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Thirty-two laws were enacted in 2020, a significant reduction from the fifty-three enacted in 2019. This can be ascribed to the lengthy period in which the government was in a caretaker capacity only. The thirty-second Dáil was dissolved on 14 January, with an election on 8 February. The thirty-third Dáil met on 20 February, but no government was formed. Leo Varadkar, TD, formally resigned as Taoiseach but he and the other members of the government continued to carry out their duties in accordance with Article 28.11 of the Constitution until the appointment of the new government on 27 June. This was the longest period in which a government had continued to carry out its duties after its resignation, and for the first time during such a transitional period, the outgoing government proposed legislation which was passed by both houses (the newly elected Dáil and the continuing Seanad): the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public Interest (Covid-19) Act 2020. These were the first of two laws enacted in the context of the global pandemic of Covid-19; of the thirty-two laws enacted, seventeen contained provisions related to the unusual health, societal and economic situation caused by Covid-19 (including the Finance and Social Welfare Acts, which, though introduced on an annual basis, in 2020 had a heavy focus on Covid-19 supports). Amongst these many provisions, some in particular relate to the administration of justice, whether offences related to the pandemic or the conduct of both civil and criminal justice in the time of a pandemic.

At 11pm on 31 January, the UK left the EU; until 11pm on 31 December, under a transition period, it continued to operate the same trade rules. The Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 was passed in preparation from its ultimate departure from the trade bloc. The Minister for Justice commenced certain parts of this legislation, which are considered below.

While the focus of new laws in 2020, both in justice and in other areas, was in efforts to slow the spread of Covid-19 and to address the societal impact of restrictions, work on reform in other areas continued, which should form the basis of upcoming legislation.

Covid-19 and criminal enforcement

Section 31A of the Health Act 1947 inserted by the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 gave the Minister for Health the power to define breaches of restrictive measures passed for preventing, limiting, minimising or slowing the spread of Covid-19 as penal provisions. The first in a series of regulations imposing temporary restrictions was signed by the Minister for Health with effect from 8 April, with leaving one's place of residence without a reasonable excuse and organising an event that was not specifically permitted both being defined as penal provisions.¹ Further regulations with degrees of severity varying across time and location have been in place since that date, and may be in place until 9 June 2021, a date which may be extended on a resolution of both houses of the Oireachtas.² The content of the regulations differed at times from the public announcements by the government; for instance, although persons over the age of seventy were instructed to stay within their home, a practice termed cocooning, there was never any legal requirement to do so. The discrepancy between advice and regulations was highlighted by Dr David Kenny when speaking at the Special Oireachtas Committee on Covid-19 Response in his capacity as a coordinator of the Trinity College Dublin Covid-19 Law

¹ Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020 (S.I. 121 of 2020).

² Section 2(3) of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 had provided a termination date of 9 November, unless extended by a resolution approving of its continuance passed by both Houses of the Oireachtas. On 22 October both houses approved an extension to 9 June 2021.

and Human Rights Observatory. Dr Kenny also stated that it was of concern that regulations were published in some cases after they had purported to come into effect (Special Committee on Covid-19 Response, 2020). Ordinarily, statutory instruments are published on the Irish Statute Book website only after a notice has been made in *Iris Oifigiúil*, itself published biweekly. The government mitigated the delay caused by this process by having a dedicated page of statutory instruments related to the Covid-19 pandemic, although here, too, there was a short delay between their signature and their publication, which was problematic, as in many instances they purportedly took effect the day after their signature (Government of Ireland, 2021).

The Criminal Justice (Enforcement Powers) (Covid-19) Act 2020, enacted in September, gave the Gardaí additional enforcement measures in relation to places where alcohol was sold or consumed, including making an application to the District Court for temporary closure orders against licensed premises which operated contrary to the Health Act regulations. The Health (Amendment) Act 2020, enacted in October, made further amendments to the 1947 Act to allow for the imposition of fixed penalty fines in place of prosecutions for contravention of penal provisions in the restrictions, and for the Gardaí to instruct someone not to attend an event in a dwelling.

While the Gardaí were granted extensive new powers under these measures, their role was to use them only when necessary. According to a report of the Policing Authority, they were to take a graduated approach of the four E's: engage, explain, encourage and, only then, enforce. Under the same report, from 8 April to 5 December 2020, the Gardaí exercised their powers of enforcement under these regulations on 859 occasions. Because the requirements to wear face coverings have remained constant since July on public transport and since August in buildings and businesses open to the public, whereas other restrictions have varied, the Gardaí have imposed fines only in the case of refusals to wear face coverings (Policing Authority, 2020).

