The Bar Review

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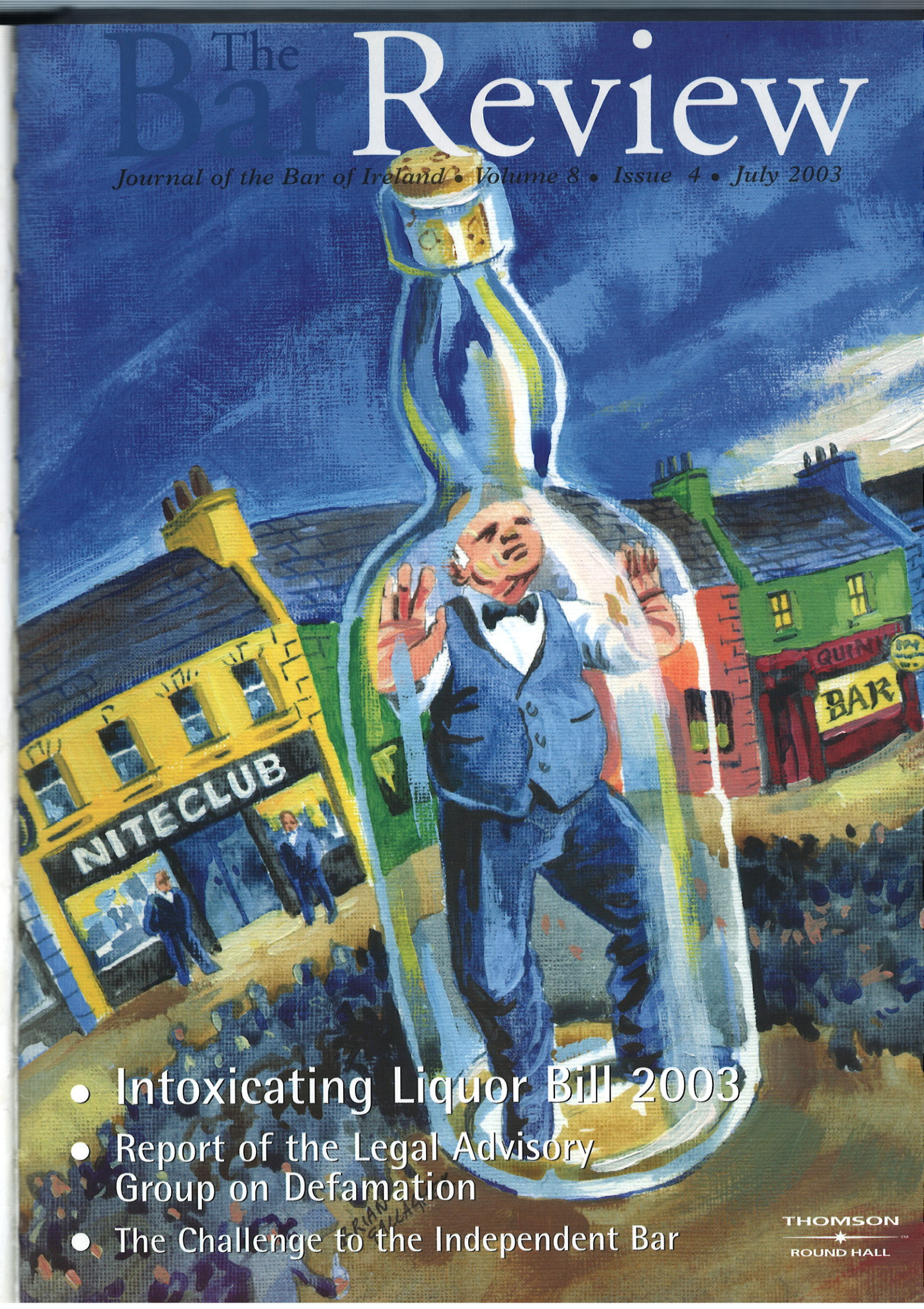

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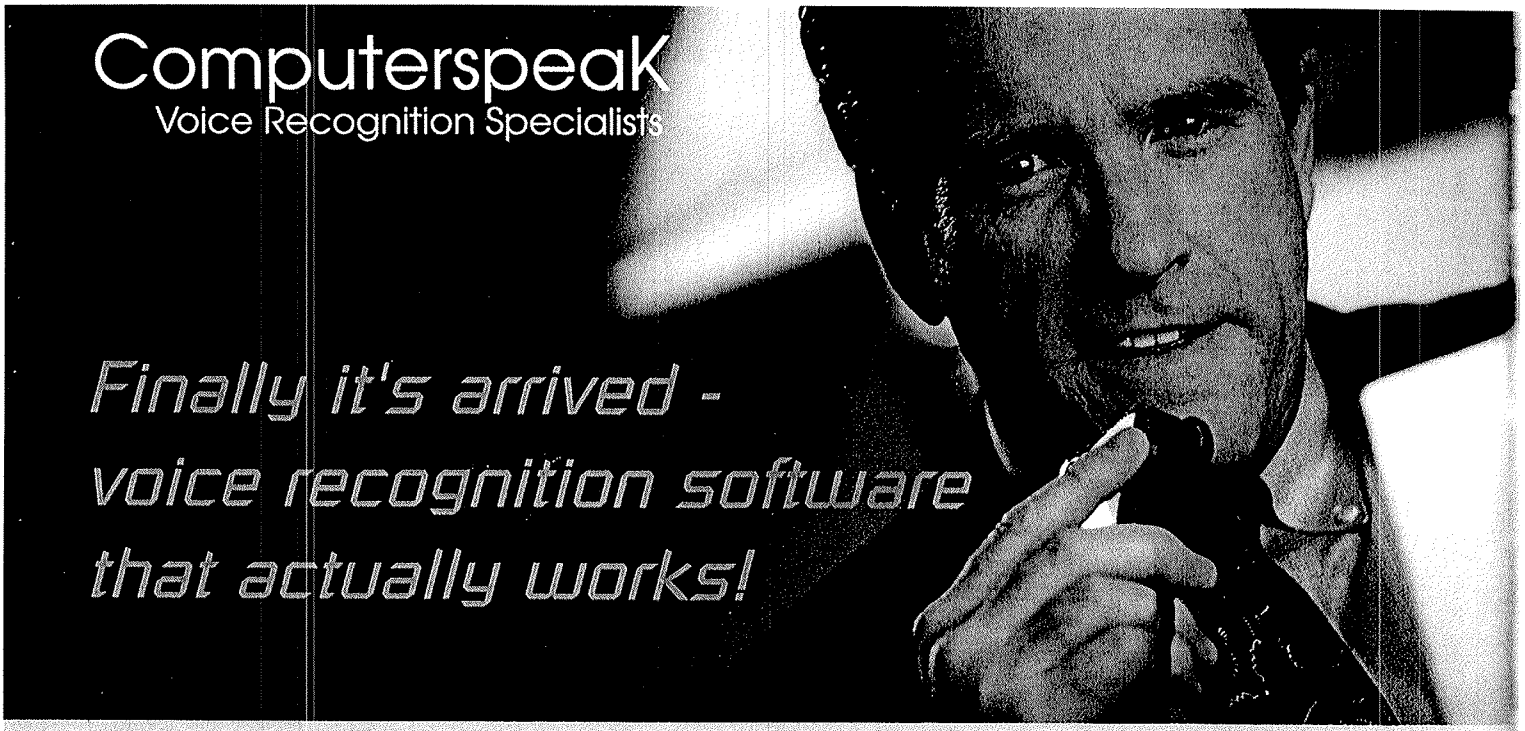

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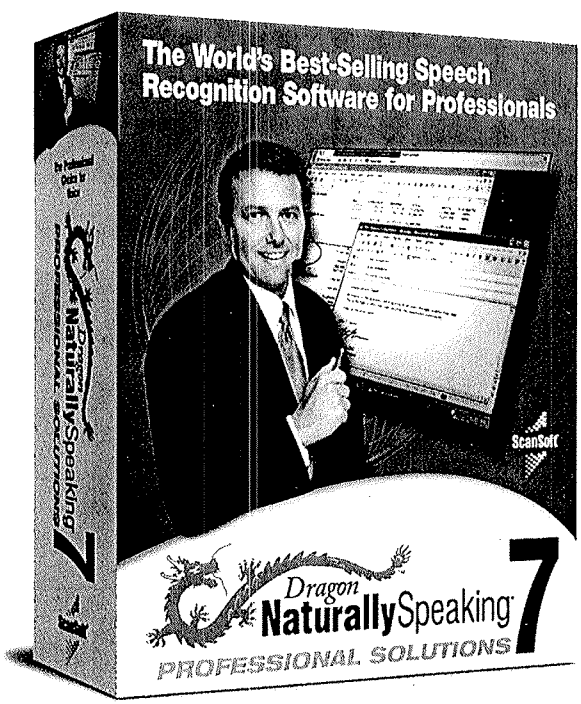

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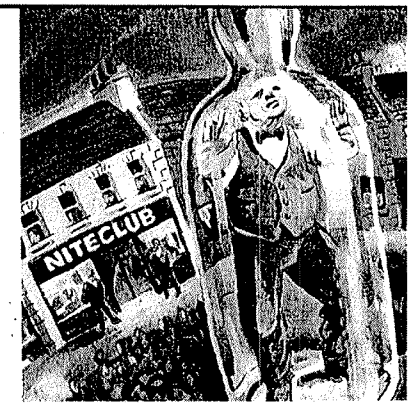

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The Commissions of Investigation Bill 2003

On 2nd July, 2003, the Minister for Justice, Equality and Law Reform, Michael McDowell, published the Bill that aims to provide for a more timely and cost-effective mechanism for the investigation of issues of significant public concern. The Minister has stressed that this will provide an alternative to the current inquiry and investigation mechanisms available and will not replace or alter the work of Tribunals of Inquiry currently underway. The thrust of the proposed legislation is that evidence will generally be taken in private, without legal representation. Certainly, any proposal that helps to cut the cost of inquiries is to be welcomed, particularly at a time when the government is becoming increasingly strapped for cash. However, in the drive to cut costs associated with inquiries, it is most important that the fundamental rights of individuals whose affairs are being investigated are not abrogated or disregarded.

A commission has wide powers to conduct its investigation in the manner that it considers appropriate in the circumstances of the case. It follows that the success of these commissions and the extent to which they conform with fair procedures will depend on the manner in which the investigation is conducted. In this regard, certain provisions in the Bill merit discussion.

Under Section 10, when the evidence of a witness is heard in private, the commission may give directions as to the persons who may be present while the evidence is heard. The legal representatives of persons other than the witness may be present only if the commission is satisfied that their presence would be in keeping with the purposes of the investigation and would be in the interests of fair procedures. Furthermore, a witness may be cross-examined by, or on behalf, of any person, only if the commission so directs. It is to be hoped that each commission will behave scrupulously in affording to any person whose good name may be tarnished by evidence given by a witness to a commission, the right to attend at the giving of that evidence and the right to cross-examine the witness. Such a practice may well serve to push up costs. So be it. Such a practice is necessary to uphold the principles of constitutional justice as formulated in the seminal *Re Haughey* case. However, a key problem is that when evidence is given in private, a person against whom allegations are made, may have no knowledge of this, unless the commission grants him the right to attend. It will be extremely difficult for any affected person to monitor the manner in which the commission is applying fair procedures, and it is possible that breaches of natural justice may only become apparent after a commission has drafted its report.

Certainly, Section 11(1) of the Bill places an affirmative duty on the commission to disclose to any person against whom evidence is given, the substance of such evidence. This undoubtedly gives a person against whom allegations have been made a chance to respond to those allegations. However, the legislation does not impose a corresponding duty on the commission to accord to such person the right to attend when the witness is giving evidence against him, or the right to cross-examine him on such evidence.

Section 11(2) also poses some concerns. This provides that the commission does not have to disclose the *source* of any evidence given or document produced by a witness, unless the commission considers that the source should be disclosed in view of the purposes of the investigation, or in the interests of fair procedures. It is very difficult to conceive of a situation where a person against whom allegations have been made would not be entitled to be informed of the source of those allegations. It is extremely difficult for any person to address allegations made against him if he does not know the identity of his accuser.

The effect of Section 10 and 11 is that any person against whom allegations have been made, has a right under the proposed legislation to receive the substance of the evidence against him, but does not have a statutory right to be informed of the source of the allegations or to cross-examine the witness on his testimony. It is to be hoped that any commission of investigation would not in practice seek to abridge the constitutional right to cross examine and confront ones accusers as enshrined in the *Re Haughey* case.

It may be argued that Section 33 and 34 of the Bill provide adequate protection for anyone identified in the report of a commission. These sections provide that any such person who believes the commission has not observed fair procedures in relation to him, may request the commission to review the draft or may apply to court for an order that the draft be amended. On such an application, the court may make any order it thinks fit, including submitting the report to the relevant Minister with such amendments as the court may direct. The court may also give such person an opportunity to give any evidence or make any submission that it considers should, in the interests of fair procedures, be received by the commission before the draft report is finalised. These provisions seem to envisage a situation where the court can cure defects in fair procedures by allowing a person to make late submissions to the commission. However, in practice, I would submit that the only appropriate order in such circumstances would be an amendment to the draft report deleting any part of it that is based on evidence received in breach of fair procedures. If the commission has come to a conclusion regarding an individual on the basis of such evidence, then, the findings in relation to that person are tainted and should be deleted. I would submit that at the time of preparation of its report, a commission will have already judged the issues. It is difficult to see how allowing a person to make submissions at this late stage (without the possibility of cross-examining any accuser) will adequately remedy any defects in fair procedures at first instance. ●

High Court Judge Weds

Pictured at the marriage of Mr Justice Diarmuid O'Donovan and Sara Moorhead B.L. at the Santa Susanna Church in Rome on June 7th, were the Hon. Mr Justice Johnson, the Hon. Mr Justice Kelly, the Hon. Mr Justice Murphy, the President of the High Court, the Hon. Mr Justice Finnegan, the Hon. Mr Justice Geoghegan, the Hon. Mrs Justice Finlay Geoghegan and the Hon. Mr. Justice Kearns.
(Photo; Jimmy Kelly)

Kings Inns Honours 007

Pierce Brosnan dropped in to Kings Inns in June to film his latest movie, "The Laws of Attraction." He had previously filmed "Evelyn" on location at the Kings Inns. On this occasion, Camilla McAleese, Under Treasurer and the Hon. Mr Justice Philip O'Sullivan, presented him with a clock as a memento of his visit.

Auction of Greg Murphy Library

Pictured at the auction of the library of the late Gregory Murphy SC were Jennifer Aston, consultant historian and Felix McEnroy SC(auctioneer). (Photo Anthony P. Quinn)

Deceased Colleagues

Heartfelt sympathies to the family and friends of Eamon Leahy, SC, Brian Gillespie BL and Triona Daly BL who passed away this month. They will be sadly missed and fondly remembered by all their colleagues. May they rest in peace.

Roger Casement Painting on Display in London

The painting of " High Treason: The Appeal of Roger Casement," usually on display at the entrance to the dining room in Kings Inns, has been placed on exhibit in the National Portrait Gallery in London. The painting will return to its usual home in October.

Report of the Legal Advisory Group on Defamation

Eoin McCullough SC

The Law Reform Commission published its Report on the Civil Law of Defamation in 1991, though no action was taken on foot of its recommendations. A number of unofficial reports and draft bills have been published over the years since then. In September 2002, the Minister for Justice, Equality and Law Reform established the Legal Advisory Group on Defamation. The Group report was published in June 2003. It recommended the repeal of the Defamation Act 1961 and the passing into law of a new Act dealing comprehensively with the law of defamation.

The Report is both convincing and comprehensive. Its recommendations are thoughtful and well balanced. If they are passed into law, they will give a new freedom to the media to report on issues of public interest, while at the same time introducing for the first time a Press Council that will provide easy and cheap redress for those whose reputation had been damaged or whose privacy had been infringed.

Summary of Recommendations

The Group considered a number of issues, including some issues specifically mentioned in its terms of reference. It recommended the acceptance of a number of the proposals that had been made by the Law Reform Commission in its report. It then embodied all of its recommendations into a draft Defamation Bill. The central recommendations made by the Group itself are as follows: -

(i) There should be a defence, to be known as the "defence of reasonable publication", which would be available where a defendant could show that the publication in question had been made in the course of, or for the purposes of the discussion of, some subject of public interest, the public discussion of which was for the public benefit.

(ii) Juries should continue to have a role in assessing damages in the High Court. However, parties should be able to make submissions to the court and address the jury concerning damages. The judge would be required to give directions to the jury on this point.

(iii) The jurisdiction of the Circuit Court in defamation cases should be set at €50,000.

(iv) There should be a clear statutory statement to the effect that, in a defamation appeal from the High Court, the Supreme Court could substitute its own assessment of damages for that award in the lower court.

(v) There should be no substantive change in the law concerning the presumption of falsity. However, the plaintiff should have to file an affidavit, which would verify the particulars of their claim.

(vi) A Press Council should be established on a statutory basis, which would have a number of functions, including the preparation of a Press Code of Conduct in the investigation of complaints in respect of alleged breaches of that code.

(vii) Defendants should be able to make lodgments in court regardless of whether liability is admitted or denied. A plaintiff should be entitled to inform the court that they have accepted a lodgment and to inform the court of the consequences for them of the resolution of the defamation proceedings.

(viii) The tort of malicious falsehood should be retained, but should be restated in a clearer and more simplified manner.

(ix) A new fast track procedure should be introduced so that, in an appropriate case, it would be possible for either party to apply to court to have a defamation action disposed of in a summary manner by a judge sitting alone. The remedies encompassed by a procedure of this kind should not include damages.

(x) The defence of fair comment should be renamed the defence of honest opinion and its scope clarified.

(xi) A new defence, to be known as "the defence of innocent publication" should be provided for, to replace and expand the common law defence of innocent dissemination. Specific provision should be made to deal with internet service providers.

(xii) There should be a single cause of action in respect of multiple publications.

(xiii) The limitation period in respect of defamation proceeding should be one year only, with a discretion in the court to dissapply this limitation period subject to a general proviso that no proceeding should be brought after the expiry of six years from the date on which the cause of action accrued.

