOT KEEN THAT SHE WOULD STUDY SUCH A MALE-ORIENTATED DISCIPLINE

mentioned her working life or her academic achievements. She did not like or seek the limelight. She was an intensely private person. She was self-contained, although often surrounded by family members. Her strongest relationships were within the family, and her family can see some resemblances in her character to that of her siblings. That all of her 11 nieces and nephews pursued higher education and professional careers is a tribute to their Aunt Dorothea.

Eleanor O'Shea was the 43rd woman to qualify as a solicitor, back in 1938 (seen here in a later photo)

PIC COURTESY: JOAN BYRNE

Eleanor Christina O'Shea (née Murray)

Eleanor Christina Murray was the 43rd female solicitor to qualify in Ireland, signing the Roll on 14 January 1938, *writes Joan Byrne (partner, O'Flynn Exhams LLP)*.

Eleanor was born on 1 January 1915 to John and Mary Murray (née Bowe). The family lived at Marymount, Emmet Place, Youghal, Co Cork. Eleanor had three brothers and two sisters – James, John, Edward, Maureen and Tep.

Her father John was a successful master builder. Ella, as she was known, accompanied him to his various sites. She was also his chauffeur and, as a very young girl, drove her father in his large American car. She was an excellent driver and loved every minute of those precious times while on site. In fact, to the best of my knowledge, her ambition was to study architecture; however, her mother was not keen that she would study such a male-orientated discipline.

Ella attended Loreto Convent in Youghal and, for her senior year, transferred to the Ursuline Convent in Waterford. She chose to study law at University College Cork, where she qualified with distinction. She served her apprenticeship in the office of Gerald O'Flynn, South Mall, Cork, and took up a position in Dublin for a short time. She then set up her own practice at Emmet Place, Youghal. She also had an office in Tallow, Co Waterford, which she attended once a month.

While studying at UCC, she met fellow student Frank O'Shea, and they married some years later. They lived in Youghal and had their family: Ray, David and Colette. Another child, Eleanor, sadly died in infancy.

In the early 1950s, they moved to Cork and Ella closed her practice. By the mid '50s, the family had relocated to Dublin. In the mid '60s, when the family was older, Ella joined a law practice in Westmoreland Street, where she remained for approximately three years before retiring.

Ella had a very engaging personality. She had a great sense of humour and a 'sense of devilment'. An example would be allowing her son Ray to accompany her on her trips to Tallow, carefully allowing him to steer the car while sitting on her lap.

She loved gardening, reading, baking, walking, travelling, swimming and sewing. She also had a great interest in wildlife and bird-watching. g

AT A GLANCE

- Workplace bullying is characterised by repetition (frequent and repeated episodes over a period of time) and an imbalance of power
- Bullying in the workplace can be subtle and difficult to pinpoint
- The issue involves the actions and reactions of the organisation, those involved, and all who witness the behaviour

Research into bullying and sexual harassment in the legal profession can teach us valuable lessons about best practice for law firms. **Angela Mazzone** and **James O'Higgins Norman** lead the way

DR ANGELA MAZZONE AND PROF JAMES O'HIGGINS NORMAN ARE WITH THE NATIONAL ANTI-BULLYING RESEARCH AND RESOURCE CENTRE AT DUBLIN CITY UNIVERSITY

MAKE IT STOP

Researchers define workplace bullying as a systematic and persistent exposure to negative and aggressive behaviours at work, primarily of a psychological nature, with the effect of humiliating and intimidating the target.

Workplace bullying is characterised by repetition (frequent and repeated episodes over a period of time) and imbalance of power (either in terms of hierarchical structure or psychological) between the perpetrator and the target. Bullying constitutes an evolving and often escalating hostile treatment, rather than a series of discrete and disconnected events. Unfortunately, bullying is a common phenomenon in many workplaces – and the legal profession is no exception. In 2019, the International Bar Association (IBA) conducted a multinational survey of 135 countries and 6,980 respondents from across the spectrum of the legal profession (for example, law firms, in-house, barristers' chambers, judiciary, government – of whom 67% were women, 32% men, and 0.2% non-binary/self-defined). Findings show that experiences of bullying are widespread in the legal profession, with half of the women and a third of men reporting experiences of bullying victimisation. In 57% of cases, the bullying episodes were not reported by the targets.

Bullying in the workplace

Acts of bullying in the workplace can be difficult to pinpoint. Subtle behaviours can be common and, when occurring in isolation, may be framed as signs of uncivil behaviour. However, these acts can still be undermining and stressful for the targets, and are defined as

PIC: ALAMY

bullying if systematic and persistent.

Examples described by members of the legal profession include:

- Exclusion – for example, silent treatment, ignoring or excluding someone from conversations and social events, and being frozen out at work,
- Verbal abuse – for example, shouting, verbal threats and insults (for example, nasty nicknames),
- Overwork and undue pressure – for example, being pressured to work long hours,
- Threats to personal standing – for example, making nasty comments on someone's physical appearance or personality,
- Withholding information and giving misleading information, which will, in turn, negatively affect someone's performance,
- Being told not to bill working hours, so that someone more senior could take the rewards,
- Being denied opportunities for professional development, and
- Creating dysfunctional dynamics in the workplace – for example, playing staff members off against each another.

In recent years, the increased use of digital media has resulted in a new form of bullying in the workplace, referred to as 'cyberbullying'. Workplace cyberbullying can be defined as all-negative behaviour occurring through electronic means of communication that is either repetitive and long-lasting, or occurs one time but is intrusive, leaving the target unable to defend. The inclusion of one-time acts is relevant since, in the online context, certain unrepeated acts – such as posting an embarrassing picture online – harm the target by the repetitive exposure to others.

Sexual-harassment distinction

Although sexual harassment constitutes bullying in some jurisdictions, in Ireland it is considered as a phenomenon distinct from bullying. According to section 8 of the *Equality Act 2004*, sexual harassment is any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature that has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

Sexual harassment could potentially target any human being, though most victims are female. International survey data collected by the IBA show that one in three females and one in 14 males reported having been sexually harassed in a work context (overall, 75% of cases were not reported). International findings also show that males are harassed to a lesser degree than females. It should be noted that, in many societies, it may be shameful for males to report sexual-harassment episodes. This is especially true in societies that perpetuate gender stereotypes in which masculinity is associated with dominance and femininity is associated with weakness and subservience. Thus, males are expected to respond with passive coping strategies (for example, ignoring) to show that they are strong enough not to be bothered by the sexual-harassment episode. This might be one of the reasons why sexual harassment could be underreported among males.

Examples of sexual harassment

- *Gender-based harassment* refers to a broad range of verbal and non-verbal behaviours conveying insulting, hostile, and degrading attitudes related to someone's gender – but mostly targeted at women. Some examples include denigrating comments against women, or comments that women do not belong in management.
- *Unwanted sexual attention* involves expressions of sexual interest that are unwelcomed and offensive to the recipient. Some examples include:
  - Unwanted sexually explicit comments, questions and jokes, or unwanted flirtation, attention, glances, gestures, and stares,
  - Repeatedly contacting the target or asking for a date in a harassing way, despite the targeted individual ignoring/denying the request,
  - Referring to someone's body inappropriately or offensively,
  - Purposely touching or brushing up against the target.
- *Sexual coercion* includes bribes or threats about the target's employment to ensure their sexual cooperation. Some examples include offering a promotion in exchange for sexual favours or threatening termination of employment unless sexual demands are met.

The internet provides a virtual environment for enacting sexual harassment behaviours. Sexual harassment in cyberspace includes offensive sexual messages or images actively initiated by a harasser toward a target, sexual remarks, and so-called 'dirty jokes'. All these are considered harassing when they are neither invited or consented to, nor welcomed by the recipient.

Although individuals who are targeted online are not physically in danger, targets of sexual harassment might perceive threats to use physical force just as real as in face-to-face situations. The sharing of sexual images without consent has recently become a criminal offence in Ireland, under a law approved by the Oireachtas.

Workplace dynamics

Research has shown that bullying in the workplace should be understood as a systemic problem, which is related to the actions and reactions of the organisation, the individuals involved, as well as all those who witness the behaviour. There are bystanders

FOCAL POINT

INTERVENTION RECOMMENDATIONS

- *Raise awareness*: targets of both bullying and sexual harassment might be uncertain about whether the abusive behaviour qualifies as bullying or sexual harassment. Therefore, strong prevention programmes place a focus on raising awareness of both phenomena and on providing tools and resources in relation to how to recognise and deal with abusive behaviours of various natures.
- *Empathy training*: such training, and personal and interpersonal skills training in law schools aimed to enhance feelings of concern towards others, does not just help ameliorate professional and social relationships, but can also encourage equality and respect in the workplace.
- *Change firm culture through effective training*: tackling bullying and sexual harassment should be a combined effort of both targets, bystanders and the firm. Develop and encourage participation in training aimed at tackling hierarchical relationships, gender discrimination, and sexism, and that encourages diversity. (Note: research indicates that only a minority of legal professionals (22%) take part in training programmes, and that these are not always effective in tackling bullying and sexual harassment. Anti-bullying and anti-sexual-harassment training should not be conceived as a once-off, generalised measure. Rather, they should be experienced as ongoing, evidence-based training, and should be suited to an employee's role as much as possible.)
- *Collaboration with experts*: firms should consider regularly monitoring bullying and sexual harassment in the workplace, using workplace climate surveys, with distinct sections on bullying and sexual harassment. Based on the collected data, expert advice on how to tackle bullying and sexual harassment in the workplace, and what tools to use to measure this, can be sought out.
- *Policies*: recent findings show that bullying is more likely to happen in organisations without clear anti-bullying policies and procedures. Such policies should reflect the promotion of respect, dignity and diversity within the workplace. It is also crucial to promote clear and accessible written policies, guidelines and complaint processes.
- *Tackling false beliefs*: it is paramount to let go of the belief or attitude 'to let sleeping dogs lie' in relation to bullying and sexual harassment. Admitting that bullying and sexual harassment exists, and that everyone is doing their utmost to tackle it, is a sign of a proactive firm that cares for employee well-being.
- *Resources and mechanisms of support*: counselling services for legal professionals, who may be in distress because they have reported or are dealing with bullying and sexual harassment, is vital. For this type of support, solicitors anywhere in Ireland can call LegalMind. It offers 'in the moment' 24/7 support over the phone with a qualified, experienced and accredited counsellor or psychotherapist, and further mental-health support if required. The service is completely independent and confidential, and can be accessed by calling 1800 81 41 77.

