# Lessons from Ireland's 2020 judicial conduct controversy

*Abstract: The difficulties in balancing judicial independence and accountability, the importance of formal processes around investigation of judicial conduct, and the need for clarity on the respective roles of the branches of government under the separation of powers were all issues that were highlighted by the recent controversy surrounding the conduct of a Supreme Court Judge in Ireland. This article considers the detail of the controversy, in the context of the Irish system governing judicial discipline and removal, analyses certain problems underlined by the episode, and finally reflects on lessons that may be helpful for any jurisdiction grappling with the complex issues involving judicial discipline and removal.*

*Keywords: Judicial discipline, judicial removal, judicial misconduct, judicial independence, separation of powers, judicial appointment, Irish politics, Irish constitutional law*

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## Introduction

In an already-turbulent year, Ireland experienced an acute constitutional and political crisis in 2020 related to judicial misbehaviour. The Irish regime for judicial misconduct—limited, based on vague, underspecified constitutional rules on removal—had long been thought lacking and subject to severe criticism.[1] In late 2019, a long-awaited statutory regime was finally enacted, and its commencement had begun, setting up a full system of judicial conduct procedures and establishing a judicial code of conduct, which Ireland previously lacked. However, these processes take time, and this work was only getting underway when, in August 2020, major controversy erupted over the conduct of newly-appointed Supreme Court Judge Seamus Woulfe.

Judge Woulfe was appointed to the Supreme Court in July 2020, having served for three years as Attorney General to the previous Fine Gael minority government. Before having heard a single case, he was embroiled in controversy when—during a period where the COVID-19

[1] For example, see Brian Murray, "The removal of Judges" in Eoin Carolan (ed), Judicial Power in Ireland (IPA 2018) 62, Colin Scott, "Regulating judicial conduct effectively" in Eoin Carolan (ed), Judicial Power in Ireland (IPA 2018) 381, Laura Cahillane, "Ireland's System for Disciplining and Removing Judges", (2015) 38 Dublin University Law Journal 55.

pandemic placed limits on social gatherings—he attended a dinner hosted by the Oireachtas (parliament) Golf Society in Clifden, Co. Galway that was at the very least questionable in terms of its compliance with public health rules and guidelines. Attempts to investigate his conduct and hold him to account offer many useful lessons for any common law country that faces the inevitable challenges around removing and disciplining judges. Given the timing of this controversy, just as reform of judicial discipline was about to take place, this recent Irish example serves as a case study of the problems that can arise when reform is delayed and the need for formal processes to deal with them. Counterintuitively, it shows that loose constitutional regulation of judicial removal may make removal more difficult if politicians behave in an overly-conservative manner for fear of treading upon judicial independence. Misunderstandings around the various roles under the separation of powers abound when the roles and duties are not adequately formalised or clarified. Ireland's experience shows the many pitfalls that can beset any attempt to carefully balance judicial independence with judicial accountability.

This article proceeds in three parts. In part I, we offer a brief overview of judicial misconduct in Ireland as it has played out in various major incidents; outline the rules in place at the time of Woulfe controversy governing judicial discipline and removal—constitutional provisions and standing orders—and the ways in which they were lacking; and discuss the 2019 statutory reform that was not yet in force at the time of the Woulfe controversy. In Part II, we outline the facts of the controversy in detail, from the controversial dinner, to the Supreme Court's response, to its problematic aftermath and eventual resolution. In Part III, we discuss the problem of defining "stated misbehaviour", the constitutional standard for judicial removal in Ireland, and the question of who should get to define it, in order to consider if it would have been constitutionally appropriate for Judge Woulfe to have been subject to removal in this case. In conclusion, we offer several major lessons that might be drawn from this controversy for any jurisdiction grappling with the complex issues that underlie judicial discipline and removal.

## I. Judicial Misconduct in Ireland

History of judicial misconduct

Before 2019, Ireland was in the unique position of being the only jurisdiction in the European Union without any formal process for disciplining judges. The only mechanism[2] available was the constitutional provision which states that judges may be removed only for "stated misbehaviour or incapacity" and then only upon joint resolutions by the Houses of the Oireachtas (parliament).[3] However, given that there hadn't been any significant public scandals involving judicial misbehaviour, there was little interest in reform. This changed with the Sheedy Affair in 1999.

Philip Sheedy was an architect who was sentenced to four years in prison for reckless driving causing the death of a woman named Anne Ryan. His release after serving only two years was ordered in circumstances which amounted to improper conduct by a Supreme Court judge, a Circuit Court judge, and a registrar of the Circuit Court.[4] The central issue involved a chance encounter between Supreme Court Judge Hugh O'Flaherty and Sheedy's sister: during the course of an informal conservation, the judge suggested it might be possible to have Sheedy's case re-listed. He inquired about this possibility to the registrar of the Circuit Court, who took it as an order and re-listed the case. The judge assigned should have been the original sentencing judge, Judge Matthews, but instead the case was listed before Judge Kelly, who suspended the remainder of the sentence in a very brief hearing, citing "grave concern" about Sheedy's mental condition but relying on psychological reports which were available to the original sentencing judge.

A media frenzy ensued, and the Minister for Justice requested the Chief Justice carry out an investigation into what had occurred. There was no statutory authority for such an inquiry. Chief Justice Hamilton concluded that the conduct of the judges (and the registrar) had compromised the administration of justice. Discussions began in government about the removal proceedings and the judges resigned.

[2] There were two very limited statutory provisions which only related to judges of the District Courts and simply allowed for investigations of questionable behaviour but not for any sanctions. See s 21 Courts of Justice (District Court) Act, 1946 and ss 10(4) and 36(2) Courts (Supplemental Provisions) Act 1961.

[3] Article 35.4.1, Bunreacht na hÉireann.

[4] See John O"Dowd, "The Sheedy Affair" (2000) 3 Contemporary Issues in Irish Law & Politics 103 for full details.

