

LAW SOCIETY SUBMISSION



**LAW SOCIETY OF IRELAND PROPOSALS FOR THE FIFTH
PROGRAMME OF LAW REFORM**

LAW REFORM COMMISSION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1 This submission details the views of the Law Society (“the Society”) in relation to the Law Reform Commission’s Fifth Programme of Law Reform.
- 1.2 The submission is divided into three legal topics and subdivided into a number of sections:
 - Probate, Administration and Trusts
 - Human Rights
 - Family law
 - Privity of contract
 - Environmental reform
 - Civil legal aid
 - Adult safeguarding
 - The Criminal Justice system
 - Discipline mechanisms in prisons
 - The defence of not guilty by reason of insanity
 - The need for legislation to protect the role of solicitors in Garda station detentions
 - Examination of mandatory sentencing impacts and reform initiatives

2. Probate, administration and trusts

2.1 What issues have arisen in relation to this area that have caused you concern?

The Law Society considers that the law is in need of reform to provide for variations of wills after a death and statutory wills.

2.2 What issues have arisen in relation to this area that have caused you concern?

It is not possible to vary a will post-death in Ireland, with limited options on disclaimers only if a variation is appropriate. Introducing a law on after death variations would allow beneficiaries, in particular where there are disputes, to amicably change the way a will operates provided everyone is in agreement without the need for Court intervention. This would provide an effective tool in the mediation of estate disputes that is currently unavailable. Post-death a beneficiary or beneficiaries of an estate may also want to redirect assets to others who are in greater need of funds, for example due to illness. Provisions under wills may also be inappropriate where a beneficiary does not have capacity to manage his or her inheritance under the will, varied or otherwise.

The Director of Decision Support Service should have a role where the will may need to be varied for a person who does not have capacity to consent to a variation.

Changing the law on variations of wills post-death would also allow the better management of cross-border estates, in particular with the UK, where the law does allow post-death variations. Given the high number of such cross border estates, the inconsistencies in the law need to be considered.

The Law Reform Commission will be aware that some sections of the Assisted Decision-Making (Capacity) Act 2015 (the "2015 Act") have already commenced and others will imminently be commenced. The original draft legislation made provisions in relation to statutory wills which the Law Society would have supported and which would have enabled wills to be changed where a person lacked the requisite capacity to do so. This approach followed the recommendations of the Law Reform Commission but unfortunately the provisions were deleted at Committee Stage.

Under the 2015 Act decisions will be made in relation to a person's property either by substitute decision-makers or by a Court which fundamentally changes the manner in which a will operates post-death. Changing the law on statutory wills would enable a Court to have discretion to amend a will to ensure it continues to reflect the person's known will and preferences. Statutory wills are provided for in other jurisdictions such as England and Wales and the Law Reform Commission could consider how this operates in other jurisdictions and whether the law should be changed in Ireland.

2.3 What problems does this give rise to in practice?

Currently issues arise where, for example, a will is made by a person who is domiciled in Northern Ireland with property in the Republic of Ireland. Under private

international law, the variation to the will which is made post-death should be recognised in relation to any movable property in Ireland but not in relation to immovable property. However, given the lack of legislation in the area this causes considerable confusion for practitioners, Revenue authorities and families.

Once the 2015 Act is fully commenced, we would envisage problems arising in relation to wills not ultimately reflecting the known will and preferences of the testator/testatrix. A typical example would be specified property being specifically bequeathed to a named beneficiary in a will. If that specified property needs to be sold by a substitute decision-maker or by the Court, for example, to provide for healthcare or other support, the specific bequest will fail if the testator / testatrix does not have capacity to change his/her will at that time. Any remaining sale proceeds at the time of death would often fall into the residue of the estate and be inherited by others. This would lead to the will not reflecting the testator's wishes and possibly unnecessary Court applications, such as applications under the Succession Act by children.

2.4 What would be the potential benefits of reform of this area?

Variations of wills post-death would assist in resolving disputes post-death in relation to wills and allow beneficiaries decide not to take bequests should they have no need for them. It would also provide some level of consistency in cross-border estates with the UK in particular.

Statutory wills would enable the will and preferences of testators to be respected in relation to their estates regardless of decisions that might be made by substitute decision-makers at a time when they no longer have capacity to amend their wills.

