Justice, 2021

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Introduction

The year 2021 saw the Department of Justice initiate a system of self-accountability, through published plans, which will assist those with a professional and academic interest to monitor changes in the legal and structural framework across the Justice sector.

There have been significant developments in immigration and citizenship, with the announcement of a scheme, to take effect in early 2022, to regularise the status of undocumented people living in Ireland, and allow them on a path to citizenship.

There has also been continued legislation with an aim to mitigate the effect of Covid-19 and to adapt to a working world where it has had effects on both health and economics. These have included criminal sanctions and temporary changes to licensing laws.

There were also new laws based on private members' bills, which were either accepted in their original form and amended, or reintroduced by the government, but with specific acknowledgment for the original legislation.

At a ministerial level there was a reallocation to accommodate the maternity leave of Minister Helen McEntee, TD, when she became the first cabinet minister to give birth while in office.

Department of Justice agenda and reviews

In February 2021 the Department of Justice published its *Justice Plan 2021*. The department has committed to publishing these reviews of its

work on an annual basis. The 2021 plan set five goals for the three-year period of 2021 to 2023:

1. tackling crime, enhancing national security and transforming policing;
2. improving access to justice and modernising the courts system;
3. strengthening community safety, reducing reoffending, supporting victims and combating domestic, sexual and gender-based violence;
4. delivering a fair immigration system for a digital age;
5. accelerating innovation, digital transformation and climate action across the justice sector. (Department of Justice, 2021, p. 5)

A *Mid-Year Progress Report* indicated significant achievement of its objectives by the target dates. While this is self-accountability, rather than an external assessment, if performed and published in an ongoing and transparent way, it will continue to provide assistance to the monitoring of the department's operations.

The department published a General Scheme of the Courts and Civil Law (Miscellaneous Provisions) Bill 2021, which gives an insight into upcoming changes in the courts.

Criminal procedure

The Criminal Procedure Act 2021, which has yet to be commenced, introduces the preliminary trial hearing. This will allow certain issues to be determined before the commencement of the trial, with the aim to facilitate the expeditious and efficient conduct of the proceedings, reduce disruption to juries and to witnesses, and to protect the interests of any victim of an offence.

It implements parts of the department's strategy outlined in *Supporting a Victim's Journey*, published in 2020. This will assist complainants and other witnesses in crimes by ensuring that matters of law are dealt with before a trial is set down for hearing. It will also lessen the costs and administration to the jury system, allowing matters to be dealt with before the jury is impanelled, and thereby reducing the interruptions through the voir dire process after proceedings have begun.

Immigration and citizenship

In December 2021 the Minister for Justice announced a scheme to regularise long-term undocumented migrants. It is an administrative scheme under the minister's executive powers. The scheme is to open only from 31 January 2022 to 31 July 2022 inclusive. It is open to applicants who have been in the state on a continuous basis for four years prior to the commencement of the scheme. This period is reduced to three years for those making a family application including at least one dependent minor child. It marks a significant step for the many who have been living and working in the country without legal status. The scheme was welcomed by the Immigrant Council of Ireland, but they noted the potentially prohibitive cost of applications, at €550 for individual applications and €700 for family units (Immigrant Council of Ireland, 2021).

The scheme is not open to those who have an international protection application open, as applicants have a temporary permission and documentation based on their application. However, there will be a separate scheme for applicants who have been in the international protection process for a minimum of two years, and who will apply through the International Protection Office (Delaney, 2021). This forms part of the separate approach of the government in adopting recommendations of the *Report of the Advisory Group on the Provision of Support Including Accommodation to Persons in the International Protection Process*, led by Dr Catherine Day, published in October 2020.

In December the Department of Justice, in conjunction with the Department of Foreign Affairs and the Department of Children, Equality, Disability, Integration and Youth, opened a scheme with up to 500 places for those legally resident in Ireland originally from Afghanistan, including naturalised Irish citizens, to apply for up to four beneficiaries from Afghanistan to come to Ireland. This was in response to re-establishment by the Taliban government and the reversal of human rights in the country.

