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THE IRISH STATUTE BOOK: A CONSTRAINT ON THE FUNCTIONING OF A TRUE DEMOCRACY

VOLUME 1 OF TWO VOLUMES

BY

BRIAN HUNT

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR IN PHILOSOPHY, TRINITY COLLEGE, DUBLIN

SUBMITTED FOR EXAMINATION

April 2006

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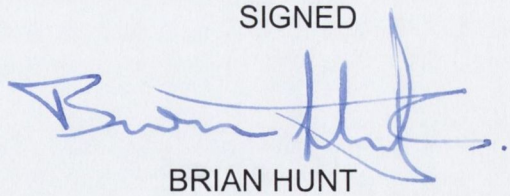

BRIAN HUNT

April 14, 2006

SUMMARY

Comprised of approximately 3,000 Acts enacted since the foundation of the State and a further 500 pre-1922 Acts, the Irish Statute Book has not been subjected to a detailed examination as to its form and present condition.

One conclusion of this thesis is that the system of effecting legislative change is such that it mitigates to a considerable degree against the accessibility of the statute book. The approach for many years has been to heap one Act on top of the other with minimal effort at integration. The fruits of this approach have been a statute book whose characteristics are more sedimentary than ordered. It is unsurprising therefore that the need for a coherent statute book has greatly increased as a result of a combination of the system of effecting legislative change along with the inadequate arrangements for publication.

It is advanced in this thesis that the role which legislation plays in governing society, along with the principle of *ignorantia juris neminem excusat*, means that citizens have the right to be able to access and understand the laws which govern them. It follows then that the State has a corresponding responsibility to ensure that that legislation is published and is accessible to the people.

A major conclusion of this thesis is that the statute book is so poorly arranged and inadequately published as to give rise to real concerns as to whether the State is discharging its obligations which arise under *ignorantia juris neminem excusat*. It is argued that the State has failed to live up to its responsibilities which arise from this principle. The statute book is comprised of the Acts in their enacted form. As virtually all of the Acts have been amended many times, and others repealed, this form of publication does not meet the needs of the users of legislation. Addressing the inadequacies inherent in the statute book has never been a political priority. This, it is argued, is because the task of publishing the statute book has been thought to have been discharged by merely publishing Acts in their enacted form. This attitude towards the publication of the statute book has, over many years, been at best inadequate and at worst, a constraint on the functioning of democracy.

A further conclusion is that in order to recover from this position, there needs to be an acceptance that the publication of the statute book is not merely secondary to the enactment of legislation. The introduction of revised statutes is central to the delivery of any meaningful change to the state of the statute book. Such a step would address the inaccessibility of the statute book in a prospective sense. Measures to address the existing body of legislation in a retrospective sense are also detailed.

Standard research methodology has been employed. Legislation has been examined in detail, and the major cases relating to and impacting upon the study of legislation have also been examined. Frequent reference is made to parliamentary debates, books and learned journals, and use has been made of important archival material.

Acknowledgements

This thesis marks the culmination of a period of 12 years continuous full-time study, the last 3 of which have been consumed by researching this thesis. This lengthy period of study could not have been embarked upon, or even contemplated, without the encouragement and unwavering support of my parents, to whom I am eternally grateful.

I would like to say a very special thanks to my wife Natallia, who endured my seemingly endless hours of solitary engagement with the "laptop". Her high tolerance of the paper mountains which I generated with great ease, was exceeded by her support and encouragement, particularly at times when the task ahead seemed insurmountable.

I would also like to thank the members of my family for their support and encouragement.

I owe a debt of gratitude to my supervisor Dr. Gerard Hogan S.C., from whose extensive knowledge, wisdom and guidance this thesis has immensely gained.

I would also like to express my gratitude to those whom I engaged with in the course of researching this thesis, who shared their insight and were also supportive, in particular: Professor William Binchy; The Hon. Mr Justice Roderick Murphy, Paul-Anthony McDermott B.L., Jack Stark, Lt. Col. Paul Farrell, Professor Peter Butt, Judge Mary Kotsonouris, retd., The Hon. Mr Justice Declan Budd, Professor Nial Osborough, Professor Ronan Fanning, and also the Office of the Parliamentary Counsel to the Treasury.

Thanks is also due to the King' s Inns Library; Berkeley Library, TCD; the

Archives Department of U.C.D; the National Archives; and also the Librarians at Mason Hayes+Curran.

And to others in the endeavours which led me to this stage, I would like to convey my thanks for assistance: Diarmuid Hegarty, Enda Kenny TD, Hon. Mr Justice Denis Roberts, and Niall Michel.

At the Office of the Parliamentary Counsel, I would like to pay tribute to Edward Donelan, Jack Hazlett, Kieran Mooney, Ann Crowley, and Brian O'Brien-Kenney, with whom I had very many hours of fruitful conversations. I would also like to thank former Attorney General, Michael McDowell S.C., and also Finola Flanagan, Liam O'Daly, and, Pat O'Sullivan of the Office of the Attorney General. Special tribute must be paid to the late Edward (Lany) Bacon S.C. a fine draftsman right up until his passing.

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Chapter 1
Introduction

Writing in 1985, some ten years after the publication of the Renton Report[1] – the most comprehensive and forward-thinking Report of its kind, which examined British legislation - Lord Simon of Glaisdale stressed the importance of legislation being made accessible to the people who are governed by its terms:

> "It is important to remember why our statutes should be framed in such a way as to be clearly comprehensible to those affected by them. It is an aspect of the Rule of Law. People who live under the Rule of Law are entitled to claim that the law should be intelligible. A society whose regulations are incomprehensible lives with the Rule of Lottery, not the Rule of Law."[2]

Comprised of approximately 3,000 Acts enacted since the foundation of the State and a further 500 Acts enacted in Britain, save for rare instances, that legislation has not been consolidated and remains in its enacted form.[3] Despite the fact that that an Act may well have been amended a number of times, under the present circumstances, the reader will be obliged to piece together the different Acts in order to deduce what exactly the up to date position of the law is. At first glance, this appears to be more conducive of a society which is subject to the rule of lottery rather than the rule of law.

In essence, this thesis seeks to establish that the Irish Statute Book is in a

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1 *The Preparation of Legislation,* (London, 1975) Cmnd. 6053.

2 Lord Simon of Glaisdale, "The Renton Report-Ten Years On", (1985) Stat. Law Rev. 133.

3 On the statute book, see generally Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001); Blackstone, *Commentaries on the Laws of England* (3rd ed., Chicago, 2004); Dwarris, *Treatise on Statutes* (2nd ed., London, 1848); Edgar, *Craies on Statute Law* (7th ed., London, 1971); *Essays on the Spirit of Legislation* (Multiple Authors) (London, 1772); Hanna, *The Statute Law of the Irish Free State* (Dublin, 1929); Hughes, *The British Statute Book* (London, 1957); Wilberforce, On Statute Law (London, 1881).

state of disarray such that the justice system's reliance on the principle of ignorance of the law is no defence, is not tenable in the long term. The poor state of the statute book, it is argued, gives rise to circumstances which make it very difficult for the users of legislation to ascertain the up to date position of the law on a particular topic. This, is largely due to the way in which we add to and amend the existing body of law. It is also due to the neglectful attitude towards the publication of the Irish Statute Book, which has prevailed for many years, to such a degree that the Irish Statute Book is in not reflective of the up to date position of the law. In addition to asserting that radical steps must be taken to address the statute book into the future, this thesis details the steps which must be taken in order to address the problems with which we are faced by the present state of the statute book.

In seeking to establish and support this thesis, there are several central questions against which the Irish Statute Book must be tested. Some of the key questions which will be addressed are: Is the role of legislation such that legislation ought to be widely communicated? What is the Irish Statute Book of today comprised of? Does the work and direction of the Office of the Parliamentary Counsel need to be changed? Should the legislative drafter have an expanded role? Can we improve the form of legislation? Would the introduction of plain language solve the problem of the inaccessible nature of our legislation and, in turn, the statute book? Does the system by which we amend existing law, and add to the statute book, need to be reformed? Is the present approach towards the publication of legislation sufficient to meet the needs of the users of legislation? Is secondary legislation having a direct impact on the statute book, and, is there a need for a greater degree of supervision and control to be exercised over its making? These are just some of the questions which will be addressed in the course of this thesis.

The thesis does not purport to examine the whole area of statutory

interpretation in any significant way.[4] However, some statutory interpretation issues are touched upon at various junctures.

Chapter 2 seeks to take a cursory look at the role which legislation plays in society. The role which legislation has played in societies has been the subject matter of many scholarly works, and it is not proposed to duplicate those here. That subject matter alone could comprise the focus of a thesis which could run to several volumes with ease. However, as the subject matter of this thesis centres around legislation and the requirement for the publication of legislation, it is necessary to look briefly at the role which legislation played in societies of centuries past. The Chapter also examines the fact that in order to be effective, legislation needs to have the unqualified support of the people, or else it needs to be backed by a sanction or the threat of a sanction. Such was the importance of the role of legislation in society, that it began to be gathered together and compiled into what has today become known as the Statute Book. The Chapter examines perhaps the earliest form of the Irish Statute Book – the Brehon Law and looks at how even at that time, legislation was encrypted to some degree. There then follows an examination of the emergence of the British Statute Book, from which the Irish statute Book was subsequently born. The Chapter then turns to look at the Irish legislative process and the requirement in the Constitution

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[4] On statutory interpretation, see generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002); Law Reform Commission (Consultation Paper), Statutory Drafting and Interpretation: Plain Language and the Law (July 1999) CP14-1999; Law Reform Commission (Report), Statutory Drafting and Interpretation: Plain Language and the Law (December 2000) (LRC 61-2000); Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001); Coode, *On Legislative Expression* (2nd ed., Ottawa, 1976); Côté, *The Interpretation of Legislation in Canada* (3rd ed., Toronto, 2000); Cross, *Statutory Interpretation* (London, 1976); Devenish, *Interpretation of Statutes* (Capetown, 1992); Dickerson, *The Interpretation and Application of Statutes* (Boston, 1975); Gifford, *How to Understand an Act of Parliament* (7th ed., Sydney, 1994); Maxwell, *Interpretation of Statutes* (12th ed., 1969); Pearce, *Statutory Interpretation in Australia* (4th ed., Sydney, 1996); Sullivan, *Driedger on the Construction of Statutes* (3rd ed., Toronto, 1994); Sutherland, *Statutes and Statutory Construction* (5th ed., Chicago, 1984); Bennion, "The Science of Interpretation" 130 NLJ 493; Casey, "Statutory Interpretation - A New Departure" (1982) 4 DULJ 110; Dickerson, "Statutory Interpretation in America: Dipping Into Legislative History" [1984] Stat LR 76; Posner, "Legislation and Its Interpretation: A Primer" (1989) 68 Neb L Rev 431; Samuels, "The Interpretation of Statutes" [1980] (1) Stat LR86; Stark, "On Language Games and Statutory Interpretation: An Inside Narrative" [1999] 20 Stat LR 144.

for promulgation. This then leads on to a discussion of the arrangements which are in place for the publication of legislation and where the responsibility for publication lies.

Chapter 3 looks closely at just what it is that the Irish Statute Book is comprised of. It would be a grave omission to write at length on the Irish Statute Book without looking closely at it and explaining what exactly it consists of. The Chapter begins by looking at the different periods from which Acts on the Statute Book come from. As there is no actual statute book to speak of, the Chapter also looks at the Irish Statute Book as a notional concept. It also looks at the different categories and types of Acts which are on the statute book. The Chapter also reviews the Law Reform Commission's analysis of legislative drafting. Having examined different aspects of the statute book, the Chapter then seeks to make an assessment of its current state - be that order or disarray and it also looks at the many past attempts to remedy the defects of the British statute book. The Chapter also records the central role of *ignorantia juris neminem excusat* and its place in the Irish legal system. The Chapter then turns its attention to other factors which impinge on the accessibility of the statute book, principally, the repeated amendment of existing legislation. There then follows a protracted examination of the various aids to the statute book, with a detailed examination of explanatory memoranda; the Chronological Tables of the Statutes; and the Interpretation Acts.

Chapter 4 deals with the origins of the Office of the Parliamentary Draftsman which later became the Office of the Parliamentary Counsel. The origin of the Office of the Parliamentary Counsel has never been charted and details of its establishment and early days were, heretofore, unclear. What transpires from this Chapter is that, as with much of our history, the British had a major role to play. Beginning with an examination of the UK Office, the Chapter then goes on to chronicle the events which led to the establishment of the Office of the

Parliamentary Draftsman and sets out the procedures which it adopted for the drafting and circulation of Bills. The Chapter also gives some attention to the great pioneer of the Irish legislation, Arthur Matheson. The Chapter then turns to look at the establishment and work of the Statute Law Reform and Consolidation Office and its successor, the Statute Law Revision Unit.

