



Northern Ireland  
Assembly

Committee for Justice

# OFFICIAL REPORT (Hansard)

Health Protection (Coronavirus, Restrictions)  
Regulations (Northern Ireland) 2020:  
Mr John Larkin QC,  
Attorney General for Northern Ireland

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— Sir Stephen offers an incredibly valuable analysis for whatever perspective one happens to bring to the issues, so I commend that paper to members.

**The Chairperson (Mr Givan):** Thank you. I will get into one of the issues that have been most topical, and it cuts across an area in which you might have a section 8 duty. It is the interpretation of what is essential travel. At the start, there was some difficulty with the policing and enforcement of that and with who interprets what is an essential journey. "Essential travel" covers a wide spectrum of contexts, whether it is for business or, indeed, leisure, which is the one that attracted the most public conversation, about how far you can travel and whether you can deem the journey to be essential. My general question is on the interpretation of what is essential travel. Have you considered, under section 8, providing guidance on that aspect to the Public Prosecution Service and the Police Service?

**Mr Larkin QC:** I mentioned Sir Stephen's Policy Exchange paper already. I will now refer to it specifically. In paragraph 55, he makes an observation — I will not do his observation justice, because I am not quoting exactly — that a lot of the enforcement and interpretation issues would pose difficulties for Justices of the Supreme Court, far less individual police officers on the ground in, for example, a busy park trying to make wise policing decisions. Sir Stephen is absolutely right to make that point. He also adds that it is one thing to handle those issues in the cloistered atmosphere of a court room but quite another to do so under operational pressures.

Our regulation 5(1) creates an offence, and the offence is leaving the place where one resides — I will use the shorthand "home" — without reasonable excuse. I will pause there. The offence is created if one leaves home without reasonable excuse. Recent amendments in Wales and England have provided for an additional offence, of being outside one's house without reasonable excuse, but we do not have that. There is only one way, which is under regulation 5(1), that an offence is committed, and that is by leaving the home without reasonable excuse.

Sub-paragraphs (a) to (m) of regulation 5(2) set out examples, because the list is not exhaustive, of what are taken to be reasonable excuses. When one looks at the examples, one sees that it is reasonably clear that travel will be required for potentially almost all of those, and perhaps all of them. For example, moving house without travelling is unthinkable.

The only explicit reference to travel relates to travel for work or the delivery of voluntary services. In one very strict view, that might be taken as the only circumstance in which travel can occur, but a common-sense interpretation plainly must include travel for all the specified reasonable excuses in regulation 5(2)(a) to (m). What that means is that, for example, if one lives in Enniskillen but is attending a funeral of a close family member in Newcastle, one can of course travel from Enniskillen to Newcastle to attend that funeral.

Before the recent amendment, that was also, I think, the position as it related to travel for exercise. If one wanted to take necessary exercise in Newcastle, one could travel from Enniskillen by car to take that exercise. There was no limitation on the amount of travel that one could engage in to take exercise. Again, I emphasise the point that merely because one can do something lawfully does not mean that is not a very great distance from it necessarily being a socially desirable thing to do. Before the recent amendment, however, one could have travelled from Enniskillen to Newcastle to, for example, walk a stretch of the Ulster Way.

The recent amendment changed that. Travel for exercise therefore will not be regarded as constituting a reasonable excuse unless it is reasonable in all the circumstances. Importantly, excluded from that limitation is travel that is itself exercise. If one is, for example, a competitive swimmer with a particular training regime who wants to swim in the sea, one can go from Enniskillen to Portballintrae by bicycle. No matter how long that distance is, if the long journey is itself a species of exercise, one can engage in another form of exercise, such as swimming off the north coast in that example.

**The Chairperson (Mr Givan):** OK.

**Mr Larkin QC:** That is an area in which it has occurred to me that section 8 guidance could potentially be very useful, but, of course, as one knows, the regulations have a built-in life of six months, and they may well not exist in their present form within that time. There is an issue about the proportionality of the helpfulness that such section 8 guidance would afford concretely, bearing in mind that it has been my practice, as the Committee knows, to consult not only, as the statute requires, the Advocate General for Northern Ireland but any stakeholders and, of course, importantly, this Committee.

**The Chairperson (Mr Givan):** I want to make a quick point about that. Regulation 5(2)(b) states:

*"to take exercise either alone or with other members of their household".*

This goes back to your point about what may be legal and what may be socially responsible being in conflict. On the amount of exercise that is taken, we do not have any current restriction on it being one form of exercise only. Yesterday, England moved to unlimited periods of exercise, but that has always been the case here.

**Mr Larkin QC:** Yes. Strictly in the construction of the regulation, that is right.

**The Chairperson (Mr Givan):** Yes. OK. Do members want to come in on the point about travel and associating?

**Mr Dunne:** The point that has exercised many people is the issue of travelling to recycling centres. A number of councils have opened their centres. Others are waiting for clarification on the issue, because they feel that, at the moment, travelling to a recycling centre is not a form of essential travel. What is your opinion on that, based on the existing legislation?

**Mr Larkin QC:** The Minister of Agriculture, Environment and Rural Affairs has set out his position on the importance of recycling. From a general environmental context, it would be very difficult to gainsay anything that he has said about the importance of recycling.