This incident showed that reform was needed, both to implement a formal process for the investigation of judicial misconduct, and to provide for a system of sanctions other than the nuclear option of removal. In 1999, the All-Party Oireachtas Committee on the Constitution published its fourth progress report which recommended a judicial council be set up, but it said the body should not have the power to impose legal sanctions, which might threaten judicial independence.[5] Around the same time, the Working Group on a Courts Commission published its sixth report,[6] which also recommended a judicial council be established with a 'Committee on judicial conduct and ethics' which would draw up a code of ethics and deal with complaints relating to judicial misconduct as well as judicial studies. A subsequent committee report contained a detailed set of recommendations on the establishment of a disciplinary system for the Irish judiciary.[7]

All of these recommendations culminated in a proposal to amend the Constitution in order to provide for a judicial council on a constitutional basis. In 2001, the Twenty-Second Amendment to the Constitution Bill provided for: the introduction of a body that would be empowered to investigate the behaviour of judges and to give it constitutional protection and amending the removal provision in the Constitution to resemble that of presidential impeachment. However, the Bill was short and its textual proposals vague. There was also controversy over the proposal that a two-thirds majority of each House would be required not just to *remove* a judge but even to suspend or investigate one. Because of these and other objections, the Bill was abandoned.[8]

The issue came to public attention again with another major scandal – the Brian Curtin case. On November 26, 2002, Circuit Court Judge Brian Curtin was charged under s.6 of the Child Trafficking and Pornography Act 1998 with possession of child pornography following a search of his house. His computer had been seized during the search and 273 pornographic images of children were apparently found. He denied the charge and suggested the

[5] *Fourth Progress Report: The Courts and the Judiciary*, The All-Party Oireachtas Committee on the Constitution, (Dublin Stationery Office, 1999). The *Report of the Constitution Review Group* Dublin Stationary Office 1996 had previously recommended the establishment of a judicial council.
[6] *Working Group on a Courts Commission, Sixth Report, Conclusion-Summary, (*Dublin Stationery Office, 1998).
[7] *Report of the Committee on Judicial Conduct and Ethics* (Dublin Stationery Office 2000).
[8] See *Dáil Debates*, vol 551, col 178 (26 March 2002).

incriminating images must have been dumped on his computer using a "Trojan Horse" virus. When the case went to trial in 2004, it was struck out when the judge ruled that the warrant used to search the premises was invalid as the time period had elapsed, and so the evidence from the computer could not be admitted.[9]

Public outcry followed and the Minister for Justice initiated a motion for the removal of Judge Curtin from office. A Joint Oireachtas committee was subsequently established to investigate the alleged misconduct and a resolution for the removal of Judge Curtin was proposed in both Houses of the Oireachtas. Judge Curtin applied for judicial review of the entire proceedings, arguing that the power to call a judge as a witness was an improper and unconstitutional invasion of judicial independence, that the Oireachtas Committee could not lawfully take possession of his computer as it had been seized in breach of his constitutional rights. The case went to the Supreme Court, which upheld the direction to produce the computer, but held that the Committee and Houses of the Oireachtas were required to accord full rights of constitutional justice and fair procedures to the applicant.[10] In November 2006, just as the Committee was swearing in its first witnesses, Judge Curtin resigned on grounds of ill-health[11] and the inquiry did not proceed.[12]

During the years following the *Curtin* case,[13] there were negotiations between the government and the judiciary and terms were drawn up for a judicial council, but there were delays due to disagreement between members of the judiciary and the Office of the Attorney General, which was responsible for drafting it.[14] The scheme for a draft Judicial Council Bill was eventually published in 2010, and while it was generally well received, no further

[9] The People (D.P.P.) v Curtin, Circuit Criminal Court, 23 April 2004, The Irish Times, 24 April 2004
[10] *Curtin v Dáil Éireann* [2006] 2 IR 556.
[11] This caused much controversy because of the fact that he had resigned just after he had reached the five-year mark in his time as a judge, thereby entitling him to a pension of €19,149 per annum and a lump sum of €57,447. Had he resigned before this date, he would not have received pension entitlements until he reached the age of 65.
[12] Reports in the media indicated much outrage at this result. For example, see Ryle Dwyer, "Curtin case is the biggest judicial scandal in history of the State", Irish Examiner (18 November 2006).
[13] There were a number of more minor scandals in this period. See Michael Clifford, "A "Quite Improper" Ruling on the Judiciary" *Irish Examiner* (6 November 2013); Mark Hilliard, "Convicted judge faces being struck off solicitors roll for second time," Irish Times (18 November 2004).
[14] See Carol Coulter, "Minister Backs Setting Up Local Family Court System" *The Irish Times* (28 December 2007); See "Working Group to Develop Judicial Council" *The Irish Times* (17 April 2008).

progress was made for a number of years. Finally, in 2017, a Judicial Council Bill was published, which went even further in terms of sanctions and processes than anything which had been proposed previously, and this became law in July 2019.

The Irish Constitution

The foundation of and limitation on judicial discipline is the Constitution of Ireland, 1937. The Constitution guarantees the separation of the judicial power from politics and preserves judicial independence, and also allows for the only major sanction that is possible against judges: removal for stated misbehaviour or incapacity. This power of removal, often incorrectly termed impeachment,[15] is included Article 35.4:

> "1° 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.
>
> 2° The Taoiseach shall duly notify the President of any such resolutions passed by Dáil Éireann and by Seanad Éireann, and shall send him a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.
>
> 3° Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the judge to whom they relate."

Though the provision refers only to superior court judges, it is extended by law to apply to all other judges.[16] These are quite scant constitutional provisions; unlike the provision for removal of the President, there is no specification of procedures for this process.[17] Removal is by simple majority of those present and voting. There is no detail in terms of how the legislature should investigate, debate, or make determinations on stated misbehaviour or incapacity. There is no provision for the procedures to be followed or what, if any, procedural protections a judge might enjoy in this process.

[15] Impeachment is reserved for the President under Article 12.10; this follows the parliamentary tradition of impeachment being a charge of misbehaviour levelled at a minister or political actors and tried in parliament.
[16] Judges of the District and Circuit courts are said to hold office by the same tenure as superior court judges by s 39 of the Courts of Justice Act 1924 and s 20 of the Courts of Justice (District Court) Act 1946.
[17] See Hogan, Whyte, Kenny and Walsh, *JM Kelly: The Irish Constitution* (5th edn, 2018), para [6.4.55].

Standing Orders

Though for a long time these provisions were not even fleshed out in the Standing Orders of the Houses of the Oireachtas, some detail on the appropriate procedure was eventually introduced. Standing Order 67 of the Standing Orders of Dáil Éireann[18] provides for a motion to remove a judge resulting in a Select Committee investigation. It requires that any such motion "shall state the matters upon which it is contended by the proposer of the said motion that the Judge who is the subject matter of the motion should be removed for stated misbehaviour or that he or she is incapacitated." A motion of this sort can either be rejected by the House, or the House can vote to establish a Select Committee to take evidence these allegations "provided that the Select Committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same." The Standing Orders stress that "The Select Committee shall at all times have due regard to the Constitutional principles of basic fairness of procedures and the requirements of natural and Constitutional justice." It meets in private, unless the Committee accedes to a request from the judge in question to make its proceedings public. The Select Committee, upon completion of its work, furnishes a report to the House, which may then debate removal. There must, in such a debate, be "due observance by each member of the Constitutional principles of fair procedures"; and the judge and his or her lawyers must be heard prior to any vote.[19]

