

# LAW SOCIETY SUBMISSION

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## **Statutory Declarations and Statements of Truth in Conveyancing**

Department of Justice

7 January 2022

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#### ABOUT THE LAW SOCIETY OF IRELAND

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

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

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

# Contents

- 1. Context/Introduction.....4
- 2. Statutory declarations in conveyancing transactions.....4
- 3. Affidavits in registration of title .....5
- 4. Statements of truth.....5
- 5. Submission.....6
- 6. Contact .....8

## 1. INTRODUCTION

- 1.1 Since March 2020, periods of lockdown and restrictions on travel, imposed by Government to prevent or delay the spread of COVID-19, have caused considerable difficulties for completion of conveyancing transactions and dealings with the Land Registry. The legal sector responded with creative solutions, including utilising video-conferencing and electronic signature platforms, to enable essential legal transactions to proceed.
- 1.2 The necessity to develop technological solutions to facilitate transactions during remote working has provided an impetus for digitisation of legal processes, and accelerated the move towards the Government's long-standing objective of eConveyancing.
- 1.3 One of the stumbling blocks to eConveyancing, highlighted during the lockdowns and periods of restrictions, is the requirement for statutory declarations to be signed in the physical presence of an independent solicitor or commissioner for oaths.
- 1.4 Legislation has been enacted to enable the use of technology to facilitate businesses, legal transactions and proceedings during the period of COVID-19 restrictions and beyond.
- 1.5 The legal profession welcomed the introduction of a statutory framework for statements of truth (which may be made in electronic form), as an alternative to affidavits and statutory declarations, in civil proceedings. Under the current legislation, statements of truth are not available for use in conveyancing transactions.
- 1.6 The State is already taking steps in other areas to modernise and digitise its processes. An example of this is where the Revenue affidavit has been replaced by an online [Statement of Affairs SA.2](#) for probate returns.
- 1.7 This submission outlines the case for enabling statements of truth to be used, as an alternative to statutory declarations and affidavits, in conveyancing transactions.

## 2. STATUTORY DECLARATIONS IN CONVEYANCING TRANSACTIONS

- 2.1 The conveyancing process in Ireland requires confirmation of various matters of fact, by way of statutory declarations made pursuant to the Statutory Declarations Act 1938 (as amended) (the "**1938 Act**"). The 1938 Act has not been amended so as to have any application to conveyancing transactions and clearly it requires amendment so as to be more suitable for dealings in a digital age.
- 2.2 Statutory declarations are used in relation to both registered and unregistered title and include section 72 declarations (regarding any burdens affecting registered title without registration), family law declarations and declarations on issues such as non-payment of ground rent, exemption from certain taxes and charges affecting property, adverse possession, easements etc. Statutory declarations are vital in conveyancing transactions and are used where statements are required as to facts that are both significant and material to the decision of the recipient to proceed with the transaction. They are required for the completion of the great

majority of conveyancing transactions and they are retained with the title deeds and documents and also relied upon by subsequent purchasers, lenders, lessees and others taking an interest in the property (each of such parties or the recipient, hereafter referred to as “**Beneficiary**”).

- 2.3 Under the 1938 Act, any person who knowingly makes a false statutory declaration shall be guilty of an offence and shall be liable on conviction for a penalty of a fine, a custodial sentence or both. The risk of the declarant committing an offence, together with the solemn nature of making a declaration before an independent solicitor or commissioner for oaths, ensures that the declarant carefully considers the truth of the facts declared. These penalties have provided a solid foundation for a Beneficiary to accept statutory declarations in transactions and dealings in real estate matters over many decades.
- 2.4 Statutory declarations cannot be made using video-conferencing or by electronic signature, as section 2 of the 1938 Act requires a statutory declaration to be signed by the declarant “*in the presence of the person before whom it is made*”. Having regard to the date of the 1938 Act, this has clearly been understood to mean in the ‘physical presence’ of a person, rather than the ‘digital presence’. Under current legislation, this step in the conveyancing process cannot be digitised to facilitate eConveyancing without a change in law.
- 2.5 During the periods of lockdown, solicitors used other workarounds, such as certificates and warranties combined with undertakings to provide declarations when restrictions were lifted. These were temporary and imperfect solutions, merely stop-gaps during a crisis, rather than a long-term solution in the context of conveyancing as it is currently operated or in the context of eConveyancing going forward.

