THE DEFINITION OF JUDICIAL MISCONDUCT IN THE JUDICIAL COUNCIL ACT 2019

Abstract: This article examines the statutory definition of judicial misconduct in the Judicial Council Act 2019 in detail. It draws on examples of judicial misconduct in other jurisdictions, such as Australia and England & Wales, to shed light on the meaning of acknowledged standards of judicial conduct in an Irish context. It then explores what is meant by bringing the administration of justice into disrepute.

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Introduction

The Constitution of Ireland provides for the removal of judges of the higher courts for 'stated misbehaviour or incapacity' if the Dáil and Seanad pass resolutions to this effect.[1] If such resolutions were passed, the President would then remove the judge from office.[2] While there is no definition of misbehaviour in the Constitution, there is a statutory definition of 'judicial misconduct' in the Judicial Council Act 2019 (the Act). This article will examine the statutory definition of judicial misconduct in detail and draw on examples from common law countries to flesh out the meaning of acknowledged standards of judicial conduct.

Traditionally, Irish judges have been subject to informal discipline (short of removal) on an *ad hoc* basis by the President of the court in which they operate. Recently, a somewhat similar process called 'informal resolution' has been placed on a statutory footing by the Act. The Judicial Conduct Committee (JCC) will investigate allegations of judicial misconduct,[3] and may arrange for the informal resolution of admissible complaints, with the consent of the judge in question.[4] The JCC may refer a matter to the Minister of Justice and suggest that the Houses of the Oireachtas examine whether the judge should be removed from office for stated misbehaviour or incapacity.[5] This is similar to the process in England & Wales where the Judicial Conduct Investigations Office (JCIO) may investigate complaints.[6] JCIO decisions may be reviewed by the Judicial Appointment and Complaints Ombudsman,[7] and the Lord Chancellor and Lord Chief Justice retain disciplinary (but not removal) powers.[8]

The key issue that this article seeks to address is how to define 'judicial misconduct'. Two preliminary points should be noted before turning to the statutory definition. First, while the definition of judicial incapacity is beyond the scope of this article, incapacity and misbehaviour may arise on the same facts. For example, Mr Justice Jeff Shaw of the New South Wales Supreme Court resigned after he was found driving under the influence of

[1] Article 35(4) 1° of the Constitution of Ireland.
[2] Article 35(4) 3° of the Constitution of Ireland.
[3] Chapter 4 of Part 5 of the Judicial Council Act 2019 (not yet commenced). Pursuant to s 43 of the Act, the Judicial Council nominated 30 June 2020 as the establishment date for the JCC. The JCC is appointed by the government and consists of eight judges and five lay people without legal qualifications.
[4] ibid ss 61 and 62.
[5] ibid s 80.
[6] Judicial Discipline (Prescribed Procedures) Regulations 2014, reg 4(2).
[7] Constitutional Reform Act 2005 ss 110-114, schedule 13.
[8] ibid part 4.

alcohol and sought treatment for alcoholism.[9] This illustrates that incapacity and stated misbehaviour are not mutually exclusive. Secondly, the relationship between the terms 'misbehaviour' (as per the Constitution) and 'misconduct' (as per the Act) is somewhat unclear. On the one hand, the plain ordinary use of these words is to treat them as synonyms. On the other hand, the constitutional standard is only engaged in the context of actions by judges which could justify their removal from office, whereas the statutory standard may be engaged in a broader range of contexts.[10] The JCC may refer a matter to the Minister for Justice who shall then propose the motion that a judge be removed from office under Article 35.4.1 of the Constitution (the misbehaviour standard) following an investigation into judicial misconduct.[11] This indicates that misbehaviour is a subset of misconduct, that judicial misconduct includes misconduct which falls far below what is required to remove a judge and that the JCC may consider both misconduct and misbehaviour.

The meaning of both 'stated misbehaviour' and 'misconduct' will be influenced by our conception of the separation of powers and judicial independence under Article 6 of the Constitution as well as a historical sense of when the legislature should be entitled to remove a judge from office. The question has been raised as to whether the Houses of the Oireachtas could define 'stated misbehaviour' in any manner or as any particular conduct that the majority agree upon,[12] or whether stated misbehaviour involves 'an objective standard of misbehaviour […][which] could be reviewed by the High Court'.[13] In order for judges to be able to meet the standards to which they are held, judges must be able to know of and comply with those standards in advance of a misconduct allegation. Therefore, stated misbehaviour ought to capable of at least some definitional parameters without waiting for an ad hoc Oireachtas decision (although whether a factual pattern falls within such definitional parameters is a different question). It seems possible that the courts could review an Oireachtas characterisation of misbehaviour if it were necessary to do so in order to protect judicial independence and to prevent abuse that could flow from a mere majoritarian dislike of a judge or of any of their judicial decisions.[14] Such judicial review would require some

[9] Gabrielle Appleby and Susan Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 Melbourne University Law Review 1, 13; James Thomas, *Judicial Ethics in Australia* (3rd edn, LexisNexis Butterworths 2009) 170-1 [10.11].

[10] The Constitutional Review Group sought to bring more precision to the concept of 'stated misbehaviour' by suggesting the addition of the words 'prejudice to the office of judge' but this suggestion has not been adopted. See Report of the Constitution Review Group (1996) 184-185.

[11] The Act s 80.

[12] This view was expressed by Congressman (later President) Gerald Ford in the United States in 1970. When Ford demanded an investigation and, if warranted, a vote on the impeachment of U.S. Supreme Court Justice William O. Douglas, Ford declared that 'an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history' and that a 'conviction results from whatever ... two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office.' See Brian C Kalt, 'Presidential Impeachment and Removal: From the Two-Party System to the Two-Reality System' (2019) 27 Geo. Mason L. Rev. 1.

[13] Gerald Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) para 6.4.51.

[14] This seems likely in light of *Curtin v Dáil Eireann* [2006] IESC 14 (referenced below) which notes that 'the Appellant's complaint is necessarily narrowed down to an issue of whether he can show that the procedure before each House, following receipt of the Committee report, will necessarily be in clear disregard of [the constitutional principles of basic fairness of procedures and the requirements of natural and constitutional justice].' Similarly, Cahillane and Kenny are of the opinion that the courts might 'prevent abuse' such as a decision 'in bad faith or with reckless disregard for the independence of the judiciary' but would give the

objective benchmarks of behaviour against which the conduct of the judge should be assessed, apart from the other requirements that flow from natural and constitutional justice.

Acknowledged Standards of Judicial Conduct

The Judicial Council Act 2019 defines judicial misconduct in the following terms:

> 'judicial misconduct' means conduct (whether an act or omission) by a judge, whether in the execution of his or her office or otherwise, and whether generally or on a particular occasion, that—
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> (a) constitutes a departure from acknowledged standards of judicial conduct, such standards to have regard to the principles of judicial conduct referred to in *sections 7(1)(b)* and *43(2)*, and
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> (b) brings the administration of justice into disrepute.

The reference in part (a) of this definition to 'acknowledged standards' of judicial conduct begs the question of the source of these acknowledged standards. Some internal evidence of the legislative intent may be gleaned from the reference to international standards of judicial conduct in subsections 7(1)(b) and 43(2) of the Act which both set out the same principles of judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure equality of treatment to all persons before the courts. These principles reflect the Bangalore Principles of Judicial Conduct,[15] which are described by the recently published Judicial Council 'Guidelines concerning Judicial Conduct and Ethics' as 'highly respected international standards on which the Oireachtas drew in framing the Judicial Council Act 2019.'[16]

Before turning to international sources of 'acknowledged standards of judicial conduct', let us briefly consider examples of judges in Ireland being accused of misbehaviour to gain a sense of what was already expected of Irish judges prior to the commencement of the Act. It will be argued that many of these examples could be framed in terms of the Act and that if similar conduct were to occur again it would amount to departing from 'acknowledged standards of judicial conduct'.