The General Scheme of the Courts and Civil Law (Miscellaneous Provisions) Bill 2021 would amend two provisions on citizenship. Head 44 would reduce the period of required residency for minors born in the state from five years to three years. This incorporates provisions agreed by the government in a debate on the Irish Nationality and Citizenship (Naturalisation of Minors Born in Ireland) Bill 2018, proposed by Labour senators. Head 45 would

clarify the law on the requirement for ‘continuous residence’ in the year before an application for citizenship, to allow absences of up to seventy days, or additional periods not exceeding thirty days under specified exceptional circumstances. This clarifies the law which was the subject of litigation in *Jones v. Minister for Justice and Equality* [2019] IEHC 519 and [2019] IECA 285. In that case the High Court took a strict interpretation of ‘continuous residence’ that had not been argued for by the state, which was loosened by the Court of Appeal. This legislation will bring clarity to this area, which was subject to interpretation and application by the department.

It would also amend the time period between an unsuccessful application for international protection and additional submissions on leave to remain. The International Protection Act 2015 streamlined the processes of asylum, subsidiary protection and leave to remain into a single application process. Under s. 48 of the 2015 Act, where an applicant is unsuccessful, they are given five days to agree to leave the state voluntarily before a deportation will issue. As time may pass between the initial application and the determination of any appeal, an applicant may frequently have additional grounds to submit to the minister for permission to remain. A period of five days was unrealistically short for this purpose. The proposed legislation would increase this to thirty days.

Trafficking

The government approved a proposal for a revised National Referral Mechanism to make it easier for human trafficking victims to come forward and receive supports. The Criminal Justice (Smuggling of Persons) Act 2021 gave effect to European Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence. It established the offences of assisting unlawful entry into, transit across or presence in state, or into a designated state, and the provision of fraudulent documents for these purposes.¹

Covid-19

Legislation throughout 2020 was dominated by the response to Covid-19. While the government and the Oireachtas had greater opportunity

¹ Criminal Justice (Smuggling of Persons) Act 2021 (No. 42), Part II (ss. 5 to 10).

in 2021 to consider legislation in other areas, the impact of Covid-19 continued into 2021. As restrictions begin to be lifted from the beginning of 2022, its imposition on the statute book may be coming towards an end.

The legislation included new criminal sanctions. The Health (Amendment) Act 2021 introduced a system of mandatory hotel quarantine through the insertion of sections 38B to 38M in the Health Act 1947. Section 38D created a series of offences related to quarantine, including the failure to comply with the requirement to present in accordance with the new provisions, failure to remain at a designated facility and obstructing the Gardaí in carrying out these provisions. These provisions were challenged by two women who were arrested for their failure to comply with quarantine rules on their return home to Ireland from a trip abroad (Carolan, 2021b). The challenge has yet to be heard by the High Court.²

Under the terms of s. 9 of this Act these inserted provisions remained in operation as part of the 1947 Act until 7 June 2021. This period was extended by resolutions of both houses, first until the date of 31 July 2021, and then until 31 October 2021. These provisions ceased to be in operation from 1 November. However, later in the year, when the Omicron variant was identified as a variant of concern, nearly identical provisions were inserted as ss. 38N to 38Z later by the Health (Amendment) (No. 3) Act 2021, with the offences contained in s. 38P. This amendment took effect on 9 December 2021, to remain in operation for three months, unless extended by a resolution of both houses.

Other amendments to the Health Act 1947 have continued in force since March 2020; however, the fact that the provisions on mandatory hotel quarantine were allowed to lapse in this manner is an indication that emergency provisions are not destined to remain in place, even as cases of Covid-19 continue to exist in the community. Legislation and regulations in this area are emergency provisions, and their extension must be justified according to actual public need.

The legislation in March 2020 introducing the initial restrictions permitted the period of operation to be extended any multiple of times by a resolution of both houses. This is now limited to a single extension

² *Mulreany v. DPP* [Record No. 2021/349 JR] and *Mulreany v. Governor of Mountjoy Prison* [Record No. 2021/492 SS], via <https://www.csol.ie/ccms/web/high-court-search/case-details/2021/492/SS> and <https://www.csol.ie/ccms/web/high-court-search/case-details/2021/349/JR> on Courts Service Online.

of no more than three months. The Health and Criminal Justice (Covid-19) (Amendment) (No. 2) Act 2021 extended the operation of emergency provisions to 31 March 2022, a date which may be extended by a further three months by a resolution of both houses of the Oireachtas. This date applies to the provisions inserted by the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, the initial legislation permitting restrictions on movement and business opening; the Criminal Justice (Enforcement Powers) (Covid-19) Act 2020, providing Garda powers to inspect premises; the Health (Amendment) Act 2020, which introduced fixed fine penalties for breaches of restrictions; and the Health (Amendment) (No. 2) Act 2021, which imposed pre-travel restrictions on those arriving in the state. Therefore, if the government wishes to continue with any of these restrictions after June 2022, further legislation will need to be enacted after that date.