### **3. AFFIDAVITS IN REGISTRATION OF TITLE**

- 3.1 The registration of title to real estate in Ireland is largely governed by the Registration of Title Act 1964 (as amended) (the “**1964 Act**”). The 1964 Act, and the rules made thereunder, requires various applications to be made with the support of an affidavit, signed with wet ink in the physical presence of a commissioner for oaths or practising solicitor, and delivered physically to the Land Registry. The 1964 Act has not yet been amended to keep pace with digital advancements.

### **4. STATEMENTS OF TRUTH**

- 4.1 Section 21 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (the “**2020 Act**”) empowers court rules committees to make rules providing for a “*statement of truth*” as an alternative to an affidavit or statutory declaration for use in civil proceedings.
- 4.2 A statement of truth does not need to be made before a solicitor or commissioner for oaths and may be in electronic form. It must include a statement of honest belief that the facts stated are true. Making a statement without such an honest belief as to truth shall be an offence, with penalties on summary conviction of a class A fine and/or imprisonment for up to 12 months and on indictment to a fine

not exceeding €250,000 and/or imprisonment for a term of up to 5 years. Similar to how the 1938 Act operates, such penalties should ensure that those making statements of truth consider them carefully.

## **5. SUBMISSION**

- 5.1 The conveyancing system is based on the principle of ‘caveat emptor’ (let the buyer beware).
- 5.2 In 2019, the Law Society modernised the conveyancing system considerably by moving the title investigation entirely to the period ahead of contract exchange. This created considerable efficiencies and was well received by consumers.
- 5.3 The Government has signalled a commitment to support moves towards eConveyancing and to improving efficiency in the conveyancing process.
- 5.4 Statutory declarations are a long-established feature of the conveyancing process in Ireland and they support the fundamental principle as described in paragraph 5.1 above. These declarations, underpinned by a statutory framework with considerable penalties for false statements, are relied upon by purchasers, lenders, lessees and others acquiring an interest in, or otherwise dealing with, real property.
- 5.5 It is considered that contractual warranties alone (i.e. without the underpinning framework referenced in paragraph 5.4 above) in relation to matters of substantial and material importance affords insufficient protection for purchasers and others acquiring an interest in land.
- 5.6 The 1938 Act predates modern technology and the continued use of statutory declarations made pursuant to this Act is an impediment to creating further efficiencies in conveyancing practice and indeed, to eConveyancing itself.
- 5.7 The Law Society submits that the concept of a “statement of truth” as provided for in section 21 of the 2020 Act would be a suitable alternative to statutory declarations which, if extended to conveyancing transactions, would facilitate progress towards a system of eConveyancing.
- 5.8 Where the completion of a transaction is delayed, it is often the case that statutory declarations and affidavits must be made again (since they are only deemed true at the time of the making and do not afford any certainty as to change in circumstances after such time). It is submitted that, in conveyancing transactions, declarations, affidavits and statements of truth should, on a statutory basis, be capable of attesting to facts for a period of time after they are made, with a statutory duty – with clear consequences in the case of breach - to notify the Beneficiary of any material change to such facts within a prescribed short period, such as one or two business days. This would obviate the need for declarations, affidavits and statements of truth to be made again, when in the vast majority of cases the facts will not have changed, thereby leading to greater efficiency without exposing the Beneficiary to material risk.
- 5.9 The Law Society calls on the Minister for Justice to introduce amending legislation, as a matter of urgency, to enable:

