



Special Oireachtas Committee on Covid-19 Response

Opening Remarks



Introduction

Thank you Chair.

Let me begin by thanking you and the Committee for inviting us to attend today's meeting. We have watched, with great interest, as the Committee has focused on various aspects of the State's response to Covid-19 and we appreciate your work in examining the legislative framework underpinning that action.

Covid-19 Impact and Response

The March 2020 lockdown impacted every aspect of Irish life including the work of the legal profession and the Courts. From the onset of the crisis, the Judiciary, the legal profession and the Courts Service worked tirelessly to maintain the most urgent of services and restore others, insofar as it was possible to do so.

Of course, the operations of Government departments and State agencies were also severely impacted and I want to thank the officials who worked with us throughout the crisis to ensure that, wherever possible, vital services remained available to solicitors and their clients.

April marked a seismic shift in the manner in which justice is administered in the State with the commencement of remote hearings and recent months have seen a remarkable fast-forwarding of the adoption and implementation of technology across our profession.

We are all participants in that change which is likely to be permanent, as many traditional ways of doing business are unlikely to return – a fact recognised by the recent addition of parameters for remote hearings to the statute book.

Legislative Response to Covid-19

While many aspects of Ireland's response were successful and compared favourably with other jurisdictions, there was a need for clearer communication as to precisely what restrictions were being imposed, the rationale for those restrictions, whether or not they were intended to have legal effect, and any sanctions for breaches.

In order to assist the Committee's consideration of the legislative response in other jurisdictions, the Society has provided some recent case law as well as detailed information on initiatives adopted across Europe. We hope that this, together with this morning's input from representatives of the profession, will assist the Committee in framing the Irish response within a wider context.

Key Recommendations

It is evident, in the face of a pandemic which spread with such speed, that no State's legislative framework including ours, could have been fully prepared to deal with the challenges which would, and did, arise. Whilst acknowledging that everything was moving at speed to address a rapidly changing and uncertain environment, there are lessons to be learned and steps to be taken to ensure that, in the event of a similar crisis, a number of issues can be better addressed.

In that regard, the Society makes the following recommendations for the consideration of the Committee:

1. Mitigating Constitutional and Legal Risk

Sweeping powers granted under the emergency legislation led to the introduction of Regulations which required people to (largely) remain in their homes and limit social interactions. This impacted on a range of fundamental rights which are protected under the Constitution and the European Convention on Human Rights.

We have set out the parameters of the *Heaney* test around the proportionality of Regulations in our submission to the Committee. While the Courts may ultimately answer the question of whether recent measures were constitutional (in the event of a credible legal challenge being brought), and while the situation facing the State in March was unprecedented, when interfering in the fundamental rights of citizens, the least intrusive approach possible which achieves the required result should always be chosen.

Also of note is the test established in the *Cityview Press* case which requires that any Regulations introduced that flow from, for example, the Health Act 1947, cannot exceed the principles and policies expressed in that primary legislation.

2. Enhancing Clarity – Regulations and Communications

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 legal obligations placed on individuals. On some occasions, the communications around restrictions fell short of providing such certainty because the extent and application of those restrictions was unclear.

Statements or "guidance" by Ministers or public authorities which purport to regulate the behaviour or activities of private citizens (or, indeed, businesses) are not satisfactory. If such requirements are considered sufficiently important to be mandatory, they should be placed on a satisfactory legal footing to ensure that private citizens and businesses can clearly understand what it is that they must adhere to.

3. Better Technology

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, service to the public.

In order to achieve this, fit-for-purpose technology platforms must be available to support remote court hearings. It is essential that, in developing appropriate systems, the Courts Service is not constrained by the limitations of its existing infrastructure rather it must be authorised to make the investment necessary to deliver a suitable long-term platform with significantly greater functionality than the current offering.

The crisis has again highlighted the urgent need for wider technological reforms which include the ability to commence proceedings, to file and serve all documents and to pay Court fees on-line. The Society has long advocated for these changes, the absence of which caused significant difficulties for solicitors throughout the crisis (for example - various Court and filing fees have traditionally been paid in Court offices which were, of course, closed during lockdown).

4. Investing in the Courts Service

It is important for Ireland to continue to invest in the Courts Service infrastructure, staff and other resources if it is to preserve access to justice for all citizens and to offer Irish and international businesses effective ways to enforce rights and resolve disputes.

5. Treatment of Persons in Custody Regulations

The availability of PPE for solicitors attending Garda stations varied during the crisis and facilities were not always conducive to the safe conduct of interviews. While the Society has engaged positively with An Garda Síochána in this regard, we believe that the *Treatment of Persons in Custody Regulations* should be amended:

- i. to include measures for safeguarding persons in custody and attending solicitors; and
- ii. to recognise the right of an accused person to have a solicitor present while being interviewed in custody.

The consistent application of robust safety measures in every Garda station is required as a matter of urgency.

Miscellaneous

We have made a number of further recommendations for the Committee's consideration. In summary, they are:

- i. **Attendance at Court** – some Courts (in particular, some District Courts) remain crowded. The efficient and safe management of numbers of people, both attending and in the vicinity of Courts, is a matter of immediate concern.
- ii. **Execution of Documents** - reforms are required to build on the E-commerce Act to allow for the execution and witnessing of legal documents via video-link as is already the case in other comparative jurisdictions (which include several Australian and Canadian states).
- iii. **Garda Powers** - the advisability of using policing as a means to ensure compliance with public health guidelines should be extremely carefully considered. In general terms, we would caution against introducing powers normally reserved for the investigation of serious criminal offences for the purposes of enforcing what are, at their core, health regulations.
- iv. **Congregated Settings** - we now know that those in congregated settings were at an elevated risk of contracting Covid-19 and the Committee has already heard extensive evidence in that regard.
 - a. **Direct Provision** - 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 statutory system for accommodating and supporting those seeking international protection put in place.

- b. **Emergency Accommodation** – consideration should also be given to making Regulations under section 10 of the Housing Act 1988 requiring the implementation of public health measures in emergency accommodation such as hostels and homeless shelters.
- v. **Evictions** – in the event of further action in the area, the prohibition on evictions should be more clearly set out in legislation with key terms (such as “evictions”) defined and the protection extended to anyone who requires it during a time of emergency (not just those with formal tenancies).
- vi. **Social Welfare** - any social welfare scheme put in place to respond to a crisis should be grounded in statute so that recipients have clarity as to their entitlements and recourse to a statutory appeals mechanism.

Conclusion

As a profession, we - like many others - have had to adjust, adapt and respond quickly to the unprecedented challenge posed by Covid-19.

We have been particularly fortunate to have developed and maintain constructive working relationships with other stakeholders including the Judiciary, our colleagues at the Bar, the Courts Service, Government departments and State agencies.

We look forward to continued constructive engagement and collaboration across the myriad of evolving issues which we know will continue to challenge all of us over the coming months and beyond.

Finally, thank you for the invitation to participate in this very valuable process which provides a welcome opportunity for us to highlight these vital issues.