Most problematically, there is no definition—in the Constitution, legislation, or standing orders—of stated misbehaviour or incapacity, and no procedure for the determination of same. The authors of a leading constitutional text call it a "problematic phrase".[20] There is also very little precedent, with a very scant number of motions moved,[21] and none coming to a final vote. We know from the *Curtin* judgment that the Supreme Court is willing to adjudicate on certain matters related to judicial removal. The requirement that charges be clearly stated was stressed by the Court, as was the need for fair procedures in all

[18] 2019. These provisions were added during the Curtin affair, discussed above, and were upheld as constitutional by the Supreme Court in *Curtin v Dáil Éireann* [2006] 2 IR 556.
[19] There are identical provisions for Seanad Éireann, and Select Committees of each House can be joined for this purpose. See Order 54, Standing Orders of Seanad Éireann, 2020.
[20] Hogan, Whyte, Kenny and Walsh, *JM Kelly: The Irish Constitution* (5th edn, 2018), para [6.4.51].
[21] In 1941, a motion of removal was initiated against Judge Edward J. McElligott on grounds of incapacity, but he retired and the motion withdrawn. In 2004, a removal motion was initiated in the Dáil against Judge Curtin, but he also resigned before the motion was brought to a vote.

proceedings. The Court noted that it was "necessary, when interpreting Article 35.4.1°, to consider the implications for each branch of government and for the entire constitutional scheme"[22] and said it would intervene only in the case of clear disregard of the Constitution. The status of any third party report or fact-finding effort (such as was carried out during the Sheedy Affair), given its lack of statutory basis, would be unclear.[23]

The 2019 Act and its non-commencement

The Act provides for the establishment of the Judicial Council comprising all of the judges in Ireland. The functions of the Council include promoting and maintaining high standards of conduct among judges, the effective and efficient use of resources made available to judges, continuing education of judges, respect for and public confidence in the judiciary and the administration of justice.[24] The Act also establishes the Judicial Conduct Committee (JCC), which aims to

> "promote and maintain high standards of conduct among judges, having regards to the principles of judicial conduct requiring judges to uphold and exemplify 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."[25]

The JCC is made up of 13 members; the five court presidents, three judges elected by and from the ordinary judges, and five lay persons appointed by the Government, as recommended by the Public Appointments Service.

The JCC was formally established in July 2020 and its first major task was to prepare guidelines on judicial conduct and ethics. These had to be submitted to the Board of the Judicial Council for approval by 30th June 2021.[26] Presumably in order to allow for this and other preliminary structures to be set up, the sections relating to the hearing of complaints and the process around this were not commenced. Once these sections have been commenced, the JCC will be authorised to consider complaints, to refer them for resolution by informal means or

[22] *Curtin v Dáil Éireann* [2006] 2 IR 556 at [93].
[23] Hogan, Whyte, Kenny and Walsh, *JM Kelly: The Irish Constitution* (5th edn, 2018), para [6.4.55].
[24] Judicial Council Act 2019, Section 7.
[25] Judicial Council Act 2019, Section 43(2)
[26] Judicial Council Act 2019, Section 43(1)(d).

undertake investigations, provide advice and recommendations to judges, and take any action necessary to safeguard the administration of justice.[27] The Act provides that in order to constitute a valid complaint for the purposes of the Act, the judicial misconduct must have occurred after the commencement of this part of the Act and complaints will only be considered in respect of sitting judges.[28]

Judicial misconduct is defined in the Act as:

> "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—
> (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
> (b) brings the administration of justice into disrepute".

This appears to involve a two-step test: first, that the conduct complained of must first constitute a departure from acknowledged standards of behaviour, referencing other sections of the Act which require judges "to uphold and exemplify 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"; and secondly the conduct must have brought the administration of justice into disrepute. The section also encompasses misconduct off the bench. There is no further guidance in the Act on how serious the misconduct must be in order to lead to a recommendation for removal, as opposed to a lesser sanction or indeed when or how to apply lesser sanctions. This will presumably be decided in procedures drawn up by the JCC.

The Act does not reference the constitutional standard of misbehaviour. However, the JCC can also make a referral to the Minister in relation to an Article 35.4.1 removal motion, whether or not the conduct or capacity in question has been the subject of a complaint.[29] If such a referral is made, the Minister will then propose such a motion in either House of the

[27] Judicial Council Act 2019, Section 43(3).
[28] Judicial Council Act 2019, Section 42.
[29] Judicial Council Act 2019, Section 80.

Oireachtas. The language is mandatory; if a referral is made, the Minister must propose a motion.

Judicial codes/training and their absence

Up until very recently in Ireland there has been no formal system of judicial education and training. From an international perspective, this is very unusual.[30] Training is supposedly mandatory since 1996, as per Section 16 of the Court and Court Officers Act 1995, but beyond the provision of bench books, some ad hoc shadowing and funding for judges to attend courses abroad, a formal system never materialised. According to the Association of Judges in Ireland—an informal representative group for judges—due to "extremely limited financial resources… Ireland has been and is accordingly unable to provide the type of continuing training and education that is common in other jurisdictions." This is an area which will now also be reformed as a result of the Judicial Council Act 2019, which established a new Judicial Studies Committee to "facilitate the continuing education and training of judges with regard to their functions."[31]

The absence of any code of conduct or training was a central part of the 2020 Woulfe controversy, with Judge Woulfe noting repeatedly that no such code existed and upon appointment he was furnished with only logistical material about "car parking and office space" rather than any substantive guidance on judicial behaviour.[32] With no clear standards of conduct, Judge Woulfe could reasonably claim that it was unfair to suggest his actions crossed a clearly-defined standard of conduct.

[30] In a survey from 2016, it was noted that in all of the 10 European jurisdictions surveyed, there existed mandatory initial or induction training for all new judicial appointees. This included England and Wales. Diana Richards, "Current models of judicial training: an updated review of initial and continuous training models across Western democratic jurisdictions" (2016) *5 Journal of the International Organization for Judicial Training* 41 at p 43. also a Council of Europe Report on efficiency of justice in European Judicial Systems from 2018, which notes that Ireland is one of only three States that do not provide continuous training. See report at p 99. Available here: https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c_[Accessed 7th April 2021.]

[31] Judicial Council Act 2019, S 17(2)

[32] Non-statutory Review by Ms Justice Susan Denham for the Supreme Court arising out of the attendance of Mr Justice Seamus Woulfe at an event in the west of Ireland on the 19th August 2020, Appendix D: Transcript of interview between Ms Justice Denham and Mr Justice Woulfe (hereinafter the Transcript), pp 55-56: https://judicialcouncil.ie/assets/uploads/documents/Appendix%20D%20Transcript%208th%20September%202020.pdf [Accessed 13 May 2021]**.** See also Report of the review carried out by Ms Justice Susan Denham (hereinafter the Report) at p 6: https://judicialcouncil.ie/assets/uploads/documents/report-1-10-20.pdf [Accessed 13 May 2021].