> BULLYING IN THE WORKPLACE SHOULD BE UNDERSTOOD AS A SYSTEMIC PROBLEM, WHICH IS RELATED TO THE ACTIONS AND REACTIONS OF THE ORGANISATION, THE INDIVIDUALS INVOLVED, AS WELL AS ALL THOSE WHO WITNESS THE BEHAVIOUR

(that is, witnesses) who are willing to act and actively help and support the target. However, in general, it is very difficult for bystanders to stand up against this. Some reasons for inaction may be related to the fear of retaliation, fear of losing one's own job, and to the belief of not having enough organisational authority to intervene.

In some other instances, the bystander might either ignore the bullying or frame it as a normative behaviour, especially when it is recurrent within the organisation without consequences or without the perpetrator being held accountable in any way. The organisational response or lack of response to bullying in the workplace is critical. Where there is no accountability for bullying in an organisation, it can quickly become an entrenched problem.

In relation to sexual harassment, this phenomenon is often actively hidden by the perpetrators and, as such, might not be directly witnessed by any other co-workers. However, when bystanders are present, they can play a key role in disrupting and changing a workplace culture that fosters sexual harassment and other gender-based forms of mistreatment.

Organisational culture

The legal profession is dominated by a culture characterised by competition, profit, and high pressure. These factors, together with established hierarchical structures, significant power imbalances, and pressure to measure work input rather than output (for example, billable hours) can create a 'toxic' environment.

The culture of an organisation is recognised as contributing significantly to bullying and sexual harassment, and either inaction and/or ignorance by the organisation are contributing factors. For instance, research has shown that legal professionals who generate high profits for firms are sometimes tolerated, despite their bullying behaviour, displaying immunity from firms' anti-bullying policies. This feeds in, significantly, to organisational culture and is noticed and felt by employees at all levels in the workplace.

When bullying is prevalent, sexual harassment and gender discrimination also occur at a high rate. This indicates that a culture of bullying is likely to sustain and tolerate sexual harassment and vice versa. Workplaces with a strong hierarchical structure, as is often the case in the legal profession, are more likely to experience sexual harassment (that is, superiors sexually harassing their subordinates), and the targets are more likely to normalise the abusive behaviours, framing sexual harassment as a normative 'part of the job'. In such workplaces, it could be acceptable (especially for men) to show their masculinity through aggressive and dominating behaviour. This contributes to a hyper-masculine and sexualised corporate culture, where sexist attitudes and gender inequality sustain and tolerate sexual harassment.

Mental-health outcomes

Research has consistently shown that workplace bullying and sexual harassment have adverse consequences on the target's and bystanders' physical health (such as, heart problems, sleep problems, low self-esteem, symptoms of post-traumatic stress, and burnout). Employees who are targets of bullying and sexual harassment in the workplace also show increased intentions to leave their job, reduced job satisfaction, and low levels of organisational commitment.

Bystanders are also severely affected, and report negative mental-health outcomes (increased levels of stress) due to exposure to a toxic environment. Witnessing repeated episodes of abuse at work is associated with repression of empathy, desensitisation to negative behaviours, feelings of isolation, hopelessness, and ineffectiveness.

Voice your opinion

In early 2021, the Law Society will facilitate the roll-out of a survey to collect data about the nature, prevalence, and impact of bullying and sexual harassment in the solicitors' profession in Ireland. The survey process will be carried out by an independent research organisation and will ensure confidentiality and anonymity to all participants. It comes as a result of the IBA report, wherein a range of suggested measures on how the legal profession can effectively and proactively address workplace bullying and sexual harassment were put forward. Included in this was a recommendation to gather data and improve transparency around these issues in the profession. Keep a look-out for communication about this from the Law Society in early 2021.

(The content of this article is based on recent research conducted in the social sciences. The present article does not aim to provide either legal information or legal advice.)

26 YEARS, 9 MINISTERS, 1 DIRECTOR GENERAL

As Law Society Director General **Ken Murphy** prepares to retire, he shares his reflections of 26 years in office and assesses the importance of his relationships with no fewer than nine Ministers for Justice

KEN MURPHY IS DIRECTOR GENERAL OF THE LAW SOCIETY

> A CAMPAIGN BY THE LAW SOCIETY FOLLOWED, UNPRECEDENTED BEFORE OR SINCE, AS THE PROFESSION FOUGHT TO PROTECT ITS INDEPENDENCE IN THE PUBLIC INTEREST. THE CAMPAIGN WAS SUCCESSFUL

One of the key themes of the massive hit series *The Crown* has been a dramatisation of the political and personal relationships over decades that a single British monarch has had with her numerous successive prime ministers. To date, by the end of the fourth series, those leaders have ranged from Winston Churchill to Margaret Thatcher.

Inspired by this (tongue firmly in cheek), as I prepare to retire after 26 years as director general, I reflect here on the political and personal working relationships I have had with no fewer than nine successive Ministers for Justice.

Naturally, the Law Society seeks to have a positive working relationship with every individual minister and department of Government and, cumulatively, with the Government as a whole, as well as with the Opposition. However, centre stage for the solicitors' profession is the Department of Justice and, at its head, the minister of the day responsible for that key portfolio.

Yes, Minister

The Society's presidents change annually. Accordingly, it is the director general who maintains continuity over the years with both the public servants in the Department of Justice and the minister. The contact is regular, and the relationship is extremely important.

Of the nine Ministers for Justice in my time as director general, five have been from Fine Gael, three from Fianna Fáil, and one from the Progressive Democrats.

Both at my commencement as director general in 1995 and at my impending conclusion in 2021, the Ministers for Justice have been women. In addition, both Nora Owen in 1995 and the incumbent Helen McEntee have had the same political party affiliation, namely Fine Gael. The third and only other woman to have served as Minister for Justice in this period was Frances Fitzgerald, also of Fine Gael.

Only two Ministers for Justice served full five-year Government

PIC: LENSMEN

Nora Owen (justice minister from 1994 to 1997)

PIC: KEN WALSH PHOTOGRAPHY

terms during the period under review – John O'Donoghue (1997-2002) and Michael McDowell (2002-2007).

Four justice ministers over the last 26 years were solicitors: John O'Donoghue, Dermot Ahern, Alan Shatter and Charlie Flanagan. Two – Michael McDowell and the late Brian Lenihan – were barristers.

Open government

Is there an advantage for the Law Society, as many solicitors instinctively expect, in the Minister for Justice being a solicitor? The answer to that is both 'yes' and 'no'. It is 'yes' to the extent that the complexity of a legal-practice issue may be more readily understood by the minister if he or she is a solicitor (or, equally, a barrister).

However, for all Ministers for Justice, in my experience of dealing with them, very properly the public interest invariably comes first – far ahead of the interest of the profession. Accordingly, the key to successful lobbying is to align the two interests in their minds through evidence and argument. Reliance on the core values of the legal profession, values such as independence, access to justice, and the rule of law, are fundamental to such a process.

There is a very large number of bills every year on which the Society is invited to make submissions. Most of the engagement is in writing, and is as much to do with issues of detailed drafting as it is on policy matters.

Nor is all of the contact initiated on the Society's side. Ireland being so small, and people knowing each other as we do, it was a not infrequent occurrence for me to look at my phone screen and see that the minister was calling personally. My counterparts as CEOs of bars and law societies in other jurisdictions, particularly larger ones, were often amazed

PIC: LENSMEN

John O'Donoghue (justice minister from 1997 to 2002)

> IN MY EXPERIENCE OF DEALING WITH MINISTERS, VERY PROPERLY THE PUBLIC INTEREST INVARIABLY COMES FIRST – FAR AHEAD OF THE INTEREST OF THE PROFESSION. ACCORDINGLY, THE KEY TO SUCCESSFUL LOBBYING IS TO ALIGN THE TWO INTERESTS IN THEIR MINDS THROUGH EVIDENCE AND ARGUMENT

PIC: LENSMEN

Michael McDowell (justice minister from 2002 to 2007)

PIC: JASON CLARKE PHOTOGRAPHY

Brian Lenihan (justice minister from 2007 to 2008)

when I would mention the ease with which I could make direct contact with a justice minister, or the minister with me.

The official visit

In addition to correspondence and other communication, every year or so I would organise a meeting with the minister – held either in the department or in the minister's office in Leinster House – to go through an agenda of items in relation to which the Society wished to communicate its views. Officials would be present at these meetings.

In addition, and far more frequently, the minister and the Law Society Director General would be in attendance at events in the course of the working day, or after it, often with large numbers present. These would be events to do with law-and-justice activities and would frequently provide an opportunity for a quiet tête-à-tête with the minister on some pressing matter of the day. At such public events, I would be very far from the only individual seeking a moment or two with the ministerial ear.

In addition, the minister would invariably be a guest in Blackhall Place at the Society's annual dinner and, probably also in the course of a year, at other events hosted by the Society.

However, all these opportunities to seek to inform and, perhaps, influence the Minister for Justice are valueless unless there is a relationship with the minister based on mutual respect and trust. Anything confidential said by a minister to me on such occasions over the years never was, and never will be, disclosed by me.

A real partnership

My relationship with each of the nine successive ministers was always slightly different, based on the personalities and political attitudes of the individual ministers. I had known almost all of them personally before they became ministers. Indeed, some I had known personally for decades before they had even entered politics. A well-informed understanding of the political world in which they operated, of the pressures and influences to which they were susceptible, was essential.

Although the politics of their Government, political party and department are always powerful influences, there is invariably a significant extent to which the personal views of the minister can be decisive in shaping policy. Law Society representations can shape policy, too. From dozens of potential examples, I will pick just two to illustrate my point.