Stated misbehaviour includes credible accusations of serious criminal conduct (without a conviction necessarily being required). For example, Circuit Court Judge Brian Curtin was unsuccessfully prosecuted for possession of child pornography and critical evidence on his computer was inadmissible because it was seized on foot of a spent warrant.[17] Proceedings

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Oireachtas 'a very large leeway to determine [the nature of misconduct] in the first instance.' Laura Cahillane and David Kenny, 'Lessons from Ireland's 2020 judicial conduct controversy' (2022) CLWR 3, 21.

[15] Bangalore Principles of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague (November 25-26, 2002) available at < https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> accessed 27 December 2020. These principles were endorsed at the 59th session of the United Nations Human Rights Commission at Geneva in April 2003. They are also expressly referenced in Judicial Council, *Guidelines concerning Judicial Conduct and Ethics* (February 2022) at <https://judicialcouncil.ie/judicial-conduct-committee/> accessed 4 March 2022.

[16] Judicial Council, *Guidelines concerning Judicial Conduct and Ethics* (February 2022) at < https://judicialcouncil.ie/judicial-conduct-committee/> accessed 4 March 2022.

[17] Brian Murray, 'The Removal of Judges' in Eoin Carolan (ed.), *Judicial Power in Ireland*, (Institute of Public Administration 2018); *Curtin v Dáil Eireann* (n 14).

were commenced in the Oireachtas to remove him, although he ultimately resigned before the process was finished.[18] Under the Act, such conduct could be framed in terms of a lack of integrity and/or propriety (and appearance of propriety) and a departure from 'acknowledged standards of judicial conduct'.[19]

The Sheedy Affair led to the resignations of High Court judge Cyril Kelly and Supreme Court judge Mr Justice Hugh O'Flaherty.[20] The Supreme Court judge was accused of intervening in a case to secure the early release of a man convicted of causing death by dangerous driving. The High Court judge agreed to hear the re-listed case and remitted the rest of the defendant's sentence, even though the correct procedure would be to have the case heard by Judge Matthews who originally sentenced the defendant.[21] The resignations of these judges and contemporaneous commentary illustrates that this conduct was considered to be inappropriate at the time (although whether this amounted to 'stated misbehaviour' per the Constitution was never officially decided by the Houses of the Oireachtas).[22] Under the Act, this type of conduct could be framed in terms of a lack of judicial independence (from fellow judges), impartiality, and/or propriety. The Sheedy Affair is a rare example of conduct on the bench leading to judicial resignations. It is more common that accusations of misconduct relate to conduct off the bench or prior to taking judicial office which have become intertwined with political controversies. For example, the resignation of High Court judge Harry Whelehan followed the political controversy surrounding his former role as Attorney General (in particular accusations of delay in extraditing a paedophile to Northern Ireland and Taoiseach Reynolds' comment that he regretted appointing the judge).[23] More recently the controversy surrounding Mr Justice Seamus Woulfe's attendance at an Oireachtas golf society dinner during the Covid-19 pandemic (discussed below) was intertwined with unprecedented Covid restrictions and the resignations of two politicians who attended the same event.[24] As the new Act explicitly refers to conduct 'in the execution of his or her office or otherwise', it is clearly intended to address conduct both on and off the bench. This approach is in line with past understandings of the standards that are expected of judges in Ireland.

International standards of conduct should also form a core element of any consideration of the relevant 'acknowledged standards' in the Judicial Council Act 2019. The drafters of the Judicial Council Act 2019 can reasonably be assumed to have been aware of international principles of judicial misconduct such as the standards set out in the UN Basic Principles on the Independence of the Judiciary (Principle 19 of which states that 'all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct,' language which is strikingly similar to the Irish statutory

[18] 'Curtin resigns on grounds of ill health' *RTÉ* (13 November 2006) <www.rte.ie/news/2006/1113/82484-curtinb/> accessed 22 October 2020.
[19] See below for discussion on the conviction of District Court judge Heather Perrin for deception.
[20] John Mullin, 'Second Irish judge quits' *The Guardian* (21 April 1999) accessed at < https://www.theguardian.com/world/1999/apr/21/ireland> 3 March 2022; Cahillane and Kenny (n 14).
[21] John O'Dowd, 'The Sheedy Affair' (2000) 3 Contemporary Issues in Irish Law & Politics 103; Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38(1) Dublin University Law Journal.
[22] ibid.
[23] Charles Lysaght, 'Harry Whelehan' *Independent.ie* (20 May 2007) accessed at <https://www.independent.ie/business/irish/harry-whelehan-26291726.html> accessed 3 March 2022.
[24] Minister for Agriculture Dara Calleary and EU Commissioner Phil Hogan resigned in August 2020. For a detailed outline of this controversy see Cahillane and Kenny (n 14).

expression 'acknowledged standards of judicial conduct'),[25] the London Declaration on Judicial Ethics issued in 2010 by the General Assembly of the European Network of Councils for the Judiciary, and the 1995 UN Basic Principles which were referred to in the Bangalore Principles from 2002 and endorsed by the UN Human Rights Commission in 2003. These 'acknowledged standards' are also likely to draw on the jurisprudence of the European Court of Human Rights (ECHR) and the ECHR's consideration of the features of an independent and impartial court per Article 6 of the European Convention on Human Rights. For example, the Court held in *Di Giovanni v. Italy* that conduct by judges off the bench (such as making unfounded allegations about the process for the appointment of other judges in newspaper interviews) can be grounds for sanctions imposed by the relevant judicial disciplinary body. This is in line with the approach taken by the Act.[26]

Furthermore, we must learn from the experiences of other jurisdictions because no Irish judge has ever been removed from office since the foundation of the Irish state in 1922 (although in 1830 Sir Jonah Barrington was removed as a judge under the Act of Settlement 1701).[27] Ireland is a comparatively small jurisdiction with relatively few judges. According to the Irish Judicial Council, there were 166 judges in Ireland in 2020 whereas in April 2020 there were 2,295 court judges in England & Wales (as well as 18,664 Tribunal judges, magistrates and coroners),[28] and over 1,000 Australian judges and magistrates in March 2019.[29] Accordingly, it is unsurprising that Ireland has little by way of precedent of actual removals from judicial office (although there have been instances of conduct by judges which have given rise to calls for the judge to be removed from office or to voluntarily resign).[30]

Experiences in other common law jurisdictions are also instructive because we share similar principles concerning the separation of powers and the independence of judges. In particular England & Wales, Ireland, Australia, and the United States share common roots in the Act of Settlement 1701, which allowed judges to hold office during 'good behaviour' (a phrase which is still referenced in Article III of the United States Constitution). Judges may be removed on the grounds of (i) incapacity and/or (ii) misbehaviour in Australia and Ireland.[31] Similarly, in England & Wales, Supreme Court judges hold their office 'during

[25] Office of the High Commissioner for Human Rights, *Basic Principles on the Independence of the Judiciary (*1985) at < https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed 21 December 2021.

[26] App no 51160/06 (ECHR, 9 July 2013).

[27] W. N. Osborough, 'Barrington, Sir Jonah (1756/7–1834)' in *Oxford Dictionary of National Biography* (Oxford University Press 2004).

[28] Judicial Conduct Investigations Office's Annual Report 2019-2020, 11 available at < https://judicialconduct.judiciary.gov.uk/reports-publications/> accessed 26 October 2021.

[29] Judicial Commission of New South Wales, Number of judges and magistrates in Australia, March 2019 <https://www.judcom.nsw.gov.au/number-of-judges-and-magistrates-in-australia-march-2018-2/> accessed 10 November 2021.