(xiv) There should be a "single publication" rule, and a cause of action in defamation should be deemed to accrue from the date on which the matter complained of is first published, (or in the case of an electronic publication) from the date on which the matter complained of was first made available.

(xv) Provision should be made to enable a court to determine, as a preliminary matter, whether or not the allegedly defamatory material is capable of bearing the meaning for which the plaintiff intends.

(xvi) The common law offences of blasphemous libel, obscene libel and seditious libel should be abolished. The offence of criminal libel should be abolished and replaced by a narrower offence to be known as the offence of publication of gravely harmful statements.

In addition to these recommendations, the Group recommended that a significant number of proposals that had been made by the Law Reform Commission should be adopted. Central amongst these are the following: -

(i) The distinction between libel and slander should be abolished and defamation should be a civil wrong in which it should not be necessary to prove special damage.

(ii) "Defamation" should be defined for the purpose of legislation.

(iii) An offer of an apology or the making of an apology by the defendant should not be construed as an admission of liability and it should be lawful for such apology or offer of apology to be used in mitigation of damages.

(iv) There should be statutory provisions clarifying some of the occasions when absolute privilege would arise, and clarifying the elements of the common law defence of qualified privilege.

(v) The defence of justification should be renamed the defence of truth and should be given statutory form.

(vi) A cause of action in defamation should survive the death of the defamer or the alleged victim after publication, subject to various conditions.

There follows below a brief discussion of the most significant recommendations made by the Group.

A New Defence of Reasonable Publication

Until relatively recently, it was believed that the common law did not in general provide any privilege for publication in the mass media. The fundamental principle of qualified privilege is that a statement is protected by privilege only if the publication of it is to persons who have a proper interest or duty in the matter with which it is concerned. Subject to certain limited exceptions[1], the public as a whole were not thought capable of having the relevant interest or duty.

It had long been apparent that this understanding of the common law was likely to conflict with article 10 of the European Convention on Human Rights which deals with the right to freedom of expression. A number of criminal convictions recorded by the Austrian Courts have been found to constitute breaches of article 10[2]. In *Oberschlick v Austria (No. 2)*, the ECHR stated: -

> "A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly."[3].

Article 10 protects not merely criticism of politicians but also political discussion and discussion of other matters of public concern generally[4]. Some of the publications in issue in these cases might have been protected by the common law of fair comment, and the article 10 case law does make a distinction between statements of fact and value judgments[5]. Nevertheless, it appears that article 10 protection extends well beyond what would be offered by the common law of fair comment. A broad view is taken of what constitutes a value judgment,[6] and it will on occasion be a breach of article 10 to require the proof of the truth of factual statements.[7] Nor is it always necessary to state the facts upon which a particular value judgement is based.[8] Although a failure to undertake adequate research may deprive a newspaper of the benefit of article 10[9], a generous view will be taken of what is appropriate in that regard. Thus, in *Jersild v. Denmark*[10], the ECHR stated: -

> "The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this court, nor for the national courts for this matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."[11].

There have been similar developments in other jurisdictions. In the United States, the Supreme Court determined in *New York Times v. Sullivan*[12] that "public officials" could not succeed in an action for defamation unless they could establish that the defendant published the statement with knowledge of its falsity or in reckless disregard of its truth or falsity. The same principles now apply to claims brought by candidates for public office and by "public figures".

1. The exceptions are discussed in Gatley on *Libel and Slander* (9th Ed.) paras. 14.79 to 14.82. To these exceptions should be added the cases protected by section 24 of the Defamation Act 1961.
2. *Lingens v. Austria* (1986) 8 EHRR 407; *Oberschlick v. Austria* (1995) 19 EHRR 389; *Oberschlick v. Austria* (No. 2) [1998] 25 EHRR 357
3. At paragraph 29
4. *Thorgeirson v. Iceland* (1992) 14 EHRR 843 (allegations of brutality against the Reykjavik police); *Bladet Tromso v. Norway* (2000) 29 EHRR 125 (allegations of breach of regulations governing seal hunting by the crew of a ship); *Bergens Tidende v. Norway* (2/5/2000) (the activities of a prominent cosmetic surgeon).
5. *Lingens v. Austria; Thorgeirson v. Iceland; Jerusalem v. Austria (27/2/2001) ; Feldek v. Slovakia* (13/7/2001)
6. Thus, for example, the statement that members of the Austrian Freedom Party had been guilty of "racist agitation" was found to be a value judgment in *Unabhangige Initiative Informationsviefalt v. Austria* (26.2.2002)
7. *Thorgeirson v. Iceland* at para. 65.
8. *Feldek v. Slovakia* at para. 86.
9. See for instance, *Prager and Oberschlick v. Austria* (1996) 21 EHRR 1.
10. (1995) 19 EHRR 1, para 31.
11. See also *De Haes and Gijsels v. Belgium* (1998) 25 EHRR 1
12. 376 US 254 (1964)

New York Times v. Sullivan has its origin in the first amendment to the US Constitution. The High Court of Australia in *Lange v. Australian Broadcasting Corporation*[13] relied upon the Australian Constitution in order to develop the common law of qualified privilege. Following *Lange*, publication on a "government or political matter" is an occasion of qualified privilege with the necessary reciprocity existing between the media and the public. In order to take advantage of this privilege, a defendant must show that its conduct in publishing was reasonable. Privilege is defeated by malice, although of course it is hard to imagine material that could be published reasonably but maliciously.

There have been similar developments in New Zealand and in a number of other jurisdictions, which share the common law heritage. The matter was considered by the New Zealand Court of Appeal in *Lange v. Atkinson*[14]. It was held that the defence of qualified privilege applied to generally published statements made about the actions and qualities of those currently or formerly elected to parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affected their capacity to meet their public responsibilities. Although in this sense the privilege is narrower is scope that in Australia, it is broader in that there is no specific requirement of reasonableness. Again, the privilege is defeated by proof of malice in the common law sense.

The common law privilege for publications in the media has been considerably extended in England by *Reynolds v Times Newspapers Limited*[15]. The House of Lords rejected the proposition that the common law should develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances. It held however that qualified privilege was available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had an interest in receiving it. For that purpose, Lord Nicholls (with whom Lord Cooke and Lord Hobhouse agreed) stated[16] that a number of matters would be taken into account in order to determine whether the duty/interest test had been met. He mentioned the following as illustrative only: -

(i) The seriousness of the allegation;

(ii) The nature of the information and the extent to which the subject matter is a matter of public concern;

(iii) The source of the information;

(iv) The steps taken to verify the information;

(v) The status of the information;

(vi) The urgency of the matter;

(vii) Whether comment was sought from the plaintiff;

(viii) Whether the article contained the gist of the plaintiff's side of the story;

(ix) The tone of the article.

The important distinction between the Australian authority on the one hand and *Reynolds* on the other hand is the rejection of a generic qualified privilege for political speech. It may of course be that this difference is more apparent than real. The decision in *Reynolds* has been justly criticised[17]. It is said firstly that it adds to the uncertainty and therefore to the chilling effect of this branch of the law. It is said secondly that issues such as those mentioned by Lord Nicholls are appropriate to be considered on the question of malice, but have nothing to do with the question of whether the occasion is privileged in the first place.

In *Loutchansky v. Times Newspapers Limited*[18], the Court of Appeal stated that the central issue in determining whether or not an article had been published on an occasion of qualified privilege was that of whether the standard of responsible journalism had been satisfied.

The Legal Advisory Group reviewed these matters, and stated that its work suggested clearly that there were deficiencies in the approach that the Irish law of defamation at present takes towards the publication of matters which would generally be regarded as being in the public interest. It recommended the introduction of a statutory provision to provide for and enhance protection in respect of publications made in the public interest. Rather than expanding the defence of qualified privilege, the Group stated that it would be more appropriate and transparent to develop a new defence, which it suggested might be called the "defence of reasonable publication". It recommended that this defence would be available where a defendant could show that the publication in question was made in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which was for the public benefit. This defence would be subject to an overarching requirement, that in all the circumstances of the case, it was reasonable for the publication to be published. In determining what was reasonable in the circumstances, the court would be guided by a number of matters, which would be permissive and not exhaustive. Relevant matters would include the following: -

(i) The extent to which the matter complained of is of public concern;

(ii) The extent to which the matter complained of concerns the performance of the public functions or activities of the person who is the subject of the defamation proceedings;

(iii) The seriousness of any defamatory imputations carried by the matter complained of;

13. (1997) 189 CLR 520
14. The original decision of the Court of Appeal is found at [1998] 3 NZLR 424. That decision was the subject of an appeal to the Privy Council, who heard the appeal at the same time as the appeal from the Court of Appeal in *Reynolds v. Times Newspapers Limited*. The Privy Council remitted the matter back to the New Zealand Court of Appeal for reconsideration in light of the decision of the House of Lords in *Reynolds*. The reconsideration of the matter by the New Zealand Court of Appeal is found at [2000] 3 NZLR 385. The New Zealand Court of Appeal did not alter its original view in the light of *Reynolds*, although it did somewhat clarify it.
15. [2001] 2 AC 127.
16. At page 205.
17. Including in the decision of the New Zealand Court of Appeal in *Lange v. Atkinson* [2001] NZLR 257, paragraph 38.
18. [2000] QB 783 paragraphs 40-41.

(iv) The content and context (including the language used) of the matter complained of;

(v) The extent to which the matter complained of distinguishes between suspicions, allegations and proven facts;

(vi) Whether it was necessary in the circumstances for the matter complained of to be published expeditiously;

(vii) The source of the information in the matter complained of and the integrity of those sources;

(viii) Whether the matter complained of contained the substance of the plaintiff's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from that person;

(ix) Any other steps taken to verify the information in the matter complained of.

It recommended that the defence should be forfeited if the publication in question was actuated by spite, ill will, or improper motive.

The approach proposed by the Group has much to recommend it. It meets many of the difficulties posed by the competing requirements to protect freedom of expression, on the one hand, and to protect the reputation of the individual on the other hand. Subject to certain reservations, it may go far enough to meet the requirements of the European Convention on Human Rights mentioned above. Implementation of the recommendation would however change the landscape for the law of libel, and there are some aspects of it that may cause controversy or even difficulty in the long term.

For instance, the Group in its draft Bill defines qualified privilege in such a way as to make it clear that the media is excluded from its scope. Reasonable publication is therefore a related but different defence, which is designed for (but which is not exclusive to) the media. Qualified privilege has never been conditioned by reasonableness, but reasonableness is a central feature of the new proposed defence. It may be argued as a matter of principle that there should be no distinction between the conditions that apply to publication at large and those that apply to publication in smaller groups. However, given the width of the proposed defence of reasonable publication, and the damage that is likely to be done by publication to large groups of people, a requirement of reasonableness may well be seen as appropriate for this new defence.

Malice would be likely to become a less significant issue than it is at present in cases involving claims to privilege. Once a defendant passes the test of reasonableness, it seems unlikely that it could fail the test of malice, and the provision that the defence is vitiated by malice may therefore largely be illusory.

The draft Bill does not address the question of the respective roles of judge and jury in determining whether the defendant has made out a defence of reasonable publication. In practical terms, while factual disputes may be determined by the jury, the ultimate question of whether the defence has been made out is likely to have to be determined by the judge. The proposed new defence may therefore lessen the role to be played by the jury in determining defamation cases in the future.

Newspapers may be concerned that one of the features to be taken into account would be the source of the information and the integrity of the sources. It is not uncommon for journalists to refuse to reveal their sources; a refusal that Lord Nicholls in *Reynolds* said should not generally weigh against the newspaper[19]. It may also be thought it will be hard for a newspaper to assess in advance whether it is likely to meet the test of reasonableness, and that the introduction of such a test is likely therefore to have a chilling effect on the willingness of newspapers to publish. But the reality is that the introduction into law of a new defence of reasonable publication will undoubtedly advance the present position of newspapers.

There are no doubt other issues that will arise for discussion in the future. But taken as a whole, the recommendation is well constructed and would do much to bring the law of libel into the modern era.

The Role of the Jury

The Law Reform Commission had recommended that the parties in defamation actions should continue to have the right to have issues of fact determined by a jury, but that the damages in such actions should be assessed by the judge. Coupled with this recommendation was the proposal that the right formerly enjoyed by parties in the Circuit Court to have issues of fact determined by a jury should be restored.

In *de Rossa v. Independent Newspapers Plc*[20] and again in *O'Brien v. Mirror Group Newspapers*[21], the Supreme Court had rejected the proposition that either counsel or the judge ought to be able to offer specific guidelines to assist the jury in its assessment of damages. Under the present practice, nothing but the most general guidelines may be given. It had been submitted in both de *Rossa* and *O'Brien* that this practice could not be reconciled with article 10 of the European Convention on Human Rights and the Constitution. In *Tolstoy Miloslavsky v. United Kingdom*[22], the ECHR had determined that an award of €1.5 million by way of damages had violated the rights of the applicant under article 10 because the then practice in England as to the information that could be given to juries and as to the basis upon which awards could be set aside on appeal were similar to the practices at present in place in Ireland[23].

The Group stated that it was conscious of the valuable role that juries have to play in defamation actions, but at the same time recognised that there was dissatisfaction with the law as it currently stands whereby juries are deprived of guidance when it comes to deciding upon the level of damages. It stated that it was of the view that a division of function whereby a jury assessed liability, and a judge assessed damages, would not operate well in practice. It pointed out that a judge assessing damages would not know the seriousness with which the jury had viewed the material found by it to be defamatory. It recommended accordingly that juries should continue to have a role

19. At page 205.
20. [1999] 4 IR 433.
21. 2001] 1 IR 1.
22. (1995) 20 EHRR 442.
23. The claim of Independent Newspapers Plc against Ireland arising out of the de Rossa case is due to be heard before the European Court of Human Rights in October 2003.

in assessing damages in the High Court, but that this role should not be unfettered. It recommended that the parties to proceedings should be able to make submissions to the court and address the jury concerning damages, and that a statutory provision should be introduced which would require the judge to give directions to the jury on this matter. Such provision would be general in nature but would, in an appropriate case, allow a judge to refer to the purchasing power of the likely award, the income, which it might produce, the scale of awards in previous defamation cases and the appropriate level of damages in all the circumstances of the case. In *Tolstoy Miloslavsky*, alterations along the lines of those recommended by the Group had been introduced to English practice by the time that the case was heard. They were accepted by the ECHR as bringing English practice into accordance with article 10 of the Convention.

The Group then considered the role of the Circuit Court in defamation actions. It stated that it was conscious of the fact that the policy of abolishing jury trials in the Circuit Court, given effect to by the Courts Act 1971, was unlikely to be reversed in the sole context of defamation proceedings. It was suggested that an increase in the Circuit Court jurisdiction to €100,000 would largely nullify the role of the jury in such actions, since it was likely that a large number of cases would fall outside the jurisdiction of the High Court. It was felt also that parties should not be encouraged to initiate defamation proceedings in a court of higher jurisdiction simply because the potential for an award of damages might be perceived to be greater in that court. With a view to reconciling these different considerations, the Group recommended that the Circuit Court should in future have jurisdiction in defamation cases where the amount of the damages claimed does not exceed €50,000.00.

The Presumption of Falsity

A defamatory imputation is presumed to be false, and the burden is upon the defendant to show that it is substantially true. This is out of line with the general position in tort law. It is arguable also that it is out of line with article 10 of the ECHR which grants pre-eminence to freedom of expression, and provides that exceptions must be narrowly interpreted and the necessity for any restrictions convincingly established.[24] On the other hand, it is the defendant who has made a charge against the plaintiff, and the plaintiff may say that he is entitled to be regarded as innocent until proven guilty.

As the Group pointed out, this is an issue which has tended to attract very divided views. The Group however was of the view that the difficulties presented by the existing law in this area were more apparent than real and was disinclined to recommend a substantive change in the status quo. It noted that the presumption is only relevant where the defence of justification (proposed to be renamed the defence of truth) is pleaded.

As the Group pointed out, most plaintiffs will chose to give evidence that the allegation against them is false, and will therefore be available for cross examination on all relevant matters. In order to address the position in which a plaintiff might chose not to give evidence on their own behalf and of the burden which this might impose on the defendant, the Group recommended that in defamation proceedings all plaintiffs should file an affidavit which would verify the particulars of their claim. It stated that the consequence of this is that all plaintiffs could be examined with regard to the content of the affidavit and, if they were subsequently found to have given false evidence, a perjury charge could be brought against them.

This is a realistic attempt on the part of the Group to find a balance between competing interests. One difficulty however is that of stating what are the "particulars of the plaintiff's claim" that must be verified by affidavit. Since it will continue to be the case that defamatory words are presumed to be false, a plaintiff would not normally have to give particulars of falsity, whether on affidavit or otherwise. Nor does it appear to be envisaged that a plaintiff who swears a verifying affidavit will necessarily be open to cross-examination on that affidavit if he chooses not to give evidence. However, the reality is that there are very few defamation cases indeed where the plaintiff will chose not to give evidence.

Lodgment in Court

At present, order 22 rule 1(3) of the Rules of the Superior Courts provides that in actions for defamation, money may not be paid into court unless liability is admitted in the defence. The Law Reform Commission in its Consultation Paper on the Civil Law of Defamation had stated that there did not seem to be any obvious reason for this provision, and had recommended its abolition. The Group agreed. It acknowledged however that while some plaintiffs will be content simply to take up the lodgment, other plaintiffs may wish for some additional element of vindication. That may apply in particular where justification had been pleaded. The Group therefore recommended that legislation should facilitate the development of a procedure, which would, in such cases, permit plaintiffs to inform the court formally of the fact that they had accepted the lodgment and the consequences for them for the resolution of the proceedings.

Limitation Periods

Under existing law, the limitation period for libel actions is six years, while that for slander actions is three years. The limitation period recommended by the Law Reform Commission in respect of defamation actions in general was three years. The Group reviewed the legislation in other jurisdictions, and noted that there is an increasing tendency to opt for even shorter periods of limitation. In the United Kingdom for instance, the period is one year.

