Legal Ease

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Note from your Editors

We hope you will find this edition interesting and informative. You will see that we have tried to cover a variety of topics which we hope are relevant and helpful. We would very much welcome your feedback and suggestions and indeed if there are any particular areas or subject matter you would like us to cover please let us know. We also wish to canvass views as to whether you like the variety or would prefer a "one theme" publication.

Thank you very much to our contributors who have taken the time to share their knowledge and experience. Our next edition will be in springtime so there is plenty of opportunity for all of you to consider a case note, article or conference experience which would be worth sharing.

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We are delighted with all the positive feedback received after the debut issue of *Legal Ease* was published in July, and it is encouraging to see how many staff are interested in contributing and helping develop a culture of improved communication and collaboration in the Board.

This issue includes a range of features highlighting developments in key areas relating to the Board's services. On page 2 Polly Phillimore gives an overview of the literature regarding conflict resolution and the pros and cons of mediation vs litigation, on page 13 Joan Crawford looks at the benefits of an integrated approach to delivering legal aid services, and on page 21 Barbara Smyth reports on an interesting seminar on collaborative law practice she recently attended. Also featured are reports on legislative developments in a number of areas including personal insolvency, workplace relations and victims of crime, and summaries of selected judgments delivered over the summer.

With winter now upon us we wish you all a happy and healthy month of workplace wellbeing and we look forward to receiving your contributions for the spring issue of *Legal Ease.*

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Mediation or Litigation?

Polly Phillimore, Director, Family Mediation Service

There is an extensive body of literature on both litigation and mediation. This article discusses and reviews the literature that connects the two approaches to conflict, looking at the factors that should be considered when choosing one or the other.

Over the last 20 years, mediation has become a much more frequently used dispute resolution process. It is used in a number of different fields: commercial, community, workplace, schools, and family. For the purpose of this article, the discussions will be limited to the family area of conflict and dispute resolution, with particular emphasis on mediation and litigation in the area of separation and divorce.

This article discusses the factors that affect the choice of litigation or mediation in deciding on the approach to conflict resolution, particularly in separation or divorce.

Research on the effects of separation and divorce on children concurs that it has a negative effect on the children involved (Wallerstein & Kelly 1980; Walczak & Burns 1984; Emery 1988; Amato & Keith 1991; Amato 1993). The adverse consequences for children involved in their parents' conflictual and bitter relationship around divorce and separation have been the subject of a number of studies (Hetherington 1999; Ricci 1980; Amato & Keith 1991; Emery 1994).

From her review of the literature, Kelly (2004) highlights factors that exacerbate these negative effects, and factors that alleviate them. The level of parental conflict has been shown conclusively in a number of studies (Brotsky, Steinman and Zemmelman 1988; Maccoby, Depner and Mnookin 1990; Emery 1994; Dowling and Barnes 2000; Hetherington 1999; Kelly 2004) to be a predictor of the level of maladjustment in children of separated and divorced parents. Kelly (2004) concludes that research over the decade of the 1980's showed that some factors did reduce the severity and incidence of some of the problems encountered by children of divorced parents (i.e. risk of drug use, lower academic achievement and behavioural problems). One of the factors identified was where a couple had undergone divorce and custody mediation, the level of conflict was low, and this was of great benefit to the child. It is therefore vitally important to ensure that the processes that are employed to deal with family disputes and separation do not in themselves undermine children's wellbeing.

An examination of factors that affect the choice of litigation or mediation necessarily include a consideration of the voluntary versus mandatory aspect of mediation. It is relevant to examine the literature related to this aspect as it directly relates to the hypothesis under review. A number of initiatives where mediation is working alongside the court will also be examined.

In Australia and many parts of Canada and the United States, mediation is compulsory for separating couples who have disputes over children. In most European countries, mediation is voluntary, and this is influenced by Recommendation R(98) 1 of the Council of Europe, which states that 'mediation should not, in principle, be compulsory.' It has been argued that voluntary mediation programmes are not often taken up, whereas mandatory mediation programmes, perhaps unsurprisingly, are more highly utilised (McAdoo et al. 2003). McAdoo et al. also make the point that is crucial from an access to justice point of view, that according to research, mandatory referral does not appear to adversely affect litigants' perceptions of procedural justice or settlement rates. Bullock and Gallagher (1997) reported that voluntary mediation programmes tend not to be cost effective because they generate only small caseloads, while others maintain that cases are more likely to settle at mediation if the parties enter the process voluntarily rather than under duress (Genn et al. 2007; Moore 1996).

In Australia and many parts of Canada and the United States, mediation is compulsory for separating couples who have disputes over children.

There are different levels of 'mandatory' and 'voluntary' mediation in operation in different jurisdictions. In some countries mediation may be made mandatory by a statutory or court rule for all cases in a defined class. In the Draft General scheme of the Mediation Bill 2012 in Ireland, it has been suggested that all family cases where children are involved must receive an information session about mediation before progressing to litigation. Family Mediation and Information Services have been set up across Ontario in 17 sites of the Family Court, and this was extended across the whole province in 2011. Court mediation services are available on particular days to deal with a narrow range of issues and are free of charge. For parties with more complex issues that require more than one session, off-site mediation services are available. These off-site services are also available to all clients regardless of whether they filed a court application (Hann & Baar 2001). This is similar to the current position in Ireland where a number of court-annexed mediation initiatives have been set up. The aim of a court-annexed mediation service is to deflect the individual from litigation towards trying to settle their dispute at mediation. Figures from the Dolphin House project in Dublin District Court, placed on a permanent basis from May 2014, show that about 50% of couples who have both received information about mediation, engage in mediation and reach agreement over custody, access and maintenance (Reports from the Family Mediation Service 2014). The

state-funded, family mediation service is available countrywide for mediation on all issues and is free for all clients.

In British Columbia since 2013, one party in a family law proceeding at the Supreme Court may compel the other party to enter mediation. In England and Wales, after his 1996 'Access to Justice' report, Lord Woolf recommended that litigation only be commenced as a last resort, and that mediation be used before the issue of court proceedings in order to attempt an early settlement. In 2011, a fundamental review of family justice (Ministry of Justice review 2011) reaffirmed that mediation was the preferred approach for dealing with disputes following relationship breakdown. It stated that judges should retain the power to order parties to attend a mediation information session, and make cost orders where one party behaved unreasonably. The UK Government's response to this has been the Children and Families Act 2014, which requires parents in dispute to consider mediation as a means to settlement by attending a mediation information and assessment meeting which is now a prerequisite to starting court proceedings.

California was the first US state to make mediation compulsory for separating couples with children in dispute over custody in 1981, and it is now mandated in 13 states with many other states giving judges discretionary power to order mediation. In these mandatory programmes, parents have to attend at least one mediation session, which is provided free of charge.

In Australia in 1995, the Family Law Act encouraged parents to use mediation as a first resort for resolving disputes over the care of children post-separation. This was changed in 2006, and what had been an encouragement became a pre-litigation requirement. It is now formalised to the degree that parents in conflict have to produce a certificate showing that they have made a genuine effort to resolve their dispute through a 'family dispute resolution' (FDR) process before the matter can be listed for court. Accredited FDR practitioners are authorised to issue these certificates stating that a genuine effort at resolution has been made or that the process is not appropriate for the couple. It is possible to get an exemption where there is a history or risk of family violence or child abuse, or there is a particular urgency involved (Rhoades, 2010). In addition to this 65 non-governmental Family Relationship Centres (FRCs) have been set up (at a cost of $200m) to divert families away from the courts by providing an inexpensive family dispute resolution process. Lawyers were initially excluded from these centres but that has been relaxed so that family members would not be disadvantaged by lack of legal knowledge. The first three hours of mediation at the centres are free, and then a sliding scale of fees is applied. Fee exemptions are available in certain circumstances (Maclean et al. 2011). In a

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report on 'Adversarial mythologies', Hunter (2003) states that lawyers are not as adversarial as ADR advocates suggest. She refers to research that demonstrates that having legal representation does not inevitably result in court proceedings, that filing court proceedings does not inevitably result in protracted litigation and a judicial decision, and that a judicial decision is not always a bad thing.

Having looked at the range of mandatory and semi-mandatory schemes in operation across the world, it is interesting to look at some of the literature that discusses satisfaction with the mediation process, and compares costs and settlement rates between mediation and litigation.

A number of studies comparing mediation and adversarial processes have found that mediation results in lower costs, faster settlement, improved compliance with a settlement, greater levels of satisfaction, and in some other benefits depending on the context of the dispute (Salem 2009). Other writers consider the benefits of mediation to be over-stated and that there has not been sufficient and robust empirical scrutiny to bear out the claims in its favour. Those writers and researchers from the middle ground argue that the effectiveness of mediation is dependent on the particular programme, the process used and the predispositions of the participants (Stipanowich 2004).

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However, in spite of claims to the contrary, there have been a number of interesting family studies which J.B. Kelly (2004) reviewed and summarised. She found that through the use of a variety of methodologies, measures and samples, the studies suggested strong support for the use of mediation in family disputes for custody and access, child protection and comprehensive divorce cases. Settlement rates were reported to be between 50% and 90%, with client satisfaction high in all studies.

A series of studies of mandatory mediation in child custody cases were carried out in the Californian Centre for Families, Children and the Courts in the 1990s. One of these studies, carried out in 1991, showed that out of 1,388 cases, 55% of families reached agreement, and a quarter of those who had not settled were continuing in mediation (Kelly 2004).

