

LAW SOCIETY SUBMISSION



OIREACTHAS SPECIAL COMMITTEE ON COVID-19 RESPONSE

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ABOUT THE LAW SOCIETY OF IRELAND

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

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

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

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1. Background

- 1.1 The President of the Law Society of the Ireland ('the **Society**') wrote to the Chair of the Oireachtas Special Committee on Covid-19 Response ('the **Committee**') on 24 June 2020 to highlight the impact of Covid-19 on the justice system and to seek an opportunity to address the Committee on issues arising.
- 1.2 The Society welcomes the opportunity to make this submission of views from our Humans Rights & Equality, Litigation and Criminal Law Committees, and will be available to expand on the contents if that would assist the Committee in its consideration of these critical issues.
- 1.3 The Society has been asked to consider the following:
 1. how the State's legislative framework contributed to an effective response to the current crisis;
 2. how this compares to the use of statutory frameworks in other jurisdictions;
 3. how the legislative framework might be improved upon to deal with similar major events in the future and the constitutional/legal risks that should be considered in this context; and
 4. how well statutory Instruments/regulations, as opposed to guidelines and public health advice, were communicated to those who needed to be aware of them, the methods used and how this compares to the practice in other jurisdictions.
- 1.4 It has not been possible to undertake extensive research into Covid-19 measures in other jurisdictions in the timeframe afforded but some international experience has been referenced. In addition, the Council of Bars and Law Societies of Europe (CCBE), of which the Society is a member, has worked throughout the crisis to detail different legislative responses. That work can be viewed on the [CCBE website](#).

2. Views from the Society's Human Rights & Equality Committee

2.1 The justice system and response to the emergency measures

- 2.1.1. It is evident that, in the face of a pandemic that spread with such speed, no State's legislative framework could have been fully prepared to deal with the challenges societies would face in seeking to stem the spread of Covid-19. This was no different in Ireland.
- 2.1.2 The State's legislative response to the health emergency presented by the spread of Covid-19 came in the form of two pieces of primary legislation, which were drafted and enacted on an urgent basis and which have been supplemented and extended by secondary legislation adopted by the Minister for Health.
- 2.1.3 The Emergency Measures in the Public Interest (Covid-19) Act 2020, deals with ameliorative measures to restrict evictions, provide for remote hearings for those detained under the Mental Health Act 2001, extend time limits under the Planning Acts, provide for the immediate registration of health care professionals, and other miscellaneous matters. Notably, while the primary legislation made amendments in respect of certain social protection payments, the most significant social protection response to the emergency i.e. the Covid Pandemic Unemployment Payment ('the **Covid PUP**') was not immediately grounded in statute.¹
- 2.1.4 The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 amended the Health Act 1947 by inserting a new s.31 A. Section 31 A empowered the Minister for Health to make Regulations imposing restrictions in relation to a number of matters including travel to/from/within the State; the prohibition of specified events; requiring persons to remain in their homes; the closure of premises and other ancillary matters. The Minister is required to have regard to certain matters relevant to the spread of Covid-19 and must consult with other Ministers in making Regulations. Breach of these Regulations can result in penal sanctions. The Gardaí can direct a person to comply with the Regulations and, if they fail to do so, arrest that person without warrant. A person is liable on summary conviction for breach of the Regulations to a class C fine and/or six months imprisonment.
- 2.1.5 As can be discerned from political statements made at the time, the dual legislative response was directed towards preventing the further spread of Covid-19 and avoiding the health system becoming overwhelmed, the priority at that time being to "flatten the curve".
- 2.1.6 The Society foresaw that the above restrictions would have an immediate impact on the legal profession. While the Society was concerned for its members' welfare, it was also conscious of the impact on society if lawyers were not able to continue their crucial work. In a society based on the rule of law and where the right of access to the Courts is constitutionally protected, it is inconceivable that lawyers would not continue to defend clients' rights, even in this set of extraordinary circumstances. This being so, the Society quickly sought the designation of the work of solicitors as "essential services" so that they could continue to operate. The Courts remained open so that essential, and often urgent, work could continue to be done. Solicitors continued to deal with urgent non-Court work e.g. preparing wills and drafting enduring powers of attorney, which afforded some peace of mind as we faced into the pandemic.

¹ See Social Welfare (Covid-19) Amendment Act 2020, which places the Covid PUP on a statutory footing with specific eligibility criteria.

2.2 Other areas of interest

The Society has identified a number of areas where existing legislation and/or the emergency provisions introduced may not have been adequate to support the State's response to the spread of Covid-19.

2.2.1 Evictions and restrictions on movement

In introducing restrictions on movement aimed at curbing the spread of Covid-19, evictions from private rented accommodation were effectively stopped for a period of three months and rent freezes introduced.² This was achieved by prohibiting landlords from issuing Notices of Termination during that time or acting on Notices already served and expiring. While these measures were welcomed insofar as they protected those with formal tenancies and prevented individuals and families having to move home or resort to State supported emergency accommodation while the restrictions on movement applied in their strictest form, those without formal tenancies were not equally protected e.g. lodgers, those in homeless accommodation or direct provision centres, none of whom were covered by the legislation and so, could not avail of the relevant protections. There was a residual protection for members of the Traveller community, but the relevant provision is so vague and imprecise as to make it difficult to understand when it would be breached, thereby rendering the protection somewhat illusory.³ The provision has now been repealed by section 13 of the Residential Tenancies and Valuation Act 2020.