2.5 Any other general comments?

Although the Law Society views that a review of the above issues is imperative the Law Society would also recommend that the Law Reform Commission should consider the wider issues being considered by the Law Commission in the UK on wills such as electronic wills, lowering the age for making wills, formalities for wills, provisions on revocation of wills on marriage (and not on divorce) and how to encourage more people to make wills.

<https://www.lawcom.gov.uk/outdated-law-of-wills-needs-overhaul-to-reflect-modern-world/>

3. Human rights law

The Society believes that the law is in need of reform in the following areas as regards to human rights law.

3.1 Family law

The Society suggests that reform of the family law system should be considered particularly in the context of the injustice of delays. There are a number of concerns around systemic problems in the family law system including a lack of expert judges, efficiency of case management and consistency of judicial approach. There are also concerns around the lack of sanction for the provision of false or misleading information in a Statement of Means. Reform of the area would ensure that the rights of some of the most vulnerable members of society would be upheld and it would ensure the protection of family life as enshrined in the Irish Constitution.

Dr Geoffrey Shannon, a member of the Law Society's Family and Child Law Committee, led a working group in 2015 on the development of a 42-page blueprint for a new family law courts structure, reflective of the needs of modern Ireland and taking its cues from the best practice examples that have been operating in other countries for decades.

The report provides an extensive list of recommendations, backed up by research on systems in place abroad. Some jurisdictions, such as Australia, have had dedicated family law courts since 1976.

Our submission, [Family Law – The Future](http://www.lawsociety.ie/submissions) can be accessed at the following link: www.lawsociety.ie/submissions

3.2 Privity of contract

The Society proposes that the Commission should consider privity of contract further. As the law currently stands in Ireland (subject to some limited exceptions), the doctrine provides that only the parties to a contract can enforce its terms. Even in circumstances where a third party is stated to have the benefit of a provision of a contract in some way, they cannot enforce any such provision against the party who confers such a benefit on them. There are particular concerns in circumstances where a State agency may be acting *mala fides* but a third party is unable to pursue the matter. If the doctrine was changed as proposed by the Law Reform Commission in its Final Report entitled "Privity of Contract and Third Party Rights", it would allow a third party who the contracting parties clearly intended to benefit from their agreement to rely on and enforce the agreement if it was not carried out properly.

3.3 Environmental reform

The Society suggests that there are a number of areas within environmental law that require reform. Some of these include significant lacunae in the planning legislation. There are also concerns around the difficulty in enforcement of

environmental law. One such example is that each application is looked at in isolation and no consideration can be given to prior concerns or difficulties with developers or company directors.

There are also significant issues in relation to corporate enforcement where people set up a number of different companies allowing them to avoid their responsibilities with little accountability on the part of enforcement authorities. There are also serious concerns around sustainability and how it is being approached. Also, there is no guidance on A.O.D. (above ordinance datum) which involves the measure by which quarrying is permitted to proceed and can have a significant impact on the landscape and environment. Another area of concern is that of heritage protection. Reform of this area would ensure that the Irish landscape and heritage would be protected and enjoyed by generations to come. It would also ensure that the rights of local communities and individuals are respected, particularly in light of the power of large companies and industries.

3.4. Civil legal aid

The Society proposes that the system of civil legal aid should be examined to assess the extent to which it complies with Article 6 of the European Convention on Human Rights. This should include an analysis of the barriers to accessing justice. The Civil Legal Aid Act 1995 designates certain areas outside the scope of the scheme including in relation to housing law, social welfare law and equality and employment law. These areas of law disproportionately affect disadvantaged communities and such exclusions may deny people on lower incomes access to the legal system. This means that there is no State-funded legal aid in areas of need such as housing, social welfare, employment and equality. Further, the lack of resources within the scheme means that there are significant waiting lists for those trying to access the service. Reform of this area would ensure that those most in need could access legal services.

3.5. Adult safeguarding

There is currently a lack of a comprehensive legislative framework for adult safeguarding. Indications from various studies and reports all point to adult safeguarding issues that cause concern. These include:

- *Abuse and Neglect of Older People in Ireland* National Centre for the Protection of Older People (NCPOP) University College Dublin (2010) and a number of subsequent reports by NCPOP
- *2016 Safeguarding Data Report* HSE National Safeguarding Office
- *Vulnerable Adults in Irish Society: National Public Opinion Survey* RedC Poll commissioned by the National Safeguarding Committee December 2016
- Solicitors in practice also experience issues of undue influence, coercion and exploitation of vulnerable adults.
- Lack of a comprehensive system of regulation of the various service providers and care setting (see for example the March 2017 ['HIQA report on Exploring the regulation of health and social services'](#)).