[30] In addition to the examples discussed above, there was also the withdrawal of a Dáil motion to remove Circuit Court judge Edward McElligott in 1941 on the assumption that the judge would 'retire at an early date' (see Dáil deb 7 May 1941, vol 83, no. 1 <https://www.oireachtas.ie/en/debates/debate/dail/1941-05-07/46/> accessed 3 March 2022). See also Diarmaid Ferriter, 'Effort to remove Curtin has precedent in 1941 Dáil motion' *Irish Times* (23 Nov 2009) accessed at <https://www.irishtimes.com/opinion/effort-to-remove-curtin-had-precedent-in-1941-d%C3%A1il-motion-1.1263919> accessed 4 March 2022.

[31] Article 35.4 of the Constitution of Ireland states that a 'judge of the Supreme Court, the Court of Appeal, or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.' Commonwealth of Australia Constitution Act s 72(ii) states that judges 'shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'. Likewise, s 191 of the South Africa Act 1909 uses the expression 'stated misbehaviour or incapacity'.

good behaviour but may be removed on the address of both Houses of Parliament' and may take medical retirement.[32] There is no statutory definition of misconduct in England & Wales but the Terms and Conditions of Appointment and the Guide to Judicial Conduct offer some guidance.[33] Likewise the Irish Judicial Council adopted Guidelines concerning Judicial Conduct and Ethics in 2022.[34] In light of these similarities, fact-specific instances of judicial misconduct in England & Wales and Australia are useful examples for interpreting the appropriate meaning to be given to judicial misconduct in Ireland. The experience in common law jurisdictions and jurisdictions with similar values and international instruments (such as the Convention and the European Treaties, and UN Declarations and Resolutions) can and should inform the interpretation of 'acknowledged standards' of judicial conduct in the Act.

With this in mind, it is worth considering examples and academic discussion of judicial misconduct in Australia to aid our understanding of 'acknowledged standards' of judicial misconduct in Ireland. Appleby and Le Mire helpfully provide ten categories through which one may assess whether conduct amounts to judicial misconduct based on the Australian experience of misconduct.[35] These categories are:

i. conduct prior to taking office such as abusing legal processes while practicing as a lawyer;

ii. bullying and incivility while in office;

iii. bias;

iv. delay in delivering judgments;

v. conduct that would be 'professional misconduct if the judge were still in practice' such as plagiarism;

vi. administrative misconduct, such as regularly failing to attend court;

vii. abuse of judicial power such as deciding cases in a manner to gain personal benefit or seeking an acquittal for a friend;

viii. criminal conduct;

ix. morally or politically reprehensible behaviour; and

x. certain post-retirement behaviour, such as perjury.[36]

While these categories are not exhaustive nor mutually exclusive, they provide a useful framework for assessing which factual patterns and behaviours that could amount to misconduct. Note that categories such as delay may also be related to mental or physical incapacity.[37] As drafters of law naturally do not want to 'freeze' the law and create gaps in

[32] Constitutional Reform Act 2005 ss 33 and 36.
[33] See discussion by Sophie Turenne, 'Judicial Independence in England and Wales' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 147, 170.
[34] The Judicial Council Guidelines concerning Judicial Conduct and Ethics (n 16).
[35] Appleby and Le Mire (n 9) 13.
[36] ibid.
[37] ibid.

the law by limiting misconduct to an exhaustive list, a general framework that can be illustrated and explored by reference to specific examples is very useful.

Conduct Prior to Taking Office

It is worth highlighting that behaviour both before and after being appointed as a judge is included in Appleby and Le Mire's framework. While the Act does require complaints to be generally made within certain time limits, this is not necessarily a bar to investigating conduct which occurred prior to being appointed to judicial office. Under subsections 50 and 51 of the Act, complaints should be made within three months of the alleged misconduct by a person who is directly affected by, or who witnessed the conduct, although this time frame may be extended if the Registrar refers the issue to the JCC and the JCC considers it just and equitable to extend the time and allows the complaint to be admissible.[38] This default three month time limit means that admissible complaints will be far more likely to relate to alleged misconduct after the judge's appointment. However, even if a complaint is not made or is prime facie time-barred, the JCC can still refer any matter relating to the conduct of a judge to a panel of inquiry for investigation under subsection 59 of the Act if there is prima facie evidence of judicial misconduct by the judge, and the Committee considers it necessary to do so for the purposes of safeguarding the administration of justice. Both the Registrar's discretion and that of the JCC will be key in determining whether conduct that was not reasonably discoverable at the time it occurred will be investigated.

One could argue that judicial misconduct in the Act is limited to behaviour while a judge is an office-holder. This view is supported by the fact that the Act refers to *judicial* misconduct. This term is defined as conduct 'by a judge' and a judge is defined in the Act as 'a judge of the Supreme Court, the Court of Appeal, the High Court, the Circuit Court or the District Court'. Conduct by a lawyer, whether personally or professionally, prior to accepting any judicial appointment would not, on this view, amount to judicial misconduct in the sense of improper actions carried out by someone while holding judicial office. Yet it would be deeply unsatisfactory if behaviour prior to holding office could not be investigated if the behaviour would meet the statutory definition of misconduct if it were to occur while in office, particularly if the behaviour was very serious and not reasonably discoverable prior to the appointment of the judge in question. For example, the conduct of former District Court judge Heather Perrin led to her conviction for deception on the 28 November 2012 following which she resigned as a judge and led to her being struck off the roll of solicitors for professional misconduct regarding accounts and clients' monies.[39] A criminal conviction (bar perhaps minor road traffic offences or other minor offences) of a current judicial office holder seems inconsistent with the holding of such office even if the events which gave rise to the conviction predated the judicial appointment. Therefore (although the statutory language lacks clarity on this point) the preferable view is that judicial misconduct by a judge means conduct by a person who is now a judge without the timing of the conduct being necessarily limited to the period during which the judge holds office. This reflects the proposition that bringing the administration of justice into disrepute (discussed below) is

[38] These subsections of the Act are also reflected in the recently published Judicial Council, *Complaints procedure* (4 February 2022) < https://judicialcouncil.ie/assets/uploads/Complaints%20procedure%20-%204th%20February%202022.pdf> accessed 4 March 2022.

[39] Fiona Gartland, 'Former judge Heather Perrin found guilty of misconduct' *Irish Times* (Dublin 17 October 2013) <https://www.irishtimes.com/news/politics/former-judge-heather-perrin-found-guilty-of-misconduct-1.1564585> accessed 8 November 2021; Law Society of Ireland Solicitor's Records available at <https://www.lawsociety.ie/Public/disciplinarysearch/?filters=s_perrin> accessed 8 November 2021.

part of what makes the misconduct undesirable, regardless of the timing of the events. If a judge administering justice has been guilty of serious relevant misconduct, whenever that misconduct occurred, it is highly likely (bar perhaps unusual exonerating circumstances) that the administration of justice will be brought into disrepute if that judge remains in office.

Even if one takes the alternative view that the definition of misconduct is limited to behaviour while a judge is an office-holder, it might still be possible to frame the failure to disclose past relevant misconduct or failure to make amends to injured parties as on-going omissions in order to bring conduct prior to being appointed as a judge within the statutory scope of the definition of misconduct in the Act. For the reasons outlined above, investigations into accusations of serious misconduct by a judge prior to their appointment should not and need not be barred by the three-month time frame in the Act. While the Act does not set a cap on how long the time frame for admissible complaints may be extended, analogies with the Statute of Limitations 1957 could provide helpful guidance when extending time limits and assessing the admissibility of complaints.