As we now know, those in congregated settings were at a very high risk of contracting Covid-19 and the Committee has heard evidence in relation to nursing homes, residential facilities for persons with disabilities and those in direct provision. The Society notes that the Programme for Government commits to ending the current system of direct provision and moving to a system of not-for-profit accommodation.

The Society recommends that, in order to lessen the risk of further outbreaks of Covid-19 in direct provision centres, the non-statutory system of direct provision should be brought to an accelerated end and an alternative system for accommodating and supporting those seeking international protection put in place. This would require the establishment of a clear statutory framework in relation to the provision of accommodation and supports (which should integrate such supports with the existing system of social protection).

In addition, there are currently no Regulations governing standards in homeless accommodation, although section 10 of the Housing Act 1988 empowers the Minister for Housing to make such Regulations. The Society recommends that consideration be given to introducing Regulations pursuant to section 10 of the Housing Act with a view to ensuring that public health guidelines can be implemented in emergency accommodation (such as hostels and homeless shelters). This may be of particular importance over the winter months when occupation levels in such accommodation can be expected to increase.

² Part 2, Emergency Measures in the Public Interest (Covid-19) Act 2020.

³ Section 5(7) of the Act is a catch-all subsection to prevent a range of evictions but it does not define the term "eviction" which renders the protection uncertain. Section 5(7)(c) provides "For the avoidance of doubt, all Travellers who are currently resident in any location should not during this crisis be evicted from that location except where movement is required to ameliorate hardship and provide protection and subject to consultation with the Travellers involved."

The Society also recommends that, in the event of any further/repeated restrictions on movement, consideration would be given to updating and amending Part 2 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 so that the wide prohibition on evictions envisaged in the legislation would be more specifically set out in law with key terms such as “eviction” defined, and extended to encompass (not only those with formal tenancies but) anyone who requires such protection during a period of emergency where that is in the common good.

2.2.2 Social welfare and uncertainly

Certain limited changes were made to the Social Welfare (Consolidation) Act 2005 in the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020. However, one of the most significant social welfare measures taken in the face of the loss of employment caused by the sudden closure of many businesses was the introduction of the Covid PUP. The President of the Law Society, Ms Michele O’Boyle, publicised the payment to members in a President’s Bulletin to the profession on 28 March 2020, recognising that some solicitors or staff might have recourse to the payment in certain circumstances. The following information which was provided through the President’s Bulletin was identical to that published by the Department of Employment Affairs and Social Protection before the payment was placed on a statutory footing in August of this year:-

“The Covid-19 Pandemic Unemployment Payment involves a new social welfare payment of €350 per week – to be paid for up to 12 weeks. To qualify for this payment, a person must:

- *be aged between 18 and 66,*
- *live in the Republic of Ireland,*
- *have been in employment or self-employment immediately before Friday, 13 March 2020,*
- *have lost his/her job, be temporarily laid off from work, or asked to stay at home from work due to the pandemic, and*
- *stopped trading as self-employed due to the pandemic.*

The final requirement above will rule out solicitors who experience a significant drop in income within their legal practice but who want to continue practising law during this difficult time.

There is also a further stipulation that you cannot claim the Covid-19 Pandemic Unemployment Payment if you are continuing to receive income from your employment.”

While the Department is, of course, not prohibited from introducing a social welfare payment on an administrative basis, it is indicative of the problems that beset any such measures when not explicitly grounded in clear legislation, that the Department appeared to add an eligibility criterion of genuinely seeking employment (published through its website in July), which was then relied upon to question the entitlement of recipients to receive payments if they travelled abroad and while they self-isolated afterwards. The lawful basis for cutting off payment of the Covid PUP to those who travelled outside the State became so embroiled in confusion and controversy that the Minister for Social Protection ultimately had to promise a review of the reported 2,500 payments that were cut off.

One of the core difficulties in introducing a social protection payment on a non-statutory basis is that the terms and conditions attaching to the payment may be vague and imprecise, may be changed without notice and without appropriate Oireachtas scrutiny and may lead to arbitrary decision-making. A core safeguard within our social protection system is the availability of a statutory appeal but administrative schemes which operate outside the legislation are not subject to the statutory appeals mechanism which leaves claimants without a satisfactory remedy.

The Society recommends that any social welfare scheme put in place to respond to a crisis such as that presented by Covid-19 should be placed on an immediate statutory footing so that recipients have clarity as to their entitlements as well as the benefit of a statutory appeals process in the event of their claim being refused, disallowed or an overpayment assessed against them.

2.2.3 Constitutional concerns, the rule of law and vagueness

The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 placed sweeping powers in the hands of the Minister for Health. The powers allowed the Minister to introduce Regulations which required people to remain in their homes and restrict social interactions with limited exceptions. Once introduced, these powers impacted on a range of fundamental rights which are protected under the Constitution and the European Convention on Human Rights e.g. the right to travel, the right to liberty, the right to privacy, the right to respect for private and family life, the right of freedom of association and freedom of expression. The restrictions were initially accompanied by Garda Powers of arrest and penal sanction to ensure that restrictions were complied with. For the most part, the population accepted these restrictions as a necessary response to the threat facing the State, and the measures were largely successful in reducing the rates of infection and preventing our health system from being overwhelmed.