## II. The Woulfe Controversy

The Golfgate dinner

Seamus Woulfe served as Attorney General for the Fine Gael minority government that had held power from June 2017 until a general election was called in early 2020. When a new coalition government was formed in June 2020, after months of negotiations, he was replaced as Attorney General. On July 15th, it was announced that he would be appointed to the Supreme Court, with the official appointment following a few days later.[33]

Throughout the summer of 2020, most parts of Ireland had enjoyed an easing of COVID-19 lockdown restrictions, which had, since the start of the pandemic in March 2020, severely limited movement and indoor gatherings at events or private dwellings. Over time, greater numbers of people were allowed at such gatherings.[34] On the 18th of August, however, it was announced that new limitations would be introduced once again to set stricter limits on the number of people attending such events for at least several weeks.[35] The proposed restriction would bring the number of people allowed at such an event from 50 down to 6. Though announced on that day, as with many of the State's COVID response regulations, there was a delay of more than a week before regulations were made to give legal effect to these measures.

On the 19th of August, the Oireachtas Golf Society staged an event at the Ballyconneely Golf Club and Station House Hotel in Clifden, Co. Galway. This was soon to be known as "Golfgate". Mr Justice Woulfe, while Attorney General, had attended several events of the Society—composed of golf-enthusiast parliamentarians and other parliamentary staff—at the invitation of the then Leas-Cathaoirleach (Deputy Speaker) of the Seanad (Senate), who was an acquaintance of his. The society had its 50th Anniversary in 2020, and the Clifden event was held to mark this. Mr Justice Woulfe was invited orally, and did not receive a written

[33] See official Government announcement in Iris Oifigiúil: https://irisoifigiuil.ie/currentissues/Ir310720.pdf

[34] See Conor Casey, Oran Doyle, David Kenny and Donna Lyons, "Ireland's Emergency Powers During the Covid-19 Pandemic", (Feb 2021), Report prepared for The Irish Human Rights and Equality Commission by The COVID-19 Law and Human Rights Observatory: https://www.ihrec.ie/app/uploads/2021/02/Irelands-Emergency-Powers-During-the-Covid-19-Pandemic-25022021.pdf [Accessed 13 May 2021].

[35] Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) (No.4) Regulations 2020, SI 326/2020.

invitation (which apparently may have referred to a dinner). After his appointment as a judge, in late July, he raised the issue of his attendance at the golf event with the Chief Justice, stressing it was a social and non-political organisation, and the Chief Justice stated that he did not think it would be a problem for him to attend.[36] No discussion of a dinner took place, as Mr Justice Woulfe said he was not aware of a group dinner being planned.

Mr Justice Woulfe arrived to stay at the Station House on August 18th, having come from his family holiday in Donegal. He did not hear of the government's announcement of new measures that night as he was on holidays and not checking the news.[37] Only when he went to register at the golf club the following afternoon did he learn about the planned dinner in the Station House at 9pm that evening. He believed that gatherings of 50 people were allowed at that juncture, and he was assured that the organisers had worked hard to ensure compliance with guidelines and advice.[38] He played 9 holes of golf (retiring after this due to bad weather) alongside three others and then returned to the Station House.

Mr Justice Woulfe met one of his golfing partners for a drink in the hotel bar at 8.15pm, and was called into dinner some time later. He did not get a sense of a large group in attendance. There were six tables and 45 people in the room in which he was seated. He says he did not understand that there was a retractable partition wall with another group of diners from the society seated on the other side of it, and a gap for staff to pass through between the two rooms.[39] This put the total number of attendees at the dinner at 81 people, substantially more than the previously allowed 50 people, though they were partitioned into smaller groups, arguably within guidelines for such events. The 6-person guideline, though perhaps *intended* to be followed from the time of announcement the day before, did not have legal effect at this point.

[36] Non-statutory Review by Ms Justice Susan Denham for the Supreme Court arising out of the attendance of Mr Justice Seamus Woulfe at an event in the west of Ireland on the 19th August 2020, hereinafter "The Report" at p 6.
[37] The Report at p. 6.
[38] The Report at p.7-8.
[39] The Report at p. 9.

At the end of the meal there were speeches and prizes, during which time some diners from the other room may have passed into the room where Mr Justice Woulfe was dining. His back was to the retractable wall, and he did not notice this if so. After a couple of drinks after dinner, he went to bed and left the hotel the next day.

On August 20th, the Irish Examiner broke the story of the Golf Society dinner and its attendees, including Minister for Agriculture Dara Calleary (though he does not golf), Ireland's EU Commissioner Phil Hogan, and Mr Justice Woulfe.[40] Calleary's resignation as Minister followed swiftly afterward, on the morning of the 21st. He had been involved in the government decision to restrict the number of people at gatherings, and had appeared, the day before the dinner, on national television warning the public to avoid gatherings as "COVID loves to party".[41] The Leas-Cathaoirleach of Seanad Éireann, Jerry Buttimer, resigned from that office, and several other parliamentarians in attendance lost the party whip. Hogan, following a series of subsequent revelations about his movements breaching guidelines, resigned on August 26th. The Golf Society was disbanded, bringing its 50-year history to an ignominious end.

The Chief Justice and Mr Justice Woulfe spoke by phone twice on the 21st of August.[42] Shortly after the first phone call between them, Mr Justice Woulfe issued a statement. This included the key points of his account that he would later repeat in the course of the review: he did not know in advance that there was to be an organised dinner; only learned of it in the course of the day; and understood the organisers and hotel were satisfied it would be within public health guidelines:

> "I attended based on that understanding, that it would be within the guidelines, but do apologise for any unintentional breach of any of the new guidelines on my part. I would never disregard governmental or health authorities advice regarding public

[40] Aoife Moore and Paul Hosford, "'I should not have attended the event': Minister apologises for attendance at golf event in breach of health guidelines", Irish Examiner (20 August 2020).
[41] Paul Hosford, "'Covid loves to party': The inevitable end of the line for Dara Calleary", Irish Examiner (22 Aug 2020).
[42] Letter from Chief Justice Frank Clarke to Mr Justice Woulfe, 5 November 2020: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].

> health…. That I ended up in a situation where breaches may have occurred, is of great regret to me, and for which I am sorry. I unreservedly apologise."