> MY RELATIONSHIP WITH EACH OF THE NINE SUCCESSIVE MINISTERS WAS ALWAYS SLIGHTLY DIFFERENT, BASED ON THE PERSONALITIES AND POLITICAL ATTITUDES OF THE INDIVIDUAL MINISTERS

PIC: JASON CLARKE PHOTOGRAPHY

Dermot Ahern (justice minister from 2008 to 2011)


PIC: LENSMEN

Alan Shatter (justice minister from 2011 to 2014)

ALTHOUGH THE POLITICS OF THEIR GOVERNMENT, POLITICAL PARTY AND DEPARTMENT ARE ALWAYS POWERFUL INFLUENCES, THERE IS INVARIABLY A SIGNIFICANT EXTENT TO WHICH THE PERSONAL VIEWS OF THE MINISTER CAN BE DECISIVE IN SHAPING POLICY. LAW SOCIETY REPRESENTATIONS CAN SHAPE POLICY, TOO

In relation to a historic issue of status for the solicitors' profession – that of eligibility for judicial appointments – when I became director general, only the District Court was open to a solicitor who wished to apply for a career on the bench. Draft legislation had been introduced by Minister Nora Owen to provide for the eligibility of solicitors to become judges of the Circuit Court although, to the disappointment of the Law Society, to no court higher than that.

As that bill was approaching Committee Stage, I spoke personally with every member of the Joint Oireachtas Committee on Justice, arguing that the centuries-old monopoly of the Bar on senior judicial appointments was a relic of history that operated contrary to the public interest. Three future Ministers for Justice, all solicitors, who were members of that committee, were vigorously supportive – namely John O'Donoghue, Alan Shatter and Charlie Flanagan (who was the chair of the committee). As a political compromise, Nora Owen agreed to establish a working group to report to Government on the issue. Geraldine Clarke, Ernest Cantillon and I served on the working group that recommended to Government that solicitors with litigation experience should be eligible for appointment to the bench at every level of the courts system.

That recommendation was turned into draft legislation by her successor, John O'Donoghue, and enacted as the *Courts and Court Officers Act 2002*. The historic first appointment of a solicitor to the High Court Bench, that of the impeccably qualified Michael Peart, who would prove to be one of the outstanding judges of his generation, was made later in 2002 by the then new minister, Michael McDowell.

Bed of nails

The single most complex and controversial piece of legislation directly affecting the solicitors'


PIC: LENSMEN

Frances Fitzgerald (justice minister from 2014 to 2017)

PIC: LENSMEN

Charles Flanagan (justice minister from 2017 to 2020)

profession during the last 26 years was the bill subsequently enacted as the *Legal Services Regulation Act 2015*. Alan Shatter was the minister who published the bill in 2011, without any prior consultation in relation to its contents, and to the dismay of the solicitors' profession.

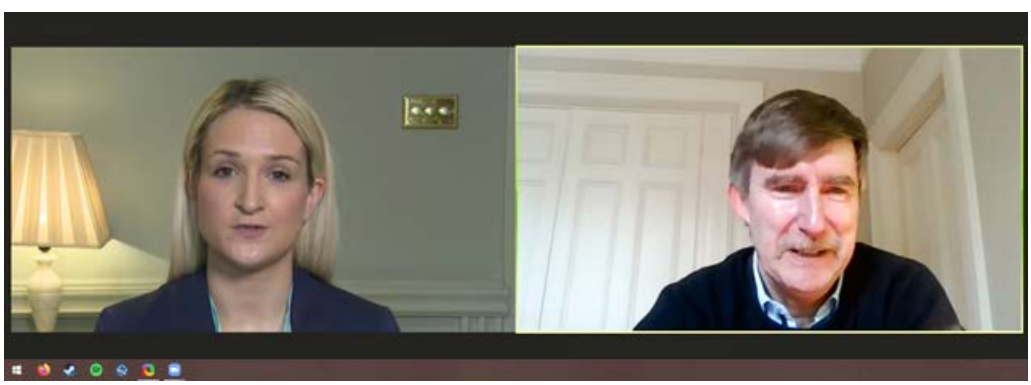
On the day the bill was published, I expressed the Society's deep concerns about the undermining of the independence of the profession on RTÉ's *Six One News*. I insisted that for the legal profession to be independent of Government control was an essential prerequisite for an independent judiciary, access to justice, and the rule of law.

A campaign by the Law Society followed, unprecedented before or since, as the profession fought to protect its independence in the public interest. The campaign was successful. I never believed that the minister who introduced the bill intended it to threaten the independence of the profession and, indeed, he denied it had that potential. Nevertheless, in the face of expressions of deep concern, both nationally and internationally, Mr Shatter amended the bill fundamentally to remove that threat.

In addition, in response to my lobbying on behalf of the Society, he agreed in principle that the bill should be amended to create the possibility of solicitors' firms forming limited liability partnerships (LLPs). Many hundreds of improvements to the bill, including in relation to LLPs, were made by his successor Frances Fitzgerald. The commencement order for solicitors' firms to become LLPs (of which approximately one-third of all partnerships have now availed) was signed by her successor as Minister for Justice, Charlie Flanagan.

Helen McEntee was appointed in late June 2020. My first and only business meeting with her was regrettably, but of necessity, by Zoom. While the pandemic persists, my successor as director general may find it more difficult to establish their own personal relationship with the Minister for Justice. g

PIC: GAZETTE STUDIO



Helen McEntee (justice minister from 2020 to present)

> ON THE DAY THE BILL WAS PUBLISHED, I EXPRESSED THE SOCIETY'S DEEP CONCERNS ABOUT THE UNDERMINING OF THE INDEPENDENCE OF THE PROFESSION ON RTÉ'S *SIX ONE NEWS*. I INSISTED THAT FOR THE LEGAL PROFESSION TO BE INDEPENDENT OF GOVERNMENT CONTROL WAS AN ESSENTIAL PREREQUISITE FOR AN INDEPENDENT JUDICIARY, ACCESS TO JUSTICE, AND THE RULE OF LAW

MATHESON SURGES FROM THIRD TO TOP

Practising certificate figures for the year ending 31 December 2020 have seen a change at the top of the 'PC league table', with Matheson leapfrogging its nearest rivals, reports **Ken Murphy**

KEN MURPHY IS DIRECTOR GENERAL OF THE LAW SOCIETY

Matheson is now the largest law firm in Ireland, having been third in each of the last six years. In each of these years, the Law Society has published the number of practising certificates (PCs) of the largest firms on the last date (31 December) of the previous practice year. The bragging rights as Ireland's largest law firm had been owned by either A&L Goodbody or Arthur Cox LLP throughout that period. But Matheson has now leapfrogged both of these large-firm competitors to top this year's table, with 327 practising solicitors.

Matheson has achieved this with a whopping year-on-year increase of 42 PCs over its 2019 and 2018 total (which was unchanged in both years). This expansion of fractionally under 15% in PC

MATHESON NOW HAS THE BRAGGING RIGHTS AS IRELAND'S LARGEST LAW FIRM, HAVING BEEN THIRD IN EACH OF THE LAST SIX YEARS

LAW FIRM PRACTISING SOLICITOR NUMBERS (AS OF 31/12/2020)

2020 ranking	2019 ranking	Firm name	31/12/2020	Diff +/- over 2019	31/12/2019
1	3	Matheson	327	42	285
2	1	A&L Goodbody	320	7	313
3	2	Arthur Cox LLP	312	13	299
4	4	McCann FitzGerald	284	18	266
5	5	Mason Hayes & Curran LLP	259	20	239
6	6	William Fry	207	0	207
7	8	ByrneWallace	137	5	132
8	9	Eversheds Sutherland	112	4	108
9	11	Maples and Calder (Ireland) LLP	108	3	105
10	10	Ronan Daly Jermyn	106	-1	107
11	13	Beauchamps	95	3	92
12	12	Freshfields Bruckhaus Deringer LLP	88	-13	101
13	14	Dillon Eustace	86	-2	88
14	20	Hayes Solicitors	64	3	61
15	16	Eugene F Collins	63	-1	64
15	-	Philip Lee	63	-	-
15	16	Pinsent Mason LLP	63	-1	64
15	18	LK Shields Solicitors LLP	63	1	62
15	15	Walkers	63	-2	65
20	-	DAC Beachcroft Dublin	53	-	-
TOTAL			2,873		2,658

These figures represent the total number of solicitors with a practising certificate, advised to the Law Society, up to and including 31/12/20. The total firm figure represents a firm's primary and suboffices on the Law Society's database

numbers places it seven solicitors ahead of A&L Goodbody (which this year has 320), and Arthur Cox LLP (with 312). These are the only three firms with more than 300 practitioners.

Others expanding too

Below the 300 number are two firms, McCann FitzGerald and Mason Hayes & Curran LLP, which have also grown substantially in PC numbers – by 18 and 20 respectively – in the past year.

Mason Hayes & Curran has now grown its number of practitioners impressively over two successive years, with an 8.3% increase by the end of 2020, added to the 5.2% growth of the previous year.

The only other firm with more than 200 practitioners, William Fry, remains steady with 207 PCs this year – the same as last year.

Managing partner of Matheson, Michael Jackson

Elsewhere in the table, by a curious coincidence, no fewer than five firms all tied on 63 PCs, namely Eugene F Collins, Philip Lee, Pinsent Mason LLP, LK Shields LLP, and Walkers. DAC Beachcroft Dublin joined the table for the first time. Given the relative stability in this table every year, it is no surprise that the rank order of most firms this year is the same, or almost the same, as in previous years.

'Brexit' PCs

The firm that appeared seventh on the table last year, Allen & Overy LLP, does not feature at all this year. In addition, Freshfields Bruckhaus Deringer LLP, down to 88 PCs in this year's table, is unlikely to feature at all next year. Neither of these City of London-headquartered firms – both members of the elite 'magic circle' – has ever had an office in this jurisdiction nor, to the best of the Law Society's knowledge, do they plan to establish one. The phenomenon of large international law firms, with no establishment in this jurisdiction, taking out Irish practising certificates for their solicitors who have recently come on the Roll here was a by-product of Brexit and has now come to an end.

As a result of a decision made by the Society in the latter part of 2020, based on a deep-dive review of policy and the relevant law undertaken by the Society's Regulation of Practice Committee, the Society now no longer issues practising certificates to firms of solicitors who do not have an office, or plan to have an office, in this jurisdiction.