Kelly (2004) also reported on research that was carried out in Colorado, where family disputes were systematically referred to mediation by the court in an early stage in the dissolution of their relationship. It was possible to get a waiver in circumstances where domestic violence was an issue or other factors that rendered mediation inappropriate. Full agreement was reached in 39% of a sample of 92 cases and 55% on some of the issues.

A report carried out by the Australian Institute of Family Studies on family law reform, found that 57% of separating couples who used the services of the FRCs or FDR, mentioned earlier in this review, reported that they had reached partial or full agreement about their child/children (Kaspiew et al. 2009).

Emery et al (2005), carried out an interesting study comparing the mediation route with the litigation route. They selected a sample of parents who had applied for a contested custody hearing in a family court in Virginia, US. They were asked whether they would like to participate in a mediation programme or a study of the court process. Emery et al. (2005), maintain that this sampling technique was vital to attributing cause to different outcomes. The sample was 35 mediating families and 36 litigating families. 80% of the mediation group settled and 11% ended up before a judge. By contrast, 72% of the adversary group went to court.

Barwick & Gray (2007) reported on a pilot run in New Zealand between March 2005 and June 2006 linked to the Family Courts. Of 540 cases offered mediation, 380 were referred for a pre-mediation meeting. 284 of these proceeded with mediation and 257 had been completed by the end of June 2006. Out of the completed mediations 59% had reached agreement in all issues, and 27% on some of the issues.

It has been argued that an analysis of the outcomes of the court-based schemes demonstrates that the readiness of the parties to mediate is an important factor in reaching settlement (Genn, 2010). Wissler (2004), by contrast, examining the effectiveness of court-connected dispute resolution, cites two studies looking at the impact of referral that found no differences in the rate or size of settlement between cases that were court-ordered into mediation or those that took up mediation voluntarily.

When considering the choice of mediation versus litigation, client satisfaction is a relevant measure. Unfortunately, there has not been a huge amount of research on this aspect. With litigation, the size of the settlement is a likely measure of success – emotional and social factors would not be quantifiable in legal terms. In mediation the measure of satisfaction is broader. Participants can identify non-monetary benefits in terms of relationships and better outcomes for children. Emery et al. (2005) in a comparative study of litigation and mediation in a family court in Virginia, found that parents on average preferred mediation to litigation. When interviewed both six weeks and 12 years after resolution, they were still more satisfied with mediation. It was found that in the litigation settlement group that the fathers were consistently unhappy with the outcome as mothers almost always won full legal and physical custody. In the mediation group, fathers' and mothers' scores of satisfaction with the process and outcomes were positively correlated.

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A meta-analysis of five divorce mediation studies enabled Shaw (2010) to suggest that mediation out-performed litigation across many measures, including satisfaction with outcome, satisfaction with process, and overall satisfaction. However, under the 'outcome satisfaction' variable, one study found that litigation participants were more likely than mediation participants to report that they had 'won what they wanted'. Another study reported that mediation parties were more likely to feel pressured to go along with something they didn't want than were litigation parties; and a further, negative to mediation, finding was that women who mediated received a smaller percentage of the family's income in the divorce agreement.

It is examples like the three aspects mentioned above that need to be borne in mind when making the choice between litigation and mediation.

A study was carried out in 15 family mediation centres in the UK in 2000 of all the cases they handled over an 18 month period. Researchers interviewed the parties and their solicitors, and in some cases held second interviews. Bevan and Davies found that 82% considered the mediator to be impartial, 70% found that the mediation very/fairly helpful, 71% said they would recommend it to others, and 59% expected to be able to negotiate further changes between themselves. Their conclusions were that the mediation had positive and distinctive features and ought to be supported as a separate system running in parallel to the court system.

However, one study found that litigation participants were more likely than mediation participants to report that they had 'won what they wanted'.

Cost and time are two other factors that have emerged as aspects to be considered when choosing between litigation and mediation.

A National Audit Office (NAO) review of mediation in England and Wales in 2007, estimated that the average cost of legal aid in mediated cases (£752) was less than half of the cost where mediation was not used (£1,682). On this calculation, not using mediation represented an additional cost to the taxpayer of £74m. In terms of time, the NAO study found that mediated cases were quicker to resolve, taking on average 110 days, compared to 435 days for non-mediated cases.

Genn (2010) found, from analysis of data from court-based mediation schemes, that parties and their lawyers believed that money could be saved by successful mediations, but it was difficult to estimate. Unsuccessful mediations, on the other hand, would end up costing the clients more money. In terms of time, Genn (2010) found no evidence to suggest any difference in case lengths between mediated and non-mediated cases.

Emery et al. (2005) in the study of a family court in Virginia, found that parents settle their disputes in half the time when assigned to mediation compared to a litigated settlement.

Having looked at the examples of studies carried out on mediation versus litigation, the underlying premise seems to be that mediation as an approach is preferable.

The question is how successful is it? To which disputes is it most applicable?, and to which, inappropriate?

Alexander Bevan, a leading legal scholar, presents an analogy of litigation, arbitration and mediation that encapsulates the type of outcome a person should expect from these three distinct processes. He hypothesises that there are two cooks squabbling over which one should be entitled to a single orange. A judge would hear the evidence and determine who has the right to the orange. An arbitrator might split the orange in two halves, giving each an equally sized piece. A mediator would ask each to explain to him and to the other disputant why he needs the orange. Suppose that the respective statements reveal that one desires to use the peel to make marmalade, and the other wants the flesh of the fruit for the juice, the mediator then might suggest that they simply agree that the first might have the peel, and the other the flesh.

We can see from this example that mediation looks at the needs and interests of the individual rather than the rights.

Kevin Liston, in his book on Family Law Negotiations (2005), outlines the strengths and weaknesses of the mediation process, from the legal perspective. He is looking at how family mediation operates within the family law dispute negotiation process, rather than as a process in isolation. This is a useful perspective to consider in the light of the hypothesis under consideration.

Liston (2005) outlines the strengths of mediation and outlines the process. From the outset, the mediator creates a climate conducive to issues being settled cooperatively. The process, identification of issues, and order in which the issues are to be addressed is determined by the mediator. He/she is in control of the negotiations but not of their content. It is the mediator's role to empower the parties to make their own decisions. The family mediator works with the clients to focus them on the future rather than the past – from complaint to resolution. Any behavioural problems are considered to be 'normal' in the context of a broken relationship, and mediation is not concerned with focusing on or changing such patterns unless change is required in order to facilitate agreement. In most cases where there is violent behaviour, the mediator will likely terminate the mediation. Clients are routinely screened for domestic abuse at the outset of the process.

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The mediator tries to ensure that prior to the commencement of bargaining and negotiation, all relevant data and information has been exchanged; there has been a mutual definition of what is at issue, the underlying interests have been disclosed, and it has been identified which items, from a list of options developed by both parties, need further consideration.

Mediation operates in a time frame that allows the mediation to have its own space. The process can operate in accordance with its own principles, rather

than those defined or imposed by the courts or legal negotiations.

Negotiation skills and strategies are used by the mediator to encourage the parties to agree a re-definition of a problem or issue to a form which does not benefit either party at the other's expense. This allows both parties to think more cooperatively during the development phase of the process.

One of the key aspects of mediation versus litigation is the impact of negotiated agreements on future relationships. Liston sees that the way in which an agreement between a separated couple has been reached can have a bearing on future interaction whether this is in a social, financial or parenting context. Where an agreement has been mediated cooperatively, couples may be less likely to adopt a confrontational approach in the future (Parkinson 1997; Kelly 2004).

The aspects of family mediation that can be identified as problematic or presenting a weakness in its general applicability as a resolution process in separation and divorce, have been identified by a number of authors, lawyers being the largest section. The mediation industry is unregulated in Ireland, and there is no professional governing body dealing with training, conduct, or entitlement to practice (Liston 2005).

One of the key aspects of mediation versus litigation is the impact of negotiated agreements on future relationships.

Where there is an imbalance of power between a couple, created either by personality, education, financial position or understanding, mediation alone may not be enough to ensure that the less dominant party is protected or that their needs are adequately met.

The neutrality / impartiality of the mediator cannot be guaranteed, and this could lead to an unbalanced outcome for one of the parties (Mayer 2004).

Mediation could be better suited to the more educated client. The whole approach of self-determination, option-development, and principled negotiation requires a certain level of cooperation, communication and education. Less educated couples with lower levels of communication, competence or verbal skills fare better when negotiations are conducted by professionals on their behalf (Liston 2005).

Mediators are not lawyers and do not give legal advice. Most mediators would ensure that their clients go and get legal advice while they are going through the mediation process so the agreements they make will be valid and enforceable. If this does not happen it can be a problem for the lawyers, who will have to renegotiate issues that have not been realistically resolved (Liston 2005).

In mediation the collecting of information from couples is left in their hands, albeit directed by the mediator. There is no legal affidavit of means in the mediation process and this can cause problems of disclosure.

If there are very high conflict issues between participants in the mediation process, this may hinder their ability to negotiate fully and thereby achieve a positive outcome.

It has been seen from some of the studies mentioned earlier in this review, that some participants in mediation felt they were pressured into an outcome that was less favourable to them than one that might have been achieved through legal negotiations or the courts. (Emery 2005; Liston 2005)

Finally, the mediated agreement does not have legal status in Ireland and is therefore unenforceable in this jurisdiction at present. The legalising of mediated agreements is one of the proposed changes outlined in the Mediation Bill 2013, but unless some of the other concerns highlighted above, i.e .equality of bargaining power and communication, there would continue to be concerns around mediation in the resolution of separation and divorce, particularly in the area of 'proper provision' and consequent sustainability of agreements.

