



THE BAR
OF IRELAND

The Law Library

Submission to the Special
Committee on COVID-19 Response
- Legal and Justice Matters

1st Sept 2020

About the Bar of Ireland

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers.

The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

Introduction

The Council welcomes this opportunity to make general observations to the Special Committee on Covid-19 Response (the “Committee”) on the legal issues arising in respect of the legislative response to the Covid-19 pandemic as set out the Committee’s invitation dated last Wednesday 26 August.

In the limited time available, we set out our observations by way of preliminary contribution and, if invited to appear before the Committee, look forward to the opportunity of addressing these issues further at that point.

Preliminary Observation

From the outset, while the Oireachtas Committee may wish to better understand and evaluate the adequacy, proportionality and effectiveness of the State’s legislative response; fundamentally it is the Courts that will be the ultimate arbiter of the legality of statutory tools deployed by the Oireachtas, having regard to the rights and obligations of the parties involved.

As a consequence, it is during this fast moving period of legislative response that the administration of justice; and a fundamental awareness and respect for the rule of law comes to the fore.

The queries raised by the Oireachtas Committee are set out below, together with the Council’s initial views.

Issue 1: How the State’s legislative framework contributed to an effective response to the current crisis.

The Committee will be well aware of the legislative framework within which measures which were seen as being necessary to control the spread of Covid-19 were given legal effect. In summary, the existing Ministerial powers under the Health Act 1947 (the “1947 Act”) were added to by the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 (the “2020 Health Act”) and at least 20 Ministerial Regulations were promulgated under these enhanced powers to give effect to what the Government believed to be the necessary measures.

For example, pursuant to these powers, the Minister for Health promulgated The Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) Regulations 2020 (S.I. 121/20) which

set out the requirement that a person could not leave his or her place of residence without “reasonable excuse” and by specifying (in regulation 4(3) thereof) that this requirement was a “penal provision” for the purposes of section 31A of the 1947 Act made a contravention thereof an offence subject to a penalty of up to six months imprisonment and/or a fine of up to €2,500 (section 31A(6) and (12) of the 1947 Act). These powers were also exercised to introduce other measures such as those in relation to the passenger locator form (S.I. 181/2020) and the requirement to wear face coverings on public transport (S.I.244/2020)

In addition to the 2020 Health Act, the Emergency Measures in the Public Interest (Covid-19) Act 2020 (the “2020 Emergency Measures Act”) was enacted which, by way of primary legislation, introduced a range of other measures to facilitate the handling of the Covid-19 pandemic such as the various tenant protection measures contained in Part 2 of the Act (including the prohibition on a landlord serving a notice of termination in relation to the tenancy of a dwelling during the “emergency period” and the prohibition on rent increases).

Whilst these were exceptional provisions which had a far reaching, real and substantial impact on every aspect of a citizen’s day to day life, and were believed by the Oireachtas to be vital in the face of a worldwide pandemic, it is important to remember that neither the Oireachtas introducing the primary legislation nor the relevant Minister making the detailed Regulations were “at large” in introducing these measures in that neither could simply make or enact whatever law or regulation they believed to be necessary to combat effectively the spread of Covid 19. The following considerations arise:

a) Compliance and adherence of primary & secondary legislation with Constitution

Firstly, the legislation enacted by the Oireachtas had to comply with the Constitution and, in particular, had to be introduced in a manner consistent with it and could not infringe the fundamental rights and protections conferred on citizens by the Constitution. It is worth noting that although the Covid-19 pandemic was seen as an “emergency”, the legislation introduced to give effect to the Covid-19 measures was not introduced pursuant to the “Emergency” provisions contained in Article 28.3.3 of the Constitution which concerns laws enacted in times of “war or armed rebellion” (see paragraph 46 of the judgment in ***O’Doherty and Another v The Minister for Health and Others [2020] IEHC 209***). In the view of the Council, this fundamental requirement to comply with the Constitution acted as an important and necessary limitation on the Oireachtas as to the scope of the emergency measures which it could introduce by way of primary legislation. In summary, in order to ensure that the legislative provisions were constitutional, it was necessary that the measures which they introduced went no further in interfering with the exercise of a citizen’s constitutional rights than was necessary

to take effective action to suppress the spread of Covid-19 and that such interference was proportionate to achieving this aim (**Heaney v Ireland [1994] 3 I.R. 593**).