- 5.9.1 statements of truth to be used in conveyancing transactions, thereby facilitating the modernisation of the conveyancing process and the introduction of eConveyancing;
- 5.9.2 statutory declarations and affidavits to be made:
- (a) remotely; and
  - (b) electronically, including by electronic signature;
- 5.9.3 statutory declarations and affidavits to be rendered capable of being relied upon when transmitted to the Beneficiary or otherwise published by electronic means;
- 5.9.4 statements of truth, statutory declarations and affidavits to be rendered capable of being relied upon for a stated period of time not exceeding 14 days (**'prospective reliance'**); and
- 5.9.5 in the case of prospective reliance, a statutory duty upon the person making the statement of truth, statutory declaration or affidavit to notify the Beneficiary of any material change to such facts within two business days.
- 5.10 The measures in paragraphs 5.9.2 and 5.9.3 would be of benefit during any period of transition towards statements of truth.
- 5.11 The Minister may adjudge it suitable that statements of truth should be available in relation to commercial activity and transactions more generally. However, for the purposes of dealings in real estate, the Law Society submits that it would be suitable to describe "Conveyancing Transaction" as:
- "the transfer of or dealing with any interest in land situate in Ireland, whether by sale, lease, voluntary transfer, conveyance, licence, assignment, surrender, charge or grant of an easement or option or otherwise"*.
- 5.12 The case for a broader application of the statement of truth is compelling. For example, in making an application to the Land Registry for first registration of documentary title (using either Land Registry Form 1 Application for first registration of freehold property, Form 2 Application for first registration of leaseholds and of rights (other than incorporeal hereditaments held in gross), Form 5 Application for first registration where title is based on possession or Form 6 Application for registration where title is based on possession of registered land only) which would not involve any transaction *per se*, a statement of truth could replace an affidavit. This holds true for other applications to the Land Registry, such as an application to register a Caution which is currently supported by an affidavit (Land Registry Form 71). In all such cases, a statement of truth in place of an affidavit should enable a person who wishes to register and protect their interest to do so more quickly and at less cost. The improved efficiency would be of considerable benefit to the Land Registry and the State since it would assist in more timely registration applications. It would be particularly useful in assisting the early conclusion of first registrations, in keeping with the objective of completing title registration of all properties in Ireland as soon as possible. Amendments to

the relevant Registration of Title Act and the related Land Registry rules (and forms) would also be required.

- 5.13 The ‘conveyancing process’ cannot be said to be concluded until the purchaser’s application to become registered as owner is complete. Long delays are being experienced with the processing of Land Registry dealings. Prior to the full digitisation of the Land Registry application process, it would improve materially the efficiency of the registration process if statements of truth could be submitted to the Land Registry in lieu of affidavits.
- 5.14 Section 21 of the 2020 Act is the enabling provision, which allows court rules committees to make rules providing for a “statement of truth” as an alternative to an affidavit or statutory declaration for use in civil proceedings. As such, section 21 provides a useful framework for a similar provision (specific to conveyancing), and further detail as to the content, verification, authentication or form of a statement of truth may then be prescribed by a competent authority. The Society will be glad to discuss which entity (or entities) might properly be designated as a competent authority/authorities, if that would be helpful. If statements of truth were to be extended to matters concerning the Land Registry, then this could be deemed the relevant authority to adjudge the content and form of the relevant statement of truth to replace statutory declarations and affidavits in relation to applications made to it.
- 5.15 It is understood that statements of truth are not yet available as an option in civil proceedings, as these will be implemented when regulations are in place enabling a larger project around electronic filings in civil proceedings. While there may be some time before implementation of this change, for conveyancing transactions and Land Registry applications, the Law Society will be ready to recommend the content and form of statements of truth to replace common and precedent forms of statutory declarations and affidavits in conveyancing practice and prescribed forms for Land Registry applications. To this extent, statements of truth in lieu of statutory declarations and affidavits in conveyancing practice could be put into effect relatively quickly. Not only would this decrease cost (commissioner for oaths’ fee removed), it would increase efficiency and remove the ongoing necessity for in-person meetings to be held during a pandemic and beyond.

## **6. CONTACT**

- 6.1 The Society’s Conveyancing Committee is available to answer any queries you may have on the content of this submission and will be happy to engage with the Department on any proposed amending legislation.

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