The Group recommended that the limitation period in defamation cases should be one year, but also recommended that a court may direct that the limitation period be dissapplied in a case where it is satisfied that any prejudice which the plaintiff might suffer, if the action were not to proceed, significantly outweighs any prejudice which the defendant might suffer if the action were to proceed. This would be subject to a general proviso that no defamation proceedings could be brought after the expiry of six years from the date on which the cause of action accrued. In the draft Bill, it is provided that the discretion of the court to dissapply the one year limitation period will arise where the interests of justice so require.

The Group also considered the issue of the time from which the limitation period should start to run. At common law, every re-publication of a libel is a new libel. Because each individual publication gives rise to a separate cause of action, each is subject to its own limitation period. In *Duke of Brunswick v. Harmer*[25], the plaintiff's agents, at his request, published at the office of a newspaper, a copy of an issue of the paper published 17 years before, which contained a libel on the plaintiff. The proprietor of the newspaper pleaded the statute of limitations. It was ruled that the sale of the copy was a distinct and independent publication and that the statutory plea was of no avail. This rule has always caused particular difficulties for booksellers. As the Group points out, it has increasingly come to cause difficulty for newspaper publishers, whose content is now frequently made available to the public via on-line archives. Applying the traditional rule in this instance effectively means that each "hit" on an on-line archive

24. See for instance *Thorgeirson v. Iceland*, at paragraph 63, and the comments of Lord Nicholls in *Reynolds* (although speaking of qualified privilege) at page 203.
25. (1849) 14 QB 185)

amounts to a re-publication, with a limitation period running from the time the material was accessed. Indeed, in the recent case of *Loutchansky v. Times Newspapers Ltd (Nos 2 - 5)* [2002] QB 783, the Court of Appeal in England affirmed the applicability of *Duke of Brunswick v. Hamer* to internet archive publications, and rejected the introduction into English law of a "single publication" rule.

Some US jurisdictions have adopted this "single publication" rule, which starts the limitation period running from when the time the material is put into general circulation and, once the period has expired, prevents an action being brought upon an individual sale at a later date[26]. The Law Commission in the United Kingdom recently investigated this issue and recommended that further consideration be given either to the adopting of a US style single publication rule or, a more specific defence that would apply to archive material in general.

The Group recommended that it should in future be provided that a cause of action in defamation would accrue from the date on which the matter complained of was first published. In the case of internet publications, that date should be the date on which the material in question was first made available, the discretion mentioned above to extend the one year limitation period should act to assist the plaintiffs in the event that they become aware of potentially defamatory material at some distance in time from the original publication.

Remedies other than Damages

The Law Reform Commission had recommended the introduction of a new form of proceedings for a declaratory judgment that a statement was false and defamatory, and for the introduction of new remedies called correction orders and declaratory orders. The Group agreed, but recommended in addition that it should be possible for either party to apply to the court to have a defamation action disposed of in a summary manner by a judge sitting alone. It appears from the draft Bill that it is envisaged that the court's jurisdiction to dispose summarily of a claim would arise where the opposing party has no realistic prospect of success and there was no other reason why the claim should be tried. The Group recommended that damages should not be available as a remedy on the summary disposal of proceedings. Such an application would be heard and determined by a judge sitting alone.

While the provision for application for summary relief would be new as far as a plaintiff is concerned, it is hard to see that it adds greatly to the procedure for an application for a declaratory judgment. It is envisaged that the latter also would be heard in a summary manner, and the plaintiff will not be obliged to establish that the defendant has no realistic prospect of successfully defending the case. Unless damages are available on an application for summary relief, it is hard to envisage that many plaintiffs will make use of the procedure. In England, under the Defamation Act 1996, damages not exceeding €10,000 are available on such an application[27]. As far as defendants are concerned, there is no great difference between the proposed procedure and that already available under order 19, rule 28 of the Rules of the Superior Courts. The new procedure will require a defendant to establish that the plaintiff's claim has no realistic prospect of success, while order 19 rule 28 requires the defendant to establish that the plaintiff's claim discloses no reasonable cause of action.

Defamation of the Dead

The Law Reform Commission had recommended that there should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication. Although not examining the matter in detail, the Group stated that it was disinclined to accept this recommendation. As set out above, it did however recommend that a cause of action in defamation should survive the death of the defamer or the alleged victim after publication, subject to various conditions.

Press Council

Although the Broadcasting Complaints Commission deals with complaints in respect of broadcast matter, there is no body in this jurisdiction that deals with complaints against the print media. In many jurisdictions, there is such a body. More often than not, the relevant body is set up on a voluntary basis, without statutory backing. The Group had been asked to consider the nature and extent of any statutory intervention, which might attach to the establishment of any entity concerned with the regulation of the press. While acknowledging the significance of the argument that statutory controls were inimical to press freedom, the Group felt that it should be possible to construct a statutory model which would fully respect the autonomy of the press, while at the same time providing an important element of independence and transparency which would secure public confidence in any process which might be established. It stated therefore that the case for a statutory Press Council seemed compelling.

The Group therefore recommended that a Press Council be established on a statutory basis. It envisaged that the Press Council should have a number of functions, including the preparation of a Press Code of Conduct and the investigation of complaints in respect of alleged breaches of that code.

In relation to the Code of Conduct, the Group recognised the discretion, which every publication must necessarily have. It suggested however that the key elements in the Code of Conduct should address the standards of journalistic ethics and practice; the accuracy of any facts or information relating to the honour or reputation of any person or group of persons, living or dead; unreasonable encroachment upon the privacy of any person, or group of persons, living or dead; matters to do with taste and decency; and sensitivity in dealing with vulnerable persons. It recommended that compliance with the Code of Conduct should be mandatory, but that it would be open to publications to pay a subscription fee to the Council, which would enable that publication to recommend persons for appointment to the Council and to comment on pending complaints.

The Group suggested a number of features in relation to the complaints mechanism. It recommended, in particular, that the procedure should be as informal as possible. If a complainant submits a matter for adjudication by the Council, they should not thereafter be able to institute civil proceedings before the courts in respect of the subject matter of which the complaint is made. The remedies at the disposal of the Council should not include damages, but should include directing the relevant publication to publish the substance of the Council's decision, or to publish a correction or retraction of the material of which complaint is made. If a publication were to refuse to comply with the decision of the Council, the Group suggested that the Council should be empowered to apply to the Circuit Court for an order compelling compliance.

Finally, the Group recommended that subscription to the Council, co-operation with its investigations and compliance, both with its decisions and any code of conduct, should be matters to be taken into account by a court in determining whether or not, in the context of the defence of reasonable publication being pleaded, it was reasonable to publish the matter of which complaint is made. ●

26. See Gatley, paragraph 6.2, footnote 19.
27. See Gatley, Ch. 29.

Intoxicating Liquor Bill 2003

Constance Cassidy SC

The Pub Scene in Dublin
A Play for Our Times (in Five Acts)

ACT ONE:

Politician: Howiya my good legal friend. How's things?
Barrister: What's the story?
Politician: How's about a long lunch to mark the Dáil recess?
Barrister: Looking forward to it.

ACT TWO:

SCENE: Private Room in Patrick Guilbaud's Restaurant, Merrion Street Upper, Dublin 2 (opposite Government Buildings)

Sparkling conversation. The best of food and finest of wines are brought to the table.

ACT THREE:

SCENE: Doheny & Nesbitts (around the corner). The gentlemen repair to the aforementioned well known legal hostelry and approach the bar to be met by Mine Host.

Proprietor: Good evening Gentlemen.
'Tis well yis are all lookin'.
Politician: Set up two pints of Guinness my good man.
Proprietor: I don't think so.
Politician: What? What? What? What!!
Proprietor: Gentlemen, I have formed the opinion that you are "drunken" persons under this new Act, and therefore I cannot supply you with intoxicating liquor or permit you to consume it.
Politician: Nonsense man! 'Drunken person' means "a person who is intoxicated to such an extent as would give rise to a reasonable apprehension that the person might endanger himself or herself or any other person...".
Proprietor: Yes, but in my opinion, and I have to make a snap judgment here and apologies all round if I'm wrong, but in my humble opinion you gentlemen have consumed more than 4 units of alcoholic beverage.
Politician: So?
Proprietor: So, my good man, doesn't that make you, now sir I'm not a lawyer, but, doesn't that make you over the limit for drivin' like? So you might endanger yourself or others.
Politician: Oh. I see... But all's well, my driver is outside.
Proprietor: I can take your word for that sir, of course sir. Two pints it is.

"Drunken persons".

This merry tale - for fiction indeed it is, dear reader - illustrates one of the problems which will be faced by those who will have to enforce the provisions of the new Bill, namely the publicans and the Gardai. "Drunken person" means a person who is intoxicated to such an extent as would give rise to a reasonable apprehension that the person might endanger himself or herself or any other person, and drunk and drunkenness are to be construed accordingly.

The proposed Bill puts an alarming onus on the publican and indeed the Garda Siochana to enforce a societal change in our drinking habits.

The Minister for Justice, Michael McDowell, refers to the factors which have contributed to the increase in alcohol consumption as follows: "societal and demographic changes, changing lifestyles and expectations, more disposable income among young people and a lessening of parental control on young people." He stresses that the problem of alcohol harm is multidimensional and that simplistic solutions will not work.

The question of whether a customer is drunk (as opposed to disorderly, which is sensibly and comprehensively defined by the Bill) is a matter to be decided, usually in an instant, by a publican or a member of staff. If the Bill becomes law it is a matter entirely for the licensee or "his or her staff at any given stage" to make a decision as to whether somebody is drunk, or disorderly, and to request that person to leave the licensed premises.

During the Senate debate, reference was made to the appalling lack of Garda resources to monitor and enforce the Bill's provision and in particular, the absence of the additional 2,000 personnel reportedly promised by the government. The Gardai are at present a reactionary force: no provision has been made locally or nationwide for a proactive police force insofar as regulating the conduct of licensed premises is concerned.

The imprecise definition of "drunken person" will lead to huge uncertainty if the Bill becomes law. Is it open to a licensee to refuse to serve a person who has taken such an amount of intoxicating liquor as

to be over the limit[1] when presenting himself at the bar of his licensed premises and therefore and accordingly under the Road Traffic Acts, unfit to drive a mechanically propelled vehicle? The definition refers to the endangering of the person himself (or herself) or any other person. It seems clear that a publican may well be obliged to refuse to serve a person who might fail the breathalyser.

If a publican supplies or permits any person to supply intoxicating liquor to a drunken person or to any person for consumption by a drunken person, or permits a drunken person to consume intoxicating liquor, or permits drunkenness to take place in the bar, or admits any drunken person to the bar, he renders himself liable to severe monetary penalties and to endorsement of his licence and temporary closure of his premises accompanied by the public humiliation of displaying a notice specifying the period of closure.

"Bar"

The definition of "bar" as contained in the Bill is taken from one of the greatest cases in Irish licensing jurisprudence, namely *R. (Bourke) v. Dublin Justices* [1903] 2 I.R. 429 which discussed, *inter alia*, the difference between a publican's licence and a hotel licence which, at that time, was a licence which permitted the licensee to sell intoxicating liquor to all members of the public once the premises answered the definition of hotel as contained in the Licensing (Ireland) Act 1902 and which did not contain a bar.

The adoption of this definition in the new Bill confuses the issue: the licensee risks heavy fine, endorsement and closure of his premises if he permits drunkenness to take place in the bar or admits any drunken person to the bar, but the crucial question is, of course, what is a bar? Is it all of the premises, part of the premises or is it confined to the counter area at which the drink is ordered? It is defined as meaning..."any open bar or any part of a licensed premises exclusively or mainly used for the sale and consumption of intoxicating liquor and includes any counter or barrier across which drink is or can be served to the public."

In the debates, Minister McDowell draws a distinction between a hotel premises and a public house premises. However, it is unclear from an analysis of the Bill whether the entire of a licensed premises (such as for example Doheny & Nesbitts, which has many compartments) is a 'bar' for the purposes of the new Bill. It is clear that a reception area and function rooms of a hotel would not constitute a bar for the purposes of the Bill: however, there are many public houses both in the country and in the city which contain various compartments which may not come within the definition as contained in the new Bill.

The corollary of this is that a "drunken person" may be admitted to a licensed premises in a drunk state, but that he must not be admitted to the bar: an interesting conundrum for the unfortunate publican.

A licensee risks closure of his premises, endorsement and a fine where he permits drunkenness to take place in a bar. Because of the uncertainty surrounding the definition of bar as opposed to licensed premises, it appears that a drunken person who gains access to a licensed premises but never approaches the bar counter may nevertheless cause the licensee to incur a penalty for permitting him to be present in a state of drunkenness in his bar. It is not clear as to whether a publican is entitled to refuse entry to a drunk person who requests entry to his licensed premises. The Bill provides that a person who is drunk on leaving a licensed premises is presumed, until the contrary is proved, to have been drunk while on those premises. This reinforces the notion that a licensee can be prosecuted, his licence endorsed, perhaps forfeited and his premises almost certainly closed, for permitting a person who hasn't even consumed intoxicating liquor on his premises simply to be there. The licensee, Gardai and the courts will have to do the best they can to resolve the inherent uncertainties contained in the Bill.

Youth

The proposal contained in Section 15 of the Bill requiring the production of evidence of age by persons between 18-21 years will be difficult to operate in practice. Section 34 of the Intoxicating Liquor Act 1988 is amended with the introduction of a new section 34A which provides as follows: "The holder of a licence on any licensed premises should not allow a person who is aged at least 18 years but under the age of 21 years to be in the bar of those premises between 9pm and 10.30am on the following day...if the person does not produce an age document to the holder."

One can imagine the scene:

ACT FOUR:

SCENE: Crowded bar somewhere in Temple Bar, 8.55pm Friday 13th: The hard pressed staff must separate the men/women from the boys /girls.

An eager Junior Counsel (obliging):

Ladies and gentlemen, do forgive this untimely interruption, but I have been asked by management to tell you that all eighteen to twenty one year olds must now produce your papers.

Clientele: Huh?

Eager Junior Counsel.:

Youngsters to the left, oldsters to the right. Now youngsters, I will read out the law: "The holder of a licence on any license premises should not allow a person who is aged at least 18 years but under the age of 21 years to be in the bar of those premises between 9pm and 10.30am on the following day...if the person does not produce an age document to the holder". So, the law requires that all of you persons between 18 and 21 years must now show the staff here your papers.

ACT FIVE:

SCENE: Riot ensues.

Zealous Junior Counsel makes a graceful but hurried exit.

Back to you Minister. ●

1. Road Traffic Act 1994:
   - Over 80 milligrammes of alcohol per 100 millilitres of blood
   - Over 107 milligrammes of alcohol per 100 millilitres of urine
   - Over 35 microgrammes of alcohol per 100 millilitres of breath

Competition in the Cab-rank and the Challenge to the Independent Bar
Part I

John D. Cooke*

This is the first part of a two part article which examines the role of the Independent Bar. Part I analyses the commercial pressures that have hastened the formation of multi-disciplinary practices in certain foreign jurisdictions. Part I also examines the impact of the recent European Court of Justice decision in the *Wouters* case on the formation of such partnerships in Europe. Part II will look in more detail at the rationale behind the division of the legal profession in Ireland into two branches and the desirability of maintaining an independent Bar. It will also look at some fundamental shortcomings in the recent Indecon report in its analysis of price competition and barriers to entry in the legal profession.

Introduction

The relevance of competition rules to the interests of consumers and the ambivalence of governments in giving them coherent application is rarely as well illustrated as by events in Ireland in recent years.

The sudden abrogation of regulation in the taxi trade is a boon to late night revellers, but a kick in the teeth for those who paid dearly to buy plates during the period when neglect of policy allowed licences to acquire wholly unnecessary capital values. How does a government formulate a coherent competition policy, which will preserve the approval of the former constituency while assuaging the wrath of the latter?

Recently, the Minister for Finance was quoted as attributing the high rate of inflation in the economy, not to his budget tax increases, but to cartels in the retail trade and restrictive practices in the professions. But, on the one hand, the government actually forbids supermarkets to compete on price in one area of direct impact on every household by maintaining the Restrictive Practices (Groceries) Order in force. On the other hand, it intervenes by means of the Solicitors Act to curtail advertising by solicitors, although in the late 1980s, advertising was effectively imposed on a reluctant Law Society as the solution to the alleged absence of price competition and transparency in the provision of legal services.

Thus, in many areas, governments are caught between divergent social concerns and between conflicting political imperatives. This article explores this conflict and outlines some basic considerations, which make the Competition Authority's current review of competition in the legal profession so important, both for the practitioners concerned and for the public interest. If, as the Indecon Report[1] seems to suggest, the main focus on restrictive practices in the legal profession is to be on barriers to entry and the absence of price competition, one would hope that the Competition Authority and those charged with considering its recommendations will bear in mind the lessons from the debacle of taxi deregulation and the *volte-face* on solicitors' advertising, before deciding to what degree the full forces of competition should be unleashed upon the administration of justice. In effect, this is the consideration that lies at the heart of the judgment of the European Court of Justice (ECJ) in the *Wouters* case, which is discussed later in this article.

Competition is an essential mechanism in the efficient operation of any market, but it is a means towards efficiency and not an end in itself. As the turnabout on solicitors' advertising shows, when you insist on the abandonment of self-imposed professional restraints, you may indeed get vigorous competition, but with results you might not wish. Competition, and especially competition through advertising, tends not only to make prices more competitive for existing customers, but it can also, by making pricing more transparent, expand the market and with potentially dramatic effects.

The enthusiastic promotion of competition rules in services in order to achieve price reductions, has important implication for the nature and quality of the services themselves. Abolishing the Groceries Order may, in some situations, reduce the price of butter but it could also conceivably alter the competitive balance as between supermarket chains and smaller outlets, as those lobbying for retention of the order argue with some force. Similarly, opening up access to the taxi trade has dramatically improved the availability of taxis to consumers, but if unlimited entry combined with price control by taxi meter means that the trade becomes only marginally viable for individual operators, they will inevitably seek to protect their profitability by cutting costs with obvious consequences for the quality of service, whether it be in the experience and honesty of taxi drivers, or in the cleanliness and safety of their vehicles.

As Ryanair has so effectively demonstrated, advertising is not just about winning business from competitors; it is also about expanding the market. So governments should not be surprised if advertising by professions leads not merely to informed consumers but to other predictable and unwelcome results. The expansion in the litigation market through the advertising of "no foal/no fee" and "first consultation free" has an impact on the volume of demand for the service and then, inevitably, on the cost of insurance.

