



IRISH ASSOCIATION  
*of*  
LAW TEACHERS

## **Annual Conference 2011 Contents**

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Welcome to the Annual Conference of the Irish Association of Law Teachers.

Last year, we celebrated (in some style) thirty years of the IALT at the Annual Conference in Limerick. In the short space of twelve months, we have all borne witness to unprecedented turmoil in the spheres of politics and economics, which has clearly had a profound effect on our professional and personal lives, as well the academic and legal context in which we teach and research. This year's Conference theme has set out to explore and critique some of the issues most relevant to the contemporary professional environment of the legal academic. The theme also sets us the challenge, as an academic community, to discuss positively the values and contributions we might seek to make, through our teaching and research, in this time of national and global uncertainty.

The Association was founded in 1979, when the challenges and difficulties that now face us were perhaps much more familiar than the Celtic-Tiger era in which many of the more recent members of the IALT community gained their academic spurs. Nonetheless, now, as then, the Association is proudly an all-island organisation bringing together legal academics and teachers of law from both sides of the border. It remains committed to furthering excellence in legal education and research through conferences, research projects and by acting as a collective voice for law teachers and researchers.

In this regard, the Council of the Association has had a busy year. Professor Conor Gearty of the London School of Economics delivered the 2011 Spring Seminar in April. Supported by the Irish Penal Reform Trust and Thomson Round Hall, the event took place at the National University of Ireland on Merrion Square, and Professor Gearty spoke about his recent project 'The Rights' Future: Exploring Dignity, Accountability, Equality and Commitment'. At the event, Professor Des Greer was made an honorary member of the Association in recognition of his outstanding contribution to legal scholarship over a long and brilliant career. The inaugural IALT Kevin Boyle Book Prize was also awarded to Dr Eoin Carolan of UCD, for his stimulating work, *The New Separation of Powers: A Theory for the Modern State*.

In advance of the Annual Conference, Issue 1 of *IALT News* was published and the Council plans to make this a twice-yearly publication. The Association is delighted to have awarded two Scholarships to postgraduate students to attend, and present, at this year's conference; Kathryn O' Sullivan (UL) and Connie Healy (NUI Maynooth). Indeed, it was heartening that the quality of the applications for the scholarships was so high: the future of legal research on the Island looks very bright indeed and it is a source of considerable pleasure to the Council that

the tradition of having a number of postgraduate students presenting their work at the Conference will be continued this year.

At the conference itself, we will be awarding the Inaugural James C. Brady Teaching Innovation Fund prize. We will also be launching, *“Thirty Years of Legal Scholarship – The Irish Association of Law Teachers”*, a collection of essays edited by Thomas Mohr and Jennifer Schweppe, published by Thomson Round Hall, and featuring contributions by more than twenty leading academic commentators. We are delighted to welcome the Hon. Mr. Justice Gerard Hogan, who has kindly agreed to launch the book.

The Association is also delighted to mark the extraordinary contribution made not only to legal scholarship, but also through services rendered to the Island of Ireland, by awarding Honorary Membership to Dr Mary McAleese, former President of Ireland.

The Annual General Meeting of the Association will be held on Sunday afternoon at 2pm, and the Council would encourage all members of the Association to attend. If you are interested in being on the Council for the forthcoming session, please let me, or another Council member know.

Finally, I would like to acknowledge the great number of people who have worked so hard in ensuring that the conference this year is a success. In particular, I would like to thank all the speakers who have put such effort into preparing and delivering their papers. The Council is most grateful to the Plenary speakers, Professor Alan Dignam, Dr Gavin Barrett and Professor Caroline Fennell, and to Judge Hogan, for making time in their busy schedules for the event. Thanks must also go to our sponsors, Thomson Round Hall and Clarus Press for their generous support.

On a personal note, I would like to express an enormous debt of gratitude to the members of the Council, who have put a tremendous amount of hard work into preparing for the conference and ensuring the ongoing success of the Association over the course of the year.

I hope you enjoy your weekend.

Best wishes,

Michael Doherty  
President, IALT 2010-11.



IRISH ASSOCIATION  
*of*  
LAW TEACHERS

**2011 ANNUAL CONFERENCE PROGRAMME**  
**“Added Value(s) - The Role of Law in Contemporary Society”**

**Friday 18 November**

**6.30pm**

Welcome Reception & Book Launch

*“Thirty Years of Legal Scholarship - The Irish Association of Law Teachers”*  
(Round Hall Press).

**The Hon. Mr. Justice Gerard Hogan**  
Venue: **The Octagon**

Followed by Buffet Dinner  
Venue: **The Octagon**

**Saturday 19 November**

**9.30-11.00am:** Parallel Sessions I\*

**11.00-11.30am:** Tea/Coffee  
Venue: **The Winter Garden**

**11.30-1.00:** Parallel Sessions II\*

**1.00-2.00pm:** Lunch  
Kindly Sponsored by Clarus Press  
Venue: **The Octagon**

**2.00-3.45pm:** Plenary Session  
“The Public Role of the Academic Lawyer”  
Venue: **Lough Ree**  
Chair: Michael Doherty  
Speakers:  
Dr Gavin Barrett  
Professor Caroline Fennell  
Professor Alan Dignam

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\* Details of Parallel Session below

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**4.00-5.00pm:** SOCIAL EVENT \*Boat Cruise on the Shannon\*  
Congregate in Main Lobby at **4pm sharp**

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**7.30pm:** Annual Gala Dinner preceded by Drinks Reception  
**The Killinure**  
**Kindly Sponsored by Thomson Round Hall**  
*Winner of James C. Brady Teaching Innovation  
Fund Award Announced  
Awarding of Honorary Membership  
Postgraduate Scholarship Winners Announced*

<b>Sunday 20 November</b>
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**10.00-11.30:** Parallel Sessions III\*

**11.30-11.45:** Tea/Coffee  
Venue: **The Wintergarden**

**11.45.-1.00:** Parallel Sessions IV\*

**1.15-2.00:** Lunch  
Venue: **The Octagon**

**2.00-3.00:** IALT Annual General Meeting  
Venue: **Lough Ree 2**

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\* Details of Parallel Session below

\* Details of Parallel Session below

## **Details of Parallel Sessions**

### **Saturday 9.30-11.00: Parallel Session I**

#### **Session A – The Challenges of Contemporary Governance**

**Venue: The Barrymore**

**Chair: Deirdre Ahern**

1. Maria Cahill, University College Cork, “The Legal Bindingness of the Lisbon ‘Guarantees’”.
2. Jennifer Kavanagh, Waterford Institute of Technology, “Freedom of Expression and Contemporary Governance: The Freedom to Criticise Government Policy”.
3. Steve Hedley, University College Cork, “University Autonomy: The State of Play”.

#### **Session B – Alternative Dispute Resolution: North and South of the Border**

**Venue: The Lenihan**

**Chair: Fergus Ryan**

1. Rory Hogan, University of Limerick, “ADR: Adding Value to Law in Contemporary Society”.
2. Jack Anderson, Queen’s University Belfast, “The Privatisation of Civil Justice? Problems in Promoting the Use of Alternative Dispute Resolution: A Northern Ireland Case Study”.
3. Connie Healy, NUI Galway, “Collaborative Practice: A Value Added Approach to Separation and Divorce in Ireland” (AWARDED AN IALT POSTGRADUATE SCHOLARSHIP 2011).

#### **Session C – Fundamental Rights and New Legal Challenges**

**Venue: The Ballybay**

**Chair: Jennifer Schweppe**

1. Sarah Fulham-McQuillan, Trinity College Dublin “Who has a Stake in Your Kidney? The Role of Law in Procuring Organs-A New Approach for Ireland”.
2. Stephanie O’ Flynn, NUI Galway, “Animal Protection Laws in Ireland- The Need for Reform”.
3. Anne Smith, University of Ulster: “What Added Value Can a Bill of Rights Contribute to Society?”.

### **Saturday 11.30-1.00: Parallel Session II**

#### **Session D – \*ROUNDTABLE\*: Pedagogy of Criminal Law**

**Venue: Barrymore**

**Convened by: Yvonne Daly, Dublin City University**

1. Kris Gledhill, University of Auckland, New Zealand, “The Teaching of Criminal Law- Are We Stuck in a Timewarp?”.

2. Shane Kilcommins, University College Cork, "The Absence of Regulatory Crime from the Criminal Law Curriculum".
3. Maura Butler, Law Society, "The Transition from Academic to Vocational Education- Undergraduate Criminal Law Education Meets the Needs of Criminal Litigation Practice Training".
4. Fiona Donson & Catherine O' Sullivan, University College Cork, "Threshold or Barrier to Understanding? Teaching *Actus Reus* and *Mens Rea* as Foundational Concepts in Criminal Law".

### **Session E – The Changing Nature of Child Protection Law**

**Venue: The Lenihan**

**Chair: Maria Cahill**

1. Magdalena Duggan, University of Limerick, "Foetal Rights in Irish Private Law. Following an Unbeaten Path in the Discussion About the 'Unborn'".
2. Fiona Broughton, University College Cork, "Ireland's Interpretation of the UN Convention on the Rights of the Child, 1989: Protection Rights and Pre-Natal Exposure to Alcohol".

### **Session F – Sex, Privacy and Relationships**

**Venue: The Ballybay**

**Chair: Mary Faulkner**

1. Fergus Ryan, Dublin Institute of Technology, "No Sex Please, We're Civil Partners': The Legal Relevance of Sexual Activity in Marriage, Civil Partnership and in Cohabiting Relationships".
2. Val Corbett, Independent Colleges, "Privacy and Sex Offenders".
3. Ronagh McQuigg, Queen's University Belfast, "Domestic Violence in Contemporary Society: The Role of International Human Rights Law".

### **Sunday 10-11.30: Parallel Session III**

#### **Session G- Criminal Investigations, Evidence and Juries**

**Venue: Lough Ree 1**

**Chair: Jack Anderson**

1. David O' Dwyer, University of Limerick, "Catching the 'Grim Sleeper': an Unbridled Victory for DNA and Criminal Investigation?".
2. Mark Coen, Dublin City University, "Fit For Purpose? Analysing the Rules on Jury Deliberations".
3. Niamh Howlin, Queen's University Belfast, "A Need for Expert Juries in Complex Fraud Trials?".

#### **Session H – Land and Matrimony**

**Venue: Lough Ree 2**

**Chair: Frank Watters**

1. Deirdre McGowan, NUI Maynooth, "Lessons for the Future from the Mistakes of the Past: the Married Women's Status Act 1957".



2. Una Woods, University of Limerick, "Curing Defects in Unregistered Land- Adverse Possession and Other Remedies".
3. Kathryn O' Sullivan, University of Limerick, "The Legal Right Share and the Surviving Spouse: A Proposal for Reform" (AWARDED AN IALT POSTGRADUATE SCHOLARSHIP 2011).