Chapter 5 seeks to examine the role of the Office of the Parliamentary Counsel and to consider whether changes need to be made in order to ensure that it is conducive to the improvement of the statute book. It begins by examining the present remit of the Office of the Parliamentary Counsel and the attempts which had been made in the past to extend its role. The Chapter then looks at the structure of the Office, the role which the Chief Parliamentary Counsel plays and the accountability of the Office in general. There is also some analysis of how the Office receives requests to draft Bills from Departments – either through a set of formal instructions or through a first draft of the Bill. The Chapter focuses on the lengthy training period for drafters, the absence of formal structured training and the need for the establishment of links with a University. The Chapter also charts the measures which have been introduced in recent years with a view to improving legislation, such as drafting manuals and boilerplate provisions. The Chapter gives some insight into a number of key issues which need to be addressed in terms of the future of legislative drafting, such as outsourcing and privatisation. The Chapter concludes by noting that the O.P.C. has had, and will have, a significant role in influencing the structure and format of legislation and ultimately, the statute book itself. In this regard, it does bear some degree of responsibility for the present, poor state of the Irish Statute Book.

Chapter 6 attempts to assess the role which the drafter plays in order to ascertain whether the way in which legislation is produced is in need of reform. In view of the fact that the previous Chapter examined the role of the

Office of the Parliamentary Counsel, this Chapter takes a closer look at the role of the individual drafters that comprise that Office. There is a degree of mystique which surrounds the role of the drafter and this is examined before then going on to cast some light on the actual role which the drafter plays. There then follows a detailed assessment of the drafter's role in policy making and whether their role in this regard ought to be expanded or formalised. The task of the drafter is a demanding one, and because of the very specific expectations required of each of them, an accomplished drafter will have certain crucial traits. The Chapter then goes on to reveal how drafters are perhaps among the most harshest critics of their own work. While the previous Chapter has examined the O.P.C. in its collective form, this Chapter has taken a closer look at the individual drafters that comprise that Office. This Chapter shows that like the O.P.C., drafters play a key role in the shaping of legislation and accordingly, they bear some, (albeit limited) degree of responsibility for the present state of the statute book.

Chapter 7 looks closely at what a piece of legislation is comprised of. The purpose of this Chapter is to ascertain to what extent if any, should the structure and features of an Act be changed with a view to increasing the accessibility of the statute book. The Chapter begins by looking at the various factors which influence the structure and content of any piece of legislation and assesses whether the influence of established drafting practice combined with tradition have had a negative effect on the statute book. The Chapter then goes on to examine the various divisions that are used, beginning first with sections – the most basic element of any Act. It is followed by a detailed look at each of the different types of provisions which an Act may feature, including the long title; marginal notes; the range of commencement provisions; sunset provisions; saving provisions; and also penalty provisions.

Chapter 8 looks at who the legislative audience is and seeks to establish whether the language of legislation is contributing in a real way to the

inaccessibility of the statute book and whether a different approach to legislative language needs to be taken. The Chapter looks at the factors which have influenced today's style of drafting It also looks at the competing interests of accuracy and simplicity and assesses the way in which drafters deal with this issue. The Chapter then turns to look at who it is that reads legislation and at whom legislation is currently directed. There then follows an evaluation of two of the principal assumptions made by plain language advocates. Those assumptions are, first, that ordinary people actually want to read legislation and, secondly, that legislation drafted in plain language will function as effectively as legislation drafted in the traditional style. Having considered these matters, the Chapter asserts that ordinary people are not interested in reading legislation and also that plain language legislation would not function effectively. As an alternative to plain language, the Chapter advocated the use of explanatory documents in order to explain the meaning of legislation to ordinary people.

Chapter 9 seeks to examine the system by which we effect legislative change – the approach taken when we add to and amend the existing body of law - and to assess whether that system, coupled with the approach towards publication, is adequate, particularly in view of the responsibility of the State which arises from *ignorantia juris neminem excusat.* It begins by looking at the various factors which affect the coherence of the statute book, such as whether the volume of legislation which we enact is in fact excessive, as well as the way in which amendments to existing legislation are executed. It also looks at the complexity of legislation and does so by asking whether the Supreme Court decision in *Cityview Press* has had the effect of increasing the complexity of legislation. It also looks at whether the exclusionary rule regarding the use of parliamentary debates has had the effect of increasing or reducing the complexity of legislation. In addition, this Chapter looks at short-cut approaches towards drafting legislation, including legislation by reference, and also the growing tendency to deal with distinct and unconnected topics

within one piece of legislation. This Chapter also looks at errors which occur in legislation and the different reasons why they arise. In order to determine whether responsibility for the poor state of the statute book lies exclusively with Governments, there then follows an attempt to chronicle the influence which members of the opposition and private interests can have on a piece of legislation, through Private Members Bills, and opposition amendments, and Private Bills. The next part of the Chapter looks at the various approaches which have been taken towards the publication of legislation: Statute Law Revision; Consolidation; Codification; and Statute Law Restatement. In large part, these approaches have been utilised on a piecemeal basis and the question is whether this approach is sustainable and whether it will bring about an orderly statute book which ensures that the State lives up to its obligations as they exist under *ignorantia juris neminem excusat.*

Chapter 10 looks at secondary legislation, but only in so far as it has a direct impact on primary legislation. For the purpose of this thesis, it has been decided to view the statute book purely in the sense of primary legislation. The aim of this Chapter is to shed some light on the extent to which secondary legislation impacts on the statute book and whether it is conducive to an orderly and accessible statute book. This Chapter first looks at the nature of secondary legislation and how it is distinguished from primary legislation. This then leads on to an examination of the principles and policies test which arose from case-law. It then looks at the lack of scrutiny of secondary legislation and the arrangements which are in place for its publication. This Chapter also looks at secondary legislation in the context of the Constitution, specifically Article 15.2 which provides that the sole and exclusive power for making laws is vested in the Oireachtas. This leads on to an account of the established exceptions to Article 15.2 and gives rise to detailed scrutiny of the use of Henry VIII provisions in our legislation. There is also a series of further exceptions to Article 15.2 which, despite the fact that they are un-established, are nevertheless frequently utilised. There then

remains the question as to whether the safeguards attached to the un-established exceptions to Article 15.2 are sufficient to save the validity of statutory instruments made on that basis.

Chapter 11 is a concluding Chapter which seeks to draw together the major arguments already advanced in this Thesis while also advocating necessary reforms.

Finally, a word about terminology. The term "O.P.C." is used throughout to refer to the Office of the Parliamentary Counsel to the Government, Dublin, formerly known as the Office of the Parliamentary Draftsman. The terms "legislative drafter" and "Parliamentary Counsel" are used interchangeably throughout. This thesis is primarily concerned with primary legislation and the use of the words "legislation" and "statute book" are, unless the context indicates otherwise, to be taken to refer only to primary legislation.

As regards some sources, much insight into specific legislative matters derives from the two or so years which I spent working at the heart of the Office of the Parliamentary Counsel in Dublin. Through my work and endless hours of conversation, I was uniquely positioned to be able to garner a deep understanding of the statute book, its creation, form and content. Accordingly, in rare instances, some assertions or statements which I make are backed up only by reference to highly experienced drafters who, on a confidential basis, are well placed to deliver a valuable and considered opinion on such matters.

Chapter 2

The Role of Legislation and the Emergence of the Statute Book

Introduction

Before any legislation ever existed, laws existed. Natural law has been with us for a very long time. Many of our laws can be traced back to one of the key pillars of natural law - that good is to be done and evil is to be avoided. Among other things, the debate around natural law and laws in general has caused people to question what is law. Why should one person obey another one? Is a person not free to act as they wish? Is a person compelled to obey and will failure to obey be met by coercion?[5] Without addressing these issues in any detail, the principal assertion to be made is that laws are made for the governance and betterment of society.

The role of legislation – the governance of society – meant that it was not sustainable to make a law and the enforce it without actually taking steps to publish it. Despite this, the statute book was a late arrival. It was long after the initial development of the law before legislation, and in turn, the statute book emerged.

The Chapter examines perhaps the earliest form of the Irish Statute Book – the Brehon Law and looks at how even legislation at that time was encrypted to some degree. There then follows an examination of the emergence of the British Statute Book, from which the Irish Statute Book was subsequently born. The Chapter then turns to look at the Irish legislative process and the

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[5] See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 25 et. seq.

requirement in the Constitution for promulgation. This then leads on to a look at the arrangements which are in place for the publication of legislation and where the responsibility for publication lies.

Nature of Legislation

What is Legislation?

The terms law and legislation are not synonymous. Legislation is but one branch or one part of what constitutes the law. The other elements which comprise the law include the Constitution, common-law, international conventions and treaties. The principal concern of this work is with primary legislation.

Acquinas succinctly defined laws as "a rule or measure of action in virtue of which one is led to perform certain actions and restrained from the performance of others." And he added that "the law is nothing else than a rational ordering of things which concern the common good promulgated by whoever is charged with the care of the community."[6].

In 1772, the reasoning behind legislation was expressed in rather more grand terms:

> "Legislation is the art of studying the genius and constitution of a people, for making them give, to necessary laws, an advantageous, but mild obedience. It embraces the whole system of politicks in a state; to the end that all resources should tend to the profit of individuals of every order; and that the talents of individuals should tend in their turn to advantage, the power, and the glory of the society. It is to reign in

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[6] St. Thomas Aquinas, *Summa Theologicae*, 1-II.q90.a4.

men, and over men."[7]

In Lysander Spooner's view, legislation is founded on a series of assumptions:

> "It is an assumption by one man, or body of men, of absolute, irresponsible dominion over all other men whom they can subject to their power. It is the assumption by one man, or body of men, of a right to abolish outright all the natural rights, all the natural liberty of all other men; to make all other men their slaves; to arbitrarily dictate to all other men what they may, and may not, do; what they may, and may not have; what they may, and may not, be. It is, in short, the assumption of a right to banish the principle of human rights, the principle of justice itself, from off the earth, and set up their own personal will, pleasure, and interest in its place. All this, and nothing less, is involved in the very idea that there can be any such thing as human legislation that is obligatory upon those upon whom it is imposed."[8]

The first appointee to the Office of the Parliamentary Counsel to the Treasury in 1869 was one Henry Thring. In Thring's view "An enactment in its simplest form is a declaration of the legislature, directing or empowering the doing or abstention from doing a particular act or thing."[9]. This is possibly the closest to our present day understanding of the term legislation. In short, an enactment may be said to comprised of a set of rules which have been determined by the representatives of the majority sitting as the legislature and promulgated or authenticated by the President.

The Role of Legislation

The question as to what constitutes legislation is well settled at this stage.

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7 *Essays on the Spirit of Legislation* (London, 1772) at p. 6.
8 *A Lysander Spooner Reader* (San Francisco, 1992) at p. 20.
9 Thring, *Practical Legislation* (London, 1902) at p. 61.

The role of legislation is another matter altogether, which occupied the minds of many. This question too has been answered satisfactorily. The general consensus is that legislation is vital in contributing to and maintaining order in society. This was a view articulated by Bentham:

> "The principal business of the laws, the only business which is evidently and incontestably necessary, is the preventing of individuals from pursuing their own happiness, by the destruction of a greater portion of the happiness of others. To impose restraints upon the individual for his own welfare, is the business of education; the duty of the old towards the young; of the keeper towards the madman; it is rarely the duty of the legislator towards the people."[10]

Though scorned for many aspects of his theses, Niccolo Machiavelli put it rather plainly when he wrote:

> "... men never do good unless necessity drives them to it; but when they are free to choose and can do just as they please, confusion and disorder become everywhere rampant. Hence it is said that hunger and poverty make men industrious, and that laws make them good. There is no need of legislation so long as things work well without it, but, when such good customs break down, legislation forthwith becomes necessary."[11]

In expressing his view of the role of legislation, T.F. O'Higgins largely reflected what both Bentham and Machiavelli had to say:

> "In every democratic state one expects to find in operation a set of rules or a system of law, which is well known and generally respected

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[10] Bentham, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof* (Edinburgh, 1843).

[11] Machiavelli, *The Discourses* at Discourse I.3.

and by means of which the actions of citizens, alone or in their dealings with one another, are controlled and judged."[12]

In practical terms, in 18th Century Ireland, one of the primary concerns of legislation was to govern and maintain society's primary activity of that time – agriculture.[13]

Thornton[14], a modern day expert in legislative drafting, asserts that one of the principal purposes of legislation is to establish and delimit the law. Issue must be taken with Thornton on this point. It is the role of parliament, and not legislation, to establish what the law is. One of the purposes of legislation is to record and communicate the wishes or determinations of parliament. It is an important distinction to be made and not one over which confusion should lie.

Legislation has become an ever-important vehicle for implementing the promises made by Governments in their programmes for government. Every new government comes into office with a new mandate and a new set of promises or proposals which it must set about implementing. Many of these proposals require some form of legislation.