This statement, while containing an apology, was highly qualified in strongly denying anything approaching culpable wrongdoing, stressing that Judge Woulfe "ended up in" the situation where "breaches may have occurred". It is clear the Chief Justice did not consider this response to be appropriate. In their later correspondence, the Chief Justice referred to this as a "limited apology".[43] In a second phone call that day, the Chief Justice stressed that he had "considerable concern that damage was being caused to the judiciary and that the public view was being formed by reasonable people and not by a media frenzy."[44]

The Supreme Court response and the Denham Review

Since, as noted above, there was no Judicial Council procedure in place, and no disciplinary procedure otherwise provided for in law, the sole formal procedure to sanction Judge Woulfe was removal under the Constitution, which is entirely within the bailiwick of the legislature. It became clear very quickly, however, that the political branches wished to distance themselves from this and hand the issue over to the judiciary, with the Taoiseach suggesting the matter was for the judiciary to sort out.[45] However, unlike the Sheedy Affair for example, the executive did not officially request that the judiciary undertake an investigation. Absent this—where the investigation would be done under the aegis of the executive's power to order inquiries—the judiciary did not have any obvious power to order an investigation of this sort, or to resolve the matter in any formal way.

On August 25th, the Supreme Court—acting as one body—wrote to retired former Chief Justice Susan Denham to ask her to "to consider certain questions" on Judge Woulfe's attendance at the event. She was "requested" to report to the Chief Justice on the following matters:

[43] Letter from Chief Justice Frank Clarke to Mr Justice Woulfe, 5 November 2020, (letter 1), available here: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].

[44] Letter from Chief Justice Frank Clarke to Mr Justice Woulfe, 5 November 2020, (letter 1), available here: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].

[45] Christina Finn, "'Judicial arm of government will have to deal with this': Martin says he can't call for Supreme Court judge's dismissal", The Journal.ie (24 August 2020).

- Should Judge Woulfe have accepted the invitation to the event?
- Should he have left hotel in light of the prevailing situation when he found out about the nature of the event?
- Should he have attended the golf event without attending the dinner?
- Are any relevant codes of or guidelines? She was also asked to make any recommendations she might have about this.

The Court's statement on the matter concluded: "This non-statutory approach has been necessitated because of the fact that the relevant sections of the Judicial Council Act, 2019 have not yet been commenced."

It was pointed out that Judge Denham had no formal process to follow, given the lack of statutory or other basis for the report.[46] The legal status of the report was also unclear, given its "non-statutory" basis and the unclear authority of the Supreme Court to order such a report. Judge Denham stressed that it would not be a fact-finding report, but an expression of an opinion. [47] She also stressed that appropriate fair procedures would be followed.[48] She described it as a "review".

Judge Denham would meet with Judge Woulfe and hear his account of events, and gather other relevant evidence. On September 4th, it was reported that Judge Woulfe had retained counsel for this process, which strongly suggested that he was taking an adversarial and legalistic approach to the review;[49] Irish political life, including the Attorney General's Office which he held, is often characterised by a culture of legalism.[50] On September 8th, Judge Denham met with Judge Woulfe and his counsel. The transcript of this meeting was published

[46] The Report at p 1.
[47] The Transcript at p 4.
[48] The Transcript at p 4.
[49] Simon Carswell, "Séamus Woulfe is believed to be 'preparing for a fight amid golf dinner inquiry", Irish Times (4 September 2020).
[50] See Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) (17) 2 European Constitutional Law Review 202; David Kenny and Conor Casey, David Kenny and Conor Casey, 'A One Person Supreme Court? The Attorney General, constitutional advice to government and the case for transparency' (2020) 42(1) Dublin University Law Journal 90.

later.[51] It showed Judge Woulfe to be extremely dissatisfied with the treatment of the event in many quarters, reserving particular criticism for the media: "I'm appalled at the kind of media treatment of the society event and the way it's presented, in some ways it's like a Ku Klux Klan now".[52] His initial reaction was that "this is the greatest load of rubbish ever", and was "dumbfounded" to hear of the Minister's resignation.[53] In a comment revealing of the highly legalistic view he took, Judge Woulfe spoke of the "vilification" he had suffered in the media and the "complete lack of fair procedures by the media and numerous politicians", constituting an "unjust attack on [his] good name".[54] The media reaction was "completely fake, overblown", and repeatedly referred to "lies" in the media.[55] He said that he was "a bit hesitant" about apologising as he "wasn't sure what [he] was apologising for".[56] He said, however, that it was "sincerely meant at the time".[57] Judge Woulfe also expressed concern that his Supreme Court colleagues had prejudged him.[58]

On September 29th, the Denham report was received by the Chief Justice and on October 1st, the report was published. Judge Denham concluded there was no breach of law committed by Judge Woulfe; that he had relied in good faith on the assurances of the organisers that the event would comply with all guidance; and that there was no breach of the separation of powers in attending an event of this sort. However, she said that Mr. Justice Woulfe

> "failed to consider in advance of his attending the dinner whether his attendance, as a Supreme Court Judge, at a celebratory dinner in a hotel, in a public place, in the middle of a pandemic, might be an impropriety, or might create the appearance of an impropriety, to reasonable members of the Public."[59]

[51] The transcript of a second meeting, on September 25th, was not published as "it relates to legal argument and submissions on a draft report": https://judicialcouncil.ie/news/statement-and-report-arising-from-review-by-ms-justice-denham/ [Accessed 13 May 2021].
[52] The Transcript at p 47.
[53] The Transcript at p 112.
[54] The Transcript at p 110.
[55] The Transcript at p 119, 129.
[56] The Transcript at p 118.
[57] The Transcript at p 119.
[58] The Transcript at p 130-131.
[59] The Transcript at p Report at p 26-27

She concluded it would have been better if he had not attended the dinner, but that it would be "unjust and disproportionate" to call for him to resign.[60] She suggested that the matter should be dealt with by "informal resolution" by the Chief Justice. At this juncture, it seemed likely that the matter would die down. An editorial in the Irish Times suggested that matter was near conclusion.[61]

Aftermath of the Denham Review

The next day, October 2nd, two things happened. First, Judge Woulfe met with three senior judicial colleagues to discuss the resolution of the matter. They spoke for the Court, and, according to the Chief Justice, were motivated by "a concern that [Judge Woulfe] did not appreciate the seriousness of the matter".[62] Judge Woulfe was extremely unhappy with this meeting; he framed their suggested resolutions as non-negotiable "demands" of the Court, to impose "serious consequences" and ensure Judge Woulfe couldn't emerge "unscathed" from the matter.[63] According the Chief Justice, Judge Woulfe accused his colleagues of "inappropriate behaviour" at this meeting.[64] The judge leading the meeting did appear to make it clear, however, that he thought Judge Woulfe should not resign.