### **Session I – Private Law Remedies and Reform**

**Venue: Lough Ree 3**

**Chair: Thomas Mohr**

1. Martina Cox, University College Dublin, "Trade Mark Infringement: Responding to 21<sup>st</sup> Century Technology".
2. Noel McGrath, Dublin City University, "The Company Charge Register under the New Companies Bill".
3. David Capper, Queen's University Belfast, "An Integrated System of Remedies for Misrepresentation".

### **Sunday 11.45-1.00: Parallel Session IV**

#### **Session J – Crime and Responses**

**Venue: Lough Ree 1**

**Chair: Niamh Howlin**

1. Paul Gavin, Kings College London, "Restorative Justice in the Republic of Ireland- What Happens Next?".
2. John Stannard, Queen's University Belfast, "From Penal Heat to Penal Light".
3. Eimear Spain, University of Limerick: "Lessons from the Past: Compulsion and the Criminal Law".

#### **Session K – Human Rights and International Laws**

**Venue: Lough Ree 2**

**Chair: Jennifer Schweppe**

1. Jennifer Brown, Dublin City University, "The ECHR and Involuntary Detention of Persons Suffering from Mental Disorders".
2. Hakeem Yusef, "Migration Law and Policy and Complicity for Underdevelopment in the Global South".
3. Noelle Higgins & Elaine Dewhurst, Dublin City University, "Ireland's Universal Periodic Review Experience".

#### **Session L – Crime and Commerce**

**Venue: Lough Ree 3**

**Chair: Val Corbett**

1. John Quinn, Dublin City University: "Cybercrime: An Irish Perspective".
2. Joe McGrath, NUI Galway, "Corporate Crime and Sentencing".
3. Anna-Louise Hinds, NUI Galway, "Added Value? The Compliance Impact of the Cartel Settlement Procedure in EU Competition Law".

## **ANNUAL CONFERENCE 2011**

### **Abstracts**

#### **Saturday 9.30-11.00: Parallel Session I**

##### ***Session A – The Challenges of Contemporary Governance***

###### **1. Maria Cahill, University College Cork, “The Legal Bindingness of the Lisbon ‘Guarantees’”.**

Given that Croatia finished Accession negotiations on 30<sup>th</sup> June, 2011, and will likely sign and ratify the Accession Treaty by the end of 2011, although Accession and entry into force will not be likely until June 2013, the question of the legal value of the “guarantees” offered to Ireland in advance of the second referendum to ratify the Lisbon Treaty re-emerges. This paper seeks to conduct a detailed examination of the legal value of the Lisbon guarantees (1) as a matter of international law; (2) as a matter of European law; (3) as a matter of national constitutional law. The conclusion will be that the guarantees may have a legal value that has hitherto been unsuspected.

###### **2. Jennifer Kavanagh, Waterford Institute of Technology, “Freedom of Expression and Contemporary Governance: The Freedom to Criticise Government Policy”.**

This paper seeks to address the fundamental question of the ability of citizens to engage with the democratic system. The constitution enables a citizen to question and criticise Government policy. But this provision is merely posturing if the citizen cannot access the policies in order to criticise them. Therefore, this paper seeks to add to the “Added Values – The role of Law in Contemporary Society” by asking how freedom of expression adds to the ability of citizens to engage in politics and policy?

It will argue that transparency in Government is tempered with unbalanced restrictions that undermine and restrict the citizen’s ability to access government policy thereby stifling engagement with policy and politics which would be considered a cornerstone of a transparent democracy. The policies of Open Government have been promoted whilst the autonomy of citizens to seek information has not developed. In fact, legislation in relation to freedom of information has been gradually eroded with hurdles placed in the way of those seeking information but executive privilege has been strengthened.

The traditional passive relationship between the governed and the Government is transforming into an active relationship where people feel they have the right

to information and access to what their Government is doing. However this has led to the institutional secrecy of the civil service is being challenged by contemporary citizen engagement.

The difference between the two concepts was summed up succinctly by Robert Hazell in the following statement:

The Government still does not fully understand the difference between open government and freedom of information. Open government means the Government publishing information largely for its own purposes: information that the government thinks we need to know or might like to know. Freedom of information requires the Government to disclose information which we decide for ourselves we want to know.

Therefore this paper will address the questions of how freedom of expression, in particular the framing of Article 40.6.1, can be revisited in order to increase citizens' access to information.

### **3. Steve Hedley, University College Cork, "University Autonomy: The State of Play".**

Institutional autonomy has traditionally been regarded as essential for any university with aspirations to intellectual excellence, however defined. Ireland has over the past few decades scored well in this regard, given the explicit acknowledgment of academic freedom in legislation, and considerable autonomy in practice. However, Irish universities' financial dependence on central government is considerable, and when coupled with the financial stringency of recent years their autonomy is arguably under threat. Even on the most optimistic view it has been severely qualified, both in the increasing level of scrutiny to which the universities have become subject, and the increasing willingness of central government to define policy goals which the universities are to follow. This paper reviews the current state of play, and the immediate prospects for change.

### ***Session B – Alternative Dispute Resolution: North and South of the Border***

#### **1. Rory Hogan, University of Limerick, "ADR: Adding Value to Law in Contemporary Society".**

*"I was never ruined but twice: once when I lost a lawsuit, and once when I won."* Voltaire (1694-1778)

Guaranteeing access to a court of law does not necessarily mean cheap access to justice, as Voltaire found out. Court costs generally reflect the amount of work required to process and complete a case. If these costs become too high then access to justice is removed for some parts of society. However the Charter of Fundamental Rights of the European Union provides that legal aid should be made available to those who cannot afford access to justice.

Nearly 300 hundred years after Voltaire's forays into litigation, the European Union (EU) stated that there is a need for improving access to justice in Member States (MS). The number of disputes across the EU has increased, mainly due to the globalisation of free trade and the increased mobility of labour and assets. The former poses a particular challenge for the EU in the area of civil and commercial disputes. Historically, these types of disputes tended to be settled by litigation. Cross-border inter EU disputes create a difficulty for the judiciary and for the smooth functioning of the internal market. The EU has identified certain MS national legislation and procedural rules of law as being barriers. These barriers have occurred in such area as choice of law, service of documents and enforcement of foreign judgments etc., language and different legal systems also create barriers by increasing costs of litigation. To overcome these barriers, Community law has created rights and obligations for parties in certain circumstances. These rights and obligations arise in private civil and commercial litigation and have direct effect between one party and another or between one party and a MS. This paper will assess how access to justice might be improved so that it is accessible to every one.

The Commission choose Alternative Dispute Resolution (ADR) as the method for improving access to justice. The Commission not only identified "*access to justice as a fundamental right*" but also identified a gap in this access. It identified the increased number of disputes as well as added costs and increased duration of litigation as the reason for the gap in access to justice. This gap is across the all elements of law but more prevalent in cross-border disputes. The Commission also felt that ADR could not only play an integral part in improving access to justice but could complement traditional judicial methods and add value by not being confrontational and reduce the work load of the courts. Proponents of ADR claim that not all disputes are best suited for resolution through litigation, a claim supported by research. The current problem with litigation is that consumers face not only long delays but the system has a rigid structure in procedure and evidence requirements. The high costs, court and expert opinions are also barriers to access. The drivers for ADR initiatives came from a number of areas , which will be examined in the paper.

The paper will also examine implementation of the Mediation Directive (2008/52/EC) which must be effected by May 2011.

## **2. Jack Anderson, Queen's University Belfast, "The Privatisation of Civil Justice? Problems in Promoting the Use of Alternative Dispute Resolution: A Northern Ireland Case Study".**

In England and Wales (e.g., chapter 36 of the Jackson Review of Civil Litigation Costs, 2009); in the Republic of Ireland (e.g., Report on Alternative Dispute Resolution: Conciliation and Mediation, LRC 98-2010); and in Brussels (e.g. Directive 2008/52/EC on certain aspects of mediation in civil & commercial matters) moves to promote alternative dispute resolution are gathering pace. In Northern Ireland, the report in September by the Access to Justice Review Group to the NI Minister of Justice noted the benefits of ADR in appropriate cases and especially in the early stages of family law proceedings. In the courts, pre-action

protocols in personal injury, clinical negligence, commercial and defamation proceedings recommend the use of ADR in resolving disputes in the stated areas and direct parties to, for instance, the dispute resolution service provide by the Law Society of Northern Ireland. More generally, a booklet called “Alternatives to Court in Northern Ireland” was launched in early September by the Law School at Queen’s, the NI Ombudsman and the Law Centre (NI) and has since been made freely available to the general public in an attempt to highlight alternatives to litigation.

To be blunt, however, the anecdotal evidence suggests that the use of ADR in Northern Ireland remains low while the resistance to or suspicion of ADR amongst the legal profession remains high. The various (some very) evident reasons for this are discussed in the paper as is the belief within the ADR community in NI that the only way of dealing with this resistance and/or reticence is to take a more forceful approach to the promotion of ADR either by mandating its use in some instances or by punishing (by way of costs) those parties who unreasonably refused to mediate at an early stage in the proceedings.

That being said, although doubtless there are benefits to the use of ADR, this paper also discusses the contention that those within the ADR community and particularly those in mediation must realise that what they are lobbying for is, effectively, some privatisation of the civil justice system and that that assignment of power and responsibility away for the ordinary court system is not something that should be done lightly or with undue haste. Of particular note here is the evidence emerging from jurisdictions such as Australia and the United States (who have a much more established and experienced view of ADR) indicating that ADR flourishes only when doubts as to the levels of quality, accreditation and training of arbitrators/mediators/conciliators are addressed fully.

### **3. Connie Healy, NUI Galway, “Collaborative Practice: A Value Added Approach to Separation and Divorce in Ireland” (AWARDED AN IALT POSTGRADUATE SCHOLARSHIP 2011).**

Divorce has been described as encompassing “...dreams unfilled, or dreams that have run their course. It may be profound grief and it may be bittersweet freedom. It is about families restructuring: financially, emotionally and practically. It is both conflict and resolution. It is pain and it is relief.”<sup>1</sup> With such a diverse description, capturing some of the many emotions experienced by parties when going through a relationship breakdown, it is clear that a traditional adversarial, one model fits all approach to the resolution of conflict in family law matters is not sufficient in contemporary Ireland. Fourteen years post the introduction of divorce to Ireland, we need to examine the research carried out into the effects of family breakdown on the parties involved and their children and consider alternative methods of dispute resolution.

