

I am very grateful to be asked to speak at this event by UCC today. The topic for discussion is of great interest not only in Ireland, but throughout the EU.

2020 will be memorable for all of us, not least for college students whose studies have been so radically affected.

In February this year, ISME cautioned businesses to prepare for the arrival of a virus that hadn't spread beyond China.

By mid-March, the Government had announced a widespread lockdown, which would have immediate consequences for business.

Our Chair wrote to the Taoiseach seeking the urgent provision of working capital for business, an operational plan to exit lockdown, and affordable access to a restructuring mechanism for SMEs.

Irish examinership is a highly structured and well-regarded process. It has stood the test of time since its introduction 30 years ago with the threatened collapse of Goodman Meats. But it's also expensive. Revenue estimates the average cost to be in the region of €80k-€130k. This makes restructuring smaller businesses an uneconomic proposition. Only a tiny proportion of Ireland's 250,000 businesses could afford examinership.

We expect business insolvencies in the low thousands to follow this pandemic.

Yet for every 100 businesses at risk of insolvency in the UK, 10% to 15% of them will be successfully restructured. Even more in the US. In Ireland, the equivalent is 3%-5%. This comes at a terrible toll to employees, business owners, and creditors.

This must change.

In the second week of April, we made a formal submission to then Business Minister Heather Humphreys, outlining a proposal for an "Administrative Examinership" process, drawn up by insolvency expert Barry Lyons.

The response from the Department might have been more enthusiastic. But the proposal was allowed to go forward to the Company Law Review Group for consideration.

It got a good hearing at the CLRG and was assigned by the Chairman Paul Egan to Professor Lynch Fannon in the Insolvency Committee, where significant progress has taken place over the summer.

For me, it was interesting that my predecessor Mark Fielding had tried to get similar proposals moving in 2012 in the aftermath of the last recession. This went nowhere after running into stiff resistance from interested parties.

However, the landscape was much changed since the last recession. Our Bankruptcy laws were amended, and the Personal Insolvency Act 2012 was introduced. Creditors became much more agreeable to a regime where personal or commercial insolvencies could be resolved.

We were delighted at the end of April when the Banking and Payments Federation explicitly welcomed our proposals in their [Plan for Economic Recovery](#).

As representatives of the largest group of creditors in the country, this statement was decisive in quelling objections to our proposals.

Professor Lynch Fannon co-opted the author of our proposal, Barry Lyons, onto the Insolvency Committee. The Committee was soon holding weekly nuts-and-bolts discussions on how to introduce speed and remove cost from small business insolvency.

Much progress has been made, but the legislative work to come will be more difficult. It is also clear that while the practitioners involved in taking our proposals this far have been supportive, there remain some concerns at Public Service level that will have to be allayed before we are successful. I should stress that our proposals do not impact anyone's constitutional rights.

I'm conscious that our considerations today move beyond those of small business insolvency, and touch on wider areas of application of common law. In a post-Brexit world, will Ireland become a go-to EU jurisdiction for the resolution of inter-company disputes?

To those that see Brexit as the sunny uplands for the Irish legal profession and our courts system, I must sound a note of realism.

Ireland's legal system has been subject to sustained and justified external criticism for some time.

The EU Commission's [2019 Small Business Act Fact Sheet](#) notes that Ireland's "Second Chance" regime, while of high performance, is deteriorating. Our time to fix insolvencies is one of the best in the EU, but the strength of our insolvency regime is rated below average. We are the fourth most expensive country in Europe in the cost of enforcing contracts.

The EU Commission's Semester reports have been consistent in their criticism of our legal system for a decade. The [2020 Semester Report](#) states high legal fees are impacting domestic productivity and are a significant factor in SMEs failing to challenge bad public procurement decisions. Legal reforms have been long delayed, with no schedule of implementation. The average length of High Court commercial proceedings has increased from 287 days in 2017 to 321 days in 2018. In enforcement of contracts, Ireland scores poorly on time required to enforce a contract in court, cost required and quality of judicial process.

The Central Bank's [Second Motor Insurance Report data](#) show legal fees in minor injuries cases average 63% of the value of damages, even though litigated actions take almost twice as long as negotiated ones, and get only €400 more in damages.

The [OECD Economic Survey Ireland 2020](#) suggests that effective enforcement of our new white collar crime laws could increase our per capita GDP by 1.6% over the next 10 years.

One area of law we *do attract* international clients is that of defamation. [US Celebrities](#) love the Four Courts. But the [European Court of Human Rights](#) has held our defamation laws violate the right to freedom of expression. This is normally seen as a tort against the media, but our retail and hospitality businesses are its most frequent victims. Promises to review the Act since 2017 have come to nothing.

Ireland remains the only common-law jurisdiction in the world without a statutory offence of perjury. ISME's campaign for a perjury statute has been ignored by the legal profession, and a [High Court Direction imposing a duty of candour](#) on lawyers in asylum cases has been vigorously opposed by the profession.

This stuff gets noticed by the people who matter. It is profoundly damaging to Ireland's reputation.

But who benefits from the status quo?

Isolde Goggin, of the Competition and Consumer Protection Commission, in her [address to the Burren Law School in 2016](#) asked whether the law protected incumbents to the detriment of consumers. Her forensic analysis of the passage of the Legal Services Regulatory Act is a seminal study in how incumbents stymie legal reform.

The enactment of the Judicial Council Act 2019 was torturous, and it passed into law [without commencement of the Judicial Conduct Committee](#). The absence of this Committee has already caused considerable but self-inflicted discomfort to the current members of the Supreme Court.

These are all serious difficulties for a jurisdiction that sees itself as progressive and outward looking. But they can be overcome.

We must recognise that the only constant in life is change. And our legal profession must recognise that their job is to serve Irish citizens and society, not the other way round.

We can make a small but significant start by promptly enacting legislation to rescue small Irish businesses.

Thank you.