Legal Ease

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Note from your Editors

Welcome to the first edition of our remodelled Legal Information Bulletin which we hope to publish on a quarterly basis. We want these publications to be informative and helpful to all of you and provide you with ease in acquiring up to date legal information and knowledge. We would welcome your suggestions and comments and in particular your contributions. Thank you to the people who took time to prepare articles for this issue or who drew our attention to pieces of interesting legislation or court judgments. We want these publications to be as meaningful and helpful as possible and look forward to your assistance in achieving these goals.

We wish you a happy, safe and enjoyable summer and hope you will add "Legal Ease" to your summer reading.

Phil O'Laoide, Regional Manager
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The concept of knowledge management has been around since I commenced my career as a librarian over 25 years ago, and the effective harvesting, dissemination and utilisation of our collective intellectual assets is still a central tenet of the library and information profession. However there is often a misapprehension that there is a magical IT solution to tapping into this holy grail of knowledge with the push of a button or click of a mouse. Computer systems and databases have come a long way in consolidating and streamlining access to information in recent decades, but as highlighted in Joan Callan's article on online dispute resolution (page 8), artificial intelligence is no replacement for human judgment, and people will always be the key component of an effective knowledge culture.

I found the recent regional meetings a valuable opportunity to network with fellow LAB staff and help determine how best to serve the needs of colleagues and, ultimately, clients. In the RIU we endeavour to align services and resources directly to user requirements, and are always open to feedback and suggestions for future developments.

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I attended the Law Society's International Conference on Child Protection and the Law on the 13th April 2015. There were a number of interesting presentations. I have however chosen to focus on the presentation of Dr Carol Coulter outlining the preliminary findings of the Childcare Law Reporting Project (the CCLRP) which I believe to be of particular relevance to Legal Aid Board solicitors involved in childcare proceedings in this jurisdiction.

Dr Coulter stated that both the CCLRP's own statistics on childcare applications and those of the Courts Service showed a wide variation in the volumes of applications sought in different parts of the country, with towns of roughly similar size having widely different numbers of child protection applications which cannot fully be explained. Dr Coulter suggested some possible explanations for this, firstly that it may be that in some areas voluntary care arrangements are very widely used instead of court-ordered care and, secondly, that it may be that some areas have much better family support services, keeping children at home with support rather than placing them in care.

The CCLRP's statistics showed wide variations on the type of orders sought and made. Only four percent of the orders sought in Dublin were for Supervision Orders, while in Cork and Clonmel it was 14 percent and in Waterford it was almost 25 percent of all applications. The reason for this is not clear. Dr Coulter deems it unlikely that the risks to children in Waterford could be met by Supervision Orders, while risks in Dublin required Care Orders. She speculates that it may be related to the availability of social workers to visit the children to ensure that they are receiving appropriate care, as provided for in a Supervision Order.

CCLRP also saw wide variations in the thresholds applied in respect of all types of orders sought. In one rural town a suspicion of cannabis use (which was denied) prompted the seeking and granting of an Emergency Care Order. However, Dr Coulter pointed out that cannabis use alone, unless accompanied by much more serious drug use and a chaotic lifestyle is rarely the basis for a Care Order application in the larger cities and towns. She referred to the fact that in another part of the country the Child and Family Agency (CFA) was unable to attain full care orders for six children when it seemed clear that the threshold that the children had suffered serious harm and were likely continue to suffer serious harm in the future had been met. The Judge declined to make long term Care Orders for the six children and made Care Orders for seven months instead. Dr Coulter commented that the judge in this particular case did not relate this decision to any assessment of the threshold required by the legislation for an order, in contrast with other judges who have, sometimes in lengthy written judgments, assessed the grounds for the

making of an order under the different sub-sections of Section 18 of the Act, relating their decision to a detailed evaluation of the evidence and framing it in the context of the obligation to make the welfare of the child the paramount consideration, as well as the need to make an order proportionate to the risk identified.

In a number of cases the CCLRP found that where the mother was found to lack parenting capacity, the possibility of the father caring for the child, perhaps with support from his extended family, was not seriously considered. Dr Coulter stated that some judges were adamant in all cases they heard that the father, if identified, should receive consideration as an appropriate care giver for the child. Other judges have not considered the father at all unless he was brought to the court's attention by the CFA even though consideration of the possibility that the father could care for the child should form part of the proportionate response to the risk the child faced in the care of his or her mother. The CCLRP's finding is clear that there is no unanimity in how the Child Care Act is applied and what the thresholds are for bringing applications on the part of the CFA on the one hand, and for granting them on the part of the judiciary on the other.

Interim Care Orders are granted on the basis that there is "reason to believe" there is a risk to the child while Care Orders are granted on the basis that the court is "satisfied" that there is such a risk.

The CCLRP has seen confusion on the part of social workers about the different levels of evidence needed to support different types of applications: for ECOs, for ICOs and for COs, which can lead to an order being refused.

An Emergency Care Order can only be granted if there is "an immediate and serious" risk to the child. Evidence has to be given that the risk is both immediate and serious. Dr Coulter stated that Emergency Care Orders have been refused on the basis that a risk, while serious, was not immediate and therefore an Interim Order was more appropriate.

Interim Care Orders are granted on the basis that there is "reason to believe" there is a risk to the child while Care Orders are granted on the basis that the court is "satisfied" that there is such a risk. This is a considerably higher threshold and the CCLRP has seen a number of cases where Interim Care Orders were granted and renewed many times while full Care Orders were later refused. In these cases the judge refusing the Care Order stated that the threshold had been met for an Interim Care Order while there was insufficient evidence to justify a full Care Order.

In terms of the evidence required for an Emergency Care Order, Dr Coulter cited a case where an Emergency Care Order was refused for a suicidal teenage boy who was being abused by his mother. The CFA sought the order ex parte. There was evidence from a psychologist that the boy was very distressed and threatening suicide. The judge pointed out that the boy had also been suicidal in 2011 and 2012 and said that if it was an urgent mental health matter an

application should have been brought under the Mental Health Act, otherwise an Emergency Care Order application should be made with notice to the boy's parents. She said the situation was serious but not immediate.

In another case in 2014 an Emergency Care Order for a girl with complex mental health needs was also refused on the basis that the situation was serious but not immediate. In that case the judge said: "it's a chronic situation, a serious situation for a number of years, which has not enormously escalated in the last six months, the immediacy has not been established".

Emergency Care Orders are regularly made by the courts, often when the Gardaí come upon the situation where a child is obviously at an immediate risk.

Dr Coulter went on to say that Emergency Care Orders are regularly made by the courts, often when the Gardaí come upon the situation where a child is obviously at an immediate risk. She cited a couple of cases, one involving three children who escaped out the window of their home where they were being abused by their mother. In this case there was obvious urgency and immediacy to the applications, which was not present in the other applications, serious though they were.

Dr Coulter stated there have been a number of Interim Care Orders granted, preparatory to applications being made for full Care Orders, but that full Care Orders were later refused. She stated that while the Interim Care Orders are in place assessments should take place of the parenting capacity of the parent or parents, including their cognitive ability, and where there are allegations of abuse these should be investigated. She cited a case of a baby born prematurely to a young woman with mental health problems who already had a child in care by a different father. The CFA were concerned about the mother's capacity to care for the child. An Interim Care Order was granted and renewed. However, during the Care Order hearing the judge, who endorsed the granting of the Interim Care Orders by another judge, said that the threshold had not been met for the Care Order as the CFA had not adequately assessed the ability of the father to care for the child.

In another case, two children were returned to their parents after five and three years respectively because the judge found that allegations emanating from another jurisdiction that the father may have been responsible for sexually abusing the mother's other child had not been proved. Because no evidence had been called to substantiate the suspicions of involvement in, or failure to protect from, child sexual abuse in the other jurisdiction, the basis for the application had not been proved, he said. The judge went on to say that "reasonable concern or suspicion is not sufficient to enable this court to make Care Orders. This court only makes Care Orders on the basis of proven facts".

The judge further stated that in order to satisfy the threshold that the children's health, development and welfare was likely to be avoidably impaired or neglected, past facts must be proved to enable the court, on an objective basis and on the balance of probabilities, to

determine the likelihood of future harm. "Findings of the court in cases of such import as child care proceedings must be based on facts proved in evidence, and not suspicions" he said.

Thus well-founded suspicion of risk to a child is sufficient to seek an Interim Care Order but not a Care Order, which must be based on proven facts. This makes the period between the granting of an Interim Care Order and the hearing of an application for a Care Order of crucial importance. Evidence must be collected so that the court is "satisfied" that there is a risk to the child that can only be met by a Care Order removing the child from his or her parents, rather than the court just having "reason to believe" that there is a risk to the child.

Dr Coulter indicated that in the majority of cases this evidence is given by one or more social workers. She said that in 80 percent of the cases attended by the CCLRP the only witnesses were social workers, in 40 percent of cases the parents consented to the order being sought and in another 40 percent the case was adjourned. She concluded that the contested cases, where evidence was likely to be tested, only accounted for 20 percent of cases.

Well-founded suspicion of risk to a child is sufficient to seek an Interim Care Order but not a Care Order, which must be based on proven facts

Dr Coulter went on to say that in many of these cases there were allegations of physical or sexual abuse which were denied. This raised difficult issues about the requirement to assess risk on the basis of "proven facts". The two sources of this evidence, apart from the social workers, were the children themselves and expert witnesses, usually experts in physical or sexual child abuse.

Dr Coulter pointed out that In this regard, in Ireland, the rules of evidence still exclude hearsay evidence, though there is an exception in relation to allegations made by children in Section 23 of the Children Act, 1997. Under the 1997 Act, the admission of indirect evidence of children is examined on a case by case basis. Dr Coulter stated that in many cases where child sex abuse is suspected, there may not be allegations from the children themselves, for various reasons, and that it may be necessary to examine the child's behaviour in order to draw conclusions about it, which is frequently done by experts in the field of child sex abuse. She said that such experts are usually called by the CFA in support of its application for a Care Order and parents may challenge their independence. Dr Coulter said that it is rare that experts in this area are called on behalf of parents, but the courts themselves have, on a number of occasions, sought evidence from independent experts on child sex abuse and on the credibility of children's allegations.