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<sup>1</sup> Cameron, N. *Collaborative Practice: Deepening the Dialogue*. (Canada :The Continuing Legal Education Society of British Columbia, 2004)

Collaborative practice is emerging as one alternative to the Courts' system of dispute resolution, particularly in the area of family law. Originating in the US in the early 1990s, it has now spread worldwide with the first trainings of lawyers in the practice taking place in Ireland in 2004. Clients choosing to use the collaborative method in the resolution of their family disputes sign a participation agreement in which they agree not to go to court but to negotiate settlement in good faith through scheduled four-way meetings and to provide full disclosure. In the event that matters cannot be resolved within the process, the clients have to instruct new lawyers if they wish to take the case before the courts. This is known as the disqualification provision. The aim behind the process is to achieve an agreed out of court, cost-efficient, settlement of family law issues in a manner that focuses primarily on the interests of the family as whole rather than pitting family members against each other as may happen in the traditional adversarial process. The original model developed was the lawyer-only model but this has now developed across the US into a team model where clients will have additional experts, to include but not limited to counsellors, financial experts or child specialists on hand to assist with the issues that may arise throughout the process. The aim is provide a more holistic approach for families.

In particular, having a trained child specialist on hand to speak to the children of the relationship in a child friendly way and bring any concerns they may have to the attention of their parents, provides a valuable resource not only for the children in helping them to cope with the trauma of family breakdown and for the parents in helping them to concentrate of the child's best interests, but also it also ensures that their right to be heard, as set out in Article 12 of the United Nations Convention on the Rights of the Child is adhered to. Would having this resource available to parents help us, as a nation, to move from the paternalistic attitude that children should not be involved in these issues and ultimately be cost-effective in the long run by cutting down on subsequent behavioural issues that may arise following on from a separation or divorce?

While proponents of collaborative practice herald it as "more family friendly", many lawyers have been critical of the process as potentially denying parties their rights to take their cases before the court, leaving vulnerable members of society, particularly victims of domestic violence, without adequate protection and placing too much pressure on the parties, both emotionally and financially, to settle because of the implications of the disqualification provision.

This paper will address how these issues and concerns have been addressed in the US culminating in the enactment of the Uniform Collaborative Law Act 2010 and the influence of this Act on the recommendations made by the Irish Law Reform Commission in their report on Mediation and Reconciliation published in November 2010.

While research has been carried out into the process in the US, Canada and the UK, this paper will present the preliminary findings of the first known empirical research carried out into the process in Ireland based on interviews conducted with ten clients that used the process. In outlining my initial findings, the paper

will also address the methodology used in my research, while acknowledging the limitations. It will address some key issues as follows:

- Demographics of clients that used the process
- What are the views of Irish clients that have used the process?
- Have they felt that it met their needs and expectations?
- Have they found it cost effective?
- Are the fears of the critics of the process borne out in practice?
- Were the clients satisfied with the process and would they recommend it to a friend in similar circumstances?

The paper will outline the possible future development of collaborative practice in Ireland, based on the initial findings of my own research and the recommendations made by the Irish Law Reform Commission.

### ***Session C – Fundamental Rights and New Legal Challenges***

#### **1. Sarah Fulham-McQuillan, Trinity College Dublin “Who has a Stake in Your Kidney?” The Role of Law in Procuring Organs-A New Approach for Ireland”.**

Organs for human transplantation are in short supply, both in Ireland and internationally. National legislation governing human tissue usually provides for methods to procure organs, and assigns responsibility to identifiable agencies.<sup>1</sup> Ireland however, has no such legislation.<sup>2</sup> This lack of legislation gives rise to the consideration of new proposals to remedy the shortage of organs in Ireland.

This paper puts forward a proposal which seeks to encourage greater organ donation from society, whilst remaining within an existing public policy framework. It examines the role of law in governing so-called “self-regarding” behaviours of individuals, namely organ donating. In so doing, the paper explores the competing rights of society and the individual donor. A conclusion is reached which seeks to strike this balance, whilst simultaneously increasing organ donation.

The shortage of organs and the existing method of procuring organs in Ireland is outlined. In order to have governmental backing, it is contended that this is a public health concern and so should be addressed through public health law. The definition of a public health concern is therefore analysed. Existing methods of organ procurement in other jurisdictions are examined and such demonstrates the faults within these systems, and the reasons why they are not of themselves sufficient to remedy this public health concern. In addition, the issue of property rights over cadaveric organs is considered. Prior to the final proposal, a

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<sup>1</sup> See in England for example, Schedule 2 Human Tissue Act 2004 that provides for a Human Tissue Authority to regulate the activities involving human tissue.

<sup>2</sup> Indeed this lack of legislation, if not in place before 2012, may be in breach of a recent EU Directive; see Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation [2010] OJ L207/14 (Safety of Organs Directive). Article 31(1), which provides that the final date for transposition is 27 August 2012.

draconian response to organ shortages is examined, whereby the viability of government salvaging of organs from cadavers without prior consent is investigated in light of existing public health measures. These include mandatory post-mortem examinations as part of criminal investigations and legislation surrounding communicable diseases. Further, it is shown why an opt-out system of organ donation is not a suitable method for Ireland to adopt.

It is suggested that financial reward should be permitted for unrelated living donation, alongside the current system of altruistic living and deceased organ donation. This could be legislated for by government but operated through a national health body (such as the HSE), thereby precluding the risks which are often inherent in a free market system. In reaching this conclusion, the existence of property rights inhering in organs of living individuals are considered. Moreover, the futility in relying on altruism alone to remedy this public health concern is demonstrated (based on organ donation statistics to date), and a comparison is made with non-pecuniary and indirect financial benefits which are currently accepted in other jurisdictions and EU secondary legislation. In addition, the proposal inherently increases living kidney donation - an increasingly important aspect of organ donation evidenced by statistics for 2011 and the training of more renal transplant surgeons in keyhole technologies this year.

## **2. Stephanie O' Flynn, NUI Galway, "Animal Protection Laws in Ireland- The Need for Reform".**

This paper will commence by seeking to investigate the role of animals in contemporary society by setting out a historical sketch of traditional thinking about animal's moral status leading into contemporary thought on this issue. It will then interrogate the manner in which the law protects animals in Ireland while also referring to other jurisdictions and will conclude by setting out potential areas of reform available to Ireland. Recent years have seen the introduction of new legislation to protect animals namely the Dog Breeding Establishment Act 2010, the Wildlife Amendment Bill 2010 and the Welfare of Greyhounds Bill 2011. A new Animal Welfare Bill is set to replace and repeal the 1911 Act is also on the agenda for this year. This year marks 100 years since the introduction of our principal animal protection laws. Animal protection is becoming more and more on the agenda and with recent case such involving "Petmania" where a female employee contracted a rare brain disease from parrots while working in the shop and the recent incident of selected student unions eating live goldfish as part of a competition - it is of utmost importance that awareness is raised in relation to animal welfare and that Irish animal protection laws are reformed.

Animal law is a new and emerging area of law with over 112 law schools in the USA and four law schools in the UK now providing courses on animal law. Irish animal protection laws are not adequate for contemporary times and need to be reformed. This is one of the new and leading areas of law that has yet to be thoroughly researched in Ireland. This presentation will provide a new and innovative area of law to this year's conference.



The paper will be divided into three sections. The first section of the presentation seeks to investigate the role of animals in contemporary society. This section will trace the historical thinking about animal's moral status.

The second section of the presentation will interrogate the manner in which the law protects animals. The paper will primarily focus on the legal situation in the Irish jurisdiction. The research will engage in a comparative analysis of the law on this issue in Ireland, the U.K. and Switzerland in order to assess the appropriateness and efficacy of existing and proposed Irish regulation on the protection of animals.

The final section will set out some possible areas of reform available to Ireland and will draw on practices from other countries such as the introduction of new laws, a constitutional change that will guarantee animals' protection or the introduction of private action where humans can prosecute on behalf of animals.

### **3. Anne Smith, University of Ulster: "What Added Value Can a Bill of Rights Contribute to Society?"**

This paper seeks to address the added value(s) the role of law plays in contemporary society by examining a specific legal instrument, Bills of Rights. Specifically, the paper questions what added value, if any, can Bills of Rights contribute to society? The paper argues that while Bill of Rights are no panacea to the problems faced by contemporary society, the level of protection afforded, and the added value, can be potentially increased if a conversational/dialogic approach is adopted to the drafting of Bills of Rights. In that regard, the paper argues that the process in developing and adopting Bills of Rights is just as important as the final product. The paper suggests that a dialogic approach contains echoes or murmurs of the kind of society a Bill of Rights should attempt to create, in actualising in concrete terms expression of the fact that rights should be developed, owned, shared, shaped and debated beyond traditional hierarchies. A dialogic form of constitutionalism attempts to encapsulate the idea that rights are not the sole preserve of elite groups such as senior civil servants, politicians and lawyers with little or no involvement from the public. The dialogic approach provides a forum to help ensure the formulation and articulation of rights are a 'shared project'. Drawing upon the experience of Northern Ireland who is currently in the process of developing a Bill of Rights, the paper develops and explores the framework underpinning the dialogic approach. The paper postulates that while the conversational/dialogic approach presents challenges, it is an appropriate model as it represents the changing nature and discourse of and about the added value Bills of Rights play in contemporary society.

## **Saturday 11.30-1.00: Parallel Session II**

### ***Session D – \*ROUNDTABLE\*: Pedagogy of Criminal Law***

#### **1. Kris Gledhill, University of Auckland, New Zealand, “The Teaching of Criminal Law- Are We Stuck in a Timewarp?”.**

A typical criminal law course covers general principles of criminal liability (actus reus, mens rea, causation, party liability and so on). In terms of specific offences, it is most common to make use of homicide; also commonly covered are other assaults, and in particular serious sexual assaults; some courses also cover property offences (theft, burglary and so on). Rarely covered are drugs, driving and public order offences.

This paper seeks to address the question of why are particular offences covered; in particular, the question is why criminal law teaching concentrates on relatively infrequent offences, particularly homicide and serious sexual offences, and does not cover much more common offences, particularly drugs, driving and public order offences. Does this represent a sensible choice? Indeed, does it represent a choice at all, or is it merely a reflection of what has always happened?

The paper reports on findings of a survey of course descriptions from the common law world (which confirms the starting point of the paper, namely the concentration on homicide and serious sexual offending), and compares this with the available statistics as to the crimes that are reported and/or prosecuted, to verify that there is at best a partial overlap between what is taught and what law students are most likely to meet if they practice criminal law. There is a further report on the external constraints on university law courses from bodies such as bar examiners. The paper then turns to the question of the pedagogy of criminal law teaching, makes some suggestions as to the benefits that arise from being able to select from a wider variety of offences, outlines proposed research questions that are relevant to the question of what offences should be taught, and offers some tentative conclusions.