The Policing Authority identified the introduction of spit hoods as an area of significant concern. These are hoods that are forcibly fitted over the full head of someone the Gardaí are restraining, for the purpose of preventing them from spitting, to prevent the possible transmission of the virus. The authority sought assurances from the Garda Commissioner that these would be used for the duration of the pandemic only. They were used a total of 120 times, with 6 of those times being against children. The Children's Rights Alliance and the Irish Council for Civil Liberties (2020) raised concerns about their use

generally, and specifically in their use against children. The use of spit hoods declined over the course of the year, with no incidents recorded in November, and one incident recorded in December.

Immigration and asylum under Covid-19 restrictions

The Burgh Quay Immigration Service Registration Office in Dublin closed as the department was not able to maintain the service with adequate distancing. It reopened in July to allow first-time registrations only. Because of this, the Minister for Justice issued temporary extensions of immigration and international protection permissions, up to the date of 20 January 2021. Interviews for international protection and hearings of appeals of negative decisions to the International Protection Appeals Tribunal (IPAT) were postponed during each of the periods of heightened restrictions. In July the Minister for Justice suspended the Irish Short Stay Visa Waiver Programme, which is ordinarily available to those who have visas to visit the UK.

Prison Services

The Prison Services made administrative changes to temporary release and considered more cases than usual. This saw a decrease in the prison population from 4,235 on 11 March to 3,772 on 22 October, a reduction of approximately 11 per cent, and those on temporary release were required to sign in on a monthly, rather than a weekly, basis. All new prisoners have been required to quarantine for up to fourteen days, while prisoners who are over seventy and others identified as vulnerable because of their medical condition have been kept apart from others, or cocooned. Visits from family members to prisons were suspended in March but resumed in July.³

Response of the courts to call for restrictions

On 12 March Taoiseach Leo Varadkar spoke from Washington, DC, about the risks Ireland was facing from Covid-19 and asked people to work from home where possible. On that day, the Courts Service (2020a) announced that it would introduce measures to scale back the number and size of court hearings, but that it would otherwise be ‘business as usual’. The following day, however, the courts began a

³ See <https://www.irishprisons.ie/visiting-a-prison/> [12 January 2021].

process of measures to scale back the work of the courts. On 16 March the Chief Justice and the other court presidents issued a notice in which they agreed to proceed only with urgent hearings or to finish proceedings already at hearing. Provision was made for the electronic delivery of judgments (Courts Service, 2020b). On 20 April the Court of Appeal began to hear virtual appeals over Pexip and, over time, more court lists moved to this virtual format. In July the Chief Justice made a statement on how the courts could begin to safely expand hearings, in which he emphasised that it had been actions involving witnesses which had suffered the most backlog, and that there was a range across the country in the ability of court facilities to accommodate the necessary distancing within court.

The move to remote hearings affects the constitutional requirement under Article 34.1 that, ‘save in such special and limited cases as may be prescribed by law’, justice should be administered in public. While there are arrangements to allow journalists and interested members of the public to call into proceedings while remaining mute and off the screen, it is nevertheless difficult to access. Other jurisdictions have measures which allow live broadcasts of court proceedings; the Supreme Court of the UK had broadcast proceedings online for a number of years, while the Supreme Court of the US, long resistant to any live broadcast, relaxed this approach, allowing broadcasts of remote proceedings taking place from the beginning of Covid-19 restrictions.

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020: Remote hearings and other matters

The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, which was enacted on 6 August, included measures relating to the administration of justice during the pandemic, while also including measures which will have a more permanent and standing part of the administration of both civil and criminal justice.

This included amendments to the Coroners Act, to allow for the temporary appointment of coroners ‘in exceptional circumstances arising due to the number or nature of deaths resulting from a pandemic, catastrophic event or other occurrence leading to mass fatalities’.⁴

⁴ Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (No. 13 of 2020), s. 7.

Section 11 gave the courts hearing civil proceedings the power to direct that any category or type of proceedings should be conducted by remote hearing, or that an individual case should be conducted by remote hearing. It should not proceed where it would be 'unfair to any of the parties or otherwise be contrary to the interests of justice'. In the case of a district or circuit judge, they would be considered to be sitting in the district or circuit to which they were assigned. It created an offence of frustrating the proceedings or recording them without the permission of the court. The section was commenced on 21 August with retrospective effect.