A brief review of the Regulations which were introduced indicates that whilst they do impose significant restrictions on the exercise of at least one important personal right, namely the right to move about freely - a restriction deriving directly from and inextricably linked with the aim of curtailing the spread of the virus - they do not interfere with the exercise of other important rights, for example the right to freedom of expression, which ensures the continuing ability to all to analyse and (lawfully) freely comment upon any restrictions enacted.

b) Scope of Regulations and delegated power.

Secondly, as regards the making of Regulations under the various Acts, the Minister making such Regulations could do no more than give effect to the “principles and policies” set out in the relevant Act and could go no further in the scope of such Regulations than was permitted by the Act in question (**City View Press Limited v. An Comhairle Oiliúna [1980] I.R. 381**). Also, such Regulations had to comply with the Constitution. Thus, in making Regulations a Minister was subject to both the Act pursuant to which the Regulations were made and the Constitution. These operated as two important “checks” on the exercise of a Minister’s power in making Regulations to give effect to the emergency measures.

Whilst the Council does not offer any views on the constitutionality of the provisions which were introduced, it does appear that the State’s legislative framework as described above did provide an effective way within which the measures necessary at that point could be brought into effect. It is clearly important that constitutional rights and procedures are protected and observed and that, in a parliamentary democracy, the Executive or individual members thereof are not given unfettered powers and are held to account. The requirement to enact laws which do not infringe the Constitution and the requirement for the Executive to make Regulations within the confines of the enabling legislation and the Constitution allow for meaningful measures to be enacted swiftly which (it is hoped) do not disproportionately infringe any citizen’s constitutional rights. The ability to introduce, subject to the safeguards outlined above, measures by subordinate legislation is especially important particularly given the nature of the evolving health situation, as it would not be practicable to address the ongoing concerns by way of primary legislation.

c) *Access to the Courts*

However, the Council is strongly of the view that for the State's legislative framework to operate effectively, it is essential that, even in times of emergency, there is meaningful and timely access to the courts so that, (as has already occurred in the *O'Doherty* case referred to above), citizens have, and are aware that they have, access to seek effective redress in the event that they believe that their rights have been unlawfully infringed. As the Committee will remember, the challenge to the Covid Regulations in the *O'Doherty* case was heard and dismissed. The existence and functioning of an independent and properly resourced judiciary and courts system is an essential factor in contributing to public trust in, and acceptance of, the validity and necessity of measures introduced in an emergency such as the Covid 19 pandemic notwithstanding the apparently harsh and far reaching nature of such measures.

Issue 2: How the State's legislative response compares to the use of statutory frameworks in other jurisdictions.

A comparative analysis of how other jurisdictions responded is a hugely valuable exercise; where best practices that support the public health objective while respecting legal rights and obligations, can be evaluated.

Within the timeframe provided by the Oireachtas for responses to this consultation, the Council have for the moment, sought to focus on remaining points. Our only comment for the moment on the issue of a comparative analysis, is that it should be cognisant of the constitutional context of the jurisdictions in place, whether it is a common law or civil jurisdiction and the political oversight (bicameral, unicameral etc) deployed.

We refer the Committee to the important work of the Fundamental Rights Agency of the EU, which monitors closely Covid-measures deployed by Member States, and their impact on fundamental rights.¹

¹ As an example, Coronavirus pandemic in the EU - Fundamental Rights Implications - Bulletin 2; available at <https://fra.europa.eu/en/publication/2020/covid19-rights-impact-may-1>

Issue 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.