#### **2. Shane Kilcommins, University College Cork, “The Absence of Regulatory Crime from the Criminal Law Curriculum”.**

In examining the contours of criminal law and its application, most lawyers and criminologists are drawn to traditional ‘real crime’ (homicides, violent assaults, organised crime, sexual offences, requirements of *mens rea* and *actus reus*, and general defences) while ignoring white collar offences, which are often enforced by specialist agencies. As a society we have tended to be preoccupied with the ‘punitive regulation of the poor’, a project closely tied to a police–prisons way of knowing that focuses on ‘crime in the streets’ rather than ‘crime in the suites’. In this paper, I wish to argue that the narrow exclusivity of this approach is a mistake, not least because criminalisation is now more than ever viewed as a panacea for almost any social problem. More and more Irish society is witnessing the increasing and extensive use of regulatory strategies by the Irish state. In

areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs, there has been a move towards using criminalisation as the last-resort strategy when compliance through negotiation and monitoring has failed.

### **3. Maura Butler, Law Society, “The Transition from Academic to Vocational Education- Undergraduate Criminal Law Education Meets the Needs of Criminal Litigation Practice Training”.**

The transition from academic to professional training is difficult and law students struggle, as different learning outcomes apply in each of these environments. Course designers, who deliver vocational training for lawyers, face considerable challenges in facilitating the transfer of necessary practice skills to the course participants. It is necessary to virtually create a ‘real practice’ environment, which will accommodate the learning needs of the trainee. Flexible and innovative teaching methods using problem-based learning (PBL) to simulate reality are necessary to achieve this accommodation.

The exclusive teaching at academic level of memory tasks, lineal reasoning and verbal symbolism combined with the lack of teaching in advocacy, interviewing, negotiation and letter writing present learning challenges.

The solution to the challenge of the design of legal education resides within the adult learner trainees being engaged with real life legal practice situations through a PBL methodology facilitating constructivist theories and the self-motivational characteristics of the adult learner.

Given that a disparity exists between the goals of academic and professional legal training, the learning needs of trainees and those of their professional environment must be accommodated in whatever course design is implemented.

In a criminal law context the undergraduate training is far removed from the considerations of day-to-day practice. There needs to be collaboration between academia and vocational trainers, to assist a smooth transition from theory to practice.

### **4. Fiona Donson & Catherine O’ Sullivan, University College Cork, “Threshold or Barrier to Understanding? Teaching *Actus Reus* and *Mens Rea* as Foundational Concepts in Criminal Law”.**

Traditional criminal law courses have tended to separate out the elements of criminal law into foundational concepts, substantive offences and defences, teaching each area separately. In addition the foundational concepts of *actus reus* and *mens rea* have become prioritised as threshold concepts,<sup>1</sup> to be mastered by students at the beginning of the course. The logic of this approach is that only

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<sup>1</sup> In using the term threshold concepts, and later troublesome knowledge, we will be making reference to the work of Jan Meyer and Ray Land. See for example, J. Meyer and R. Land, *Overcoming barriers to student understanding: Threshold concepts and troublesome Knowledge*, (Routledge: London, 2006)

after this “troublesome knowledge” has been grasped can the other components of the subject be addressed and understood.

However, in practice the emphasis on threshold concepts can detract from a more coherent approach to teaching criminal law. Our experience of teaching *actus reus* and *mens rea* as threshold concepts has tended to produce a situation where problems of understanding and “troublesome knowledge” are not solved by an emphasis on the foundational concepts. Rather the separation reinforces the artificial nature of the syllabus and the students fail to grasp the wider complexity of how criminal law actually works. Thus at the end of their course many students fail to see the subject as a whole, and continue to focus on the separate elements.

In this paper we will explore how the separation of concepts, offences and defences can hinder understanding, and how the idea of threshold concepts may in fact act as a barrier to understanding. We will also offer some thoughts on whether a better approach to teaching criminal law can be developed through considering the components holistically rather than separately.

### ***Session E – The Changing Nature of Child Protection Law***

#### **1. Magdalena Duggan, University of Limerick, “Foetal Rights in Irish Private Law. Following an Unbeaten Path in the Discussion About the ‘Unborn’”.**

Over centuries numerous attempts have been made to establish the moment of when a foetus or, in other words, a conceived but unborn human being, gains a status of a ‘person’. The above lack of certainty has been accepted by scholars representing diverse disciplines, such as medical sciences, philosophy, ethics, theology and, finally, the law. Nowadays, in spite of being a source of perpetual academic dispute, foetal status remains a topic at the forefront of medico-legal literature in numerous jurisdictions. The issue becomes even more relevant if one considers a number of spectacular achievements in the field of modern medicine which touch upon antenatal life and which include, on the one hand, assisted reproductive techniques (ART) and, on the other hand, possible methods of treatment *in utero*.

It can be also observed that the law of many European countries contains numerous direct references to foetal rights. They concern the domain of both public law, i.e.: the norms of legal intercourse between the state and its subjects, as well as private law, traditionally understood as the norms regulating legal relations between private parties. Nonetheless, it should be noted that, despite the undertaken attempts, no universal or harmonised solutions have so far been adopted in the discussed area, as attitudes towards foetal status and the degree of protection awarded to unborn humans by domestic laws vary from country to country.

The aim of this paper is, first of all, to describe and analyse the directions of the Irish academic debate concerning foetal rights while adopting the ‘public v. private law’ approach and, secondly, to compare them with the directions of a

parallel discourse that has been taking place in continental Europe. It is hoped that the comparison will then allow us to decide whether the discussion concerning foetal rights in Ireland could be enriched by tackling the issue from a virtually different angle.

Accordingly, the first section of this paper will examine the historic background of the Irish debate, focusing on the 1983 Constitutional Amendment, which brought about the art. 40.3.3<sup>o</sup> of *Bunreacht Na hÉireann*. Some views of the doctrine as well as pivotal judgments, offering interpretation of the wording of the above cited provision, such as, for instance: *Attorney General v. X, AG (SPUC) v. Open Door Counselling* or *M.R. v. T.R. and Others* will be also referred to in that context. The second section of this paper will discuss a catalogue of foetal rights in private law of the selected continental countries. Accordingly, the author will provide examples of specific provisions that have been enacted by the Polish, German, French and Italian legislatures in some of the domains traditionally classified as belonging to the canon of private law.

In conclusion, it will be argued that the continental, broader approach, which seems to be largely inspired by the Roman traditions, significantly differs from the one prevailing in Ireland, where the doctrine and the judiciary seem to focus rather on examining when the human life begins in the context of the existing constitutional abortion prohibition, introduced by virtue of the 1983 amendment. That, in turn, might reveal an intrinsic link between the general concept of ‘antenatal rights’ and the wording of the the art. 40.3.3<sup>o</sup> of *Bunreacht Na hÉireann*. Furthermore, it will be demonstrated that a possible explanation behind the difference of attitudes may be the policy-dominated character of the Irish private law that effectively blurs the rationale behind the previously described important division between public and private law. In the end, the author will also mention a number of antenatal prerogatives, which exist in several areas of the Irish private law and which, to certain degree, resemble some of the analogous, previously described continental solutions. Most notably, a general clause inserted in s. 58 of the Civil Liability Act 1961, referring to the issue of antenatal damages and the corresponding caselaw will be further examined. It is hoped that the above cited examples will ultimately help to prove that the debate about the ‘unborn’ in this jurisdiction could benefit from following the so-far unbeaten ‘private law’ path.

## **2. Fiona Broughton, University College Cork, “Ireland’s Interpretation of the UN Convention on the Rights of the Child, 1989: Protection Rights and Pre-Natal Exposure to Alcohol”.**

The United Nations Convention on the Rights of the Child (CRC) is ambiguous on the issue of whether the Convention applies to children who are not yet born. This issue was hugely contentious during drafting stages and the result is political compromise whereby the question of whether the CRC applies to pre-natal children is, in practice at least, left open for each State Party to decide for itself. Ireland has not submitted any declaration or reservation to establish whether the State interprets the CRC as including or excluding children who are conceived but not yet born.

This paper examines the relevant domestic law in an attempt to discern whether Ireland (which is uniquely placed to protect the pre-natal child given such a child's constitutional status) currently applies CRC protection rights to children before birth. The harm caused by pre-natal exposure to alcohol is taken as a case study for two main reasons. The issue of maternal alcohol consumption has huge national relevance in Ireland, as recent regional and national longitudinal studies show. Moreover, alcohol has been shown in numerous studies to affect more children pre-natally than any other drug.

Alcohol has been repeatedly proven to interfere with the development of a pre-natal child. The results range from full Foetal Alcohol Syndrome with the characteristic growth restrictions, facial anomalies and central nervous system dysfunctions to effects of the broader spectrum 'Foetal Alcohol Spectrum Disorder' including reduced cognitive and social skills. The fact that harm may be caused to a child by excessive exposure to alcohol pre-natally is now largely uncontested in medical literature. However, child protection and the law is an area which is fraught with difficulties concerning the balancing of rights. When the child who requires the protection of the State is not yet born, this exacerbates an already complex situation.

Although Article 40.3.3<sup>o</sup> has only ever been used by the Irish courts in the context of abortion, it is suggested that it could be used in a much wider context to encompass the protection of pre-natal children from other harm. Similarly, while the *Child Care Act 1991* has only ever been interpreted by the Irish courts as applying to children post-birth, it is submitted that the Act may be interpreted to protect children from other forms of harm. The paper concludes that Ireland does not apply the CRC right to protection from harm to pre-natal children in any context other than abortion.

## ***Session F – Sex, Privacy and Relationships***

### **1. Fergus Ryan, Dublin Institute of Technology, “No Sex Please, We’re Civil Partners’: The Legal Relevance of Sexual Activity in Marriage, Civil Partnership and in Cohabiting Relationships”.**

In January 2011, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 came into force. It brought to life three new legally recognised relationships between otherwise unrelated adults: namely civil partnership, cohabitation and qualified cohabitation.

Instinctively, one might fairly say that – absent sexual coercion and abuse - the sexual relationships of the parties to these unions should not be of particular legal concern. Court decisions in modern times have stressed the private nature of such relations, forcing the state to beat a hasty retreat from the bedroom door. (See for instance, *McGee v. Attorney General* [1974] IR 289 and *Lawrence v. Texas* (2003) 39 US 558).

Nonetheless, it is a curious feature of both marriage and cohabitation, as defined, that marital and extra-marital sexual activity – or the absence thereof – remains legally relevant. A marriage is voidable where a party is unable to consummate the marriage. A marriage may also be annulled where one of the parties is gay or lesbian, either on the basis that this orientation was (1) concealed from the other party at the time of marriage or (2) prevents the parties from forming and sustaining “a normal and caring marital relationship.” A judicial separation in the Republic of Ireland and a divorce in Northern Ireland may issue, moreover, in cases where the respondent has committed adultery. (Nonetheless, the courts generally do not take sexual infidelities into account in making post-divorce ancillary orders).