Part 4 of the Act governs the circumstances in which elements of criminal proceedings may be conducted remotely, which are more circumscribed than in the case of civil proceedings, given the consequences for defendants and the rights they retain. Under section 23, with certain exceptions, applications for bail or free legal aid, applications relating to sentencing, or applications relating to appeal proceedings may be done remotely. Section 25 broadens the use of video evidence as part of trial hearings. Section 26 allows appeals in criminal matters to be heard by remote hearing, and contains a similar offence as in section 11 for obstruction of the proceedings or unauthorised recording.

The limited use of remote technology in earlier legislation became redundant on the enactment of this new legislation. Therefore, sections 33 and 34 of the Prisons Act 2007, which had limited the use of video links to persons who are being held in custody, and section 26 of the Civil Law (Miscellaneous Provisions) Act 2008, which had provided for video conferencing in civil proceedings, were repealed.

The use of remote technology was also extended to other state bodies. Sections 29 to 31 allowed ministers to permit state bodies and other designated bodies as competent for remote meetings and remote hearings, and for decisions to be considered as valid where a vote was taken remotely. Over thirty such orders were made by various ministers and, specifically in the areas of justice, this was applied to the meetings and hearings of the Legal Aid Board and the IPAT, as well as other bodies with quasi-judicial functions such as the Workplace Relations Commission or Irish Financial Services Appeals Tribunal. The body itself may determine, of its own motion or following representations by a person concerned, not to hold a remote hearing where it would be 'unfair to the person, or would otherwise be contrary to the interests of justice'. In the case of the IPAT, for

example, hearings were postponed with the option of a remote hearing granted to appellants who wished to have it.⁵

The legislation had been proposed in the context of the pandemic and, because of this urgency, it received only a day of debate in each house. However, the same legislation also implemented reforms to civil proceedings generally with an older provenance. Chapter 3 of the Act reformed the law on the admissibility of business records in civil proceedings. Applications for business records in criminal proceedings will remain under the separate basis of Part II of the Criminal Evidence Act 1992. This reform had been proposed by the Law Reform Commission in its 2016 report *Consolidation and Reform of Aspects of the Law of Evidence*. It provides that in civil proceedings any record in the form of a document compiled in the course of business shall be presumed to be admissible evidence of the truth of the fact or facts asserted in that document. Under section 13, ‘any record in document form compiled in the ordinary course of business shall be presumed to be admissible as evidence of the truth of the fact or facts asserted in such a document’, which marks a change to the rule against hearsay.

Chapter 4 provides for court rules to allow for electronic filing (section 20), and for an electronic statement of truth to take the place of a sworn or affirmed affidavit (section 21). While this has salience in a time when courts may wish to minimise the journeys solicitors would have to make to court offices, or to a neighbouring solicitor to swear or affirm an affidavit, these provisions will find their use and application beyond this period of unusual procedures. Although the statement of truth is being proposed as an alternative to an affidavit only for the circumstances of electronic filing, it is now more than thirty years since the Law Reform Commission published its *Report on Oaths and Affirmations* (1990), in which it considered that the ‘balance of the argument weighs heavily ... in favour of requiring all witnesses without distinction to affirm’ (Law Reform Commission, 1990, p. 46). Later reforms may see it become such a universal substitute for the default procedure of sworn affidavits or sworn testimony in proceedings.

Brexit

Parts 16 to 19 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 took effect at

⁵ See <http://www.protectionappeals.ie/> [12 January 2021].

11pm on 31 December 2020 following their commencement by the Minister for Justice.⁶ These provisions were designed to facilitate, as far as possible, having similar procedures as had existed before withdrawal in the respective areas of extradition; immigration; international protection; recognition of divorces, separations and marriage annulments; and defamation. In the case of international protection, as the UK is no longer part of the Dublin system of common recognition of asylum procedures, it would instead be recognised as a safe third country, to which Ireland could issue a return order for someone who makes an application for international protection in Ireland, but who has spent time living in the UK. This differs from either a transfer between member states under the Dublin system or a deportation order for someone who otherwise does not have permission to be in the state.