There was some political support from outside the government parties for the continuation of these provisions: the extension to 31 March 2022 passed the Dáil by a vote of eighty-seven to forty-eight, with the support of the government parties of Fianna Fáil, Fine Gael and the Green Party, but also the Labour Party and the Social Democrats, with opposition from Sinn Féin, People Before Profit/Solidarity and Aontú (with independent TDs predominantly voting against).

However, with a significant reduction in restrictions from 21 January 2022, it will remain to be seen how much of the structure in primary legislation will remain after 31 March, and whether any further legislation will extend it, or whether it will instead be amended to allow only a minimal level of restrictions (Bray, 2022; Martin, 2022).

The Civil Law (Miscellaneous Provisions) Act 2021 amended licensing law to allow for outdoor sale and consumption of alcohol on a temporary basis and to allow for enforcement of licensing laws in an adapted form in these circumstances. By contrast with other legislation, this was mostly a permissive rather than restrictive emergency measure, and was not subject to the shorter extension periods for its operation; it did, however, expand the scope of the Criminal Justice (Public Order) Act 1994 to include an outdoor seating area on private land as a public place. As enacted in July 2021, the provisions were to stay in force until 30 November 2021, with multiple six-months extensions permitted. By a resolution of the Seanad on 16 November and of the Dáil on 25 November, its operation was extended to 31 May 2022. Even where there are

reduced restrictions in general in summer, the government may wish to promote and facilitate outdoor hospitality, so that a further extension to November 2022 could remain possible, even in the absence of wider restrictions.

Adoption of private members' bills: Child victims, perjury and ticket touts

On 29 October 2020 the Court of Appeal held in *The People (Director of Public Prosecutions) v. E.C.* [2020] IECA 292 that the restriction on naming a child who had been the victim of a crime extended to circumstances where a child had been killed. Two private members' bills were proposed that would allow a child to be named in these circumstances: one proposed by the Independent Seanad Group, and another proposed by Fianna Fáil TDs Jim O'Callaghan and Jennifer Murnane O'Connor. The Department of Justice agreed to support the measure, and ultimately it was the former bill which was progressed. Senator Michael McDowell, speaking in the Seanad debate, described 'the fact that my Bill was chosen was partly the luck of the draw ... what was considered the most expeditious way of dealing with the legislation' (Seanad Éireann, 2021). The Children (Amendment) Act 2021 amended s. 252 of the Children Act 2001 to permit the naming of a child. It was commenced on 7 May.³

The Criminal Justice (Perjury and Related Offences) Act 2021, which was commenced on 28 July, gave a statutory definition to the offence of perjury. It originated as a private members' bill in the previous legislative term from the independent Senators Pádraig Ó Céidigh, Michael McDowell, Ian Marshall and Victor Boyhan. The Perjury Act 1911, which had consolidated the common law offences in British law, was never extended to Ireland. The common law offence of perjury was rarely prosecuted in Ireland; in introducing the bill in the Dáil, then Minister for Justice and Equality Charlie Flanagan, TD, noted that there had been thirty-one prosecutions in the previous ten years (Dáil Éireann, 2019). This new Act established the offences of perjury, subornation of perjury, the making of certain false statements and the fabrication of evidence.

The Sale of Tickets (Cultural, Entertainment, Recreational and Sporting Events) Act 2021, drafted by the Department of Enterprise, Trade and Employment rather than Justice, regulated the secondary

³ Children (Amendment) Act 2021 (Commencement) Order 2021 (S.I. No. 199).

sale of tickets, intended to tackle the problem of ticket touts.⁴ The Act adapts legislation proposed in two private members' bills in the previous Dáil: one from TDs Noel Rock (Fine Gael) and Stephen Donnelly (Fianna Fáil), and a second from TD Maurice Quinlivan (Sinn Féin), the former bill having been accepted by the government before lapsing on the dissolution of the thirty-second Dáil.⁵ The new Act created the offences of prohibiting the sale or advertisement of tickets for relevant events for a price exceeding the original sale price (s. 15), and failing to provide particular information on its price for both the primary and secondary seller (ss. 16 and 17). It granted powers to the Gardaí to enter and search premises where they have reasonable grounds for believing that a person is committing an offence under the Act (s. 20) and to arrest without warrant where they find someone committing the offence of selling a ticket at a price exceeding the original sale price (s. 22).