There was a palpable sense of community and solidarity as we faced into the emergency and the population largely accepted and complied with the measures, understanding that it was in everyone's interest to do so. However, the consent of the people to comply with restrictions does not mean that they were introduced on a constitutionally sound basis, or that they would withstand a credible legal challenge. In this regard, the Society is mindful that the Committee has asked how the legislative framework might be improved to deal with a similar future emergency having regard to the constitutional risks involved.

The Society is aware of the single constitutional case that was initiated against the legislative measures and secondary legislation adopted by the Minister. It is noted that the applicants in the case were lay litigants who appear not to have had legal advice. The decision of Mr Justice Meenan J in *O'Doherty & Waters v The Minister for Health & Ors*, delivered on 13 May 2020 is likely of limited assistance in understanding whether the legislation is constitutionally frail. An excerpt from that decision illustrates a fatal flaw in the proceedings:

“Unfortunately, in making their case for leave, the applicants, who have no medical or scientific qualifications or expertise, relied upon their own unsubstantiated views, gave speeches, engaged in empty rhetoric and sought to draw an historic parallel with Nazi Germany – a parallel which is both absurd and offensive. Unsubstantiated opinions, speeches, empty rhetoric and a bogus historical parallel are not a substitute for facts.”⁴

⁴ *O'Doherty & Waters v The Minister for Health & Ors*, [2020] IEHC 209, at para 56.

The absence of a verified factual basis, evidencing the alleged breaches of the Applicants' constitutional rights in the case, undermined their ability to obtain leave to bring the proceedings. However, a case brought on a more evidentially sound basis might not be so readily dismissed. While Article 28.3.3 of the Constitution provides that legislation may be immune from constitutional challenge where enacted for public safety during a time of war or armed rebellion, a pandemic does not come within scope of that very narrow exception and, as such, the laws enacted and Regulations adopted to deal with the pandemic are not immune from constitutional challenge. The classic statement of the test applied by the Courts when reviewing the constitutionality of legislation which entrenches on individuals' rights is that contained in *Heaney v Ireland*⁵ where Costello J. stated:

"The means chosen must pass a proportionality test. They must: (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations (b) impair the right as little as possible, and (c) be such that their effects on rights are proportional to the objective..."

Were the measures adopted in March and then extended on a number of occasions by secondary legislation constitutional? While the legitimacy of the objective pursued by the State can hardly be gainsaid, in order to defend the legislation, the State would have to show that there were no other measures reasonably open to it at that point in time which would have achieved the stated objective. This might be hard to illustrate if there was evidence that people were willing to follow public health guidelines and therefore, did not need the added threat of penal sanction to ensure compliance. While the situation facing the State in March of this year was unprecedented, when interfering in the fundamental rights of the citizen, the least intrusive approach possible that achieves the required ends should always be the one adopted.

In addition to the single Irish decision in the area which did not put the emergency legislation beyond constitutional doubt, we have identified two other jurisdictions where challenges to emergency legislative measures have been successful and another case where the challenge failed (largely because the issue was moot by the time it reached the Courts).

In our nearest neighbouring jurisdiction, a challenge to a lock down law was dismissed in July. In *R (Dolan and Ors) v Secretary of State for Health and Social Care and Secretary of State for Education* [2020] EWHC 1786 (Admin) it was alleged that Regulations were *ultra vires* the Secretary of State's powers and in contravention of the European Convention on Human Rights. While it was found that the challenge to the more severe restrictions introduced (around leaving a person's home and limiting gatherings to no more than two in a public place) had become moot by the time the case was heard and so, this aspect of the case was not considered, the Judge also found that the Secretary of State had not acted *ultra vires* in introducing the Regulations and had not unlawfully fettered his discretion in establishing five tests to be satisfied before the restrictions could be eased.

In *Ryno Dawid De Beer & Ors v The Minister of Cooperative Government and Traditional Affairs* where judgment was delivered by the High Court of South Africa, it was found that, in declaring a national state of emergency and adopting severe Regulations to deal with the pandemic, the Government had little or no regard to the impact on the individual's constitutional rights and whether that impact was justified.

⁵ *Heaney v Ireland* [1994] 3IR 583.

A question arose as to whether the Government could have relied on existing legislation to deal with the spread of the virus rather than invoking a national state of emergency. It was noted that the Regulations adopted had a number of contradictory outcomes regarding the impact on different groups and also lead to serious hardship, hampering the distribution of aid relief. The Court indicated that the Government should, as a starting point, have considered how the rights of citizens could be limited to the least extent possible in dealing with the Covid-19 threat but this crucial step was missed and the goal of limiting the spread of the virus was pursued without regard to the constitutional rights of the South African people. It is of interest that the core principle of only impairing constitutional rights to the least degree possible resonates with the approach taken by the Courts here in cases such as *Heaney v Ireland*.