Criminal Conduct

Criminal conduct can amount to judicial misconduct but a criminal conviction is not a prerequisite for a finding of judicial misconduct. As noted above, Circuit Court Judge Brian Curtin was unsuccessfully prosecuted for possession of child pornography and critical evidence on his computer was inadmissible because it was seized on foot of a spent warrant.[40] Proceedings were commenced in the Oireachtas to remove him, although he ultimately resigned before the process was finished.[41] Clearly conduct can amount to judicial misconduct even without a criminal conviction and there may be different rules of admissibility of evidence in a criminal court case and in an investigation into whether judicial misconduct has occurred.[42] This reflects that the separation of powers exists to protect the integrity of the judicial office rather than individual judges and that there is a personal right to liberty, livelihood, and one's good name, but one's position as a judge is a privilege.

The Australian courts have taken a similar view in *Clark v Vanstone* when examining legislation that empowered a Minister to suspend a Commissioner for misbehaviour.[43] At first instance, Gray J held that stated misbehaviour need not be criminal nor undertaken while in the course of the duties of one's office.[44] He held that context matters for assessing whether the office holder has the capacity to continue to hold office or is widely perceived to be 'corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the function of the office are performed.'[45] On appeal, Chief Justice Black (as

[40] Murray (n 17); *Curtin v Dáil Eireann* (n 14).
[41] 'Curtin resigns on grounds of ill health' (n 18).
[42] For example, standing orders of the Houses of the Oireachtas may provide for evidence gathering by Select Committees for both Houses (without finding facts), see discussion of the Houses of the Oireachtas (Inquiries, Privileges and Immunities) Act 2013 discussed in Murray (n 17) 82.
[43] [2004] FCA 1105, (2004) 81 ALD 21. This case was cited with approval by Lord Scott of Foscote in *Lawrence v Attorney General of Grenada* [2007] 1 WLR 1474. In the latter case, the Director of Audit of Grenada sent an intemperate letter to the Prime Minister and others accusing him of tampering with her report for parliament. The Privy Council upheld a tribunal's recommendation that she be removed from office for misbehaviour as her conduct affected the perception of others as to her ability to carry out her duties and was likely to bring the office of Director of Audit into disrepute.
[44] ibid.
[45] ibid.

he then was) took a similar view.[46]

Likewise, a minor criminal offence unrelated to the judicial office is not necessarily grounds for a finding of judicial misconduct. For example, a judge who smokes inside her office is unlikely to have committed judicial misconduct, because this conduct is not so serious and so closely related to the role of the judiciary that it departs from acknowledged standards of judicial conduct and is unlikely to affect public trust in the judge or the judiciary generally. [47] There are more ambiguous examples such as whether driving under the influence of alcohol would be considered judicial misconduct.

> Speeding, or driving under the influence, are in one sense ubiquitous and relatively minor offences, but the danger the conduct poses to other road users, and the perception that such conduct indicates a disregard for the law, underscore their seriousness and relevance to the judicial role[48]

This suggests that conduct by a judge off the bench which has no connection as such with the exercise of the judicial function may nonetheless be considered when assessing judicial misconduct if the conduct in question affects the public perception of justice and public trust and confidence in the fairness, impartiality and competence of judges. Similarly, when dealing with intemperate comments made by a judge in the course of oral arguments, the Massachusetts Supreme Court noted that '[p]recisely because the public cannot witness, but instead must trust what happens when a judge retires to the privacy of his chambers, the judiciary must behave with circumspection when in the public eye.'[49]And in *Adams,*[50] the Supreme Court of Indiana noted that judges 'joined in a profane verbal altercation that quickly turned into physical violence and ended in gunfire, and in doing so, gravely undermined public trust in the dignity and decency of Indiana's judiciary.'[51]

As context is relevant for determining whether driving offences constitute a disregard (or perceived disregard) for the law or unfitness for judicial office, it is worth contrasting some case studies which occurred in Australia. In New South Wales, in 2004, Judge Jeff Shaw of the Supreme Court was found to be illegally driving with a blood alcohol content of 0.225

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[46] Black CJ also noted at [22] that '[p]lainly enough, the word misbehaviour takes its meaning from its context. In ordinary usage, to speak of the misbehaviour of school students on public transport, or the misbehaviour of a crowd or players at a sporting event, or the misbehaviour of a judicial officer, or the misbehaviour of a jury is to use the word – and to give it a corresponding meaning – that differs markedly with each context. Depending upon the context, the conduct said to be misbehaviour may range from the slight and trivial to a matter of grave public concern. Misbehaviour is a word that is especially susceptible to taking its content from its context.'

[47] Canadian Judicial Council, *Judicial Council Closes File in Complaint Against BC Madam Justice Southin* (Ottawa, 21 March 2003) <https://cjc-ccm.ca/en/news/judicial-council-closes-file-complaint-against-bc-madam-justice-southin> accessed 10 November 2021.

[48] Appleby and Le Mire (n 9).

[49] *Re Brown* 691 N.E. 2d 573.

[50] 134 N.E. 3d 50 (2019).

[51] ibid 55. 'While in town to attend a statewide educational conference for judicial officers, 10 hours before the program convened, Respondents walked the streets of downtown Indianapolis in a heavily intoxicated state. When Judge Bell extended her middle finger to a passing vehicle, neither Judge Adams nor Judge Jacobs discouraged the provocation or removed themselves from the situation. Instead, all three Respondents joined in a profane verbal altercation that quickly turned into physical violence and ended in gunfire, and in doing so, gravely undermined public trust in the dignity and decency of Indiana's judiciary.'

after which he resigned and sought treatment for alcoholism.[52] In 2014, Judge Anthony Meagher of the New South Wales Court of Appeal was found to be driving with a blood alcohol content of 0.053 (0.003 above the legal blood alcohol limit of 0.05) after which he apologised but did not resign.[53] This suggests that the degree to which one's blood alcohol content is over the legal limit is a highly relevant factor for assessing whether misconduct occurred. In 2013, in South Australia, Judge Anne Bampton pled guilty to driving without due care, with a blood alcohol reading of 0.121, and causing minor injuries to a cyclist.[54] She did not resign but Chief Justice Kourakis determined that she should not hear matters associated with driving offences until the charges against her were finalised nor sit on cases involving driving offences, disputes over the mental element of an offence arising out of a defendant's consumption of alcohol, or where the offender was materially affected by alcohol for twelve months.[55] This illustrates that proportionate remedies (short of removal) can be effectively applied to address driving (and other lesser) offences.

This also raises the question of whether similar remedies (restrictions on which cases are heard by a judge) would be practical in Ireland. The type of resolution (informal or formal) applied, the appropriate remedies (removal or lesser sanctions) and the severity of the alleged misconduct are deeply intertwined. As mentioned above, the Act allows the JCC to refer a complaint for informal resolution (whereby designated judge(s) will attempt to informally resolve the complaint and submit a report to the JCC) if both the judge complained of and the maker of the complaint consent.[56] While the JCC has not yet published guidelines as to the operation of this informal resolution process, it seems likely that similar remedies could be used in Ireland based on the response to the controversy following Mr Justice Woulfe's attendance at a dinner during the Covid-19 pandemic (discussed below). Following this controversy, the Chief Justice declined to assign any cases to the judge for three months and his letter indicates that voluntarily waiving three months' salary, being publicly reprimanded, and apologising, would have been the informal resolution for the events discussed in the

[52] Georgina Robinson, 'Former NSW attorney-general Jeffrey Shaw dead' *Sydney Morning Herald* (28 November 2017) < https://www.smh.com.au/national/nsw/former-nsw-attorneygeneral-jeff-shaw-dead-20100511-up71.html > accessed 8 November 2021.

[53] Michaela Whitbourn, 'Court of Appeal judge Anthony Meagher 'deeply ashamed' after low range drink driving charge' *Sydney Morning Herald* (23 December 2014) <https://www.smh.com.au/national/nsw/court-of-appeal-judge-anthony-meagher-deeply-ashamed-after-low-range-drink-driving-charge-20141223-12cokt.html> access 8 November 2021.