Dr Coulter quoted Hoyano and Keenan who urge caution in assessing the evidence of such experts, pointing out that phrases like behaviours being "consistent with" having been abused are problematic. They say that such a statement is an observation that some abused children exhibit this condition which, without elaboration, does not indicate the frequency in which the

behaviour occurs in abused as against non-abused children. Dr Coulter went on to say that given the tentative nature of such conclusions, it is essential that parents in child protection proceedings have access to qualified and experienced experts who can, if necessary, challenge the expert evidence put forward on the part of the State. She said that while this may prolong proceedings, the danger of miscarriages of justice in such cases, if fair procedures are not followed, is great.

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Dr Coulter stated that parenting capacity assessments are more routine and can be crucial in providing the judge with evidence on which to base a decision. She pointed out that parenting capacity assessments can also present problems. She said that again and again the CCLRP have heard evidence of the outcome of a parenting capacity assessment given in court where there is uncertainty about the cognitive ability of the parent or parents, and no cognitive assessment had been carried out. She goes on to say that it is difficult to see how conclusions can be drawn about parenting ability without an assessment of how well the parent understands what is being asked of him or her.

Dr Coulter stated that there may also be cultural misunderstandings as the issue of physical chastisement is one which has been identified as a source of conflict between social workers and certain minority communities. Also, attitudes towards older children taking on responsibilities for younger ones and towards children being unattended for periods of time may differ from ours in certain communities. Dr Coulter said that all of these differences may feed into an assessment of an individual's parenting capacity. She quoted the American social work academic, Krishna Samantrai, who said "any child's behaviour, play and symptoms, have to be interpreted in the context of the norms, practices, values and beliefs of that child's family and culture".

Dr Coulter then looked at how we can improve child protection proceedings so that they best serve the needs of vulnerable children and their families. She said that first of all, multiple adjournments and delays must be eliminated as soon as possible which will require the establishment of a dedicated family court and dedicated childcare courts or childcare days in smaller courts within it which she hopes will come soon. She went on to say that the Courts Service and the Judiciary should look at procedural and organisational measures to ensure that sufficient days are set aside to hear lengthy and complex cases without such cases having to be constantly adjourned, with lawyers for other parties juggling their diaries to fit another few days here and there.

Dr Coulter stated that while social workers do not need to be lawyers, they do need to understand the fundamental principles of Constitutional Law, International Human Rights Conventions and Child Protection Legislation so that they can inform their practice as social

workers long before the issue of seeking court orders may arise. They need an understanding of the term "proportionate" recently inserted into our Constitution as part of the children's amendment.

She went on to say that the principle of proportionality means that assessing risk must be combined with assessing what will ameliorate that risk, and seeking an order which is proportionate. Dr Coulter concluded by saying that there is a greater need for everyone in the Child Protection System – social workers, guardians ad litem, judges, lawyers – to understand each other's disciplines, their concerns and preoccupations and what best professional practice in each discipline entails. She says that education, training and discussion need to be integral to the work of everyone involved.

Cross Border Forced Labour and Human Trafficking Conference

The second cross border conference on human trafficking took place on 21st January 2015 in Newry, Co. Down. This conference focused on forced labour. Given the overlaps between human trafficking for forced labour and forced labour in itself, it was decided not to limit the conference to human trafficking alone. There were three overarching themes for the day:

- Challenges for law enforcement in particular cross border investigative challenges
- Prevention and identification – challenges in trying to locate and remove victims from abusive situations and ensuring they are supported and informed of their rights
- Awareness raising and training – approaches to raising awareness of this issue on a cross border basis

This well attended event had an audience of approximately 80 people from State agencies, NGOs, and international bodies from both sides of the border. The Conference was addressed by UK experts as well as representatives from NGOs and State agencies providing supports to victims of trafficking for labour exploitation and forced labour.

The list of speakers included:

- Mr Neil Jarman, Institute of Conflict Research NI
- Ms Grainne O'Toole ,Migrants Rights Centre Ireland (MRCI)
- Ms Mariaam Bhatti, MRCI (a former victim of labour exploitation)
- Mr Paul Broadbent, UK Gangmasters Licensing Authority
- Mr John Kelly, NERA
- Mr Kevin Hyland, UK Independent Anti -slavery Commissioner (designate)

Presentations from the Conference are available at:

http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/news-publications-en

Online Dispute Resolution: Coming Down the Track?

Joan Callan,
Medical Negligence Unit

A recent report by the Online Dispute Resolution Advisory Group of the Civil Justice Council is calling for radical change in the way the court system of England and Wales handles low value claims. The report recommends the introduction of an online dispute resolution service (ODR) to deal with civil claims up to £25,000.00.

Although the terms of reference were restricted to civil claims up to £25,000.00, the report recommends that the jurisdiction should also be extended to suitable family disputes and to appropriate cases that come before tribunals. As a first step, the report calls for piloting of ODR and proposes a launch date of 2017.

The report provides examples of online civil dispute resolution internationally. For example, in the Netherlands, an online service was developed for the Dutch Legal Aid Board. The first service is for family law disputes and includes divorce and ancillary matters such as custody, maintenance etc. Landlord and tenant and neighbour disputes are planned for the future.

The report states that the aim of the new online dispute resolution service is to broaden access to justice and to resolve disputes more easily, quickly and cheaply. It is suggested that access to justice should be viewed broadly and subdivided as follows: dispute avoidance, dispute containment and dispute resolution. The view is taken that the current system focuses more on dispute resolution and it is argued that investment in containment and avoidance would greatly reduce the number of cases coming before the courts.

Essentially, the report envisages a three tier system. Tier one, dispute avoidance - online evaluation, would involve the parties being invited to outline their grievance and to categorise their claim. At this stage, the parties would be made aware of their rights, obligations, their options and remedies.

Tier 2 would provide dispute containment in the form of online facilitation. There would be individuals, communicating online, who would review papers and statements and assist the parties through advice, mediation and negotiation to resolve the dispute without the use of judges. There would be telephone conferencing facilities, where necessary, and some automated negotiation to help resolve differences without the intervention of human experts.

Only if 1 and 2 were unsuccessful, would the claim progress to Tier 3, dispute resolution. Judges would determine the case (or parts of the case) online substantially on the basis of papers submitted electronically. This process would be supported, where necessary, by telephone conferencing facilities. Furthermore, the Judge would have the discretion of referring cases to court, for example where credibility of a witness is better judged in a physical courtroom.

Ultimately, it is envisaged that two further generations of the ODR system would follow. The main characteristic of the second generation system would be the addition of video technology. The third generation of system would be those that are enabled by artificial intelligence. However, the report does not anticipate that artificial intelligence based systems would replace human online judges.

It is proposed that the decisions of online judges would be subject to the same rights of appeal as in conventional courts and that parties would have the option to choose between the online court and the conventional court system.

Comment

So one might ask whether online civil courts should be introduced in this jurisdiction?

It is generally accepted that our civil courts are slow, costly and cumbersome. Technology has many benefits to offer in terms of achieving effectiveness and increasing efficiencies and I believe that its use should be seen as an opportunity rather than a threat. Any move in the direction of online courts would, of course, require safeguards in terms of reliable and secure technology to ensure confidentiality and security given the potential risk of hacking.

However, one must balance accessibility against fairness and consider whether a fair trial can be delivered over the internet. Oral hearings are at the heart of our justice system and there are benefits to the formality, swearing on the bible and the oral hearing. How often has a lawyer seen a "good" case on paper disintegrate on cross- examination? Also, witnesses play a vital role in our judicial system. Is there any substitute for face to face contact when it comes to deciding credibility of a witness?

The report does not anticipate that artificial intelligence based systems would replace human online judges.

We must also bear in mind that Article 34 of the Constitution provides that justice should generally be delivered in public. However, the Injuries Board has been very successful and justice is not delivered in public in that process so this right is not absolute.

Potential suitable cases for an online court may include small claims up to €2,000.00 (the small claims court already has an online application process), appropriate district court cases including licensing, debt collection and straightforward cases where liability is not in dispute. It may also be suitable for matters that fall within the remit of the Injuries Board. It would not be appropriate for complex disputes although parts of cases could possibly be

decided online e.g. motions. It is debateable whether it would be suitable for family law, in particular, cases where the welfare of children is at stake. However, it may be suitable for district court maintenance cases and judicial separation and divorce cases where there are no children/assets.

We certainly need an innovative approach to address the challenging problems in our courts in a long term strategic way and to ensure that we are administering justice effectively as well as fairly. An online civil court, for certain classes of dispute, is more than likely inevitable but it may be some years before it is introduced. It would, of course, require a change in legislation and new court rules. Considering the current focus on mediation, it would also be beneficial to have a more integrated approach to dispute resolution in our courts incorporating dispute avoidance and dispute containment at an early stage.

We need an innovative approach to address the challenging problems in our courts in a long term strategic way and to ensure that we are administering justice effectively as well as fairly.

It is unlikely that an online system would replace our traditional courts as "real live" courts are essential in certain cases but I envisage that it may at least operate as part of our civil justice system in the future. We should proceed cautiously and watch and learn from other jurisdictions. We are awaiting on-line filing of documents with the courts which is an essential first step before online courts are introduced.

Food for thought – in the future, will some civil disputes in Ireland be administered by robots in virtual courts?

Legal Services Provided by the Board for Potential Victims of Human Trafficking

The Legal Aid Board provides legal services on certain matters to persons identified by the Garda National Immigration Bureau (GNIB) as "potential victims" of human trafficking under the Criminal Law (Human Trafficking) Act 2008.

There are no merits or means testing involved and the applicant is not required to make a financial contribution to the Legal Aid Board. The service will be provided by solicitors who have received specific training in human trafficking issues.