While the above mentioned factors of litigation v mediation have positive and negative aspects for both processes, it is generally undisputed that mediation should be the avenue of choice where separation and divorce, or any family dispute, involves children. The research is more or less unanimous in acknowledging the detrimental effect parental conflict has on children and various writers were cited at the outset of this review. It is also well documented that the level of conflict engendered by involvement in the litigation process, with repeated, stressful court appearances, causes long-term damage to children and families. This is acknowledged in the judgements in the family law cases, and has become a major motivator for judges to refer family law case involving children to mediation. The court-related mediation initiatives in Ireland and other jurisdictions are evidence of this welcome development in the family law arena.

Jen McIntosh, a clinical Psychologist and researcher at the University of Melbourne, has conducted a huge amount of research in the area of children and separation, and the role they should play within that process. Hearing the voice of the child throughout the mediation process, either by consulting directly with children themselves, or indirectly through the parents, is the way forward and is already happening in Australia, Ireland, England and other jurisdictions. It requires specialist training and should not be conducted without it, but working with parents and children in the forum of mediation gives better outcomes than the adversarial context offered by litigation.

One of the key aspects of mediation versus litigation is the impact of negotiated agreements on future relationships.

While there is a great deal of literature on the theory and practice of mediation, other alternative dispute resolution options, and the adversarial system, there is a gap in the research. There needs to be research examining the longer-term outcomes of taking one or other route. The benefit to families and society in general, needs to be examined and researched so that the legal system and the alternative dispute resolution options can be fine-tuned to meet the needs of society.

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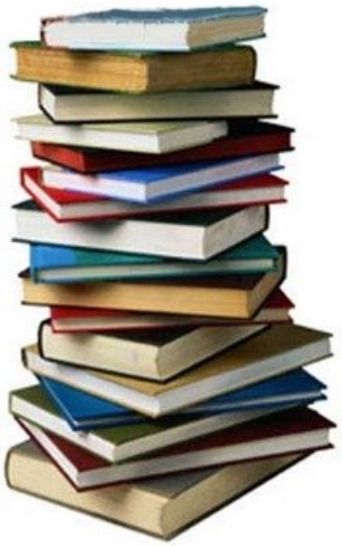

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A New Strategy: The Strategic Model of Legal Aid

Joan Crawford, Blanchardstown Law Centre

In recent times, due to the economic downturn and spurred on by the need to obtain value for money, the Irish Government implemented a new Public Service Reform Plan 2014 to 2016. It incorporated the requirements of both the EU and the IMF for fiscal transparency and delivering services at reduced cost. It recognised the recommendations of the OECD Report on the Irish Public Service in 2008 which recommended the improvement of integration and coordination of public services which would lead to value for money.

The concept of shared services was seen as a way forward in saving costs in the operation of public services. It is important therefore for the Legal Aid Board to take this opportunity to look at a new model of service delivery. Zeman (1985) compares the service model with the strategic model of delivery of legal aid. He says

"Service models deal with a categorised legal problem and have little time to deal with the uniqueness of the person's lifestyle: they do not handle problems which have not been on the traditional agenda of legal service. The strategic model in contrast, looks at identifying the other problems facing the community it is serving, taking a long term approach of research and reform. It views advocacy as only one potential strategy to solve the problem."

The reform plan was also influenced by the concept of New Public Management which began in the 1970s. As cost cutting initiatives impacted on the provision of services, government and public service managers considered ways to implement efficiency and effectiveness in the delivery of the services. To enable any public service reform programme be successful, the values of public service need to be questioned and updated to the needs of a changing society.

This change in focus to service delivery models opened up a debate on the quality of service provision and the challenge to engage the citizen in the process. To put it simply, new policies need to consider how to identify and address the needs of those who are using the public services. This involves managers incorporating social responsibility to make choices that enhance the welfare of society and not just the organisation itself. The biggest consideration given to any change model is the cost. However, if we are truly serious as a society about looking at benefiting the citizen and the service user, the strategic model cannot only

solely be guided by its cost. The integration of many service providers should in fact lead to cost savings.

Ireland has a strong voluntary sector which is often funded by the State and there has been little done to integrate into existing public services. The public are constantly referred from one department to another to access the various services they need with the repeated form filling and financial means testing a feature. A system where each transaction and process re-enforces the other saves time, costs and improves the quality. So what can the Legal Aid Board do?

To answer this question it is important to look at the services provided in other jurisdictions where integrated service delivery models already exist. Two countries that have excellent models of service delivery are Australia and the Netherlands. In 2006 in Australia the government implemented a radical change in the way services were delivered to those experiencing family breakdown. At that time there was a real concern that fathers particularly were being cut out of their children's lives to a great extent and all the other problems that followed family breakdown were now escalating and costing substantial sums of money to the State. The result of recommendations following an extensive study was the setting up of the Family Relationship Centres. Basically, these Centres assisted in moving separating parties in to a mediation and holistic process and away from the Courts. They also dealt with all the other issues that arise as a result of family breakdown i.e. housing issues, repossession of family homes, psychological needs of the children and parents, mental health issues and drug and alcohol addiction. It had been recognised that by putting in place a strategic model that dealt with all the problems for a particular family when whatever the nature of that family was, when problems arose, that services could work together in a holistic way to solve the problems for that family. This of course took some time to change. The different service providers and professionals involved had to understand how to work together. It also of course meant a substantial commitment by the government to provide the budget to set these Centres up.

Ireland has a strong voluntary sector which is often funded by the State and there has been little done to integrate into existing public services.

Subsequent research has shown the value and the success of the Family Relationship Centres. One of the most important aspects of the success of these Centres was that the needs of the children involved in the family breakdown are looked after in their entirety. If a child has special needs in education or any psychological difficulties a referral is made to the appropriate service immediately. If there is a problem with accommodation or the availability of housing that problem is dealt with as part of the overall solution and not something which is left aside to be dealt with at a later date. All issues are dealt with by the Family Relationship Centres and the integration of the various different services has led to cost savings and a more timely provision of the services.

The Netherlands has also implemented a change in the way they deliver legal aid and again it took a considerable amount of co-operation between various different service providers and indeed the commitment of the government to provide the budget to set up the service in the first place. There are many different aspects to the service that is provided - one of them being service counters where trained staff can assist a citizen with issues in respect of family breakdown, social welfare, housing, immigration and many other issues that cause difficulties for people.

In Ireland there has never been a proper co-ordinated approach to a more strategic delivery service model in respect of all the different service providers and we now have an opportunity to look at how that can be done.

In Ireland we have had the benefit of an excellent Citizens Information Bureau which provides superb services throughout the country to the citizen and assists them in accessing other services. MABS the Money Advice and Budgeting Service also provide an excellent service assisting people with their financial problems and negotiating with various financial institutions on the repayment of debt etc. However, there has never been a proper co-ordinated approach to a more strategic delivery service model in respect of all the different service providers and we now have an opportunity to look at how that can be done.

The reality is that there is no budget available to tackle this problem at this moment in time. However, I believe by beginning local initiatives in the community a new way of thinking and reacting to help people solve their problems is possible. It was with this in mind that I decided to find out what local services are available in the Dublin 15 area where Blanchardstown Law Centre is situated. I was more than surprised to learn of the incredible number of voluntary services and local services that are funded by different government departments that exist within this locality. The next step was to make contact with a number of them to find out what exactly they did and what service they might be able to provide and whether there was a cost involved. I arranged first of all to get an overview of the service provided by our local Social Protection Office and a member of staff from every Law Centre in Dublin attended this meeting. It was interesting to note the service provided in assisting those who wanted to start their own business and the long term employment access work experience with local businesses in the Dublin 15 area. Following on from this and having met the manager of the local Citizens Information Bureau (CIB) office and MABS office a meeting was held with staff from the CIB office in Dublin 15 to understand exactly what services they provide and also for us to explain to them the services that we as a local law centre can provide. Myself and my staff certainly learned a lot at this meeting. We were not aware for instance that the local information officers in the CIB office assist people with form filling and applications in respect of application to the Rights Commissioners and to the

Employment Appeals Tribunal and attend and represent them at these forums. We also learned that they deal with Social Welfare appeals and provide representation for that also. There were a number of other services we were not aware they provided. More importantly they informed us of other local services in the area which would be very helpful to some of our clients and I contacted these services and have set up contact points with them. The next step is for a further meeting now with the local MABS office and CIB office and other local service providers to set up a structured referral process where people are not referred from one office to the next for a particular service and that we are all aware first and foremost of the service we provide. I would also intend to set up a new system between ourselves and MABS in respect those who are coming in to see us with problems and mortgages arrears. It is frustrating both for the client and for the solicitor to have a situation where applicants are waiting on a waiting list for advice in respect of these particular matters and unless they fit in to a specific criteria there is little assistance we can offer them other than to send them to MABS at that stage. With the better integration of a service delivery between our office and the local MABS office I would hope that we can offer a more timely helpful service jointly to the Applicant.

With the better integration of a service delivery between our office and the local MABS office I would hope that we can offer a more timely helpful service jointly to the Applicant.