*Judge of the Court of First Instance of the E.C. The views expressed are entirely personal.

1. Indecon-London Economics. Report for Competition Authority on Restrictions in the Supply of Professional Services, March 2003.

The Commercial Pressures

Clearly, the formulation of competition policy for legal services involves the difficult task of balancing the public interest in procuring the cost-effective availability of legal services to both the public and the State itself (the profession's single biggest client), against the social interest of retaining public trust in the quality and integrity of such services by not allowing the administration of justice to be governed by predominantly commercial criteria. We would like our lawyers to be, if not cheap, at least reasonably priced but it seems unlikely that a population with such a proven appetite for litigation would easily trade the availability of access to an independent profession made up of large numbers of competing practitioners, for a form of universal legal aid in which the costs of civil and criminal litigation are borne out of general taxation and made generally available (and therefore rationed), along the lines of our "free" medical services.

Invariably, however, public discussion of these issues, in so far as it occurs at all, tends to be conducted in confusion and cliché. Practitioners may bemoan the mileage obtained by journalists from the annual tables of fees paid by the Attorney General and the legal aid schemes with the inevitable reference to "fat cat lawyers," but they can also contribute to the general perception of the profession as predominantly profit motivated by themselves adopting the jargon and criteria of commercial trade. Is it really necessary for solicitors to emulate bankers by publicising annual league tables of the values of the merger and acquisition deals they have handled?

The apparent public perception of the legal profession as greatly more influential and pervasive in Irish life is no doubt partly due to the rapid expansion in its size. Practising solicitors increased from 3600 in 1991 to almost 6000 in 2001: practising barristers from 750 to 1300 in the same period.[2] But apart from this expansion in numbers there has been little change in the structure or roles of the two branches in this country in modern times, especially when compared with the more fundamental changes that have taken place in Europe and elsewhere. It is 30 years since solicitors were granted a right of audience in all Irish courts but the relationship between the solicitors' branch and the Bar and that between those branches and the public have remained largely unaltered. The solicitors' branch has become somewhat more openly competitive as a result of the legalisation of advertising. A number of the main Dublin firms have established offices abroad and a number of firms have created formal links with law firms in other jurisdictions. The solicitor's profession here has not, however, experienced the trend towards major consolidation of the main commercial law firms that has happened elsewhere.

Consolidation of International Firms

The changes taking place elsewhere are not confined to the structural changes brought about by consolidation into a small number of large international law firms. There have also been important internal changes in the way in which some legal professions are organised and conducted, especially in the French speaking countries.

A number of forces have contributed to these changes. The most important factor in Europe has undoubtedly been the opening up of the single market within the European Union. A series of directives since 1977 have made it possible for lawyers to practise outside their home Member State: to set up branch offices in a second Member State and, more recently, to gain admission to the profession in a second Member State.[3]

A second but related force behind these changes has been the more general impetus towards freer international trade which has gathered pace since the 1960s. As trading freedom became an increasingly important element in the foreign policy of the United States, the American services sectors and particularly legal and accountancy professions, have found it increasingly important to be able to follow their major corporate clients as they established subsidiaries and investments outside the United States. Because legal and accountancy services were always regulated on a national basis, it became important to the professions in America to procure the right to set up branch practices in the countries where their clients established. It was partly their determined lobbying that pushed service markets, including legal and accountancy services, and then trade related intellectual property rights onto the GATT/WTO agenda. Thus, partly as a result of the need to create international practices in order to service the needs of clients outside the United States, and partly in the pursuit of growth and turnover for its own sake, the major consolidation of the accountancy profession on a worldwide basis into the "Big 5" and now the "Big 4" accountancy firms came about over the last 20 years.

In a similar way, a number of major American law firms pursued active policies of establishing an international presence in the 1970s and 1980s. Initially, the main branches were established in London and Brussels but subsequently firms began to establish themselves in other European commercial centres. At first, these firms were interested in continuing to give the general commercial and financial advice which their American clients required on their European investments. However, with the expanding role of the European Commission both in competition matters and merger control, and then in international trade law with the creation of the WTO panels, these firms required access to litigation expertise and rights of audience both at Community level and in the Member States. Many Member States' professional rules, however, precluded practising lawyers from being employed by non-lawyers, including American law firms, or from concluding partnerships with them.

Influence of U.S. Law Firms

This increased presence of American law firms in European centres placed considerable strain on the traditional role of the local profession. Thirty years ago, the French avocat had a role similar to that of the Irish or English barrister. He was an independent practitioner and usually a sole practitioner. His strict duties to the court required him to remain at arms length from his client's commercial interest. Because of the existence of the separate profession of notaire, the French or Belgian avocat did not handle clients' funds and had little involvement in the sort of general business advice given by solicitors. He could not sit on the board of a client company or have any personal commercial interest in such a company and could not advertise.

2. Indecon Report Tables 4.2 and 5.1. Whether this is the cause or result of the litigation explosion and the multiplicity of tribunals, however, is difficult to tell.

3. Directive 77/249 to facilitate the effective exercise by lawyers of freedom to provide services. (OJ L78, p. 17). Directive 98/5 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. (OJ L77, p. 36).

As the single market opened up, local practitioners found themselves under competitive pressure from American and international law firms so that both the French and Belgian professions felt compelled to make radical changes in the role of the avocat. Regulations were adopted to permit the avocat to handle client funds and open a client account under the supervision of the Bar Council. Partnerships were allowed and firms began to increase in size and to specialise.

In 2002, the London firm of Clifford Chance became the biggest law firm in the world by merging with the German firm of Weber and Axster and the New York firm of Rogers & Wells. Several other English law firms have merged with continental firms largely in order to create strong European based practices to counter the influence of American law firms.

Effects of Change

Not all of these attempts at consolidation are achieved without pain and disruption. Major law firms evolving in the way accountancy firms have evolved, through growth and consolidation, have to live with the inevitable consequences. Firms with several hundred partners and offices in half a dozen countries are under constant financial pressure. Ruthlessly efficient and cost conscious, they become highly dependent upon a constant cash flow from their major clients. Just as the major accounting firms regard audit work as a loss leader which may have to be tendered for at a loss in order to ensure retaining the more profitable consultancy work (the so-called "low balling"), law firms must constantly strive to create a closer relationship with major clients and widen the areas in which they can be continually advised and represented. With major international commercial clients, no law firm can afford to be without a competition department, a merger department, a banking department, an intellectual property department and so forth. Having to tell an important client with a specialist problem to consult a rival law firm involves the risk of losing that client for all work. When a client is lost or there is a downturn in mergers and acquisitions business, firms have to be prompt and ruthless in letting the necessary staff go in order to save costs.

One of the senior partners in Clifford Chance, when interviewed about the merger, explained that clients used to come to him for legal advice but nowadays they come to him for general advice.[4] Many of these firms see the crisis of confidence in accountancy firms resulting from the Enron and World Com debacles as an opportunity to replace accountants in much of the valuable consultancy work.

The Professions' Response

This more openly aggressive competition between law firms to win and then retain major corporate clients has gradually influenced the governing bodies of the profession in many countries to abandon traditional practices and restraints in order to permit their members to cope with the threat posed by the arrival of international firms. As a result, restraints on advertising are relaxed and first associations and then full partnerships with lawyers from other Bars are permitted. Now we are seeing extensive pressure to allow multi-disciplinary partnerships.

These pressures have coincided with a changed attitude of governments towards the role of competition as an increasingly important mechanism for achieving value for money, both on behalf of consumers and for the exchequer itself as a purchaser of professional services. Hence, the current inquiry into restrictive practices in several professions by the Competition Authority.

Undoubtedly, if you start from the premise that the public interest in the provision of professional services is primarily an economic one - value for money - it can be difficult to justify many of the traditional practices of the profession including a ban on advertising[5] and on one-stop-shop practices of mixed professions.

Multi-Disciplinary Practices

In fact, when multi-disciplinary practices are referred to, it is invariably partnerships between accountants and lawyers which are being mooted. The advantages claimed for multi-disciplinary practices are entirely economic and it does not appear to be seriously argued that the quality of either professional service is itself improved by joint practices.

The creation of multi-disciplinary practices of this kind, particularly in major commercial centres where a process of consolidation into a small number of larger firms is already underway, has obvious implications for the administration of justice. For one thing, there is the danger of a greatly reduced choice of representation if a very large part of the legal and accounting expertise in areas such as competition, mergers and takeovers and intellectual property come to be concentrated in a small number of very big firms in the major European capitals. Even in Ireland, where major consolidation has not yet occurred, it can be difficult to find independent expert witnesses on finance or economic issues for major commercial litigation involving two or three banks or insurers because so many of the major accounting firms within the country are either already involved or have a conflict of interest.

Many of the major cartel cases, which have come before the European courts over the last 10 years have involved large numbers of the leading undertakings in the markets in question all over Europe. In the *Cartonboard* cartel cases, there were 15 different applicants and in the *Cement* cases, there were as many as 42. It is easy to see the difficulties that will arise for such companies if the main European expertise in competition law and the main accounting, financial and economic expertise in antitrust matters came to be consolidated in five or six major multi-disciplinary practices comprising of top law firms and the main accounting practices with branches in the main capitals.

But there are also issues of principle thrown up by the possibility of such partnerships. The lawyer's duty of professional confidentiality is generally recognised in Community law and in the law of most Member States. So if a lawyer discusses a commercial transaction with his client and advises upon it, he cannot subsequently be compelled to divulge the contents of that discussion and advice to a court if the transaction ends up in litigation. But the lawyer's accounting partner in the multi-disciplinary practice giving advice on economic aspects of the transaction does not enjoy any equivalent privilege and the contents of his file may well be discoverable in that litigation. In such a case, is there not a conflict of interest which would prevent the lawyer continuing to represent the client when the accuracy or legality of his partner's advice may be in issue? In other words, the creation of a partnership relationship between a lawyer and an accountant may have the effect of undermining and even destroying the client's entitlement to the protection of the confidentiality of his legal advice.

4. Peter Cornell interviewed in The Sunday Times, 30 June 2002.
5. In Case T-144/99 *IPR v Commission* [2001] ECR II-1087, the European Court of First Instance effectively recognised that advertising is a normal instrument of competition in a service market and that a professional rule banning particular types of advertising - in that case comparative advertising - does fall within the prohibition of Article 81(1) and may be difficult to justify for exemption under Article 81(3).

The *Wouters* Case

It is not surprising, therefore, that there was a general sigh of relief in many quarters of the legal profession throughout Europe when, in the *Wouters* case,[6] the ECJ upheld the validity of a rule of the Council of the Netherlands Bar prohibiting partnerships between members of that Bar and non-lawyers. It is important to note the particular basis upon which the Court formulated its judgment because its implications for the profession are not entirely unambiguous. The case should not be taken as indicating that multi-disciplinary practices will not now come about in Europe, nor does it mean that a professional rule banning multi-disciplinary practices is entirely immune from attack on competition law grounds in other Member States.

The Bar of the Netherlands was established under a public act of 1952, which lays down its structure and constitution and confers power to make professional regulations upon its General Council. The General Council was required by the act to ensure the proper practice of the profession in the Netherlands and was given power to adopt any measures which could contribute to that end. In 1993, the Dutch Bar adopted a regulation which prohibits members of the Bar from entering into professional partnerships unless the primary purpose of each partner's respective profession is the practice of law.

Mr Wouters, a member of the Amsterdam Bar, became a partner in Arthur Anderson and Co. Tax Consultants (perhaps not the happiest of timing) and gave notice of his intention to practise under the title "Arthur Anderson and Co. Advocates and Tax Advisers". A second plaintiff in the case gave notice of his intention to join in partnership with Price Waterhouse. The General Council of the Dutch Bar found that both of these practices infringed the professional rule. The lawyers appealed to the Dutch Courts putting in issue the compatibility of the 1993 partnership prohibition with Articles 85 and 86 (now 81 and 82) of the EC Treaty. The lower Dutch Court held that the Treaty provisions did not apply because the Bar of the Netherlands was a body established by public statute to further a public interest objective. When the matter then went on appeal to the Dutch Appeal Court, that Court referred a series of questions to the Court in Luxembourg under Article 234 EC.

The European Court disagreed with the lower Dutch Court and held that the competition rules of Article 81 and 82 do apply. The Court pointed out that when a Member State sets about the regulation of a profession such as the legal profession, two approaches are possible. On the one hand, it can set up the statutory regime where it lays down a public interest criterion which must be pursued by that profession and the essential principles with which its rules must comply and the Member State can retain its own power to intervene to adopt decisions in the last resort in directly regulating that profession. In such a case, the rules adopted by the professional association remain state measures and are therefore not governed by the Treaty competition rules applicable to undertakings.

The second approach is that in which the professional rules adopted are attributable to the profession alone and in that case rules such as Article 81 and 82 will apply, even if the profession owes its constitutional status and regulatory powers to a statute. The members of the profession are regarded as undertakings engaged in an economic activity and any governing body that they elect, is regarded as an association of undertakings for the purpose of the competition rules.

The ECJ held that the Dutch Bar fell into the second of these categories, notwithstanding the fact that it had been established under a public statute which bore many similarities to the Irish Solicitors Acts. The Court seems to have come to this conclusion because the legislation in question laid down no particular public interest criteria, which the Dutch Bar and its General Council were obliged to pursue and because the governing bodies of the Dutch Bar are composed exclusively of members of the Bar elected solely by the profession. So, when the Dutch Bar adopted the 1993 regulation, it was doing so exclusively in pursuit of its own professional interests and the national authorities had no reserve power to intervene.

The Court went on to find, in effect, that, viewed purely as an economic activity, a regulation prohibiting partnerships between lawyers and accountants has an adverse effect on competition and may affect trade between Member States. It seemed to find in favour of the arguments that are usually put forward in favour of multi-disciplinary partnerships when it said:

> "Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business - the one-stop shop advantage. Furthermore, multi-disciplinary partnerships would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation. Nor, finally is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the costs of services".

The Court then held that a prohibition on such partnerships in the 1993 regulation is therefore liable to limit production and technical development within the meaning of Article 81(1) of the Treaty. In an interesting balancing exercise, however, the Court then went on to acknowledge the reality of some of the disadvantages, including the implications of the highly concentrated state of the accountancy profession and the conflicts of interest that can arise, but said:

> "Nevertheless, insofar as the preservation of a sufficient degree of competition on the market in legal services could be guaranteed by less extreme measures than a rule such as the 1993 regulation which prohibits absolutely any form of multi-disciplinary partnership, whatever the respective sizes of the firms of lawyers and accountants concerned, those rules restrict competition".

Then, the Court at paragraph 97 of the judgment took the novel approach of examining the objective which was being pursued by this anti-competitive agreement. It said that not every agreement between undertakings or decision of an association of undertakings, which restricts the freedom of action of the parties necessarily falls within the prohibition in Article 81.

> "For the purposes of application of that provision to a particular case, account must first be taken of the overall context in which a decision of the association of undertakings was taken or produces its effect. More particularly, account must be taken of its objectives which are here connected with the need to make rules relating to

6. Case C-309/99 [2002] ECR I- 1577.

> organisation, qualification, professional ethics, supervision and liability in order to ensure that the ultimate consumers of legal service and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It is then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives".

The Court then proceeded to examine the obligations of professional conduct that the Dutch Bar imposed on its members and particularly, the duty of independence vis-á-vis public authorities, other operators and third parties and the duty of professional secrecy. It pointed out that there can be a degree of incompatibility between the advisory activities of members of the Bar and the supervisory or auditing activities of an accountant and the fact that the accountant is not bound by any rules of professional secrecy. It decided that the 1993 regulation could reasonably be considered necessary in order to ensure the proper practice of the legal profession and that this could not be attained by any less restrictive means. The ECJ concluded that the 1993 regulation did not infringe Article 81 of the Treaty

> "since the Dutch Bar could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession as organised in the Member State concerned".

What is interesting and novel about this judgment from the point of view of competition rules is that the Court appears to be derogating from the traditional interpretation of the phrase used in Article 81 which prohibits any agreement between undertakings "the object or effect of which" is to restrict competition. In this case both the object of the regulation namely, the prohibition of a particular type of service co-operation and the anti-competitive effect of the rule were clearly established; but the Court nevertheless disapplied Article 81 by reference to the overall purpose which was being pursued. Because the objective was one with a superior public interest value, the consequential restrictive effects that the pursuit of that objective brought about were to be tolerated.

Even more strikingly, perhaps, the Court makes no mention of Article 81(3), but simply disapplies Article 81(1). Hitherto, Article 81 has always been interpreted and applied on the basis that once an agreement between undertakings is found to restrict competition and to affect inter-state trade, it can escape the prohibition of paragraph (1) only if it can be shown to satisfy the criteria for exemption under paragraph (3). Community law recognised no U.S. style "rule of reason".

The impact of *Wouters*

One important lesson of *Wouters* is that the ultimate decision as to whether multi-disciplinary practices should be allowed or prohibited rests with each Member State and its professional governing bodies. It is therefore conceivable that they will be authorised in a number of Member States just as a large number of the individual Bars of the American states have come out in favour of a liberalisation in this direction. No rule of Community law prevents a Member State authorising such practices or a professional body from deciding to permit them.

On the other hand, the clear finding that there is a legitimate public interest in maintaining rules of professional conduct which guarantee the independence and integrity of the legal profession in the interests of the quality of the administration of justice, is of immense importance. It may also be of significance to a jurisdiction such as ours where an independent referral Bar exists alongside the solicitors' branch of the profession, that even the economic assessment of a prohibition on multi-disciplinary practices from the point of view of competition rules emphasises the need to strike a balance between the scope of the prohibition and the need to adopt the least restrictive rule consistent with the professional objective. This has the ironic result that the position of the Law Societies in the common law jurisdictions may be weaker and that of the Bars stronger when it comes to standing over a ban on multi-disciplinary practices.