Regulation 5(2)(i) states:

*"to access critical public services including —".*

Although certain public services are specified, the key concept is "critical public services". If one were to ask the question of whether recycling is a critical public service, in the view of the Minister, it is. As far as I am aware, no one has seriously contended otherwise. If one is accessing that critical public service, it seems entirely proper that one should travel to access it.

**The Chairperson (Mr Givan):** May I just follow up on that?

**Mr Larkin QC:** Yes.

**The Chairperson (Mr Givan):** It is an area that I have engaged on with the Minister of Agriculture, Environment and Rural Affairs to try to distinguish what the regulation means. In my constituency, one council has opened its recycling centres; another has not. It is about that key point of interpretation. The Minister said that disposing of waste is a critical service, but, because it is not "essential", there seems to be some confusion in the interpretation of what is essential and what is critical, and councils have taken different views. Your view of what is deemed essential or critical seems clear to me, but will you define or try to distinguish what the difference is between the two?

**Mr Larkin QC:** That is a difficult question, Chairman, but I take Mr Justice Frankfurter's advice to law students:

*"(1) Read the statute; (2) read the statute; (3) read the statute."*

Regulation 5(2)(i) refers to accessing "critical public services". I do not have the Minister's paper before me, but, if he has defined recycling as a critical public service, that is exactly the language used in regulation 5(2), and no one has, it seems to me, gainsaid the Minister's due assessment of recycling. Indeed, in a larger environmental context, one might suggest that it would be very difficult to do so. Hence, it seems to me that someone who wishes to access recycling is accessing a critical public service.

**The Chairperson (Mr Givan):** Who is the authority on that? People will seek opinions from various sources, and the Minister has provided guidance to councils. Are the Departments responsible for interpretation? Is that where people should go? Is it a case of people being told how they should interpret regulation 5(2)(i)? In this case, recycling is deemed critical and therefore people should take the Department's lead.

**Mr Larkin QC:** The regulations were made by the Minister of Health. However, the policy assessment of particular functions within the subject matter of another Department should be judged by that Department. It seems obvious that DAERA should be the judge of whether recycling is a critical public service. That comes with the caveat that, of course, the meaning of the regulations falls ultimately for judicial determination in the event of litigation on that subject.

Again, taking the matter in terms of what regulation 5(2)(i) says, as well as, if one dare say such a thing, a common-sense approach, the Minister, in defining recycling as critical, seems to be going entirely with the grain of a common-sense interpretation.

**The Chairperson (Mr Givan):** That is helpful. Gordon, sorry for interrupting you.

**Mr Dunne:** No. I think that you have answered my question. The understanding that I have now is that your interpretation of the regulations is that recycling centres could reopen and the public could travel, in a sensible and managed manner, to the sites.

**Mr Larkin QC:** Yes. I defer, of course, to the Minister because I do not possess the policy expertise that he has at his disposal. If the Minister determines that recycling is a critical public service, as he has done, it seems to follow that members of the public can and ought to be able to access that critical public service.

**Mr Dunne:** Thanks very much for that.

**Mr Frew:** I suspect that this will be a very helpful session; it has been so far.

The first issue that we talked about was the "essential", the "necessary" and the "critical" services. All of that terminology bursts out. It is very clear to me that, when all is said and done and we look back, the experiment of using draconian law will be seen not to have worked. That is clear to me daily. You are right: the only way you can test legislation is in a court, and the amount of pain that will be caused to get to that point will be immense and much more detrimental than any imposition placed on people. I hope, and I tend to think, that people have moved to a sensible, responsible, safe position without this legislation, but, of course, it is hard to say.

I want to ask about "necessary" and "essential". It is essential that I eat because, if I do not eat, I will die, but it is not necessary or essential that I shop at a certain time of day or a number of times. You could bring a lorryload or trailer of food and store it somewhere at your house. It is not necessary or essential to take your recycling to a certain place; you could stockpile it in your backyard. It would not be very nice, but you could still do that. It comes down to the interpretation of the terminology. When you try to legislate for everybody's life and daily routine, you fall into all these traps and problems. There is a question here somewhere, but is that a fair assumption? Do you agree with that?

**Mr Larkin QC:** Chair, Mr Frew will excuse me if I do not simply give him a yes or no answer. The starting point is the large issues, and it is absolutely correct that law cannot do everything for us, and law very often fails when it tries to do too much. Lots of statutes provide for the penalisation of x, if one does x without a reasonable excuse. Usually, what is a reasonable excuse is left completely at large, so what happens is, if someone is prosecuted for x, they raise evidentially what they say is a reasonable excuse. In such cases, the function of a court is to determine whether the excuse is capable of being a reasonable excuse, and, if it is, it is the function of the prosecution to prove beyond reasonable doubt that it does not exist in the circumstances.

Against that background, the structure in 5(2) is that there is reference to "need". Here, it seems to me, "need" does not impose a free-standing obligation to establish need for the various activities in (a) to (m). The word "need" in the preface to (a) to (m) is an acknowledgement by the legislator that these are pretty basic human needs. There is the need to take exercise. That is a human need, whether an individual happens to acknowledge it or not, and whether one is an Olympic athlete or someone who needs exercise rather more than the Olympian. Likewise, with food, one does not get into asking people what kind of biscuits they bought or whether they could have done without a particular item. The law, happily, does not condescend to that level of intrusive detail. If you are shopping — again, I am not criticising law enforcement officers, who are doing a difficult job in very novel circumstances — it is no function of the police to peer into your shopping basket and to approve or disapprove of your choices.