Secondly, on that day the appendices of the Denham report, including the transcript, were published by the Judicial Council, with Judge Woulfe's consent.[65] The reaction to the transcripts was negative, with a general concern that Judge Woulfe had regarded his conduct as without fault because it was legal, and that his comments about the media and public

[60] The Transcript at p 28.
[61] "The Irish Times view on Seámus Woulfe: a question of judgment", Irish Times (1 October 2020).
[62] Letter from Chief Justice Frank Clarke to Mr Justice Woulfe, 9 November 2020, (letter 3) available here: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].
[63] Letter from Mr Justice Woulfe responding to Chief Justice Clarke, 9 November 2020, (letter 2), available here: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].
[64] Letter from Chief Justice Frank Clarke to Mr Justice Woulfe, 5 November 2020, (letter 1), available here: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].
[65] Letter from Chief Justice Frank Clarke to Mr Justice Woulfe, 9 November 2020, (letter 3), available here: <https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/> [Accessed 13 May 2021].

reaction lacked temperance. A few days after the release of transcripts, newspaper editorials called for his resignation, as did certain politicians.[66]

At this point, the Chief Justice sought to meet Judge Woulfe on October 5th. This was delayed on several occasions due to the ill health of Judge Woulfe, and ultimately took place on November 5th. At this point, the Chief Justice also entered into correspondence with Judge Woulfe, which was later—over Judge Woulfe's objections—published. They disagreed strongly on several major points. The Chief Justice made it clear that the Golfgate dinner was a very serious incident, even if it may have technically complied with the regulations in force:

> "a judge should not attend any event which is organised in breach of the law or where there may be a reasonable public perception that this is so. To do so brings the law into disrepute and is therefore a serious breach of judicial ethics. Whether or not the organisation of this particular event involved a breach of the regulations, its legality depended on an argument as to the arrangements within the hotel. Assuming it to have been lawful, it did not comply with the objective of the regulations, which was to prevent large numbers of people from mingling together at social events. It is inappropriate for a judge to attend such an event. To do so adds to a public health hazard and to a perception that legal technicalities outweigh public health."[67]

He noted it was even more problematic in light of the August 18th announcement, even if this did not have immediate force of law; "A failure by a judge to observe these principles can lead to serious damage to public trust in, and respect for, the judiciary… I am required, therefore, to reprimand you in respect of your conduct." Though noting he had no formal powers of discipline, he informed Judge Woulfe that he would not list him to sit on any cases until February 2021 and recommended that he waive his salary for the relevant period.[68]

The Chief Justice added that a further issue had arisen due, not to the dinner in Clifden but, "[t]he manner in which you have met this problem", which had "added very substantially to the damage caused to the Court, the judiciary generally and thus to the administration of justice". He criticised Judge Woulfe's "concentration on narrow and technical issues rather than recognising the serious public concern and the consequent damage to the Court", which

[66] "Time for Mr Séamus Woulfe to show judgment by stepping down", Sunday Times (4 October 2020).

[67] Letter 1, (n 63).

[68] Letters 2 and 3 (n 62, 61).

is evidenced both by their written contact and the transcript of the Denham interview. It was clear he "did not appreciate the genuine public concern" and this undermined the value of any further apology. He also noted that Judge Woulfe had criticised the government in the Denham interview, and claimed his colleagues on the Court had prejudged him, and that in subsequent correspondence with the Chief Justice had "suggested inappropriate behaviour" on the part of judicial colleagues that had come to see him. He concluded with an unprecedented statement about Judge Woulfe's position:

> "It is my view, and the unanimous view of all of the members of the Court (including the ex-officio members), that the cumulative effect of all of these matters has been to cause a very significant and irreparable damage both to the Court and to the relationship within the Court which is essential to the proper functioning of a collegiate court.
> "It is not part of my role to ask, let alone tell, you to resign. Resignation is and can only be for the judge him or herself. Regrettably, however, I believe that I should make clear my personal opinion that, to avoid continuing serious damage to the judiciary, you should resign."

Judge Woulfe's response to this letter seemed to affirm his narrow view of the events in Clifden, asserting the event did not contradict the spirit of the regulations, and that his lack of awareness of the announcement by government the previous evening absolved him of any wrongdoing.[69] He said he "was not being narrow, technical or legalistic" but stating matters of fact. He also disagreed with the suggestion that the Denham report encouraged or recommended a censure of his conduct when it suggested an "informal resolution".

He rejected any suggestion that it would best for him to resign, and characterised the Chief Justice's expression of his personal view as pressuring him to resign, and suggested it was a bad precedent from the viewpoint of judicial independence. The Chief Justice, in his response, rejected this characterisation:

> "The principle of judicial independence is to guarantee the independence of judges in carrying out their functions in deciding cases. Questions sometimes arise, however, about the conduct of judges and the question may arise whether a judge should consider resigning because of the damage being done to the Judiciary generally, and the administration of justice. It is an unrealistic view of the principle of judicial

[69] Letter 2 (n 62).

> independence to contend that the President of the relevant court is not entitled to have an opinion on the matter, and may not express it to the individual judge."[70]

On November 9th, this correspondence was published. The revelation of the Chief Justice's personal view of the issue led to a great deal of discussion about the possibility of removal and whether Judge Woulfe's conduct met the constitutional standard of "stated misbehaviour". After discussion with all parties, the government, on November 17th, announced their intention not to pursue any such proceedings. Opposition TD (MP) Paul Murphy announced an intention to bring forward a removal motion, but the government said it would oppose such an opposition motion, and major opposition party Sinn Féin were disinclined to support this course.[71] Ultimately, it did not proceed. Judge Woulfe commenced his judicial duties in February 2021.

### III. Stated misbehaviour, and its arbiter

As noted above, a major uncertainty surrounding the constitutional removal process is the standard for stated misbehaviour (or indeed incapacity, though that is not relevant to our discussion here). The authors of *Kelly* note that is unclear if the idea of misbehaviour refers only to criminal misconduct, or could include deviation from accepted (but perhaps unwritten) standards of judicial conduct. It is also unclear how serious the misconduct must be; if the stated misbehaviour can precede the judicial appointment; and, crucially, whether the constitutional idea of misconduct simply means any conduct *deemed* to be misconduct by a majority of the Houses of the Oireachtas, or does the Constitution "connote an objective standard of misbehaviour so that [removal on the basis of conduct] which, objectively speaking, did not warrant the removal of the judge could be reviewed by the High Court?"[72]

There is certainly a case to say that the courts might intervene. We know from the *Curtin* case that certain matters related to the impeachment process are subject to judicial review, and that the judiciary consider the constitutional procedure to have necessary limits to protect

[70] Letter 3 (n 61).
[71] Aoife Moore, "Taoiseach: Government to oppose any move against Woulfe", Irish Examiner, (23 November 2020).
[72] Hogan, Whyte, Kenny and Walsh, JM Kelly: The Irish Constitution (5th edn, 2018), para [6.4.51].

judicial independence.[73] Leaving the Oireachtas entirely at large to determine the nature of misconduct might not provide sufficient protection to such independence, and so the courts might be inclined to place some limit on this to prevent abuse. However, removal of a judge is inevitably a political function—it is the only direct check on the judiciary and the judicial power—and so it is important that the Oireachtas' view on the matter be given a great deal of weight. It might be most likely that the courts, if asked, might reserve some residual power to review the standard of misbehaviour in certain extreme cases, but make it clear that the Oireachtas had a very largely leeway to determine this in the first instance.