[54] Sean Fewster, 'Drink-Driving Supreme Court Judge Anne Bampton Apologises, Fined $1300 and Disqualified from Driving for Eight Months', *The Advertiser* (15 January 2014) < https://www.news.com.au/national/south-australia/drinkdriving-supreme-court-judge-anne-bampton-apologises-fined-1300-and-disqualified-from-driving-for-eight-months/news-story/2f0162a17a414a73aaa292fbb34def37> accessed 8 November 2021.

[55] ibid.

[56] The Act s 60; ss 61–63; s 63(1) and (2); and 62(1) respectively. The JCC is also required to 'prepare and publish guidelines providing for the resolution by informal means of complaints that are determined to be admissible' per s 43(1)(c). These guidelines have not been published as of February 2022 but will likely be published on the website at a later date, see <https://judicialcouncil.ie/judicial-conduct-committee/> accessed 8 March 2022. Dr Cahillane notes that while 'it is important that there are avenues for dealing with complaints that will not have adverse effects on a judge's reputation and potentially their ability to administer justice […] sections in the Act are "worryingly vague"'. Dr Cahillane also expressed concerns about resolution of complaints not being made public. See Irish Council for Civil Liberties, *Towards Best Practice: A Report On The New Judicial Council In Ireland* (2022) p 57. <https://www.iccl.ie/wp-content/uploads/2022/02/Towards-Best-Practice-Judicial-Council.pdf> accessed 23 February 2022.

Denham Report.[57] This suggests judges could voluntarily accept financial sanctions as part of a disciplinary procedure *prior* to the commencement of the Act, even though nothing in the Irish Constitution or legislation provides for financial sanctions on members of the judiciary. However, financial sanctions are now prohibited by subsection 62(4) of the Act which states that the 'resolution of a complaint by informal means pursuant to this Chapter shall not include the payment of any financial compensation.'[58] It is still possible that the informal resolution process could involve a judge agreeing to apologise or not being assigned certain cases for a set period of time. It is striking that two of the remedies the Chief Justice mentioned in his letter (suspension and a financial penalty),[59] do not appear to be sanctions contemplated by the Act.[60] Suspensions (with or without pay) are a feature of other judicial complaint systems.[61] It is worth considering if the Act should be amended to allow for this remedy.

Delay, Bullying and Sexual Harassment

Whether delay amounts to judicial misconduct depends on the context in question. The recently published guidelines for the Irish judiciary refer to the judge's obligation to deliver judgments with 'reasonable promptness' but 'taking into account available resources and the length or complexity of the case and other work commitments of the judge'.[62] In England, Sir Timothy King of the High Court was reprimanded three times for delay but this delay was seen as understandable as he had a seriously ill family member and was close to retirement.[63] In contrast, the English High Court judge, Sir Jeremiah Harman, resigned after the Court of Appeal criticised him for taking 20 months to deliver a judgement after the hearing.[64] Lord Justice Peter Gibson viewed this delay as weakening public confidence in the judiciary and ordered a retrial as key facts of the case appeared to have been forgotten.[65] In considering whether delay alone would warrant the removal of a judge it should be noted that Sir Jeremiah Harman had been repeatedly accused of rudeness and bullying prior to the

[57] Chief Justice Clarke writing to Mr Justice Woulfe (5 November 2020) <https://www.rte.ie/documents/news/2020/11/05.11.20-draft-letter-to-mr-justice-woulfe.pdf> accessed 11 November 2020.

[58] Note that levying taxes on judicial pensions was (unsuccessfully) challenged as a breach of the separation of powers per *O'Byrne v Minister for Finance* [1959] IR1 and this might have influenced the decision to expressly exclude financial sanctions as part of the informal resolution process in the Act. In 2011, in the aftermath of the financial crisis, a constitutional amendment was approved by referendum to permit judges' salaries to be reduced proportionately with reductions applied to State employees.

[59] Chief Justice Clarke (n 57) 'you will not be listed to sit as a judge until February 2021 and I strongly suggest in those circumstances that you should make arrangements to either waive or repay your salary for this period (for example by utilising s.483 of the Taxes Consolidation Act, 1997).'

[60] s 78(5) of the Act refers to the panel of inquiry making recommendations to the JCC providing for the issuing of advice to the judge, training courses, or issuing an admonishment to the judge.

[61] For example, the three Indiana judges in *Adams* (n 50) were suspended without pay for 30 or 60 days.

[62] Judicial Council, Guidelines concerning Judicial Conduct and Ethics (n 16) at para 5.5.

[63] Graham Gee, 'Judicial conduct, complaints and discipline in England and Wales: assessing the new approach' in Richard Devlin and Shelia Wildeman (eds) '*Disciplining Judges Contemporary Challenges and Controversies*' (2021 Edward Elgar).

[64] 'Judge resigns after damning report from colleagues' *BBC News* (14 Feburary 1998) <http://news.bbc.co.uk/2/hi/uk_news/56369.stm> accessed 1 January 2021.

[65] 'Peers boot out Sir Jeremiah, the Kicking Judge' *The Herald* (14 February 1998) <https://www.heraldscotland.com/news/12308465.peers-boot-out-sir-jeremiah-the-kicking-judge/> accessed 1 January 2021.

Court of Appeal criticising him for delay.[66] It was reported by newspapers that Harman J was 'dreadfully rude, discourteous, bullying' and had once told a female witness who wanted to be referred to as Ms: 'I've always thought there were only three kinds of women: wives, whores and mistresses.'[67] These two contrasting examples illustrate that serious delay is one factor which could, but does not necessarily, amount to a departure from acknowledged standards of judicial conduct. Cumulative conduct, such as a series of prejudiced remarks and delay in delivering judgments, can be relevant when assessing whether a judge has departed from acknowledged standards of judicial behaviour.

Bullying and sexual harassment would also amount to a departure from acknowledged standards of judicial conduct, although there are practical difficulties in investigating such misconduct.[68] In Australia, 'former High Court judge Dyson Heydon was found by an independent investigation to have sexually harassed young female associates of the court' which sparked calls for an independent judicial complaints body.[69] It is notable that the initial complaint to the Chief Justice and the investigation finding that he had harassed associates occurred after this judge retired, when concerns about the career impact of making complaints were less (although not non-existent, depending on the views of other judges about a lawyer making such a complaint). [70] Given that lawyers may have concerns about the impact on their legal career if they make a sexual harassment complaint,[71] it is to be welcomed that subsection 59(1) of the Act enables the JCC to investigate a judge's conduct 'in the absence of a complaint or where a complaint in respect of a judge is withdrawn' if there is prima facie evidence of judicial misconduct and it is necessary to investigate 'for the purposes of safeguarding the administration of justice.' This procedure could be helpful to promote the equal treatment of all persons before the court, including court staff, litigants, lawyers, and members of the press and public, in line with subsections 7(1)(b) and 43(2) of the Act.[72]

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66 Jason Bennetto, 'Red card for "worst judge in Britain"' *Independent* (Feburary 1998) <https://www.independent.co.uk/news/red-card-for-worst-judge-in-britain-1144543.html > accessed 1 January 2021.

67 ibid.

68 While this may sound obvious, it was only in 2018 that the Code of Conduct for United States Judges was amended to expressly include sexual harassment as cognisable misconduct. This amendment followed the resignation of Judge Kozinski after six women (including former law clerks and interns) made allegations of sexual harassment against the judge. See Zachery Johnson, #Courtstoo: Constitutional Judicial Accountabilty in the #Metoo era (2020) 46 J. Legis. 346.

69 Jacqueline Marley and Kate McClymont, 'Top Legal Women call on Attorney General to establish independence complaints body for judges' *The Sydney Morning Herald* (6 July 2020) < https://www.smh.com.au/politics/federal/top-legal-women-call-on-attorney-general-to-establish-independent-complaints-body-for-judges-20200704-p558yc.html > accessed 15 March 2021.