This is because multi-disciplinary practices may be more tolerable in terms of competition rules in those jurisdictions where an independent referral Bar exists. It is precisely because an independent referral Bar comprised of sole practitioners offers to corporate law firms the possibility of avoiding conflicts of interest and offers to the clients of those firms a guarantee of choice and independence in representation and advice, that a total prohibition on multi-disciplinary practices of solicitors and accountants may be less justifiable. If an independent referral Bar had existed in any numbers in the Netherlands, it would have been more difficult for the Dutch Bar to rely upon the problems of concentration of firms and the resulting conflicts of interest to justify an outright prohibition.

Implications for the Irish Bar

A final lesson of this judgment concerns the position of the Irish Bar in the context of the proposed adoption of a new Code of Conduct. Whatever doubts might be raised as to the status of the Law Society of Ireland under the Solicitors Acts, *Wouters* leaves no doubt but that the members of the Law Library are "undertakings" and that the Bar Council they elect is an "association of undertakings" for the purposes of both the European competition rules and section 4 of the Competition Act of 2002. On that basis, many of the rules governing conduct of members of the Irish Bar may be regarded as restrictive practices in economic terms. Moreover, the security of a Code of Conduct from the point of view of competition rules has been greatly weakened by the removal of the possibility of submitting an agreement for negative clearance or exemption under Section 4. (A similar change will occur for Article 81 of the Treaty when the new Regulation 1/2003 replaces Regulation 17 in May 2004.) The effect of this is to require the Bar to make its own decision as to whether its rules are compatible with Section 4 of the Act of 2002 and Article 81 or not. It also raises the risk that individual rules may be picked off in a piece-meal way and attacked in individual cases, in the absence of the protection of an exemption decision for the code as a whole.

The Bar is therefore faced with the challenge of having to get across a subtle, difficult and sophisticated argument which seeks to get away from defending the merits of each individual rule, by demonstrating that the rules as a whole form a coherent structure which defines the nature of the independent role of the practising barrister. As is clear from the approach of the Indecon Report, this possibility is seldom addressed. In Part II of this article, I will examine in more detail the rationale behind the division of the legal profession into two branches and the desirability of maintaining an independent Bar. I will also look at some fundamental shortcomings in the recent Indecon report in its analysis of price competition and barriers to entry in the legal profession. ●

Legal Update

The BarReview
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ABBREVIATIONS
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
FSLJ = Financial Services Law Journal
GLSI = Gazette Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law Review
IIPR = Irish Intellectual Property Review
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = ITR
JISLL = Journal Irish Society Labour Law
JSIJ = JSIJ
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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Irish Criminal Law and the Convention on the Future of Europe

Eugene Regan BL

Introduction

The role of the European Union in criminal law matters has until relatively recently been indirect, arising mainly from the EC Treaty obligation on member states to take all appropriate measures to achieve the objectives of the Treaty[1]. More particularly, it requires member states to refrain from any measures that could jeopardise the attainment of those objectives.

Thus the European Court has held that criminal legislation and the rules of criminal procedure are matters for which member states are responsible. But the Court also stated that Community law imposes certain limits on the control measures which it permits the member states to maintain in connection with the free movement of goods and persons.[2]

Member States are obliged to undertake prosecutions for the purpose of recovering sums lost to the Community budget. While the choice of penalties remains within the discretion of member states, they must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law; thereby making the penalties imposed effective, proportionate and dissuasive. Furthermore, national authorities must proceed, with respect to infringements of Community law, with the same diligence that they bring to bear in implementing corresponding national laws.[3] The nature of the obligation imposed by article 10 is underlined by article 280(2) of the EC Treaty, which expressly requires Member States to take measures to counter fraud affecting the financial interests of the Community similar to the measures they take to counter fraud affecting their own financial interests.[4]

In addition, national legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment and may not restrict the fundamental freedoms guaranteed by Community law.[5] Furthermore, where criminal proceedings are brought by virtue of a national legislative measure, which is held to be contrary to Community law, a conviction in those proceedings is also incompatible with EC law.[6]

The European Court has recognised limits to the Community's influence on national criminal law, holding that it cannot give a preliminary ruling on national criminal legislation that falls outside the scope of Community law.

However, the borderline between Community law and national criminal law has not always being clear-cut. National criminal laws must not conflict with the provisions of the Treaties in respect of the single market. Also, more than ten years ago, the Community laid down common rules in such diverse areas as the sale of counterfeit goods, smuggling of antiques, insider dealing and money laundering, which fall within the area of criminal law.

Cooperation in Criminal Law Matters

Cooperation in criminal law matters between member states in the European Union is not a new phenomenon. Co-operation in justice and home affairs matters began in the 1970's with the establishment of the Trevi Group in 1976 designed to combat terrorism and organised crime. Other examples of such cooperation include the Schengen Agreement of 1985[7] relating to the abolition of internal borders, the movement of persons and flanking measures on policing and security.

These developments initially took place outside the Community framework but this changed with the adoption of the Maastricht Treaty 1992, which provided a Treaty basis for such cooperation. The Maastricht Treaty 1992 provided for the development of close cooperation in justice and home affairs[8]. It established the Third Pillar - Title V1[9] identifying matters of common interest including asylum, external border control, immigration, drug addiction, international fraud, judicial cooperation in civil and in criminal matters, customs cooperation and police cooperation.

The Amsterdam Treaty 1997 established the objective of developing the Union as an area of freedom, security and justice[10]. This encompassed First Pillar measures on visa, asylum, immigration and other policies related to the free movement of persons, including judicial cooperation in civil law matters.[11] It also encompassed police and judicial cooperation in criminal matters, which remained within the Third Pillar.

Article 29 provides for measures on preventing and combating crime[12] through closer cooperation between police forces, customs and other national authorities (both directly and through Europol[13]) and between judicial and other national authorities[14] and approximation of

1. EC Treaty Article 10
2. Case C-203/80 Criminal proceedings against Guerrino Casati [1980] ECR 2595
3. Case C-68/88 *Commission v Greece* [1989] ECR 2965 paragraph 23
4. Case C-186/98 *Ministerio Publico v Nunes & de Matos* 8 July 1999
5. Case 186/87 *Ian William Cowan v Tresor Public* [1989] ECR 195
6. Case 88/77 *Minister for Fisheries v Schoenberg* [1978] ECR 473.
7. See also -The Schengen Implementation Agreement of 1991.
8. Article B (now article 2)
9. Article K 1-9 (now articles 29 to 42)
10. Article 2 TEU/Article 61 TEC1. Articles 61 -69 Amsterdam Treaty
12. "Crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud"
13. Articles 30 -32
14. Arts. 31(a) to (d) & 32

rules on criminal matters.[15] Article 30(1) police cooperation includes operational cooperation, collection and exchange of information, training, exchange of liaison officers, secondments, use of equipment and forensic research and evaluation of investigative techniques. Article 30(2) provides the role of Europol is to facilitate and support investigations, to ask member states to conduct investigations and to promote liaison between prosecuting/investigating officials.

Article 31 provides for common action to promote cooperation in criminal matters between ministries and judicial authorities in relation to the enforcement of decisions to facilitate extradition, to prevent conflicts of jurisdiction and to set minimum rules on the constituent elements of criminal acts and for penalties in fields of organised crime, terrorism and illicit drug trafficking. The Amsterdam Treaty also provided for the incorporation of the Shengen Convention provisions into EU and EC Treaties.

The Vienna Action Plan was drawn up to implement the Amsterdam Treaty provisions on freedom, security and justice and was adopted by the Justice and Home Affairs Council of 3 December 1999.[16] The Action Plan states that "the agreed aim of the Treaty is to provide an institutional framework to develop common action among the Member States in the indissociable fields of police cooperation and judicial cooperation in criminal matters .."

The Tampere European Council 15/16 October 1999, which was devoted exclusively to justice and home affairs matters, outlined the underlying justification for the creation of an area of freedom security and justice in the EU, as follows:

> "The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgement and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of member states must be achieved."[17]

The EU Heads of State, bypassing their Ministers for Justice, at this Special European Council called for the creation of an area of freedom, security and justice to be based on three fundamental principles; compatibility and convergence of legal systems, mutual recognition of judgements and the establishment of a scoreboard on implementation by member states. It also called for the establishment of the European Police Chief's operational task force, a European Police College and Eurojust - composed of national prosecutors, magistrates and police officers.

The co-ordination or approximation of national criminal laws is to be focused initially on specific areas of criminal activity of a trans national nature such as financial crime, drug trafficking in human beings, high tech crime and environmental crime. It called for the approximation of criminal law procedures in respect of tracing, freezing and confiscating of funds and extended Europol's mandate to this area.

The Laeken European Council on the future of Europe stated that there had been frequent public calls for a greater EU role in justice and security, action against cross border crime, control of migration flows and the reception of asylum seekers and refugees from "far flung war zones" and posed the question "do we want to adopt a more integrated approach to police and criminal law co-operation?" The Convention on the Future of Europe is to provide an answer to that question.

The Nice Treaty provided a legal basis for the operation of Eurojust [18] and provisions for cooperation through Eurojust in a new article 31(2) as follows:

(a) Enabling Eurojust to facilitate coordination between prosecuting authorities;
(b) Promoting support by Eurojust for criminal investigations in serious cross border crime;
(c) Facilitating cooperation between Eurojust and the European judicial Network, in particular, in order to facilitate the execution of letters rogatory and extradition requests.

The Seville European Council examined the Commission's communication entitled "Towards integrated management of the external borders of the member states of the European Union"[19] , a feasibility study concerning the establishment of a European border police force. The Council took note of the intention expressed by the Commission of continuing to examine the advisability and feasibility of such a police force, and the study concerning police and border security, carried out by three member states under the OISIN co-operation programme.[20]

Developments Within Existing Treaty Framework

Notwithstanding the various Treaty changes and policy declarations outlined above, the existing Treaty framework is far from satisfactory. Decision-making in justice and home affairs matters has given the European Union a bad name and is mainly responsible for the 'democratic deficit' tag being attached to all Union decision-making.

Individual Member States share the right to initiate legislation with the European Commission, resulting in a lack of coherence in the range of proposals put forward. Furthermore, the Commission has no power to initiate infringement proceedings under article 226 EC Treaty against Member States for failure to implement EU law similar to that which applies in Community law matters.

There is little democratic control by the European Parliament, which is merely consulted on new legislation. The European Court of Justice has been precluded from exercising its normal judicial supervisory role[21]. In addition, the legal instruments used, such as joint actions, common positions and framework decisions have created enormous confusion not only for the lay person but also for practicing lawyers. In addition, for some considerable time, decisions in this policy area were not published or otherwise readily accessible. The main legislative instrument -- the framework decision -- does not have direct effect and all decisions in this area are subject to unanimity.

Notwithstanding these limitations, however, there have been significant recent developments in the area of policing and judicial cooperation in criminal law, which have taken place within the existing Treaty framework:

15. Art.31(e).
16. 1999/ Official Journal C 19/01-23/1/1999
17. Tampere European Council Conclusions paragraph 5
18. Article 29, 31(1)(a) & 31(2)
19. Brussels 7 May 2002 Com
20. Saville EC Conclusions paragraph 31
21. Article 35 TEU gives the ECJ jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions and validity of measures implementing them. However, article 35(1) gives member states the option of declaring whether or not they accept the jurisdiction of the ECJ in this area. Article 35(5) provides that the ECJ has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement agencies.

Council Framework Decision on racism and xenophobia 2000[22].

Council Framework Decision of 28 May, 2001, on combating fraud and counterfeiting of non -cash means of payment.[23]

Council Decision 187/2002 of 28 February, 2002, setting up Eurojust with a view to reinforcing the fight against serious crime.[24]

Council Framework Decision of 13 June, 2002, on combating terrorism.[25]

Council Framework Decision of 19 July, 2002, on combating trafficking in human beings.[26]

Council Framework Decision on child pornography and prostitution 2002.[27]

Council decision establishing a European police college 20 December, 2000.[28]

Council decision on cooperation between financial intelligence units of member states.

Council Framework Decision on attacks on information systems 2002.[29]

Council Framework Decision of 15 March, 2001, on the standing of victims in criminal proceedings.[30]

Council Framework Decision of 13 June, 2002, on joint investigative teams.[31]

Council Framework Decision of 13 June, 2002, on the European arrest warrant.[32]

Council Framework Decision relating to the protection of the environment through criminal law JHA Council 29 January, 2003.[33]

Council Framework Decision on mutual recognition of financial penalties JHA Council 8 May, 2003.

While there has been an acceleration in policy making, the achievements in the area of criminal law have been less than spectacular.

Report of Group 10 of the Commission

Preliminary work of the Convention on the Future of Europe, chaired by Valery Giscard D'Estaing, was carried out by a series of working groups. Working Group 10, chaired by John Bruton TD, dealt with justice and home affairs matters. In its introduction, the report of the group underlined the raison d'etre for Union's involvement in the area of policing and criminal law as follows:

> "There are a number of areas such as cross border crime, asylum policy or control of the Unions external borders which cannot be dealt with effectively by states acting on their own, nor is defence against the new terrorism threats compatible with autonomous action at national level."
>
> "It is important that the citizens feel that a proper sense of European public order has taken shape and is actually visible today in their daily lives. In this respect, the principles of transparency and democratic control are of utmost importance. The establishment of the European area of freedom, security and justice is also closely linked with respect of the rights of citizens and the principle of non-discrimination (Article 12 and 13 TEC)."

The Group recommended a series of changes in the legislative procedure. It proposed that Framework decisions, decisions and common positions be replaced by the normal Community legal instruments and that the instrument of Conventions be abolished. It recommended that the principle of mutual recognition of judicial decisions should be formally enshrined in the treaty. It recognised that some approximation of certain elements of criminal procedure and specific areas of substantive criminal law, respecting the different European legal traditions,[34] would prove necessary in order to facilitate mutual recognition.

The Group considered that the present treaty contains, broadly speaking, an adequate legal basis for the adoption of rules facilitating police and judicial cooperation between member states but it recommended that the legal basis be complemented so as to enable adoption of the necessary measures for the mutual recognition of judicial orders, fines, disqualification decisions, and all other forms of judicial decisions.

It considered that a specific legal base should be included in the treaty on crime prevention, which, while mentioned in Article 29 TEU, is not included in the specific legal base of Article 30 and 31 TEU. It is envisaged that this legal base will be limited to incentive and supporting measures for the prevention of crime e.g. exchange of best practice, financial programmes for incentive measures or for Unionwide research and documentation indicators on common statistics on crime.

It was proposed that qualified majority voting (QMV) and co-decision would govern decision making in the following areas.

* Minimum rules on constituent elements of sanctions for those crimes with a cross- border dimension listed in the treaty. (2a,aa)
* Minimum rules on constituent elements and sanctions for crime directed against a common policy of the Union, if that policy itself is governed by QMV.(2a,bb)
* Common minimum standards for the protection of the rights of individuals in criminal procedure, as corollary to the principle of mutual recognition. (2b)
* Common rules on specific elements of criminal procedure, such as the admissibility of evidence throughout the Union. (2b)
* Rules on police and judicial cooperation between member states authorities. (2c)
* Measures on prevention of crime.(2d)

In addition, it is considered that any possible extension of Europol's and Eurojust's scope of action to new types of crime, all rules of their organisation and management and any extension of their existing powers would also be governed by QMV and co-decision.

The report states that "in certain aspects of cooperation in criminal matters concerning core functions of the member states and deeply rooted in their various legal traditions, the unanimity rule would remain". Examples relate to the creation of union bodies with operational powers, the approximation of substantive criminal law in areas other than those referred to above, rules on action by national police authorities, joint investigative teams, or law enforcement authorities acting in the territory of another member state.

22. OJ L328/1 2000
23. OJ L 149 of 2 June, 2001
24. OJ L 63 of 6 March, 2002
25. OJ L 164 of 22 June, 2002
26. OJ L203/01 (2002/629/JHA)
27. OJ L164/3 2002.
28. OJ L 336 of 30 December, 2000
29. OJ L162/1 2002
30. OJ L 82 of 22 March, 2001
31. OJ L 162 of 20 June, 2001
32. OJ L 190 of 18 July, 2002.
33. Council Framework Decision 2003/ 80/JHA of 27th January, 2003 OJ L29/55
34. Including the ECHR and Charter of Fundamental Rights in particular as regards the presumption of innocence

The Group considered that in order to ensure that legislative initiatives emanating from Member States respond to a genuinely general concern, a threshold of a quarter of member states should be required before any initiative is permitted.

There was general agreement within the Group on developing a genuinely integrated system of external border control management as agreed by the Seville European Council. Most members of the Group considered the possible creation of the common European border guard unit as a longer term issue. Immediate steps which could first be taken include enhanced cooperation, close cooperation between member state services, common instruction and training, sharing of equipment and joint teams composed of officials from different member states.

The Group recommended that in relation to the implementation of EU legislation by member states, explicit mention should be made in the treaty of mutual evaluation or peer review and that the Commission should fully play its role as guardian of the Treaty and have the capacity to exercise its functions under Article 226 TEC in introducing infringement proceedings against member states.

The Working Group proposed a role for national parliaments in this area, through greater involvement in the definition by the European Council of the strategic guidelines and priorities for European Criminal Justice Policy, regular inter-parliamentary conferences on the Union's policies in this area and in the use of the subsidiarity early warning mechanism, in particular for specific aspects of subsidiarity in criminal law matters.

The Working Group took the view that the limited jurisdiction of the European Court of Justice is no longer acceptable concerning acts adopted in the areas of police cooperation and judicial cooperation in criminal matters, which directly affect fundamental rights of the individual.

Draft Constitution

The draft articles of the new constitution submitted on 14th March, 2003, by and large reflect the recommendations of the Convention Working Group on Justice and Home Affairs.

Following further work by the Presidium of the Convention, Part 1 and 11 of the new treaty or Constitution were submitted to the Thessaloniki European Council held on the 19th and 20th June, 2003, while Part 111 and 1V are subject to final modification by the Convention.

Article 1.3.2 provides that the Union shall offer its citizens an area of freedom, security and justice without internal frontiers and Article 1.13 provides that the creation of an area of freedom, security and justice constitutes a shared competence with Member States.

The detailed provisions on creating an area of freedom, security and justice are set out in part 111 at articles 111-153 to 111-171.

Article 111-153 provides that "the Union shall constitute an area of freedom, security and justice, with respect for fundamental rights, taking into account the different legal traditions and systems of Member States."