Increasingly, a new policy, or a change in existing policy, will require that change to be effected through legislation. The impetus for new policy or policy change can come from a variety of sources, such as: the Government; programme for Government; a white paper or green paper; a private member's bill; a Law Reform Commission Report; a decision of the courts; a tribunal; a commission of investigation; a committee of the Houses of the Oireachtas; a request from a public body; trade union demands, or pressure group demands etc.

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[12] O'Higgins, *The Irish Legal System.*

[13] The importance of the role of legislation in this context is illuminated by *Essays on the Spirit of Legislation* (London, 1772).

[14] Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 47.

So in addition to the traditional reasons behind the origin of any legislation - such as the good governance of the nation; popular demand; and, weaknesses in existing law – the implementation of electoral promises is a further factor which today gives rise to an increasing amount of legislation.

Legislation and the Need for Sanction

Respect & Affection – The Effectiveness of Legislation

If a law does not command the respect or affection of the people, they are likely to disobey that law. Respect and affection are two very different things. In a dictatorship, the law might not command the respect of many people because it has not originated from the representatives of the people i.e. from a democratically elected parliament. And so those people might be inclined to disobey the law. Equally, the people might view a law as being unjust, and this is not conducive to respect for that law. This led Augustine to express the view that an unjust law is not a law. In saying this he was not questioning the validity of the law itself in a literal sense, but rather he is making the point that even though a policy may be enshrined in law, if it does not command the respect and obedience of its subject, then for all intents and purposes, it is not a law. This view was shared by Acquinas who declared that a government who abuses its authority by enacting unjust laws, forfeits the right to be obeyed.

Affection on the other hand stems from a personal like or dislike of a particular law, or it might extend to a dislike of laws in general - a dislike of being governed. So if a person does not like a law, they are likely to disobey it. A recent and practical example of the manifestation of this is the ban on smoking in the workplace which was introduced in Ireland in March 2004

under regulations made under the Public Health (Tobacco) Act 2002. In a relatively short time after its introduction a number of public houses openly and deliberately flouted this law because they did not agree with it. Similar sentiments led a member of parliament to smoke in a bar contrary to the law. This illustrates the importance of people having some degree of affection for the law.

Respect and affection play an important part in the effectiveness of and adherence to a law. Reason plays an important role when a person is deciding whether to lend their support to a law. A person's decision to abide by a law will occasionally be dependent on whether that person believes that law to be a good law or a bad law. The assessment as to whether a law is good or bad is made by testing against reason. It was the Roman jurists, Gaius, Ulpian, Paulus, and Celsus who convinced the judges to begin to question the fairness and reasonableness of law. It might be said that this questioning of the law has been carried through and is formalised today in our superior court's powers to question the constitutionality of our legislation.

If a person decides that a law is a bad law, in the sense that it is unnecessary or unjustifiable or amounts to a disproportionate interference with his or her personal rights or freedoms, then that law will be met first by disregard, and then contempt. This is where the need for a sanction arises. A sanction will give force to a law even in circumstances where respect, affection and reason are absent.

Obedience and The Role of a Sanction

The authority which underpins modern legislation is the belief that the majority is always right. Irrespective of whether it is right or not, compliance must follow. This expression of the will of the majority over the minority means that there is little room for those disaffected by the terms of the law. They are bound by the law in the same way as the majority and must yield to its terms.

The fact that the minority do not support the law is not a justification for the failure to obey its terms. This is often where the need for coercion or a sanction arises.

A successful legal system requires the people to obey the laws regardless of whether they choose to. Their observance may be voluntary or it may occur as a result of enforcement – or through a combination of both.

There are two principal ways to ensure that people comply with the law. The first, is to put in place the threat of a sanction. The second approach is to encourage people to comply with the law by appealing to their own self-interest or by asking them to have regard to the interests of others.

In articulating his view of what constituted a law, John Austin believed that sanction was a necessary constituent of any law. He believed that laws were a body of commands issuing from a sovereign which were enforceable through the use of coercive sanctions. Hart did not place the same degree of importance in the presence of a sanction. He believed that in order for a legal system to function effectively, a degree of co-operation and voluntary obedience on the part of the people was necessary.

Observance of the laws will be increased in situations where people have been convinced of the moral correctness of the laws. As for those who cannot be so convinced, they should be left in little doubt that breach of the laws will carry consequences – so in effect they will be induced to comply with the laws.

A notable feature of Brehon law is that it did not provide for corporal punishment or even the death penalty. For even what we would consider to be the most serious crime – murder, the penalty was not imprisonment, but instead a fine. The most severe punishment under Brehon law was exile.

Brehon law was a system based on the high levels of respect which people had for each other at that time. This negated the need to reinforce laws with stiff penalties. A testament to the esteem in which people held the law was the fact that there was no court system for the administration for Brehon law.

However, in these very different modern times, in order to secure its protection, the conferral of a right needs to be accompanied by a penalty for the breach of that right. Similarly, in order to be effective, the imposition of a duty must be accompanied by a sanction for the failure to discharge that duty. The very necessity for legislation of this kind to contain a sanction has been clearly expressed by Blackstone, who wrote:

> "For it is but lost labour to say 'Do this, or avoid that,' unless we also declare 'This is the consequence of your non-compliance.'".[15]

One wise writer pointed out that while a sanction may be necessary in legislation, great care and attention should be directed towards ensuring that the penalty is proportionate to the gravity of the breach:

> "The laws ought to be clear, fixed, small in number, and their violation unpardonable. Indulgence or partiality mixing with them, throw the whole into disorder. The people or the tribunals allowing themselves to limit or restrain the law, tends to anarchy; and if there is any hope of favour, the law is null. Only, care should be taken, that the punishment by the laws, be proportioned to the nature of the protection they confer. A Legislator in agriculture ought never to be terrible: it belongs to the Japonnese to punish slight faults like great crimes."[16]

This highlights the fact that when a person is assessing a law and applying reason to its terms, the proportionality of the penalty is an important

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15 Blackstone, *Commentaries* i. 57.

16 *Essays on the Spirit of Legislation* (London, 1772) at p. 18.

consideration. The penalty must be sufficiently substantive so as to be an effective deterrent, but it must be balanced enough so as to represent a fair punishment.

Because of the way in which it is made, statute law will often command a greater degree of adherence than common law. The setting of penalties in the context of legislation receives far greater scrutiny and consideration than the setting of a penalty would in the development of common law.

Legislation and Common Law

A number of distinctions may be made between statute law and common law. Principally, the method by which each is made is very different. Common law develops and evolves over a long period of time, whereas statute law is devised and enacted as part of one process and takes place within a relatively short period of time. A further distinction lies in the fact that the common law is made by judges at the behest of the people who present a case to them; and statute law is made by representatives of the people, invariably at the behest of the Government.

It can be argued that the existence of legislation is preferable from the citizen's point of view. They would point to the fact that legislation offers greater certainty than common law, and they would also point to its availability in a centralised location and in standard format. In addition, statute law is promulgated and declared to be the law. In contrast, there is no requirement that common law (a court judgment) be subject to a process akin to promulgation or to be specially publicly declared. While recognising that common law might be reported in the official law reports or it may be unreported or in fact it might even be an unpublished ex tempore decision, judgments are not as yet available in an official centralised location.[17]

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[17] However it should be noted that the Office of the Supreme Court has, in recent times, begun to publish the decisions of that Court as they are delivered. This is a very welcome first step, which it is hoped that the Central Office of the High Court will follow.

A further distinction between legislation and common law is that the mode of publication and availability of each are very different. Common law is only discernible from tracking down and reading judgments of the courts (if they are available) and, also by looking at law books. In contrast, legislation is published in bound volumes in a standard format and is publicly available. However, both are difficult for an ordinary member of the public to decipher.[18]

Another feature which distinguishes statute law from common law is the degree of certainty attached to each. Legislation can only be amended by a further Act of the parliament acting in majority. Common law can be changed by a judge acting alone, and with limited public exposure. Also, delays in the reporting of cases can mean that the changes might occur in the common law without many people becoming aware of that fact. Early legislation was usually based on petitions which had been presented in parliament by persons seeking redress for grievances. When Parliament moved from legislating based on petition to legislating by way of a Bill, it established the principle that once a Bill was introduced into Parliament, it could not be amended except by the authority of Parliament and that the Act which follows from the Bill must reflect identically the terms of the Bill as passed by Parliament. Robert Bork affirmed this principle when he stated that our laws are rules which we have no right to change except by going through the prescribed process. He believed that the very existence of a set of procedures for changing laws tended to prove that law has a meaning, independent of what any one person asserts that law to be.

Origin of the Statute Book

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[18] The language of legislation is discussed in greater detail in Chapter 8.

Brehon Law

In Ireland, Brehon law was one of the earliest forms of written law. Brehon law was more akin to common law in that it was not the law as determined by the representatives of the people in a parliament. Despite that, it was eventually committed to paper in the form of a code of laws. As such it represents the earliest form of legislation in Ireland.

The early references to Brehon law are vague, so we will never really know when Brehon law became established.[19] However, it appears safe to suggest that Brehon Law pre-dates the iron age. Experts in this area credit the middle bronze age Tuatha de Danann as having made a major contribution to the formation of the Brehon Law, if not its outright development. Brehon law continued in use until it was abolished in the seventeenth Century.

Brehon law was administered by the breitheamh, (which has become the Irish language term for a judge today). However, his role was not that of a judge. His role was more concerned with an interpretation of the law, rather than the administration of justice. If the law provided for an offence of stealing cattle then he simply found that law, interpreted it for the parties to the dispute and imposed the requisite hefty fine for stealing the cattle and that would be the end of the matter. So complicit was the law that it provided the penalty or the remedy, not the breitheamh.

It was not until the third century that Brehon law was committed to paper. And even when it was written down, Brehon law was more akin to an encrypted code rather than bearing any similarity to statute law as it exists today. It was written down in volumes or tracts, entirely in the Irish language[20]. Even at that time, the laws were very difficult to understand and were only accessible to what might be described as the select initiates. Those who wished to become

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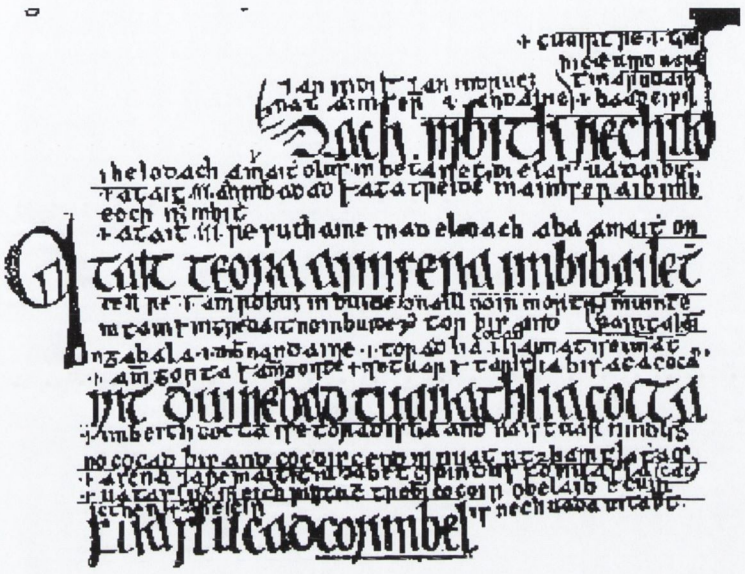
[19] For example, in the Prelude to the First Battle of Moyturra, mention is made of the Firbolg and Tuatha de Danann negotiating "under the Laws of battle".

[20] The laws were written in the oldest dialect of the Irish language, known as Bérla Féini.

breitheamhs had to be specially instructed on how to read the laws. The following is an actual extract of Brehon law, taken from the Senchus Mór:



A testament to its "encrypted" form is the very fact that the law itself must be read in a very special way. The four lines of large text are a part of the Senchus Mór proper, and they are to be read in the following order: second, first, third, fourth. The smaller text is in fact a commentary, and it consists of seventeen lines and supposing them to be numbered from top to bottom they are to be read in this way – begin at line 8 (which comments on the line of larger text right under it) then 7, 6, 5; part of 4 and part of 3 (both as far as the curve) the rest of 4, the rest of 3; then 2, 1. Resume at 9 and go on in the same way - sometimes upwards, sometimes downwards - to the end.

Brehon law was a system of codified laws. It was not comprised of statutes pronounced by any parliament, but rather, it was the result of the gathering of decisions handed down by the courts. In the same was as the doctrine of precedent exists today, when the breitheamh adjudicated on a conflict which was not covered by any pre-existing rule, then that new rule was added to the body of existing law.