70 ibid. See also Jacqueline Marley and Kate McClymont, 'High Court inquiry finds former justice Dyson Heydon sexually harassed associates' *The Sydney Morning Herald* (22 June 2020) < https://www.smh.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html > accessed 15 March 2021.

71 For example, a survey of 1,700 female barristers in 2016 in England found that two in every five respondents reported suffering harassment at the Bar, 80% of whom did not report the harassment, generally due to concerns about the impact on their legal careers. Bar Standards Board, 'Women at the Bar' July 2016, 4 <https://www.barstandardsboard.org.uk/uploads/assets/14d46f77-a7cb-4880-8230f7a763649d2c/womenatthebar-fullreport-final120716.pdf> accessed 8 November 2021.

72 Dr Turenne notes that 'there is now an online confidential reporting tool available in England known as TalktoSpot which gives barristers the option to record and report their complaints anonymously' and a whistleblowing policy for judges.
Irish Council for Civil Liberties, Towards Best Practice: A Report On The New Judicial Council In Ireland (2022) page 55 at
<https://www.iccl.ie/wp-content/uploads/2022/02/Towards-Best-Practice-Judicial-Council.pdf> accessed 23 February 2022.

Morally or Politically Reprehensible Behaviour

Of the ten categories of misconduct outlined by Appleby and Le Mire, reprehensible behaviour is perhaps the broadest category and the most likely to give rise to uncertainties as to what constitutes judicial misconduct. Therefore, it is worth considering what is meant by this category. Appleby and Le Mire draw on examples from Australia which include:

i. frequenting a massage parlour that employs sex workers;

ii. texting shirtless photos to a bailiff and responding flippantly to reporters' questions about this behaviour;

iii. publicly criticising political decisions or debating law reforms; and

iv. publicly discussing issues related to a pending or ongoing case.[73]

An example in the UK which could fall within this category occurred when 'district judge Timothy Bowles, immigration judge Warren Grant, and deputy district judge and recorder Peter Bullock' were removed from office for using judicial IT equipment to access pornography in their offices.[74] Lord Chancellor Grayling and Lord Chief Justice Thomas of Cwmgiedd were satisfied that this behaviour was not illegal but was an unacceptable use of judicial IT accounts.[75]

Two recent examples in Ireland which could potentially fall within this category come to mind. First, three women involved in family law proceedings have complained that a now retired District Court Judge asked for their phone numbers during the proceedings.[76] This is clearly inappropriate behaviour due to (i) the large power imbalance between a judge deciding on family law issues and women appearing in the same family law case before that judge; and (ii) the potential for real and/or apparent bias towards one of the parties in the case. Secondly, the attendance of Supreme Court Judge, Mr Justice Séamus Woulfe, at an Oireachtas golfing dinner during the Covid-19 pandemic sparked calls for his resignation.[77] In her report, former Chief Justice Susan Denham concluded that Mr Justice Woulfe breached no law and that 'it was not unreasonable for him to consider that the dinner was Covid-19 compliant' but that he failed to consider the possible appearance of impropriety to the public in attending the dinner during the Covid-19 pandemic. She found that resignation

[73] Appleby and Le Mire (n 9) 13 and 14.
[74] Owen Bowcott, 'Three judges removed and a fourth resigns for viewing pornography at work' *The Guardian* (England, 17 March 2015) <https://www.theguardian.com/law/2015/mar/17/three-judges-removed-and-a-fourth-resigns-for-viewing-pornography-at-work> accessed 1 January 2021.
[75] ibid. Note that the JCIO deletes statements about sanctions leading to a removal from office five years after the officeholder has been removed.
[76] Mick Clifford, 'Two more women make claims about retired Kerry-based judge' *Irish Examiner* (29 September 2021)
<https://www.irishexaminer.com/news/arid-40708823.html> accessed 8 November 2021.
[77] In a report issued on the 29 September 2020, Ms Justice Susan Denham, a retired Chief Justice, concluded that 'it would be open to the Chief Justice to deal with this matter by way of informal resolution.' Susan Denham, Report, 29 September 2020 <https://judicialcouncil.ie/assets/uploads/documents/report-1-10-20.pdf > accessed 22 October 2021.

would be 'unjust and disproportionate'.[78] Yet the controversy did not end with this report. The Denham report and the transcript of Mr Justice Woulfe's interview during this investigation were published by the Judicial Council to create transparency and accountability. However, some of Mr Justice Woulfe's comments in the transcript created further controversy as did the letter published by (as he then was) Chief Justice Frank Clarke stating that, in his personal opinion, Mr Justice Woulfe should resign on the basis that the transcript undermined Mr Justice Woulfe's initial apology for attending the event and contained implied criticisms by Mr Justice Woulfe of both politicians and fellow judges.[79] Cahillane and Kenny query whether 'his reaction to the controversy – rather than just his attendance at the dinner – [could] be considered to constitute misconduct' and if so whether this reaction could be sufficiently stated 'as the Constitution demands'.[80] While cumulative misconduct could be considered when initiating an investigation into judicial misconduct (such as delay and prejudicial remarks discussed above), considering a judge's reaction to an on-going investigation as misconduct risks creating an endless cycle or shifting goalposts as to what is being investigated.

Bringing the Administration of Justice into Disrepute

The definition of judicial misconduct in the Act refers to bringing the administration of justice into disrepute. This element of the definition is clearly entwined with the public perception of the judiciary and court system. A similar approach to defining judicial misconduct can be found in other common law countries. For example, Lord Phillips stated in a report of the UK Privy Council that 'So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function.' [81] Public faith in the courts is generally acknowledged as having intrinsic and instrumental benefits, such as encouraging compliance with court orders, reducing vigilantism, and adding a sense of democratic legitimacy to the courts.

Assuming that 'bringing the administration of justice into dispute' means lowering the public's opinion of and trust in the independence, integrity and legitimacy of the court system, part (b) of the definition in the Act is arguably even more open to interpretation than part (a) of the definition. It is not clear what is meant by 'disrepute', 'public opinion' or how to assess these factors. It is unclear whether the statutory definition requires that the misconduct in question *actually* brings the administration of justice into disrepute or merely has the *potential* to do so. The rise of populism illustrates that we cannot assume the public

[78] ibid. A subsequent criminal prosecution against the alleged organisers of the event was dismissed on 3 February 2022, the court finding that the event was in compliance with the relevant regulations and guidelines <https://www.thejournal.ie/article.php?id=5672124> accessed 4 March 2022.

[79] Chief Justice Clarke writing to Mr Justice Woulfe (5 November 2020) <https://www.rte.ie/documents/news/2020/11/05.11.20-draft-letter-to-mr-justice-woulfe.pdf> accessed 11 November 2020.

[80] Cahillane and Kenny (n 14) 21-22. See also their detailed account of these events on pp 11-20.