Total PCs in 2020

The total number of practising certificates issued by the Law Society on 31 December 2020 was 11,854. This is a reduction of 105 on the record 11,959 practising certificates on 31 December 2019, and is largely accounted for by the decline in 'Brexit' PCs taken out in 2020 by comparison with the previous year. g

I'VE GOT THE POWER

The European Commission has proposed new rules curbing the power of digital companies. It's hammer time, says **Cormac Little**

CORMAC LITTLE SC IS HEAD OF THE COMPETITION AND REGULATION UNIT OF WILLIAM FRY AND CHAIR OF THE LAW SOCIETY'S EU AND INTERNATIONAL AFFAIRS COMMITTEE

THE DSA AND THE DMA AIM TO CREATE A SAFER DIGITAL SPACE IN WHICH THE FUNDAMENTAL RIGHTS OF ALL EU-BASED USERS ARE PROTECTED, WHILE ESTABLISHING A LEVEL PLAYING FIELD TO PROMOTE INNOVATION, GROWTH, AND COMPETITIVENESS

News from the EU and International Affairs Committee. Edited by TP Kennedy, Director of Education

In December 2020, the European Commission launched a much heralded and far-reaching reform of the rules governing online commerce and activity. Specifically, the commission has proposed a new regulation on contestable and fair markets in the digital sector (*Digital Markets Act*) while also recommending the adoption of a new regulation on a single market for digital services (*Digital Services Act*) – DMA and DSA, respectively – amending the *eCommerce Directive*. These initiatives result from an extensive public and stakeholder engagement led by the commission, including the April 2019 independent expert report, *Competition Policy for the Digital Era*.

The growth of online services has created major benefits for consumers while opening new markets for businesses. That said, these changes have not always been positive. Illegal goods are sold on various websites, disinformation is spread, and certain platform providers act as bottlenecks between traders and consumers. Accordingly, the DSA and the DMA aim to create a safer digital space in which the fundamental rights of all EU-based users are protected, while establishing a level playing field to promote innovation, growth, and competitiveness.

Purpose of the reform

The DMA seeks to curb the power of 'gatekeepers', that is, platforms that serve as a key gateway for businesses to reach their customer base. Given their 'footprint', gatekeepers often act as private rule-makers. The application of the DSA is broader. It contains a series of obligations that apply to all providers of online services (with some exceptions for smaller companies). This proposal aims to regulate how digital intermediaries engage with their customers and what content they provide, while also modernising the *eCommerce Directive* originally adopted in 2000. Under the DSA, providers of online services must stipulate in their terms and conditions any restrictions they impose on content, while acting responsibly in the enforcement of such limitations. Digital companies must also publish regular reports regarding such policies. Hosting services and online platforms are subject to further obligations as are entities categorised as 'very large online platforms' (that is, those not designated as gatekeepers under the DMA).

Scope of the DMA

The DMA does not aim to apply to the entire online world. Instead, it targets the provision of so-called 'core platform services' (CPS) by gatekeepers. Such services range from search engines (for example, Google Search) to video-sharing platform services (such as YouTube) and from social networking services (like Facebook) to intermediation services (such as Apple's App Store). The DMA seeks to prevent gatekeepers from imposing unfair conditions on both businesses and consumers while ensuring the transparency of key services.

Gatekeepers are large companies that provide at least one CPS while having a durable cohort of users across various EU member states. Specifically, if an entity satisfies three cumulative quantitative criteria, it is likely to be designated as a gatekeeper:

- The first criterion relates to size that impacts the EU's internal market. Such an effect is presumed if the relevant entity provides a CPS in three or more member states while the undertaking to which it belongs either generates an annual turnover in the European Economic Area (that is, the 27 EU member states plus Norway, Iceland and Liechtenstein) of €6.5 billion in its three most recent financial years, or has an average market capitalisation (for listed companies) or equivalent fair market value (for private companies) of at least €65 billion in its most recent financial year.
- The second focuses on control of an important link between traders and consumers. This is presumed to be met where, in its most recent financial year, the entity operates a CPS

PIC: ALAMY

with a minimum of 45 million active end-users per month in the EU, with more than 10,000 active EU business customers per annum.

- The third addresses whether the relevant entity has an entrenched and durable position. This is satisfied where the relevant entity meets the thresholds detailed in the second criterion in each of its three most recent financial years.

If these three quantitative criteria are satisfied, the relevant company is presumed to fall into the gatekeeper category. That said, a potential gatekeeper may seek to rebut this presumption by providing evidence to the commission regarding the size of the actual CPS provider and/or the absence of barriers to entry in the provision of its service(s). By contrast, if the three quantitative criteria are not met, the commission may categorise a particular

BASED ON THE COMMISSION'S MARKET EXPERIENCE, THE DMA STIPULATES TWO SETS OF 'DOS AND DON'TS' THAT GATEKEEPERS MUST FOLLOW IN THEIR BUSINESS ACTIVITIES. THE FIRST SET CONTAINS OBLIGATIONS THAT ARE NOT SUBJECT TO FURTHER SPECIFICATION, WHEREAS THE SECOND MAY BE CLARIFIED BY THE COMMISSION TO ENSURE COMPLIANCE WITH THE DMA

entity as a gatekeeper based on a qualitative assessment of various factors, including its financial size, and economies of scale/scope.

Gatekeeper status

The DMA provides that gatekeepers carry a special responsibility to ensure that businesses and consumers are treated fairly while ensuring an open digital environment and contestable markets. (This duty is not dissimilar to the special obligation on dominant entities under EU/Irish abuse of dominance rules not to undermine competition.) Moreover, the commission may impose certain obligations on entities likely to have an entrenched and durable position in the future.

Dos and don'ts

Based on the commission's market experience, the DMA stipulates two sets of 'dos and don'ts' that gatekeepers must follow in their business activities. The first set contains obligations that are not subject to further specification, whereas the second may be clarified by the commission to ensure compliance with the DMA. Under the first set, gatekeepers must:

- Refrain from combining personal data sourced from the provision of a CPS with the personal data gleaned from the offering of other services (unless the end-user has consented).
- Allow their business customers to sell products or services at different prices on other platforms. Put another way, 'most-favoured nation' clauses are banned.
- Desist from requiring business users or consumers using one CPS to use, at least. one other CPS.
- Permit businesses to market to customers acquired using the relevant CPS and to conclude contracts 'off-platform'. In such situations, the relevant business should be allowed to provide products through their own software using the relevant platform.
- Allow business users to complain to any relevant regulatory authority.
- Refrain from requiring business users to avail of its identification service.
- Provide, on request, details of spending and commission regarding a given advertisement to both advertisers and advertising agencies.

Gatekeepers are also required to 'inform' the commission regarding proposed acquisitions of other digital companies regardless of whether the relevant transaction is mandatorily notifiable under the EU *Merger Regulation* or under national merger control rules in any individual EU member state. In doing so, gatekeepers must provide relevant information on the target, including its most recent annual global and EEA annual turnover, details of its user numbers, and the rationale for the acquisition. However, interestingly, unlike transactions notified to the commission or to any national competition authority, gatekeepers do not require clearance before completing relevant digital transactions.

Under the second set of 'dos and don'ts', a gatekeeper is subject to a long list of obligations, including:

- Refraining from using confidential data sourced from the provision of a CPS to its business customers in competing with such entities,
- Allowing customers to delete any pre-installed software applications – commonly referred to as apps,
- Desisting from ranking its own products and services more favourably to those offered by competitors,
- Providing full interoperability information regarding the relevant operating systems to third parties, and
- Giving advertisers/advertising agencies access to the relevant performance measuring tools.

The DMA allows a gatekeeper to request the commission to grant an exemption, on public interest grounds, from any of the 'dos and don'ts'. Moreover, the commission may also suspend the operation of a particular provision where, due to the exceptional and extenuating circumstances, the economic viability of a gatekeeper is threatened.

How and when?

Under the DMA, a potential gatekeeper must consider whether it meets the three quantitative criteria described above. If so, it should duly inform the commission who, on the basis the three criteria are satisfied, will designate the relevant entity as a gatekeeper. Within six months of being designated as a gatekeeper, the relevant entity must also follow both sets of 'dos and don'ts'.

Enforcement

The commission has the exclusive right to enforce the provisions of the DMA. (That said, third parties, allegedly harmed by an infringement of the DMA, may sue a gatekeeper for damages in a national court.) The commission's proposed enforcement powers under the DMA are broadly similar to its current functions regarding EU competition rules. The DMA gives the commission the power to issue formal information requests, to take witness statements, to launch dawn raids, to accept commitments, and/or to adopt interim measures. After giving the relevant gatekeeper the opportunity to contest any preliminary adverse findings, the commission may impose fines of up to 10% of a gatekeeper's most recent annual global turnover for any substantive breach.

In addition, fines of a maximum of 1% of the relevant turnover may be levied for any procedural infringement.

Next steps

The journey before either the DMA or the DSA becomes law is likely to be challenging. These proposals will go before the European Parliament and the Council of Ministers – both institutions must agree before either regulation is adopted. The DMA and the DSA will be of significant interest to any entity providing digital services in the EU, not least to the major technology companies. Expect an army of lobbyists (both formal and informal) to be deployed by the latter. That said, there is significant momentum behind both the DMA and the DSA due to recent developments in the political (think of the two most recent US presidential elections) and economic spheres (for example, the surge in online commerce because of the COVID-19 pandemic). Accordingly, while the battle ahead will be hard-fought, both the DMA and the DSA are ultimately likely to be adopted relatively unscathed.

Broader implications

The proposed adoption of the DMA is an acknowledgement on the part of the commission of the enforcement challenge it faces arising from the fact that the unilateral conduct of strong but not dominant digital players falls outside the reach of EU competition law. Another key difficulty is that competition rules are applied on an *ex post* basis – in other words, the commission may only intervene when an infringement has occurred. Given the time involved in pursuing any investigation, the relevant sector may have irrevocably changed or 'tipped' because of the allegedly illegal conduct. Accordingly, any remedy imposed by the commission may be either insufficient and/or tardy. The DMA will apply on an *ex ante* basis. In other words, major digital players will, as gatekeepers, be required to act and be prohibited from acting in particular ways. From the commission's perspective, this will hopefully prevent the big technology companies from creating lasting damage to the structures of competition. That said, it is likely to take at least 18 months and possibly longer before the DMA and the DSA come into effect. Until then, competition/antitrust law will remain the key arrow – as is obvious from the ongoing actions against Google and Facebook on both sides of the Atlantic – in the commission's and other competition authorities' quiver. g

BREXIT FOCUS

UK NATIONALS AND THEIR NON-EEA FAMILY MEMBERS LIVING IN IRELAND

Brexit came fully into effect on 31 December 2020, and UK nationals living in Ireland or family members of a UK national living here with them will be subject to certain changes.