There are many other initiatives that are beginning in the Dublin 15 area with other service providers and very valuable support has been given to some of our clients by local service providers of which we were previously unaware. So for the moment what I would say is take the time to make the contact with your local service providers and your local voluntary groups and you will be very surprised to discover how you can give a more holistic service to your client as a result. I know this takes time and it takes effort but the reality is that you will not only be helping your client but yourself also because there are many problems which we cannot solve as solicitors and knowing a local group who can help your client while you are dealing with the legal problems can take a lot of stress away from a difficult case. This article is just to provoke some thoughts as an organisation as to how we can provide a more rounded service to the client and to start the process in a very small local way of initiating that change.

I am very lucky to have not only a willing and interested staff in our Law Centre who have been extremely helpful to me in progressing this but also the enthusiasm and the co-operation of the other local service providers who I have found to have been extremely interested in progressing this issue and have been so helpful in so many ways to many of our clients in this Law Centre. I do believe that we need to think differently about the way we provide services and to help the clients help themselves. A further meeting is planned next week between the different local groups where I hope we will put in some specific new

structures in our local area and pilot some of these changes. I would hope to be able to keep you undated on how these initiatives are working and whether they have been successful or not and maybe it might encourage some staff in other Law Centres to make contact with their local service providers. For all of the busy managing solicitors I would give you a little tip, amongst your staff you will find at least one enthusiastic and willing clerical officer or law clerk who would help you make that first contact and would be invaluable in a direct one to one relationship with your other local service providers!

Wardship Applications: Adults With Diminished Mental Capacity

Julia Hull,
Cork North Law Centre

An issue that arises for a lot of families is caring for a family member who no longer has the capacity to manage their own affairs. This may commonly arise if an elderly relative is suffering from a form of dementia. Most of us are aware that managing care for relatives in this situation can leave families facing huge difficulties, if that person is not in a position to participate in making decisions regarding their finances and care. At present, the options for families in this situation are either wardship or an enduring power of attorney. Wardship is complex and expensive, and governed by antiquated legislation dating back to 1871 under the Lunacy (Regulation) Act, but may need to be undertaken where there is property involved and/or a conflict between other family members. Entering into an enduring power of attorney is a simpler process, but it requires forward planning as the person has to have capacity at the time of taking it out.

In practice, of course, family members and carers frequently make day to day decisions, including decisions on the spending of money, on behalf of people who do not have capacity. However, there is no legal right to make such decisions for adults nor is there any protection for the person making the decision. Whilst a change in the law is anticipated through the Assisted Decision Making (Capacity) Bill 2013, until this is enacted, the only option in the absence of an Enduring Power of Attorney is an application to the court for Wardship under the Lunacy (Regulation) Act 1871. However, whilst Wardship may enable family members to manage their relatives care, it does carry a significant responsibility.

First, it is worth noting there are two types of Wardship - Wardship in relation to minors (commonly where the minor has been awarded substantial damages and has special housing or care needs) and Wardship in relation to adults, where the purpose of Wardship is to look after the welfare and to protect the property of the a person where it is considered necessary.

Which Court?

An application for Wardship can be made

to either the Circuit Court or the High Court. Where the subject of the application has limited resources, the Circuit Court has jurisdiction by virtue of section 22(2) of the Courts (Supplemental Provisions) Act 1961, which gives the Circuit Court concurrent jurisdiction with the High Court, in cases where the property of the person does not exceed €6350 in value or the income therefrom does not exceed €381 per annum. A circuit court application can therefore be made where, for example, the only asset is the family home, if other family members are living there and the property cannot be rented out. If the person has no assets, a Wardship application may still be necessary if the issue is medical treatment, and this application can also be made to the Circuit Court.

At present, the options for families in this situation are either wardship or an enduring power of attorney. Wardship is complex and expensive, and governed by antiquated legislation dating back to 1871 under the Lunacy (Regulation) Act.

Procedure

The procedure for the Circuit Court is set out in Order 47 of the Circuit Court Rules. As with all Circuit Court actions, proceedings are commenced by issuing a Civil Bill as to Capacity (contained in Form 2F of the Schedule to the rules), along with an endorsement of claim setting out the facts of the case as well as the orders that are required. The Circuit Court Rules also require that two affidavits are filed with the Civil Bill – one from a 'person having an interest in the wellbeing of the person alleged to be of unsound mind' and one from a General Practitioner.

The rules set out the content of the affidavits, which must give information regarding next of kin, assets, and evidence of the 'unsoundness of mind' of the person who is the subject of the application.

Stamp Duty is payable on the Civil Bill (€130 for the Civil Bill and €15 for each affidavit), and the affidavits must be filed with the County Registrar. Once the Civil Bill is issued, a copy of it is served on the person alleged to be of unsound mind along with a Notice of the issuing of the affidavits. A copy also has to be served on the person they are residing with (their carer or Nursing Home). Once service has been effected the matter can be bought to court by serving a Notice of Trial.

In the High Court, the application is governed by order 67 and is commenced by way of petition, accompanied by the two affidavits.

At the hearing of the application the judge may appoint a second doctor to report confidentially to the court if he considers the evidence before him insufficient

The Judge can only grant the application if s/he is of the opinion that the person is of unsound mind and incapabale of managing their property or affairs and that their property needs to be protected and applied for their advantage.

Whilst a family member may have no option but to make an application for Wardship, once granted it places a

significant responsibility on the Applicant, who is appointed a Guardian, and is then subject to a number of duties, the most important of which is to account for the property. The court can also give directions regarding whether any security should be given by the Guardians, what type of investments may be permitted, and what accounts should be kept. The Guardian (s) must then file accounts each year with the County Registrar of the Office of Wards of Court if it is a High Court application. In the Circuit Court, there is also an obligation on the Guardian to notify the court if the property increases in value, or if the income from the property increases to the extent that the Circuit Court no longer has jurisdiction. This may be of relevance if a person's home is rented out to help meet nursing home fees, after being made a Ward of Court.

Orders that the courts can make include, for example, if the Ward is residing in a nursing home, the court may direct that pension income can be paid directly to the nursing home, that their house can be let or sold and the proceeds applied to nursing home fees, or if the property is not vacant, that it can be charged.

If the person who is subject to the Wardship passes away, the Guardian must make a further application to the County Registrar of the Circuit Court or the Office of Wards of Court to have the wardship dismissed, and must file the death certificate, a statement of the person's property and any claims against it, and once those claims have been discharged and probate or letters of administration have been produced, the matter can be dismissed from the jurisdiction of the court.

Whilst a family member may have no option but to make an application for Wardship, once granted it places a significant responsibility on the Applicant, who is appointed a Guardian, and is then subject to a number of duties, the most important of which is to account for the property.

Other issues may arise, such as consent to medical treatment, and again, the approval of the court must be obtained, although in emergency situations normal medical considerations apply.

As stated above, a change in the law is anticipated with the Assisted Decision Making (Capacity) Bill 2013, which reached Committee stage in July 2015. The bill proposes that instead of making adults with diminished mental capacity wards of court, instead a decision making assistant, a co decision maker or an attorney will be appointed depending on the capacity of the person involved.

There is a consensus amongst practitioners working in the field of mental health that the law in this area is long overdue a change.

There is no indication yet of when the bill is likely to be enacted, but there does seem to be a consensus amongst practitioners working in the field of mental health that the law in this area is long overdue a change.

Note on Section 19 of the Intoxicating Liquor Act 2003

Susan Fay,
Tullamore Law Centre

Equality legislation prohibits discrimination on nine grounds; gender, civil status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community.

While most practitioners will be familiar with the provisions of the Equal Status Acts (as amended) and the Employment Equality Acts (as amended) with respect to equality matters, practitioners may be less familiar with the provisions of the Intoxicating Liquor Act 2003 in litigating complaints involving allegations of discrimination.

The Workplace Relations Commission (formerly the Equality Tribunal) is the primary forum for hearing and determining complaints under the Equal Status Acts. Provisions were introduced under section 19 of the Intoxicating Liquor Act 2003 where discrimination, (as defined under the Equal Status Acts as including direct, indirect and discrimination by association) takes place on or at a licensed premises, complaints relating to discrimination must be brought before the District Court.

In advising clients complaining of being discriminated against on any of the nine grounds, care must be taken in applying the legislation. While the term licensed premises obviously includes pubs, it also includes registered clubs, hotels and some restaurants. It is also important to note that the discrimination must take place on or at the licensed premises for the discrimination to fall within the scope of the Intoxicating Liquor Act 2003. If the discrimination took place at a part of a hotel that is not part of the licensed area of the hotel, e.g. a leisure club or over the telephone, the complaint should be referred to the Workplace Relations Commission rather than the District Court. Section 19 specifically excludes complaints relating to the provision of accommodation or any related services at a licensed premises from coming within the jurisdiction of the District Court with the Workplace Relations Commission being the appropriate forum for such complaints.

There are differences between the Workplace Relations Commission and the District Court in dealing with complaints involving discrimination. Unlike cases referred to the Workplace Relations Commission, complaints referred to the District Court under section 19 of the

Intoxicating Liquor Act are not heard in private and costs can be awarded against the losing party, while there is no outlay incurred in bringing an application to the Workplace Relations Commission, applications to the District Court attract stamp duty.

While section 19 of the Intoxicating Liquor Act 2003 is silent on the subject of time limits for Respondents bringing complaints of discrimination to the District Court, in practice the District Court imposes the same time limits as the Workplace Relations Commission, i.e. two months for a notification (which can be extended to four months) and six months (which can be extended to twelve months) for the application to be served on the Respondent and lodged in the District Court.

Great care should be taken by practitioners in drafting notifications to Respondent in cases under the Intoxicating Liquor Act that the correct Respondent is identified.