[81] Hearing on the report of the Chief Justice of Gibraltar, [2009] UKPC 43, Privy Council No 0016 of 2019 <https://www.jcpc.uk/cases/docs/jcpc-2009-0016-judgment.pdf> accessed 10 November 2021. The allegations against the Chief Justice were complex but involved an alleged obsession with judicial independence which adversely affected his relationship with the government and the Bar and references to his wife's criticisms of members of the Bar Council and various other alleged misjudgements in his public behaviour. By a 4-3 decision the Privy Council concluded he should be removed from office.

have access to verified facts or even that all members the public will always care about facts.[82] Furthermore, the public may have a limited interest in the details of how the courts operate. Graham Gee notes that in England & Wales 'public interest in the [judicial] complaints system is very limited',[83] that public confidence in the judiciary in England & Wales was high even before the Constitutional Reform Act 2005, and 'there is no indication that this [reform and increased transparency] has affected public confidence.'[84] It is not clear on what time scale public opinion should be assessed as the public may change their mind as time goes on and new information becomes available. Finally, public opinion as to whether the administration of justice has been brought into disrepute may be deeply divided and we cannot assume that there will be a consensus.[85]

While decision-makers applying the statutory definition of judicial misconduct may be self-aware of the socio-economic or digital bubbles in which they operate and actively seek to avoid conflating their own views with the views of the majority or giving undue weight to the opinions of the loudest groups, it is still desirable to engage with a greater use of data, surveys and interviews to shed better light on public opinions regarding the administration of justice. For example, a survey by the European Network of Council for the Judiciary (ENCJ) found that (i) lawyers tend to be more critical of the independence of the judiciary than the general public,[86] and (ii) the independence of the judiciary was rated an average of 9/10 by 41 UK lawyers and just over 8/10 by 64 Irish lawyers.[87] Respondents in both countries strongly disagreed that bribery and corruption were common,[88] but more than half of the Irish lawyers reported being very dissatisfied with judicial authorities handling of judicial misconduct.[89] While lawyers represent only a fraction of the stakeholders whom the administration of justice affects, this type of data is a helpful starting point. Also note that lawyers' opinions about the administration of justice may have a wide influence as lawyers guide their clients and may discuss cases with journalists in ways that would not be appropriate if judges were to do so.

Assuming that public confidence in the courts is capable of being measured,[90] surveys of stakeholders and the general public as well as public commentary by the media and politicians

[82] Christopher Hilson, 'Climate Populism, Courts, and Science' (2019) 31 JEL 395, 396; Sanja Bogojević 'The Erosion of the Rule of Law: How Populism Threatens Environmental Protection' (2019) 31 Journal of Environmental Law 389, 392.
[83] Gee (n 63) 152.
[84] ibid.
[85] The controversy surrounding Mr Justice Woulfe's attendance at a golf event and dinner is perhaps the best recent example of public opinion being divided in Ireland. In Australia, Chief Justice Gleeson noted that '[t]here is a problem about treating people outside the court system as a class with a consistent set of opinions about courts.' For example, litigants 'success or failure may colour their views' and many people's 'opinion about the justice system may run no deeper than a reaction of approval or disapproval to some recent decision that has come to their notice.' Murray Gleeson Chief Justice of Australia, 'Public Confidence in the Courts' Address to the National Judicial College of Australia (Canberra, 9 February 2007) p. 1 , 3-4 <https://cdn.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_9feb07.pdf> accessed 9 March 2022.
[86] European Network of Council for the Judiciary, *Independence and Accountability of the Judiciary: ENCJ/CCBE Survey among lawyers on the independence of the judiciary* (2018-2019) 15 < https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Reports/ENCJ%20Survey%20on%20Independence%20Accountability%20of%20the%20Judiciary%20among%20lawyers%20%202019.pdf > accessed 15 March 2021.
[87] ibid.
[88] ibid 19.
[89] ibid 26.
[90] 'We assume that such confidence [in the courts] is as measurable as, say, the approval of a political leader, or the popularity of a celebrity.' Murray Gleeson (n 85).

are useful sources when attempting to assess public opinion. Surveys and questionnaires are often used to measure trust and confidence, such as asking people to rate their agreement with statements on a scale of 1-5.[91] Surveys should define ambiguous terms as clearly as possible and ask respondents about their sources of information and the basis on which they assess their trust in the courts. For example, detailed surveys can ask people to rate their attitudes to public institutions, knowledge of courts, sources of information on courts, court experience, expectations of and views about the performance of courts, their perceptions of procedural fairness and distributive justice, and can collect demographic information.[92] Wallace and Goodman-Delehunty note that researchers investigating trust and confidence in the courts (including views on the courts' competence, benevolence and integrity) could also study participants' behaviours,[93] and use

> indirect methods, such as those typically used in experimental studies, in which participants are blind to the manipulated variables and are randomly assigned to manipulated groups, as a way of teasing out the effects of those variations unconsciously on participants' behaviour and, hence, on their attitudes or beliefs.[94]

As sharing data and approaches to data collection can help researchers use similar approaches to compare trends over time or investigate specific questions that have not yet been researched in depth, it is important to make the research methods and results of such studies or surveys available, for example by publishing research methods and results on relevant websites.

Media coverage and politicians' commentaries are also indicative of public opinion. '[A]bstract perceptions of courts can be very influential in public and political discourse, as criticisms of courts over sentencing demonstrates', particularly for people who have no first-hand experience of the Irish court system.[95] Although '[t]hings that shake confidence are more likely to be newsworthy', the 'readiness with which politicians, the media, and interest groups demand a judicial enquiry as the procedure for investigating controversial and sensitive issues surely reflects the fact that judicial process enjoys a certain reputation for integrity [amongst the public].'[96] In Ireland, the frequent use of tribunals where the Tribunal members are often serving or retired judges, such as the Charleton tribunal,[97] suggests there is a high level of

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[91] Anne Wallace and Jane Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) International Journal for Court Administration, 12(3). They also note that the social sciences can provide guidance on how to promote surveys that are designed to be 'valid and reliable' so that they measure all relevant parts of the concept they are intended to assess.

[92] ibid. See also John Rogers and Diane Godard, Trust and Confidence in the California Courts, Part II Executive summary of Methodology with Survey Instruments. Judicial Council of California, Administrative Office of the Courts, 2006, pp. 5–12 at < https://www.courts.ca.gov/documents/4_37pubtrust2.pdf > accessed 9 March 2022; Council of Europe, European Commission for the Efficiency of Justice, 'Handbook for Conducting Satisfaction Surveys aimed at Court Users in Council of Europe Member States' (7 December 2016) <https://rm.coe.int/168074816f#_Toc462130544> accessed 9 March 2022.

[93] Wallace and Goodman-Delahunty (n 91) note that survey respondent's behaviour may be more accurate than their subjective self-assessments about their beliefs. See also Aurore Grandin, Melusine Boon-Falleur, & Coralie Chevallier, 'The belief-action gap in environmental psychology: How wide? How irrational?' (20 May 2021) PsyArXiv <https://doi.org/10.31234/osf.io/chqug> accessed 9 March 2022.

[94] Wallace and Goodman-Delahunty (n 91).

[95] Ibid. see also Arie Freiberg Bridging Gaps, Not Leaping Chasms: Trust, Confidence and Sentencing Councils. (2021) 12(3) International Journal for Court Administration.

[96] Murray Gleeson (n 84).

[97] Mr Justice Peter Charleton was the first sole member of the Protected Disclosures Tribunal which inquired into allegations of malpractice by An Garda Síochána.

trust in the judiciary (although the use of tribunals have been criticised as being time consuming and costly).[98] While the opinions of politicians and the media are not quantifiable, they can give a general sense of public's attitude at a particular time.

When assessing whether the administration of justice has been brought into disrepute, it may be wise to include both (i) an element to reflect the general zeitgeist and (ii) a test of a reasonable person with access to all relevant facts (akin to the test used for objective bias).[99] This second element could be used to filter out, as far as possible, criticisms based on incorrect or misleading information which is desirable because the removal of a judge must be grounded in facts and evidence and the process should follow fair procedures (as is clear from the *Curtin* case discussed previously). Surveys, interviews, media and politicians' commentary can provide an overall sense of whether public faith in the courts has been diminished by judicial misconduct. Public confidence in the courts could also be assessed and improved by allowing the public to 'provide "real-time" feedback to court staff and judges, enabling early identification of particular issues and timely responses',[100] for example by creating a mobile app where the public could ask logistical questions or report issues.