The service provides initial advice to persons identified as "potential victims" of human trafficking on their legal rights. It also provides legal advice and aid to "potential victims" of human trafficking offences acting as witnesses in prosecutions taken under specified provisions of the Criminal Law (Human Trafficking) Act 2008.

Information leaflets in relation to the Board's services in this area are available on the Board's website www.legalaidboard.ie.

Whistleblowers and the Protected Disclosures Act 2014

Phil O'Laoide,
Regional Manager

The Protected Disclosures Act 2014 which became law on the 15th July 2014 introduces significant protections for whistle blowers and significant obligations on the organisations in which they work. The Act applies to all types of organisations regardless of their size or whether they are public or private or non -profit. It also applies to a wide range of workers to include employees, contractors, trainees, agency staff, former employees and even in some limited circumstances "volunteers". Contrary to general practice the Act is also retrospective. Therefore an employee making a protected disclosure prior to the date of the coming into force of the Act (15th July 2014) may be protected.

What is a Protected Disclosure

A disclosure is not defined in the legislation other than a reference in Section 3(1): "disclosure in a case in which information disclosed is information of which the person receiving the information is already aware, means bringing to the person's attention". Therefore a disclosure may concern new information or drawing a person's attention to something of which they are already aware. It does not have to be in writing. It is a disclosure of information which in the reasonable belief of the discloser shows one or more relevant wrongdoing. The disclosure must be giving information or conveying facts and not just stating a position. It must come to the attention of the employee in connection with their employment and must be disclosed in the manner described in the Act to be protected. Motivation is irrelevant.

Relevant Wrongdoing

There are 8 relevant wrongdoings:

A. Commission of an offence

B. Failure to comply with any legal obligation other than one arising out of the worker's contract

C. Miscarriage of justice

D. A danger to health or safety of **any** individual

E. Damage to the environment

F. Unlawful or otherwise improper use of funds of resources of a public body or of other public money

G. An act or omission by or on behalf of a public body that is oppressive, discriminatory or grossly negligent or constitute gross mismanagement

H. Information tending to show that any matter falling in paragraphs (a) to (g) has been, is being or will be concealed or destroyed

Disclosed in the Manner Described

Disclosure can be internally to an employer or to a prescribed person or to the relevant minister or to a legal representative or in in some circumstances to the media. It is a tiered disclosure regime and an employer should put procedures in place and set out clearly how disclosure should take place. Under the Act however there is no obligation to disclose internally but to disclose for example to media or outside prescribed procedures the worker will only be protected if the disclosure is not made for personal gain. In disclosing externally the disclosing person must show that in all the circumstances it is reasonable that the disclosure is made and that they reasonably believe they will be penalised if they disclose to the prescribed person or there is no prescribed person or believes the evidence will be concealed or destroyed or there has previously made disclosures with substantially the same information or the relevant wrongdoing is exceptionally serious.

We will have to await case law to see how these different sections will be interpreted. The tiered disclosure process is designed to encourage workers to make disclosures to the employer in the first instance, to specify a third parties in certain other circumstances and to make disclosures of information to the public domain as an option of last resort .The main rule is to gain the protection of the legislation workers must comply with the disclosure process.

The Burden of Proof

Under Section 5 (8) of the Protected Disclosures Act 2014 a disclosure is presumed to be protected unless the contrary is proved.

What are the Protections Available?

The Act provides six main protections to whistle blowers set out in Part 3 of the Act. The first three are employment related protections available to employees only and provide for increased protection against unfair dismissal and other forms of penalisation that an employee could suffer as a result of making a protected disclosure (employee has the same meaning as a term in the Unfair Dismissals Act but specifically includes members of An Garda Síochána and civil servants). The three remaining protections paragraph 3.4 to 3.6 are available to any worker defined very broadly as including employees of independent contractors, consultants, agency workers, temporary workers, trainees, interns, work experience etc. In relation to the first three protections we look firstly at Unfair Dismissal Protection. Section 11 of the Act amends the Unfair Dismissals Acts so that dismissing an employee for protected disclosure is an unfair dismissal. It should be noted:

The Act provides six main protections to whistle blowers… the first three are available to employees only … the remaining three are available to any worker defined very broadly.

The Act removes the one year service requirement for access to the unfair

dismissals legislation and whistleblowing employees can bring claims for unfair dismissal from the start of their employment.

The Act also increases compensation that can be awarded under the Unfair Dismissals Act for a maximum of 2 years gross remuneration to the maximum of 5 years gross remuneration if the employee has been dismissed for making a protected disclosure (this is the only instances where motivation maybe a factor in reducing but not denying compensation. Compensation may be reduced by 25% if the investigation of a relevant wrongdoing was not the sole or main motivation for making the disclosure).

Interim Relief

An employee who claims to have been unfairly dismissed for having made a protected disclosure can apply to the Circuit Court for interim relief. The outcome of an Interim Relief Application can be an order for reinstatement, re-engagement or the continuation of the employee's contract of employment pending the determination or settlement of the employee's claim for unfair dismissal. The court has to be satisfied that there are substantial grounds for contending the dismissal results wholly or mainly from the employee having made a protected disclosure.

Protections from Penalisation

Under Section 12 of the legislation an employer shall not penalise or threaten penalisation against an employee or cause or permit any other person to penalise or threaten penalisation against an employee for having made a protective disclosure. Penalisation is defined very broadly and includes any acts or omissions that affects a worker to the workers detriment including suspension, lay-off, dismissal, transfer of duty, demotion, unfair treatment, imposition, or administrating of any discipline, remands or other penalty, coercion, harassment, unfair treatment, discrimination, disadvantage, injury, damage or loss or threat of reprisal.

A New Action in Tort

Under Section 13 of the Protected Disclosures Act a worker who is subjected to inappropriate treatment as a result of making a protected disclosure will also enjoy a new right of action in tort against any person who causes them detriment. This action applies to employees and non-employees and to any type person who may be negatively affected by the making of a protected disclosure.

Protection Against Civil and Criminal Suits

Section 14 of the Act provides that workers are immune from civil liability in respect of having made a protected disclosure and will be able to claim qualified privilege under the Defamation Acts. In defence of criminal proceedings in relation to an offence prohibiting or restricting disclosure of information a worker can rely on a specific defence of "reasonable belief".

Protection of Identity

Perhaps the most onerous obligation on a person to whom a protection disclosure is made is that they must take all reasonable steps to avoid disclosing information that might identify the

person who has made the protected disclosure. This protection is not absolute. Disclosure identity may occur: where the person to whom the protected disclosure was made shows that he or she took all reasonable steps to avoid so disclosing any information or believed that the person making the disclosure did not object or disclosing the information was necessary for an effected investigation of the relevant wrongdoing concerned and the prevention of serious risk, security of the state, public health, public safety or the prevention of a crime or prosecution. It will be very difficult for an employer to determine when it is appropriate to disclose a persons identity and when it is not. It very much will depend on the nature of the allegations and the wrongdoing concerned. Also of course the question of natural justice applies and as a general principle of fair procedures an accused person has the right to confront his accusers. Again case law and practise are awaited to inform us further in this area.

Every public body must establish and maintain procedures for the making of protected disclosure by workers who are or were employed by the organisation.

Whistleblowing Procedures

Every public body must establish and maintain procedures for the making of protected disclosure by workers who are or were employed by the organisation (the obligation does not apply to other organisations but obviously it would be desirable that they would put such procedures in place). The advantages of good whistle-blowing procedures are that that they should create a work place culture where workers are encouraged to disclose wrongdoing confident that they will not be penalised and that they can disclose in the knowledge that their disclosures will be acted upon. An organisation with a good set of procedures will benefit by deterring wrongdoing in the workplace, improving trust and confidence and morale and limiting the risk of institutional and financial damage (Failure to comply with an employers protected disclosure procedures will be taken into consideration during any proceedings. In the UK case of *Jeffery v London Borough of Merton* an unfair dismissals case where the claimant made his initial disclosure on the internet and not via his employer's disclosure procedure the Employment Tribunal held that the disclosure wasn't a protected disclosure).

It is essential in the disclosure procedures that there is commitment to protect the identity of the worker making the disclosure. However such assurances must be realistic as there are circumstances as already outlined above where confidentiality may not be able to be maintained. Procedures must also inform workers how a disclosure will be dealt with once it is received and that there will be an assessment to determine whether or not investigation is necessary. Workers should be assured that the investigation will be carried out in an impartial manner consistent with principles of due process and natural justice. The appropriate person to receive disclosures should be clearly identified. These would usually be a line manager but additional or alternative recipients should be set out. A review process

should be built into the procedures and workers should be assured that this review will be conducted by someone other than the person who carried out an initial assessment. Above all the procedures should provide that the worker will be supported by the organisation throughout the assessment stage, the investigation and completion of the investigation.

Finally it should be noted that employers cannot contract out of the legislation or seek to gag whistle blowers. Employers who have good procedures for implementing the protective disclosures legislation can create a culture of trust and confidence in the workforce.

New Family Law Court Centre to be Developed

A major site beside the Four Courts is to be used as a venue for a family law court centre. The large site, which will also have capacity for other public services and offices, is at Hammond Lane off Church Street in Dublin and is currently in the ownership of the Office of Public Works (OPW).

At the inspection visit Chief Justice Denham said that "there is a great need for a single centre where family cases may be heard, with all the required support services at hand. This site poses a great opportunity for us to do something positive. It can link the administration of family law, and many other of our public services to the Four Courts complex".

Minster for Justice Frances Fitzgerald said, "I am fully aware of the need to develop suitable and appropriate facilities in regard to family law cases. I fully support the plans to centralise all family law business, including mediation and legal aid services in Dublin. The planned facilities at this site would comply with modern standards for court accommodation and would, most importantly, meet the needs of clients who come to court at a difficult time.

This is an ambitious project which will require detailed planning and consultation and I am happy that my Department will engage fully in taking this forward". The Minister also referred to the Programme for Government commitment and the ongoing work to undertake significant reform of the courts, including reform of the family law court structure so that it is streamlined, more efficient, more user-friendly and less costly.