UK nationals

Practitioners should be aware that the Department of Justice has confirmed that nothing will change for UK nationals living in Ireland. Practitioners will be able to advise such clients that the protections provided by the Common Travel Area mean that such clients living here (and, likewise, Irish citizens living in the UK), will continue to travel freely, live, work and access education, healthcare and social services in each other's country after the UK leaves the EU.

Practitioners should note that UK nationals do not require any documentation under the *Withdrawal Agreement* to continue their lives in Ireland after 31 December 2020, although they are free to request same if they wish.

Non-EEA family

The Department of Justice has indicated that separate arrangements are being put in place for non-EEA family members and/or dependants of UK nationals who are, as of 31 December 2020, exercising EU treaty rights under the EU *Free Movement Directive* and who hold a valid Irish Residence Permit (IRP) on that basis, known as 'EU FAM'. Family members of a UK national, from 31 December 2020, will hold the same residence rights in Ireland and can continue to live, work or study in Ireland.

Practitioners should advise such clients that it will be necessary to exchange their current valid IRP Card for a new one. It will be necessary to state in the application that the client's residence rights derive from EU free movement under the *Withdrawal Agreement*.

The programme will apply from 1 January 2021 and be administered by the Immigration Service of the Department of Justice for applications nationwide. Practitioners should note that applications are to be made through the online renewal system.

When advising/assisting clients in relation to the making the online application:

- Applicants will be asked to confirm that they have been exercising EU treaty rights to reside in the State on or before 31 December 2020 and continue to do so,
- Submit their current valid IRP card,
- Clients have until 31 December 2021 to apply.

The Department of Justice has indicated that it will continue to process applications received before the end of the transition period (31 December 2020) from non-EEA family members of UK nationals resident in Ireland, and exercising rights in accordance with the *Free Movement Directive* and the entitlements guaranteed under the *Withdrawal Agreement*. Practitioners have been provided with comfort that these applications will continue to be processed even if a decision is not made until after 31 December 2020.

After 31 December

There will be no change for UK nationals who wish to live in Ireland after 31 December 2020. Their rights under the CTA will continue to be protected as set out above.

A new scheme will be introduced for UK nationals who come to Ireland after 31 December 2020 and wish to bring their non-EEA family members. Details of the scheme have now been published and are available to practitioners. See Notice 5 ('Joining your UK national family member in Ireland') of 23 December on www.inis.gov.ie/en/INIS; attention is drawn specifically to the *Scheme in Relation to Non EEA Family Members of UK Citizens Intending to Reside in the State* policy document published by the department on 23 December.

Ross McMahon is managing partner of David F Mc Mahon & Co, Solicitors, and a member of the EU and International Affairs Committee.

REPORT OF LAW SOCIETY COUNCIL MEETING

11 DECEMBER 2020

IWLA

The Council extended its congratulations to Michele O'Boyle and Maura McNally (chair of the Bar Council), who were named joint winners of the Irish Women Lawyers' Association 'Woman Lawyer of the Year' Award for 2020.

Resolutions passed

The Council passed resolutions to:

- Amend the Council regulations to include rules of procedure to be utilised in the event of an alleged breach of the regulations or the code of conduct by a Council member,
- Approve the *Solicitors Practising Certificate Regulations 2020* and the *Registered European Lawyers Qualifying Certificate Regulations 2020*,
- Make provision for the organisation of Council meetings during the currency of public-health guidance and restrictions that affect corporeal gatherings, and
- Approve the practising certificate fee for 2021 as recommended by the Finance Committee and, in relation to the Compensation Fund contribution, as recommended by the Regulation of Practice Committee.

Banking charges on deposits

Following recent indications that some Irish banks will begin to impose charges on deposit holdings that exceed certain thresholds, a dedicated working group has been established to examine the issue.

The matter is also being considered by the Regulation of Practice Committee, which will issue guidance to the profession in due course.

Extraordinary members

The president sought and obtained the Council's approval for the appointment of Law Society of Northern Ireland representatives: Rowan White (president), Suzanne Rice (senior vice-president), Brigid Napier (junior vice-president), Eileen Ewing, and John Guerin.

Review group

The Council noted that the Review Group on the Administration of Civil Justice had completed its work and a report had been sent to the Minister for Justice. The matter is now expected to move to an implementation group, and progress will continue to be monitored by the Society.

LSRA report on education

The Council discussed the recently published report and the recommendation to establish an entity called Legal Practitioner Education and Training (LPET), to be comprised of seven members, none of whom would be involved in legal education in Ireland.

The Council noted that it was envisaged that LPET would have an ambitious body of work, and that it would be necessary to establish a dedicated task force within the Society to fully address the changes proposed in the report.

LSRA report on unification

The meeting noted publication of the report, which had not recommended unification of the two branches of the legal profession in Ireland.

PII

The Council heard that all existing insurers had remained in the market for the renewal, and one new insurer had joined. While an issue had arisen as a result of a late change in underwriting criteria, increases in premiums had been in line with expectations and lower than those in England, Wales and in non-legal PII markets.

It was agreed that sufficient time would be set aside to accommodate a detailed discussion on the issue of PII at the January 2021 Council meeting.

Human Rights Committee

Noting that the British Government had recently announced its decision not to hold a public inquiry into the death of solicitor Pat Finucane, the Council agreed to write to the British ambassador to express its concern.

In that regard, the Council noted that the British Supreme Court had found a failure to hold an effective investigation into Mr Finucane's death, and all previous examinations of his death had not been compliant with human-rights standards.

PRACTICE NOTES ARE INTENDED AS GUIDES ONLY AND ARE NOT A SUBSTITUTE FOR PROFESSIONAL ADVICE.
NO RESPONSIBILITY IS ACCEPTED FOR ANY ERRORS OR OMISSIONS, HOWSOEVER ARISING

UNDERTAKINGS FROM RECEIVERS – A REMINDER

The Conveyancing Committee reminds practitioners of its practice note published in the January/February 2019 *Gazette* (p59) in relation to receiver contracts, and specifically in relation to accepting undertakings from receivers.

Practitioners are reporting to the committee that they are encountering long delays by receivers in some cases in complying with their undertakings. In those circumstances, the committee's view is that the client could consider reporting the delays to the appropriate regulatory body for the professional who gave the undertaking, or the client could consider issuing proceedings to compel compliance.

In relation to sales by lending institutions, the committee is of the same view in relation to complaints to the Central Bank about a bank and/or issue of proceedings.

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CONVEYANCING COMMITTEE

BREAK CLAUSES

The Conveyancing Committee has published a commentary on break clauses in commercial leases and has provided a sample clause for the assistance of practitioners.

These can be found at www.lawsociety.ie (see 'solicitors'/'representation'/'committees'/'conveyancing'/'resources'–and view 'conveyancing guidelines'/'landlord and tenant'.

This sample clause is not provided by the committee as a recommended precedent, merely as a sample to help illustrate the commentary, and for general guidance.

CONVEYANCING COMMITTEE

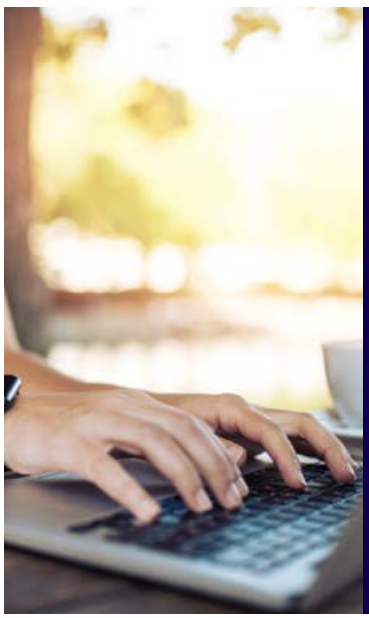
REQUISITIONS ON TITLE – 2019 (REVISED) EDITION

The Conveyancing Committee recently made revisions to its 2019 *Requisitions on Title* to include new requisitions on the vacant-sites levy, and published it to the profession in the December 2020 issue of the *eZine*.

The revised edition has been made available in fillable PDF format on the 'precedents' page at www.lawsociety.ie (click the 'solicitors' tab/'practising'/'precedents' and scroll to *Requisitions on Title 2019 (Revised) Edition*), and was recommended for use for all transactions commencing on or after 1 January 2021. The accompanying explanatory memorandum was also updated and can be found on the precedents page also.

In case of heavy demand for hard copies of the revised document in the short term, please bear in mind that practitioners can use the online version on the precedents page until such time as all print orders are fulfilled.

To order hard copies, visit www.lawsociety.ie/publications.



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LAW SOCIETY OF IRELAND

ADVERTISING REGULATIONS TRANSFERRED TO LSRA

Solicitors are advised that responsibility for the regulation of the advertising of legal practitioners, including solicitors, has now transferred from the Law Society to the Legal Services Regulatory Authority.

Pursuant to section 218 of the *Legal Services Regulation Act 2015*, SI 644/2020 (the *Legal Services Regulation Act 2015 (Advertising) Regulations 2020*) commenced on 18 December 2020. The authority is now responsible for regulating the advertising of all legal services by legal practitioners.

Solicitors are assured that advertisements relating to all legal services (except 'personal injuries' – see below) that were published in compliance with the Society's *Solicitors Advertising Regulations 2019* will remain compliant with the LSRA regulations, and no further action is necessary.

The Society is of the view that the LSRA regulations are a positive and effective realignment of the previous regulatory regime, and the Society's *Solicitors Advertising Regulations 2019* provided a useful template for the construction of the LSRA regulations. In addition, the Society provided two written submissions to the authority as part of its public consultation process.

Solicitors will note that the broad prohibitions contained in section 4 of the LSRA regulations are identical to those under the previous regulatory regime enforced by the Society. The Society recommended no change to these provisions because broad and robust regulations are essential to preserve the integrity of the profession, and the adoption of this recommendation is welcomed. Under the LSRA regulations, section 4 prohibits advertisements that:

- Are likely to bring the legal profession into disrepute,
- Are in bad taste,
- Reflect unfavourably on another legal practitioner,
- Are false or misleading in any respect, or
- Are published in an inappropriate location.

More generally, advertisements are also prohibited from making any express or implied reference to the success rate of the legal practitioner, or to include statements about the legal practitioner's success rate.