A recent High Court challenge to various legal restrictions imposed on the New Zealand population in order to eliminate the spread of Covid-19 was successful.⁶ While the Court found against the Applicant in relation to various claims that the measures were *ultra vires*, it found in favour of the Applicant on one important point. The Judgment traced the history of the measures which involved a series of Orders which moved the population from preparing for a lock down to the lock down itself and where the population was required to stay at home other than in order to access essential services. However, it was shown that the Prime Minister, other politicians and the police had made public announcements in mandatory terms that indicated that the population was required to stay home or face legal consequences, before the specific legal measures which required a lock down were in place. Therefore, it was found that the statements made represented a state of law that did not (as yet) exist, that the directions given by politicians and police were not prescribed by law and were therefore restrictions placed on rights guaranteed by the New Zealand Bill of Rights. In determining what, if any, relief should be granted in light of the fact that the unlawfulness identified had long since been remedied, the Court stated:

“The rule of law requires that the law is accessible and, so far as possible, intelligible, clear and predictable. As Lord Bingham has explained extrajudicially, if individuals are ‘liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty’. The required clarity was lacking here. Although the state of crisis during those first nine days goes some way to explaining what happened, it is equally so that in times of emergency the Courts’ constitutional role in keeping a weather eye on the rule of law assumes particular importance. For these reasons we conclude that it would be appropriate to make a declaration.”

This statement underlying the importance of the rule of law and providing the population with clarity as regards the rules that are being imposed as well as the consequences for breaching them, is relevant to the Committee’s considerations, where the Regulations adopted by the Minister for Health have been vague and imprecise in some respects and where the messaging from Government has, on occasion, gone beyond what is set out in law (for example, in respect of the mandatory terms in which “cocooning” was communicated to the over 70s).

⁶ Judgment at https://www.courtsfnz.govt.nz/assets/cases/Borrowdale-v-D-G-of-Health-V_1.pdf

3. Views from the Society's Litigation Committee

3.1 Need for clarity in Regulations

The outbreak of Covid-19 was one of the greatest challenges in the history of the Irish State. The Government urgently needed to take radical action to deal with the unprecedented threat to public health and welfare, while simultaneously dealing with the enormous economic and social impact. While allowance should be made for the fact that, in the early days of the crisis, the Government was moving at breakneck speed to deal with a rapidly changing situation, there are lessons to be learned and steps to be taken now to ensure that, in the event of future outbreaks or a similar crisis, the issues identified can be avoided.

While many aspects of Ireland's response were successful and compared favourably with other jurisdictions, there was (and is) a need for clearer communication as to what restrictions were being imposed, the rationale for those restrictions, whether or not they were intended to have legal effect, and the sanctions for breaching them if they were legally binding. Confusion and resentment arose due to the lack of clarity as to what the rules were, whether they were legally binding or merely guidance, how they applied in different situations, and whether they were consistently enforced. There was also public concern where there was insufficient clarity as to the rationale for the requirements or where they appeared inconsistent.

The same rules should apply to everyone and citizens are more likely to comply with rules if they understand their rationale. In order to ensure that everybody understands their rights and obligations, and to be fair to people in terms of knowing what they are required to comply with, there should be greater clarity in explaining the requirements and such requirements should be given legal force. Legislation and Regulations should be put in place so as to remove uncertainty. Absent such legislative and regulatory clarity, compliance is likely to be lessened and resentment will arise between those who follow guidance and those who do not.

It is also unfair to criticise individuals for failing to comply with requirements unless those requirements have been clearly explained. Indeed, it is a requirement under Irish law, EU law and the European Convention on Human Rights that there should be certainty as to the nature of obligations placed on individuals by law. On some occasions, the communications around restrictions fell short of providing such certainty because the extent and application of those restrictions was unclear to An Garda Síochána and to the legal profession, let alone the general public.

It is also unsatisfactory that there should be statements or "guidance" by Ministers or public authorities which purport to regulate the behaviour or activities of private citizens (or, indeed, businesses). If such requirements are considered sufficiently important to be made mandatory - as opposed to nonbinding recommendations - then they should be placed on a satisfactory legal footing so that private citizens and employers clearly understand the requirements which they must adhere to. This is an important legal safeguard, which would also help to ensure a more consistent approach to compliance throughout the country.

3.2 Welcome innovations during the crisis to continue the administration of justice

The initial lockdown disrupted virtually every aspect of Irish life, including the work of the Courts. However, from the outset, the Judiciary, the legal profession and the Courts Service worked tirelessly to maintain the most urgent services, and to restore other services insofar as possible.

The Society played its part in supporting the tremendous efforts made by the Judiciary and the Courts Service to continue operations where they were most urgently required and to rapidly adapt existing practices, resources and systems with a view to returning to normal operations where possible.

Prior to the crisis, the Courts Service was chronically underfunded, and there were proposals for a long overdue and much needed technological upgrade. Senior members of the Judiciary and leaders of the Society were already advocating for greater use of technology in the Courts Service. Such reforms, already seen as desirable, suddenly became vital and had to be fast tracked in order to ensure the continued administration of justice.

The Court of Appeal and Supreme Court led the way in demonstrating that, if live hearings were impossible during lockdown, remote or virtual hearings could be effectively conducted using video conferencing. The Society worked with the Judiciary, the Courts Service and the Bar Council to facilitate the rapid piloting and trialling of such technologies, ensuring that virtual or remote hearings could be rapidly introduced, thereby allowing the Higher Courts to continue to operate.

Unsurprisingly, since the technology available for immediate deployment was not originally intended for this purpose, the systems are not perfect. Nor are they suitable for all types of case (such as jury trials). However, virtual hearings are preferable to the far greater disruption to the work of the Courts which would have occurred without them.

The interruption to the normal operation of the Courts Services and the lockdown requirements made many other traditional litigation procedures difficult and have prompted positive changes such as, the use of electronic books. The Society and its members helped demonstrate that electronic trial bundles could be prepared which would enable Court hearings to be effectively conducted without the huge volumes of hard copy documentation which was a traditional feature of such hearings. The Supreme Court, the Court of Appeal and the High Court have all welcomed the use of electronic bundles.