Minister Harris referred to the strong working relationship between the OPW and the Courts Service on the provision of facilities. "I am delighted that we can progress the development of a family law court on this site and I have no doubt that the new facility will offer the highest level of accommodation. In addition, the site will provide much needed accommodation for other State services".

Next Steps

The next step is the preparation of a detailed business case for the proposed development. This will require further work to determine the exact arrangement of services to be included in the building. A working group will develop the project from this year with a view to proceeding to detailed design work next year and construction could potentially begin in 2016 and be completed in 2018.

Case Note in Relation to the Water Protest Charges

Barbara Egan,
Finglas Law Centre

Most solicitors within the Legal Aid Board are well versed in what areas of practice we deal with and those which are excluded. However, from time to time issues will arise which require closer scrutiny and lead us into unchartered waters. Such a situation arose over the last few months with the receipt of applications from people who had come before the High Court defending proceedings brought against them on behalf of GMC/Sierra Limited. GMC/Sierra had been charged with the task of installing water meters which action had precipitated widespread protests throughout the country. As a result the company had sought and obtained injunctive relief in the High Court against a number of individuals in the Dublin area.

Subsequent to this proceedings were brought seeking to attach and commit several people to prison for breach of the orders made by the court. It was at this stage that the Law Centres became directly involved. As a side issue, there were Judicial Review proceedings brought by some of the same applicants seeking declaratory relief against the state in relation to the provision of legal aid. While a full hearing was pending in one client's JR case he made an application to the Legal Aid Board for a certificate to cover his representation in the contempt matter.

The question that then arose was whether the contempt proceedings which can, by their very nature, lead to the loss of a person's liberty are 'criminal' in nature within the meaning of Article 6 of the European Convention on Human Rights. If the proceedings at issue did attract the protection of Article 6 then certain safeguards would apply to the hearing. One would be the right to examine witnesses against you. There is abundant authority from the European Court of Human Rights and from England and Wales to support the contention that these contempt proceedings, although arising from a civil source, are criminal in nature. It has been argued in the past that proceedings of this nature are purely civil but the authority does not support this. Given that this is the case the question arose as to how applicants for legal aid in this position should be processed.

Even though the applicant presenting himself at the Law Centre was dealing with proceedings that were civil in nature, the sanction that GMC/Sierra was

seeking to impose was to commit him to prison and in those circumstances the claim against him had 'morphed' into a claim that was criminal in nature. At the outset of the case the proceedings were civil in nature and thus clearly within the remit of the Board. The applicant in question was financially eligible and instructed that there were reasonable grounds to defend the proceedings. However, when the contempt aspect of the matter was reached the matter had taken on a criminal character.

Section 28(5) of the Civil Legal Aid Act 1995 requires that regard is given to international instruments. Article 6 of the European Convention on Human Rights which applies to criminal charges has been interpreted by the Court as extending to civil matters where the penalty is committal to prison and deprivation of liberty. In these circumstances the applicant is entitled to legal aid. In the absence of any other legislation to provide legal aid to a defendant in civil proceedings where the penalty can be committal to prison it falls to the state to provide legal aid. Consideration having been given to this a certificate was granted.

In the absence of any other legislation to provide legal aid to a defendant in civil proceedings where the penalty can be committal to prison it falls to the state to provide legal aid.

In the first of these cases in which legal aid was granted was before the court in December of 2014. The related Judicial Review came before the High Court within days and the Judge indicated that the issues arising were moot in that legal aid had now been granted. The contempt case here was disposed of quickly in that GMC/Sierra chose to focus on breaches of an injunction granted after the one which applied to the client. The case against him was adjourned generally.

Subsequent to this there were further applications made for legal aid by several of those who the company contended were in breach of the later injunction. Legal aid was ultimately granted to a number of individuals represented by two solicitors from two different Law Centres. There was a full hearing before Judge Gilligan in the High Court on 16 February 2015 and he delivered his judgement on February 19 2015. He refused relief in relation to two people as he stated that the Plaintiff had not satisfied him beyond a reasonable doubt. The five remaining protestors were committed to prison. Two were committed for 28 days and the other two for 56 days as there had been a previous finding against them.

All involved were given an opportunity to give undertakings to the court and all, bar one who was out of the jurisdiction, refused to do so. Counsel advised that there were no clear grounds for appeal and that the matter had been dealt with carefully and appropriately by the Judge. Subsequent to their committal a copy of the warrant was obtained and counsel advised that there were clear grounds to bring an Article 40 application. As legal aid in these matters is dealt with by means of the Attorney General's scheme the private practitioner who had previously dealt with the case took the matter back to the High Court. On 9 March 2015 the President of the High Court released the four people who had

been imprisoned as a result of flaws in the warrant.

These cases are of interest in relation to the scope of Legal Aid and how situations can arise where civil legal aid is granted where it might not previously have been envisaged that it would be. The issue relating to Article 6 are of particular interest. These issues and these types of cases may continue to arise as more proceedings of this nature may come before the court in the coming months. It is an opportunity to be involved in an area where solicitors within the board would rarely venture and to deal with clients whose liberty is in jeopardy and require representation in defending their position.

The Children & Family Relationships Act 2015

Ronan Deegan,
Civil Operations Section

The Children and Family Relationships Act 2015 is a significant piece of legislation recently enacted by the Oireachtas. The legislation, when commenced, will introduce a regime for dealing with the parentage of children conceived via donor assisted human reproduction. It makes significant amendments to the Guardianship of Infants Act 1964 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It also amends the following other family legislation:

- Family Law (Maintenance of Spouses and Children) Act 1976
- Status of Children Act 1987
- Family Law Act 1995
- Civil Registration Act 2004
- Adoption Act 2010

The "Best Interests" Principle

The Act inserts the "best interests" principle throughout family law dealing with children. It provides that a court must always put the best interests of a child first in dealing with family law applications involving children. This is consistent with the newly inserted Article 42A.4.1 of the Constitution of Ireland 1937 which provides that the best interests of the child will be the paramount consideration in childcare, adoption, custody, access, and guardianship proceedings.

Section 63 inserts a new Part V into the Guardianship of Infants Act 1964 which sets out in detail the factors that the Court must apply when considering the best interests of the child.

Donor Assisted Human Reproduction

The Act will establish a legal regime for donor assisted human reproduction ("DAHR") though not surrogacy. The birth mother is always regarded as a parent of a child (see the judgement of the Supreme Court in *MR v An tArd-Cháraitheoir [2014] IESC 60*). Section 5 (8) of the Act provides that by default the birth mother alone will be a legal parent of a child born as a result of a DAHR procedure carried out after the commencement of Part II. However,

section 5(1) provides that the mother's husband, civil partner, or cohabitant can be an "intending parent", if both they and the mother consents to for them to be.

In the case of a child born as a result of a DAHR procedure prior to the commencement of Part II of the Act, section 21 provides for the mother and the intending parent to apply jointly to the District Court for a declaration that the intending parent is a parent of the child concerned. The "child" may be over eighteen. The child will be joined as a party to the proceedings. Each of the applicants will have to swear a grounding affidavit with three required averments:

- that the child is a child to whom the section applies
- that the applicant who is not the birth mother is an intending parent of the child
- that they consent to the declaration being made

Section 22 provides for the mother, the intending parent, or the child to apply the Circuit Court for a declaration that the intending parent is a parent of the child concerned.

Part 9 of the Act provides for the registration of births of children born as a result of DAHR.

A consequence of the fact that a civil partner of a mother (as well as a spouse, when legislation is enacted to implement the Thirty-Fourth Amendment to the Constitution) can be an intending parent is that a child can now have, in law, two female birth parents. Consequently the Act amends certain other legislation to provide that where a child has two female parents, the second parent (who is not described as a "mother", but rather as a "second parent" or "second female parent") will have the rights that a father would otherwise have. As the birth mother is always automatically a parent (per MR), and the Act does not deal with surrogacy, there is no provision for a child to have two male birth parents. That said the amendments to the Adoption Act 2010 do provide for two male civil partners to adopt a child.

Guardianship of Infants Act 1964

The Act comprehensively amends the Guardianship of Infants Act. As well as making provisions consequent on same-sex marriage, civil partnership, co-habitation, and DAHR, it also expands the range of people who can apply for guardianship, custody, and access, removes the need for certain persons to apply to the Court for leave to make an application, and introduces enforcement of access/custody orders. Some of the more important changes are set out in the table on pages 24-26.

The Law Reform Commission have produced a consolidated version of the 1964 Act which includes as footnotes the amendments the 2015 Act will make, available at http://www.lawreform.ie/

Succession Act 1965

Section 69 amends Section 117 of the Succession Act 1965 to provide that an order in proceedings by a child for proper provision out of a parent's estate cannot affect the legal right share of the parent's civil partner where that person is also a parent of the child.

Family Law (Maintenance of Spouses and Children) Act 1976

Section 73 allows maintenance orders to be made against a cohabitant of a parent or a person in loco parentis, who is not themselves a parent but has been appointed a guardian.

Status of Children Act 1987

Section 80 amends section 35 of the Status of Children Act 1987 to update the provisions on seeking a declaration of parentage. A person can now seek a declaration that either a person or two persons named in the application are or are not a parent or parents of the child named in the application (who no longer need be the applicant). The applicant can be either the child, or a person seeking a declaration that they are or are not the parent concerned. This being the case, if the applicant is not the child, the child must be joined as a party to the proceedings. In addition, section 35(4), which allowed the Court to refuse to hear the application if it thought it in the best interests of the applicant, is repealed.

The 1987 Act is also amended so as to replace the provisions for blood testing to prove paternity in civil proceedings with DNA testing, and adapts it for the case of a child born as a result of DAHR.

Family Law Act 1995

Section 90 extends section 41 of the Family Law Act 1995 (regarding secured maintenance orders) to apply it to a maintenance order awarded against a cohabitant also. Section 91 amends section 42 of the 1995 Act to provide that where a Court awards a lump sum payment instead of a maintenance order, it can specify the purpose to which the payment is to be applied.