Currently, the HSE policy Safeguarding Vulnerable Persons at Risk of Abuse is limited to services provided by the HSE Social Care Division and does not extend to services funded by the State but not directly provided by it. One large gap is the lack of regulation in relation to care in the home. Nor is there any regulation where vulnerable adults may be experiencing abuse but not availing of any health or social

care services. Financial abuse of frail older persons is a particular cause of concern where both the NCPOP prevalence study and the HSE Data Report of 2016 confirm higher levels of abuse of those over the age of 80 years.

Without initiating the above reform programme, there is:

- A lack of awareness of what constitutes abuse and therefore a lack of appropriate response when abuse occurs.
- Many people who are aware of abuse have no clarity to whom reporting should be made.
- There is no legal duty for organisations to have procedures in place to assist staff when there are reasonable suspicions of abuse or when concerns are identified.
- A greater risk of exploitation and abuse of more vulnerable adults because, for example, at present there is no statutory power for the current HSE Safeguarding Protection teams to enter premises in which a vulnerable person resides or no power to compel persons to co-operate when concerns are raised or to produce documents or evidence when requested to do so. In practice, if there is no complaint, then the Gardaí are not involved and the Safeguarding Teams are limited in terms of trying to access the individual or to seek the co-operation of third parties in order to undertake their investigation.
- A greater risk of neglect of more vulnerable adults.

The benefits of the above mentioned reform programme would include the implementation of a comprehensive legislative and regulatory adult safeguarding framework. This in turn would provide more certainty as to which body (which includes the consideration of the establishment of a new independent body) matters of concern should be reported to, thus reducing the risk of exploitation, abuse and neglect of vulnerable adults.

One of the statutory functions of whatever body is tasked with implementing adult safeguarding is to promote public awareness and education to ensure there is a zero tolerance of abuse in society of vulnerable adults. The legislation ought to also impose a mandatory requirement on all organisations tasked with adult safeguarding to work collaboratively to ensure such zero tolerance is achieved.

Adult safeguarding legislation would also enable the State to comply with its obligations under Article 16 of the UNCPRD to put in place an effective legislative framework and policies to ensure that instances of exploitation, violence and abuse are identified, investigated and, where appropriate, prosecuted.

Adult safeguarding legislation should include preventive measures against abuse to enable standards and policies to be comprehensively developed on a national basis. An example would be the development by the Central Bank of a Consumer Protection Code for financial entities which would have systemic practices in place to prevent abuse.

4. The criminal justice system

The Society recommends that the Law Reform Commission examine the following areas in the criminal justice system as an area of reform.

4.1. Discipline mechanisms in prisons

The Law Reform Commission has an important role to play in the development and enhancement of prison law. In particular, the adequacy of current prison discipline mechanisms merits consideration.

Currently, minor offences can attract the most severe penalties with serious offences attracting light penalties. This demonstrates the need to introduce more proportionality and reasonableness into the discipline process. The appeals process would benefit from review to ensure best practices are consistently applied.

Research could include review of current Prison Rules, provisions in the Prisons Acts 1826 to 2015 and the issues highlighted by Ms Justice Una Ni Raifeartaigh in *Peter Kenny v Governor of Portlaoise Prison 2015 292 JR*.

Legislative reform proposals could:

- create fair procedures/processes for discipline
- create fundamental prisoner rights within the prison discipline process
- ensure consistency of sanctions across prisons
- assist prison governors' understanding their role and powers
- enhance the appeals process

4.2. The defence of not guilty by reason of insanity

The Law Reform Commission has an important role to play in securing the availability of all defences to accused persons in every court. In practice, the defence of not guilty by reason of insanity is rarely pleaded in the District or Circuit Courts. This is likely because of the 'chilling effect' of the defence being successfully pleaded leading to indefinite detention in the Central Mental Hospital. For crimes of a less serious nature, the risk involved in pleading this defence for a client is far too great because it may lead to them being detained in the Central Mental Hospital indefinitely. It is important to explore the availability of the defence of not guilty by reason of insanity especially in light of emerging psychology practices and treatments. The potential that this defence can be pleaded for crimes of a less serious nature without the risk of indefinite detention in the Central Mental Hospital offers many benefits for individuals and society.