While the Workplace Relations Commission has provided a precedent notification form to be sent to the Respondent within two months of the alleged incident of discrimination, in cases under the Intoxicating Liquor Act 2003 there is no suggested form. Great care therefore should be taken by practitioners in drafting notifications to Respondent in cases under the Intoxicating Liquor Act that the correct Respondent is identified (a licensing search is usually necessary) and that the elements included in the precedent notification prepared by the Workplace Relations Commission are included in the notification sent to the Respondent, notifications sent under the Intoxicating Liquor Act are usually sent to the Respondent by letter. If a satisfactory response is not received following the transmission of the notification to the Respondent, a complaint is referred to the District Court. The appropriate form to be used is at Schedule C, Form 80.5 of the District Court rules.

Where a complaint of discrimination is upheld in favour of the Applicant, the District Court may award damages (to the maximum jurisdiction of the District Court), order the licensee to take a course of action or make an order for the temporary closure of the licensed premises. The District Court is obliged under section 19 to provide a statement of reasons for its decision if requested by either party.

Collaborative Law Training Day

Barbara Smyth,
Wicklow Law Centre

I attended a seminar recently entitled "Collaborative Practice in Action – A Top Up Training" organised by the Association of Collaborative Practitioners.

The training day was designed to provide participants with a very practical step by step guide which can be used when conducting cases along with the steps of a Collaborative Law Case from beginning to end. It provided very practical support to give lawyers the confidence to embark

on their first case and a refresher for those who had not done a case for a long time and needed to hone their skills.

The main speakers were Joe Maguire Solicitor and Eoin O'Connor Solicitor who are both very experienced Collaborative Practitioners and members of the ACP Board. They both spoke at length about their experience in Collaborative cases, what they had learned over the years – how they were still learning – and the benefits to clients. Emphasis was put on the fact that in a Collaborative case the parties had control over the outcome. As they had both bought into the process and both parties had an input into the final resolution it was more likely to be a success in the long term. The importance of maintaining relationships, in particular with the children, was a strong feature. An emphasis was put on listening skills both for the clients and especially for the lawyers – how often do we as lawyers not listen to what our client is saying?

The training day was designed to provide participants with a very practical step by step guide which can be used when conducting cases along with the steps of a Collaborative Law Case from beginning to end.

A discussion took place on screening clients - that is deciding at an early stage would the parties be both willing and suitable to engage in the process. This is of particular relevance to private practitioners as they are at risk of losing a client if the process breaks down. There is also a fear of change in the legal profession and doing things differently – we all like to remain in our comfort zone and there is no doubt that Collaborative Practice does involve thinking outside the box!

The use of coaches was also discussed and the cost. Coaches are specially trained licensed mental health practitioners who work on multidisciplinary teams with family law professionals. I myself have never used a coach but the feedback from the meeting, from those who had used coaches, was very positive. The coach works with the client in supporting them through the process and helps to move the process forward. A coach can assist the client through the emotions of the process and it makes the lawyer's job easier as we do not have to get involved in an area in which we have neither the skill set nor the training. The client employs the coach and is responsible directly for their fees which are normally charged on an hourly rate. I think the use of coaches should be explored by the Board. The view at the meeting was that engaging coaches saves time and money in the long run and they are essential to the process. There were a number of coaches at the meeting and it was very interesting to hear them express their views.

Time was also spent discussing on how to market a Collaborative Practice, how to sell it to clients and get people interested. The view of the meeting was that networking and establishing relationships with other Collaborative Law Practitioners through active practice groups will help to market Collaborative Practice. A vibrant website is also crucial.

The seminar was very interesting and well worth attending.

Note on the Personal Insolvency (Amendment) Act 2015

Phil O'Laoide,
Regional Manager

This act amends the 2012 Act in the following ways:

1. It provides new procedures for the approval of Debt Settlement Arrangements and Personal Insolvency Arrangements.

2. It provides for a Court of Review of proposed personal insolvency arrangements in certain circumstances.

3. It amends the eligibility criteria for debt relief notices.

4. It provides for the regulation and supervision of PIPS.

5. It establishes a duty to promote better public understanding and awareness of matters relation to personal insolvency and bankruptcy legislation.

As the reader will be aware the Personal Insolvency Act, 2012 introduced three new debt resolution mechanisms to help mortgage holders and other people with unsustainable debts to reach agreement with their creditors. The mechanisms introduced were:

1. A Debt Relief Notice will allow a write off of a debt (generally unsecured and in some cases secured) up to €20,000. This is now increased to €35,000.

2. A Debt Settlement Arrangement for an agreed settlement of unsecured debt with no limit involved.

3. A Personal Insolvency Arrangement with the agreed settlement of secured debt up to €3,000,000 and unsecured debt with no limit.

The Act also introduced automatic discharge from bankruptcy subject to certain conditions after three years as opposed to 12 years.

The Amendment Act of 2015 builds upon the protective steps taken to increase supports available to people in arrears. The most major reform introduced by the Amendment Act is giving the Courts the power to review and, where appropriate to approve Personal Insolvency arrangements that have been rejected by the banks/creditors.

Introducing the legislation the Minister for Justice and Equality, Frances Fitzgerald, said that "the review by the courts is an important reform to protect distressed mortgage holders from any unfair lack of co-operation from their banks when it comes to seeking to agree a personal insolvency situation and to provide a better balance between the interests of banks and those facing

unsustainable mortgages who want to pay their debts as far as they can and keep their homes". These changes are designed to ensure that fair and sustainable proposals by borrowers for a Personal Insolvency Arrangement under the Act can be independently assessed by the court which will also have power, where it considers appropriate, to impose the proposal on creditors.

The most major reform introduced by the Amendment Act is giving the Courts the power to review and, where appropriate to approve Personal Insolvency arrangements that have been rejected by the banks/creditors.

The Procedure for Court Review

It is Section 21 of the Personal Insolvency (Amendment) Act, 2015 that amends Section 115 of the Principal act by the insertion of Section 115A authorising the PIP to make an application on behalf of a debtor to court not less than 14 days after the creditor's meeting. The application should be on notice to the insolvency service and each creditor concerned. The application should be accompanied by a statement of the grounds of the application which shall include:

1. A Statement that the proposal for a Personal Insolvency Arrangement has not been approved and

2. (If the proposed arrangement is one to which Section 111A applies) a statement identifying the creditors who have voted in favour of the proposal.

3. The Application to court should attach copies of the proposals for the Personal Insolvency Arrangement, copy of the PIP's report and a statement by the PIP that he has formed the opinion that the debtor satisfies the eligibility criteria and that the proposed Personal Insolvency Arrangement complies with the mandatory requirements of the legislation and does not contain any terms which would release the debtor from an excluded debt or an excludable debt.

The notice to the creditor should be accompanied by a notice indicating that he or she may within 14 days lodge a notice with the appropriate court setting out whether or not they object to the application and their reasons. If the creditor lodges a notice it should also be served on the insolvency service, the PIP and each creditor concerned. It should be noted that the right to seek a Review will only arise where the debt is secured on the debtor's primary place of residence.

A protected certificate remains in force until the Personal Insolvency Arrangements comes into effect or the time for appeal has expired or the appeal has been withdrawn or determined.

The Court and What it Should Consider in Reviewing

The Act specifically provides that the hearing shall be held with all due expedition. Hearings will generally be in the Circuit Court. The court shall consider whether to make an order only where it is satisfied that the eligibility criteria under Section 91 has been satisfied and the mandatory requirements in Section 99 have been complied with and the proposed arrangement does not contain terms which would release the debtor

from an excluded debt or an excludable debt and it considers that no grounds of challenge available to creditors specified in Section 120 applies in relation to the debtor or the proposed arrangement.

The court has to have regard to all relevant matters including the terms on which the proposed arrangement is formulated and has to be satisfied that there is a reasonable prospect that confirmation of the proposed arrangement will enable the debtor to resolve his or her indebtedness without recourse to bankruptcy and enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit and that it also enables the debtor not to dispose of an interest or cease to occupy all or part of his principal private residence. It must also assess as to whether the debtor is reasonably likely to be able to comply with the terms of the proposed arrangement and must be satisfied that the costs of enabling the debtor to continue to reside in their private residence is not disproportionately large. Before the court will approve the proposed Arrangement it has to be satisfied it is fair and equitable in relation to each class of creditor that has not approved the proposal and whose interests or claims would be impaired by its coming into effect and it must be satisfied that the proposed arrangement is not unfairly prejudicial to the interests of any interested party.

The full effect of this new power of the court to review Personal Insolvency Arrangements remains to be seen.

Under sub-paragraph 10 a court in making an order must have regard to the conduct of the debtor in seeking to pay the debts concerned and the conduct of the creditor in seeking to recover the debts due to the creditors.

The court registrar will notify the Insolvency Service and the PIP concerned where the court makes or refuses to make an order.

The Personal Insolvency Arrangement comes into effect upon being registered in the register of Personal Insolvency Arrangements.

The full effect of this new power of the court to review Personal Insolvency Arrangements remains to be seen and it will be interesting to see in particular how this recourse of access to the courts for Review will influence negotiations between PIPs and creditors.

The recent amendment to the Personal Insolvency legislation is to be welcomed, giving as it does the power to courts to review a Personal Insolvency Arrangement which has been rejected by the lender.

Code of Conduct on Mortgage Arrears

However it is clear from recent case law (see case note on page 37) that the courts will be mindful of the separation of power and will seek that any intervention on their behalf in the relationship between a borrower and a lender be provided for by the legislature and in particular that non compliance with the Code of Conduct on Mortgage Arrears does not oblige a court to refuse a repossession order.