Adoption Act 2010

The amendments to this Act allow civil partners and couples co-habiting for more than three years to adopt children, and for a female same-sex couple to place a child for adoption. If a female same-sex couple places a child for adoption, the parent who is not the birth mother is treated as if she were the father of the child in the same circumstances. If there is no second parent (i.e. the birth mother is the only legal parent) the consultation requirement is removed completely.

There are consequential amendments to legislation dealing with adoptive leave that provide that where an adopting couple are of the same sex either partner may take adoptive leave (if a couple are of opposite-sex, only the adoptive mother may take it).

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

There are substantial changes to this Act. Sections 29, 30, and 34 of the 2010 Act are amended to provided that the Court must take the dependent children of the couple into account when making orders regarding the shared home.

The Act inserts similar provisions into the 2010 Act to those in the Family Law (Maintenance of Spouses and Children) Act 1976 to allow for maintenance to be awarded against a civil partner for the benefit of the dependent child of the civil partners or of one of the civil partners. If a dependent child of the civil partners is being maintained by a person who is not one of the civil partners, that person can in certain circumstances apply for

maintenance against either of the civil partners. Section 146 inserts a new section 52A into the 2010 Act which is essentially identical to section 9A of the 1976 Act (as amended). This means that a maintenance debtor arrested on foot of a bench warrant must be informed by the district judge of their right to apply for civil legal aid and advice.

Section 150 amends section 110 of the 2010 Act to provide that, when granting a dissolution of civil partnership, the Court must be satisfied that proper provision is made for any dependant children of the civil partnership. It also provides that a Court may make orders in relation to custody of or access to any dependant children in the same manner as if an application for access or custody had been made under the 1964 Act.

Section 155 amends section 118 of the 2010 Act to allow a Court grant a property adjustment order for the benefit of a dependant child of the civil partners, upon dissolution of the civil partnership or thereafter. Section 156 amends section 119 to provide that the welfare of a dependant child must be taken into account when granting ancillary orders in relation to the shared home.

Impact on the Board's Service

The Act is a major piece of family law, which is where the majority of the Board's work lies (84% of all cases handled in law centres in 2014). In particular, the Act encompasses a major update of the Guardianship of Infants Act 1964. It is these amendments which will have the most profound affect on the work of the Board. In 2014, 3,306 private practitioner legal aid certificates (63% of the total of 5,224) issued by the Board included an application under the 1964 Act. The Board's law centres handled a further 608 cases (3.4% of the total number of cases handled by law centres).

It is always difficult to predict in advance the extent to which any new piece of legislation will result in an increase in demand for legal services. However, the expansion of the scope of the 1964 Act has the obvious potential to expand the number of applications to the Board for civil legal aid for matters falling under the scope of the Act.

There are also significant amendments to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, arising out of the ability of civil partners to have children through DAHR and adoption. In reality, these provisions may now be superseded by the Thirty-Fourth Amendment (when it is implemented in legislation) though it is worth noting that England and Wales and Scotland did not repeal civil partnership legislation when same-sex marriage was introduced.

The DAHR provisions may not have the impact that they potentially could due to section 26 of the Act, which bans future anonymous donations. It has been speculated by some that this section may ironically serve to end DAHR in Ireland, given that historically most donations have been on an anonymous basis. The cost of the treatment may render it unaffordable for persons financially eligible for legal services in any event. It is important however to be aware of the changes in the law in relation to legal parentage that have arisen out of the decision to recognise DAHR in this jurisdiction.

Section	Amends GOIA section	New/Amended Provisions
46	5(2)	District Court has jurisdiction to grant a lump sum of up to €15,000 in maintenance proceedings .
47	6	• Civil partners/cohabitants are automatically joint guardians of a child they have jointly adopted. • If a civil partner/cohabitant who is a joint adopter dies, the surviving civil partner/co-habitant becomes the sole guardian, unless the Court appoints another .
49	6B (new)	• A man married to the child's mother who is the father of the child is automatically a guardian of the child (except in cases of DAHR). • a person living with the mother will be automatically a guardian if they have lived with the child's mother for twelve consecutive months after this section is commenced, including at least three months living with the mother and the child after the birth of the child. • A woman in a civil partnership with the child's mother is automatically a guardian of the child. • The Court can appoint a temporary guardian in certain circumstances.
	6C (new)	The following people are allowed to apply to the Court for guardianship • A person: married to, in a civil partnership with, or cohabiting for over three years with a parent of the child, who has shared responsibility for parenting the child for at least two years. • A person who has provided for the child's day to day care for at least twelve months, where there is no parent or guardian willing to exercise the rights and responsibilities of guardianship. If such a person applies the Court must direct that the Child and Family Agency be put on notice and have regard to any views they express. • A person appointed as a guardian under this section cannot take certain major decisions regarding the child's life as long as there is a parent still alive. These include residence, schooling, religion, consent to medical treatment and to place the child for adoption.

Section	Amends GOIA section	New/Amended Provisions
	6D (new)	Recognises certain foreign equivalents to guardianship under the Hague Convention or Council Regulation (EC) No. 2201/2003.
	6E (new)	Provides for the appointment by the Court of temporary guardians.
	6F (new)	A person can apply to the Court for a declaration that he or she is or is not (automatically) a guardian.
52	8A (new)	Guardianship ends when the guardian dies, the child reaches the age of 18 or the child gets married, whichever comes first.
55	11(B)	• Repeals section 11B(2) so as to remove the requirement for grandparents to apply to the Court for leave to apply for access. • Replaces "in loco parentis" with "person with whom the child resides or has formerly resided,". • Requires the Court to take into account the views of the child and whether it is necessary to facilitate access to the child, when deciding to grant access under this section.
57	11E (new)	Allows the following to apply for custody: • Relatives (grandparent, brother, sister, uncle or aunt of the child). • A former spouse or civil partner of a parent, or person who formerly cohabited with a parent for more than three years, and (in all cases) has shared with the parent day to day care of the child for at least two years. • An adult who has provided for the child's day to day care for at least twelve months, where there is no guardian willing to exercise the rights and responsibilities of guardianship. The Court must not make an order without the consent of each existing guardian, but may dispense with this requirement if it is in the best interests of the child.

Section	Amends GOIA section	New/Amended Provisions
58	12A (new)	Allows the Court to: • Add such conditions to any order as it feels appropriate. • Take up the passport of a child or direct that it be held by a specific person where necessary. • Adjourn proceedings under the Guardianship of Infants Act and make a care order or supervision order.
59	18A (new)	Provides for enforcement of access/custody orders. An enforcement of access/custody order can provide for: • Extra periods of custody/access for the applicant. • The person who denied the applicant access/custody to reimburse the applicant financially for expenses incurred in attempting to exercise the custody/access previously ordered. • For the applicant and/or respondent to attend counselling, a parenting programme, or receive information on mediation.
	18C (new)	The court can vary or terminate an enforcement order.
	18D (new)	Where a parent fails to exercise access or custody granted to them the other person can apply to the Court for that person to compensate them for expenses incurred in trying to facilitate the custody or access concerned.

The Child Care Acts: Annotated & Consolidated

The third edition of Paul Ward's book was published in August 2014 by Thomson Round Hall. The updated content includes the Child Care (Amendment) Acts of 2011 and 2013, the role of the Child and Family Agency, and key judgments since the last edition. The LAB library has experienced unprecedented demand for this book and is looking at options for sourcing additional copies.

Annotated and consolidated legislation is also available on Westlaw IE (available to all staff via the LAB portal), including primary and secondary child care legislation, and a number of articles on child care law from a range of publications including the *Irish Journal of Family Law.*

Revised versions of the Child Care Act 1991 and the Child Care (Amendment) Act 2007 are available on the Law Reform Commission website.

Costs and Childcare Proceedings

Phil O'Laoide,
Regional Manager

The reader will be familiar with the Supreme Court case of *CFA v OA* and the judgement of Mr Justice John McMenamin on the 23rd June 2015.

The matter came to the Supreme Court pursuant to Section 16 of the Courts of Justice Act 1947 by way of case stated. The question raised was:

In what circumstances may a District Court Judge award costs against the Child and Family Agency to a parents privately retained lawyer, consequent on childcare proceedings?

Legislation provides that a Circuit Court Judge may state the case to the Supreme Court on any question of law on a matter arising in the Circuit Court. Here the "law" referred to the exercise of a discretion in respect of costs. As you will know in the substantive hearing the District Court Judge intimated an intention to award costs in a childcare case and the HSE (the CFA's predecessor) applied for a case stated to the High Court as to whether judges held any jurisdiction to award costs in childcare proceedings. The High Court held against the HSE and the HSE initially appealed to the Supreme Court but then withdrew their appeal. In the original case in the District Court costs were awarded and it was that Order which was appealed to the Circuit Court and was the basis for the case stated herein.

Some points to note about this case:

1. The judge raised at the outset the query as to why the appellants (CAF formally HSE) did not proceed by way of judicial review.

2. It was accepted that the question that arose from the case stated was not confined to one childcare matter it was effectively a test case.

3. The judge said that any fixed judicial policy on costs awards in child cases would have broad consequences to children, to the other parties involved and ultimately to the public.

In his judgment Judge McMenamin advised that in childcare cases a number of constitutional rights are at stake:

The child's right to have the decisions made with his or her welfare as a primary consideration and the rights of both parents and of children to be properly represented in proceedings where "the outcome can be truly life changing".

From the outset the Supreme Court held

that it was a long established that costs were a discretionary matter but a judge is not at large in considering a costs application and may not apply a policy on costs awards and must exercise his or her discretion in each case.