The Brehon law which remains with us today is evidence of a very sophisticated and well regulated society. The law itself forms a great body of civil, criminal and military law. Taking the criminal law aspects of Brehon law for example, in the same way as the law today, each crime was specifically provided for, depending on the extent of injury and weapon used. Another feature of Brehon law which is similar to the codes of today was that each tract of Brehon Law addressed a disparate topic.

Form of Early Legislation

Before the days of legislatures, it was not the practice to publish legislation. Publication was believed to be unnecessary as it was thought that its declaration and very existence would suffice. Published legislation, and in its collected form of the statute book, did not have much of an existence before the creation of the first legislatures.

The parliamentary form of legislation only emerged towards the end of the thirteenth century. In 1299 an official roll of parliamentary statutes was maintained in the Chancery. However, prior to that time, no official procedure for enrolling parliamentary statutes had been established. In the absence of official records, the public relied on private collections of statutes.

In the Tudor period, the nature of parliamentary legislation changed significantly. This was due to the further development of the bills procedure. A characteristic of early legislation was that it declared rather than enacted. It sought to combine declarations with particular decisions.

In the reign of Henry VI, the House of Commons would send its demands to the King in the form of a Bill so that he could accept it or reject it. In 1433, the words "By authority of Parliament" were included in every Bill. From the reign of Henry VIII onwards, the reference to petitions in the body of Bills was

abandoned as legislating by Bill had become an entirely acceptable way of making the law.

Printing was invented in or around 1476. This was a development which changed the way in which legislation would be presented and assisted greatly in allowing legislation to become more widely available. The invention of printing and its subsequent popularity has only been superseded by the development, in much more recent times, of the internet, which from a legislative point of view, holds the potential to make laws available to every person who wishes to access them.

Drafting of Early Legislation

The earliest British Acts were drafted by the Kings' judges. In fact, until 1487, most legislation was drafted by judges, counsellors and officials in Latin or in Norman French. Their content and language reflected a simple and accessible style. So much so that it led Lord Ellenborough to remark in 1806:

> "In ancient statutes, no great precision of language prevailed, and the words were very loose and general."[21]

After 1487, Parliament handed over responsibility for drafting statutes to conveyancers. To the task of drafting, they brought their prolixity which was, and to a great extent remains, endemic in conveyancing, and regrettably, ever present in today's legislation. This was also accompanied by a tendency to use synonyms.[22] In addition to language, conveyancers also had an impact on the form of statutes – they carried over their belief that everything should be expressed in one sentence.[23] This marked the beginning of the use of a

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[21] *Wilson v Knubley* (1806) 7 East 128, 136.

[22] Craies would explain the tendency to use synonyms at this time as arising from the fact that the change over from Norman French and Latin left the drafters unsure as to which words were more appropriate, so to resolve the doubt, they resorted to using not one, but two or even three words of the same meaning. See, Edgar, *Craies on Statute Law* (7th ed., London, 1971) at 22.

[23] See Chapter 7.

verbose style in the framing of legislation. A level of verbosity once (and perhaps still) characteristic of deeds is now equally prominent in much of our legislation, much to the despair of many.[24] The belief that conveyancers made ideal drafters continued to prevail in Ireland until relatively recently. In 1923, when Ireland's first Parliamentary Draftsman, Arthur Matheson was seeking to engage an assistant Parliamentary draftsman, he expected the candidate to be "an experienced conveyancer of not less than 12 years standing at the Bar"[25].

Emergence of the Statute Book

In the early days, before the availability of printing became widespread, there was a heavy reliance placed on the oral communication of the law. Early English Acts were proclaimed by the sheriffs in the county courts. Instructions were sent to the sheriffs directing them to read and proclaim the statutes which had been sent to them. A widely known example of this is section 7 of the Riot Act which required that its provisions be read openly at every quarter session. The sheriffs were also obliged to make transcripts of the statutes and to furnish them to the knights of the county and every justice of the peace.

Similar arrangements were in place in Scotland, where the Clerk Register was directed to register the statutes and to disseminate them to the sheriffs for proclamation. Prior to 1851, it appears that in Scotland, a statute was not binding on the people until it had been proclaimed at the market-cross of the chief town in the shire.[26] In 1801, following a House of Commons resolution, the King's printer was directed to deliver a specific number of copies of Acts to those listed in the resolution.

In Denmark, as well as other countries, legislation often contained a

[24] The language of legislation is discussed in greater detail in Chapter 8.

[25] Letter from Arthur Matheson to Hugh Kennedy dated 14 September 1923 (UCD Archives P.4-640).

[26] Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 34.

requirement that it be read out in the streets or that it be available in a specific place – such as a church.[27] There was a requirement that some legislation be read from the pulpit, but as this method of communication grew, it had to be curtailed as it was regarded as interfering with the spirit of the ceremonies. It seems that in Sweden, the official proclamation of laws was carried out in churches until 1894 when the law gazette took over this role.

In Britain, the publication of legislation has been carried out on an annual basis by the King's Printer from Richard III's time. The King's Printer had a monopoly in this regard. Despite this, it is reputed that "no complete collection of the printed annual statutes exists."[28]. On that basis it is asserted that "[t]he authentic copy is the original copy."[29]. Theoretically, all of the Acts of one session of Parliament were regarded as a single statute. This explains why British statutes from earlier times are referred to as a chapter of a statute.

In 1800, a Select Committee of the House of Commons which had examined public records, presented a report which recommended that a complete and authoritative edition of all statutes be published. This report led to the appointment of the first Record Commissioners, who set their primary goal to be the preparation of a complete and authentic collection of statutes. This in turn led to the publication of a new set of statutes.[30] Shortly after, in 1807, an authentic collection of the Scottish Statutes was published. A comparable collection of Irish statutes was not published. However, earlier, on the order of Lord Halifax, Lord Lieutenant of Ireland, in 1762 a twenty folio volume version had been published by the King's Printer General in Ireland.

The Legislative Process and Promulgation in Ireland

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27 See further: Blume, "The Communication of Legal Rules" (1990) 11 Stat. LR 189.

28 Hughes, *The British Statute Book* (London, 1957) at p. 84.

29 *ibid.*, at p. 85.

30 *Statutes of the Realm, printed by command of His Majesty King George III, in pursuance of an address from the House of Commons of Great Britain, from original records and authentic manuscripts.*

In Ireland, the legislative process is built upon the Oireachtas[31]. The Oireachtas is comprised of Dáil Éireann (the lower house of parliament); Seanad Éireann (the upper house of parliament); and Uachtarán na hÉireann (the President). A Bill can be initiated in either the Dáil or the Seanad. In each House, a Bill must go through five stages, those being: 1. initiation; 2. second reading; 3. committee stage; 4. report stage; and, 5. final stage. Meaningful contributions to a Bill can only be made at stages 2, 3 and 4.

When a Bill is being given a second reading, the Minister presents the Bill to the House by making a speech explaining the purpose and contents of the Bill. This is then responded to by the spokespersons from each of the main political parties and then other members of the House may contribute at that point. It is at both committee stage and report stage that amendments may be tabled to the Bill. Once all stages have been completed, the Bill is then referred to the other House, and all of the stages are again repeated.

Once a Bill has completed its journey through both Houses, it is printed onto vellum paper and is presented to the President for her signature in accord with Article $25.4.5^0$ of the Constitution:

> "As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President or, where the President has signed the text of such law in each of the official languages, both the signed texts shall be enrolled for record in the office of the Registrar of the Supreme Court, and the text, or both the texts, so enrolled shall be conclusive evidence of the provisions of such

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[31] On the legislative process, see generally, Lambert, *Bills and Acts* (Cambridge, 1971); May, *Parliamentary Practice* (17th ed., London, 1964); Power, *Parliamentary Scrutiny of Draft Legislation* (London, 2000); Symonds, *The Mechanics of Law Making* (London, 1835); Zander, The Law Making Process (London, 1999); Denza, "Parliamentary Scrutiny of Community Legislation" [1993] 14 Stat LR 56; Engle, "The Legislative Process Today" [1987] Stat. LR 71; McCarthy, "Legislation – Its Preparation and Enactment" Public Administration of Ireland, Vol. III (Dublin, 1954) 1; Miers, "Legislation and the Legislative Process: A Case for Reform?" [1989] Stat LR 26; Samuels, "Pre-legislation Scrutiny" [1998] 19 Stat LR 213.

law."

Accordingly, the authentic, or sole official version of a statute enacted in Ireland is the signed text, as enrolled for record in the Office of the Registrar of the Supreme Court.[32]

It is recognised in all democracies that in order to be most effective, legislation needs to be authenticated in some way. The reason for this is so that the persons to whom legislation is addressed must be able to see that the law has come from a solemn authority - that it has been promulgated. The word promulgate derives from the Latin word promulgatus which means to proclaim. The dictionaries typically record the word promulgate as meaning to put something into effect; the act of making something known by open declaration; or to promote something publicly.

As mentioned earlier, in 1870 the Danish parliament established a law gazette and this is the forum used to announce and publish the full text of laws passed. This continues to be done in compliance with the obligation under Article 22 of the Danish Constitution. The gazette was initiated on the belief that it would be a means by which citizens would read of legislative developments. Sweden followed suit in 1894 with the establishment of its gazette. A similar channel of communication exits under E.U. law. Once passed, E.U. legislation cannot come into force until notice has been published in the Official Journal. In Ireland, once an Act has been promulgated, notice of this fact is published in *Iris Oifigiúil.*

The requirement for the promulgation of Irish legislation appears a number of

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[32] On promulgation, see generally, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.5.27 et. seq.; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 169 et. seq.

times in the Constitution[33]. Article 13.3.2 states that "The President shall promulgate every law made by the Oireachtas."[34]. Article 25.4.2 goes into more detail and gives an indication as to what mode promulgation should take:

> "Every Bill signed by the President under this Constitution shall be promulgated by him as a law by the publication by his direction of a notice in *Iris Oifigiúil* stating that the Bill has become law.".

Though the role of the President in declaring a particular text to be law may in some regards be described as ceremonial, it is a role which is central to our legal system in that it is the sole means of authenticating legislation. It has never been believed that the President has or ought to have a role in, or responsibility for the publication of legislation, though at first glance, the wording of the Constitution might suggest otherwise.

Bentham had a strongly held view that the legislature had a responsibility to see to it that once enacted, legislation receives the widest possible publication amongst the public. He was scathing in his criticism of the legislature for what he saw as its failure to fulfil this responsibility and compared the legislature to an ostrich who buries its eggs in the sand, not caring about whether they are crushed underfoot of a passer by. When Bentham uses the word promulgate, he gives it the widest possible meaning:

> "... to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed; all these means may be good, but they may be all employed without

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[33] On the Irish Constitution, see generally, Hogan & Whyte, *JM Kelly: The Irish Constitution* (4th ed., Dublin, 2003); Morgan, *Constitutional Law in Ireland* (2nd ed., Dublin, 1990); Morgan, *The Separation of Powers in the Irish Constitution* (Dublin, 1997); Kohn, *The Constitution of the Irish Free State* (London, 1932).

[34] See, Hogan & Whyte, *JM Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.5.25.

> accomplishing the essential object. They may possess more of the appearance than the reality of promulgation. To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes."[35]

However, in the context of Article 13 of the Irish Constitution, the word "promulgate" has always been taken to be limited to putting a law into effect, and not the wider meaning relating to publication.

It is not insignificant that the Constitution has no express requirement to the effect that all Acts must be published upon their passing. There is no requirement to publish an Act even after it has been passed. As mentioned above, all that is required by the Constitution is that notice of its passing and signing into law be published in *Iris Oifigil*, the official journal by way of a short notice.

Responsibility for Publishing Statutes

Shortly after the foundation of the State, the question as to where responsibility for the binding, indexing and publishing of legislation would fall was the subject of correspondence between the Ceann Comhairle and then Attorney General, Hugh Kennedy. In one letter, the Ceann Comhairle[36] noted that in England these tasks are carried out by the King's Printer and he went on to suggest:

> "instead of appointing an officer specially to look after work of this kind for us here we will utilise the services of some officer who has already some other functions to discharge in relation to the Acts of the

[35] Bentham, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof* (Edinburgh, 1843).

[36] Letter from Ceann Comhairle to Hugh Kennedy dated 24 February 1923. (UCD Archives P.4-979).

Oireachtas."

The tenor of the Ceann Comhairle's letter is indicative of an element of politicking surrounding this issue – the writer was clearly anxious that this responsibility should not fall elsewhere. Having suggested that the Officer of the High Court (referred to in Article 42 of the Constitution of the Irish Free State[37]) might be appropriate, the writer hastily adds that such officer might not be the most suitable. By way of conclusion, he states that the work would be best "looked after here" – in the Oireachtas.