Legislative reform proposals could include:

- a mechanism for raising this defence in a proportionate way
- an alternative to indefinite detention in the Central Mental Hospital
- a limit on the length of detention in the Central Mental Hospital
- an out-patient assessment mechanism similar to that available to assess fitness for trial
- a mechanism which accommodates the potential temporary nature of a mental illness at the time a crime occurred; a mental illness which may be resolved should not lead to the threat of indefinite detention in the Central Mental Hospital.

4.3 The need for legislation to protect the role of solicitors in Garda station detentions

The Society recommends that the 5th Programme explore the adequacy of current mechanisms for the facilitation of the role of solicitors in Garda stations by evaluating whether the basis upon which solicitors attend Garda stations to provide legal advice and attend interrogations should be placed on a statutory footing.

Solicitors play a vital role in overseeing Garda powers of detention by challenging, when necessary, actions which directly encroach upon a citizen's right to liberty or silence. A detainee in a Garda station is in a position of considerable vulnerability. Access to a solicitor presents the opportunity for this vulnerability to be tempered slightly by a professional who can advocate for detainees' legal, constitutional and human rights.

Professor John Jackson attributes a very broad meaning to the role of solicitors in police stations in the *Modern Law Review* (pay walled) (referred to by Dr Vicky Conway, *The right to legal advice in the Garda station: DPP v Doyle*, 19 January 2017, humanrights.ie). Professor Jackson's description of the role goes considerably beyond the giving of legal advice and includes:

- Protecting the rights of detainees such as the privilege against self-incrimination
- Preventing miscarriages of justice
- Delivering the aims of Article 6 of the ECHR
- Fulfilling a representational role (rather than exclusively advisory) in complex cases

The experience of arrest and detention at a Garda Station is unsettling for most people, and solicitors often find that they are playing an emotional support role, as much as a legal representation role. No two Garda station experiences are ever the same, and are rarely a pleasant experience. But that is what a solicitor's role is all about - it is as varied as life itself and upholding legal rights and representing clients during major moments in their life is core to the solicitors' profession and is what motivates most solicitors each and every day.

As it currently stands, the Criminal Justice Act 1984 requires Gardaí to inform a person who is detained that they are entitled to consult with a solicitor. However, that is as far as the statutory obligation on Gardaí goes. This ignores the reality of the dynamic of investigation during the detention and interrogation process. If the solicitor cannot rely on statutory requirements then preference will always be given to the requirements of investigation over the rights or needs of a client. The Criminal Justice Act 2011, which has yet to be fully implemented, states that a detained person shall not only be informed of their right to consult a solicitor, but that person also has the right to consult with a solicitor before questioning starts.

In addition, people who are arrested and detained on arrival into the country under section 12 of the Immigration Act 2004 as amended by the Civil Law (Miscellaneous Provisions) Act 2011 are not entitled to legal advice or representation through the Garda Station Legal Aid Revised Scheme. Upon arrival in the State, international protection applicants and immigrants are particularly vulnerable as often they are not aware of their rights and fear deportation/risk of detention. Access to a solicitor would ensure, in these circumstances, rights to liberty and the ability to apply for international protection if required.

4.4 Examination of mandatory sentencing impacts and reform initiatives

The Society recommends examining mandatory and presumptive sentences. Mandatory sentencing has become part of the Irish landscape; however, international research is now indicating that it may not be as effective a deterrent as initially believed. It would be worthwhile to examine the potential lack of impact as a deterrent as well as the potential to create injustice.

Research could explore alternatives to mandatory sentencing, including exploring possible issues regarding consistency, transparency and predictability of sentencing practice. Reform initiatives which could be examined include:

- The introduction of non-statutory sentencing guidelines setting out the principles that should underpin sentencing, including the principle of imprisonment as a last resort and the principle of proportionality between the severity of sentence and the seriousness of an offence to include the identification of maximum and minimum sentences which should be reviewed periodically.
- The expanded use of such judicial guidelines by judges on the Court of Appeal to promote consistency in the types of sentences granted in cases.
- A mandatory requirement that all judges provide a written judicial explanation of all custodial sentences including an outline of mitigating and aggravating factors alongside recommendations for prison authorities to encourage a meaningful engagement with rehabilitation services.

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