The Supreme Court examined the statutory provisions underlying the work of the Child and Family Agency. It identified the main policy objectives as being the promotion of the welfare of children and its duty to regard the welfare of the child as its first and paramount consideration. In furtherance of these aims the statutory duty requires the Agency to institute proceedings where it appears a child requires care and protection. The degree of judgment exercised by the CFA involves an assessment in circumstances in which childcare proceedings should be initiated, maintained and brought to conclusion. Interestingly the judgment differentiates the work of the CFA from other organisations of the State for example the DPP which operates within a series of limited timeframes. The court held that by contrast the nature of court orders such as full care orders placing a child in care is more long term, imposing continuing responsibility on the Agency. The court recognised that a high degree of "parental input" is necessary in the consideration of welfare questions and parents are entitled to be legally represented in their own right not only "by virtue of their constitutional status but also because of their close and intimate connection towards child welfare questions". The court recognised that the Agency may sometimes initiate proceedings it has at its disposal with only a limited degree of information where albeit on further enquiry and after the institution of proceedings it may be found court orders are not warranted.

The Supreme Court recognised the difficult decisions that District Judges make in childcare cases and the personal and social significance of their judgments in contrast to judgments in other courts.

Judge McMenimum makes it very clear in his judgment that with the wide powers conferred on the CFA comes a responsibility to verify facts and "insofar as possible to ensure that in this highly sensitive and profoundly human area which involves incursions into relationships between parents and children, un-thought out precipitous and drastic interventions do not cause problems rather than curing them".

The Supreme Court recognised the difficult decisions that District Judges make in childcare cases and the personal and social significance of their judgments in contrast to judgments in other courts. The court welcomed the recent reforms to allow media access to courts engaging in childcare work.

Judge McMenamin set out the Child and Family Agency's position in arguing that a District Court judge should bear in mind that legal aid will be available to parents of children engaged in childcare proceedings. Reference is made to Section 33 of the 1995 Act which advises that costs are to be recoverable by or on behalf of the person in receipt of legal aid or advice and it is intended that such recipient is to enjoy the same rights and

duties of recovery of costs against another party as would normally apply to privately represented litigants. The CFA's legal team argued that the existence of such a duty suggested that in childcare cases a court in assessing whether to award costs to a party of moderate means who retains a private lawyer should bear in mind that such a person might have applied for and received legal aid.

"It is true all cases are distinct but not all cases are exceptional".— Judge McMenamin

The court took judicial notice that: the District Court frequently made no award as to costs in childcare proceedings where parents were legally aided nor were any precedents presented to the court for the Child and Family Agency actually seeking an award of costs against parents.

That frequently parents are represented under the Civil Legal Aid Scheme and that courts may occasionally refrain from awarding costs on a practical basis i.e. funding ultimately emanates from the same ultimate source ie. the State albeit that the Legal Aid Board solicitors have a duty to make an application in fulfilment of their duties under Section 33 of the Civil Legal Aid Act 1995.

The court held that the conduct of the case and its outcome are the two relevant factors in any costs award. In the case at hand the court found that District Judge Toal had a granted a supervision order for a period of one year with a review date, and this order was not appealed on its merits. It could not be said then that Ms. OA the respondent had been "a successful party".

Judge McMenamin's judgment sets out the consequences of judges adopting a general approach in exercising their discretion in costs. He said there was a risk it could create a type of "shadow legal aid scheme administered by judges" and rules might not be properly recognised or its application might vary.

It would appear from this landmark case that the starting point should be that there be no order for costs in favour of parent respondents in District Court proceedings unless there are distinct features in the case which might include:

1. Situations where the Child and Family Agency had acted captiously, arbitrarily or unnecessarily in commencing and maintaining the proceedings

2. Where a particular injustice would be visited on the parents or another party if they were to bear the costs having regard to the length and complexity of the proceedings

3. Where the outcome of the case is particularly clear and compelling

Judge McMenamin is of the view that in any case in which a District Court seeks to depart from the general default position and to award costs it is necessary to give reasons and these reasons must identify some clear feature or issue in the case which makes the case exceptional.

To quote the judge, "it is true all cases are distinct but not all cases are exceptional". It remains to be seen how this is interpreted. It would seem that costs should not turn on the outcome of

the proceedings but only be awarded in exceptional cases.

What is of interest to the Legal Aid Board is the judge's view that if there was an argument that in pursuance of administrative justice and/or the vindication of family rights under the constitution a more effective scheme of legal representation for parents and others was required (and the judge said that he did not exclude that possibility) then such a matter was ultimately for the Supreme Court to decide in a case where the issues were properly argued rather than a case stated in respect of District Court costs. Will this pave the way for future litigation on this question?

Finally it is clear that the Supreme Court considers that if costs were to be freely awarded the Child and Family Agency may become over careful in deciding not to bring proceedings and that children may then be at risk.

Practice Note: District Court (Childcare) Rules

New District Court (Childcare) Rules came into operation on the 11th May 2015 (SI No.143/2015). An application for an emergency care order, interim care order and supervision order must all be preceded by the issue and service of a Notice and an Affidavit sworn by the moving party setting out and verifying the grounds of the application. Interestingly the rules at Section 9 (3) are silent as to the necessity of a grounding affidavit where an application for an extension of an existing interim care order is made. We await with interest what the practice will be on the ground.

Banks or Building Societies in Liquidation

In any action against a bank or building society in liquidation no proceedings can issue without permission from the High Court. This is now governed by the Irish Bank Resolution Corporation Act 2013. Section 6 requires that there be no further actions or proceedings issued against IBRC without the consent of the High Court.

The procedure for the obtaining of such consent is as follows:

1. An Ex Parte Docket and grounding Affidavit are stamped.

2. The grounding Affidavit is filed in the Central Office and should exhibit the Intended proceedings.

3. A copy of the filed Affidavit and Ex Parte Docket are handed to the High Court Registrar of the Motion Judge on any Monday during term time.

4. The grounding Affidavit should set out the title of the proceedings and the nature of the intended Plaintiff's claim. It should also set out the jurisdiction in which the intended proceedings are to be brought.

5. The cost of the application will generally be reserved to the trial of the matter.

6. The High Court Order should be sent to the relevant County Registrar/Registrar when the substantive proceedings are being issued.

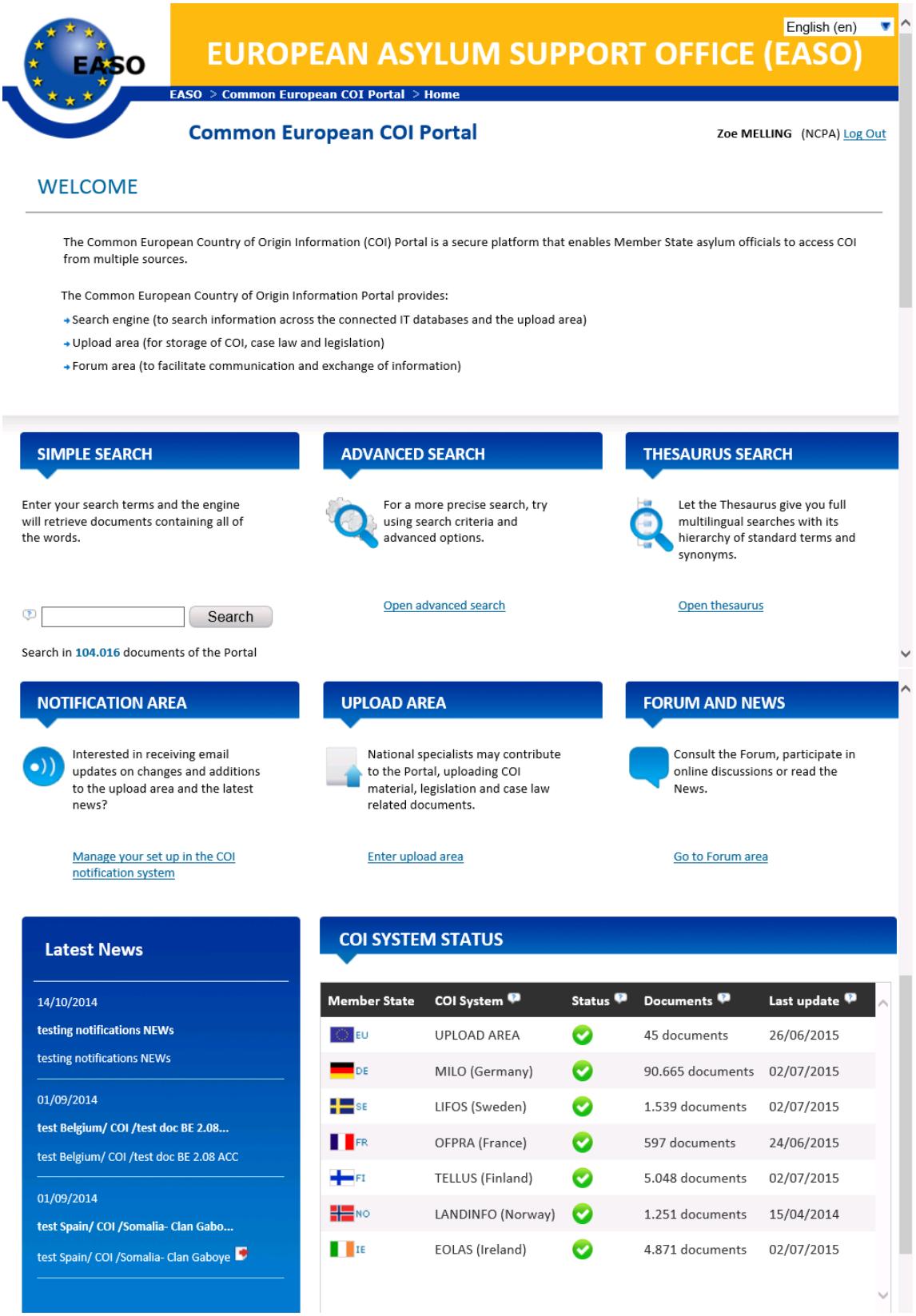
E-Developments in Library and Research Services

Zoë Melling,
Research & Information Unit

The final data migration for the E-Library upgrades was successfully completed on 20th May, and the new interface will be activated for end users as soon as testing and customisation work has been completed. Training will be rolled out for all users in the coming months. The new system is known as Enterprise/Portfolio and includes a portal component, digital archive and integrated search function. The E-Library, which was developed and launched in 2007 under the Department of Justice's Asylum and Immigration Strategic Integration Programme (AISIP), includes online access to the catalogues and electronic collections of the LAB, RDC and DJE libraries. In addition to the library catalogue, the E-Library contains approximately 25,000 electronic documents including Country of Origin Information, RDC country packs, query responses, journal contents, legal resources, and training materials. The system has been due an upgrade for a number of years as the digital archive software had reached end of life and is no longer supported or maintained by the system vendor. This was delayed by a number of factors including technical issues, availability of the new software for local hosting, staff resources and budgetary constraints. In 2012 the RDC secured funding from the European Refugee Fund (ERF) to connect its database to the EU Country of Origin (COI) Portal, and this also covered the library system upgrades which were required prior to the connection.