It was subsequently decided that responsibility for the statute book should indeed lie with the Houses of the Oireachtas through the Ceann Comhairle, and now the Houses of the Oireachtas Commission. This pivotal decision, taken in the formative years of the statute book of the Free State, was a significant factor in contributing to the problems which exist today with the statute book. The acquisition of independence, a new Constitution and a new parliament were an ideal opportunity to start somewhat afresh – to place the responsibility for the maintenance of the statute on the shoulders of an Officer – effectively an editor-in-chief - dedicated to that task, and the opportunity was squandered. It meant that the statute book did not have one master who could keep a trained eye on its order and coherence. The consequences of this decision are being felt by the many who consult the statute book today.

Publication of Legislation

There is no primary legislation governing the publication of Acts. It has always been the case that an Act is published after it has been signed by the President. At present, it is the Bills Office in the Houses of the Oireachtas which is charged with sending the signed version of an Act for printing. Within a number of days, the Act is available for purchase from Government Publications Sales Office or the Act can be downloaded free from the website

[37] Article 42 of the 1922 Constitution dealt with the enrolling of law "in the office of such officer of the Supreme Court as Dáil Eireann may determine".

of the Houses of the Oireachtas.[38]

From the very early days, in other countries, private enterprise has played a significant role in the publication of statutes. In the UK, the publication of the official edition of the statutes was effectively "shadowed" closely by private publishers. As a result, there is relatively wide selection of commercially published British statutes. Regrettably, this level of private sector involvement has only recently emerged in Ireland. This is despite the fact that acquiring the necessary copyright permissions from the State is largely a formality[39]. As a result, the publication of the Irish statute book has been all the poorer for its absence.

The absence of rules governing the publication of Acts can be contrasted with the strict procedures which have been set down for the publication of secondary legislation. The publication of statutory instruments is governed by section 3 of the Statutory Instruments Act 1947, as amended by the Statutory Instruments (Amendment) Act 1955. Section 3(1) requires first, that within seven days of its making, a copy of a statutory instrument must be sent to a number of specified libraries. Secondly, a statutory instrument must be printed as soon as possible after its making. Thirdly, as soon as it has been printed, notice of its making and details of where a copy can be obtained must be published in *Iris Oifigiúil*. Subsection (2) goes on to state that the failure to comply with any of these requirements will not affect the validity of a statutory instrument.

Perhaps most significantly, section 3(3) provides that if notice of the making of

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[38] The availability of Acts in electronic form will be the subject of greater discussion in Chapter 9.

[39] In respect of the years up to and including 2000, copyright in Acts of the Oireachtas, and statutory instruments, vests in the Government. Requests for permission to reproduce legislation enacted or made up to and including 2000, should be made to the Government Publications Sales Office. Regarding legislation enacted from and including 2001, in accordance with section 192 of the Copyright and Related Rights Act 2000, copyright vests in the Houses of the Oireachtas. Requests for permission to reproduce legislation enacted or made from and including 2001, should be made to the Ceann Comhairle of the Dáil.

a statutory instrument has not been published in *Iris Oifigiúil* in accordance with subsection (1), then a person cannot be prosecuted for an offence arising from that instrument, unless it can be shown that other reasonable steps had been taken to bring the statutory instrument to the notice of the public.

Under section 4(1), the Stationery Office, (now Government Publications) must assign a number to each statutory instrument, which shall then appear on the front page alongside the year of publication.

It is perhaps interesting to note at this stage that in 1922, a Bill was brought forward which would have required a 40 day consultation period before any statutory rules would be made. In December 1922[40], Arthur Matheson sent a draft Rules of Publication Bill to the Law Officer for his consideration. This Bill was intended to regulate the printing, publication and citation of statutory rules and orders. It was based on the Rules of Publication Act 1895. The Bill required that 40 days notice of an intention to make the rules be given to the public and that the rules be available for public inspection during that time. It also provided all statutory rules and orders were to be printed and sold by the official printers. The Bill also directed that Regulations were to be made to establish a system for the numbering of all statutory rules and orders.

Bi-lingual Legislation

The Bills passed by the Oireachtas following independence were in the English language only. Under Article 42 of the Free State Constitution, two versions of each Act were to be made available – one in Irish and one in English. On their publication, each English version of the Act was accompanied by an Irish version[41], usually on the left-hand page. At that time, a yearly volume of statutes was published, entitled "Na hAchtanna Puiblí Generalta a rith Oireachtas Saorstát Eireann sa bhliain,"[42] meaning "The

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40 Letter dated 8 December 1922 (UCD Archives P.4-635).

41 Prepared officially in accord with the Constitution and standing Orders of the Oireachtas.

42 It may be of interest to note that the fada was not used over the initial "E" of Eireann. This

Public General Statutes passed in the year,".

Bentham recognized the importance of legislation being available in the language of those to whom it is addressed, particularly in multi-cultural societies:

> "If the nation which ought to obey the same laws is composed of different peoples, speaking different languages, it is proper that an authentic translation of the code should be made into each of these languages."[43].

In recognition of this principle, the Standing Orders of the Dáil require that every piece of legislation enacted by the Dáil be translated.[44] The publication of bilingual volumes of Acts of the Oireachtas ended in 1986. From that time onwards, only some Acts were selected for translation. In recent years, the Supreme Court had cause to examine the availability of statutes in the Irish language in *Ó'Beoláin v Fahy*[45].

The Supreme Court decision in this case brought the availability of bilingual legislation to the fore. The Court held, *inter alia*, that the State had a constitutional obligation under Article 25.4 to make available an official Irish translation of the Acts of the Oireachtas. In the context of the State's failure to publish an Irish translation of the Rules of the District Court, Hardiman J. stated that an "apparent lack of staff in the office of the Chief Translator in the Houses of the Oireachtas is no sort of excuse."[46]. Hardiman J. was scathing

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tradition continued up until approximately 1930. One theory on this omission is that it was improper to place a fada on a capital letter.

[43] Bentham, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof* (Edinburgh, 1843).

[44] Standing Order 18(3) provides: "The Clerk shall cause to be made an official translation into English of every law enacted by the Oireachtas in Irish, and an official translation into Irish of every law enacted by the Oireachtas in English.".

[45] [2001] 2 I.R. 279. See, Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at paras. 3.2.153 and 4.5.40 et. seq.

[46] *ibid.*, at p. 344.

in his response to Counsel for the State's argument that there was no deadline by which the State was obliged to provide an official translation of Acts:

> "According to this line of argument, years may elapse, during which the statute in question is in daily use without any translation being provided, without the State being in breach of its obligation, just so long as the authorities sincerely intend to provide the translation at some future date. It must be obvious that this line of argument is utterly inconsistent with the constitutional status of the national language and with the long standing policy of bilingualism in relation to the business of the courts, repeated in statutory form as recently as 1998. In my view, there must be implied into the terms of Article 25.4.4 at the very least a requirement that the official translation shall be provided as soon as practicable and there is clearly scope for the contention (not made in this case) that it must be available before the Act is sought to be enforced on a person competent and wishing to conduct his official affairs in Irish."[47]

It is salient to point out that the thrust of Hardiman J.'s judgment seems to have amounted to an attack on the attitude and consequent inaction on the part of the Government towards the Irish language, rather than an attack on the Chief Translator and his staff at the Translation Service.

The Government continues to fail to comply with Article 25.4.4[48] as exposed by the Supreme Court in *Ó'Beoláin v Fahy*[49]. Despite that, at the Government's behest, the Oireachtas enacted the Official Languages Act 2003, section 7 of which provides:

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[47] *ibid.*, at p. 346.

[48] Article 25.4.4. reads as follows: Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language.".

[49] [2001] 2I.R. 279.

> "As soon as may be after the enactment of any act of the Oireachtas, the text thereof shall be printed and published in each of the official languages simultaneously.".

It has been said that some provisions of the Constitution are merely aspirational, the same cannot be said for legislation. This matter was alluded to by the Supreme Court in *Cork County Council v Whillock*[50] where Egan J. stated:

> "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislator must be deemed not to waste its words or to say anything in vain." [51].

Enacting legislative provisions which it is known will not achieve full compliance on the part of the people is one thing, but to enact legislative provisions which the Government itself cannot and does not comply with, only serves to demean the law.

Concluding Remarks

The centuries have witnessed the evolution of what has now become the statute book. Before the statute book ever existed we had natural law, followed by laws which were merely declared and proclaimed in public. The advancement of societies led to laws being written down in a regimented way – Brehon law being but just one example of the increasing complexity of societies of that period. Over that time, legislation has also evolved from being an abstract concept which was read out to the people, to one where a person can pick up or even own a piece or legislation, and may question or

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50 [1993] 1 I.R. 231.
51 *ibid.*, p. 239.

challenge it.

We have also witnessed the emergence of the forerunner to the Irish Statute Book. In England, the arrival of the printing press meant that copies of statutes could be made and they began to be gathered and collected in bound volumes. With the onset of Irish independence in 1921, Ireland assumed a great body of pre-existing law from the British statute book.

As this chapter has shown, there are a number of important characteristics of legislation. The need to provide a sanction has become an important feature of legislation – particularly in more modern times, where people are more likely to be more questioning of authority and, consequently, more likely to exercise their own discretion. Promulgation is another important aspect of legislation, not just for the purpose of the authentication, but for the opportunity which it represents for the communication of the terms of the legislation. The role which legislation plays in lending stability and providing a mechanism for the order and business of society means that it should receive widespread pronouncement and not merely, formal promulgation.

While the method of making laws may have changed, the role and function of laws has not. The reasons why Brehons or Tudors felt the need for laws are still largely the same reasons why we have laws today. Laws serve many needs, however, one fundamental need which laws serve is the governance and order of society. What has changed is the complexity of society and the detailed legislation which has materialized to reflect this.

In support of the thesis, this Chapter has established that the role of legislation is such that it must be communicated in a meaningful and effective

way to the people who are governed by it. Further chapters will examine whether the effective communication of the Irish Statute Book has been and is being, achieved.

Chapter 3

The Composition of the Statute Book

Introduction

The principal purpose of this Chapter is to assess just what exactly the Irish Statute Book is comprised of. It does so by looking at some of the factors which have contributed to its poor state and by highlighting other aspects, which will be discussed in later chapters.

Largely inherited from, and influenced by, the British statute book, the Irish Statute Book is comprised of a disparate set of Acts from very different times. As such, the problems which we now face in relation to the statute book have been bedded down over very many years. This Chapter looks at the Statute Book in the context of it being very much a notional object.

The Law Reform Commission have already spent some time examining legislative drafting and statutory interpretation[52]. However, rather than looking at the existing body of law with a view to proposing measures which might improve it, the Law Reform Commission's examination was somewhat limited in that its proposals were intended to be entirely prospective in effect, and their recommendations were largely stylistic and even if implemented in full, would not adequately tackle the poor state of the statute book.

Down through the centuries, there has been extensive criticism of legislation and in turn of how it is gathered in the statute book. In that time there have been several concerted attempts, particularly in Britain, to impose some order

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[52] Law Reform Commission (Consultation Paper), *Statutory Drafting and Interpretation: Plain Language and the Law* (July 1999) CP14-1999; Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000).

on an untidy statute book. As this Chapter shows, this is an experience from which some lessons can be drawn by the Irish authorities.

Central to this thesis' criticism of the statute book is the principle of *Ignorantia Juris Neminem Excusat* – Ignorance of the Law is No Defence.[53] It follows that if the legislature and the courts are going to impose an onerous requirement such as this, then the corollary of that is that legislation must be widely available and easily accessible.

Symptomatic of the poor state of the statute book are the aids which exist in order to assist the reader to decipher the state of the law. Explanatory memoranda exist in order to guide the reader through an individual Act. The Chronological Tables enable the reader to decode the complex tapestry of Acts so as to see the effect of amendments. And, the Interpretation Acts seek to encourage a degree of consistency in relation to some aspects of Acts.

What is the Irish Statute Book?

The Irish Statute Book is comprised of several thousand statutes, some of which date back to the 12th Century. Many of the statutes have their origin outside of Ireland, having been passed by Parliament in Britain. The statute book today may be said to be comprised of a number of different categories of Acts, categorised by the period of enactment: Acts of the English Parliament (pre-1707); Acts of Parliaments sitting in Ireland (pre-1800); Acts of the British Parliament (1707-1800); Acts of the Parliament of Great Britain and Ireland (1801-1922); Acts of the Oireachtas of the Irish Free State (1922-1937); Acts of the Oireachtas (1937 to date).