**Mr Frew:** OK. Thank you.

**The Chairperson (Mr Givan):** On the aspect of human need, many have curtailed what they regard as their fundamental human rights, whether that is to freedom of assembly, freedom of worship or the fundamental right to education. All those things are being curtailed voluntarily. The question is this: at what point could somebody seek to challenge the regulations, in reference to the European Convention, on the basis that there is now a disproportionate restriction of fundamental rights by the state? Could an individual or an organisation decide to do that?

**Mr Larkin QC:** I was struck, when Mr Frew put his question, that he referred to litigation as being something calamitous. In many ways, socially, litigation can be an ill, but it is not so for lawyers. In one sense, I am a little surprised that there have not been litigation challenges. That may be a sign that the public have responded as a body of good citizens and good neighbours, and are not taking up the legal point that, undoubtedly, can be conjured up in relation to any legislation.

On fundamental rights, the rights protected under articles 8, 9 and 10 of the European Convention are all engaged in some way by these regulations. The Minister of Health, whose primary responsibility it is, has made certain prefatory declarations relating to the state of affairs of public health that were necessary in order for these regulations to be made.

**The Chairperson (Mr Givan):** Thank you. I have a question on local authorities. As Members of the Assembly, we are deemed to be providing an essential public service and have a duty to be here. We are here and facilitating people attending remotely. There is an issue emerging around local authorities. There is a view that it is not an essential journey for a councillor to travel to a council building to participate in a council meeting. What is the view of these regulations? Can a councillor say that his journey is covered within the regulations? Can he say that he therefore has a democratic responsibility to exercise his duty? Should that be accommodated by the local authority in the same way as the Assembly is accommodating Members?

**Mr Larkin QC:** The first thing to observe is that an elected councillor holds a public office. Therefore, at common law, certain obligations attach to the holder of a public office. If a councillor, as a holder of public office, considers it her or his duty to attend a council meeting — it is quite understandable that a councillor would take that view — he or she may be regarded, pursuant to regulation 5(2)(h), as "fulfilling a legal obligation". Therefore, it seems to me that the focus must be on what the councillor is trying to do, in substance, rather than the travel, because the travel, to an extent, is a red herring.

If one is discharging the public function, just as, for example, if one is attending a funeral, or if one is a minister of religion going to the church where one is the pastor, it strikes me that, of course, one will have to travel, and there is no limitation on the travel that one has to do in order to discharge the substantive function. It seems to me that whether the matter is viewed as another reasonable excuse, but one that does not fall within the specified regulations 5(2)(a) to (m), or, as it seems to me, possible under regulation 5(2)(h), that one is, as a public official, necessarily discharging the duties of that station, travelling to discharge those duties, it seems to me, fits comfortably within that.

**The Chairperson (Mr Givan):** That is helpful. Has any local authority sought advice from you on the interpretation of these regulations?

**Mr Larkin QC:** No, and that might not be particularly extraordinary. As this Committee will know in particular, my primary function is to give advice to the Executive. It has been absolutely clear, during the almost 10 years that I have been discharging this function, that individual MLAs, Members of Parliament and other public figures can write to me. It may not be appropriate for me to answer their question, but, when it is, particularly when a question gives rise to issues of general public importance, I will try to do so.

**The Chairperson (Mr Givan):** That is helpful. A lot of public bodies are struggling, but local authorities seem to be struggling in particular. You can determine whether the advice that they seek is provided, but the door being open for the ask to be made is something that other elected members can benefit from and avail themselves of.

**Mr Larkin QC:** I am happy to give that indication.

**The Chairperson (Mr Givan):** The Executive have announced a step-by-step process. Obviously, we are looking at step 1, and it is all broken down into different sectors, whether it be leisure, community or family. We recognise that it is very difficult to legislate a way out; you often require social

responsibility to do more than the law requires, and the law is often there to capture those who refuse to go with the mainstream on these things. Will moving to the different steps of whatever sector require a continual updating of the regulations so that what is permissible in respect of step 1 and then 2 and 3 is clearly defined? Should we anticipate a vast number of regulations coming forward to implement the various stages?

**Mr Larkin QC:** As your question rightly suggests, the five-step policy is a policy. It is a direction of travel; it is not in itself a change in the law or the law. It is, obviously, a commitment by the Executive that is binding on Ministers as a commitment by the Executive. It is likely that it will require either amendment or, indeed, perhaps gradual removal, as obligations cease to be necessary. It may be that we will see not more but, quantitatively, less regulation.

**The Chairperson (Mr Givan):** I had not thought about it in the sense of removing. I am trying to picture in my mind how you legislate for every possible scenario, as, often, you need to provide a general framework and you fit within that. I see how the removal of a regulation would allow us to go back to what it was, and, "Here's the legal framework as it was around responsibility for health and safety" and so on.

**Mr Larkin QC:** Or, indeed, as you suggested, it may sometimes require more, because, if one is trying to specify with greater particularity, you have a bit more ink on the page rather than less.

**Mr Beattie:** John, thank you. You are always gracious with out-loading what you are thinking; I thank you for that. That is an interesting point that you raised. As we start to go through that unlocking, we could start taking out regulations or easing them in a physical way with our written documentation. However, we may have to take a step back; we may have to re-impose regulations. Do we need a regulation that is flexible and agile? I think that you alluded to the fact that everything that we are doing now is like policing by consent. We need an agile regulation as opposed to taking stuff out of it or adding stuff to it.