Ironically, there can be a tension between (i) public confidence in the administration of justice and (ii) greater transparency and publicity during judicial appointment and disciplinary processes. There is no evidence that public confidence in the administration of justice increased in the aftermath of the events discussed in the Denham Report (discussed above) and the publicly published letters between the judges regarding these events.[101] Nor did it inspire public confidence in the United States judiciary when accusations of sexual misconduct were made against two Supreme Court nominees during the judicial appointment processes in 2018 and 1991 respectively.[102] These examples reflect the fact that public faith in the courts may well be lowered when judicial misconduct allegations become public. This is to be expected. The primary purpose of initiating investigations into allegations of judicial misconduct is not to inspire public confidence in the courts but rather to make the system one which the public would be justified in trusting by addressing alleged judicial misconduct and misbehaviour. Achieving a system where justice is blind is more important than blind trust in the justice system.

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[98] Daniel McConnel 'State inquiry costs set to hit €500m by end of this year' *Irish Examiner* (5 March 2019) at <https://www.irishexaminer.com/news/arid-30908731.html> accessed 10 March 2022. See also the changes proposed in Peter Charleton, Ciara Herlihy and Paul Carey, 'Clocha Ceangailte agus Madraí Scaoilte or How Tribunals of Inquiry Ran Away from Us' (2019) 41(2) Dublin University Law Journal.

[99] The Judicial Council Guidelines concerning Judicial Conduct and Ethics (n 16) at 2.6.3 note that objective bias is 'concerned with the perception of partiality in the eyes of a reasonably objective and informed observer.' It could be that in some circumstances 'public confidence is really a theoretical construct; something to which we appeal in order to objectify our reasoning, rather as we appeal to the hypothetical fair-minded lay observer when we apply the principles of law about apprehended judicial bias.' Note also that '[t]here may be a difference between what members of the public actually think about the courts, when they think about them at all, and what a judge believes would or should cause a hypothetical, fair-minded, well-informed observer to be concerned about judicial competence, independence or impartiality'. Murray Gleeson (n 84).

[100] Wallace and Delahunty (n 91).

[101] See for example Chief Justice Clarke writing to Mr Justice Woulfe (n 57).

[102] Senate Committee on the Judiciary, Hearing on the nomination of Brett M. Kavanaugh, to be an Associate Justice of the Supreme Court of the United States (17 September 2018) <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-5 > accessed 10 November 2021; Senate Committee on the Judiciary, Hearing on the nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States (October 1991) *U.S. Government Printing Office* < https://web.archive.org/web/20111107034024/http://www.gpoaccess.gov/congress/senate/judiciary/sh102-1084pt4/41-124.pdf > accessed 10 November 2021.

It is difficult to definitively state what standards need to be met so that the public would be justified in trusting a court system but as a starting point one would expect such a system to have the following features:

i. compliance with the general principles of natural justice such as hearing both sides of a case, providing reasons for one's decision, and impartial adjudication;

ii. independence from the government (including in the judicial appointment process as far as possible);

iii. compliance with the Bangalore principles which have been incorporated into the Act (discussed above);

iv. a reasonably democratic method of making the laws which are enforced by the courts so as to maintain trust in the rule of law;

v. 'the skilful application of the law';[103]

vi. an 'obvious commitment to public service in the activities of every facet of a court'.[104] This involves making the court process accessible, avoiding undue delay, seeking and implementing feedback etc;

vii. an appropriate complaints system and accountability mechanisms to address both allegations of judicial misconduct and general complaints; and

viii. an appropriate complaint system to address complaints of misconduct by lawyers and to maintain the necessary ethical standards of the legal professions.[105]

The commencement of the Act and the ethical and procedural guides published by the JCC are clearly important contributions towards an appropriate complaints system to address judicial misconduct and continuing to earn the trust and confidence of the public in the justice system as a whole.

Conclusion

The definition of judicial misconduct in the Act does not reinvent the wheel. Rather its value lies in adding clarity to this area by articulating standards and principles to which judges are held in Ireland and implicitly aligning these standards with international standards. While arguably judges have already been held to very similar standards in the past, the Act makes these expectations explicit and places them on a statutory footing which provides legal authority and legitimacy to these expectations.

As the question of whether conduct amounts to judicial misconduct is highly context-dependent and will likely have to be assessed on a case by case basis, we must wait to see

[103] Stephen Parker, *Courts and the Public* (Australasian Institute of Judicial Administration 1998) 17, 26–28.
[104] ibid.
[105] As Covington J (dissenting) noted *In Re Coe* 903 S.W. 2d 916 (1995) at 921 'laxity in lawyer conduct [is] one of the very problems the Court is attempting to address in its efforts to improve the public confidence in the profession and in the legal system.'

how the Act will operate in practice over the coming years. In particular, it will be interesting to see how the Registrar (who has a role in extending the time frame for admissible complaints) and the role of non-legally qualified lay people will develop and whether any potential barriers to making *bona fide* complaints can be addressed proactively. It also remains to be seen if the new architecture set out by the Act will prompt a higher volume of complaints and whether the lack of a statutory basis for the imposition of suspensions and/or financial sanctions will come to be seen as an omission of useful remedies. That said, three final points can be drawn from the examples discussed above.

First, retirement and resignation are far more common than the removal of a judge from office following allegations of stated misbehaviour, not only in Ireland but also in England & Wales and Australia. On the one hand, this could be seen as demonstrating a lack of appropriate mechanisms to deal with judges who should have been removed from office or an unscrupulous strategy by the judge in question to retain his or her pension rather than being removed.[106] On the other hand, it could be seen as judges taking responsibility for their own mistakes or placing the public perception of justice above their own career interests. The tendency to resign could also be viewed as the consequence of the absence of less drastic remedies leading to unnecessary resignations.

Secondly, in practice, judicial misconduct requires a threshold of seriousness to be met and/or conduct that is closely related to one's role as a judge. These two factors are not explicitly referred to in the definition of misconduct in the Act, but based on the various examples outlined above, they are likely to be required in practice. As judges are as prone to human error as any human being, conduct off the bench should only be considered as falling within the statutory definition of judicial misconduct if the conduct off the bench is damaging to public confidence in the integrity or independence of the judiciary. Past examples of alleged misconduct are not binding precedent for the JCC but they are relevant for exploring the types of issues and behaviours that the Act seeks to address. The type of sanctions (if any) to be imposed and whether informal or formal proceedings are appropriate will depend on the severity of the alleged misconduct. These examples in Ireland and other common law jurisdictions could be helpful in determining how serious or how connected to one's role as a judge misconduct must be in order to warrant informal resolution or (in extreme cases) a recommendation of removal proceedings. The gravity and severity of misconduct depends on various factors including whether any law was broken, if so whether the nature of the breach indicates a disregard for the law (such as the level of alcohol consumed when a driving under the influence offence occurs), the knowledge and mental state of the judge at the time of the alleged misconduct (such as whether a judge believed that an event complied with Covid-19 guidelines), and whether any mitigating or aggravating factors (such as an explanation for delay or a lack of explanation for rudeness to witnesses) are present.

Finally, as the meaning of 'bringing the administration of justice into disrepute' is somewhat imprecise and public opinion is difficult to measure accurately, two approaches to defining this term could emerge. This part of the definition in the Act will either (i) be treated as an issue to be proven and disputed in future allegations of judicial misconduct or (ii) be side-lined, for example if certain behaviour is presumed to automatically bring the administration of justice into disrepute without further analysis. Either way, more frequent and more detailed surveys and research studies about public attitudes towards, knowledge of and concerns about the courts would be helpful for assessing the basis for and the extent of

[106] Gee (n 63) 144; 'Curtin resigns on grounds of ill health' (n 18).

public confidence in the courts and addressing any concerns the public has proactively. While it is generally agreed that there is a high degree of confidence in the Irish judicial system, public opinion can change rapidly. Even if the public have already placed their faith in the Irish courts, 'eternal vigilance' is required to ensure that our democratic institutions live up to the trust we place in them. The long overdue Judicial Council (and long advocated by the judiciary) will play a significant role in preserving that trust.