Personal injuries

Previously, the Society enforced certain controls on the advertising of personal-injury legal services, and supports the additional specifications now contained in the LSRA regulations. In summary, the authority's new regulatory regime makes clear that advertisements relating to 'personal injuries' shall not:

- Expressly or impliedly solicit, encourage, or offer any inducement to any person or group or class of persons to make claims for personal injuries or seek legal services in connection with such claims,
- Include words or phrases such as 'no win, no fee', 'no foal, no fee', 'free first consultation', or other words or phrases of a similar nature that could be construed as meaning that legal services in connection with claims for personal injuries would be provided by the legal practitioner at no cost to the client,
- Refer to the *quantum* of a possible award of damages, save insofar as by reference to the Personal Injuries Assessment Board *Book of Quantum* or other guidelines as may be published by the Personal Injuries Assessment Board or other statutory authority or statutory body,
- Expressly or by implication suggest that there are circumstances in which legal services involving contentious business may be provided without there being any risk that the client may be required to pay costs to any other party or parties, unless that actually represents the legal position.

In addition to the above, any advertisement relating to 'personal injuries' must now include a clear reference to the prohibitions on charging costs in the circumstances contained in section 149 of the 2015 act.

Solicitors are also advised to exercise caution in respect of any connection (known or otherwise) that they may have online with other advertisements. Where an online advertisement published by (or on behalf of) a solicitor links to other information available elsewhere online, the solicitor is personally responsible for the publication of the linked advertisement. An obvious example of this would be Google, which lists hyperlinks of websites based on key search-words.

More general recommendations that were made by the Society and were incorporated into the LSRA regulations also included the amendment to the definition of 'client' from 'his' to 'his/her'. This was considered necessary for the purposes of gender neutrality.

Finally, and as per the Society's recommendation, the previous exemption clause that distinguished between an advertisement and a 'communication to give information on the law' has also been retained. This is to be welcomed, as this clause, now found under section 10 of the LSRA regulations, provides an effective means of differentiation between general advertisements and information pieces that serve an overriding public interest.

As the authority is now wholly responsible for regulating the manner in which legal practitioners advertise their professional services, the Society no longer provides a vetting service to solicitors, where advertisements were approved prior to publication. All queries relating to the new regulatory regime should be made directly to the authority, via the email address LSRA-inbox@LSRA.ie.

For further information, please visit www.lsra.ie/for-law-professionals/advertising-legal-services. g

WILLS

Allen, Johanna (Josie) (deceased), late of Ballydavid, Thurles Road, Littleton, Thurles, Co Tipperary. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 7 June 2020, please contact Butler Cunningham & Molony, Solicitors, Slievenamon Road, Thurles, Co Tipperary; DX 40006 Thurles; tel: 0504 21857, 22315; email: info@bcmthurles.ie

Cahill, Michael (deceased), who died on 20 January 1947, late of Seraghtown, Crossakiel, Kells, Co Meath. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Rogers and Byron, Solicitors, Cannon Row, Navan, Co Meath; tel: 046 902 1939, email: info@rogersandbyron.ie

Conway, Kathleen (née Griffiths) (deceased), retired accountant, late of 11 Marian Place, Bennettsbridge, Co Kilkenny, who died on 23 May 2019. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact JA Canny & Co, Solicitors, 44 Friary Street, Kilkenny; DX 27 013 Kilkenny; tel: 056 777 1977, email: tony@jacanny.com

Daly, Caitriona (deceased), late of Blackheath Park, Clontarf, Dublin 3, who died on 18 October 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact Nuala Farrell, tel: 087 773 3125, email: nualagf@gmail.com

Gorman, Patrick (deceased), late of 5B Newtown Park, Tallaght, Dublin 24, and Community Nursing Unit, Clonskeagh Hospital, Clonskeagh, Dublin 6, who died on 14 September 2018. Would any person having knowledge of a will made by the above-named person please contact the Chief State Solicitor's Office, Osmond House, Little Ship Street, Dublin 8; tel: 01 417 5177, email mairead_keegan@csso.gov.ie

Griffiths, James (orse Jimmy) (deceased), retired carpenter, late of Gowran Road, Bennettsbridge, Co Kilkenny, who died on 15 April 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact JA Canny & Co, Solicitors, 44 Friary Street, Kilkenny; DX 27 013 Kilkenny; tel: 056 777 1977, email: tony@jacanny.com

Hurley, Beatrice (deceased), late of 49 Beechpark, Portmarnock, Co Dublin. Would any person having knowledge of the whereabouts of any made by the above-named deceased, who died on 5 December 2020, please contact Gary Irwin, Solicitors, 3 Portmarnock Town Centre, Portmarnock, Co Dublin; tel: 01 845 9100, email: info@garyirwinsolicitors.ie

Hurley, Michael (deceased), late of 49 Beechpark, Portmarnock, Co Dublin. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 5 December 2020, please contact Gary Irwin Solicitors, 3 Portmarnock Town Centre, Portmarnock, Co Dublin; tel: 01 845 9100, email: info@garyirwinsolicitors.ie

Kelly, Gerard (deceased), late of Glebe House, New Road, Straffan, Co Kilkenny (formerly of 14 Alexandra Manor, Clane, Co Kildare, and Mask Drive, Artane, Dublin 5). Would any person with any knowledge of a will executed by the above-named deceased, who died on 24 July 2020, please contact O'Shea Russell Solicitors, Main Street, Graignamanagh, Co Kilkenny; tel: 059 972 4106, email: nicholas@oshearussell.ie

McCarthy, Sally (deceased), late of 105 Rathfarnham Road, Dublin 16. Would any person having any knowledge of a will made by the above-named deceased, who died on 7 November 2020, please contact Marcella Power, Fiona Twomey Solicitors, 3 Eastgate Village, Little Island, Co Cork; DX 189 001; tel: 021 435 5405, email: reception@fionatwomey.ie

McLiesh, Dorothy Victoria (otherwise Dorothy Victoria Butler) (otherwise Victoria Butler) (deceased), late of 60 Woodstock Court, Woodstock Gardens, Ranelagh D06 W261, formerly of 11 Maxwell Court, Maxwell Road, Rathmines, D06 CM33. Would any person having knowledge of a will executed by the above-named deceased, who died on 26 December 2020, please contact Murchan & Company, Solicitors, 68 Lower Lesson Street, Dublin 2; tel: 01 676 8522, email: murchanlaw@gmail.com

RATES

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €152 (incl VAT at 21%)
- **Title deeds** – €304 per deed (incl VAT at 21%)
- **Employment/miscellaneous** – €152 (incl VAT at 21%)

HIGHLIGHT YOUR NOTICE BY PUTTING A BOX AROUND IT – €30 EXTRA

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. ALL NOTICES MUST BE EMAILED TO catherine.kearney@lawsociety.ie and PAYMENT MADE BY ELECTRONIC FUNDS TRANSFER (EFT). The Law Society's EFT details will be supplied following receipt of your email. **Deadline for March 2021 *Gazette*: 12 February 2021.**

No recruitment advertisements will be published that include references to ranges of post-qualification experience (PQE). The *Gazette* Editorial Board has taken this decision based on legal advice that indicates that such references may be in breach of the *Employment Equality Acts 1998* and *2004*.

MISSING HEIRS, WILLS, DOCUMENTS AND ASSETS FOUND WORLDWIDE

FREEPHONE: 1800 210 210
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Sir John Rogerson's Quay, Dublin 2
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TRACING HEIRS TO ESTATES, PROPERTY & ASSETS

Mahon, Sarah Rose (Rosie) (deceased), late of Drummin, Ballinagare, Castlerea, Co Roscommon, who died on 9 October 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Callan Tansey Solicitors, The Crescent, Boyle, Co Roscommon; DX 65002 Boyle; tel: 071 966 2019, email: info@callantansey.ie

Markey, Anna (deceased), resident Drumlin House, St Mary's, Castleblayney, and formerly c/o Oriel House Nursing Home, Armagh Road, Rooskey Vale, Monaghan (approx 20 years), formerly St Davnet's, same address, who died on 18 December 2015. Would any person having knowledge of the whereabouts of any will executed by the above-named deceased please contact John O'Keeffe & Co, Solicitors, 2nd Floor, City Gate Building 1000, Mahon, Cork; tel: 021 2409 240, email: john@okeeffesolicitors.com

Nagle, Bridget (o/w Brigid) (o/w Bríd) (deceased), late of Rockboro Heights, Waterpark, Carrigaline, Co Cork, formerly of Knockrobin, Compass Hill, Kinsale, Co Cork, who died on 8 November 2020. Would any person having knowledge of the whereabouts of a will made or purported to have been made by the above-named deceased, or if any firm is holding same, please contact Niamh O`Connor, JW O'Donovan LLP, Solicitors, 53 South Mall, Cork; tel: 021 730 0200, email: info@jwod.ie

Nichol, John (deceased), late of Clough, Castlecomer, Co Kilkenny. Would any person having knowledge of any will made by the above-named deceased, who died on 6 December 2020, please contact Cogan Daly Solicitors, Brighton House, 50 Terenure Road East, Rathgar, Dublin 6; tel: 01 490 3394, email: contact@cogandalylaw.ie

O'Brien, Michael (deceased), late of 18 Congress Gardens, Glasthule, Co Dublin, who died on 19 August 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Denis McSweeney, Solicitors, 16 Herbert Place, Dublin 2; email: elainedenise@denismcsweeney.com

O'Brien, Patrick (deceased), late of Green Lane, Kenmare, Co Kerry, who died on 19 October 2019. Would any person having knowledge of the last will made by the above-named deceased, or its whereabouts, please contact Muldowney Counihan & Co, Solicitors, Office 3, Clon Court, Main Street, Clonee, Dublin 15; tel: 01 825 5863, fax: 01 801 3249, email: muldowneycounihan@msn.com

O'Callaghan, Patricia (deceased), late of 89 Landscape Park, Churchtown, Dublin 14, who died on 26 November 2020. Would any person having knowledge of any will made by the above-named deceased, or any knowledge of the above-named deceased, or if any firm is holding any will or documents, please contact McKenna and Co, Solicitors, Fitzwilliam House, 4 Upper Pembroke Street, Dublin 2; DX 109065 Fitzwilliam; tel: 01 485 4563, email: lisa@mckennaandcosolicitors.com

O'Shaughnessy Michael (deceased), late of 10 Cluain Muilleann, Tyone, Nenagh, Co Tipperary, and formerly of Tullira, Ardrahane, Co Galway, who died on 10 October 2020. Would any person having knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, or if any firm is holding same, please contact John M Spencer, solicitor, Cudville, Nenagh, Co Tipperary; DX 20 007 Nenagh; tel: 067 31622, email: info@jmspencer.ie

Power, Aileen Mary (deceased), late of Lacopple (otherwise Loughcopple) House, Fethard, Co Tipperary, and previously Ballyduff House, Kilmeaden, Co Waterford. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 26 September 2020, please contact HD Keane Solicitors, 22 O'Connell Street, Waterford; DX44014 Waterford; tel: 051 874856, email: enquiries@hdkeane.com

Weir, Paul (deceased), late of 41 Frankfurt Avenue, Rathmines, Dublin 6, who died on 6 December 2020. Would any person having any knowledge of the whereabouts of a will made by the above-named deceased please contact John Wallace, NJ Downes & Co, Solicitors LLP, Dominick Street, Mullingar, Co Westmeath; tel: 044 934 8646, email: jwallace@njdownes.ie

TITLE DEEDS

Harbour Street, Tullamore, Co Offaly – registered owner: Ann McKeon (deceased).