**Mr Larkin QC:** Yes. Obviously, the technical difficulties cannot be underestimated. That is why I go back to Sir Stephen Laws's paper. He makes a critique of some aspects of the English regulations, but he, as a supremely experienced and skilled drafter, is very quick to point out his admiration for those who put this together in a remarkably short time. It is, perhaps, back to the issue of litigation. When all is said and done, it is, perhaps, a tribute to the regulations — as they emerge, as they are touched on and as they develop — that there has not been a great wave of legal controversy ending up in the courts as a result of them.

**Mr Beattie:** On that last point, I always get a sense that the court piece does not normally kick in until it has all quietened down, it has all gone and we are all back to some state of normality. Is there a feeling that litigation in regard to everything that we are going through now may well kick in after this crisis has finished?

**Mr Larkin QC:** Of course, that is the beauty of policing by consent. If, for example, a police officer makes a suggestion such as, "Would you mind moving on?", and the members of the public move on, it may be that, in some very strict analysis, the police officer ought not to have imposed that condition, but, if, as a suggestion, it is complied with, it does not really matter what the formal legalities are six or 12 months down the line.

**The Chairperson (Mr Givan):** I want to tease that out. On public gatherings, regulation 6 states that no more than two people can gather in a public place unless they are of the same household and so on. If you were to move that to 10 people, you could not withdraw that; you would need to amend it to say "10", for example.

**Mr Larkin QC:** That is right, or if one decided that that was not an issue any more and could be dealt with simply by encouragement, regulation 6 would vanish in its entirety. One approach is to amend, and, in many ways, that is helpful because we can see, "Ah, that is what I must do. That is what I can do", or one can simply remove it in its entirety. Hopefully, we will reach the stage where that becomes appropriate.

**The Chairperson (Mr Givan):** That is helpful. Paul, you have an issue concerning access to children.

**Mr Frew:** Yes. There seems to be a growing issue at constituency level — I am sure that all MLAs are hearing it — whereby there has been a relationship breakdown between two parents with shared access to a child and the relationship has become fraught to the point where there is no access. Perhaps arrangements that had been in place beforehand are now just tossed up in the air and, because hostilities have started, there has been a blanket ban. In that case, people's only redress is court. When you cannot reason with an unreasonable person, you have no other option but to go through the court process, which, in the family setting, is arduous as it is. The Lord Chief Justice seems to have the role and responsibility for court procedures; I get that and accept it 100%. However, in your role, do you have any discussions with the Lord Chief Justice on this? Are there conversations happening at present? I know that court sessions and proceedings are taking place, but there does not seem to be a great deal, in what is a very slow process in normal times. Have you any thoughts on that? Is there any conversation ongoing about when we will be able to see more activity in our courts to allow parents to gain access to children? Some people are going up the walls; they really are. It is a very emotive issue and is very pressurised.

**Mr Larkin QC:** It is. Family law is, at the best of times, a hugely sensitive and emotionally charged discipline. It is really important to keep COVID-19 health protection regulations separate, because the provision in regulation 5(2) for the continuation of access arrangements is simply a common-sense acknowledgement that it is important, by and large, for children to have contact with their parents. If there are reasons, perhaps following litigation, why it is important that a particular child does not have unsupervised access with one of her or his parents, the COVID-19 regulations do not really sound on that. If, for example, there is an issue of access to the court and there is evidence that a child is suffering because of the inability to see one or other parent, I am quite sure that lawyers who are acting properly for such a client will notify the court and, if necessary, notify the office of the Lord Chief Justice and ask for arrangements to be made for an urgent hearing when the usual conditions for an urgent hearing exist.

**Ms Dillon:** My point is on that same issue, which is why I wanted to come in now, Chair. On the back of that, what I have been saying to families who have asked for my advice is that my understanding of the guidelines is that where there is co-parenting and a child is moving between two homes, those two homes are treated as one unit for COVID-19. If there are symptoms in one house, both households have to behave as though they are one and both self-isolate for 14 days. In some cases, it has been helpful, but, in others, parents are using it as an excuse, "Somebody in your house has symptoms, so I am not allowing the child to go to your house, or "I believe somebody in your house has symptoms, so I am not allowing the child to go to your house".

My view is that the advice is wrong, but I do not know whether it is a problem in the courts systems or with the legal advice that they being given. However, parents in those cases are unable to access the judicial system to get access to their children. One parent was told that the only circumstance under which they would get an urgent hearing is if the child was in danger: if they could prove that the child was in danger in the home with the parent that they were with. You have just said that a child being in danger could also be interpreted as a child being prohibited from seeing one or other parent. That is not good for that child. It is not good for their mental health or for the relationship between the parent and the child.

I want a wee bit more clarification on that. Like Paul, quite a few constituents are coming to me about that issue because they are having difficulties getting advice anywhere else. They are coming to us as a last resort, but we can only give them the guidance that is out there. The legalities of it are an entirely different matter.

**Mr Larkin QC:** At this remove, there is, of course, the risk of being the hurler on the ditch, saying, "This is what you should do". It is a role that I will not take up. In general terms, and human nature being what it is, there will, of course, be exploitation of the crisis, in all kinds of areas. That is inescapable, I regret to say. In the particular context in which parent A thinks that parent B is pulling a fast one about the existence of a high temperature in one household as opposed to the other, unfortunately, that is simply one of those things and not too much can be done about it. If, however, the particular quarantine period, the 14 days, has elapsed and the excuse is still being uttered, there may, of course, be something that can be done about it.