The Workplace Relations Act 2015

Pat Fitzsimons,
Director of Human Resources

The current system for the resolution of employment law and industrial relations disputes is quite complex, with up to 200 different pieces of employment legislation involved. The new Workplace Relations Act represents an attempt to simplify the legislative, organisational and procedural matters governing the resolution of such disputes.

Main Purpose of the Workplace Relations Act

The Workplace Relations Act 2015 provides for a range of changes to the bodies and procedures which deal with:

• The resolution, mediation and adjudication of industrial disputes and

• The resolution of complaints about breaches of employment legislation.

The Act provides for a number of changes to a range of employment laws and for new compliance measures. It amends 24 Acts and numerous Statutory Instruments.

The New Arrangements

Under the Act there will be two bodies dealing with complaints and disputes in relation to industrial relations and employment law – a new body called the Workplace Relations Commission (WRC) and the Labour Court.

The Workplace Relations Commission will take over the functions of:

• the National Employment Rights Authority;

• the Labour Relations Commission (LRC);

• some of the functions of the Employment Appeals Tribunal (EAT); and

• the Director of the Equality Tribunal.

Given:

• the number of organisations currently dealing with dispute resolution in this area; and

• the wide range of issues within their remits;

the streamlining of both the organisations and procedures involved is to be welcomed.

All industrial relations, employment law and employment equality disputes and complaints will, initially, be referred to the Workplace Relations Commission with appeals being made to the Labour Court in all cases. Time limits for the making of appeals are being generally standardised.

The appeal functions of the EAT are being transferred to the Labour Court. The Tribunal will continue to function until it completes the cases which are before it when the Act comes into effect. It will then be dissolved. The EAT currently has about 3,500 cases on hand, so it will take some time to finalise them.

The Labour Court will continue in existence with a number of different functions and will be expanded.

Workplace Relations Commission (WRC)

The WRC will have a board consisting of a chairperson and eight other members. Representatives of employers and employees will have two members each; one member will be from a body which seeks to promote equality in the workplace and three members will be people who have experience and expertise in relation to workplace relations, resolution of disputes in the workplace, employment law or equality law.

The appeal functions of the EAT are being transferred to the Labour Court.

The main functions of the WRC are to:

• Promote the improvement of workplace relations, and maintenance of good workplace relations;

• Promote and encourage compliance with the relevant laws;

• Provide guidance in relation to compliance with codes of practice;

• Conduct reviews of, and monitor developments in workplace relations;

• Conduct or commission relevant research and provide advice, information and the findings of research to Joint Labour Committees and Joint Industrial Councils;

• Advise the Minister for Jobs, Enterprise and Innovation in relation to the application of, and compliance with, relevant laws; and

• Provide information to the public in relation to employment laws other than the Employment Equality Act.

The legislation has widened the roles of the Labour Relations Commission (LRC) and the Labour Court. While the LRC is to be replaced by the Workplace Relations Commission, in practice the new body is really the LRC with additional functions added on.

Implications for the Legal Aid Board

From the Board's point of view as an employer, the new legislative framework and operational arrangements will make it easier for us to deal with cases arising. It will also help to avoid the "forum shopping" that can occur under the existing arrangements (for example, we have had cases in the past whereby a person can seek redress before a Rights Commissioner, the EAT and the Equality Tribunal on the basis of the same set of circumstances).

Employee's Perspective

From an employee's perspective, it will enable somebody, who feels their rights have been infringed, to get earlier access to a third party to seek redress. Also an employee will not have to make a similar case in different forums and will instead be able to seek redress at the Workplace Relations Commission (WRC) in the first

instance with an appeal option to the Labour Court.

Reasons Driving Reform in This Area

Some of the key reasons driving reform in this area, apart from a desire to reduce the incidence of "forum shopping", (which was not highlighted to any great extent in public discussion on the reforms) are:

• the need to improve the efficiency of the process for handling disputes, (rather than having each agency accepting applications separately, there is now one point of contact); and

• to address delays in the system (e.g., waits of over a year and longer to get access to the EAT and the Equality Tribunal).

The Act came into effect on 1 October 2015, but some administrative arrangements were put in place in advance of its implementation. For example, a central system for receiving complaints has already been established. They are being referred to the appropriate body, while some services are being shared by the bodies concerned.

Costs

If an employee succeeds in establishing that his or her rights have been infringed and obtains an award, this cost has to be borne by the employer. However, unlike the normal practice in civil cases, there is no provision to award costs against the losing party in a dispute. So each side bears their own costs. While the procedures involved are deemed to be "informal", in practice, many parties to disputes tend to be represented by either trade unions or legal representatives.

Procedures

An underlying ethos behind the legislation, for dealing with individual cases, is to redress the potential imbalance between the employee (the weaker party in a dispute) and a better resourced organisation. This concern is addressed in some instances by putting the onus of proof onto the employer. For example at the outset of an EAT hearing, the default position is that the dismissal is deemed unfair. To successfully defend the case the employer then needs to demonstrate at the hearing that:

• s/he did not infringe the legislative rights of the former employee;

• fair procedures were scrupulously followed; and

• the alleged behaviour of the employee was such that the penalty of dismissal was a proportionate response by the employer.

It is interesting to note that around two thirds of EAT cases are settled either before a hearing takes place or during a hearing. Of the remaining one third of cases that go to a full hearing, around half of the cases result in the employee getting an award.

Clearly from an employer's perspective, the alternative of settling a case before the main costs involved are incurred (e.g. legal costs as well as the opportunity cost to employers of the time spent preparing submissions and attending a hearing) can be a more cost effective option. The exposure for an employer is a potential re-instatement of the employee (very rare) or

compensation of up to two years salary. The incentive to settle is therefore quite high even where an employer is confident of successfully defending a case. The choice is to pay what is sometimes referred to as "nuisance money" at an early stage in full and final settlement of the case rather than incur the costs of contesting it with the attendant risk (50% chance of losing at an actual hearing) of an adverse finding involving financial compensation for the employee.

Labour Relations Commission (LRC)

One of the main reasons for establishing the Labour Relations Commission (LRC) in 1990 was to put a greater emphasis on resolving disputes at enterprise level and to ensure that the Labour Court operated as a court of last resort. The LRC's brief included the use of conciliation services to facilitate resolution of disputes and working with organisations and unions to promote better industrial relations. In recent years the LRC has assisted in brokering deals between the Government and public sector unions with which staff in the Board will be familiar (the Croke Park, Haddington Road, and Lansdowne Road Agreements).

Our personal views on the adverse implications that these agreements have had on our overall pay and conditions should not detract from the manner in which the LRC succeeded in enabling the parties to reach an accommodation in difficult circumstances. The agreements represent a tangible measure of the value of the LRC's input and how skilfully facilitated engagement between parties with entrenched views can lead to resolution of seemingly intractable disputes.

Mediation

The Director of Equality Investigations has a mediation service available to parties in dispute. This is a very useful service as the disputing parties can engage with the mediation service on a without prejudice basis and are free to pursue their case to a hearing before an Equality Officer if mediation doesn't work out. Staff in the Board will be particularly familiar with the concept of ADR. Using the mediation route can enable the parties to:

- get a better appreciation of the other side's point of view;
- identify areas of potential agreement; and
- narrow the area of disagreement.

Given the role and function of the LRC, the mediation aspect of the Director of Equality Investigation's services is likely to be given more emphasis in the Workplace Relations Commission.

Summary

On balance, the new legislative, organisational and procedural arrangements for dispute resolution should ultimately prove beneficial for all parties involved. Faster processing of cases and a likely continued emphasis on mediation and conciliation will facilitate earlier access to redress for employees and provide employers with greater scope to address matters arising in one go (subject to appeal).

The EU Victims Directive

Ronan Deegan,
Civil Operations Section

The date for the implementation of the EU Victims Directive (Council Directive 2012/29/EU) is rapidly approaching. Member states are required to have transposed the Directive into national law by 16th November 2015. A General Scheme of a Criminal Justice (Victims of Crime) Bill was published by the Minister for Justice and Equality on 14th July 2015. However legislation has not yet been introduced into the Oireachtas to implement the Directive.

The purpose of the Directive is to ensure that victims of crime receive appropriate information, support and protection and that they are treated in a respectful, dignified, professional and non-discriminatory manner by the criminal justice system. It also provides that where a child has been a victim of crime their best interests should be a primary consideration in the criminal justice system. In this article we look at some of the provisions of the Directive and its implications for the Board.

What is a Victim?

Article 2 of the Directive provides that a victim means:

(i) "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;

(ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death;"

Head 2 of the General Scheme would provide that this is whether or not, in either case, a complaint alleging the commission of an offence has been made or any offender has been identified, apprehended, charged or convicted in relation to the offence. While the Directive refers to the "offender", the General Scheme uses the term "alleged offender" instead, so as not to affect the position at common law that an accused is innocent until proven guilty.

Information to be Provided to Victims

Article 4 of the Directive outlines information which a victim must be offered on their first contact with a "competent authority". Head 4 of the General Scheme would provide that this information would be offered when a victim contacts the Garda Síochána and would include:

- procedures for making a complaint alleging an offence

• services which provide support for victims of crime

• the role of the victim in the criminal justice process

• protection measures available for victims

• services providing legal advice and legal aid

• The Criminal Injuries Compensational Tribunal and the power of a court to make a compensation order under section (6) of the Criminal Justice Act 1993

The purpose of the Directive is to ensure that victims of crime receive appropriate information, support and protection and are treated in a respectful, dignified, professional and non-discriminatory manner.