Mandatory minimum sentences

In *Ellis v. Minister for Justice and Equality* [2019] IESC 30, the Supreme Court found that a statutory provision imposing a mandatory minimum sentence but only applying to a limited group of such offenders identified by one particular characteristic, namely that such person has previously committed one or more of the listed offences, was unconstitutional. On this basis, it found that s. 27A(8) of the Firearms Act 1964 (as substituted by s. 59 of the Criminal Justice Act 2006) was repugnant to the Constitution. Similar provisions existed in other legislation. The Criminal Justice (Amendment) Act 2021 amended several legislative provisions with similar provisions, being the Dublin Police Magistrates Act 1808, the Illicit Distillation (Ireland) Act 1831, the Refreshment Houses (Ireland) Act 1860, Firearms Act 1925, the Firearms Act 1964, the Misuse of Drugs Act 1977, the Firearms and Offensive Weapons Act 1990, the Criminal Justice Act 2007 and the Parole Act 2019.

Judicial reform and civil law

On 24 April 2021, after an amendment under s. 30 of the Family Leave and Miscellaneous Provisions Act 2021 to allow bridging between the

⁴ (No. 21 of 2021).

⁵ Prohibition of Above-cost Ticket Touting Bill 2017 (No. 9 of 2017) and Sale of Tickets (Sporting and Cultural Events) Bill 2017 (No. 29 of 2017).

old Book of Quantum in respect of older cases, the Personal Injuries Assessment Board Act 2003 and the Civil Liability and Courts Act 2004 were amended to require both the Personal Injuries Assessment Board and the courts to have regard to the new personal injuries guidelines drawn up by the Judicial Council. Challenges were brought in the High Court later in the year to the constitutionality of the guidelines (Carolan, 2021a; Phelan, 2021).

Under s. 8 of the Civil Law (Miscellaneous Provisions) Act 2021, the Courts and Court Officers Act 1995 was amended to increase the number of ordinary judges of the High Court from thirty-seven to forty-two, with a provision allowing the appointment of one further judge to the High Court where ‘necessary in the interests of the administration of justice to do so’.

Civil legal aid is under review. The Legal Aid Board will no longer include the Housing Assistance Payment in their calculation of entitlement to civil legal aid.

Ministers

Helen McEntee, the Minister for Justice, became the first minister in Ireland to take maternity leave while in office. There was a reallocation between ministers of the Department of Justice during the year to accommodate this. S. 7 of the Ministers and Secretaries (Amendment) Act 1939 provides for another member of the government to discharge the duties of a minister on a temporary basis, where the minister responsible for a department is temporarily unable to discharge the duties of office, and for that minister to be described as ‘acting’. However, rather than using this provision, the department was simply reallocated from McEntee to Minister Heather Humphreys, TD, on 27 April (Government of Ireland, 2021a). McEntee remained in the government as a minister without portfolio. This is provided under s. 4 of the 1939 Act, under which ‘Nothing in the Ministers and Secretaries Acts ... shall render it obligatory for every member of the Government to be a Minister having charge of a Department of State’.

Humphreys was also Minister for Social Protection and Minister for Rural and Community Development, and held the three positions together. James Browne, TD, who was already Minister of State at the Department of Justice, was given increased responsibility, while Hildegard Naughton, TD, was appointed as Minister of State at the Department of Justice for the duration of McEntee’s maternity leave (in addition to her roles at the Departments of the Environment,

Climate and Communications, and of Transport). On 1 November the department was allocated again to McEntee (Government of Ireland, 2021b).

Current legislation therefore proved flexible to accommodate this reallocation at a cabinet level, but further changes will be necessary to accommodate parental leave at all levels of politics, including within the Dáil, the European Parliament and councils. Ireland still has a relatively low proportion of women in elected politics, at 22.5 per cent of the Dáil, compared to a global percentage of 25.9 per cent (Inter-Parliamentary Union, n.d.).

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