Would any person having knowledge of the whereabouts of title documents relating to the above-mentioned property or if any firm is holding same, please contact Belgard Solicitors, Block B, Cookstown Court, Old Belgard Road, Tallaght, Dublin 24; DX 104019 Tallaght; tel 464 9120, email: info@belgardsolicitors.ie

In the matter of the *Landlord and Tenant Acts 1967-2019*, and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*, and in the matter of an application by Frank O'Riordan

Any person having a freehold estate or any intermediate interest in all that and those 49 Highfield Road, Rathgar, Dublin 6, held under an indenture of lease dated 7 March 1871 between John Conroy of the one part and Alfred Howard and William Howard of the other part, whereby all that and those "the piece of ground, yard and premises with the buildings thereon on Highfield Road, Rathgar, bounded on the north by Highfield as aforesaid, on the south partly by Mr Bond's holding and partly by the houses and premises belonging to the said John Conroy called Dodder House and let by him to Mr Barnett, on the east by house and premises belonging to the said John Conroy and let by him to Thomas Higgins, and to the west partly by Dodder House aforesaid and partly by the road leading from Rathgar to the River Dodder", as delineated on the map drawn thereon and including the premises the subject of this advertisement, was demised to Alfred Howard and William Howard for a term of 189 years from 1 May 1871 at the yearly rent of £47.

Take notice that the said Frank O'Riordan intends to apply to the county registrar of the county of Dublin to vest in him the fee simple and any intermediate interests in the said property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title to same to the below-named within 21 days from the date of this notice.

In default of any such notice being received, Frank O'Riordan intends to proceed with the application before the Dublin county registrar at the end of 21 days from the date of this notice and will apply to the Dublin county registrar for such directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversion in the aforesaid property are unknown or unascertained.

Date: 5 February 2021

Signed: Gleeson McGrath Baldwin LLP (solicitors for the applicant), 29 Anglesea Street, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2019* and in the matter of the *Landlord and Tenant (Amendment) Act 1980* and in the matter of an application by Terence Grace of 9 Old Golf Links Road, Newpark, Kilkenny in the county of Kilkenny

Any person(s) having interest in the superior interest and/or freehold estate of the following property: the hereditaments and premises at Newpark Lower in the parish of St Maul, barony of Gowran and county of Kilkenny, and now known as 9 Old Golf Links Road, Newpark, Kilkenny,

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Tremendous Opportunity.

ENQUIRIES IN CONFIDENCE TO:
David Rowe at Outsource, 01 6788 490
dr@outsource-finance.com

in the county of Kilkenny.

Take notice that the said Terence Grace intends to apply to the Circuit Court for the county of Kilkenny for a reversionary lease in the aforementioned property pursuant to part III of the *Landlord and Tenant (Amendment) Act 1980*, and any party asserting that they hold an interest in the said property are called upon to furnish evidence of title to the below-named firm of solicitors. In particular, such person or persons who are entitled as successors or assigns to the interest of one Henry William McCreery, pursuant to lease of 16 April 1915 made between the said Henry William McCreery of the one part, and John Murphy of the other part, whereby *inter alia*, the aforementioned premises were demised to the said John Murphy, his executors, administrators, and assigns for a term of 99 years from 29 September 1914, subject to a yearly rent of £7 and to the covenants and conditions therein contained, should provide evidence of their title to the below-named firm of solicitors within four weeks of the date of this notice.

In default of such evidence of the current holders of the interest of the said Henry William McCreery in the abovementioned property being received within a period of four weeks from the publication of this notice, the said Terence Grace intends to proceed with the said application before Kilkenny Circuit Court for a reversionary lease and for such directions and/or orders as may be appropriate on the basis the person or persons entitled to the superior interest including the freehold interest in the aforesaid premises are unknown or unascertained.

Take notice thereafter that the said Terence Grace intends to submit an application to the county registrar for the county of Kilkenny for the acquisition of the freehold interest and all intermediate interests in the aforesaid premises, and any party asserting they hold a superior interest and/or freehold interest in the said premises are called upon to furnish evidence of title to the below-named firm of solicitors within four weeks of the date of this notice.

In default of such evidence being received, the said Terence Grace intends to proceed with an application before the county registrar of the county of Kilkenny to purchase the fee simple in the above premises and for such directions as may be appropriate on the basis the person or persons entitled to the superior interest including the freehold interest in the said premises are unknown and unascertained.

Date: 5 February 2021
Signed: Kearney Roche & McGuinn (solicitors for the applicant), 9 The Parade, Kilkenny

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2019*, and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Rambutan Limited, having its registered office at O'Neill Foley, Patrick's Court, Patrick's Street, Kilkenny

In the matter of portion of the three-storey retail shop situated at 10-12 William Street, Galway, being the premises described in a lease dated 28 January 1936 from Michael Whelan and John Whelan to the Blackrock Tailoring Company Limited as "all that the premises being portion of the premises 10 Williamsgate Street, Galway, in the county of Galway, consisting of a shop, lavatory, and yard on the ground floor, together with the three rooms on the first floor of the said premises, and the three rooms on the second floor of the said premises, and more particularly described on the map or plan attached hereto and thereon coloured red".

Take notice that Rambutan Limited, having its registered office at O'Neill Foley, Patrick's Court, Patrick's Street, Kilkenny, being a private company limited by shares, intends to submit an application to the county registrar for the city of Galway for acquisition of the freehold interest and intermediate interests in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Rambutan Limited intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city and county of Galway for directions as may be appropriate on the basis that some of the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 5 February 2021
Signed: McMahon O'Brien Tynan (solicitors for the applicant), Mill House, Henry Street, Limerick

In the matter of the *Landlord and Tenant (Ground Rents) Acts 1967-2019*, and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*: an application by Rambutan Limited, having its registered office at O'Neill Foley, Patrick's Court, Patrick's Street, Kilkenny

In the matter of portion of the three-storey retail shop situated at 10-12 William Street, Galway, being the premises described in a lease dated 3 October 1951 from Michael Whelan and John Whelan to the Blackrock Tailoring Company Limited as "all that portion of the premises known as 10 Williamsgate Street, Galway, situate in the parish of Saint Nicholas and barony and county of Galway, hereinafter referred to as the said premises, as more particularly delineated on the map endorsed hereon and thereon coloured blue".

Take notice that Rambutan Limited, having its registered office at O'Neill Foley, Patrick's Court, Patrick's Street, Kilkenny, being a private company limited by shares, intends to submit an application to the county registrar for city and county of Galway for

acquisition of the freehold interest and intermediate interests in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Rambutan Limited intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city and county of Galway for directions as may be appropriate on the basis that some of the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 5 February 2021
Signed: McMahon O'Brien Tynan (solicitors for the applicant), Mill House, Henry Street, Limerick

In the matter of the *Landlord and Tenant Acts 1967-2019* and in the matter of an application by Daniel McNamara of Clonadrum, Mullagh, in the county of Clare, and in the matter of the property now known as 'Villa Maria', Spanish Point, in the county of Clare

Take notice that any person having a freehold interest or any intermediate interest in all that and those the property known as 'Villa Maria', Spanish Point, in the county of Clare (hereinafter called 'the property'), the subject matter of a lease dated 10 October 1853 and made between Burdett Morony of the one part and Anna Maria Morony of the other part for a term of 900 years from the 29 September 1853, subject to an annual rent of £2 pounds thereby reserved, and to the covenants by the lessee and conditions therein contained.

Take notice that Daniel McNamara intends to submit an application to the county registrar for the county of Clare for the acquisition of the freehold interest in the property, and that any party asserting that they hold a superior interest in the property are called upon to furnish evidence of such title to the property to the undermentioned solicitors within 21 days of this notice.

Take notice that, in default of such notice being received, the applicant, Daniel McNamara, intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Clare for such directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in the property are unknown or unascertained.

Date: 5 February 2021
Signed: Kerin, Hickman & O'Donnell (solicitors for the applicant), 2 Bindon Street, Ennis, Co Clare; RJH 0359/EK

In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*, and in the matter of an application by Midsal Homes Limited, and in the matter of the property at the rear of 80 Meath Street, Dublin 8

Take notice that any person having an interest in the freehold estate or any intermediate interests of that part of the property now known as the rear of 80 Meath Street, Dublin 8, held under an indenture of lease made 16 July 1951 between Albert Siev of the one part and Kevin McCann of the other part ('lease'), for a term of 150 years from 29 June 1951 at the annual rent of £10 and subject to the covenants and conditions therein contained.

Take notice that Midsal Homes Limited intend to submit an application to the county registrar for the county of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and that any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property are called upon to furnish evidence of title to the said property to the below named solicitors within 21 days from the date of this notice.

In default of any such notice being received, Midsal Homes Ltd intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate that the person or persons beneficially entitled to the intermediate interests, including the fee simple, in the aforesaid property are unknown or unascertained.