Article 111-155 provide that national parliaments shall ensure respect for the principle of subsidiarity and may participate in the evaluation mechanism[35] and political monitoring of Europol and Eurojust.

Article 111-160 provides that the right of initiative of legislation lies with the Commission or a quarter of member states.

Article 111-166 provides that judicial cooperation in criminal matters will be based on the principle of mutual recognition of judgments and judicial decisions, with some approximation of the laws of member states.

A European Law or Framework law (to replace Regulations and Directives and other legal instruments such as framework decisions) will establish:

* Rules and procedures to ensure such mutual recognition
* Prevent and settle disputes of jurisdiction
* Encourage training of the judiciary
* Facilitate cooperation between judicial authorities

A European Framework law may establish minimum rules concerning:

* Mutual admissibility of evidence
* Definition of rights of individuals in criminal procedure
* Rights of victims of crime
* Other procedural matters agreed by Council unanimously.

An Irish amendment was accepted to the effect that: "Adoption of such minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for the rights of individuals in criminal procedure."

Article 111-167 provides for the approximation of criminal law in respect of "particularly serious crime with cross-border dimensions" which are identified as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Other crimes may be added if decided unanimously by the Council.

Article 111-168 provides for the adoption of a European Law or Framework law to promote and support the action of member states in the field of crime prevention.

Article 111-169 provides that Eurojust's mission shall be to support and strengthen coordination and cooperation between member states and makes provision of the adoption of a European law on its structure, workings, scope of action and tasks.

Article 111-170 provides for the creation of a European Public Prosecutor's Office by unanimity.

Article 111-171 provides that "the Union shall establish police cooperation involving the Member States competent authorities, including police, customs and other agencies in relation to the prevention, detection and investigation of criminal offences. A European law or framework law may establish measures concerning:

* Information
* Training and exchange of staff and equipment and research of crime
* Common investigative techniques in relation to organised crime

On the basis of unanimity, the Council may establish measures concerning operational cooperation.

Article 111-172 provides that Europol's mission is to support and strengthen action by member states police and other law enforcement

35. Provided for at article 111-156

services authorities and their mutual cooperation in preventing and combating serious crime affecting two or more member states, terrorism and forms of crime which affect a common interest covered by a Union policy. A European law shall determine Europol's structure, operation, field of action and tasks.

The tasks of Europol may include collection, storage, processing, analysis and exchange of information and the coordination, organisation and implementation of investigative and operational action carried out jointly with Member States in the context of joint investigative teams.

Article 111-173 provides that the Council may adopt unanimously the conditions and limitations under which the authorities of one member state may operate in another.

Assessment

The policy objective of creating an area of freedom, security and justice within the EU has taken shape since the Amsterdam Treaty.

The Special European Council in Tampere attached priority to this objective. September 11 provided the catalyst for progress in the area of police and judicial cooperation in criminal law matters but in fact, the development of this policy area and the Union's competence in these matters has been an evolutionary process.

Bearing in mind the agreement on objectives, the existing legal base for action and the existence of such bodies such as Europol, Eurodac and Eurojust, as reflected in the Maastricht, Amsterdam and Nice Treaties the new Treaty provisions put forward by the Convention, could not be considered radical. A shared right of initiative between the Commission and Member States is maintained, (albeit a minimum of a quarter of member states is required), QMV will only apply in very specific and well defined policy areas in matters concerning police and judicial cooperation in criminal law and there are no proposals to create immediately a European Public Prosecutor's Office or a European Border guard, which would have to be decided in any event by unanimous decision of the Council.

The new Treaty provisions are consistent with the objectives of the new Convention which seek a simplification of the treaties, instruments and decision-making procedures and represent a natural evolution of policies first articulated in the Maastricht and Amsterdam Treaties.

The focus of Irish concern, has been with the approximation of criminal law, (which is considered a euphemism for harmonisation), the creation of a European Public Prosecutor, which would allegedly give the EU "competence to criminalise, investigate, arrest, prosecute, try and punish EU Member States citizens"[36] and finally the issue of qualified majority voting in this area is called in question. The most recent statement by the Minister for Justice, Michael McDowell, on this subject was his address to the National Forum on Europe 19th June 2003 in which he reiterates his objections to the creation of a European Public Prosecutor's Office as it constitutes "a piece of the Corpus Juris Project sitting there by itself." He also expresses concerns about QMV and the risk of "proposals on criminal procedure" being adopted "against our wishes".

These remarks are a far cry from the earlier statements[37] by the Minister against any EU involvement in the area of criminal law and his speech in general demonstrates an acceptance of the role of the EU in criminal law matters. His reservations are now confined to two issues, that of qualified majority voting and the treaty provisions providing for the eventual establishment of a European Public Prosecutor's Office. The impression is created in this, as in other speeches by the Minister on this subject, that the proposed Treaty changes constitute a threat to our criminal justice system. I would suggest that this impression is misleading and the analysis upon which it is based is flawed. Rather than posing a threat, greater EU involvement in policing and criminal law matters constitutes an opportunity for more effective criminal law making, policing, investigation and prosecution of crime in Ireland and in the EU in general.

(i) The starting point for any discussion of the Union's competence in this area is the recognition by all member states that most serious crime has a foreign element, be it drug trafficking, illegal immigration or child pornography and that cross-border crime cannot be tackled by member states acting alone. Furthermore, it is commonly recognised that the elimination of internal borders throughout the EU has given an added urgency for a greater common effort in dealing with these types of crime.

(ii) Approximation of criminal law is already provided for in the Amsterdam Treaty and is a necessary adjunct to the principle of mutual recognition. It has taken place formerly through UN and Council of Europe Conventions and latterly, through framework decisions, the most recent of which has been being incorporated into Irish law in the Criminal Justice (Terrorist Offences) Bill 2002, put forward by the Minister.[38]

(iii) Indeed there is already agreement among all member states, including Ireland, on the definition of and minimum penalties applicable to practically all forms of serious crime. Such crimes are now catalogued either in the Europol Convention or the Framework Decisions on the Euro arrest warrant and Terrorist Offences, measures which have been endorsed and ratified by the Irish Government.

(iv) The proposals on justice and home affairs are firmly anchored on the principle of mutual recognition rather than harmonisation of criminal law. The Justice and Home Affairs Ministers have already adopted a comprehensive programme of measures to implement the principle of mutual recognition of decisions in criminal matters, which were published on 15th January, 2001[39]. The principle of mutual recognition is based on mutual respect for each country's criminal law system, subject to agreement on minimum standards for the protection of fundamental rights and access to justice. For this latter purpose, some approximation of criminal law and procedure is required. By objecting to approximation, we prevent the establishment of the very minimum standards which we consider important.

(v) The new Treaty proposals provide for the adoption of minimum rules on the admissibility of evidence, the definition of the rights of individuals in criminal procedure in compliance with fundamental rights and on the rights of victims of crime - measures designed to protect the rights of the individual citizen, which must be welcomed. The adoption of such minimum rules would enhance the willingness of authorities in the different member states, including Ireland, to more readily lend assistance to each other and to recognise judgments and other orders of their respective criminal courts. There is no question of Ireland implementing blindly, judicial decisions of other member states of a Union of 25, without minimum standards been agreed. The European Commission has commenced the process of laying down those minimum standards and safeguards in the criminal law field in its Green Paper of 19th February, 2003, on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.

36. Michael McDowell to Plenary Session of the Council of European Bars and Law Societies, 6 January, 2002.
37. "EU input into Irish Criminal law is 'not on'", Irish Times 9 November, 2002 and "McDowell wants stand against common EU Criminal law", Irish Times, 13 December, 2002.
38. This Bill implements in Irish law the provisions of the European Union Framework Decision on Combatting Terrorism (13 June, 2002), the International Convention against the taking of Hostages, the Convention on the Prevention and Punishment of crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention for the Suppression of Terrorist bombings and the International Convention for the Suppression of the Financing of Terrorism.
39. 2001/C12/02 OJ C12/10 of 15 January 2001

(vi) No one disputes that there should be no undermining of safeguards provided by the Irish Constitution and the Irish legal system in the investigation, prosecution and trial of individuals in Ireland. The fact is that there are no proposals providing for any interference with the system of Irish criminal law and administration of justice. This applies to issues such as trial by jury, which is not unique to Ireland or the UK legal tradition. The adoption of the Irish amendment on member states maintaining or adopting a higher level of protection for the rights of individuals in criminal procedure may assuage Irish concerns in this regard.

(vii) The present system of decision making based on unanimity does not work, resulting in a host of Conventions being adopted but not ratified by Member States. It most certainly will not work in a Union of 25 member states or more. This is why qualified majority voting has been proposed in a select number of areas in justice and home affairs matters. While the new Treaty provisions provide that measures adopted in this area must take account of the different legal traditions, this is considered inadequate by the Minister for Justice, to let go of the crutch of unanimity in criminal law matters.

(viii) The new Treaty proposals do not provide for the EU to be given competence to criminalise, investigate, arrest, prosecute, try and punish EU citizens, as has been suggested by the Minister for Justice, but rather the role of Europol and Eurojustis to coordinate and facilitate cooperation between the authorities of member states in the investigation and prosecution stages of specific cross-border crimes.

(ix) A wider competence for the Union was proposed by the Dutch government within the Convention in which it called for a single uniform jurisdiction to combat crime against the interests of the Union (counterfeiting euro and fraud against the financial interests of the Union and certain types of serious cross border crime). "Not only would investigations and criminal prosecutions of offences take place by common appointed authorities, but also trials will be held and sentences imposed and will be carried out. This means, instead of an isolated European Public Prosecutor working through the national authorities, a complete judicial legal system."[40] One example cited in the Dutch proposal is the European Commission competence in the area of competition policy and its power to impose substantial fines on companies which infringe EC competition law, (fines which in an Irish context would be considered a criminal sanction.). This proposal has found few takers in the Convention on the Future of Europe and is not reflected in the Draft Constitution.

(x) The notion of an European Public Prosecutor's office arises from the perceived need at some stage to confer on the Union authority to initiate prosecutions in particular cases, such as that of fraud against the Community Budget, and where Member States fail to take action. For example, had an EPP office existed, would the Italian government have been able to flout the Milk Quota Regulations and failed to recover superlevy from Italian farmers since 1984, a matter that has only recently been resolved at the level of the European Council. The establishment of a EPP requires an unanimous decision of the Council and all prosecutions would be effected through delegated national prosecutors and the national courts. Whether working through the national court systems, rather than a European Court system, will be effective remains to be seen. However, agreeing to the possibility of creating an EPP office, as proposed, does not imply the adoption of a federal system of criminal law. Time will tell whether the EPP Office will eventually have to be complemented by a European Criminal Code and a European Criminal Court when dealing with specified "European crimes" in order for it to be effective. For the moment the creation of such a federal system is not on the agenda.

(xi) The benefit of establishing bodies at European level to assist member states in this area has been acknowledged recently by the Minister for Justice when he welcomed the introduction of the Eurodac fingerprinting system.[41]

(xii) What is most welcome in the new Treaty is that all decisions taken at European level in the area of policing and judicial cooperation in criminal matters will in future be taken in accordance with the Community Method. Proposals will be on the initiative of the European Commission, (or a quarter of member states), will be subject to democratic control by the European Parliament and to judicial control by the European Court of Justice. Thus the lack of democratic accountability, transparency and judicial control in this area, is finally being addressed.

(xiii) Member States have agreed that they cannot handle these issues alone and have agreed that these type of measures provide the key to more effective policing and prosecution of crime. Ireland subscribes to that view, subject to the necessary safeguards and provisions on fundamental rights. There is no doubt that agreement on the incorporation of the Charter of Fundamental Rights into the EU Treaty has laid the basis for the progress achieved, within the Convention on Justice and Home Affairs matters. Oddly enough, it has been the Irish government which has been most opposed to making the Charter judiciable in EU law.

(xiv) Notwithstanding some divergence of views, it is the level of agreement on criminal law matters among member states that is most remarkable - a level of agreement which would have been unthinkable only a few years ago: No Third Pillar, decision-making to be based on the Community Method, albeit with some variations, legal instruments are being simplified, the principle of mutual recognition is to be given a Treaty base and criminal law and procedure to be subject to a measure of approximation. Finally, bodies such as Europol and Eurojust may be assigned new tasks without further Treaty changes. Such changes are to take place within the context of a judiciable Charter of Fundamental Rights.

Conclusion

From being a peripheral policy area in the days of Trevi, justice and home affairs and in particular, police and judicial cooperation in criminal law matters, have become a fundamental cornerstone of the EU Treaty and policy making.

Notwithstanding the unanimity voting requirement, there has been a considerable body of EU criminal law legislation adopted over the past two to three years based on the principle of mutual recognition and approximation of crimes and sanctions, which have been or are about to be incorporated into Irish law. Accordingly, the nature and form of the European Union's involvement in the criminal law area is now well known and accepted by all member states, including Ireland.

The new Treaty provisions proposed, which have yet to be endorsed by an Intergovernmental Conference of member states to commence in October of this year, do not represent any radical departure from the existing Treaty arrangements. The new provisions are necessary, however, to ensure, through qualified majority voting, greater efficiency in decision making in a Union of 25 or more member states. They will also introduce for the first time a system of democratic control by the European Parliament and national parliaments and judicial supervision by the European Court of Justice in the area of policing and criminal law matters, which is fundamental to ensuring the legitimacy of the decisions taken in this important area. ●

Eugene Regan BL is Editor of "The New Third Pillar Cooperation against Crime in the European Union", published by the Institute of European Affairs [2000].

40. Conv 733/03 12 May, 2003.
41. Press Release 1/3/03 "Minister McDowell welcomes the introduction of the European Union EURODAC fingerprinting system for asylum seekers."

Commercial Mediation

Klaus Reichert BL

Introduction

The Irish Commercial Mediation Association (ICMA) was founded earlier this year as an umbrella organisation for those involved with, and/or having an interest in, commercial mediation in Ireland. This article explores the concept of mediation as an alterative form of dispute resolution and examines its development in other jurisdictions. It will then look at the likely development of commercial mediation in Ireland. This article is concerned solely with the mediation of commercial disputes and will not address family mediation, or any other forms of dispute beyond the commercial sphere.

A classic definition of mediation is contained in the seminal text book on ADR (Alternative Dispute Resolution)[1] which defines mediation as:-

> "..... a facilitative process in which the disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute."[2]

Mediation has also been defined as follows:-

> "Mediation involves the appointment or intervention of a neutral third party who seeks to help the parties in dispute to reach a negotiated agreement."[3]

> "Mediation is a process whereby a mediator, i.e. a neutral third party, works with the parties to resolve their dispute by agreement, rather than imposing a solution."[4]

It is probably uncontroversial to say that mediation has developed into the principal form of commercial ADR[5] used in several countries including Australia, New Zealand, the United Kingdom, and the United States. The European Union has signalled its intentions also by the release on 19 April, 2002, by the European Commission of its Green Paper on alternative dispute resolution in civil and commercial law[6]. The stated EU objective was "to initiate a broad-based consultation of those involved in a certain number of legal issues which have been raised as regards alternative dispute resolution in civil and commercial law." What, one might ask, does all of this mean for the Irish practitioner, and the Irish barrister in particular? Before addressing that question, I will give an account of the progress of an average commercial mediation.

The Phases of Mediation

The ADR Practice Guide on Commercial Dispute Resolution[7] describes the main phases of mediation. A typical non-family civil dispute goes through four basic phases.

1. Preparation

This includes drawing up a mediation agreement, appointment of mediator and delivery of written submissions and document bundles to the mediator and other parties, plus any pre-mediation contact by the mediator with the parties, either by telephone or sometimes in a pre-mediation meeting.

2. Opening joint session

Introduction by the mediator and brief presentations by each party of their case at a round-table meeting.

3. Private meetings or 'caucuses'

'Shuttle diplomacy' by a mediator who seeks in confidential sessions with each party to clarify privately the nature of their case and their settlement interests, and to help the parties to design their own acceptable settlement.

4. Conclusion

Joint meeting to agree or sign written terms of settlement, which are usually a legally binding contract or consent order; or to terminate the mediation process. This may occur at a range of levels. Negotiations may have completely broken down; agreement may be reached on further information needed before negotiation can start again; agreement may have been reached on some issues leaving a narrower range to be litigated or discussed later.

Before expanding a little on each phase, one should always remember that the entire process is non-binding until signatures are on the dotted line of a written agreement at the end of the mediation. One of the particular features of mediation is that any party can get up and walk away at any time unless and until a written settlement agreement is reached. Another particular feature of mediation is the "without prejudice", confidential nature of the process. Documents disclosed,

1. Brown & Marriott *ADR Principles and Practice* (2ed) Sweet & Maxwell, 1999
2. Para. 7-001
3. Para. 3.3.1 of Mackie, Miles, Marsh & Allen The *ADR Practice Guide Commercial Dispute Resolution* Butterworths, 2000
4. Para. 1-45 of Lew, Mistelis & Kröll *Comparative International Commercial* Arbitration Kluwer Law International, 2003
5. I do not include arbitration within the meaning of ADR as current thinking would not perceive arbitration as "alternative". Arbitration has far more in common with litigation than one might think, given that it is a binding, adjudicative procedure, though private in nature.
6. See http://europa.eu.int/comm/justice_home/fsj/civil/fsj_civil_intro_en.htm
7. Para. 3.3.1

positions taken or conceded and information passed over from one side to another, are strictly without prejudice and cannot be used in subsequent litigation, if a settlement is not reached. It is only with such a framework in place that the process of mediation has any chance of success.

The preparation stage lays the foundations of any successful mediation. The agreement to mediate is most important to buttress the essential characteristics of confidentiality, the without prejudice nature of the process, and the concept of 'no final deal until signature'. Mediation is the creature of the agreement of the parties, and it is absolutely essential that such an agreement be in place before the process begins. The mediation agreement delineates rights and duties of the parties, and those of the mediator, thus, the greatest care and attention must be given to this preliminary step[8].