The issue is whether a child is suffering, under the provisions not only of our Children Order but of the UN Convention on the Rights of the Child. In all those things, the best interests of the child have to be a primary consideration. It need not be that a child is in acute danger of real physical harm, but if there is, as one could imagine, evidence that could be properly put before the courts that a child is suffering

and may sustain emotional damage — it could be that it is affecting their home learning, their performance at school because one parent helps with maths and the child is falling behind or whatever — that is something that I am quite sure the courts will take into account in deciding whether to list the case to see whether it needs to be adjudicated at this time.

Of course, very often, it is the old line that if you don't ask, you don't get, and I suspect that what may be happening is that people are not asking. Lawyers, on behalf of clients, should ask. Indeed, the clients should ask the lawyers in a proper case where there are genuine concerns about child welfare in the largest sense, and that includes the avoidance of emotional suffering in these circumstances.

**Ms Dillon:** That is advice that I have given. OK.

**The Chairperson (Mr Givan):** Gordon, you have a couple of questions about funerals, crematoriums, businesses such as hairdressers and so on. In a general sense, businesses are raising issues about when they can reopen and so on. Maybe we can spend a little bit of time talking about the regulations in the context of business activity.

**Mr Dunne:** I have a couple of issues, one of which is attendance at funerals. I have been at a couple of funerals recently; in fact, I was at one today. Do you agree that there is need for further clarification on the numbers that can attend funerals? The police seem to be fairly firm on 10 people being at family funerals, and, sadly, those have happened over the past few weeks. There is a grey area about whether the public can stand on the street outside the funeral parlour in a proper socially distanced manner, which, in my experience, has been the case. We need some clarification and direction on that. The police tend to, when I contact them, push it down the line, "It is 10 and 10 only", and there is a misunderstanding — perhaps I would put it in brackets — that people cannot attend or be seen at a funeral in any large numbers and cannot stand in a socially distanced manner in the street outside the funeral parlour. What are your thoughts on that?

The other issue that has been brought to my attention this week is about attendance at the crematorium. A local lady in my constituency is very annoyed that a relative is unable to attend the chapel during the process, if you want, at the crematorium. Having done some research on it, I understand that the City Council is fairly strict on it because there are number of issues in relation to the health and safety of employees, which we all understand. In Northern Ireland, we all appreciate that funerals are a very sensitive issue, and we have a high regard and respect for the dead, which is commendable and is one of the great positives of this place. It is perhaps time to review the regulations. They were designed and put in place for the extreme conditions, and we are all thankful to God that they did not happen. Those issues perhaps need some review and amendment. I would like to hear your thoughts — I appreciate that it is your interpretation — on the numbers at funerals and on the crematorium issue.

**Mr Larkin QC:** Let me separate two things. One is the question of a review of the regulations, and that will be a matter for Ministers. The second issue is what is currently in the regulations. Of course, the provisions on funerals are twofold. There is reference to funerals in 5(2)(g). One of the specified reasonable excuses for being outside the home is to attend a funeral of a member of the person's household or of a close family member. If no one specified in sub-paragraphs (i) or (ii) is attending — that is, no member of the household or no close family member — a friend can attend. That is so that no one is buried alone. Of course, there is no numerical limitation in 5(2)(g), so if one comes from a very large family and has lots of brothers and sisters, they could all attend the funeral of one of their sisters, for example.

Separately, the issue of control of gatherings is dealt with in regulation 6. The main prohibition there is on participating in a gathering of more than two people. Among the exceptions to that are to attend a funeral. Interestingly, it is not linked back to the categories in regulation 5(2)(g), but a common-sense interpretation of the regulations as a whole is that they should be read harmoniously. That is an area where the number of 10 is simply a rule of thumb. You will not find that figure of 10 in the regulations. The issue will be this: if you are standing spaced out from someone, are you participating in a gathering? Of course, the other side of that coin is, "Well, why are you here? Why are you in this location?". The answer might be, "Well, I've gathered together with other members of the community to pay my respects at the occasion of the funeral of Mr Brown across the street". I am afraid that there are no easy answers to that.

On the crematorium issue, what matters is that the premises are not physically open, hence the person you described cannot access the chapel of remembrance in that particular context. I suspect that that would be much more for review than for present interpretation.

**Mr Dunne:** OK. Is it true to say, then, that it would be reasonable for a large family to go to the graveyard?

**Mr Larkin QC:** Yes, it is.

**Mr Dunne:** What if there were more than 10?

**Mr Larkin QC:** There are large families, so, if you are talking about a close family member, yes. Let us say that one had 15 siblings — there are, of course, families of that size here — and one of one's brothers or sisters died, could the other 14 attend the funeral? Yes, of course they could.

**Mr Dunne:** The other issue is about whether it is reasonable for the public to gather in the street in the proper manner.

**Mr Larkin QC:** I think that one might then be moving into the territory of unspecified reasonable excuse. If, for example, a police officer came along and said, "I know you're all spaced out, but there are 20 of you here in this particular street", and someone then said, "Look, I've been a neighbour of Mrs Brown for the past 50 years. She has a very small family, and I want her family to appreciate that this street is in solidarity with them at their great bereavement", I would hope that sensible enforcement would permit that, if suitable social distancing were present.