The Act of 2010 recognises two adults living together “in an intimate and committed relationship” as cohabitants for the purpose of the Act, provided they are not already closely related to each other. S.173(3) indicates that such a relationship need *no longer* be sexual in nature in order for it to be intimate, though the clear implication is at some point the foundation of the cohabiting relationship must have been sexual rather than platonic.

Civil Partnership stands apart. Although confined to unrelated same-sex couples, there is nothing in the Act to indicate that a civil partnership be founded on an exclusive sexual relationship, past or present. The couple must be of the same sex, but need not be gay or bisexual. None of the grounds of nullity of civil partnership directly address sexual activity, orientation or impotence, while sexual infidelity appears irrelevant in the context of civil partnership. Likewise, while civil partnership in the UK is similar in almost all respects to marriage, civil partnership dissolution cannot be obtained on the basis of adultery, one of the few contexts in which a UK civil partnership differs from marriage.

Why is sexual activity irrelevant in the context of civil partnership but legally relevant to marriage and cohabitation? Is the ‘sexless’ civil partnership a sign of the legislature’s reluctance to acknowledge the sexual dimensions specifically of gay relationships? Or does it simply reflect the lack of procreative potential from such unions? Or is the legal treatment of sex within civil partnership a signal of possible future directions in marriage law, with the State beating a hasty retreat from the bedroom door? The broader question arises as to whether our jurisdictions should privilege sexually-based relationships over non-conjugal cohabiting arrangements: why is the sexual relationship of married and cohabiting parties of relevance at all?

## **2. Val Corbett, Independent Colleges, “Privacy and Sex Offenders”.**

This paper explores the question as to whether the public has a legitimate interest in the disclosure of private information regarding the identity or whereabouts of convicted sex offenders upon their release from custody or whether such disclosure by media outlets amounts to an unjustifiable intrusion on the offender’s right to privacy. In this regard, the offender’s right to privacy (as an aspect of his autonomy) is debated. The public interest (or otherwise) in such information is examined by reference to similar debates which have taken

place in the United States surrounding community notification laws, otherwise known as 'Megan's Law', which allow for the widespread dissemination in that jurisdiction of such information to the public at large. In light of the expansion of similar schemes in the United Kingdom ('Sarah's Law') and recent case law in Northern Ireland and the Republic of Ireland, the author considers whether the appropriate balance has been struck between the competing interests of privacy and the public interest/public safety in these circumstances.

### **3. Ronagh McQuigg, Queen's University Belfast, "Domestic Violence in Contemporary Society: The Role of International Human Rights Law".**

Domestic violence has always been present in society, however it is only relatively recently that it has become an issue of public concern. Historically, the political theory of liberalism and its analysis of the public and private spheres contributed towards the creation of a culture whereby violence against women in the home was viewed as a private matter and not as an issue which should prompt legal intervention. The legacy of this cultural norm still remains, as even now it is widely recognised that the responses of laws and legal systems fail to provide sufficient protection to victims of domestic violence.

This paper will discuss the manner in which this culture of non-intervention was reflected also in the approach of human rights law to domestic violence. Until relatively recently the response of international human rights law to this issue was clearly inadequate. Rights were developed in such a manner as to create a public/private divide, whereby human rights law was upheld in the public sphere where the state was involved, but was not applied in the private sphere. This dichotomy tended to operate in a gendered manner, for example, issues such as domestic violence did not come within the ambit of the traditional interpretation of human rights law.

However, the public/private dichotomy in international human rights law is being gradually eroded. For example, although the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not make any explicit reference to domestic violence, it has nevertheless been interpreted in such a way as to cover this issue.<sup>1</sup> This paper will analyse the jurisprudence of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to CEDAW in the area of domestic violence, and will examine the positive duties which states now have under international human rights law as regards this issue. It will also discuss the difficulties that remain in this area, such as problems surrounding implementation and enforcement.

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<sup>1</sup> General Recommendation No.19, Committee on the Elimination of Discrimination Against Women, U.N. Doc A/47/38 (1992) at para. 4.



## **Sunday 10-11.30: Parallel Session III**

### ***Session G– Criminal Investigations, Evidence and Juries***

#### **1. David O’ Dwyer, University of Limerick, “Catching the ‘Grim Sleeper’: an Unbridled Victory for DNA and Criminal Investigation?”.**

Lonnie David Franklin Jr, was indicted in March 2011 in California on 10 Counts of murder and one count of attempted murder. The alleged serial killer, dubbed the ‘Grim Sleeper’ because of an extended gap between killing periods (the first seven killings occurred between August 1985 and September 1988, the other three during March 2002 and January 2007), was arrested in July 2010 as a result of novel DNA policing techniques. The break in the case occurred when Franklin’s son was arrested. Pursuant to California law, which requires all those arrested for felony offences to submit a DNA sample for entry onto the state database (in the form of the derived DNA profile), Franklin’s sons DNA was taken and uploaded onto the database. Using a technique known as ‘familial searching’ the profile revealed a ‘near miss’ to the DNA profile’s obtained from the victims of the ‘Grim Sleeper’. Given the principles of hereditary, individuals who are related often share similar genetic sequences. Thus the police began to investigate the relatives of Franklin’s son, through this process Lonnie Franklin was identified as a target for police investigation. Using a technique known as surreptitious sampling, LAPD placed an undercover officer (as a waiter) in a restaurant frequented by Lonnie Franklin, where the officer retrieved utensils and a pizza crust from Franklin. The DNA samples derived from the recovered materials provided a direct match for the DNA profiles found on the victims of the Grim Sleeper, these events lead to Franklin being arrested for the offences in July 2010.

The aim of this paper is to question the techniques used to bring the ‘the Grim Sleeper’ to justice. It will be submitted that while recent discourse in the DNA debate has focused upon time limits and retention policy, it is important to broaden the debate to incorporate other controversial DNA techniques that are currently ‘flying under the radar’. For example, the Irish Bill that is proposing to establish a DNA Database<sup>1</sup>, is silent on issues such as familial searching and surreptitious sampling, which raise significant concerns from a human rights and due process perspective. As a result of recent European Court of Human Rights jurisprudence surrounding DNA retention,<sup>2</sup> it would seem that the category of individual subject to retention needs to be strictly limited to satisfy Article 8 (‘right to respect for private life’) of the European Convention on Human Rights. The concern is that the current focus of attempting to reduce the number of ‘innocent’ people on the DNA database, will result in smaller databases which may consequently result in increasingly controversial DNA techniques being utilised in an attempt to maximise the potential of this powerful biometric-identification technology. Thereby this paper will stress that it is imperative that

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<sup>1</sup> See Criminal Justice (Forensic Evidence and DNA database systems) Bill 2010. Available at: <http://www.oireachtas.ie/viewdoc.asp?DocID=13886&&CatID=59>

<sup>2</sup> See *S and Marper v United Kingdom* 30562/04 [2008] ECHR 1581 (4 December 2008).

legislation accompanying the creation of a DNA database must rigidly and stringently outline, not only the sampling and retention criteria for those engaged in the criminal process but it must also explicitly outline the exact parameters and conditions for when DNA can be used within a criminal investigation.

## **2. Mark Coen, Dublin City University, “Fit For Purpose? Analysing the Rules on Jury Deliberations”.**

This paper will critique the Irish law on jury deliberations in comparative perspective. The question of whether jurors should be given greater guidance on how to deliberate will be considered by reference to relevant social science research. The legal framework in which deliberations take place will be evaluated with a view to determining what it reveals about our approach to, and conceptions of, the institution of the jury.

## **3. Niamh Howlin, Queen’s University Belfast, “A Need for Expert Juries in Complex Fraud Trials?”.**

In recent weeks the Director of Public Prosecutors has suggested that ‘expert juries’ be empanelled to try complicated fraud cases, and other ‘white-collar’ crimes. Currently such cases are tried by juries of twelve randomly-selected citizens from the (very limited) jury pool, under the provisions of the soon-to-be-overhauled Juries Act 1976. The proposed new regime would see panels of forensic accountants, for example, possibly drawn from outside the jurisdiction. The justification put forward is that the evidence in such cases is of such a technical, esoteric and voluminous nature that it is difficult for the ordinary juror to comprehend. Prosecutors feel the need to reduce their cases to one or two simple charges, rather than bombarding jurors with undue amounts of detailed, technical evidence. Convictions are difficult to secure in such cases as the criminal justice system currently stands, and a radical change may be necessary. This paper considers the legal, practical and constitutional implications of such a move.

## ***Session H – Land and Matrimony***

### **1. Deirdre McGowan, NUI Maynooth, “Lessons for the Future from the Mistakes of the Past: the Married Women’s Status Act 1957”.**

Family law in general and Irish family law in particular is often criticised as under conceptualised, overly political and governed by vague principles. Frank Martin has argued that meaningful family law reform is not possible within the current constitutional framework which supports a definition of family based on heterosexual marriage. Approaching family law reform from the perspective of constitutional reform has however proved problematic in the past, often leading to a focus on moral arguments rather than the problems which family law is intended to address. I suggest that in order to achieve meaningful reform of family law we need to unpick the patchwork of reform which has occurred since the 1950s, examine specific reforms in their social and economic context and

evaluate the extent to which statutory measures reflect social reality. The Married Women's Status Act 1957 is often ignored in discussion of family law but, is of fundamental importance in understanding the development of modern family law.

The paper will demonstrate that, in order to fully understand the effect of the 1957 Act, we need to understand the both the legal and economic position of married women at the foundation of the State. We also need to consider the impact of the 1937 Constitution. The Constitution provided a formula for protecting women in a dependent role during marriage. Its gendered language conflicts with current views on equality and the principle of indissolubility proved to be unsustainable in the face of social change, but the implied community of property should not, perhaps have been so carelessly put to one side. Family law reform since the 1970s has tended to focus on addressing dependency through the allocation of gender neutral discretionary remedies, or as in the Family Home Protection Act, encouragement to commit to voluntary community of property. The confusion created by this emphasis on discretion remedies means that family law is commonly described as unprincipled, chaotic and "not real law".

## **2. Una Woods, University of Limerick, "Curing Defects in Unregistered Land- Adverse Possession and Other Remedies".**

It is frequently argued that the doctrine of adverse possession plays an essential role in the functioning of the unregistered conveyancing system by curing defects in title. However, the potential for an adverse possessor to deprive the true landowner of title without warning has proved controversial in recent times. In 2002 England and Wales reformed the doctrine as it applied to registered land, dramatically improving the position of the registered owner, by permitting the owner to veto an adverse possession application unless the applicant falls within one of three exceptional situations where the Law Commission felt the balance of fairness lay with the adverse possessor. The Law Commission justified limiting the 2002 reforms to registered land by arguing that the extension of the veto system to unregistered land could weaken the security of title to such land.