In our view, it is for the Oireachtas to determine what the constitutional standard is—this being the only real check on the judiciary—and the courts should not intervene save, perhaps, to review if the determination is made in bad faith or with reckless disregard for the independence of the judiciary. However, this is our own view only, and this point must be determined by the courts should the appropriate case present itself.

There were two major issues in respect of the potential removal of Judge Woulfe in the circumstances discussed above: was his conduct in attending the dinner serious enough to meet this constitutional standard? And could not broader considerations such as his reaction to the controversy—rather than just his attendance at the dinner—be considered to constitute misconduct? We will discuss these in turn.

In terms of attendance at the dinner, there are several reasons why this might not amount to constitutional misbehaviour. The standards used to assess judicial misbehaviour in other jurisdictions generally rely on yardsticks such as whether the behaviour has damaged confidence in the administration of justice or whether the conduct was 'unbecoming a judge'. Misbehaviour occurring on the bench is also often treated more strictly than misbehaviour occurring in a judge's private life, unless the latter has had serious consequences.[74] In the

[73] *Curtin v Dáil Éireann* [2006] 2 IR 556.

[74] See generally, Mary Volcansek, Elisabetta de Franciscis, Jacqueline Lucienne Lafon, Judicial Misconduct; a Cross-National Comparison, (University Press Florida, 1996), Shimon Shetreet & Sophie Turenne, Judges on Trial; the independence and accountability of the English judiciary, (2nd edn) (Cambridge University Press, 2013), Gabrielle Appleby, & Suzanne Mire, "Judicial conduct: Crafting a system that enhances institutional integrity", (2014) 38 Melbourne University Law Review 1-67.

context of Judge Woulfe, first, the conduct did not relate to any judicial conduct, anything undertaken in the course of Judge Woulfe's judicial role. Secondly, on Judge Denham's account, Judge Woulfe was not aware of the breaking of any rules in respect of the dinner. If rules were broken, the offences were committed by those organising—not those attending—the event. There is no way in which it can be said that *he* broke the law.

Thirdly, it might be thought that a judge should not attend an event held by an Oireachtas group, but the Golf Society was a social group, so the concern here is minor. Moreover, Judge Woulfe had raised this question with the Chief Justice, who took no issue with it in principle, suggesting that appropriate steps were taken by the Judge to avoid any impropriety. The conclusions of the Denham report also support this conclusion. As such, it is hard to conclude that Judge Woulfe's attendance at the dinner, without more, could constitute stated misbehaviour for the purposes of removal. The Oireachtas therefore was correct, in our view, in not seeking to remove Judge Woulfe on this ground.

The second problem is much more complicated. On the one hand, Judge Woulfe's actions in responding to this incident—his failure to believe he had done anything wrong; his intemperate remarks in the transcript; his comments about politicians and, apparently, about his colleagues—caused him to lose the trust and faith of his colleagues and damage the reputation of the Supreme Court and the courts system overall. If the constitutional standard relates to one's ability to continue to carry on the functions of a judge with credibility, or to whether one's actions have damaged the public confidence in the administration of justice, then there is a good case that Judge Woulfe's conduct cumulatively constituted misbehaviour that rose to the constitutional standard. At the same time, this "misbehaviour" is diffuse: it would be hard to "state" it, as the Constitution demands. When stated, it would amount to allegations that he had intemperately spoken in an interview with Judge Denham and to his colleagues. It is less "misbehaviour" as evidencing a lack of character and judicial temperament. This is a serious failing—it may be just as serious as "misbehaviour" from the point of view of the administration of justice—but the Irish Constitution does not allow for removal for displays of inappropriate temperament unless it constitutes or leads to misbehaviour. Perhaps a code of conduct could help to make it clearer when this would be, but even then, it would be challenging to draw this line. Such instances of misbehaviour might

be more appropriately dealt with by issuing appropriate sanctions, something which will not be possible in Ireland until the Judicial Council Act 2019 is fully operational.

This is a borderline case, in our view: it is not clearly outside the constitutional standard, and if the Oireachtas determined in good faith that these actions, collectively, constituted stated misbehaviour, this might be within the constitutional standard. We think the Oireachtas *could* have found that misbehaviour had taken place. However, this would have certainly been at the very outer bounds of the constitutional standard, and would have characterised the constitutional standard in a broad way for any future cases of removal. Though it may have been a constitutionally acceptable action, it was also perhaps an action best avoided.

**Conclusion: Lessons from the crisis and the cost of unpreparedness**

Ireland's experience of the Woulfe controversy holds several general lessons in respect of judicial misconduct and removal that are relevant beyond the Irish context. Some of these are quite obvious, and Ireland's failure in respect of them represents a serious lapse. Others are more subtle and deeper, raising more fundamental questions about the role of politicians and other judges in the removal process, and deserve broader consideration.

Ireland's experience shows how essential it is to have a judicial code of conduct with clear prescribed rules and some very strong guidance on appropriate and inappropriate conduct. Obviously, such a code will not be exhaustive: judicial behaviour must be appropriate in a broader sense than can be captured by precise codified rules, and at some point codes of conduct need to resort to indeterminate standards. But even these vaguer edicts are important, because they give some guidance and advance notice to judges as to what is expected of them. Ireland's need for such a code has been apparent for a long time, and its delay in creating one is an inexcusable lapse which, ironically, was being rectified when this incident took place. The first and most obvious lesson of this Irish experience is that a code of judicial conduct is indispensable.

The second lesson of the Woulfe controversy is similar: it is essential that there is a clear and robust process around judicial misconduct, complaints, investigation, sanctions, and removal. There was no process through which Judge Woulfe could be officially and formally

investigated with respect to his alleged misconduct. There was no way for formal findings of fact to be made. The constitutional removal process is scant, supplemented by a fairly skeletal set of standing orders. This made every step in the process challenging. An investigative procedure of questionable standing was convened, unable to make formal findings of fact, with no clear way for its recommendations to lead to any direct sanctions or a removal process, and deeply unclear standing if such a process had begun after it. Indeed, this process itself could have been challenged by Judge Woulfe by way of judicial review had the outcome of the review included a recommendation for resignation or removal. This would have led to a constitutional conundrum involving the High Court adjudicating on the actions of the Supreme Court in ordering the informal review and even, perhaps, the Supreme Court pronouncing on its own actions on appeal. There were perhaps better ways that this could have been handled— for example, a formal executive request for an investigation by the judiciary—and the new statutory framework will certainly offer marked improvements. But the Woulfe controversy offers an important lesson about how difficult it is to improvise these processes where they are lacking.