**Mr Dunne:** If they were to proceed down the street after the cortege in a socially distanced manner, would that be unauthorised?

**Mr Larkin QC:** There are separate provisions, of course, on parades legislation, so that is a different issue. Once that starts to happen, the risk might be, from the perspective of those who are concerned about this, as we all must be, that it then becomes harder. It is one thing to remain stationary and preserve your distance, but when you start to walk, the cultural habits of centuries will start to kick in, and we can see the risk that there will be a closer gathering.

I would hope that the police would be sensitive to persons standing still to pay their respects, perhaps in a street context, even if the numbers were in excess of 10, for example, but that number is nowhere specified in the regulations.

**Mr Dunne:** Is it not specified?

**Mr Larkin QC:** No. It goes back to the example of the family. If you have a family of 14 brothers and sisters, that is fine.

**The Chairperson (Mr Givan):** That figure of 10 has been repeated extensively. Only 10. I have dealt with families who have asked, "Sorry, which one my brothers is not going?" If it is not in the regulations —?

**Mr Larkin QC:** The term that is used in regulation 5(2)(g) is "close family member". As always, I speak subject to correction, but I see no upper limit in regulation 5(2)(g).

**The Chairperson (Mr Givan):** Should regulation 6(c) expressly connect back to the part of regulation 5 that relates to funerals?

**Mr Larkin QC:** The regulations have to be read harmoniously, so the implication will be that it is the people who should be attending in the first place. That is the group that is specified in regulation 5(2)(g).

**The Chairperson (Mr Givan):** OK.

**Ms Dillon:** Do you have any views on possible human rights and privacy issues with the proposed contact-tracing app? *[Laughter.]*

**Mr Larkin QC:** I laugh because if I were to take out my mobile phone, which is an antique, you would realise that this is territory that is entirely foreign to me.

I am very happy to look at the issue and think about it, but I have to say that, in all candour, nothing that I could say now would be of any use whatsoever, save to say in the very general sense. Obviously, we live in an era in which commercial entities have access to data about us, including sensitive data about us, that would have been unimaginable in previous decades. The state also has access to vast amounts of data about us. There are, in a general sense, always concerns about the proper use of data and, as the Committee knows, there are existing protections for personal data. I am afraid that I would be of no use whatsoever on the specific contact-tracing app.

**Ms Dillon:** I ask the question on the basis that I am very much like yourself. I am "Linda-not.com". I would not be aware of all the issues about it, but I have been lobbied on the issue. I am also aware that there does not seem to have been any great uptake in other countries where it has been introduced. I suppose that I am just trying to inform myself about the issue, but thank you.

**Mr Larkin QC:** It is an issue that I am happy to look at if the Committee wishes.

**The Chairperson (Mr Givan):** John, I want to ask about vulnerable people. I cannot put my finger on the regulation, but the regulations define vulnerable persons, and one group is those who are aged 70 and over. I have had increasing correspondence from people in that age category, who all of the evidence shows are more susceptible to COVID and for whom it can have fatal consequences. However, there are those in that category who are concerned at being treated wholesale and who say, "I am in good health and I do not want to have a specific age application that will curtail my freedoms, which may well be relaxed for those who are below that threshold". What is the view on how that will interface with existing legislation? Obviously, there is age-discrimination legislation and so on. Going forward, how can regulations be framed in a way that does not just issue a blanket command, "If you are over the age of 70, you are under more severe restrictions"?

**Mr Larkin QC:** That will be a challenge going forward. Again, perhaps for the third time, I commend Sir Stephen Laws's paper generally in that context. I suppose that I would draw particular attention to article 14 of the European Convention on Human Rights. As the Committee will know, article 14 is not, of course, free-standing, so it acts in combination with one of the more substantive provisions of the convention. Classically, in this context, it will be article 8, 9 or 10. There will have to be an analysis of whether any change imposes an excessive or disproportionate burden on persons over the age of 70, or over any age, for that matter, who are perfectly healthy and capable of enjoying life. Will there be a proportionate reason for imposing restrictions on them that are no longer applied to the rest of us.

As is so often the case, what will matter will be the text going forward, but I am quite sure that the Department is aware of the sensitivities in this area and will take appropriate care in drafting any relaxation provisions that are only partially relaxing and that will continue to impose restrictions on our older citizens.

**The Chairperson (Mr Givan):** We have debated travelling to an elderly relative's home to visit them for their mental well-being while being socially distanced in their garden or looking through the window. Is it permissible under these regulations to decide, "I am going to visit because I believe that it is necessary for the greater welfare of that individual"?

**Mr Larkin QC:** If one looks at regulation 5, and I again make the general point that, although 5(2)(a) to (m) specify certain reasonable excuses, one sees that they are carved-out, specified examples and are not exhaustive. Within that, if one looks at 5(2)(d), one sees:

*"to provide care or assistance, including relevant personal care with the meaning of ... emergency assistance."*

If one looks at (f), one sees that emergency assistance is, at large:

*"to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living."*

If you are providing a charitable service — and if one remembers the etymological origins of the word "charitable", one will remember that it is about love — we might see that one could invoke that

provision in order to provide some necessary care — it is necessary in the larger sense — to an elderly family member by preserving social distancing but letting them see a face that they have not seen for some time. It would be a hyper-strict interpretation of these regulations to conclude that that was not possible, either under the general reasonable excuse provision or, indeed, within some of these provisions.

