

TCD paper says Ireland needs binding legislation on the 'right to disconnect'

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A new policy paper from the Trinity College School of Law says the Government should utilise its plan to legislate for a worker's right to request remote working to introduce binding legislation on a 'right to disconnect', as the current 'code of practice' approach is "insufficient."

The TCD paper, 'A Right to Disconnect: Irish and European Legal Perspectives', says that the Government's stance on the right to disconnect – that legislation is not necessary – is "misguided."

Earlier this year, a Code of Practice on the 'right to disconnect' was introduced via statutory instrument. The Code, drawn up by the WRC, is not legally binding but can be relied upon in dispute scenarios.

The authors argue, however, that there is a pressing need to legislate around the non-availability of workers during their rest periods – something which the Organisation of Working Time Act does not adequately capture.

"There is a need for legislation to define not only 'working time' and 'leisure time', but to place limits on the expectation of work that may or may not materialise", they argue.

The new Code of Practice on the right to disconnect, the paper says, "does not adequately address the issues raised by remote working in particular (and the modern workplace in general), and excessively delegates regulation of the right to disconnect to businesses."

Another aspect the authors point out is that the traditional demarcation between 'working time' and 'rest periods', under EU law, is harder to distinguish when people are working from home – something which has led to the 'always on' culture.

The paper was written by Mark Bell, Marta Lasek-Markey, Alan Eustace and Thomas Pahlen and is part of Trinity College Dublin's Covid-19 legal observatory.

KEPAK CASE

The 2018 Kepak determination of the Labour Court ([see IRN 31/2018](#)) is illustrative in refining the current questions around the right to disconnect, the paper outlines.

The complainant in *Kepak* “had to respond to emails outside of business hours, but even if there was no such communication, she already had a workload that required far in excess of normal business hours to complete.”

The determination “shows the burden is firmly on the employer to keep sufficient records of working time, and to pay close attention to these on an ongoing basis.”

It also demonstrates that the relevant legislation imposes an obligation on employers “not to permit employees to work excessively (even if the employee is willing to, or feels they need to in order to complete their assigned work).”

The paper also refers to the likelihood of EU-level legislation on the right to disconnect in the coming years, noting the Framework Agreement on Digitalisation and the European Parliament’s draft Directive of January 2021.

Whether or not these proposals will lead to a Directive from the European Commission in the next few years, legislating on the right to disconnect “is now firmly on the EU policy agenda.”

FULL RECOMMENDATIONS

The policy paper makes the following recommendations:

- The right to disconnect should be placed on a specific legislative footing. The legislation should:
 - define what counts as ‘work’ for the purposes of ‘working time’;
 - define the broad circumstances when it is permitted to contact workers outside of normal working time and the consequences of such interruptions for rest periods;
 - allow leisure time to be ring-fenced in advance from both work and the expectation of communication, with robust protection against penalisation.
- The government should consult with the social partners in designing the legislation. Social partners should also be involved in the implementation of the right to disconnect in each workplace. Where trade union membership in a particular workplace is weak, there should nonetheless be consultation between management and workers’ representatives;
- Legislation should clarify the relationship with existing working time regulation and with other legislation on flexible working arrangements and remote working, and how the right to disconnect should operate in circumstances where business is conducted across time zones;
- Atypical and ‘gig-economy’ workers should be included within the scope of protection;

- There must be adequate remedies available to workers and effective enforcement mechanisms.