Sexual offences

There is continuing reform to how the criminal justice system approaches complainants in sexual offence cases. In August the Minister for Justice published the *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, authored by a working group chaired by Tom O'Malley, barrister and senior lecturer in NUI Galway. This was followed by *Supporting a Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases*, a report by the Department of Justice and Equality on how it proposed to implement these changes.

This report identified that a key part of the work needed is in promoting awareness of recent legislative change. The Criminal Justice (Victims of Crime) Act 2017 implemented the EU Victims' Rights Directive; the Criminal Law (Sexual Offences) Act 2017 updated the definitions of certain sexual offences, including an understanding of consent in sexual offences cases; and the Domestic Violence Act 2018 updated definitions of protective orders in cases of domestic abuse and created new offences, such as forced marriage and coercive control. The 2018 Act also established that a relationship between the defendant and the victim would be an aggravating factor

⁶ Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Part 16) (Commencement) Order 2020 (S.I. 687 of 2020) and Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 (Parts 17, 18, 19 and 20) (Commencement) Order 2020 (S.I. 693 of 2020).

in the sentencing of certain offences. The department intends to promote awareness at all levels of education and through public information campaigns.

The report recommended changes to trials in certain sexual offences cases. A legal team would be briefed to represent the interests of the complainant in cases of sexual assault, as distinct from the interests of the Director of Public Prosecutions. A preliminary trial hearing would address applications to question a complainant about their sexual experience, and the Legal Aid Board would receive notification of this application. The preliminary trial hearing would also address issues relating to the appointment of intermediaries or other special measures required for vulnerable witnesses (Department of Justice and Equality, 2020, p. 38). The report also recommended that the Legal Aid Board should be empowered to give free legal advice to complainants of sexual offences, and not just where a prosecution is taking place.

As well as changes that have been implemented or have been proposed to underpin a more modern understanding of intimate relationships and consent, the need for change has also arisen because of modern technology. In December the Harassment, Harmful Communications and Related Offences Act 2020 was enacted. It is one of the few Acts which originated as a private member's bill rather than from the government, having been proposed by Brendan Howlin, TD, in 2017 while Labour Party leader. It received momentum when Jackie Fox – whose daughter Nicole Fox Fenton (known to friends and family as Coco) had died by suicide after cyberbullying – was told by Gardaí that there was no basis to prosecute those who had caused her daughter harm (Staines, 2020). The bill was later supported by the Minister for Justice and by members in both houses, and, in memory of this victim, it has become known as Coco's Law. The law adopted proposals to tackle harms and abuses in electronic form from a draft bill contained in *Report on Harmful Communications and Digital Safety*, published in 2016 by the Law Reform Commission. The Act created new offences in relation to online abuse and amended the terms of the offence of harassment to address the abuses which have been known colloquially as revenge porn and upskirting. Section 2 created an offence of distributing, publishing or threatening to distribute or publish an intimate image without consent with intent to cause harm or being reckless as to whether harm is caused. This is treated liable on indictment to a term of seven years and is listed as a serious offence under the Bail Act 1997. Section 3 created an offence

of recording, distributing or publishing an intimate image without consent. This differs from the offence in section 2 as not requiring the intent to cause harm and is liable to a summary conviction only. Under the Domestic Violence Act 2018, it will be treated as an aggravating factor in sentencing under either of these sections that the perpetrator was in an intimate relationship with the victim. For the purposes of both these offences, an intimate image is defined as a visual representation of or purporting to be the person's genitals, buttocks or anal region or, in the case of a female, her breasts or the underwear covering these areas, or where they are nude or engaged in sexual activity. It is separately an offence under section 5 for anyone to breach the anonymity of an alleged victim of either of these offences.

Section 4 created an offence of distributing, publishing or sending threatening or grossly offensive communication with intent to cause harm. While the Act as a whole focuses on image-based sexual abuse, this offence is not limited to such circumstances, and could be used in much broader contexts of online communication. 'Grossly offensive communication' is not defined in the Act, and would remain to be interpreted by a judge. During the Dáil debate, Paul Murphy, TD, expressed concern that it could have a wide application affecting the freedom of expression, referring to the abuse he received as a public representative, which he '[did] not welcome ... but [did] not think ... should be criminalised'. Minister of State James Browne, TD, responded that the requirement to prove intent to cause harm should limit this concern (Dáil Éireann, 2020).