This paper examines the role played by adverse possession and other remedies in unregistered conveyancing. It discusses whether a veto system could be extended to unregistered land in a manner which would not raise concerns about the functionality of the conveyancing system. One option would be to preclude reliance on the veto if the adverse possessor can prove 'colour of title.' An alternative approach would be to introduce marketable title legislation specifically designed to cure title defects so that the doctrine of adverse possession would no longer be required to fulfil this function. Both options for curing title defects are evaluated in order to identify a solution which is workable and in alignment with government policy to extend the registered title system to the entire country. The practical difficulties which may be encountered in extending the veto system to unregistered land, particularly where the owner cannot be identified or located, are also discussed.

It could be argued that the reduced protection afforded to the owners of unregistered land in England and Wales is a temporary problem which will disappear once all land has been brought onto the land register. The current position may even encourage such owners to apply for voluntary first registration. This paper argues that the interim position is undesirable, and should not be replicated in Ireland bearing in mind that such unregistered land may not be the subject matter of an event triggering compulsory first registration for decades to come. It discusses how immediate improvements in the security of title afforded to owners of unregistered land could be made by introducing legislation which would simultaneously protect them against adverse possessors and cure title defects.

**3. Kathryn O' Sullivan, University of Limerick, "The Legal Right Share and the Surviving Spouse: A Proposal for Reform" (AWARDED AN IALT POSTGRADUATE SCHOLARSHIP 2011).**

Whilst almost everyone will, at some point in their lives, come into direct and personal contact with the legal provisions which regulate family property on death, this area of Irish law has generated relatively little attention compared to other matrimonial property issues. Indeed despite its quantitative importance, the impact of succession law in this area is often overlooked. However, despite this lack of attention, it is clear the importance of property transmission on death demands that these issues must be tackled; legislation dealing with the property entitlements of the surviving spouse should be subject to review and re-evaluation in order to ensure its effectiveness. To this end, it is of fundamental importance that Irish legal scholars and the Irish legislature do not become complacent in our approach to succession law but rather retain an open mind to possible avenues for improvement.

Almost fifty years ago, the Oireachtas took a firm stand in the protection of the surviving spouse through the introduction of the legal right share in the Succession Act 1965. Entitling surviving spouses to a fixed fractional share of their deceased spouse's estate, section 111 represents the cornerstone of this protection and, when combined with the right to appropriation under section 56, provides, in many cases, considerable protection for the family home. These protections should not be underestimated and the legislature should be lauded for their courage in enacting such a regime in the face of the then widespread application of discretionary provision on testacy. The dual effect of these rights is far superior to the protection provided in many other jurisdictions on death and represents a key strength of Irish matrimonial property law. Nevertheless, despite its positive attributes, certain difficulties may arise from the application of section 111 which demand consideration. A major weakness in the adoption of a fractional share is the fact that the size of the share will depend on the size of the deceased's overall estate. This poses a particular problem where the estate is modest, a situation arguably where the need for legislative protection is most acute. Simply put: the smaller the estate, the smaller the share. However, if it is accepted that the primary social goal behind the introduction of the legal right

share was to ensure a minimum level of support for surviving spouses, reform must be considered to ameliorate this shortcoming.

This paper will make the argument for the introduction of a preferential share, but will then tackle the difficulties inherent in such a regime. First, from a theoretical point of view, it will question whether such a regime would represent too great an infraction on the testamentary autonomy of an individual or whether such an infraction can, in fact, be justified. Second, the presentation will test the proposal from a practical point of view. If it is accepted that a preferential share poses a credible alternative to the current legal right share, the level at which the preferential share should be established must be considered. This presentation will question how an appropriate figure for the preferential share could be achieved and how the provision of a fixed monetary sum would work in practice in light of the current turmoil in property markets. In this regard, one of the primary difficulties with a preferential monetary share is that in order to keep pace with inflation and retain real value the legacy must be updated. The fact that the share must be varied to keep in line with changes in currency values or the value of estates means that there is the possibility of constant lobbying for change from some members of the community. Similarly, due to the potential for public comment or backlash upon every increase or otherwise, such a system could be awkward for the government to implement.

Finally, in order to effectively demonstrate the practical implications of the proposal for a surviving spouse vis-à-vis the family home, and compare its application to that arising under the current Succession Act 1965, the presentation will introduce a case study for consideration. In this way, the strengths, weaknesses, similarities and differences of both approaches will become apparent and allow for a clearer picture of the “real-world” application of the law to emerge.

### ***Session I – Private Law Remedies and Reform***

#### **1. Martina Cox, University College Dublin, “Trade Mark Infringement: Responding to 21<sup>st</sup> Century Technology”.**

By the turn of the millennium, trademark owners had acquired extensive protection not just for globally well-known marks, but also for lesser known, nationally famous marks. These famous marks were considered deserving of protection even absent a likelihood of confusion among consumers, but also when similar marks were used on dissimilar goods. However the contemporary debate over whether the sale and use of AdWords infringe third party marks that are identical or confusingly similar to those marks, remains ambiguous. In principle, advertisers are free to select any keywords for their advertising link. This becomes a legal issue when an advertiser purchases a keyword that has been registered as a trademark by another company.

The recent judgements of the European Court of Justice in the *Google France* Adwords cases constituted a major landmark toward clarification of this debate. In light of these developments, this paper examines whether an internet

referencing service provider (IRSP) can be held liable for trademark infringement when it stores and ultimately sells, as a keyword, a sign identical to those trademarks, and organises the display of advertisements on the basis of that keyword. More specifically, whether such actions of IRSP's constitute "use" of that sign within the meaning of Article 5(1) and (2) of the Trade Mark Directive regarding infringement is explored.

The general principles of trademark infringement will be set out, with the broader impact of the unauthorised use of trademarks as metatags or keywords examined. In particular, the potential for liability is evaluated when an ISRP offers advertisers the possibility of selecting not only keywords which correspond to registered trade marks, but also those keywords used in combination with expressions denoting counterfeit such as 'imitation', 'replica' and 'copy'. In addition to the seminal infringement question, this paper will examine when the safe-harbour defence under Article 14 of the E-Commerce Directive can be applied. In the above case, *Google* had a pecuniary interest in consumers click-throughs on advertisements displayed in response to AdWord searches. Whether and how such an interest may disqualify search engines from enjoying the benefit of this liability exemption will be discussed. Although not a named party to any of the three *Google* cases, the future liability of the Advertisers themselves is examined, in addition to the appearance of any advertising and its demonstrable or likely effect on consumers.

Finally, this paper will contrast the approach to use of such metatags and keywords in the USA, with an analysis of US trademark law being of significant practical importance given that *Google* has been running its Adwords service there for years. The federal Lanham Act which governs trademark infringement will be reviewed, together with the impact of the judgements of the CJEU on the future of *Google* Adwords in the US.

## **2. Noel McGrath, Dublin City University, "The Company Charge Register under the New Companies Bill".**

Part IV of the Companies Act, 1963 requires that certain categories of charge created by companies be registered with the Companies Registration Office within 21 days of their creation. The current law has been on the statute books since the introduction of the Companies Act, 1900 and plays an important role in the determination of priorities in corporate insolvency in Ireland. The existing provisions, along with their equivalent in England and Wales, have been widely criticised.

Pillar A of the forthcoming Companies Bill was published for information and consultation purposes on 30<sup>th</sup> May 2011. Part 7 of the Bill contains the extensive new provisions relating to company charges. This paper will investigate the nature and scope of the proposed changes to the charge register. It will argue that while the proposals represent a welcome advance on the status quo, they fail to place Irish charge law on a properly modernised and rational footing. In addition, it will be suggested that the new provisions create several traps for the

unwary practitioner and are likely to lead to increased levels of litigation over charge registration.

### **3. David Capper, Queen's University Belfast, "An Integrated System of Remedies for Misrepresentation".**

Two principal remedies are available for pre-contractual misrepresentations – rescission and damages. Rescission 'cuts away' a contract that would not have been made but for the misrepresentation. Damages compensate for all losses occasioned by entering into the contract and include losses that could be made good by rescission as well as consequential losses. A coherent system of remedies should reasonably clearly delineate the job each remedy is to do. So rescission should be confined to 'cutting away' the vitiated contract and should not be fashioned into an holistic remedy for misrepresentation. Consequential losses should only be remedied by damages although it would be acceptable for a claimant to obtain a damages award providing monetary relief for those losses otherwise made good by rescission. Rescission should thus be combined with damages by allowing it in cases where the claimant wants specific (as opposed to monetary) relief.

Damages should only be awarded in a case of misrepresentation where there has been a tort, i.e. where the defendant has been dishonest (the tort of deceit) or is in breach of a duty of care (the tort of negligent misstatement). This is broadly the position in the United States and in Australia. The Misrepresentation Act 1967 and the Misrepresentation Act (NI) 1967 should be repealed so far as they provide for a damages remedy beyond the torts of deceit and negligent misstatement. These more extensive damages remedies lack moral or policy based justification and provide for more extensive relief than is available for breach of contract

## **Sunday 11.45-1.00: Parallel Session IV**

### ***Session J – Crime and Responses***

#### **1. Paul Gavin, Kings College London, “Restorative Justice in the Republic Of Ireland- What Happens Next?”.**

In June 2009 the National Commission on Restorative Justice (NCRJ) presented its Final Report to the then Minister for Justice, Equality and Law Reform, Dermot Ahern T.D. The NCRJ was convinced that the introduction of restorative justice into the Irish criminal justice system would provide “a positive contribution to the lives of all citizens”, especially those connected to offending behaviour (NCRJ: p. 3).

Over two years have passed since the NCRJ presented its Final Report. Up to this point restorative justice in Ireland has been legislated for only at youth justice level. At an adult level, restorative justice operates through two local community schemes in Nenagh in Co. Tipperary, and Tallaght in south Dublin. Restorative justice practices have also been operated in a school setting in the north – west of Ireland. The aim of this presentation is to focus on where restorative justice in Ireland is today, two years since the NCRJ Final Report was issued. This presentation will be divided into four sections.

In the first section I will examine the development of restorative justice in Ireland at both a youth justice level (as per the Children Act 2001) and an adult level. This will involve an in depth examination of the services provided for under the Children Act 2001 as well as the schemes in Nenagh and Tallaght. The second section of this paper will examine the work undertaken by, and the recommendations contained the Final Report of the NCRJ (2009). The principle recommendations of the report will be considered, especially those concerning the type of offences which are deemed necessary for restorative justice, as well as the models of restorative justice which are most appropriate in an Irish context.