• entitlement to interpretation and translation or other linguistic assistance

• procedures for victims who are resident outside the State

• entitlement to expenses arising from participation in the criminal justice process

• entitlement of a victim to inform the court of trial how he or she has been affected by the offence

• the procedure to obtain information from the Irish Prison Service on the release of a prisoner

• available grievance procedures

Neither the Directive nor the General Scheme provide how the information should be given. Guidance from the Commission suggests that it can be provided both orally and in writing, but must be appropriate to the victim's individual circumstances – for example you could not refer to a website if a victim did not possess a computer.

Article 6 refers to the right of a victim to information regarding criminal proceedings that arise from their complaint. This includes any decision not to prosecute the offender, the time and place of the trial, the nature of the charges against the offender, final judgment and information enabling the victim to know about the state of the criminal proceedings. Head 8 of the General Scheme would provide for the appropriate member of the Garda Síochána to provide a complainant with various information, if he/she so requested, including:

• significant developments in the investigation of the offence alleged

• any decision not to proceed with, or to discontinue an investigation into the offence alleged and the reasons or a brief summary of the reasons for same

• if it is proposed to deal with an alleged offender in relation to the offence alleged in the complaint otherwise than by prosecution before a court

• any decision not to prosecute an alleged offender and the reasons or a brief summary of the reasons for same

• the date and place of the trial of, and the nature of the charges against, any alleged offender

• the date and place of any appeal by an alleged offender or by the Director of Public Prosecutions against any decision

in the trial of the alleged offender

• the final decision in any trial of an alleged offender and the outcome of any appeal against that decision

• the release or escape from custody of any alleged offender, at any time prior to the final decision in his or her trial for the offence in any case where it has been assessed that the victim may require protection

• a copy of any statement made by the victim

Head 10 of the General Scheme would provide that in fatal cases the information that would have been provided to the victim can be provided to family members instead.

Victim Assessments

Article 22 of the Directive provides for national authorities to ensure that victims receive an assessment of their individual protection needs. Head 6 of the General Scheme would provide for this assessment to be carried out by the Garda Síochana.

Article 23 of the Directive provides that where a victim is assessed as having special protection needs that specific measures should be taken to protect them during interviews and court proceedings.

Article 24 provides that where the victim is a child, all interviews should be recorded and these should be admissible as evidence in criminal proceedings.

Review of a Decision not to Prosecute

Article 9(3) gives the victim a right to brief reasons for a decision not to prosecute, and Article 11 allows the victim the right to seek a review of a decision not to prosecute. Head 13 of the General Scheme would provide that where a decision is taken not to prosecute, and the victim has requested to be informed of such a decision, the Garda or the DPP as appropriate must give the victim the reasons or a summary of the reasons for the decision. This is a major change in that the DPP has traditionally not given reasons for her decisions, though she has done so to victim's family members in homicide/fatal accident cases since 2008.

Restorative Justice Services

Article 12 of the Directive provides for the protection of the victim when participating in restorative justice services. This includes information about the services, that they should have the victim's free and informed consent, and that the offender has acknowledged the basic facts of the case. Head 28 of the General Scheme would provide in these terms.

Victim Personal Statements

Head 9 of the General Scheme would provide that if a victim chose to, they could make a statement in writing (called a Victim Personal Statement) setting out how they had been affected by the crime. This statement would be given to the Garda and the DPP. The prosecution would give this statement to the trial court and serve it on the defence when a plea of guilty is entered or after the accused is convicted (but before sentencing). The Court would be required to take the Victim Personal Statement into account when sentencing the accused.

Other Provisions

The Directive provides the following rights, among others, to victims:

• to protection, from retaliation, intimidation, and repeat victimisation, among other things (Article 18)

• to avoid contact with the offender (Article 19)

• to protection of privacy (Article 21)

Legal Aid Implications

Article 13 of the Directive provides that member states shall ensure that a victim has access to legal aid where they are a party to criminal proceedings.

In the Irish criminal justice system, the victim is not typically a party to criminal proceedings. Although the common law right to take a private prosecution still exists (see *Kelly v Ryan [2015] IESC 69*), the overwhelming majority of offences are prosecuted either by or on behalf of the Director of Public Prosecutions. Therefore it appears that there are no new legal aid implications arising from the Directive, and the General Scheme does not mention legal aid. The Board continues to provide its free legal advice service to victims of human trafficking and complainants in rape and certain sexual assault cases, and legal representation to complainants in rape and certain sexual assault trials where an application is made to adduce evidence on, or cross-examine the complainant in relation to, their prior sexual history.

Implementation in Ireland

This is just an overview of some of the more important provisions in what will be a significant piece of legislation from the point of view of victims of crime. It marks a move towards a more victim-centric approach in the criminal justice system. In particular the statutory provision for the DPP to give reasons will be a major change in practice. It will be noted however, that in the General Scheme, many of the provisions would be placed on an "opt-in" basis would not automatically be applied. The victim would have to inform the Garda of their decision to opt in – the phrase "if the victim so requests" appears repeatedly. This is a feature of the proposed Irish legislation rather than the Directive itself.

It is extremely unlikely that a Criminal Justice (Victims of Crime) Bill will be introduced, much less enacted by the Oireachtas by 16th November - the date the Directive is required to be transposed into national law. However in *Public Prosecutor v Ratti [1979] ECR 1629* it was established that an individual may be able to rely on an EU directive if the time for transposing the directive into national law has expired. This being the case, the Department of Justice and Equality has established a working group for the implementation of the Directive on an administrative basis as of this date. The Board is represented on the working group.

You can find the Directive, along with guidance notes from the Commission at:

http://ec.europa.eu/justice/criminal/victims/index_en.htm

The General Scheme of a Criminal Justice (Victims of Crime) Bill is available at:

http://www.justice.ie/en/JELR/Pages/Criminal_Justice_(Victims_of_Crime)_Bill

Current Awareness: Case Summaries

Phil O'Laoide,
Regional Manager

In the Matter of D.W. (A Minor), Child & Family Agency & A.T. & J.T. v Adoption Authority of Ireland & D.W. [2015] IEHC 563

Abandonment by Failure to Appoint Testamentary Guardian

This case deals with the question of abandonment by a deceased parent. Mr Justice Abbott gave judgment on the 27th August, 2015 granting an Adoption Order in respect of child D.W. who was born on the 7th November, 1997. The birth mother of D.W. had indicated to the social work department that she could not cope with caring for her children and she had requested that they be taken into care. D.W. was placed with the proposed adopters A.T. and J.T. The birth mother died in July, 2008 intestate. The applicants sought an order of the court authorising the Adoption Authority to make the Adoption Order where the birth parents of D.W. had failed in their duty towards him.

Section 54(2) of the 2010 Adoption Act deals with abandonment. It states as follows:

2. On an application being made … the High Court by order may authorise the authority to make an adoption order in relation to the child in favour of the applicants and to dispense with the consent of any person whose consent is necessary to the making of an adoption order if:

(a) Having due regard for the rights, whether under the constitution or otherwise, of the persons concerned (including the natural and in-prescriptable rights of the child), the High Court is satisfied that it would be in the best interest of the child to grant the authorisation, and

(b) It has shown to the satisfaction of the High Court as follows:-

1. For a continuous period of not less than 12 months and immediately preceding the time of the making of the application, the parents of the child ….failed in their duty towards the child.

2. It is likely that this failure will continue without interruption until the child attains the age of 18.

3. That failure constitutes an abandonment on the part of the parents of all parental rights, whether under the constitution or otherwise with respect to the child.

4. By reason of the failure, the State as guardians of the common good should supply the place of the parents.

2. That the child:

1. At the time of the making of the application in the custody of or at a home of the applicant.

2. For a continuous period of not less than 12 months immediately preceding that time has been in the custody of or has a home with the applicant.

3. The adoption of the child by the applicants is an appropriate means by which to supply the place of the parents.

In his judgment Judge Abbott deemed it most appropriate for the court to consider the rights of the child in addition to its considerations of the rights of the birth father and the birth mother. He said while not limiting itself to the consideration of the rights of the central figures the court would "isolate these actors considerably who remain most at issue in the present circumstances".
His judgment goes on to deal with the rights of the unmarried birth father as having evolved and whose position has been altered by Section 5 of the Adoption Act, 1998 which entitles the birth father of a child to be heard in the context of an application for the child's adoption. This entitlement is included under Section 43 of the Adoption Act of 2010. The father in this case had stated in writing that he did not object to the proposed adoption of the child.
Judge Abbott then held that for a continuous period of not less than 12 months preceding the time of the making of the application by the proposed adopters the birth father had failed in his duty towards the child and it is likely this failure would continue without interruption until the child is 18 and that the failure constituted an abandonment.

Judge Abbott held that "the natural and inprescriptable rights of the mother and her child must be balanced".

In dealing with the question of abandonment by the birth mother Judge Abbot held that she had demonstrated herself to have failed her child through alcohol abuse the consequences of such abuse including the inappropriate care of her child and her decision to place him into care. In assessing as to whether such conduct seemed to constitute parental abandonment for the purpose of the Act Judge Abbott held that "the natural and inprescriptable rights of the mother and her child must be balanced".