**The Chairperson (Mr Givan):** An example has been given of when your child has autism, and you are struggling to contain them in that environment, so one of the ways to assist is to go on a car journey.

**Mr Larkin QC:** That example I think is plainly addressed by 5(2)(m), which states:

*"to avoid injury or illness or to escape a risk of harm."*

That is primarily designed for the domestic abuse situation, but it is not confined to that. If a parent responsibly takes the view, "My child with autism is going to be damaged if we do not leave the house" — remember, the offence is committed when one leaves the house; it is not being outside the house, as it is in England and Wales — getting into a car to relieve some unbearable tension on an autistic child seems to me to be entirely proper and within these regulations.

**The Chairperson (Mr Givan):** You may be stopped, which a number of us have been, me included, and asked, "What does your journey relate to?", and you explain to an officer, "I needed to because my child was climbing up the walls, the atmosphere was getting very difficult and this is a way to relieve that". It is at that point that 5(2)(m) is not taken as allowing for that or some other regulation does not capture that or the visit to the garden for your relative's welfare, even though it is your subjective view that their welfare required you to make that visit, but Officer X says, "That is not serious enough. I do not accept that, here is your penalty notice, go back home".

**Mr Larkin QC:** One hopes that that has never happened, but there is anecdotal evidence that something like it has happened up to the point where the refusal of the reasonable excuse has occurred and the parent has returned home.

**The Chairperson (Mr Givan):** Outside of their enforceability, the regulations create a culture. What you have then is almost a shaming if you step outside the house. It may never lead to a complaint to the police or a prosecution, but there is a kind of feeling of, "I am not going to visit my granny, because my neighbour might see me, even though I need to"; it will be seen as, "You are putting the public at risk". There is a cultural shaming of people to not do things that are permissible under these regulations. The regulations are intuitive to how society is going to deal with this.

**Mr Larkin QC:** That is why I began with the notion of good citizens and good neighbours. It is not the act of a good citizen or good neighbour to turn this place into Hawthorne's evocation of 17th century New England where there is the equivalent of 'The Scarlet Letter' if people act responsibly. Good citizens and good neighbours would be only too supportive of stressed parents who bring their autistic children for the necessary spin in the car. To go back to Mr Frew's point, the law is at its best when it goes with the grain of common sense in particular communities. Sometimes the law reaches outcomes that do not, in the view of many of us, correspond from time to time with common sense, but, usually, it reaches fairly common-sense solutions. I would be astonished if a court were to conclude that a parent responding to the pressures of an autistic child's need for space and a change of scene could not lawfully take that child out, as they, in their sensible judgement, required.

**The Chairperson (Mr Givan):** Thank you.

**Miss Woods:** Thank you. I have a very specific question, following on from Linda's about the contact-tracing app. Have you provided or been asked to provide to the Executive any guidance or advice on the development of such an app?

**Mr Larkin QC:** There are two things to consider. In relation to my section 8 guidance, which is, as you know, under the 2004 Act and is guidance on international human rights standards addressed to criminal justice organisations, I do not have that currently in contemplation, largely for the reasons explored with the Deputy Chair. There is also convention that, when giving advice, neither the advice itself is ever disclosed nor whether it has been sought. That is a long-standing convention for law officers.

**Miss Woods:** I have another question, but I will let other members continue with theirs, as I know there is another list.

**The Chairperson (Mr Givan):** OK.

**Ms Dolan:** Thank you. I have a question about the regulations and the use of hotels for domestic violence victims. You mentioned victims having to leave the house to escape the risk of harm. How do the regulations stand if someone needs to go to a hotel for emergency accommodation?

**Mr Larkin QC:** Absolutely no trouble at all. If premises are available, of whatever kind — you should remember that the offence under regulation 5 is leaving your home without a reasonable excuse — once you leave to protect yourself from harm, you can stay somewhere else in perfect legality.

**Ms Dolan:** Even though the hotels are meant to be closed?

**Mr Larkin QC:** If the hotel provides accommodation for victims of domestic abuse, it is discharging an absolutely necessary function in my view.

**Ms Dolan:** How does the temporary or early release of prisoners stand up under the regulations?

**Mr Larkin QC:** I see nothing in these regulations about that. That would be addressed separately. There is a provision, as you know, in prison rules providing for early release, but that is at the election of the governor or Prison Service. That will be exercised, no doubt, having regard to all kinds of considerations, and the present health emergency is another factor. That is not addressed in these particular sets of regulations.

**Ms Dolan:** OK. Thank you.

**The Chairperson (Mr Givan):** I take it that the hotel scenario that Jemma mentioned is a defence for the hotel. If someone came and said, "Sorry, person X is staying here", it could say, "Yes, but person X availed themselves of regulation 5(2)(m)".

**Mr Larkin QC:** One knows anecdotally — for my part, I am delighted to hear this — that hotels have also been providing accommodation for NHS employees to help them to shield their families from the risk attendant upon their work. It is absolutely right that that should happen.

**The Chairperson (Mr Givan):** Before I forget, Patsy had a question, which I will read out.

In the application of the COVID-19 regulations, what responsibility have the Executive, and each Department, to ensure that their decision or decisions do not intensify serious risk to the health and safety of the community, including in the workplace?

**Mr Larkin QC:** These regulations are addressed to us all as citizens. Neither the original regulations nor the amendments impose any additional obligations on Ministers or the Executive as such.