On 10th June 2015 the RDC COI database, known as Eolas, was successfully connected to the EU COI Portal. Launched in 2011, the COI Portal is managed by the European Asylum Support Agency (EASO) and aims to support practical co-operation and decision making in asylum procedures. It provides a common entry-point enabling asylum officials from EU+ countries (including Norway and Switzerland) to access COI from multiple sources via a web-based interface. It also includes an upload area for each country, a communications forum and a notification system. The RDC has been involved in the COI Portal project from its inception in 2007 and agreed at the outset to connect its document repository. This will enable a more integrated and standardised approach to the provision of COI to asylum agencies and other key stakeholders both in Ireland and Europe, and contribute to the Common European Asylum System. Connection to the Portal also allows for remote access to the RDC digital archive for the first time. Currently the E-Library, although available to users via the LAB & DJE internal intranets, is not accessible to external stakeholders who don't have access to these networks.

COI Portal Homepage



Current Awareness: Legislation Update

Civil Debt (Procedures) Bill 2015

The Bill was published by the Government on 30th June 2015 and provides for the enforcement of certain categories of civil debts by means of attachment of earnings or deductions from certain social welfare payments where the debtor has capacity to repay the moneys owed. It seeks to implement recommendations of the 2010 Law Reform Commission Report Personal Debt Management and Debt Enforcement aimed at enforcement and recovery of debts, provides access to new District Court procedures to deal with certain debts where the debtor won't pay, includes safeguards to ensure protection of debtors who can't pay, and proposes to abolish imprisonment of debtors.

Central Bank (Variable Rate Mortgages) Bill 2015

This Private Member's Bill was introduced on 9th June 2015 to address failures in the market for principal dwelling house mortgage loans, and to give the Central Bank powers to cap the interest charge on variable rate mortgages. It only applies to banks operating in the Irish market on or before 1st January 2015.

Workplace Relations Act 2015

The Act was signed by the President on 20th May 2015 and is due to be commenced on 1st October 2015. It provides for changes to the procedures for dealing with the resolution of industrial disputes and complaints regarding breaches of employment legislation. Under the new legislation a Workplace Relations Commission will be formed to replace a number of existing bodies and the appeals functions of the Employment Appeals Tribunal will be transferred to the Labour Court. An overview of the Act is included in the latest edition of the LAB Library Bulletin.

International Protection Bill

The General Scheme for the drafting of the International Protection Bill was published on 24th March 2015. The Bill aims to streamline procedures for international protection and reduce the length of time asylum applicants spend in the direct provision system. Ireland is the only EU Member State that doesn't currently have a single application procedure in place for asylum seekers. Under the scheme the Office of the Refugee Applications Commissioner (ORAC) will be subsumed into the Department of Justice.

Personal Insolvency (Amendment) Bill 2015

This Private Member's Bill was introduced on 11th March 2015. The purpose of the Bill is to effect a further reduction in the automatic discharge period from bankruptcy to one year and to reduce income payment orders to a maximum of three years. In addition there is a provision that in circumstances where the principal private residence of the bankruptcy has not been sold within three years of the adjudication in bankruptcy ownership of the principal private residence re-vests in the bankrupt.

Current Awareness: Case Summaries

Bank of Ireland Mortgage Bank v Finnegan and Ward [2015] IEHC 304

This matter came before the High Court by way of Appeal from the Circuit Court. Ms. Justice Murphy delivered her judgment on the 20th May, 2015. In October 2012 the Plaintiff issued a Civil Bill for Possession of the Defendants' residence in County Cavan. The Civil Bill stated in paragraph 7:

"the rateable valuation of the premises does not exceed €253.94 (£200). The Plaintiff will rely at the hearing of this Civil Bill on the following affidavits:

1. Affidavit of Geoffrey Hogan solicitor on behalf of the Plaintiff sworn 8th October, 2012

2. Affidavit of Adrian Browne, Manager in the Arrears Support Unit of the Plaintiff sworn the 4th October, 2012".

When the matter came before the Circuit Court in Cavan the Plaintiff relied on the rateable valuation of the premises to establish jurisdiction, The Affidavit of Adrian Browne referred to a "Certificate of Rateable Valuation". This in fact was a stamped letter from the valuation office dated the 1st August 2012. The letter was headed "Provisional Assessment" and in this correspondence it was stated that the valuation office "were unable to issue such a Certificate as the property is not as yet valued for rating purposes however if a building is erected/ reconstructed in accordance with the dimensions shown on the deed plan submitted I certify the rateable valuation of the said building will not exceed the value of €253.95". The Plaintiff's claim came for hearing before the Circuit Court in Cavan on the 18th March 2014 and an Order for Possession was made.

The Defendants appealed the Order of the Circuit Court and the matter came before the High Court on the 26th January 2015. Six issues arose in relation to the appeal and the court dealt firstly with the **issue of jurisdiction.** The Defendants' position was that the Circuit Court's jurisdiction depended on the relevant property having been rateably valued and that that valuation did not exceed €253.95. The Plaintiff argued that the Defendants' objections were met by Section 67 and Section 60 of the Valuation Act 2011 and the letter of provisional assessment was sufficient. The Defendants' countered that Section 67 of the Valuation Act did not apply in their case because it was clear that no application had been made by the Plaintiff to the Commissioner of Valuation for rateable valuation. It was clear from the proceedings that both parties had been in contact with the valuation office but there was some disagreement as to the nature of the information emanating from that office on the status of the letter received by the Plaintiffs. The court having examined the correspondence from the valuation office was satisfied that both at the time of the initiation of the proceedings and at the time of the hearing of the Circuit Court the Defendants' premises were not rated or rateable. The legislature may have

intended that court's jurisdiction be based on market values as would appear form The Civil Liability and Courts Act 2004 Section 45 but the necessary ministerial order as required by Section 1 (2) to bring this into operation was not passed. The court held that this was the position until the enactment of the Land and Conveyancing Law Reform Act 2009 where a new jurisdiction not dependant on rateable valuation was conferred on the Circuit court in mortgage suits. This provision came into effect on 1st December 2009 but only confers this jurisdiction on the circuit court for mortgages for housing loans created after that date. Section 3 of the Land and Conveyancing Law Reform Act 2013 extends this jurisdiction to mortgages created before 1st December 2009. However in the present case the proceedings were commenced prior to the coming into force of this section and could not be affected by it. The Circuit Court did not therefore have jurisdiction to hear the case and make an order for repossession.

The practitioner in advising clients in relation to defence of repossession proceedings should check the date the proceedings issued and check does a rateable valuation for the mortgaged property exist.

Thanks to Victoria Ryan, Solicitor, Limerick Law Centre for bringing this case to our attention.

Child and Family Agency v HL & Anor [2014] IEDC 20

Judge Alan Mitchell gave judgment in the above case on the 28th November 2014. The case arose from an application for full care orders in respect of two children and the application was supported by the guardian ad litem and contested by both parents. The application was refused. The full judgment is available on the Courts Service website. The case is interesting in that Judge Mitchell deals with a number of issues very relevant for the childcare practitioner:

The admissibility of evidence and Reports in another jurisdiction where the authors of the Reports are not available to prove same:

In this case the Respondents had been living and were habitually resident in the United Kingdom and travelled to Ireland in the summer of 2009 at a time when the mother was at an advanced stage of pregnancy and was expecting one of the children. Documentation had been forwarded to the hospital where she gave birth by social services in the United Kingdom which expressed child protection concerns in respect of the unborn child. An emergency care order was granted. The court commenced hearing the application for the Section 18 Order in early summer of 2014 and heard oral evidence over 19 days. The Respondents sought to exclude evidence relating to historic documentation received from the United Kingdom where witnesses were not called to prove the documentation. The court held that in the light of the legal authorities and in all the circumstances it could attach legal or no weight to the expert evidence in the case regarding historic documentation save for Court Orders. The applicant's case was primarily based on events relating to the parents in England. No evidence was called to prove the documentation upon which the applicants were relying or on

events described in those documents. No evidence was called by the applicants to seek to substantiate the serious allegations of child abuse against the respondents or their alleged involvement in such abuse. The court found that the failure by the applicants to call this evidence was fundamental to the court determination in the case and that it would be a breach of the respondent's constitutional rights to a fair hearing as provided under Article 40.3 of the Constitution if the court was to decide this case in the absence of such evidence. Judge Mitchell went on to say that if as stated by the applicants that witnesses from the other jurisdiction refused or were not prepared to attend court it is a matter which should be raised by the Child and Family Agency with the appropriate ministers and their department to raise the matter with their ministerial colleagues in the United Kingdom as a matter of urgency.

Role of the Guardian Ad Litem

Judge Mitchell said it was clear from an examination of Section 26 (1) of the Childcare Act 1991 that a guardian ad litem is not a party to the proceedings as their appointment relates to circumstances where the child is not a party to the proceedings. He stated that from legal authorities it appeared to the court that a guardian ad litem can be described as a person "appointed by the court, who is independent of the parents and the Child and Family Agency who establishes and promotes the wishes, interests and feelings of the child, insofar as is practicable having regard to the child's age and understanding and who expresses an professional view as to what is in the child's best interest and welfare and presents this to the court for recommendations and advice as to what should happen the child".