3.3 Longer term benefit of reforms

Reforms due to the crisis, such as electronic trial bundles and virtual hearings, clearly have the potential to improve the administration of justice on a long-term basis, beyond when this crisis has passed.

There have been practical problems with rapidly introducing these innovations, which is unsurprising given the pace and circumstances of change. However, the success of the innovations demonstrates the potential for even more effective use of technology in the future.

For example, while some Court hearings would ideally be conducted in person where possible, the experience of recent months has demonstrated that many types of Court works - such as call overs of Court lists and procedural matters – can be conducted

just as efficiently (indeed, arguably more efficiently) via remote hearing which has enormous implications for the administration of justice.

The successful use of technology during the crisis and the introduction of a legislative framework to facilitate remote hearings, paves the way for the Courts Service and the Judiciary to offer an improved (and more cost effective) nationwide service to the public. For example, in many parts of Ireland, the Circuit Court or the High Court has infrequent sittings through the year at which a judge on circuit will grapple with an enormous amount of Court business over a very short space of time. The remote hearing functionality now means that it would be practicable to conduct more frequent call overs, to review Court lists and to deal with procedural matters in towns and cities where judges are not permanently stationed. This would greatly expedite the progress of cases in those jurisdictions, ensuring that when judges attend on circuit, their time is fully utilised dealing with contested hearings and work which could not be satisfactorily dealt with by remote hearing. Recent experience has clearly demonstrated that technology has the potential to offer much greater access to justice at a lower cost to the public outside Dublin.

While the Courts Service and the judiciary have done a remarkable job in facilitating remote hearings, using an infrastructure which in many respects needs reinforcement and upgrade, it is important that a stronger technological platform is made available to support remote hearings. It is also important that, when investing in technology, the Courts Service does so in a technologically neutral way which will ensure that Ireland can take advantage of emerging technology in a rapidly changing environment. We must also invest in a better system with greater functionality which is necessary to conduct effective remote hearings. It is essential that, in developing such systems, the Courts Service is not constrained by limitations imposed by its existing out-dated infrastructure but can, if necessary, make the investment required to ensure a more suitable long-term platform for remote hearings which will have significantly greater functionality than the current offering. The Society has welcomed the opportunity to engage with the Courts Service and the Judiciary in exploring the opportunities to develop better platforms for remote hearings and would welcome the opportunity to continue to engage in this process which is in the interests of all stakeholders in the administration of justice, including the general public and clients wishing to avail of legal services.

3.4 Other investment and technological reforms needed

The crisis has demonstrated the need for other technological reforms to be introduced by the Courts Services in consultation with the legal profession, including the ability to commence proceedings and file and serve all documents electronically and to pay Court fees electronically. The Society has long advocated for these changes and the absence of such facilities has caused significant difficulties for solicitors, their clients and the Courts Service during the crisis. The introduction of such reforms would align the operation of the Courts Services with the way consumers and businesses choose to operate, both in Ireland and internationally. Such reforms would also lead to time and cost savings in the longer term.

The significant practical difficulties faced during the lockdown highlight the need for further reform. For example, traditionally solicitors pay filing and other stamp fees through facilities available in Court offices which were not accessible during lockdown. This highlighted the need for more effective technology allowing online payments for such transactions.

While recent legislation provides for statements of truth as an alternative to affidavits, this was both a welcome and long overdue reform which does not go far enough to reflect the pluralist nature of modern Irish society. In addition, to avoid the difficulty caused by antiquated rules relating to the execution of documents, reforms are required to build on the E-commerce Act and to allow for execution and witnessing of legal documents via video-link, reforms which have been introduced by other comparative jurisdictions (such as several Australian and Canadian states).

Furthermore, and notwithstanding trojan efforts on the part of the Judiciary and the Courts Service to continue operations as much as possible, there are many types of Court work which have been disrupted during Covid-19. There was already a need for significant investment in the Courts Service in terms of resources, staffing and infrastructure, and this need has now increased. It is important for Ireland to continue to invest in the appointment of judges and in the staffing and infrastructure of the Courts Service (including the introduction of new technology) if it is to maintain and preserve access to justice for all citizens and to offer Irish and international business effective ways to resolve legal disputes and to enforce their rights when required.

3.5 Consultation with stakeholders

The recent innovations by the Judiciary and the Courts Service have been generally successful despite the speed with which virtual hearings, electronic bundles and other reforms were introduced. This was because all stakeholders – representatives of the Judiciary, the Courts Services, the Society, the Bar – worked together to ensure that the technology was as fit-for-purpose as it could be and to avoid the practical problems which could otherwise impede the success of such innovations.

Clearly there will be a need for further, more permanent, solutions and investment both in specific areas (such as more bespoke video conferencing technology) and in the infrastructure of the Courts Service generally. The success of the recent collaboration between all stakeholders demonstrates the importance of continued collaboration when introducing new technology. Stakeholders need to be consulted throughout so that technological and system requirements can be identified, and the system introduced in a way that meets the needs of all users and the public at large.

The Society has been delighted to engage with the Courts Service and the Judiciary in the trialing of systems for e-filing, for use of electronic bundles and data paper records, and for better platforms for remote hearings. Going forward, the Society would welcome the opportunity to be involved in the development of the technological offering of the Courts Service to ensure that it continues to meet the changing needs of all stakeholders – the Judiciary, the Courts Service, solicitors, barristers, and most importantly, the general public.