Date: 5 February 2021
Signed: Mason Hayes & Curran (solicitors for the applicant), South Bank House, Barrow Street, Dublin 4

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Kmont Property Holdings Limited in respect of the premises known as 52 Hanover Street, Cork (formerly 66 Hanover Street, Cork)

Take notice that any person having an interest in 52 Hanover Street, Cork, now forming part of Rearden's Pub, and formerly 66 Hanover St Cork, the subject of an indenture of lease dated 2 January 1864 between John Fitton of the one part and John Hatton of the other part (the 'lease') for a term of 200 years from 1 November 1863, subject to a yearly rent of £9.

Take notice that Kmont Property Holdings Limited intends to submit an application to the county registrar for the county of Cork for acquisition of the fee simple and any intermediate interest in the aforesaid premises, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of the title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Kmont Property Holdings Limited intends to proceed with the application at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Cork for directions as may be appropriate on the basis that the persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Date: 5 February 2021
Signed: Callan Tansey (solicitors for the applicant), Crescent House, Boyle, Co Roscommon

In the matter of section 50 of the *Land and Conveyancing Law Reform Act 2009* and in the matter of an application by Kouchin Properties Limited, Pottery Road Owners' Management Company Limited by Guarantee, and Joinery Apartments Limited ('the applicants')

Any person being the freehold owner, or deriving title from or under the freehold owner, of all that and those the lands bounded by Stillorgan Road (N11) to the west, Clonkeen Road to the east, and Kill Lane to the north, or the lands fronting onto the eastern side of Clonkeen Road, both in the areas of Deansgrange,

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Foxrock and/or Blackrock, Dublin 18, or any part thereof, such lands constituting the lands retained by General Estates and Trust Company Limited at the time that such company conveyed adjoining land to Michael Joseph Noonan by deed of conveyance dated 2 June 1944 (the 1944 deed), and the lands retained by the said Michael Joseph Noonan at the time that such person conveyed a portion of the said adjoining land to Joseph Pius Noonan, William Mark McCarthy, John Gregory Hogan and James Matthew Quinlan by deed of conveyance dated 3 April 1945 (the 1945 deed), and claiming to be the dominant owner in respect of, or to otherwise have an interest in the performance of, the following freehold covenants ('the freehold covenants') entered into by the purchasers under the 1944 deed and the 1945 deed and now affecting lands on which Mentec House and The Highline in Dun Laoghaire Industrial Estate, Pottery Road, Dun Laoghaire, Co Dublin, are situate, being the lands registered in Folios 57749F and 36221F of the register of freeholders county Dublin, and which lands were part of the lands conveyed under the 1944 deed and the 1945 deed and are now owned by the applicants ('the servient land').

1944 deed – "Firstly, that he will not erect or permit to be erected on any part of the lands hereby conveyed to the west of the back avenue shown on the maps annexed hereto any dwellinghouse or premises that shall not be of a cubic capacity and appearance at least equal to the last three dwellinghouses already built to the north of the undeveloped eastern road frontage adjoining the public roadway known as the upper road aforesaid. Secondly, that he will not erect or permit to be erected on the lands hereby conveyed east of the said back avenue any dwellinghouse or premises that shall not be of a cubic capacity and appearance at least equal to the semi-detached dwellinghouse already built on the west side of the Clonkeen Road. Thirdly, that should he develop the interior of the lands hereby conveyed, he will do so in accordance with the plan already lodged by the vendor with the Dublin County Council or in accordance with some substituted plan approved by the said county council and that he will indemnify the vendor against all claims by the said county Council in respect of the development of the property hereby conveyed."

1945 deed – "Firstly, that they will not erect or permit to be erected on the lands hereby conveyed any house or houses that shall not be of a cubic capacity and appearance at least equal to the semi-detached houses now already built on the west side of the Clonkeen Road, opposite to the lands hereby conveyed. Secondly that should they develop the lands hereby conveyed they will do so in accordance with the plan already lodged by [General Estates] with the Dublin County Council or in accordance with some substituted plan to be approved of by the county council and that they will indemnify the vendor against all claims by the county council or any other proper body, person or corporation in respect of the development of the property hereby conveyed arising out of each development, and the vendor hereby acknowledges the right of the purchasers to production of the documents specified in the schedule hereto and to the delivery of copies thereof and hereby undertakes for the safe custody thereof."

Take notice that the applicants have applied to the High Court (record no 2020/266SP), as owners of the servient lands and servient owners in respect of the freehold covenants, for an order discharging in whole the freehold covenants, on the ground that continued compliance with the freehold covenants would constitute unreasonable interference with the use and enjoyment of the servient land; and take further notice that, at a sitting of the High Court on 18 January 2021, O'Regan J indicated that it is the court's intention to grant the order sought by the applicants at a further sitting of the High Court (chancery motions (2) list) at 10.30 am on 22 March 2021, unless any person claiming to be the dominant owner in respect of, or to otherwise have an interest in the performance of, the freehold covenants appears in court on that date and shows just cause as to why the court should do otherwise.

Date: 5 February 2021
Signed: AMOSS Solicitors (solicitors for the applicants), Warrington House, Mount Street Crescent, Dublin 2

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THE TRUTH IS OUT THERE

Not content with sharing their plans to deal with a zombie apocalypse (see November *Gazette*, p73), the US Government has made available nearly 3,000 pages of material that is claimed to be a collection of CIA-related UFO records. Open Culture reports that release of material on what they now call UAPs ('unidentified aerial phenomena') followed the filing of numerous *Freedom of Information Act* requests by The Black Vault. The scanned, poorly photocopied documents are available at www.theblackvault.com.

'PSYCHO SQUIRREL' TERRORISES NYC

At least three people in New York have been attacked by a deranged squirrel, *The Guardian* reports. The rodent's reign of terror has made people afraid to go out without anti-squirrel weaponry.

One victim said that she was targeted by the toothy terror in December. "The squirrel ran up my leg and I thought: 'It's a small rodent, how bad could this be?' The next thing I knew, the blood started to fly. It was a wrestling match that got very bloody, very quickly. It was angry, vicious and incredibly strong." She eventually managed to get rid of it, only for the squirrel to run up a tree and stare at her.

Other neighbours have also been attacked, including a woman who was chased down the street by the same squirrel. City officials have advised hiring a licensed trapper, and Godzilla has been paged.

BIT OF CHEESE WITH THAT?

A gang of wine thieves pelted French police with Burgundy in a motorway chase, *The Guardian* reports.

The gang stole €350,000-worth of wine from a luxury hotel, but had to hurl their haul at pursuing officers as they sped down the motorway. They finally abandoned their vehicle after crashing into a toll barrier 35km north of Lyon.

The hotel owner was reportedly woken by the fire alarm, jumped in his car, and kept up with the gang's van while calling for reinforcements.

Investigators say nobody was hurt, and the bottles missed their target.

It was the second time that the five-star hotel had been broken into in two days. Just 24 hours previously, thieves broke into the property and stole €200,000 worth of fine wines from the same cellar.

JET-SKIING JOCK'S JAUNT TO JAIL

A man who rode a jet-ski from Scotland to the Isle of Man to see his girlfriend has been jailed for breaching COVID rules, *The Irish Times* reports.

Dale McLaughlan (28) made the four-and-a-half-hour trip, despite never having driven a jet-ski before. He had expected the journey to take 40 minutes, prosecutors said.

After departing the Isle of Whithorn in the morning and arriving in the northern town of Ramsey at 1pm, McLaughlan walked 25km to Douglas. Authorities said McLaughlan's "deliberate and intentional attempt to circumnavigate" the restrictions had posed a risk to himself and the island's residents.

LAWYER LOSES LGOPNR

An Australian barrister has vowed not to back down after losing a legal battle to keep 'offensive' number plates on his tasteful neon-yellow Lamborghini, reports *Legal Cheek*.

Peter Lavac was ordered to remove his 'LGOPNR' plates. In his appeal, the 74-year-old argued that most people would not realise the meaning. A second appeal was dismissed after the plates were deemed offensive by a magistrate.

Lavac is taking the setback in his stride and apparently has some replacements in mind, including 'XLEGO' – an abbreviation for 'extra-large ego'. g

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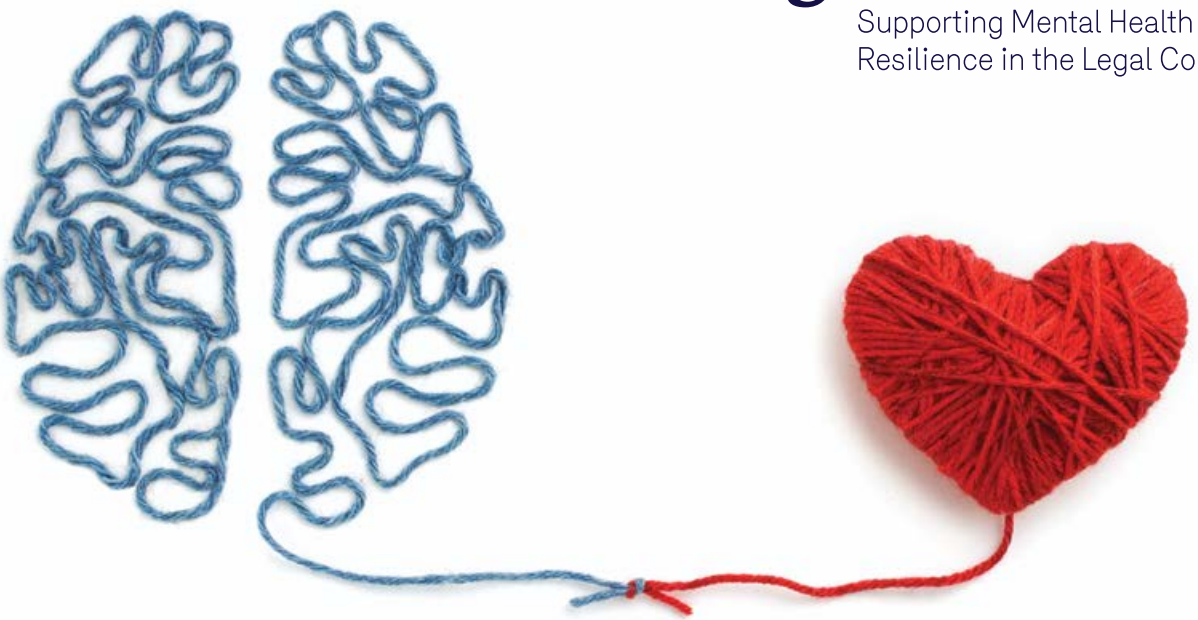

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