Applying this definition the Judge found that the entitlement of the guardian ad litem to cross-examine is more limited than may be operating in practice in many childcare cases before the District Court. The judge went onto say that where facts in the case are in dispute between the CFA and the parents the guardian ad litem should not become involved in an adversarial nature in the determination of the disputed facts unless the guardian has been in a position to determine the wishes and feelings of the child. If there is a matter involving the welfare of the child the guardian with permission of the court may ask questions relating to this. Judge Mitchell said:

"it would appear that the appropriate occasion for the guardian ad litem to ask such questions would be at the conclusion of the examination in chief and before the cross examination of the witnesses takes places".

The guardian would have an opportunity during the hearing to give evidence to the court and present to the court their finding and recommendations. The Judge said that the role of the guardian is to advise the court and that it is of vital importance to their role that their independence be scrupulously protected and defended. In illustrating the importance of the preservation of the independence of the guardian the judge drew particular attention to a number of matters of concern:

There had been a recommendation made

by the guardian for the termination of telephone access between the respondent parents and the children. The judge deemed that this was inappropriate. He was of the view that any concerns which the guardian had in relation to any such telephone access should have been presented to the court on the occasion of the Interim Care Order Application and then it would have been a matter for the court having heard the concerns and hearing the views in evidence of the parties to determine whether the termination of such telephone access was appropriate.

Following the receipt of the psychologist report recommending reunification the guardian met with the children's social workers and arranged a meeting with these professionals with a view of discussing their findings. The judge said that it was inappropriate to have met the professional witnesses with the social worker as there would be a clear perception on the part of the parents which would have created a negative perception of the independence of the guardian.

During the course of the proceedings the guardian ad litem had made an application to the court for the appointment of a consultant paediatrician to review the medical records from England. The court refused this application at the time. In his judgment Judge Mitchell said that such an application was not appropriate as it exceeded the role and function of the guardian ad litem at that stage in the proceedings. The responsibility to prove the case in childcare proceedings is a matter for the Child and Family Agency

The court did find however that because if the complexity of the case it was reasonable for a solicitor and counsel to represent the guardian and awarded the guardian's costs.

Delay

Judge Mitchell in these proceedings directed the guardian to write to HIQA and the Children's Ombudsman notifying them of the delays in the case and asking them to investigate. The applicant had been requested by the court to prepare a chronology with a view as to ascertaining how the delays occurred. The chronology was prepared but agreement could not be reached on the document to be presented to the court. In such circumstances where there is dispute which is not relevant to the final determination the court did not make any findings as regarding how the delay had occurred or the reasons for the delay or culpability however they did find that the delay was "inordinate, inexcusable and entirely unacceptable and not in the best interests of children".

Training of Social Workers

The Court in this case finally required the CFA to carry out an internal independent investigation into its handling of the case and to critically examine the role of the social worker team in the case. This investigation was to incorporate an examination of the training afforded to the social workers. Of particular concern to the Judge was that the application for emergency care orders had been prepared using a Report prepared for proceedings in another jurisdiction as its basis and transcribed substantial portions of this report but excluded reference to an essential piece of information (ie. the

respondent wasn't the only suspect regarding the abuse which had occurred). There was no adequate explanation given as to why a complete sentence was excluded and whilst the court held that in the circumstances and in light of the evidence presented the emergency care order would have been made in any event however this omission should not have occurred. The judge emphasised that it was essential for the court to have confidence that where a witness swears to the truth and accuracy of the contents of the report being present that all relevant facts and other information are provided in the report.

In conclusion the court was not satisfied that the threshold provided in Section 18 (1)(c) was met in the case and declined to make the Care Order and instead imposed a supervision order under Section 19 of the Act for one year.

Note: The parents may have been represented by the Legal Aid Board and any practitioner involved may wish to write a comment for our next edition.

Thanks to Edel Hamilton of Longford Law Centre for bringing this case to our attention.

Corbally v The Medical Council and Others [2013] IEHC 500

In 2012, rejecting the advice of its legal assessor, the Fitness to Practise Committee (FPC) of the Medical Council (the Council) recommended to the Council that it make a determination of "poor professional performance" in respect of Professor Corbally, a distinguished and experienced surgeon with a practice previously rated by the Council itself as "outstanding." The recommendation was in connection with what the Supreme Court described as the Professor's "…once-off error in a handwritten description of a proposed surgical procedure which was not serious in its nature or effect, which misled no-one, and which had no consequences…" Although not caused by the error, but in circumstances of unfortunate, associated, confusion, another surgeon in the hospital concerned carried out a *lingual frenulectomy*, rather than the actually-required *upper frenulum release* procedure. However, this was later corrected in a further, straightforward, procedure on the same day. The Council found the case of "poor professional performance" proven, and out of the full range of sanctions available to it, imposed the minor sanction of "admonishment." In light of this, and of the absence of a statutory appeal being available, Professor Corbally instituted judicial review proceedings to quash both the underlying findings of the FPC and the determination of the Council.

High Court

The President of the High Court found in Professor Corbally's favour. Relying on the English High Court decision in *R (Calhaen) v The General Medical Council*, he held that "poor professional performance" was conceptually separate from the further, and individually distinct, concepts of negligence and misconduct. Poor professional performance connoted a standard of professional performance which was unacceptably low, and which, save in exceptional circumstances, had to be demonstrated by reference to a fair sample of a doctor's work. The President agreed with Calhaen in considering that a

single occurrence of deficient professional performance, unless sufficiently serious, which this one was not, was unlikely to constitute "poor professional performance".

Supreme Court

The Council appealed the High Court decision on the primary basis that the Medical Practitioners Act 2007 did not expressly or implicitly require any threshold of "seriousness" to be met in order to establish "poor professional performance". The Council conceded that, if such a threshold was required, Professor Corbally's conduct would have fallen short of it. However, the Act did not contain such a criterion, and also seemed to have intended a distinction from the more serious ground of "professional misconduct." The Supreme Court dismissed the appeal, for the reasons set out below.

Mr Justice Hardiman noted that the interpretation of "poor professional performance" turned on a question of statutory construction. He drew close comparisons between the concepts of "deficient professional performance" and "poor professional performance" under the respective statutory regimes in the UK and Ireland. He noted that, in England, it was established law and practice that a 'seriousness' threshold attached to the former concept. He referred to the "long historical continuity of relations between the medical communities in the UK and Ireland, and the well-established practice of citing relevant English authorities in Irish courts." In this context, he felt that the Irish legislature ought not lightly to be taken as having intended to differentiate sharply from the English position when it introduced the concept of "poor professional performance" in the 2007 Act. In his view, had it wished to deviate from that position, and to legislate so as to render sanctionable non-serious failings by a medical practitioner, it would have used explicit language to bring that about. He further noted that the same, full, range of sanctions could be imposed for "poor professional performance" as could be imposed for "professional misconduct."

Though not relying on this for his conclusion, Hardiman, J also referred with interest to parliamentary material from the period when the 2007 Act was being debated as a Bill. He noted that express inclusion of a criterion of 'significance' had been proposed as an amendment, but later withdrawn, on the basis that this criterion was already inherently necessary and implied as part of our law. In that regard, the debates made reference to the judgment of Mr. Justice Keane in the leading Irish decision of *O'Laoire v The Medical Council*, in which it was held that conduct alleged to constitute "professional misconduct" had to be sufficiently serious. This was because regard had to be had to the grave and disproportionate impact a disciplinary proceeding and any upholding of a complaint, could have on the good name and livelihood of a medical practitioner.

Finding the principles in O'Laoire to be fully applicable here, the Court in Corbally ultimately found that the absence of the words "serious" or "significant" from the definition of "poor professional performance" was - and could be - of no significance. Therefore, a

threshold of 'seriousness' had to be met before a prima facie case could be established, and a medical practitioner fairly or justly subjected to what Hardiman, J called "the extremely threatening ordeal of a public hearing", with the grave consequences associated with even "…the mere ventilation of such an allegation…", as well as those associated with upholding it. To hold otherwise would not reflect the intention of the legislature, nor would it adequately vindicate the constitutional rights of a medical practitioner to his good name and to earn a livelihood.

While the judgment focused primarily on the interpretation of "poor professional performance", Hardiman, J also adverted to the failure of the FPC to state to Professor Corbally and his representatives that it was departing from advice received from its legal assessor, and to give "clear and cogent reasons" for this. Referring to the High Court decisions in *Prendiville v Medical Council* and *McManus v Medical Council*, the Court noted that, whilst it was entitled to depart from that advice, these failures denied Professor Corbally the opportunity to comment on the basis on which the FPC was actually going to approach the question of whether poor professional performance had been established. The Court observed that this alone might have been sufficient to quash the decision of the Medical Council in this case.

Comments

The precise wording and context of any individual disciplinary code must always be considered.

However, in light of this judgment, professional regulators and disciplinary bodies should be careful to check that any alleged professional misconduct, or poor professional performance, is sufficiently serious before identifying that there is a prima facie case for an inquiry, or proceeding against a professional.

In deciding to rehearse any proceedings, they will need to consider, on the one hand, the seriousness of the falling-short alleged, and, on the other, the distress, publicity and gravity of the potential consequences for the professional. Having regard to the constitutionally-protected rights to a good name and to earn a livelihood, this is particularly so where any proceedings might be held in public, or they - or their outcome - could be the subject of publicity, or where the rehearsal of the allegations and/or any findings and ultimate determination could have grave consequences for the reputation and practice of the professional concerned. Even if a case does proceed, disciplinary bodies will need to apply these principles before finding that the case is proven and/or imposing any sanction.

While bodies may take, and either follow, or depart from, legal advice, they must disclose the advice to the professional concerned, or in the case of rejection, "clear and cogent reasons" for this. The proposal to follow or depart from advice will represent a proposed approach to the question before the body, and as a matter of procedural fairness, it must therefore afford the professional concerned an opportunity of making submissions on that approach, before finally considering the question at issue, and lawfully making any finding or determination.