The third section will provide a comparison between what the NCRJ recommended and the type of restorative justice schemes that operate in other jurisdictions. Restorative justice programme evaluations in the UK (Campbell et al; 2006, Shapland et al 2004 – 2008), New Zealand (Bowen and Boyack; 2003) and Australia (Trimboli; 2000) will be considered for their close association to Ireland as common law countries. European civil law jurisdictions such as Austria (Hofinger et al; 2002) and France (Pelikan and Trenczek; 2006) will also be considered to see what can be learned from a European perspective. The final section of this paper will then draw on the NCRJ’s unanimous recommendation that “a restorative perspective be introduced nationally into the Irish criminal justice system” (NCRJ: p. 3). This section will examine what has happened since this recommendation was made in order to introduce restorative justice at a national level. Finally, I will discuss what the future holds for restorative justice in Ireland in light of the current economic crisis. I will argue that this crisis



actually provides an opportunity for restorative justice to reduce costs in the criminal justice system and thus provide savings for the Irish government.

As an epilogue, I will briefly discuss the potential for restorative justice to be used in response to the recent riots which have taken place in London.

## **2. John Stannard, Queen's University Belfast, "From Penal Heat to Penal Light".**

Recent years have seen considerable discussion of what Jonathan Simon refers to as "penal heat" or "the retributive urge" – that is to say the urge on the part of victims and others to see harsh punishment meted out to the perpetrators of crime. This paper seeks to analyse the phenomenon of "penal heat" from a psychological and emotional perspective, in order to discern how the law should respond to it. Drawing on the work of Simon and others, the paper will address the following issues: (1) the nature and definition of penal heat; (2) the emotions underlying it; (3) possible legal responses to penal heat; and (4) other ways in which penal heat may be dissipated.

## **3. Eimear Spain, University of Limerick: "Lessons from the Past: Compulsion and the Criminal Law".**

Both legal commentators and the judiciary have long been divided as to whether one should be excused, even justified, for actions committed under compulsion and how far a defence or defences of this nature should extend. We have seen members of the judiciary, academic commentators and law reform bodies invoke the historical basis and scope of the defences of necessity and duress as justification for their view of the defences in modern times, yet a comprehensive review of this history has not been undertaken to date. If an analysis of the role of these defences in modern times is not to be undertaken from first principles, it is important that we have a complete understanding of their historical development. This paper hopes to enlighten this debate by examining the origins of the defences through a review of both case-law and the offerings of institutional writers. The inconsistencies in the case-law and the treatises of the most renowned common law jurists have undoubtedly contributed to the confusion surrounding the defences of duress and necessity but it is hoped that recognising these contradictions will assist us in modern times. While a review of this nature cannot provide concrete answers as to the proper places of the defences in a modern legal system, understanding when and on what basis the defences were first conceived of illuminates our understanding.

### ***Session K – Human Rights and International Laws***

#### **1. Jennifer Brown, Dublin City University, "The ECHR and Involuntary Detention of Persons Suffering from Mental Disorders".**

This paper discusses the European Convention on Human Rights ("the Convention") and the effect it has had upon the legal regulation of involuntary detention of persons suffering from mental disorder in the Council of Europe

States. There are two types of obligations under the Convention, positive and negative. Negative obligations are generally associated with civil and political rights. They require states and their agents to refrain from any action which may breach Convention requirements. Positive obligations are generally associated with economic, social and cultural rights. They require states and their agents to take positive steps to uphold Convention requirements. The Convention case law in relation to mental health deals with human rights that are essentially negative in character. Utilising Article 5 (the right to liberty) the European Court of Human Rights (“the Court”) has determined important requirements for the detention of persons suffering from mental disorder. It has placed limits on government power and interference with rights in three main areas: compulsory detention, conditions of confinement and civil rights. This paper argues that the Court should now focus on determining positive rights for said persons. A starting point could be a right to treatment and adequate services in mental health law.

## **2. Hakeem Yusef, “Migration Law and Policy and Complicity for Underdevelopment in the Global South”.**

This paper directs attention to the important nexus between migration laws and policies of the United Kingdom and the incidence of corruption and underdevelopment in the countries of the global south. Drawing mainly on insights from criminology and development studies, it investigates how the commercial migration laws and policies, specifically the aspects that deal with encouraging or attracting ‘high-value’ foreign entrepreneurs and investors hold out the state as complicit in corruption and underdevelopment in the global south. There is an important and urgent need to address the implicated migration laws and policies as a critical and integral part of the international efforts to combat corruption and promote peace and development in the global south. Reform of the implicated laws and policies is in the long term interest of all stakeholders.

## **3. Noelle Higgins & Elaine Dewhurst, Dublin City University, “Ireland’s Universal Periodic Review Experience”.**

Following years of criticism of the Human Rights Commission, the UN created a new human rights institution, the Human Rights Council, on the 15<sup>th</sup> March 2006 (UNGA Res 60/251). This Resolution mandates the Human Rights Council to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States” (UNGA Res 60/251).

The UPR is designed as a type of peer review where states under review are provided with an opportunity to present a report on human rights laws and practices in their state, on which all other states can refer questions and recommendations. The establishment of the UPR has been welcomed and has been described as “an undertaking imbued with a shift from the former Commission’s policies and practice of shaming to a new consensual and

cooperative model of human rights evaluation” (Abebe, 2007, p. 1). The review process began in 2008 and 48 states are reviewed every year. Ireland was reviewed in October 2011.

Since the beginning of the UPR process in 2008, the Irish government has been very proactive in intervening in the reviews of other states and has made 151 recommendations overall in relation to 42 states. African states (40.4%) have received the greatest number of interventions, followed by Asia (23.84%), Eastern European Group States (19.21%), Latin American and Caribbean States (GRULAC) (10.6%) and Western European States and Others Group (WEOG) (5.96%). This paper assesses Ireland’s participation in the UPR process, by reviewing the Irish government’s intervention in the report processes of other states and by evaluating its own reporting experience.

## ***Session L – Crime and Commerce***

### **1. John Quinn, Dublin City University: “Cybercrime: An Irish Perspective”.**

There are few elements of society that remain free of the digital revolution as evidenced by the 2 billion internet users worldwide and the 47.2 billion pounds spent online in the United Kingdom alone in 2009. The benefits of this revolution have been immense, dramatically reducing the time and effort required to communicate globally in addition to the vast amounts of e-commerce taking place online. However, as Lloyd points out “it appears an inevitable feature of technological development that criminal applications follow legitimate uses with very little time lag.” Cybercrime has gladly embraced the rapid and unregulated nature of the internet and by doing so presents international legislatures with a demanding challenge. Ireland, while not having specific legislation to deal with cybercrime, does possess legislation which could be used to combat cybercrime in the form of the 1991 Criminal Damage Act and the 2001 Criminal Justice (Theft and Fraud) Offences Act. These Acts, while not exclusively designed for cybercrime do offer some means to prosecute cybercriminals. However, they are far from providing a satisfactory framework from either a substantive law or a procedural law standpoint. Hence, the Council of Europe’s Convention on Cybercrime becomes very important from an Irish viewpoint. The convention tries to remove the three major difficulties of cybercrime.

- 1) The lack of co-operation between nations
- 2) The lack of substantive law offences
- 3) The lack of procedural powers given to police

Ireland has yet to ratify the Convention on Cybercrime and doing so would represent a major step forward in the fight against cybercrime in Ireland. As of August 2011, 31 countries have ratified the Treaty including the United States, the United Kingdom, France and Germany, with a further 16 countries having signed but not ratified it, a group which includes Ireland. Ireland risks being left behind in this fight against cybercrime and could even become a haven for such criminal activity. Over the past 15 years, due to the cost and destruction inflicted by cybercrime several global institutions have considered acting in an attempt to help the situation. The European Parliament, the Organisation for Economic Co-

operation and Development, the G8 and the Council of Europe have all considered the problem, the overall aim being to adopt a global harmonised approach. However, it has been the Council of Europe which has become the most prominent international institution on the topic. The first act the Council of Europe took was to publish a paper recommending states to adopt specific laws regarding computer crime in 1995. Two years later it began deliberating on a convention to harmonise international law and established a committee of experts on crime in cyberspace and began the drafting process in 1997. It took four years and 27 drafts before a final version was agreed. The convention is split into four chapters, chapter one defines the terms used in the convention, chapter two states the measures which are to be taken at national level with regard to procedural and substantive law, chapter three sets out a framework for international co-operation and chapter four contains a list of final provisions. The convention provides the best chance for Ireland to reduce the numbers of cybercrime attacks in the country. It provides for a range of criminal offences and procedural powers and while it is far from the perfect solution, ratifying the convention would represent a major step towards limiting the effect cybercrime is having. Ireland further lags behind in other areas of cybercrime prevention methods like failing to transpose the European Council Framework Decision 2005/222/JHA on attacks against information systems.

There has been a legislative initiative for some years now to get a comprehensive framework enacted to deal with cybercrime. The bill was entitled the "Criminal justice (Cybercrime and Attacks against Information Systems) Bill and was intended to give legal effect to the both the convention on cybercrime and the European Union's framework decision. However there has been no significant progress on this recently and there is no formal publication date despite the convention being available for ratification for over ten years and the deadline of implementation for the framework decision passing in 2007. Businesses in Ireland have reported single incidents of cybercrime which has cost them over €250,000. In a time when finance and business opportunities are hard to come by, businesses cannot be expected to absorb such costs and still continue to operate. A large part of the economy is now conducted online with a large part of many businesses becoming about generating revenue online. Trust and confidence is key to continuing this growth. Business confidence in Ireland will eventually be undermined by this phenomenon of cybercrime continue to go largely unchallenged. Ireland lags behind many European countries and this could well turn out to hurt business in Ireland.

Cybercrime is going to be impossible to eradicate, new technologies will continue to develop and cybercriminals will continue to find ways around both legislation and police. This should not mean however that they should be given free reign over the internet to do as they please. Significant ground can be made by legislating correctly and providing a realistic threat of being apprehended. Criminal law and fear of being caught still provide strong deterrents to potential criminals. Providing authorities with adequate resources, substantive and procedural law would give the police the power to decrease the cost of cybercrime. The convention on cybercrime was open for ratification in 2001 yet it mains the best option available to combat this form of crime. By providing the

necessary law, particularly procedural provisions and removing many of the jurisdictional difficulties between nations it represents the best chance for reducing the effect cybercrime is having. Should nations continue ratifying the treaty especially countries where cybercrime is plentiful, the convention will prove to be a key tool. At the moment its primary flaw is simply that not enough countries have ratified it.