The third lesson from the Irish experience is that the position politicians take in respect of removal can be problematic, but not only for the reason usually feared. Far from overstepping the mark and threatening judicial independence, Irish politicians side-lined themselves almost entirely. Judge Woulfe's actions could not be discussed in parliament for fear of violating the separation of powers.[75] But politicians surely have to discuss the conduct of judges before starting a removal process in order to determine whether to take that drastic step. Why would the separation of powers preclude this? Irish politicians are respectful of the separation of powers to the point that they ignore a crucial part of it: the ability of the legislature to remove judges being the only core constitutional check on sitting judges. This is clearly a well-motivated instinct, but a misguided one when taken to the extreme that the only

[75] This reflects a broader conservatism on politicians discussing the judiciary. The Salient Rulings of the Chair—the set of speaker's rulings that that serve as precedents of a sort to the interpretation of the Standing Orders and supplement the standing orders—include rulings restricting the ability of the House to comment on or even *refer to* judicial rulings in the House, or mention any conduct of a judge. Judges should not even be commended lest this cause another to offer criticism. See Rulings 457-464.

constitutional accountability mechanism is diminished and rendered hard to use. Again, it might be part of a political culture that is generally highly legalistic.[76]

This brings us to a fourth problem: the definition of misbehaviour, and how to deal with compound misbehaviour and behaviour showing inappropriate temperament or character. Focusing on discrete instances of misbehaviour will make it hard to capture the more diffuse and murkier situations thrown up by the Woulfe controversy. There may be good reason why we cannot have rules that include such broader or cumulative misconduct—it might be impossible to draw them precisely and thus undermine judicial independence—but it should be carefully considered lest a swath of problematic judicial behaviour lie entirely outside disciplinary systems.

A further problem relates to the constitutional standard itself, which is too ambiguous in Ireland's constitutional text, and more detail is needed. Initially, detail would seem necessary to avoid political abuse of a vague power, but again Ireland serves to teach the opposite lesson: vague provisions can also stop well-motivated political actors from taking disciplinary action which is a core part of the separation of powers. Paradoxically, greater constitutional regulation of this process would make it more, not less, usable in practice. As noted above, judicial misconduct is defined in the Judicial Council Act but this does not necessarily impact on the constitutional definition. The Judicial Council, however, can also determine that a removal motion should be initiated against a judge in the Oireachtas, and so in essence, decide whether the behaviour *prima facie* reaches the constitutional standard. There is no guidance in the Act on this issue. Given the marked reluctance of the Oireachtas to engage with this issue in the Woulfe context, it may be necessary to provide for some guidance for the future as to when the constitutional standard is engaged.[77]

After the Sheedy Affair, an amendment to the Irish Constitution was proposed to elaborate on this scant constitutional regime.[78] This focussed mostly on procedure, and did not define

[76] See Casey and Daly (n 50).
[77] See Brian Murray, "The removal of Judges" in Eoin Carolan (ed), Judicial Power in Ireland (IPA 2018) 62 and also see Laura Cahillane, "Ireland's System for Disciplining and Removing Judges", (2015) 38 Dublin University Law Journal 55.
[78] Twenty-second Amendment of the Constitution Bill, 2001.

misbehaviour, but a more comprehensive version including guidance as to the process and as to the definition of the constitutional standard might be worth re-consideration. The Woulfe affair should perhaps encourage Ireland to take such a step to make its constitutional regime more explicit, and serve as a lesson to others to not leave such matters underspecified. A comparison between the judicial removal provision in Article 35.4.1 of the Irish Constitution and the more detailed presidential impeachment process, included in Article 12.10, makes for a stark dichotomy.

A fifth issue, linked to that of misbehaviour relating to character or temperament, is the poor state of Ireland's judicial appointments process. The problems with this process have been outlined elsewhere and are too numerous to engage with here,[79] but the present Judicial Appointments Advisory Board does not currently assess candidates in any meaningful way. They filter out any unqualified applicants and generally send all qualified candidates to the government as potential appointees. They do not interview or assess in any formal way the character, temperament or suitability of judicial candidates. Given the obvious difficulties in removing a judge displaying unsuitable character or temperament as outlined above, it would be much more effective to deal with this issue in the appointments process.[80]

A sixth point is that relying on the judiciary to play a core role in judicial discipline is challenging. In one way, it respects the separation of powers and judicial independence to have judges play this role. However, the Woulfe controversy shows that involving judges in this process, particularly in collegiate courts, will result in situations where colleagues must formally and informally comment on each other's conduct and suggest actions or sanctions that may displease their colleagues. These judges may then be expected to work side by side to administer justice. There is an extent to which this problem is irreducible—lack of judicial involvement would present its own difficulties that would potentially be even greater—but

[79] See for example, Dermot Feenan, "Judicial Appointments in Ireland in Comparative Perspective", (2008) Irish Judicial Studies Journal, 37; Laura Cahillane, "Judicial appointments in Ireland: the potential for reform", in Laura Cahillane, James Gallen & Tom Hickey, *Judges, Politics and the Irish Constitution* (MUP 2017; David Kenny, "Merit, diversity and interpretative communities: the (non-party) politics of judicial appointments and constitutional adjudication" in Laura Cahillane, James Gallen & Tom Hickey, *Judges, Politics and the Irish Constitution* (MUP 2017).

[80] See further Laura Cahillane, Tom Hickey and David Kenny, "Submission to Joint Oireachtas Committee on Justice on Heads of Judicial Appointments Commission Bill" (2021).

the Woulfe affair shows this risk is not nugatory and deserves careful consideration in respect of systems around judicial misconduct. Another facet of this problem is that judges may have to sit in judgment on the meaning of standards of misbehaviour, and whether particular conduct constitutes it, when they have already in some form made some comment or conclusion on it as part of a formal or informal process. Constitutional or statutory standards of misconduct being more precise could reduce, though not eliminate, the need for judicial interpretation.

Perhaps the most unfortunate lesson of Ireland's experience is that change should come as soon as its necessity becomes apparent. Since reform is difficult, it usually takes some time to introduce. We are almost always fighting the last war. Ireland had finally begun to address problems first highlighted long before when its greatest challenge struck. The difficulties of balancing independence and accountability of the judiciary are great—and may never fully be overcome—but preparedness in our systems and procedures is essential if we are to have any chance to succeed.