The documents which each side prepares for the mediator are, in practice, akin to pleadings, though rather less formal, less guarded, and do not engage in self-contradicting positions[9]. The written statement of a responding party, or defendant, is definitely alien to the system of pleading defences in Ireland. Traversal of a claimant's statement does not happen in practice, and does not help the mediation in any way. Such obstructive behaviour would probably irritate the mediator immediately, and also result in the early torpedoing of the process. The statement of the respondent is generally very much more forthcoming on its real position, and hence can be quite short[10] in comparison to the usual litigation defence. Documentation to back up positions in the written statements are put together, cross-referenced to the 'pleadings', and are delivered to the mediator in good time to allow him/her to read them. This is one of the features of commercial mediation, namely, the mediator knows in advance the case being made by both sides, and sees their evidence also, thus very little time is wasted at the mediation by openings, or explanations of what the dispute is about. A mediator is obliged to be fully familiar with the documentation, and it becomes all too apparent very quickly if the mediator has not in fact taken the time to prepare thoroughly.

A warning should be sounded about the delivery of back-up documentation. This is not to be viewed as an opportunity to deluge the other side and the mediator with paper. Care should be taken to pick the core documents which back up the position taken in the written statements. Also, 'discovery' from the other side of documents only available to that party, that were not included in that party's bundle (i.e. documents which one thinks could damage the other party's case) cannot happen in the context of mediation. If one's case depends on unearthing the 'smoking gun' in discovery, then mediation is not for you, and you should not waste any time with this process.

Once the parties have undertaken the essential preliminary steps, the day of the mediation is set by agreement in conjunction with the mediator. The mediator will always ensure that there is a person from each side present at the mediation who has full authority to sign up to any agreement reached on the day. Without such a person present, mediation subject, say to board approval at a later date, is a waste of time. The momentum built up during a day's mediation can quickly dissipate if final agreement is held over for the approval of others.

Turning to phase 2, the opening joint session, this is the opportunity, sometimes for the first time, for the parties to tell each other, face to face, what their case is about. It starts with the mediator giving a few words about the mediation, what its purpose is, what his/her role is (particularly the limitations of that role), and reaffirming the confidential nature of the process. Much really depends on the personality of the mediator. These initial words are very important to instil confidence in the parties both in the person of the mediator, and the process itself.

The mediator then invites the party's respective lead representative in turn to make their opening statement. The order in which this is taken can sometimes lead to rancour, and the mediator must be careful to handle this properly. Clearly one can have a situation where both parties feel that they are the claimants.

What is said in the opening statement? It is certainly not the traditional opening of a full-blown case. The purpose can be anything from the pleasure of 'having one's say' or amplifying particular grievances or aspects of the case. A good mediator will learn much from the opening statements, particularly when he/she is looking for what each side considers to be the really important issue. Quite often what is important to one side can be trivial to another, and this dissonance is a powerful tool in the hands of a clever mediator.

One generally expects each side to put its best foot forward in the opening statement. Evasive and mutually contradictory positions get found out pretty quickly, and are certainly not in the spirit of mediation. Given that the whole process is confidential, and without prejudice, the parties should take advantage of that fact to give themselves a little more latitude in being frank about their case. Thus, openings can be quite short and to the point.

The private meetings or 'caucuses' phase is where the key work of the mediation is done. Immediately after the conclusion of the opening statements, the parties retreat to their respective break-out rooms. The mediator can then visit each side in complete privacy to discuss the case they are making. The attitude the mediator takes in these sessions, again, varies from person to person. There is the anodyne approach where the mediator gently gets the parties to go through their case, telling him/her about what is important to them, and what they want. There is also the tougher approach of the mediator telling the party to pull themselves together, and so on. There are innumerable variations and combinations of these approaches. What, however, is consistent throughout is the fact that the parties can be absolutely confident that what they say to the mediator is in the strictest of confidence, and will not be disclosed to the other side unless express authorisation is given. This allows the caucus sessions to be of great use and benefit. A party will, and indeed must, be frank with the mediator in the caucus session so as to allow the identification areas of commonality, and possible methods of settlement. A party who is being cagey in the caucus

8. Appendix II to Brown & Marriott contains several precedents.
9. i.e. endless "without prejudice to the foregoing....."
10. Such as "Yes, what the Claimant says happened broadly did happen, but we are not responsible because of ....."

sessions clearly has no serious intentions at the mediation, and is wasting everyone's time.

I digress slightly here as note should be made of the work of UNCITRAL in this area. The United Nations Commission on International Trade Law in 2002 released its Model Law on International Commercial Conciliation[11]. Article 8, "Disclosure of information" states:-

> "When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation."

This is a different beast to the caucus session described above, and reflects more the civilian approach to mediation. Essentially, Article 8 allows the mediator to decide whether or not to disclose any of the information given to him/her, and it is only kept confidential if it is expressly said to be so. This is at variance with the practice in the U.K., and indeed in any mediation I have encountered. Information given in a caucus session would always, to my mind, be confidential unless a specific release was given over specific items. One should be exceptionally careful when setting up a mediation, conducting it, or taking part in one. If this UNCITRAL Model Law governs the procedure, one could find entirely different perceptions as to the role, and rights of the mediator. I do not agree with the UNCITRAL Model Law in this regard, and earnestly hope that if Ireland implements it in due course, a suitable amendment will be made to reflect a more satisfactory approach.

Returning to phase 3, this is the heart of the mediation, and the mediator can spend many hours shuttling between the two sides, teasing out, probing, and generally cajoling, and persuading the parties to move towards a settlement. The mediator looks for issues of common ground to build on, and also endeavours to see if a matter which is of burning importance to one side is similarly thought of by the other. If, for example, the return of some property is a key consideration for one side, and regarded as trivial by the other, this would be exploited by the mediator to build up some level of co-operation between the parties.

Great care has to be exercised by the mediator in the manner in which information is passed from one side to another. Often one hears the phrase "you are to tell that to them", namely, some hardened position, or gratuitous insult. The mediator's response can take various forms, such as "how would you take it if I were to come back from the other side and tell you something like that", or, making it clear that what is said in the other room is completely confidential. Thus, one can keep a tight rein over the exchange of information. This can be very important as the good mediator will know whether or not a particular bit of information will, if told to the other side at a particular juncture, wreck the entire process.

One of the more interesting possibilities with mediation is the opportunity it affords parties to move forward in business together, rather than splitting up in acrimonious fashion. The mediator will have to look out, in the caucus sessions, for what might be possible by way of future business opportunities, as this can sometimes make a deal possible, rather than just a simple pay-off.

The mediator must have a very good idea of the consequences of no settlement being reached on the day. This principally means knowing the costs of litigation/arbitration. However, it is important for the mediator to explore this at an appropriate stage in the caucus sessions with the parties. The useful phrase, "where do you go from here, and what will it cost you?" is useful as it can often keep reluctant parties at the mediation. If a commercial party at a mediation can be reminded of the down-side of walking away and heading to litigation/arbitration, then the process has a good chance of working out. This, as I recollect, can be paraphrased in one of the acronyms which populate this field, namely the BATNA, "the best alternative to a negotiated agreement".

Assuming that progress is made in the caucus sessions, and the bones of an agreement can be identified, the mediation enters its final phase, the conclusion. Thus could involve the mediator getting the parties back together to draft up a settlement agreement, or, depending on how much progress has been made, shuttling back and forth with heads of agreement. Great care must be exercised by the mediator not to undo the good work done to date by getting parties back into a room together so that they can immediately start arguing again. Much depends, as always, on the mediator and his/her personality.

However it is achieved, the goal of every mediation is to have signatures on a settlement document. The mediator would, and should, be very reticent about letting parties leave without signing up, as that is undoubtedly where the second thoughts will start to come in. The mediator must be skilled in drafting of effective settlement documents, and quite often must take the lead in this, as each side may be wary of the other, and any draft proffered. However it is done, the end-product is a written agreement, and until signatures are affixed to that document, each side can walk away without prejudice to any position it may have in underlying litigation or arbitration. Thus, the mediator must be there until the bitter end, and cannot leave until it is clear that a settlement has been signed, or no deal is possible.

This is a brief description of a mediation and there are many more facets than have just been described. Perhaps the classic text in the field is Brown & Marriott's *ADR Principles and Practice*, and it contains a great deal of detail on how the process works in practice. Certainly Henry Brown, and Arthur Marriott are some of the leading authorities in the field and have a very sound approach to the topic.

Mediation in other jurisdictions

Before turning to recent events in Ireland, a few words about other jurisdictions, and in particular to those with a split profession like our own.

11. See www.uncitral.org

Since 1999, England & Wales[12] have had a radically different civil procedure regime to that in Ireland. Indeed the changes are so significant that one should now shun the White Book as a source of assistance on practice and procedure. A quick snap-shot of the new philosophy running through their new rules can be found in Part 1, namely, the "Overriding Objective". In general, this requires all cases to be dealt with justly, ensuring that the parties are on an equal footing, proportionate to the sums involved, complexity, and a plethora of other factors. Part 1.4-(2)(e) of the Civil Procedure Rules is particularly interesting for the present purposes and states the aim of (in relation to case management by the Courts):-

> "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."

A further relevant section from the White Book is in the Autumn 2001 edition of the White Book Service[13]:-

> "The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties."

This, along with various other provisions, has meant that the English Courts now take a particular interest in whether or not ADR has been used in a case, and will robustly deal with parties who do not properly engage in such procedures. This robustness has recently led to a decision where a successful party in a litigation was penalised on costs when it was disclosed at the end that it had failed to take up an offer of mediation[14]. Those who wish to see the current state of English law on this area should read the judgment in full, though one passage[15] of Lord Justice Brooke's costs judgment is worth quoting:-

> "if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence."

It has certainly led to very great care being taken by the practitioners there in handling requests for mediation. This case also demonstrates the now wide gulf between Ireland and England in terms of the role of mediation in litigation. This wide gulf is one which can sometimes lead to misunderstandings when parties from that jurisdiction find themselves sued in Ireland. I have come across some rather amusing demands by English parties, or their lawyers, to stay Irish proceedings pending mediation in England, when of course there is absolutely no obligation in Ireland to accede to such a demand. The litigation culture is dramatically different in England and it is important to avoid reliance on the White Book for a great deal of material. In essence, trial by ambush is impossible in that jurisidiction, and when heading into court one knows exactly the nature and extent of the case and evidence which one is expected to meet. If one tries to be evasive, or to simply deny everything, very severe costs sanctions will be the result. The sanctions in costs are a major factor in the explosive growth of mediation in England, as demonstrated by the *Dunnett v Railtrack* case.

The question arises as to how our colleagues at the English Bar have faired under this new regime. The statistics show that there has been a decrease in the number of cases actually arriving in court for hearing. Anecdotal evidence suggests a large drop in case loads, and barristers leaving the Bar for alternative professions. In mediation, the requirement for large numbers of lawyers to be on hand is simply not there. There is the mediator, very often with an assistant mediator, and then one, perhaps two legal representatives on each side. As the process is confidential, exact figures are likely to be hard to come by, and I have to rely on comments and conversations with colleagues. The position of mediator, and the assistant mediator, have been viewed as suitable for a barrister, and several sets of chambers have pursued active policies to this end. Certainly many of the larger commercial disputes, where each side is represented by Magic Circle Law Firms[16] in a mediation, will choose a barrister as mediator. When it comes to the legal representation at the mediation, based on anecdotal evidence, it appears that many of the large law firms will not brief counsel to act for the parties in a mediation. This will be undertaken by the partner in charge of the file. That is simply the way things have developed, though not exclusively. This trend is not confined to the big London law firms, and can be seen ever more widely now. While this is not an absolute rule, I think it is uncontroversial to say that the Bar in England have had more success as mediators rather than as the parties' legal representatives at the mediation.

A different approach is taken in New South Wales[17] where barristers are very much involved in mediation as the parties' representatives. The rationale for this is that the counsel is fully immersed in the case for the mediation, and if no settlement is reached, then there is no lengthy delay in briefing the barristers as they are already up to speed in the matter. Mediation in commercial matters has been very successful for several years now in Sydney, and is very much a part of the barrister's work in that jurisdiction.

For those who would like to pursue their comparative study of mediation a little further, I would recommend the book *ADR in Canada: Options for the appropriate resolution of business disputes*[18] which is an excellent critique of various dispute resolution mechanisms in the Canadian context. In fact, Bill Horton's re-christening of ADR from 'Alternative Dispute Resolution' to 'Appropriate Dispute Resolution' in that article is one of the most perceptive comments in the literature on this subject. A recent, extremely good European, and therefore Civil Law perspective, can be found in *Haft/Schlieffen Handbuch Mediation*[19].

Mediation in Ireland

What, then, is happening in Ireland? The principal development this year has been the foundation of the Irish Commercial Mediation Association (ICMA). ICMA[20] is the umbrella organisation for those involved

12. Thanks to Michel Kallipetis QC of Littleton Chambers for his assistance.
13. See p.18
14. See *Dunnett v Railtrack*, Court of Appeal, 22 February, 2002. This can be viewed at www.cedr.co.uk/library/edr_law/Dunnett_v_Railtrack.pdf
15. See section 15 of the costs judgment
16. The term of art for the very large law firms such as Clifford Chance, Allen & Overy, etc.
17. Thanks to the Hon Trevor Morling QC, and Francis Douglas QC of the NSW Bar for their help.
18. By William G. Horton, The Adovcates' Society Journal. September 2002, p. 11
19. 2002, Verlag C.H. Beck, Munich

with, and/or having an interest in, commercial mediation in Ireland and, as such, acts as a forum for reflecting their views to government, professional bodies, business organisations and the general public.

ICMA is the professional link between commercial mediators in Ireland. Its focus is on promoting commercial mediation within Ireland, developing and maintaining links with commercial mediation training organisations, and with individuals and groups who provide such services.

As mediation has had success in other jurisdictions, many involved in the legal and commercial field in Ireland have concluded that some, though not all, disputes or commercial claims may well be resolved more appropriately between the parties themselves.

ICMA is not a provider of mediation services in its own right but will facilitate commercial mediation within Ireland by holding a register of qualified commercial mediators. It will support them and their service by promoting commercial mediation as a voluntary service and as an alternative process for resolving commercial disputes. The purpose is to assist organisations to satisfactorily resolve disputes, which have arisen through the course of their commercial, business and administrative activities in the most time, resource and cost effective manner.

The objectives of the ICMA are to:

* Promote commercial mediation to Government, the general public, private and public sector organizations, professional associations and agencies (the stakeholders) as an additional means of resolving commercial disputes.
* Support the training and CPD of commercial mediators through linkage with agreed professional training and accreditation standards bodies
* Maintain a publicly accessible panel/register of mediators who have reached the agreed standard and demonstrate an ability to maintain it.
* Publish an agreed code of practice for commercial mediation and mediators in Ireland
* Provide a forum for communication and exchange of knowledge, information and expertise
* Represent commercial mediation in Ireland at national and international level

The other major mediation event of this year was the holding, for the first time in Ireland, of a mediation training course[21] by CEDR, the Centre for Effective Dispute Resolution[22]. CEDR is perhaps amongst the best known mediation service provider and trainer currently operating. While principally operating in London, it is well-known throughout the world. Certainly, accreditation as a CEDR mediator has been seen as a *sine qua non* in the U.K. The training course lasts 5 full days, and effectively requires a full week for background reading. There is a planned second CEDR course to be held in Dublin either at the end of September or at the beginning of January next. Anyone who wishes to get more information, including the cost (approx. stg£3,000.00) and timing should contact Joe Kelly at A&L Goodbody[23].

The principal development though, is yet to come, namely, the Commercial Court under the Honorable Mr Justice Peter Kelly. How mediation of commercial disputes fits into the practice and procedure of that Court will be keenly watched by anyone interested in the subject.[24]

Clients, particularly multinationals, are now increasingly demanding that disputes can be resolved by ADR. The Commission of the European Union has explicitly recognised this in its Green Paper on ADR of last year, and lawyers will simply have no choice in the matter. If the clients want mediation, they will find the lawyers who will provide that service to them. This fact is reflected in the number of mediation service providers who are now actively promoting their services. Many such service providers have traditionally been arbitration bodies, but have keenly developed their mediation/conciliation wings[25]. Unless there is a full embrace of mediation by the legal profession, it is very likely that clients will seek their dispute resolution service elsewhere. Whether mediation is appropriate for a particular client is not the preliminary issue for lawyers. The issue is whether we can provide a fully-fledged system of commercial mediation for a client who requests it. Certainly it is very likely that one will be asked to consider ADR when advising on cases and disputes.

Two positive steps for any practitioner who is interested in commercial mediation are (a) to obtain accreditation from one of the principal mediation bodies. This involves at least a week of one's time, and a substantial fee; and (b) to join the mailing list of those interested in commercial mediation[26] in Ireland. The mailing list is a large *ad hoc* group of lawyers, accountants, business-people, and others, in Ireland with a definite interest in the development of commercial mediation. From a general meeting of that group sprang ICMA.

The type of mediation which will operate in Ireland has not yet taken shape. Will it be the model where the Bar functions solely as the provider of mediators (such as seems to be happening in London), or will it take the New South Wales route? There is really no way of telling. However, one thing is absolutely certain. Only those with accreditation from the well-known training bodies will find themselves nominated as a mediator in commercial disputes. That seems abundantly clear at this early stage of commercial mediation in Ireland.

A short, perhaps controversial concluding remark. My personal view is that commercial mediation will only take off in Ireland when the heavy costs penalties, akin to those elsewhere, are deployed by the courts. If there is a significant risk of ugly costs orders heaped upon the heads of recalcitrant parties, it is then that we will see a significant rise in the numbers of disputes being dealt with by ADR. Quite frankly, this has been the reason for ADR growth elsewhere, coupled with client demands, and has certainly freed up court time in London. Delays now are greatly reduced, and cases get on far more quickly. What odds that the same thing will happen here? ●

20. The members of the interim Council of ICMA are Stuart Margetson, Alexis Fitzgerald, William Alymer, Petria McDonnell, Geoffrey Corry, Joe Kelly, John Casey, and Klaus Reichert.
21. In January at A&L Goodbody. The participants were Caroline Preston, Laurence Shields, Dermot McEvoy, Andy Lenny, Conor McDonnell, Klaus Reichert, John Doyle, Sean Bagnall, Alexis Fitzgerald, William Alymer, Eugene Murphy, Michael Tyrrell, Emer Gilvarry, Gerard McMorrough, Brian Kiely, Michael Quinn, Michael Twomey, and Niall Pelly.
22. See *www.cedr.co.uk*
23. *jkelly@algoodbody.ie*
24. Recently published materials in Ireland regarding commercial mediation include articles by William Aylmer in the Law Society Gazette, and Dermot McEvoy's papers for the Law Society Seminary on Mediation in April, and for various trade magazines. These explore future possibilities for commercial mediation in Ireland.
25. A short shopping list would include the American Arbitration Association (www.adr.org), the LCIA (www.lcia-arbitration.com), the ICC (www.iccwbo.org). There are several service providers who focus on mediation, such as CEDR, ADR Group, ADR Chambers, etc. A good list is found at the back of Brown & Marriott.
26. For anyone who wishes to be placed on the list to hear of news of commercial mediation in Ireland, please contact me at klaus@indigo.ie

Bar Soccer Trip to Nice June 2003.