## **2. Joe McGrath, NUI Galway, “Corporate Crime and Sentencing”.**

Since the revelations emerged of serious banking misconduct in 2008, Irish politicians have accused white collar criminals of economic treason, and even compared them to terrorists. It has been suggested that those wearing white collars and suits must be treated the same as those wearing balaclavas and carrying shotguns. New laws have been introduced to address deficiencies that have plagued corporate enforcement in Ireland. The Criminal Justice Act 2011, for example, strengthens the investigative powers of regulators and facilitates the prosecution of white collar crime. Most of the recent legislative reform, however, seems to concentrate on streamlining criminal law procedures to make it easier to achieve white collar crime convictions. It seems to be assumed that offenders will go to prison if this is the case. However, despite the political rhetoric on treating white collar criminals like ordinary criminals, the rules on sentencing serve to privilege corporate wrongdoers in such a way that they are unlikely to receive custodial sentences.

Though Irish sentencing is very unstructured, Irish jurisprudence has consistently confirmed that offenders are entitled to the constitutional right to be punished proportionately for their wrongdoing, considering both the particular facts of the offence and the particular circumstances of the offender. Offences are considered particularly reprehensible if they are premeditated, if they are excessively violent or involve a weapon, if they are committed by criminal gangs, if victims’ homes are invaded, or if they are motivated by the victims’ race or religion. However, corporate offenders are unlikely to have engaged in any such behaviour. In large companies, responsibility can fall between the cracks, so it may be impossible to prove premeditation. Corporate offences, unlike homicides and rapes, are generally non-violent and the tools of industry are spreadsheets and meetings, not guns and knives. Victims’ homes are not invaded and neither ethnicity nor creed is likely to have been the inspiration for wrongdoing. Corporate collectives are not considered criminal gangs, but rather an effective form of large-scale business administration. Therefore, these aggravating factors, often associated with conventional offences, are unlikely to apply to corporate wrongdoing.

Meanwhile, the particular circumstances of corporate offenders are such that they are likely to benefit from well-recognised mitigating factors. The most significant of these are arguably the good character of the offender and the absence of previous convictions. Given that it is often unlikely that corporate crime will be detected in the first place, and that companies are reluctant to report fraud within their ranks, corporate wrongdoing is likely to be ‘filtered’ out of the criminal justice system. This means that corporate offenders are unlikely

to have previous convictions. Indeed, surveys by Professor Ivana Bacik and others have shown that people from the poorest 20 per cent of the community are 12 times more likely to face criminal prosecution in the District Court than those who live in communities with the richest 20 per cent. Corporate offenders are also more likely to be of good character, as evidenced by a steady employment record and a good family background, because they have often been raised in intact, middle-class families and have more secure employment opportunities by virtue of greater access to education at all levels. For example, criminologist Dr Paul O'Mahony's analysis of the inmates in Mountjoy prison revealed that most were poorly educated, had chronically unemployed parents and came from broken homes or large families, and therefore had to compete for scarce material and emotional resources. He concluded that inmates "tend to be young, urban, undereducated males from the lower socioeconomic classes and the so-called underclass, who have been convicted predominantly for relatively petty crimes against property without violence. Very few offenders are imprisoned for white collar crime".

Corporate offenders, by virtue of their personal circumstances and the nature of their crimes, are more likely to avail of the mitigating factors and avoid any aggravating factors. As a result, they are likely to receive less severe punishments. For these reasons, the rules on sentencing, though ostentatiously orientated to each individual's circumstances, are actually systemically biased and have resulted in more lenient penalties for corporate offenders. Recent case law, however, has questioned the orthodoxy of this approach. Mr Justice McKechnie in DPP v Duffy has suggested that the courts should now focus more on the harm caused by the crime to determine the length of custodial sentences. The usual mitigating factors should not apply because the corporate offender, by his very nature, will always avail of them and corporate wrongdoing will be systemically under-punished by the law. This view is controversial and has received a mixed reaction from the legal community. Without overstating its significance, it may indicate an initial step towards a new way of thinking, one which recognises that corporate crime is harmful, immoral and must be punished severely. At present, the case is just one isolated decision, and it is unclear if it will be followed. Unless, however, McKechnie's proposals are more regularly adopted by the judiciary for serious corporate wrongdoing, the Irish legal system will continue to be preoccupied with punishing the poorest and weakest of society, and white collar crime will continue to be under-punished.

The deprivation of liberty through imprisonment is the strongest available punishment in the Irish legal system, and it should be used to punish only the most serious crimes. However, in light of the banking crisis in 2008, there can be no doubt that corporate and white collar crimes are serious wrongs that threaten the economic security of the state. Though prison is a flawed instrument of punishment in many respects, it is an embedded feature of the Irish criminal justice system. It plays an important retributive role which is not restricted to the punishment of the poor. The best way of robbing a bank may be to own one, but it should not be the basis for impunity.

### **3. Anna-Louise Hinds, NUI Galway, “Added Value? The Compliance Impact of the Cartel Settlement Procedure in EU Competition Law”.**

As any legal or regulatory system is only as effective as its enforcement mechanism, it is critical to optimise an enforcement strategy that optimises the achievement of the legislative or regulatory goals of that system. Competition law embodies rules designed primarily to protect the competitive process, enabling society’s limited resources to be produced and allocated in the most efficient way possible resulting in economic efficiency and contributing to greater overall economic wellbeing. Rather than regulate the market *per se*, competition law is therefore designed to regulate the behaviour of undertakings to prevent them acting in an anti-competitive manner thereby restricting competition in the marketplace. Enforcement has been described as the ‘life blood’ of competition law. The European Commission has never been lax in its enforcement of competition law. It has radically overhauled competition policy both in terms of its own theoretical understanding and application of the substantive rules and in terms of the procedures involved. Since 2001 there has been a change of approach to the enforcement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to cartels, with the Commission finding a new found energy to deal with the detection and elimination of cartels, and subjecting them to ever-increasing penalties. The Commission has taken a number of steps to strengthen the application and enforcement of Article 101 TFEU to cartels, including establishing a dedicated Cartel Directorate in DG Comp in 2005 and amending its fining and leniency policies in 2006. The most recent addition to the Commission’s cartel toolbox, introduced in 2008, is the ‘settlement package’, essentially a system of direct cartel settlement. The premise of this settlement system is that in return for an admission of cartel liability, the carteliser is offered a 10% fine reduction. The underlying rationale behind settlement is that it allows for greater efficiency in the enforcement process.

In regulation theory, enforcement strategies include compliance, deterrence and responsive regulation approaches. The compliance and deterrence approaches are at opposite ends of a spectrum, with compliance advocating a cooperative, facilitative and persuasive approach and deterrence advocating a punitive approach. The Commission’s approach to competition law enforcement is predominantly a deterrent one. The new cartel settlement procedure does not prevent the imposition of fines for cartel infringement and can, therefore, be categorised as punitive in nature falling into the deterrence approach. However, it may be that the *process* involved in the settlement procedure points towards a more cooperative approach, indicating some discrete responsive regulatory enforcement by the Commission. This presentation will seek evaluate the cartel settlement procedure according to the theory of regulatory enforcement in an attempt to assess if it potentially offers something more to cartel enforcement than its stated aim of procedural efficiency. The combination of punitive and cooperative elements may offer potential for the Commission and cartelists to explore the issues in a constructive rather than adversarial or coercive manner and this may nurture a positive relationship between the Commission and its regulatees, ultimately encouraging compliance.



## **IALT COUNCIL 2010-2011**

Michael Doherty, Dublin City University (President)  
Deirdre Ahern, Trinity College Dublin (Secretary)  
Fergus Ryan, Dublin Institute of Technology (Membership Secretary)  
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Frank Watters, Dundalk Institute of Technology  
Eugene McNamee, University of Ulster\*

Each third level institution also has an IALT representative. If you do not know who your representative is, please contact [michael.doherty@dcu.ie](mailto:michael.doherty@dcu.ie)

If you would like to be on Council, or nominate a colleague to be on Council, please speak with Michael Doherty or another member over the course of the weekend. The forthcoming Council will be elected at the AGM which takes place on Sunday at 2pm.

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\* Eugene McNamee replaced Liam Thornton in early 2011.



**ANNUAL CONFERENCE 2011  
LIST OF ATTENDEES**

Deirdre Ahern	Trinity College Dublin
Jack Anderson	Queen's University Belfast
Gavin Barrett	University College Dublin
Vera Birmingham	Kingston University
Fiona Broughton	University College Cork
Jennifer Brown	Dublin City University
Maria Cahill	University College Cork
David Capper	Queen's University Belfast
Bruce Carolan	Dublin Institute of Technology
Mark Coen	Dublin City University
Val Corbett	Independent Colleges
Mary Corrigan	Athlone Institute of Technology
Martina Cox	University College Dublin
Margaret Crowley	IT Carlow
Yvonne Daly	Dublin City University
Elaine Dewhurst	Dublin City University
Alan Dignam	Queen Mary, University of London
Michael Doherty	Dublin City University
Fiona Donson	University College Cork
Magdalena Duggan	University of Limerick
Sinead Eaton	University of Limerick
Mary Faulkner	Kings' Inns
Caroline Fennell	University College Cork
Margaret Fitzgerald	Dublin City University
Gerard Forde	Cork Institute of Technology
Sarah Fulham-McQuillan	Trinity College Dublin
Paul Gavin	Kings College, London
Kris Gledhill	University of Auckland
Connie Healy	NUI Galway
Steve Hedley	University College Cork
Noelle Higgins	Dublin City University
Anna-Louise Hinds	NUI Galway
Gerard Hogan	Judge of the High Court
Rory Hogan	University of Limerick
Niamh Howlin	Queen's University Belfast
Mark Hyland	Bangor University
Jennifer Kavanagh	Waterford IT
Maura Kelly	Law Society
Allison Kenneally	IT Carlow
Shane Kilcommins	University College Cork
Paul Lambert	Trinity College Dublin
Deirdre McCaffrey	Sligo Institute of Technology
Chris McDermott	Athlone Institute of Technology
Deirdre McGowan	NUI Maynooth
Joe McGrath	NUI Galway
Noel McGrath	Dublin City University

Pauline McHugh	IT Carlow
Ronagh McQuigg	Queen's University Belfast
Thomas Mohr	University College Dublin
David O'Dwyer	University of Limerick
Stephanie O'Flynn	NUI Galway
Catherine O'Sullivan	University College Cork
Kathryn O'Sullivan	University of Limerick
Marian O'Neill	Waterford IT
John O'Sullivan	Barrister
John Quinn	Dublin City University
Michael Randles	Cork Institute of Technology
Fergus Ryan	Dublin Institute of Technology
Jennifer Schweppe	University of Limerick
Colin Scott	University College Dublin
Ivan Sheeran	IT Carlow
Anne Smith	University of Ulster
Eimear Spain	University of Limerick
John Stannard	Queen's University Belfast
John Tully	IT Carlow
Francis Watters	Dundalk IT
Una Woods	University of Limerick
Hakeem Yusef	Queen's University Belfast