With the changed situation brought about by independence, the Irish Statute Book took on its own shape in 1922. The first collection of Irish statutes was

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[53] See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 28 et. seq.

published in 1922, by the Free State Government. It contained five Acts, they are: 1. Constitution of the Irish Free State (Saorstát Eireann) Act; 2. Adaptation of Enactments Act; 3. Appropriation Act; 4. Local Elections Postponement Act; and 5. Expiring Laws Continuance Act. This set the precedent for the format and shape of Irish legislation today. The Irish Statute Book at present is comprised of approximately 3500 Acts[54]. Looking at the growth of the statute book over the past ten years, it is possible to ascertain the extent and rate of growth of the statute book in recent years. The Table below sets out the number of Acts enacted over the period 1995 to 2004:

Year	Number of Acts	Pages
1995	36	886
1996	43	985
1997	46	2906
1998	54	1351
1999	35	1166
2000	42	1531
2001	57	2269
2002	33	991
2003	46	1824
2004	44	1500

This Table reveals that a staggering 436 Acts, covering 15,409 pages were enacted in the 10 year period, 1995 to 2004[55]. This gives an indication of the rate at which the statute book is growing.

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[54] 582 *Dáil Debates* Col. 1628 (30 March 2004).

[55] The figure relating to 2004 (above) is estimated as the volume of statutes relating to 2004 was not, at the time of writing, yet published.

Secondary legislation can also be said to be part of the statute book. However, for the purpose of this thesis, a more narrow approach is being taken so that matters being examined will be restricted to primary legislation alone. Despite this, an examination of some aspects of secondary legislation proved to be unavoidable and secondary legislation, in so far as it directly impacts on primary legislation, is discussed in Chapter 10.

"The Irish Statute Book" – A Notional Concept

Our statute book is a notional one. The Irish Statute Book is at best a misnomer. Not simply because no single book comprises the statute book, but for far more substantive reasons.

The statute book which we have today is comprised of Acts enacted by the Oireachtas and also those enacted by its predecessors – including the British parliament. Taken strictly in its enacted form, it does not represent the body of law which governs our State – as many Acts will have been amended and likewise, many will have been repealed. In this regard, it may be said of the Irish statute book that what you see is not what you get. For example, one may open the Defence Act 1954, believing it to be a fairly comprehensive Act which alone governs our defence forces. However this is not entirely true. The Defence Act 1954 has been supplemented by seven Defence (Amendment) Acts and the 1954 Act, and indeed the "amendment" Acts, have been amended many times by a whole range of other Acts. However, the lay reader who examines the 1954 volume of statutes may not know this and in the present circumstances, can not realistically be expected to.

Similarly, a reader might examine the 1999 volume of statutes and conclude that planning and development matters are governed by the Local Government (Planning and Development) Act 1999. However, this is not the case as that Act has been repealed in full by section 264 of the Planning and

Development Act 2000. In the same way, the lay reader will not know and can not be expected to know that the volume which she or he holds does not in fact accurately represent the statute law which governs him or her.

Broad Categories of Acts

Each year, the type legislation which is added to the Irish statute book would, for the most part, be common to any other common law jurisdiction today. Typically, each annual volume of the statute book will primarily contain two broad categories of Acts: first, Acts to deal with the regulation/administration of the State and secondly, Acts which arise by virtue of our membership of the European Union, or by virtue of our international obligations.

The Acts which deal with the regulation/administration of the State may deal with any matter from education, to communications regulation, to environmental matters. Acts in this category will also regulate and extend criminal law. Also falling within this category are the annual or recurrent Acts which deal with fiscal matters. Each year there are three Acts which are certain to feature year after year: they are the Appropriation Act, the Finance Act, and the Social Welfare Act. These three pieces of fiscal legislation are passed on an annual basis, and are fundamental to the effective administration of the country.

The Appropriation Act is really a procedural measure, it formally deals with the State's spending for the year. The Finance Act is enacted each year to give effect to many of the changes announced as part of the Budget, which is delivered by the Minister for Finance in December of each year. It does so by effecting amendments to the Finance Acts and Tax Acts of previous years. Similarly, the Social Welfare Act enacted each year is designed to give effect to the changes introduced by the budget.

The second broad category of Acts enacted in a given year are those which arise by virtue of our membership of EU or by virtue of our international obligations. Increasingly we are seeing the impetus behind legislation coming from Europe and even further afield. On an annual basis, new Acts are required to give effect to changes introduced as a result of EU Directives and EU Framework decisions. In recent years there has been a steady increase in the number of Acts which have been enacted to give effect to international agreements. In addition, section 3 of the European Communities Act 1972 Act allows for the making of regulations which are capable of amending primary legislation in pursuance of obligations which arise by virtue of our membership of the EU. This is an unusual and broad power, so naturally, regulations made under section 3 are in a special category. As the obligations which arise by virtue of our membership of the European Union become more onerous, regulations under section 3 are becoming increasingly frequent. Regulations of this kind are discussed in greater detail in Chapter 10.

Types of Acts

Establishing what type a particular Act is, can be particularly important from the point of view of interpretation. For example, in *Equality Authority v Portmarnock Golf Club*[56], O'Higgins J.'s approach towards the interpretation of the Equal Status Act 2000 was heavily influenced by his belief that this Act was a "remedial Act"[57].

The importance of ascertaining the precise nature of an Act was alluded to by Chief Justice Hughes of the U.S. Supreme Court in *Sugar Institute v United*

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[56] High Court, unreported, 10 June 2005.

[57] The Act is believed to be remedial in a social sense, and is not to be confused with Acts which are regarded as being "curative".

States[58], where he said:

> "We have said that the Sherman Anti-Trust Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree."

This rationale could be applied to a number of Acts on our statute book – such as the Freedom of Information Act 1997, and the European Convention on Human Rights Act 2003 - with the effect of significantly influencing the way in which that legislation is interpreted.

The two broad categories of Acts discussed earlier can be further subdivided into four further groups: Enabling Acts; Declaratory Acts; Curative Acts; and Acts to Amend the Constitution.

Enabling Acts

An enabling Act is one which makes it lawful to do something which would otherwise have been unlawful. An example of this is the Dormant Accounts Act 2002, which allows the Minister for Finance to seize the money in personal bank accounts which have been inactive for a certain number of years. The actions of the Minister for Finance in this regard would not have been lawful in the absence of Act of 2002 which effectively, enables him to seize money in circumstances which the law would otherwise deemed to have been an offence.

Declaratory Acts

Though it is a rare occurrence, the Oireachtas occasionally passes what

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[58] 297 U.S. 553 (1936).

might be described as a declaratory Act. A declaratory Act is one which is passed to explain and declare what already is or has been the law. Invariably an Act of this kind only arises to reiterate what has been the position in common law. The decision to propose a declaratory Bill is evidence of the impact which judicial interpretation can have on the statute book. The need for a Bill of this kind often arises where the legislature believes that there has been a judicial error with regard to the state of the existing law and presenting a Bill of this nature is their way of clarifying or rectifying that problem. The Interpretation (Amendment) Act 1997 is perhaps a recent Irish example of a declaratory Act. This Bill was enacted in response to a judicial decision, following the abolition of certain offences at common law. While it is not framed in overtly declaratory terms, the motive which led to its enactment and also its effect, is clearly declaratory.

Curative Acts

A curative Act is one which remedies a defect in existing statute law and does not seek to merely transpose what was common law into statute law. The need for a curative Act is most likely to arise from judicial criticism or striking down of a statute. The Immigration Act 2004 is a perfect example of a curative Act. The need for this Bill arose after Ms Justice Finlay-Geoghegan struck down key aspects of the immigration laws of the State.[59]

A more recent example of a curative Act is the Health (Amendment) (No 2) Bill 2004. This Bill was introduced in December 2004 when the Government discovered that there was no legal basis for the imposition of charges upon persons who were resident in State nursing homes, dating back to 1976. The Bill was introduced to retrospectively validate charges for this service which had been imposed. It was a cause of considerable controversy at the time. The Bill was rushed through both Houses in two days in the run up to Christmas. Once the Bill was sent to the President for her signature, she

[59] *Leontjava and Chang v D.P.P.* [2004] 1 I.R. 591. This case is discussed in Chapter 7.

convened a meeting under the Council of State and subsequently referred the Bill to the Supreme Court under Article 26 of the Constitution in order to test the Bill.[60] The Supreme Court subsequently found the Bill to be unconstitutional[61], despite counsel for the Attorney General having argued that the Bill was curative.

Acts to Amend the Constitution

Acts to amend the Constitution adopt a standard format. They invariably begin with two preambles; the first of which refers to Article 46 of the Constitution from which the power to amend the Constitution is derived. The second preamble specifies the Articles of the Constitution which the Act proposes to amend. These Acts usually contain only two sections. Section 1 is the substantive provision which directs that the amendments set out in the Schedule to the Act must be made in the Irish and English texts provided. Section 2 of the Act sets out the short-title of the Act.

The purpose of enacting Acts to amend the Constitution is radically different from all other Acts. They are not passed for the purpose of sitting on the statute book as an expression of the law, rather such Acts are merely a vehicle passed by the legislature to facilitate an amendment to the Constitution. Acts to amend the Constitution are quite different in other respects. Once enacted, each Act is allocated a number. For example, the Finance Act 2002 is Number 5 of 2002 and it may be cited by this number. In contrast, Acts to Amend the Constitution are not allocated a number.

The year in the title of an Act relates to the year in which that Act was passed by both Houses. On occasion, if there is a delay between the passing of an Act by both Houses, and promulgation by the President, an Act passed by the Houses in one year, might not be enacted until the following year. The title of

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[60] Article 26 is discussed is Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.5.80 et. seq.

[61] *In Re Article 26 of the Constitution and the Health (Amendment) (No 2) Bill 2004* Supreme Court, unreported, 16 February 2005.

such an Acts will not reflect the year of its enactment, rather the title reflects the year of its passing by the Houses. For example, both the Twenty First Amendment of the Constitution Act 2001 and also the Twenty-Third Amendment of the Constitution Act 2001 were in fact passed on 27 March 2002, and not in 2001 as their titles would suggest.

Law Reform Commission's Examination

In 1976, the Law Reform Commission's first proposal for law reform proposed to review the interpretation of statutes, and most notably, it went on to state:

> "The Commission proposes to examine ways in which the present method and style of drafting statute law might be improved. It also proposes to examine the form of production and publication of statutes and of amendments to statutes, as well as the question of the consolidation of statute law."[62]

However, despite this good intention, other matters took precedence and the issue of legislation and legislative drafting was never actually reached until 1999. It was not until then that the Irish Statute Book was given a most welcome and thorough examination by the Law Reform Commission in its Report and prior Consultation Paper, entitled *Statutory Drafting and Interpretation: Plain Language and the Law*[63]. What they found was a wounded patient, haggard and limping from years of neglect and mis-treatment; bandaged by a few sparse consolidations.

The Law Reform Commission Consultation Paper was preceded by the

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[62] Quoted in Law Reform Commission, *Statutory Drafting and Interpretation: Plain Language and the Law* (Consultation Paper) (Dublin, 1999) at page vii.

[63] Law Reform Commission (Consultation Paper), *Statutory Drafting and Interpretation: Plain Language and the Law* (July 1999) CP14-1999; Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000).

publication of the Interpretation Bill 2000[64]. The publication of the Consultation Paper was welcomed by both politicians and practitioners alike.

Following the publication of the subsequent Report, the Government Chief Whip, Seamus Brennan undertook that "aspects of the Report ... will be reflected on Committee Stage of the Interpretation Bill".[65]

In its Report, the Law Reform Commission made 17 well-considered recommendations and observations, the first 11 of which are primarily concerned with statutory interpretation. Quite a number of the recommendations which relate to legislative drafting have been implemented in the Interpretation Act 2005. Many of the recommendations dealing with statutory interpretation were addressed by Committee Stage amendments[66] to the Interpretation Bill and it is believed that many of the recommendations dealing with legislative drafting have been addressed by the Office of the Parliamentary Counsel in their Drafting Manual.[67]

The Commission recommended that the courts should have discretion to take into account all potentially helpful material in interpreting a statutory provision, such as marginal notes. Accordingly, they proposed that section 11(g) of the Interpretation Act 1937 be relaxed somewhat. Effect has been given to this recommendation by section 7 of the Interpretation Act 2005. The Commission also expressed the view that a court should be free to make reference to extrinsic aids – such as Explanatory Memoranda and parliamentary debates in interpreting a statutory provision, where the provision is ambiguous or obscure, or where a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas.

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64 Enacted as Interpretation Act 2005.

65 539 *Dáil Debates* Col. 9 (26th June, 2001).

66 22 January 2003.

67 Though it has not been published in an orthodox way, the Drafting Manual (July, 2001) has been laid before the Houses of the Oireachtas and is available in the Oireachtas Library.

The Commission then went on to make a number of recommendations specific to legislative drafting. Principally, it recommended that a comprehensive programme of reform of Irish law, with a view to replacing existing statutory provisions with alternatives expressed in plain language, be undertaken. It went on to advocate the adoption of 8 particular policies or what it called devices which it felt would improve the form of legislation:

1. familiar and contemporary vocabulary in legislative drafting;
2. shorter and less complex sentences;
3. the active, rather than the passive, voice;
4. positive statements, rather than negative ones;
5. the avoidance of multiple cross-references between sections and subsections of the same Act;
6. the replacement of concepts, such as 'the relevant period', or 'the appropriate date', with more specific information where this would be clearer;
7. increased use of examples, maps, diagrams and mathematical formulae; and
8. the highlighting in bold font of terms defined earlier in an enactment.