4. Views from the Criminal Law Committee

In reviewing the effectiveness of the legislative framework in responding to the crisis, it is important that we acknowledge the speed with which the emergency arose and the timeline available to the Oireachtas to react. The legislative framework, comprising both existing and new provisions, enabled practitioners to continue to advocate for their clients but the Covid-19 crisis has impacted on the manner in which legal services are delivered by solicitors to clients.

It is useful, for the purposes of completeness, to detail in a Schedule (at section 5 of this document), the legislative framework which was introduced to limit the spread of the virus by limiting the movement of citizens and creating offences for breaches.

4.1 Challenges faced in the criminal justice system

Solicitors in the practice of criminal law in representing their clients, are required to attend prisons, Garda Stations and Courts to ensure that clients' rights are respected and that they receive a fair trial. Criminal law provides statutory protections to those detained in Garda Stations, prisons and juvenile detention centres as well as those detained in the Central Mental Hospital to regulate the term of detention and to ensure such detention is lawful. It was crucial therefore that accused persons could continue to access the Courts to advocate for their rights throughout the crisis.

Regulation 121/2020 was comprehensive in providing that the provision of legal services was an "essential service" thereby enabling practitioners to ensure that clients' interests were protected during the crisis. It also specifically provided that attending Court, satisfying bail conditions and participating in legal proceedings were exempted activities and as such, enabled clients to fulfil their legal obligations. Schedule B also provided that the An Garda Síochána, the Prison Service and the administration of justice were essential services ensuring that the Criminal Courts could continue to operate, albeit in reduced circumstances.

4.2 Solicitors attending Garda stations

Clients arrested and detained in Garda Stations during the Covid period were provided with PPE. The availability of PPE for solicitors attending Garda stations was not always consistent nor were the facilities always the most suitable for interviews. The Society has had positive engagement with An Garda Síochána and operational orders have been put in place to improve safety measures. We are aware that inconsistency remains in the safety measures which are in place from station to station.

While S.30(2) of the Health Act 1947 requires those having the care of a person and knowing that another person is a probable source of infection, to take all reasonable precautions to prevent the infection of the person in their care, the provision does not place a clear obligation on Gardaí to minimise the prospect that an arrested person would become infected by taking reasonable precautions such as providing PPE to that person and ensuring that the interview room is sufficiently ventilated and of sufficient size to facilitate social distancing.

The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 could usefully be amended to reflect the reasonable safety measures that should be in place to reduce the transmission of Covid-19 and to protect persons arrested and detained and attending solicitors.

Further, these Regulations do not recognise the right of an accused person to have solicitors attend interviews in custody. During the pandemic, attendance at Garda stations was more problematic for practitioners as it was not clear what systems were in place to protect their health. Since the decision of *People (DPP) v Gormley*⁷, solicitors have been allowed to attend interviews but without any statutory acknowledgement of that right. As such, practices to ensure their safe attendance were not to the fore during the crisis. Consistent application of robust safety measures in every station is required as a matter of urgency.

4.3 Criminal Courts

The practice of criminal law has clearly been impacted by Covid-19 in that congregations of large groups create a risk of infection. The crisis has brought about innovation grounded on previous legislative provisions such as S.33 of the Prisons Act 2007 which has enabled prisoners to attend appeals before the Court of Appeal (Criminal) remotely. Equally, for bail hearings and remand appearances, prisoners have been appearing by video link from prisons in order to reduce the risk of infection.

Prisoners attending Court in person are required to self-isolate on returning to the prison which can be distressing. A recent report of the Inspector of Prisons on the lived experience during the crisis⁸ detailed the isolation felt by prisoners which was no doubt heightened by the 14-day self-isolation requirement. Equally, patients who are before the Courts on criminal charges but who are detained in the Central Mental Hospital and attend Court are required to self-isolate on their return which can have a significant impact on a patient's mental health and treatment plan.

The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 enables a greater number of applications to be heard by video link and does not limit the provisions to those persons in custody in a prison. Section 23 will enable a President of a Court to make a direction that certain applications will be dealt with by video-link. When commenced, those provisions will hopefully address some of these concerns.

Courts, especially the District Court, remain crowded at times thus making working there inherently risky. The management of numbers of people attending Court and in the vicinity of the Courts would benefit from clear (and consistent application of) Regulations. Increased use of video links will assist in this regard but other solutions must also be found as video-link will not be suitable for every case.

⁷ *People (DPP) v Gormley*, 6 March 2014, Supreme Court, Paragraph 9.2

⁸ <https://www.irishtimes.com/news/crime-and-law/prison-diaries-give-insight-into-bleak-conditions-during-pandemic-1.4316027>

4.4 Prisons and clients

Understandably, face to face meetings with clients in prisons ceased during the height of the crisis in order to protect the prison population, many of whom are vulnerable due to age and illness. However, the need to consult with clients and to receive instructions remained. The Prison Service engaged positively with the Society to facilitate video consultations and whilst imperfect at times, practitioners found that the service operated well overall.

Criminal practitioners, like other legal practitioners, encountered difficulties in having affidavits sworn by clients which was even more problematic when a client was in custody. The Courts have taken practical decisions, such as enabling solicitors to swear affidavits for their clients for High Court bail applications, but the recent introduction of a statement of truth⁹ which obviates the need to have affidavits sworn is welcome.