Conor Bowman BL

Who was it said that life is what happens to you when you're busy making other plans? John Lennon, I think, and let me say that for a guy who had no shortage of "Imagination", he would have been hard pressed to predict that John Sweetman Junior would put money on himself to be the first scorer for the Bar in this match and then go on to miss a penalty. Still, these things happen and in the pantheon of penalty misses, it probably ranks below Breen's miss in the World Cup last year (but only just).

The French hadn't heard so much English spoken on the Cote d'Azur since the Americans liberated them in 1945. We ate in restaurants like we owned them and we ate more ice cream than you would expect to see at a Pavarotti love-in. The sun shone relentlessly and the locals laughed at our jokes and our chat-up lines, most likely because they didn't understand them. The hospitality of the Mississippi Nite-Club would be hard to reproduce without the entire cast of the Rocky Horror Picture Show, with more leopard skin on show than in the leopard outfitters shop on Leopard Street in Leopardsville.

The host Bar were ever gracious in victory and appeared to have totally forgotten that France failed to score a single goal at last year's World Cup, while Ireland scored 6 or 7. We took it upon ourselves to remind them.

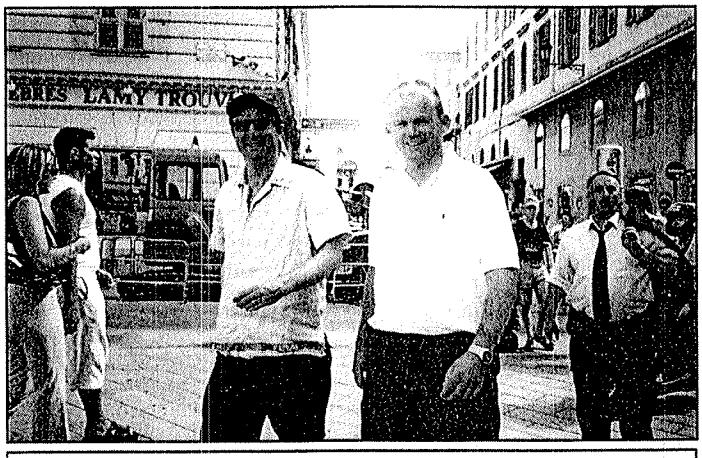
One of our number drove a convertible on the Grand Prix Circuit in Monaco with the handbrake on. Henceforth, he shall be known as "The Man who broke the Clutch in Monte Carlo".

There were trips to Saint Paul de Vence and other fabulous places, like Antibes and Eze. There were nights of much fine drink and poor pool-playing. During the day, the postage stamp swimming pool on the roof proved a catalyst for the kind of intimacy that had all but disappeared from these trips abroad. In the middle of it all, the crosses of St George swayed in the sunshine and the whole of Ireland placed (or misplaced) their hopes in the hands (and feet) of John Sweetman Junior.

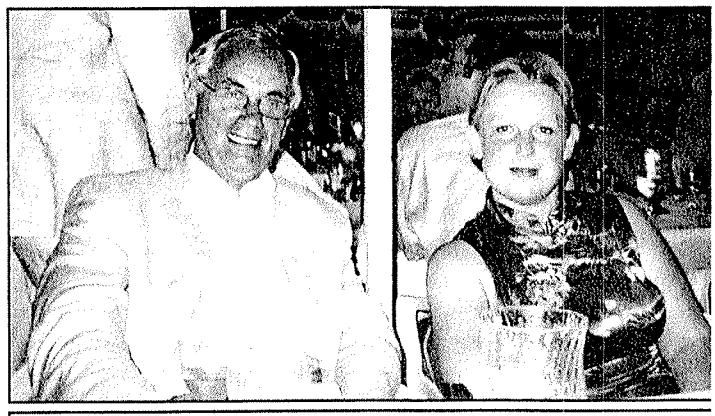
Bar Soccer Team, which lost 4-0 to the Nice Bar

Front Row, L to R, Nap Keeling, Conor Dignam, Micheal P. O'Higgins, Eoin Hardiman, Paul McGarry, Seamus Woulfe, Chris Meehan. Back Row, L to R, Mark Sanfey, Kevin D'Arcy, Gerard Groarke, John Sweetman, Feargal O'Dubhghaill, Micheal O'Scanaill, Garret Baker, Neil Steen.

Enjoying the game, His Honour Judge Carroll Moran and the Hon. Mr Justice Esmond Smyth.



Taking Nice by storm, Micheal P. O'Higgins, Des Dockery and Chris Meehan.



The Hon. Mr Justice Esmond Smyth and Aideen Collard.

Conor Bowman and Michael O'Donoghue entertain their French hosts with a Gallic rendition of "Cockles and Mussels".

James Connolly, Pat Hanratty, Paddy Hunt, Michael O'Donoghue, His Honour Judge Carroll Moran, Paul O'Higgins and Aideen Collard.

Photos by Aideen Collard

The Family Law Reporting Project

Siobhan Flockton BL[1]

The Family Law Reporting Project was set up by the Courts Service. When considering the family courts in its sixth report, the Working Group on a Courts Commission observed that

> "...the operation of the in camera rule has hidden from the public at large the extent of marriage breakdown and consequent family law litigation in our society. This can, for instance, prevent public representatives from evaluating properly the situation, such as the need for the provision of support services to aid couples whose marriages are in difficulty".

The Working Group recommended that a pilot project should be set up initially for a year with three aims:

1. that a Barrister or a Solicitor would report on family law cases in the Dublin Circuit and District Courts. These reports would be distributed through the law reports and media to give legal practitioners, the court users and the general public a more consistent picture of the workings of the family courts and the approach used by judges to make decisions;
2. to provide to the public general information about the workings of the family courts so that the public would understand how family law worked in practice;
3. to provide meaningful statistical information on the work of the family courts.

As a result of this recommendation, the Family Law Development Committee, chaired by Mrs Justice Susan Denham, recommended to the Courts Service Board that the Family Law Reporting Pilot Project should be established. Siobhan Flockton B.L. was appointed after a process of open recruitment by advertisement and interviews. A Steering Committee was established with representatives from the Law Society, the Bar Council, a judge from the District Court, a judge from the Circuit Court and several members of the Courts Service to monitor the project.

First aim: to gather information about family law cases

Information about family law is shrouded in secrecy. The "in camera" rule has had a far-reaching effect beyond its original intention, which was to preserve the privacy of individuals and their families in very sensitive circumstances when they are seeking remedies in the family courts for marriage breakdown, domestic violence, etc.

The "in camera" rule as it is interpreted at the moment means that only the parties, the legal representatives, the judge and court officials are permitted to sit in court. However, there have been occasional studies where the courts have permitted restricted access to researchers to gather information about the workings of the District Court, *e.g.* Study of Domestic Violence by Women's Aid. As a consequence of the "in camera" rule, information about how judges make decisions and what criteria they apply to different cases is gathered in a very haphazard way. Legal practitioners such as solicitors and barristers glean information about how judges may decide cases through anecdote and mutual exchange of information from their colleagues, sometimes outside the door of the court, about what a particular judge decided or is likely to decide in a particular case.

The only other sources of information about the process in which family law cases are decided are the occasional written judgments given on matters of family law. These are mainly given by the High Court and very occasionally by the Supreme Court and the Circuit Court. However, more information is desirable regarding the bulk of decisions being made every day in the District Courts and the Circuit Courts around Ireland.

Circuit Court figures for the period from January 1, 2000 to December 31, 2000 show that there were a total of 5,286 cases.The District Court family law business for the same period was a total of 23,329 cases, 3.65 per cent of District Court cases for that period. In comparison, the High Court dealt with 189 family law cases in the same time. Of course, this figure does not reflect the number of interim applications, orders and injunctions made in the same period, which at the moment is collated with Chancery Interim Orders, making a total of 1,701 orders.

Background to the debate about family law issues

There is a high level of frustration in all quarters about family law issues. On the one hand, most people who are seeking some kind of remedy in the family court are relieved to know that when their case is going on in court, no one except the parties and their representatives will be permitted to be present during the proceedings. On the other hand, many people who want to talk about their experience in the family courts, because they feel aggrieved about some issue arising from their court case in a family law matter, are prevented from doing so by the "in camera" rule. They are forbidden from referring to the circumstances of their case or issues that arise from their experience in a family law case even after the case is completed.

1. former Family Law Recorder. This article was first published in the Family Law Journal.

The public's frustration is evidenced very clearly whenever radio talk shows raise any family law issue - the telephone lines are jammed by people who want to talk about their own case and are not permitted to do so except in general terms.The secrecy that surrounds family law cases encourages many people to feel that injustice is being done behind closed doors. This strong sense of injustice is hard to dispel when there is virtually no information about family law cases to counter that perception.

The judges

What is not always appreciated is that judges would like to have regular information about how other judges decide family law cases. That information is not available because the sheer volume of cases in the Circuit and District Courts mean there is rarely a written judgment. Most judges do not have the time to give written judgments and even if the issue in a case is particularly important the judgment is usually given on an *ex tempore* basis. A reported case of the type which comes before the District Court every day, such as one concerning what criteria are likely to be applied for granting an order under the Domestic Violence Act, is rare. Similarly, an everyday case in the Circuit Court, such as how a matrimonial home should be apportioned between the parties in divorce proceedings, is extremely rare.Therefore, there is little flow of information about how different factors in a particular case will affect the outcome of such a case. Family law jurisprudence obtained from a body of reported cases from the District Court or the Circuit Court, where the bulk of decisions are made, is very limited.

Implementation of the Family Law Reporting Project

It was anticipated that the Family Law Recorder would sit in the Family Circuit and District Courts and report on various cases after obtaining the consent of the parties to a case and their representatives. It was anticipated that consent to reporting cases would be subject to the preservation of the privacy of the parties by excluding the names of the parties and any details which would identify them and their families. It was the experience of the Family Law Project that where consent was sought from the relevant parties to report on a case, it was extremely unlikely that all parties would consent to such reporting. On a number of occasions, the Family Law Recorder attempted to report on cases in the Circuit Court. She discussed with parties and legal representatives whether they would be willing to give their consent to reporting their case, subject to the various safeguards of privacy and confidentiality. In some cases, although there were concerns about the safeguards in place to preserve the privacy of the parties and their families, they were willing to have their cases reported. However, where cases were more heavily contested, despite reassurances that confidentiality would be preserved, it was difficult to get all parties to agree that a case should be reported. And on a number of occasions where, for example, a health board was involved in the case, it was indicated that they would not consent to their case being reported at all. This may have been because clients and legal practitioners were concerned that such reporting might identify the client or compromise them in some way. As a result of the failure of the "consent" reporting element of the pilot project, the Steering Committee advised that legal opinion should be sought as to the status of the "in camera" rule.

The status of the "in camera" rule

As pointed out in the article "Reform of the In Camera Rule" (June/July 2002 issue of the Bar Review), written by Rosemary Horgan, Geoffrey Shannon and Brian Gallagher, Irish law is committed to open justice in Article 34(1) of the Constitution:

> "Justice shall be administered in courts established by law by judges and, save in such special and limited cases as may be prescribed by law shall be administered in public".

However, family law cases and cases involving children are amongst the categories of cases which may by law be shielded from such public and media scrutiny. The Courts (Supplemental Provisions) Act, 1961, provides that justice may be administered otherwise than in public in specified circumstances. Section 45(1) of the 1961 Act states:

> "Justice may be administered otherwise than in public in any of the following cases:
>
> (a) application of an urgent nature for relief by way of habeas corpus ,bail, prohibition or injunction;
> (b) matrimonial causes and matters;
> (c) lunacy and minor matters;
> (d) proceedings involving the disclosure of a secret manufacturing process."

The right to the protection of and strict adherence to the application of the "in camera" rule has become the sacred cow of the family law system in Ireland. Individual family statutes provide that the "in camera" rule is mandatory in most family law matters[2] The Steering Committee for the pilot project was advised that there was no discretion available, not even to the presiding judge, to permit anyone into court to report on family law cases. The Committee, therefore, decided to terminate the project after only one year, although the other aims of the project were still achievable.

The Steering Committee referred the issue of the status of the "in camera" rule to the Department of Justice, Equality and Law Reform. The Programme for Government issued after the general election in 2002 included the intention to reform the "in camera" rule. There have as yet been no proposals as to how or when the "in camera"rule should be reformed.

Second aim: to provide information about family law to the public

One of the tasks of the pilot project was to distribute information about family law to the general public. During the course of the project it became apparent, first, that the demand for information was huge because there is no established source of information, and, secondly, that the information required was basic and required delivery in simple straightforward language. It is often forgotten when lawyers are immersed in law that the kind of information that is required by the public is quite straightforward, *e.g.* what court a person should go to for a particular application or what information the court needs to know for a particular application? How will the court case be conducted? Who will be allowed in court? What will the judge want to know?

2. See "Reform of the In Camera Rule", by Rosemary Horgan, Geoffrey Shannon and Brian Gallagher in the Bar Review June/July 2002 for a detailed analysis of this rule

The Family Law Information Bulletin

A publication was devised, with the assistance of the Information Office of the Courts Service, called the Family Law Information Bulletin, which was intended to cover interesting and relevant topics around the subject of family law, and had an easy-to-read layout and design. There were editions covering the Circuit Court, the District Court,. and what type of cases were heard in each particular court. Two particular editions of the Bulletin covered family law topics such as domestic violence. The publication was intended for ordinary members of the public but in fact many different people found the bulletin useful, from the advice worker in an information centre to the solicitor who was not entirely familiar with the court procedure for family law applications in the District Court. Copies of the publication were distributed throughout the country to Citizen Information Centres, Court Offices, solicitors' offices and many other centres where the public sought information about family law. The demand increased for copies of the publication as it became known where to find copies and where to order more. The print run for the first edition was 1,500 copies; by the fourth edition the print run had increased to 7,500 copies and it was anticipated that any further editions would require more copies for distribution.There were plans for further editions but unfortunately the pilot project was not continued after its first year.

However, it is clear that such information about family law is needed by the general public on an ongoing basis and it is hoped that the Family Law Information Bulletin will be continued in some form by the Courts Service to answer that need. The Courts Service web site http://www.courts.ie has all four editions of the Family Law Information Bulletin contained therein. It should be possible to download the contents of the Bulletins accordingly.

Third aim:to provide meaningful statistics on the family courts

When the pilot project was established in April 2001, one of the aims of the project was to provide meaningful statistics on family law business within the District Court and Circuit Court in Dublin and it was intended that that template for statistical collection would inform all other courts in Ireland.

In 2001, all statistics covering the work of the family courts throughout Ireland were collected and recorded manually. In other words, a person sits in the court and records by hand, filling in on a sheet what type of case it is, the category of person making the application, how many cases of a particular kind were heard and some other limited data. The statistics are collected and compiled monthly and then quarterly and the quarterly statistics are submitted to the Courts Service statistical office for further processing into yearly figures. As a result of the basic method of collection by hand and the severe pressure on the number of staff in individual court offices, statistics have not been given the priority they deserve.

It was considered necessary firstly to evaluate the statistics that were collected already; secondly to decide what statistics should be collected in the District Court and the Circuit Court; thirdly,to consider how those statistics could be collected given the primitive(manual) method of the collection of statistics.

The quality of the statistics

In the Courts Service Annual Report, 2000, the statistics were recorded for family law applications dealt with by the Circuit Court from 1997 to the year 2000. The annual report specified the different categories collated such as divorce, judicial separation, nullity and section 33 applications (where leave is required from the court for a waiver of the three-month rule) and appeals from the District Court. The report also recorded how many applications were made within a certain period of each category and in the same period how many applications were received, granted, refused, withdrawn or struck out. Furthermore, in divorce and judicial separation, the sex of the applicant was recorded. Surprisingly, the statistics collected from the family law courts have the most detail of any statistics produced by the Courts Service. But, it was recognised that information about family law could be improved considerably by refining the way data was collected in the medium and long term by introducing computers in every court and directly entering data and statistics to a central computer in the Courts Service in Dublin. The estimate for introducing such a computerised system varies from three to five years.

It was also considered vital to improve the quality and quantity of family court statistics in the short term. The Family Law Recorder therefore set about compiling a list of data that could be collected manually by the staff of the family courts but could improve the quality of the statistics and at the same time provide a more refined and therefore an accurate picture of family court business.

For example, in consultation with the Solicitors' Family Law Committee a list of data that could be collected was drawn up. All family law applications would provide the following information:

* The sex of the applicant;
* The age of the parties;
* Age and number of the children ;
* The number of applications;
* The type of applications made;
* If applicants/respondents were legally represented privately or legally aided.

It was intended that the collection of data would be improved over a period of time as the computerisation of the family courts would be introduced.

Conclusion

Unfortunately, the pilot project was not continued beyond the initial period of one year. It was disappointing that the momentum of the project was stopped so abruptly because it was evident that there was a great deal of work required to fulfill the aims of the project, in particular the provision of information to the public on family law and the courts and the proposed plans for improvement of statistics. It is to be hoped that the initial work on the proposals for improvement of the quality and quantity of statistics from the family courts will be continued by the Courts Service as a matter of urgency.

In 2003, family court statistics are still collated manually in the various courts around the country. The compilation of detailed statistics is vital to inform the public, the Courts Service, the Department of Justice and all other interested parties as to what is happening behind closed doors in the family courts. Statistics provide a vital tool in analysing trends in the family courts and making realistic provision of services for family court users. ●

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