The Commission were anxious to emphasise that while the use of plain language is desirable, they believed that this end should not be achieved at the expense of legal certainty, especially where certain words and grammatical constructions, though not in common usage, have acquired a fixed and clear legal meaning.[68] The Law Reform Commission also favoured the use of "purpose clauses" which they felt should be included where appropriate, particularly where an Act gives effect to European legislation which itself has a "purpose clause"[69].

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[68] The language of legislation is discussed in greater detail in Chapter 8.

[69] The use of purpose provisions in legislation is discussed in greater detail in Chapter 7.

Leaving aside particular aspects of legislation itself, the Commission went on to recommend that explanatory memoranda which accompany Bills should be revised so as to reflect any amendments made at the various stages of a Bill's passage through the Houses of the Oireachtas, and should, when published, be made available on the internet.

Though clearly the reforms proposed by the Law Reform Commission will not remedy the present poor state of the statute book in a comprehensive way, the implementation of these recommendations would at least be of some assistance in halting the downward trajectory of the quality of the Irish Statute Book. Therefore, it is hoped that the Commission's Report will be far more fully implemented than its closest comparator in the UK - the Renton Report - has been. Such was the degree of failure to implement the Renton Report, some ten years after the launch of the Renton Report, Lord Renton noted that only half of the conclusions of the Renton Report[70] had been implemented, and in rather disenchanted tones he said: "I venture to mention that the Australian Parliament has stolen a march on the Mother of Parliaments by implementing more of it than we have done."[71].

State of the Statute Book

Born of the same stable as the English statute book, the Irish statute book has adopted the same style and deployed the same devices as its English counterpart. The similarities do not end there, as sharp words of criticism levelled at the English statute book are equally applicable to the Irish Statute Book.

The criticism of the poor state of the statute book is by no means new. There has been a steady flow of criticism down through the centuries. For example, Edward VI pointed to the need for statutes to be gathered into one, up to date

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70 "The Preparation of Legislation" (London, 1975) (Cmnd. 6053).

71 "Renton Report's Tenth Birthday" (editorial) (1985) Stat. L.R. 60

source: "I would wish that ... the superfluous and tedious statutes were brought into on sum together, and made more plain and short, to the intent that men might better understand them."[72]. The Lord Keeper Sir Nicholas Bacon called for "a short plan for reducing, ordering, and printing the Statutes of the Realm.".

The UK Law Commission[73] has described the British statute book as being "in a sad state" and in "disarray", while Professor Bruno Leoni believes that vested interests have ensured that the practice of turning out turgid and incomprehensible legislation has been perpetuated. In the absence of real change, he foresaw problems emerging:

> "Too many vested interests and too many prejudices are obviously ready to defend the inflation of the legislative process in contemporary society. However, unless I am wrong, everybody will be confronted sooner or later with the problem of a resulting situation that seems to promise nothing but perpetual unrest and general oppression."[74].

Bentham once famously described the statute book as:

> "... a heap on to which, as from a rubbish cart, a continually increasing and shapeless mass of law from time to time is shot down."[75]

Bentham's contention that most of the difficulties which people experience regarding the law are due to confusion of thought, obscure expression and the general disarray of the body of legislation was a view which is as fresh today as it was a few centuries ago.[76] Sheer frustration with legislative language led

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72 See, "The Preparation of Legislation" (London, 1975) (Cmnd. 6053) at para. 2.8.
73 Third Annual Report of the UK Law Commission.
74 Leoni, *Freedom and the Law* (3rd ed., Indianapolis, 1991) at p. 15.
75 Hughes, *The British Statute Book* (London, 1957) p. 87.
76 Bentham, *General View of a Complete Code of Laws* (London, 1843).

Cockburn[77] to criticise legislation in frank terms, stating that legislation was:

> "more or less unintelligible, by reason of the uncouth barbarous phraseology in which they are framed."

Not content with expressing such strong views, he went on to explain that the reason for this was because:

> "the work of framing them is committed to few hands, while the task is a Herculean one, far beyond the strength of the men employed properly to discharge."

Some years later, in 1889, Lord Herschell[78] expressed a similar view, though in remarkably more subtle terms:

> "If the object had been to render it as difficult of construction as possible, success could hardly have been more complete."

The state of the English statute book has been best articulated in vivid and visually rich terms by Harman LJ[79]:

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side ..."

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[77] Andrew Cockburn, in a speech at the Guildhall, 9 March 1876. See, Edgar, *Craies on Statute Law* (7th ed., London, 1971) at 23.

[78] *Cooke v New River* (1889) 14 A.C. 698, 699.

[79] *Davy v Leeds Corporation* [1964] 1 WLR 1218, 1224.

His frustration in his attempts to decipher the meaning of one Act reflect poorly on the prospects for deciphering the English statute book as a whole. Few, if any, would venture to suggest that such criticisms could not equally be levelled at the Irish statute book.

Indeed, some Irish commentators have described their own experience of the Irish Statute Book in varying degrees of frustration. Byrne and McCuthcheon describe the user's experience as being "the opportunity to engage in a fascinating intellectual challenge of navigating through volume after volume of statutes."[80]. When speaking on the Second Stage of the Law Refom Commission Bill 1975 in the Seanad, Attorney General, Declan Costello, alluded to some degree of recognition that the statute book was in crisis:

> "There can be no doubt that the simplification of the law is a desirable end. Ease of access to law is important not just to help the work of practising lawyers but also in the interests of the public."[81]

And so thirty years on, little, if anything has been achieved. The word "desirable" seems to have been the crucial word which has been, and would be, the firm basis for inaction. With so little done, and so much more to do, the simplification of the law and addressing access to statute law, remains (in the political sphere at least) an aspiration.

The question of remedying the present poor state of the statute book needs to be looked at holistically. There is little point in proposing that we change the way we do things from this point on. Equally, there is little point in attempting to tidy up the statute book on a retrospective basis. There needs to be a retrospective and also a prospective solution. Dealing with the devils of the past is one thing, but if we maintain our present system of effecting legislative change, then those devils of the past will merely be repeated in the future and

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[80] Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001) at para. 13.110.

[81] 80 *Seanad Debates* Col. 205 – 206 (10 April 1975).

its incoherence is of a self-perpetuating nature. If we are to achieve a comprehensible and accessible statute book, then in tandem with a retrospective solution, the way in which we make and amend our laws in the future needs to be changed.

Past Attempts to Impose Order

Historically, valiant attempts to address the state of the statute book have never managed to redress the problems which we continue to be faced with today. Perhaps this failure might be best attributed to the approach taken, rather than commitment or ability.

Mindful of the old adage that history repeats itself, the past experiences of the UK in seeking to improve their statute book may throw some light on the kind of measures which are likely to assist any future efforts to improve the Irish Statute Book.

In 19th Century England, there was a range of efforts directed at rectifying the untidy state of the statute book. Some efforts were productive and resulted in significant improvements. However, quite a number of initiatives came to nothing. Even where deemed urgent, it seems that efforts to tidy up the statute book in other jurisdictions which appear to have started well, ended up dwindling, due to an incremental and unstructured approach.

In 1806 the Commission on Public Records passed a resolution to the effect that consideration should be given as to the best method of making the statute book more accessible – including the possibility of revising statutes. In 1816 both the House of Commons and the House of Lords passed a resolution directing that a digest of statutes be published and for that purpose declared that an eminent lawyer with 20 clerks be commissioned to carry out the work. However, this resolution appears not to have been acted upon.

In 1833, Lord Chancellor Brougham established the Statute Law Commission to examine legislation with a view to improving the statute book. It was dissolved twelve years later having published seven reports.[82] In its 1835 Report, the Commission were forthright in their criticism of the statute book:

> "The imperfections in the statute book arising from mere generality, laxity or ambiguity of expression, are too numerous and too well-known to require particular specification. They are the natural results of negligent, desultory and inartificial legislation; the statutes have been framed extemporaneously, not as part of a system, but to answer particular exigencies as they occurred."[83]

A further committee was established for a similar purpose, however, it too was dissolved shortly after.[84] It was 1861 before the first fruits of any of these costly committees appeared. Their work was incorporated into a series of Criminal Law Consolidation Acts which were passed in 1861.[85]

It was not until 1850 that the language of statutes got some much needed attention. The enactment of the Interpretation Act 1850[86] marked the beginning of a tendency towards effectively toning down the language of legislation.

In 1853, Lord Cranworth announced his intention to devote himself to the task of improving the statute book. In pursuance of this undertaking, Lord Cranworth appointed a Board for the Revision of the Statute Law, whose

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82 In the twelve years of its existence, the Commission cost approximately £35,000 – a very substantial sum at that time. This it seems was a weighty factor which influenced the dissolution of the Committee.

83 See, Bennion, "Reforming Statutory Drafting" *Proceedings of the Ninth International Symposium on Comparative Law* (Ottawa, 1971).

84 It was dissolved in 1849, having cost £12,000.

85 Accessories and Abettors Act; Larceny Act; Malicious Damage Act; Coinage Offences Act; Offences Against the Person Act; Forgery Act.

86 Sometimes referred to as "Brougham's Act".

objectives were: 1. the revision of the statute book by expurging inoperable Acts; 2. the consolidation of statutes. There was some initial disagreement as to which should proceed first – statute law revision or consolidation.

The Statute Law Board of 1853 came to an end in 1854 and the Statute Law Commission was set up also in 1854. The Commission produced four reports – in 1854; 1856; 1857 and February 1859. In its first report, the Commission stated that a number of consolidation bills had been prepared under its direction. They concluded by expressing the following view:

> "... perhaps nothing satisfactory towards the improvement of future legislation can be effected until either a board or some other persons are appointed, whose duty shall be either to prepare or revise and report upon all Bills before they are brought into Parliament, and to watch them during their progress though the two Houses, either as officers of the Lord Chancellor or of some other Minister, or as officers of the two Houses of Parliament."

In their final report, the Commission expressed the belief that the body of law contained on the statute book could be consolidated into 300 or 400 statutes. They suggested that this could be completed in about two years by ten or twelve drafters. They envisaged that this would enable them to present a three volume collection encompassing the entire statute book to Her Majesty. Despite their progressive thinking, the Commission was subsequently dissolved after it produced its fourth report in 1859.

It was to be a few years before the work of the Commission was to come to fruition – it took the form of the Statute Law Revision Act of 1856. Its effect was to repeal 120 statutes and was based on the recommendations contained in the commission's Report of 1854. As it progressed through parliament, this Bill became known as the Sleeping Statutes Bill. Further Statute Law

Revision Acts were enacted in 1861 and also, 1863.

In 1860, the then Attorney General, Sir Richard Bethell informed the House of Commons that he had engaged two people with a view to identifying Acts in need of expurgation. The aim was that once the statutes had been identified and expurged by way of a Statute Law Revision Act, an edition of the actual living law would be published.

A further Royal Commission was established in 1866[87] to "inquire into the expediency of a digest of law". The Commission presented their sole report in May 1867 and was subsequently dissolved. This Commission is credited with giving birth to the private enterprise idea of the publication of what is today known as Halsbury's Law of England[88].

The period after 1867 saw real impetus being injected into statute law revision initiatives. In 1868, Lord Cairns appointed a statute law committee[89] "to make arrangements for, and to superintend the publication of, a revised edition of the statutes."[90] This period also saw the establishment of the Office of the Parliamentary Counsel in Britain[91] and the publication of the first volume of an expurgated version of the statutes.

In 1875 a Select Committee of the House of Commons was appointed to consider "whether any and what means might be adopted to improve the manner and language of current legislation."[92] It reported on 25 June 1875, but in the following year, the Government opposed a motion calling for the Report to be implemented. The Select Committee had four principal concerns. First, they were critical of the way in which Bills were prepared and

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87 In which Lord Thring participated.
88 Hughes, *The British Statute Book* (London, 1957) p. 113.
89 Of which Henry Thring, soon to be appointed the first Parliamentary Counsel, was a member.
90 Thring, *Practical Legislation* (London, 1902) at p. 10.
91 This has been explored in detail in Chapter 4.
92 Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 27.

the way in which they varied previous statutes. They were concerned about the uncertainty which resulted from inconsistent amendments. The Committee bemoaned the absence of consolidation. Finally, they were unimpressed by the absence of a proper classification of Acts.

In 1885, a revised edition of the statutes covering the years up to 1878 was published. The following year, in 1886, the Government sanctioned the publication of a second, cheaper version of the revised statutes so that it "might be easily purchasable for the libraries accessible to the working classes"[93].