4.5 Constitutional and legal risk

In considering this issue, it is useful to reiterate the constitutional parameters associated with Regulations. Article 15.4 of the Constitution provides that the Oireachtas shall not enact any law which is, in any respect, repugnant to the Constitution. The Supreme Court case of *Cityview Press Ltd v An Comhairle Oiliuna*¹⁰ sets out the constitutional test (known as 'principles and policies') against which Regulations delegated by the Oireachtas via primary legislation are examined by the Courts. Judge Keane described the test as follows:-

"In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised, for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."

Therefore, any Regulations introduced to combat the pandemic that flow from the Health Act 1947 cannot exceed the principles and policies expressed in that Act.

4.6 Discussion on house parties

The proposal to empower Gardaí to enter private dwellings with a view to enforcement of Covid-19 Regulations is of some concern to the Society. Article 40.5 of the Constitution states that the dwelling of each citizen shall be inviolable and shall not be entered, save in accordance with law. Criminal statutes which provide for powers of entry by the Gardaí into private dwellings generally have safeguards which require that certain preconditions are met to ensure that such entry is lawful e.g. requiring a reasonable suspicion as to the commission of an offence and/or a warrant from a District Judge. The Oireachtas has generally provided that powers of entry into private dwellings are reserved for the investigation of serious offences, for example an arrestable offence whereby the penalty for such offence has a penalty of five years imprisonment or more.

⁹ Section 21 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020

¹⁰ [1980] IR 381 at 398

S.94 of the Health Act 1947 provides a power for authorised officers to enter premises between 9 a.m. and 6 p.m. to investigate breaches of regulations under the Act. The Society considers that this represents a more appropriate means of investigating such incidents rather than providing a power to enter a private dwelling to enforce a breach which gives rise only to a summary offence. The Society cautions against introducing powers which are normally reserved for the investigation of serious criminal offences for the purposes of enforcing what are, in effect, health regulations.

4.7 Criminal Justice (Enforcement Powers) (Covid-19) Bill 2020

On 28 August 2020, Minister McEntee announced the publication of the Criminal Justice (Enforcement Powers) (Covid-19) Bill 2020. As yet, the Society has only seen the Minister's press release which indicates that the Bill is intended to address breaches of Covid Regulations by licenced premises and provide for the following:

- A power for a Garda Superintendent or higher to issue an immediate closure order on a licenced premises effective for the remainder of the day.
- A power for An Garda Síochána to apply to the District Court for an emergency closure order of three days where there has been more than one breach.
- A power for An Garda Síochána to apply for a temporary closure order, where there has been a failure to comply with a Compliance Notice and the Garda is of the opinion that such failure to comply is continuing or likely to recur. A first temporary closure order can be for up to seven days and a second or subsequent temporary closure order can be up to 30 days.

The publication of this Bill has given rise to some academic discussion as to the concept of a civil offence which is of concern as criminal and civil law should not be conflated in any way. As such, clarity on this issue would be welcome.

5. Schedule

Legislative Framework

Amendments introduced to address the Covid-19 crisis

1. The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020

- The amendments effected by sections 4, 5 and 6 came into operation on the 9th March 2020.
- The amendments effected by sections 7 and 8 came into operation on the 13th March 2020.
- The amendments effected by—
 - i. Part 2, subject to subsection (4), continue in operation until the 9th May 2020, and
 - ii. Part 3; continue in operation until the 9th November 2020, unless a resolution approving of the continuation of Part 3 has been passed by both Houses of the Oireachtas.

2. The Emergency Measures in the Public Interest (Covid-19) Act 2020

- Part 3 shall come into operation on such day as the Minister for Housing, Planning and Local Government may by order appoint.
- Part 5 came into operation on the 30th March 2020.
- The amendments effected by Part 8 came into operation on the 13th March 2020.
- The amendments effected by Part 9 came into operation on the 13th March 2020.

3. Civil law and Criminal Law (Miscellaneous Provisions) Act 2020

Criminal Offence Provisions – Section 31A of the Health Act 1947

Section 31A and 31B of the Health Act 1947 as inserted by the Health (Preservation and Protection and other Health Measures in the Public Interest) Act 2020, commenced primarily on the 20th March 2020 and is the main legislative provision governing the penal provisions associated with COVID.

Section 31A provides for the making of regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19. Section 31A(1)(b) explicitly provides that the regulations can restrict travel within the State. Regulations that flowed from this legislation include the following;

1. **SI 120 of 2020** - Health Act 1947 (Affected Areas) Order 2020. Updated to: 12 August 2020 Spotlight on Covid-19 Legal Material 2 This Order declares that the State (being every area or region thereof) is an area where there is known or thought to be sustained human transmission of Covid-19. This Regulation came into operation on the 7th April 2020.