**Miss Woods:** On Tuesday, as you will be aware, the road map document was published by the Executive Office and announced in the Chamber by the First Minister and deputy First Minister. I raised an issue about safe workplaces for those who are required to return to work. I am hoping to gain some clarification on the legal duty of employers to provide safe workplaces in the context of the regulations and the restrictions requiring social distancing. The First Minister stated that, ultimately, it would be the Executive's responsibility. Can you comment on that?

**Mr Larkin QC:** No, because it falls outside these regulations, so it is not really something that I can comment on today. I will make specific the general point that I made earlier that, if you have a detailed query about that — this goes for any Committee member — and wish to write to me about it, I will give you a more considered answer.

**Ms Dillon:** This follows on from the Chair's questions about what is reasonable and what is considered to be reasonable. To be fair, for the most part, common sense has been applied. If as much common sense was applied in all other matters, we would be in a good place.

Is it your view that, for the most part, common sense has been applied by the PSNI? I know that Alan Todd came out quite early in the process to talk about the very specific circumstance of a child who has autism, for example, needing to get out of the house as part of their routine, because routine is so important, and he said that that would be seen as essential. In your observations, how have the regulations been applied, particularly by the PSNI? For the most part, its people will be the ones who are called on to deal with exactly the issue that Paul raised of people almost being shamed for leaving their home for perfectly legitimate reasons. Has it been your observation that the PSNI has, for the most part — obviously, you cannot say that this has happened in absolutely every case — applied the regulations in a common-sense manner and in a way that has helped the public to work with rather than against the guidelines?

**Mr Larkin QC:** That is a tough one. It is a tough question in two ways, because it assumes that I have perhaps a greater knowledge of the police operation on the ground than I, in fact, do, and because it is not at all clear how the issues have always been approached. Again, I think that Sir Stephen Laws is absolutely right: many of the issues are ones that would be tough for Supreme Court Justices to handle in the rarefied atmosphere of a courtroom. I am not sure that correct interpretations have always been given by everyone in relation to that area, but I do not think that it is helpful to focus on the approach that was taken in the past. The amendment imposes a reasonableness condition in relation to travel for exercise, but I think that everyone is pretty much on the same page now. I am pretty confident of that, bearing in mind the limitations of what I see and what I hear anecdotally.

The media have done a very good job of drawing attention to some of the issues. Many of us will have heard of some of the issues around autistic children through the work of journalists. At the same time, however, there is, sometimes, a tendency for stories to come into being because of, "Oh well, she says that he's doing a bad job when he says that he's got this wrong" rather than focusing on trying to deliver the best possible service. I enormously applaud the work that has been done to expose the difficulties in enforcement, but we need to keep on the pretty good path that we appear presently to be on.

**Mr Dunne:** My last question is about the management and regulation of business premises. It has come up in the Economy Committee in relation to businesses such as hairdressers, beauty parlours and sunbed studios. I understand that, in some areas of the Province, premises like that have opened. There is difficulty around who actually has the authority to close them. I am fully aware that the environmental health areas of local government have responsibility, as does the Health and Safety Executive. My understanding is that, while both are highlighting the regulations and the necessary legislation, no one seems to have the authority to close such premises. What is your opinion on that?

**Mr Larkin QC:** The key concept is the "relevant person" under the regulations. As I understand matters at present, the only relevant person is a constable. There the matter rests. That, of course, could change; there may be a specification of other relevant persons. By analogy with the issue in relation to access and contact, we already have an existing substratum of health and safety law as well as these regulations. Activity that is dangerous, which does not provide a safe system of work for employees, will already be unlawful in our existing substratum of health and safety regulation. Additional powers are contained in these regulations, but, right now, the only specified relevant person is a police officer.

**Mr Dunne:** They have the ultimate authority?

**Mr Larkin QC:** They are the ones who are able to invoke the enforcement requirements in regulation 7.

**Mr Dunne:** If a business was not complying with the necessary health and safety and hygiene —

**Mr Larkin QC:** That would be a matter for the Health and Safety Executive. The relevant person is charged with the enforcement of these regulations. That is why I point to the existing substratum of health and safety regulation, where it would be the relevant enforcement body that already exists. In many cases, that is the Health and Safety Executive.

**Mr Dunne:** Yes, we have sort of been there, and I suppose that there is a reluctance. One of the factors is who is responsible for the loss of earnings. That is, perhaps, an issue that leaves it in a grey area. The bottom line is that the police have the authority, as it exists.

**Mr Larkin QC:** A constable is a relevant person for the purpose of these regulations, but, obviously, a police officer does not have general or specialist enforcement capability in relation to the purview of the Health and Safety Executive, for example.

**Mr Dunne:** Yes. OK. Thanks very much, John.

**The Chairperson (Mr Givan):** Thank you. There are no final questions from members.

Thank you, John. It has been very helpful for members to be given that oversight. Like all these things, it will raise more questions, but it has been informative for how we try to move forward. There has certainly been plenty that will be hugely beneficial. As always, I appreciate your making yourself available to the Committee.

**Mr Larkin QC:** It was a pleasure, Chair. Again, I am very happy to respond to queries from members of the Committee, the Committee corporately and other public representatives, if that is helpful. Sometimes, we get queries such as, "Can I get planning permission for my pigeon loft?". Let me be upfront: I will not answer that question, but I will certainly try to answer questions of general public importance.

**The Chairperson (Mr Givan):** I very much appreciate that. Thank you.