Pinpointing constitutional / legal risks to be considered in the context of developing such legislative framework for major events in the future are matters to be considered by all involved in introducing and implementing measures to address such events based on their practical experience. In *Bacik & Ors v An Taoiseach [2020] IEHC 31*, the High Court acknowledged the concerns raised regarding a risk to which the State might be exposed where the ability to enact emergency legislation in the future might be jeopardised such as where essential legislative constituents may be absent. The Court emphasised however the necessity of the Oireachtas to act urgently, including to overcome any impeding political stalemate, so as to ensure necessary measures required by the Constitution to effect such legislation are in place.

The role of consultation with key Justice stakeholders.

The Council emphasises that despite the speed at which the Oireachtas may, on occasion, be obliged to act, it is nonetheless in the public interest for it to accommodate a facility of effective (and rapid) consultation with key stakeholders; so far as is reasonably possible. The Bar of Ireland, through our Committee structure and the expertise within them, is ably positioned to assist in this exercise, where appropriate and relevant.

Unquestionably, it is important that the impact of measures taken on particular groups is adequately taken account of.

Issue 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.

The Council is not in a position to offer any expert insight into the effectiveness of the communications strategy followed during the course of the Covid-19 Response. Matters of publication are within the purview of the Government, their Departments and the professionals

within them. However, lawyers and politicians will be familiar with the significance and role of An Iris Oifigiúil.²

But in reality, meaningful public communication by the Government is a matter for their respective communications teams who are better positioned as to advise on how such issues are communicated directly to the public, including sectoral groups and stakeholders.

As noted above, it is the Council's view that a robust pre-legislative consultation exercise, where at all possible, greatly enhances both the quality and credibility of the legislative action, in addition to serving as a mechanism to support the communication of the final output to relevant parties.

Related matters

The Committee will note that throughout our submission and in particular our preliminary observation, there is an underlying theme that in a time of crisis such as presented to us by Covid-19, the administration of justice plays a fundamental role, not only as a check on the actions of the Oireachtas and any emanation of State, but also so that citizens can continue to be confident that the regulation and resolution of their affairs continue to be properly conducted.

The Bar has communicated elsewhere - and takes this opportunity to raise directly with members of the Oireachtas - the need for our courts system to be in a position to respond to these requirements. Since the lock-down, the business of the Courts has been severely scaled back, impacting on a wide range of civil and criminal law matters. It was inevitable that the day-to-day workings of the court system would be significantly affected by the measures which were introduced as part of the Covid-19 response. Accordingly, a significant number of cases or applications have been deferred although the courts did remain open to deal with urgent matters in person.

² From www.irisofigiuil.ie:

Iris Oifigiúil is the official means used by the Government for announcing appointments to public offices and publishing proclamations, statutory instruments, appointment of receivers to companies, etc.

Prima Facie evidence of any proclamation, order, rule, regulation, bye-law, or other official document may be given in any legal proceedings by production of a copy of the Iris purported to contain such matter (Documentary Evidence Act 1925 ss.3-4).

The use of remote hearings has, to a degree, been useful and important. But they are suitable for a narrow range of cases only.

For the first number of months, latitude was afforded as the administration of the courts responded to the public health requirements. However, the Council of the Bar of the Ireland urges that a clear, well-resourced and pragmatic plan be put in place to ensure the continuing administration of justice for remainder of 2020 and into the coming years.

We have submitted a range of proposals (see attached) in respect of safeguarding civil and criminal justice during these times and we are eager to contribute to a longer term planning exercise. These proposals have included, but are not limited to

- Use of alternative venues
- Changes to court rules
- Some minor legislative changes
- Amendments to some practice, procedure and conventions.

If there is not a clear and resourced plan, the likely outcome will be that the State will be effectively 'storing up' delays which would, in due course, be likely to undermine public confidence in the legal system generally.

We are available to discuss and answer any questions members of the Committee have in respect of the above and look forward to supplementing these submissions should it be desired by the Committee.



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