2. **SI 121 of 2020** - Health Act 1947 (section 31A – Temporary Restrictions) (Covid19) Regulations 2020. These regulations provide for restriction of movement of persons from their place of residence, except where they have reasonable excuse, and for restrictions on events, for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19. This regulation came into effect on 8 April and remained in operation until 12 April 2020.
3. **S.I. 128 of 2020** – Extends the operation of restrictions set out in S.I 121 of 2020 to the 5th May 2020.
4. **S.I. 153 of 2020** – Extended the date of operation of restrictions in the principle regulations to the 18th May 2020 and extends the travel distance from 2kms from home to 5 km.
5. **S.I. 174 of 2020** – Extends principal regulations to the 8th June 2020 and amended the principal regulations in some minor respects.
6. **SI 181 of 2020** - Health Act 1947 (Section 31A – Temporary Requirements) (Covid-19 Passenger Locator Form) Regulations 2020 These Regulations provide for the imposition of a requirement that international passengers (including Irish citizens) arriving in the State at a port or airport from a place outside the State complete a COVID-19 Passenger Locator Form for the purposes of recording and verifying information regarding their contact details and place of residence for a period of up to 14 days following arrival. This Regulation came into operation on the 28th May 2020 and remained in force until the 18th June 2020.
7. **SI 206 of 2020** - Health Act 1947 (Section 31A – Temporary Restrictions) (Covid19) (No. 2) Regulations 2020. These Regulations provide for the unwinding of certain restrictions including the reopening of retail outlets and extending the distance that may be travelled for specified purposes. This Regulation came into operation on the 8th June 2020 and remained in force until 29th June 2020.
8. **SI 209 of 2020** - Health Act 1947 (Section 31A – Temporary Restrictions) (Covid19) (No. 2) (Amendment) Regulations 2020. These Regulations amend S.I. No. 206 of 2020 to allow all retail outlets to reopen. Amendments are also made in regard to access to certain sports facilities for the purposes of organising or holding outdoor sporting or educational gatherings (such as summer camps) of no more than 15 persons. This Regulation came into operation on the 15th June 2020.
9. **SI 234 of 2020** - Health Act 1947 (Section 31A – Temporary Restrictions) (Covid19) (No. 3) Regulations 2020. These Regulations provide for restrictions on the numbers of persons attending indoor or outdoor events and restrict access by the public to certain businesses and services. This Regulation came into operation on the 29th June 2020 and remained in force until 20th July 2020.
10. **SI 244 of 2020** - Health Act 1947 (Section 31A – Temporary Restrictions) (Covid19) (Face Coverings on Public Transport) Regulations 2020. These Regulations provide that members of the public shall not, without reasonable excuse, travel by public

transport without wearing a face covering. This Regulation came into operation on the 13th July 2020 and remained in force until 5th October 2020.

11. **SI 295 of 2020** - Health Act 1947 (Section 31A – Temporary Restrictions) (Covid – 19) (Relevant Counties) Regulations 2020. Spotlight on Covid-19 Legal Material 3 These Regulations provide for certain temporary restrictions in County Kildare, County Laois and County Offaly because of Covid-19. The Regulations remain in operation until 23 August 2020. This Regulation came into operation on the 8th August 2020.
12. **SI 296 of 2020** - Health Act 1947 (Section 31A – Temporary Restrictions) (Covid19) (Face Coverings in Certain Premises and Businesses) Regulations 2020. These Regulations require the wearing of face coverings in certain premises. A person shall not, without reasonable excuse, enter or remain in a premises where goods are sold directly to the public or a premises set out in the Schedule to the Regulations, without wearing a face covering. The Regulations do not apply to children aged under 13 years. This Regulation came into operation on the 10th August 2020 and remains in force until 5th October 2020

Criminal Offence Provisions

Section 31A (6) of the Health Act 1947 creates an offence of contravening penal regulations:

“(6) A person who—

- (a) contravenes a provision of a regulation made under subsection (1) that is stated to be a penal provision,
- (b) obstructs, interferes with or impedes a relevant person in the course of exercising a power conferred by regulations under this section on that relevant person,
- (c) fails or refuses to give to a relevant person information—
 - (i) that is within the first-mentioned person’s knowledge,
 - (ii) that the first-mentioned person is required by regulations under this section to give the relevant person, and
 - (iii) that the first-mentioned person has been requested to give, or has been otherwise informed of the requirement to give, to a relevant person, or
- (d) in purported compliance with a requirement under regulations under subsection (1), gives information to a relevant person that, to the first-mentioned person’s knowledge, is false or misleading in any material particular, shall be guilty of an offence.”

Subsection (7) provides for a garda power to direct that a person to take steps to comply with the regulations where they reasonably suspect the person is in breach.

Subsection (8) creates an offence of failing to comply with a direction.

Subsection (9) allows a garda demand a name and address. Failure to do this is criminalised under subsection (10).

Under subsection (11) there is a power of arrest where a garda believes an offence has occurred under subsection (10).

Detention to limit the Spread of Covid-19

Section 38A of the Health Act 1947 as inserted by section 11 of the Health (Preservation and Protection and other Health Measures in the Public Interest) Act 2020 enabled the detention of a person who presented a risk of infection and refused to self-isolate or couldn't self-isolate following an order from a medical officer.

Pre-existing Legislative Framework - Criminal Law and Procedure

Section 33 Prisons Act enabled video links for certain applications and enabled prisoners to appeal by video link from custody for bail applications and remand hearings. This reduced the risk for prisoners of attending Court and contacting the virus. Section 33 of the Prisons Act also enabled the Court of Appeal (Criminal) to hear criminal appeals remotely with prisoners in custody.

Section 24(5) of the Criminal Procedure Act 1967 enable a prisoner who was too unwell to attend Court to be remanded in their absence, thus reducing any risk of infection where there was a concern about the prisoner having COVID.

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