



Minister Helen McEntee TD
Minister for Justice
Department of Justice
St. Stephen's Green
Dublin 2
D02 HK52

Date: 3 July 2020
Our Ref: FMC/6609
Your Ref:

BY E-MAIL ONLY:
helen.mcentee@oireachtas.ie
helen.mcentee@oir.ie

**Re: Urgent Change Required By Covid-19 Pandemic
To Enable Access to Justice**

Dear Minister McEntee,

Congratulations on your appointment as Minister for Justice; it is wonderful to see and I have no doubt that you will make an excellent contribution to the Government of our country in this challenging role.

While no doubt you are extremely busy and have many priorities to attend to upon taking office, I am writing to you as you start out on your journey in the Department to highlight an issue which has come to light as a result of the current Covid-19 pandemic which gives rise to a need for urgent change; change that is within your power to bring about.

Thankfully this change can be made quickly and easily, at practically no cost and rapidly; it simply requires long overdue action by our legislature and the legislation required is drafted and ready to be enacted.

We all restricted our activities as directed by the Government to do what we could to slow the spread of the Covid-19 Corona Virus.

While legal services were designated as essential services, legal practitioners also restricted activities to those that were essential and that could be delivered safely. This involved most people working from home and remotely in other ways.

During the crisis period, our courts were effectively closed other than for urgent matters and, at the time of writing, the activities of the courts remain significantly curtailed in many key areas.

However, meanwhile, citizens awaiting remedies from the courts are entitled to access to justice in a timely fashion. Social distancing is likely to remain with us for some time and it is difficult to see the operation of our courts returning to normal while these requirements remain a necessity. Therefore, we need an alternative as a matter of urgency.

Almost all legal business required to be done to progress legal proceedings can be done remotely, with one very significant exception.

Affidavits cannot be completed remotely. They must be sworn in the physical presence of either a commissioner for oaths or a practising solicitor. These documents are an essential requirement for all court proceedings and for many non-contentious court-sanctioned processes such as the functions of the Probate Office and the Wards of Court Office.

A recent High Court ruling on affidavits has confirmed that, as the law currently stands, if a person has religious faith, they must swear an affidavit placing their hand on the sacred text of that faith. This places the commissioner for oaths (or practising solicitor) taking the oath in the entirely unsatisfactory position where he or she must enquire if the person making the affidavit is a person of religious faith and, if so, the commissioner must then produce the appropriate sacred text of that faith for the oath to be administered in accordance with the requirements of that faith.

This is a completely anachronistic practice that has no place in our modern society. The State, the courts, and the legal profession have no business enquiring as to the faith or otherwise of a person in the context of legal proceedings, unless for some reason the question of faith forms part of the subject matter of the proceedings. A person seeking to complete an affidavit should not be subject to the intrusion, indignity and potential embarrassment of having to explain their religious beliefs or otherwise to a stranger in the context of exercising their rights in a democratic republic.

The case for this change was made in a report of the Law Reform Commission from 1990 and I attach a copy of the summary of recommendations from that report which you will see offers a very simple and succinct change to the position. The legislation required to give effect to this change has been advanced to heads of bill stage since 2017 and can quickly and easily be brought forward for enactment. I also attach a relevant extract from the heads of bill.

It will be clear to anyone that this is a change that should have long since been made even in the absence of the current need for social distancing. But it must also be remembered that an affidavit can only be sworn in the physical presence of a person acting as commissioner for oaths who is independent of the solicitor acting on behalf of the person swearing the affidavit.

Therefore, affidavits cannot be sworn without a physical meeting of two or three people, and perhaps more depending on the circumstances. There are no circumstances in which an affidavit can be completed remotely and, therefore, a system of remote court hearings cannot presently proceed without the affidavits that the litigation process depends upon being sworn physically.

This need for otherwise unnecessary physical meetings is dangerous in the context of the current pandemic. Many litigants in court proceedings are vulnerable people who find themselves with no choice but to seek redress from the courts. Furthermore, the requirements for affidavits in probate matters and in the context of the creation and registration of enduring powers of attorney exposes many elderly people to the possibility of meetings with strangers that are entirely unnecessary and should be capable of being done remotely.

While many of the measures required to combat the current pandemic will involve significant cost, this is a change that will be almost completely cost-free to implement. Furthermore, it will result in significant cost savings for consumers who will no longer have to pay the additional third party commissioners' fees that are currently associated with almost all legal transactions.

Having regard to all of the foregoing, this long overdue and necessary change is now urgent.

When the effects of this issue on the practice of law became apparent as the outbreak unfolded, I started a petition in relation to the matter. You can see the live petition here: <https://my.uplift.ie/petitions/remove-faith-based-oaths-from-the-legal-system>

I now attach that petition which, at the time of writing, has 540 signatures. The vast majority of those who have signed this petition are practising solicitors who are acutely aware of the effect that this issue is having in practice and the delivery of legal services to the citizens of this country. Given the nature of this issue, it is very little known about in society at large and in this context the fact that 540 citizens, most of whom are legal practitioners, have signed the petition is remarkable and noteworthy. It is a call for urgent change that needs to be acted upon.

In the circumstances, I now ask you to give effect to the change sought by these petitioners as a matter of urgency.

In that context, I note that the introduction of Statements of Truth forms part of the current Programme for Government.

It is critically important that this essential legislative change is now introduced as a matter of urgent legislative priority and passed without any further delay whatsoever so that Statements of Truth are available to legal practitioners and their clients for use in practice immediately as part of the response to the Covid-19 crisis.

It is reported today that the Central Bank warns that it could take until 2024 for the Irish economy to rebound from the current crisis and that the pace of that recovery will be dependent on how severely the economy is impacted by further waves of the virus.

We need to learn the lessons of our extraordinary experiences in dealing with Covid-19 since March and ensure that we now urgently put in place measures to enable us to deal with future waves of the pandemic more effectively with less disruption on all aspects of our lives.

This is an essential preparatory measure that we need to put in place immediately to ensure that this element of the practice of law can continue safely and remotely without disruption in the event that future waves of the pandemic require a return of restrictions.

This is a positive change that you can make happen quickly in the context of the Covid-19 response which will in turn have many long overdue benefits in terms of the modernization and improvement of our legal system.

I look forward to hearing from you and to seeing you make this change for good in our society happen as soon as possible.

If you have any queries, or require any assistance in relation to any of the foregoing, I am available to you and am happy to assist in any way that I can.

Thank you for your attention and thank you in anticipation for your action.

Best wishes for your future Ministerial career; I look forward to your progress and success.

Yours sincerely

Flor McCarthy
McCarthy & Co. LLP
flor@mccarthy.ie

This letter has been sent by e-mail
and therefore bears no signature.
882788