Here the birth mother had died on the 7th July, 2008 Judge Abbott held that "death in the absence of testamentary provisions or the election of a testamentary guardian has in special circumstances of this case caused the mother of the child to have failed in her duty towards her child. This failure was ongoing and perpetual and constituted abandonment on her part of all her parental rights, the rights being now impossible to realise or indeed redeem.

The court heard the evidence of both the proposed adopters and was satisfied that they would provide a good home for the child. Judge Abbott met the child in person and listened to the views of the child and was satisfied that it was in his best interests to be taken into the T family and all parental rights and duties which pertain to him should now be vested by order of the adoption authority with the adoptive parents A.T. and J.T.

In the Matter of B.L.R. AND V.A.R. (Minors), R v R [2015] IEHC 573

Acquiescence and Grave Risk as Defences in Child Abduction Proceedings

Judgment was delivered in this case on the 31st July, 2015. It was heard before Mr Justice Henry Abbott. The proceedings involved an application by a German national who was married to the Respondent, a Polish national, for the return of his two sons aged 5 and 3 to Germany. The children had been taken by their mother on the 8th December, 2014 to Ireland. In the course of proceedings and as part of the Respondent's defence it was asserted that the Applicant had acquiesced and also there was grave risk if the children were returned.

The court was satisfied that the children had been habitually resident in Germany and that the removal had been wrongful. The defence of acquiescence arose out of emails sent by the Applicant around the 12th December, 2014. In the email the Applicant set out what Judge Abbott referred to as "his stall". The emails set out proposals for the applicant coming to Ireland and suggested items that could be sold in Germany and sent to Ireland. References were made to there being only one season in Ireland! Judge Abbott was satisfied that this email was merely setting out the grounds for negotiation rather than an acquiescence of the children staying in Ireland. Judge Abbott held that the letter did not "constitute a consent or document of acquiescence " and that it clearly "indicates a negotiating mentality rather than a concessionary one: an invitation to negotiate".

The Respondent also relied on the Applicant's involvement with the children's education in Ireland and his enquiries into their education. Judge Abbott held that the Applicant's participation was something to be praised and it would be improper and bad policy for the court to hold that a level of participation in children's lives would amount to acquiescence or consent. In the Judge's view it would be very destructive of children's interest in the context of this type of litigation to allow that type of consideration to creep into assessment of such cases.

Grave Risk

In relation to grave risk it was accepted that the standard of grave risk is a high one. It was admitted in evidence that the Applicant would have carried out corporal punishment and did in fact kick one of his sons on one occasion. The court was of the view that if there was a grave risk of danger to the child it would have been canvassed by the Respondent in greater detail other than in respect of one isolated incident of a kick. There had been no narrative, recourse to police authorities, court procedures or social workers. It was held that there had been normal contact between the parents and the children and the fact that there had been a different parenting approach by the two parents was not unusual. Judge Abbott did say it was of considerable importance in finalising considerations of grave risk that there was an undertaking given to the court that the Applicant

it was accepted that the standard of grave risk is a high one.

would vacate the apartment occupied by the family and leave it free for the Respondent to return with the children pending the determination of the custody proceedings in Germany.

Note: A Protection Order had been obtained by the respondent in the District Court in this jurisdiction. Judge Abbott held that this District Court Order was made entirely under the proper jurisdiction insofar as the Brussels 2 bis regulations allow for protective measures to be taken by courts dealing in matters of parental responsibility regardless of where the main jurisdiction might lie under the Hague proceedings.

Irish Life and Permanent plc v Dunne & Irish Life and Permanent plc v Dunphy [2015] IESC 46

Good and Bad News for Borrowers in Financial Difficulties

Judgment was delivered by Mr Justice Clarke on 15th May 2015. These cases came by way of case stated to the Supreme Court having been referred by His Hon Mr Justice Hogan in the High Court. The question as to whether the Supreme Court had jurisdiction had first to be addressed. Both cases had come before the High Court by way of appeal from the Circuit Court.

Interestingly it was the Irish Permanent who was the Appellant in the "Dunnes" case where an Order for possession had been refused. In the Dunphy case Mr Dunphy was appealing a Circuit Repossession Order. No oral evidence had been adduced. Indeed the Dunnes had not engaged with the proceedings or attended court. The Courts of Justice 1936 act allows for appeals from the Circuit Court under sections 37 (where there was no oral evidence) and Section 38. It is however only section 38 which provides that an appellant court can state a case.

The court declined to adopt a literal interpretation and held it had jurisdiction to hear cases where no oral evidence had been heard.

It is the Dunnes case which involved the "Code". In spite of the fact that no Defence or even Appearance had been entered by the Dunnes the Circuit Court judge was not happy to make the repossession order.

The Dunnes had been advanced a loan in 2007 and a charge was registered on their lands in County Offaly. They defaulted on same and under the terms of the loan the principal sum became payable immediately. Proceedings were issued in May 2011. The Dunnes did not enter an Appearance or Defence and no issue in respect of the code was raised until the matter came before the Circuit Court. The court refused a repossession order on the basis that there had been no demand for payment on or before 1st December 2009. Judge Murphy did not accept that the Bank had an existing right which would subsist in spite of the repeal of section 62(7) of 1964 act. There had not been compliance with the code.

The High Court in hearing the appeal by the bank stated the following questions:

- *In the absence of any statutory indication that failure to comply with the applicable Code of Conduct on Mortgage Arrears as promulgated under Section 117 of the Central Bank Act 1989 as*

amended ("the Code") affects the ability of the lender to secure an order for possession of premises covered by the Code, does non-compliance of the Code affect, as a matter of law, the lender's entitlement to obtain an order for possession?

- *If non-compliance with the Code affects the entitlement of the lender to secure an order for possession, must the Court refuse to make such an order in the event of any breach with the Code, or does the lender's entitlement to an order depend on the nature or the circumstances of the breach or on the possibility of addressing any prejudice resulting from such breach by an order for adjournment of the proceedings or the granting of a stay (subject to conditions or otherwise) or any order for possession?*

His Honour Mr Justice Clarke in delivering judgment held that there was no doubt the Code forms part of the law. Under Section 117(1) of the 1989 act as amended a regulated financial institution is obliged to follow the Code and will be answerable to the regulator if it fails to do so. However what the court was concerned with was the impact on the legal rights and obligations of the lender and borrower.

The court was not satisfied that the Code could be an implied term in the contract between a lender and borrowers. The Code terms could change and the legislation had not specifically stated it should be such an implied term (unlike for example Sale of Goods and Supply of Services Act 1980).

The court examined the case law to date and differentiated between the moratorium provision of the code and other provisions.

Mr Justice Clarke stated that for a court to entertain an application for possession which was brought in circumstances of a clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned in seeking possession was contrary to the intention or purpose behind the Code itself.

The court held that in respect of the other provisions of the code different considerations applied. The court did not consider it had a role in assessing reasonableness or compliance in detail. Mr Justice Clarke said:

The problematic legal issue which arises in this case stems from the very fact that the Oireachtas did not choose, in the context of empowering the Central Bank to make binding codes, to specify whether the courts were to have any particular role in applying the provisions of such a code to affect what would otherwise be the ordinary legal rights and obligations arising between a lender and a borrower.

It is clear from this judgment that, except in a case of a clear breach of the moratorium (and the reader will know this has been reduced to a three month period), the courts will not play a role in assessing compliance with the code or conduct in general and in the absence of legislation to the contrary will not refuse an order for repossession where a lawful case for possession exists but the Code has been breached.

Current Awareness: Legislation Update

Industrial Relations (Amendment) Act 2015

This Act was signed by the President on 22nd July 2015 and commenced on 1st August. It provides for employment agreements governing remuneration and conditions of employment in individual enterprises, and a statutory framework for minimum rates of remuneration, pension and sick pay. It also reforms the current law on collective bargaining.

Civil Debt (Procedures) Act 2015

This Act, signed by the President on 27th July 2015, provides for the attachment of earnings or deductions from social welfare payments for enforcement of debts more than €500 and less than €4000 in value. It also includes safeguards to ensure protection of debtors who "can't pay" and abolishes imprisonment of debtors.

Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015

Signed by the President on 29th August 2015, this Act gives effect to the Constitutional amendment to allow marriage to be contracted by two persons without distinction as to their sex, as approved at the referendum on 22nd May. The Marriage Bill 2015 was initiated on 15th September 2015 to update the statute book in line with the result of the referendum.

Child Care (Amendment) Bill 2015

This Bill, introduced in the Seanad on 16th October 2015, strengthens the legislative provisions for aftercare by placing a statutory duty on the Child and Family Agency (Tusla) to prepare an aftercare plan for eligible children and young people for the first time.

Child Care (Guardian Ad Litem) Bill 2015

Initiated on 15th July 2015, this Bill aims to regulate the system for appointing and retaining guardians ad litem in child care proceedings, and to reduce costs. It empowers the Minister for Children to make regulations, grants courts the discretion to retain a guardian ad litem in circumstances where a child becomes party to proceedings, and provides judicial guidelines for the appointment of a guardian ad litem.

Education (Amendment) Bill 2015

Initiated on 21st October 2015, the purpose of this Bill is to establish an Ombudsman for Education, and to provide an appeal mechanism for decisions of boards of education concerning decisions of teachers and grievances against schools.

Employment Equality (Amendment) Bill 2015

This Bill, introduced on 9th June 2015, seeks to amend the provisions in Section 37(1) of the Employment Equality Act 1998 which currently allow religious organisations, on particular grounds, to give less favourable treatment to employees on the basis of gender, marital status, family status, sexual orientation, religion, age, traveller community, disability or race.