The offence of harassment in section 10 of the Non-Fatal Offences against the Person Act 1997 was amended to include communications about an alleged victim in its definition, as well as with the alleged victim themselves directly. The liability on indictment was also extended from seven years to ten years.

Report on the administration of civil justice

In December a Review Group on the Administration of Civil Justice chaired by former President of the High Court Peter Kelly delivered its report. The report made over ninety recommendations, and the Minister for Justice committed to producing an implementation report by February 2021. These included a proposal of an automatic discontinuance of cases which had not been set down for trial within thirty months of their commencement (Review Group on the Administration of Civil Justice, 2020, p. 134). It also proposed a

reform to threshold for leave in applications for judicial review. In standard cases of judicial review, leave may be obtained where there is an arguable case; in the statutory schemes for judicial review of decisions relating to immigration or planning, an applicant must demonstrate that there are substantial grounds to obtain leave. The review group recommended that there should be legislative change requiring applicants to demonstrate in all instances both that there are substantial grounds for review and that the claim has a reasonable prospect of success (Review Group on the Administration of Civil Justice, 2020, p. 208). It proposed the establishment of a scheme for multi-party litigation, or class actions (Review Group on the Administration of Civil Justice, 2020, p. 261).

Transfer of functions

In October functions of the Department of Justice and Equality relating to disability, equality, human rights, integration of migrants and reception conditions for international protection applicants were transferred to the newly renamed Department of Children, Equality, Disability, Integration and Youth.⁷ *The Report of the Advisory Group on the Provision of Support Including Accommodation to Persons in the International Protection Process* will fall to be implemented by this newly restructured department. This advisory group was chaired by Catherine Day, former secretary general of the European Commission, and presents a pathway for phasing out the current system of direct provision, a commitment which was in the program for government of the administration formed on 27 June. From 1 November, the Department of Justice and Equality was itself renamed as simply the Department of Justice.⁸

References

Courts Service. (2020a). *Covid-19 notice – Court hearings – March 12th 6:30 p.m.* Retrieved from <https://www.courts.ie/news/covid-19-notice-court-hearings-march-12th-630-pm> [12 January 2021].

⁷ Disability, Equality, Human Rights, Integration and Reception (Transfer of Departmental Administration and Ministerial Functions) Order 2020 (S.I. 436 of 2020) and Children and Youth Affairs (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. 437 of 2020).

⁸ Justice and Equality (Alteration of Name of Department and Title of Minister) Order 2020 (S.I. 452 of 2020).

- Courts Service. (2020b). *Updated statements of the presidents of each court – Covid 19*. Retrieved from <https://www.courts.ie/news/updated-statements-presidents-each-court-covid-19> [12 January 2021].
- Dáil Éireann. (2020, 17 December). Harassment, Harmful Communications and Related Offences Bill 2017: Report and final stages. *Dáil Debates*, 1002 (7).
- Department of Justice and Equality. (2020). *Supporting a victim's journey: A plan to help victims and vulnerable witnesses in sexual violence cases*. Dublin: Department of Justice and Equality.
- Government of Ireland. (2021). *Statutory instruments related to the Covid-19 pandemic*. Retrieved from <https://www.gov.ie/en/collection/1f150-view-statutory-instruments-related-to-the-covid-19-pandemic/> [12 January 2021].
- Irish Council for Civil Liberties. (2020). *Children's Rights Alliance: Spit hoods fly in the face of government's progressive youth strategy*. Retrieved from <https://www.iccl.ie/news/cra-spit-hoods-fly-in-face-of-progressive-youth-strategy/> [12 January 2021].
- Law Reform Commission. (1990). *Report on oaths and affirmations*. Dublin: Law Reform Commission.
- Policing Authority. (2020). *Tenth report on policing performance by the Garda Síochána during Covid-19 health crisis*. Dublin: Policing Authority.
- Review Group on the Administration of Civil Justice. (2020). *Review of the administration of civil justice – Report*. Dublin: Department of Justice and Equality.
- Special Committee on Covid-19 Response. (2020, 9 September). *Covid-19: Legislative framework underpinning the state's response*. Retrieved from https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid_19_response/2020-09- [12 January 2021].
- Staines, M. (2020, 16 September). 'Coco's Law': *Online abusers to be criminalised by Christmas*. Retrieved from <https://www.newstalk.com/news/cocos-law-online-abuse-1077178> [9 January 2021].