Ignorantia Juris Neminem Excusat – Ignorance of the Law is No Defence

All the people of Ireland are presumed to know all of the statute law of the State, stretching from the 13th Century to the present day. This is what can be termed "the great presumption". It is a presumption upon which our legal system, and even our State, is built. The State presumes that its citizens have read the thousands of statutes and the several thousand statutory instruments which govern the land. However, the reality is considerably different.

Austin was of the view that no law can exist unless it is expressed. If a law has not been expressed, then it is known only to its maker. If a law is known only to its maker, then it is clearly unreasonable to make people culpable for a failure to adhere to that law. It is probable that a sizeable majority of the citizens of the State have not seen a statute, let alone read one. Looked at more closely, it is possible to argue that the principle of *ignorantia* is not merely a duty imposed on the people. It also amounts to an obligation imposed on the State. This is not only the obligation to publish laws, but to take steps to ensure that the meaning and effect of those laws are conveyed

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[93] *ibid.*, at p. 36. In more recent times, a third edition of the Statutes Revised was published in 1950, which covered the years up to the end of 1948.

and communicated. So, it may be said that the act of publication on the part of the State is not in itself always sufficient.

Writing in 1971, the leading scholar and writer on statutory interpretation, Sir Francis Bennion was unambiguous in his dismissal of the principle of *ignorantia* as being fictitious:

> "We may accept it as fiction that every citizen is supposed to know the law, while striving to make knowledge of legal rules as available to him as is practicable."[94]

Bennion's statement in this regard says more about the state of the British statute book than it does about the value or import of the principle of *ignorantia*. In Ireland, it is assumed that once a piece of legislation has been published, it is deemed to be known by all. Is it acceptable or even fair that the very act of publication means that all people are fixed with knowledge of that law and are in fact bound by it? As succinctly put by Lord Simon of Glaisdale:

> "Legislation which is unnecessarily difficult to understand is a derogation from the democratic right of the citizen to know by what law he is governed."[95]

Statutes and all other forms of legislation are public documents. But just what does this mean? In Ireland it means that legislation is published in an unrestrictive manner, such that the public are not expressly prohibited from seeing them. Theoretically, the fact that statutes are public documents means that the public have access to them, but the reality is quite different.

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[94] Bennion, "Reforming Statutory Drafting" *Proceedings of the Ninth International Symposium on Comparative Law* (Ottawa, 1971) at p.10.

[95] Hansard Vol. 336, p. 954.

The publicity surrounding legislation has increased in recent years. Acts which are regarded as having a broad appeal or are of newsworthy interest to the public will usually be reported on in the newspapers with a very brief reference to some of its key provisions. Such publicity serves a purpose, at the very least it makes the public aware of the existence of that piece of legislation. However, it (invariably) plays no role in informing them of the detail of the legislation.

In *Bilbie v Lumley*[96], Lord Ellenborough captured the essence of the principle of ignorantia, when he stated:

> "Every man must be taken to be cognizant of the law: otherwise there is no saying to what extent the excuse of ignorance might not be carried."

The sharpness of Lord Ellenborough's words on this issue are in stark contrast to those of Lord Denning, who, in *Kiriri Cotton Co. v. Devani*[97], employed an inappropriate, literal interpretation of the terms of the principle ignorantia juris neminem excusat, where he stated:

> "It is not correct to say that everyone is presumed to know the law. The true proposition is that ... no man [may] excuse himself from doing his duty by saying that he did not know the law on the matter.".

While the second sentence in that quotation may well be the literal interpretation of that version of the principle of ignorantia, in factual terms, the effect of the principle is, contrary to Lord Denning's assertion, that everyone is presumed to know the law.

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[96] 102 ER 448 at 472.
[97] [1960] A.C. 192 at 204.

In *Cooper v Phibbs*[98], Lord Westbury drew a clear distinction between the operation of the principle of ignorantia in the context of general law, as opposed to its operation in the context of a private right:

> "It is said 'ignorantia juris haud excusat;' but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, the maxim has no application."

In *R v Bailey*[99] the Court had to determine whether a prisoner had been lawfully charged with having committed an offence under an Act, the existence of which he could not have known. In directing the jury, Lord Eldon expressed the view that strictly speaking, under the terms of the legislation, the accused was guilty even though it was clear that he could not have known of the existence of the Act. He went on to say that the accused's ignorance of this fact could not affect his case, though he added that it might go some distance in allowing him to procure a pardon. This case illustrates the harsh reality of the principle of ignorantia in practice, though subsequent cases were indicative of a more pragmatic approach being taken by the courts.

In *Burns v Nowell*[100] it was suggested that:

> "... before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance, and though ignorance of the law may of itself be no excuse for any one who may act in contravention of it, such ignorance may nevertheless be taken into account, when it becomes necessary

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[98] L.R. 2 H.L. 149.
[99] (1800) Russ. & R. 1, 4.
[100] (1880) 5 Q.B.D. 444, 454.

to consider the circumstances under which the act or proceeding was continued, and when and how it was discontinued with a view to determine whether a reasonable time had elapsed without its being discontinued."

In *Johnson v Sargant & Sons*[101] a UK Court held that an order which was made on the 16 May did not in fact actually come into operation until its content had become known to those affected by it, which was the following day, 17 May.

Such is the depth to which the principle of ignorantia is embedded in the Irish justice system, that the courts have not delivered a comprehensive or explorative judgment on the matter. Neither, it must be said, has the legislature debated or articulated to any great degree the true import of this principle.

The furthest that the Irish courts have ventured into the principle of ignorantia is to confirm the applicability and effect of the principle. In *Jackson v Stopford*[102], the High Court of Appeal was asked to rectify or cancel a deed in circumstances where its terms operated differently from what the parties had intended. The initial trial judge, Gordon J., felt that to rectify the lease "would, in my opinion be contrary to the ordinary principle ignorantia juris non excusat, and none of the cases which [counsel for the plaintiff] has cited goes the length that he has contended for ..."[103]. On appeal, O'Connor M.R. emphasized the importance of the principle of ignorantia:

"The ignorance in the present case was not the ignorance of a mere private right. It was the ignorance of the statute law governing every member of the community ... To countenance the proposition that

[101] [1918] 1 KB 101.
[102] [1923] 2 IR 1.
[103] *ibid.*, at 5.

instruments inter partes should be cancelled because they did not know the general law of the land would lead to insecurity in the ordinary transactions of every-day life."[104].

In *O'Neill v Carthy*[105] , Hanna J. intimated that there may be circumstances in which a person could successfully rely on the principle of ignorantia. In this case, the applicant, in seeking an extension of time, claimed that he was not aware of the time limit within which a notice of intention to claim relief must be served, as stipulated by section 24 of the Landlord and Tenant Act 1931. In affirming the decision of the Circuit Court to decline to grant an extension of time[106], Hanna J. stated:

> "The most that can be said for the tenant here is that he made a slip: in other words he pleads ignorance, if not of the existence of the Act itself, of the fact that the Act laid down certain times within which he must serve certain notices before he could benefit thereunder.
> I am not to be taken as laying down a rule that mere ignorance of the Act itself or of the times prescribed thereby is in itself a sufficient or insufficient ground upon which a Judge might extend the times under sect. 45. I can conceive cases of absence beyond the seas or even of illness on the part of the tenant in which he might successfully plead ignorance of the Act or of its provisions. But in this case, without in any way binding myself to a view of the effect of ignorance in all possible cases, I am of opinion that ignorance of the provisions of this well-known Act cannot be pleaded three years after its passing by a tenant who was living in Dublin and has read the newspapers, presumably, in which the Act has been discussed, and who is, on his own showing, well aware of the existence of the Act and of the fact that he has rights

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[104] *ibid.*, at 11.
[105] [1937] IR 580.
[106] A request to grant an extension of time based on a plea of ignorance of the law was also declined by the Employment Appeals Tribunal in *Conly v Keatings Transport* 18/01/2000 UD653/99.

thereunder."[107]

It is particularly significant that Hanna J. was able to "conceive cases of absence beyond the seas or even of illness" where a person might successfully plead ignorance of the law. While his comments in this regard appear to be restricted to the circumstances of the instant case, his comments nevertheless represent a possible chink in the armour of ignorantia, which has yet to be exploited.

Other judicial decisions have thrown a little further light on the scope of the applicability of the principle of ignorantia. The comments of Ó'Dálaigh C.J. in *The State (Quinn) v Ryan*[108] serve to confirm that the principle of ignorantia is referable not only to statute law, but also to common law, as well as the provisions of the Constitution:

> "A belief, or hope, on the part of the officers concerned that their acts would not bring them into conflict with the Courts is no answer, nor is an inadequate appreciation of the reality of the right of personal liberty guaranteed by the Constitution."

A similar point was at issue in *The People v Shaw*[109] where the admissibility of evidence was at issue. With reference to that dicta of Ó'Dálaigh C.J. in *The State (Quinn) v Ryan,* Walsh J. stated that:

> "To hold otherwise would be to hold what to many people would be an absurd position, namely, that the less a police officer knew about the Constitution and, indeed, of the law itself, the more likely he would be to have the evidence which he obtained in breach of the law (and/or the Constitution) admitted in court. If such indeed were the position, it

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[107] *ibid.*, at 583.
[108] [1965] IR 70, 134.
[109] [1982] IR 1.

could well lead to a demand that the interests of equality of treatment should permit an accused person to be allowed to be heard to the effect that he did not know that the activity of which he was charged, and which has been proved against him, amounted to a breach of the criminal law."

In *Hanahoe v Hussey*[110], Kinlen J. appeared to assert that the principle of ignorantia is equally applicable to members of the judiciary:

"There is no evidence that the learned District Judge had no experience of such warrants or that she was unfamiliar with the Act. The onus to prove such matters lies firmly with the applicants. The maxim 'ignorantia juris quod quisque scire tenetur non excusat' - (ignorance of the law, which everyone is presumed to know, excuses no one) is applicable. Here a court of record has issued warrants and there is a presumption in favour of their legality."

Kinlen J. again touched upon the principle of ignorantia in *O.B. v R*[111], a nullity case, where, with reference to the petitioner's claim that "she did not know or understand the law", Kinlen J. stated that "that, in itself, is not an explanation or excused for the failure to assert one's rights. The old maxim is 'ignorantia juris, quod quisque scire tenator neminem excusat' ignorance of the law, which everyone is presumed to know, excuses no one)."

The principle was also applied by Murphy J. in *Vehicle Imports Limited (in liquidation)*[112], where in finding a person involved in the accounting affairs of a company to be a shadow director, he stated that "If the maxim, ignorantia juris haud excusat, ignorance of the law is no defence, is to have any application it must have particular application to a person recognised by the Companies

[110] [1998] 3 IR 69.
[111] [1999] 4 IR 168, 177 – 178.
[112] High Court, Unreported, 23 November 2000 at para. 53.

Acts as qualified to audit books of account."

The utterances of our parliamentarians on the principle of ignorantia have been relatively rare, and where they do occur, they tend to be quite brief and directed towards the applicability of the principle in the context of a particular section or Act.

During the course of the Report Stage debate on the Status of Children Bill 1986, in the Dáil, Deputy Taylor[113] sought to alleviate concerns that his proposed amendment would create problems for people who would be unaware of its terms:

> "We all know that ignorance of the law is no excuse. People are presumed to know the law and if this Bill becomes law in its present form no doubt there will be a fair amount of publicity concerning the date on which a will is made. It is up to any person to amend a will if he is of a mind to do so. People are imputed with knowledge of the law and the law is given publicity by the media when measures are passed. Laws and promises are constantly changed and people have to cope with that situation."[114]

In discussing section 4 of the Prohibition of Forcible Entry and Occupation Bill 1970, Senator Mary Robinson touched on the assertion that the principle of ignorantia not only obliges people to know what the law is, but that it equally obliges the State to make those laws accessible to the people:

> "It is, and has always been, one of the fundamental precepts of our criminal law that a person ought to know, or ought to be able to know, what the law is and particularly whether he is committing a criminal

[113] In advancing the merits of his amendment which proposed that the non-marital of a testator would benefit from a will in the same manner as marital-children.
[114] 375 *Dáil Debates* Col. 1139 (18 November 1987).

offence. It is one of the maxims of the law that ignorantia juris nemini excusat—ignorance of the law is no excuse—and the obvious and logical corollary to this is that a person must be able to ascertain in good faith whether he would be committing a criminal offence or not. It is on this basis that I would have some doubts about the constitutionality of this provision and also I would find it, even if marginally constitutional, highly undesirable to have a situation where a person would not know whether as a member of that group he would be committing a criminal offence ..."[115]

The words of Deputy M.J. O'Higgins during the course of the debate on the Succession Bill 1965, serve as an honest admission by a member of the legislature that the principle of ignorantia is largely theoretical:

"It is all very well for the courts to say ignorantia juris non excusat—ignorance of the law is no excuse. As the Minister in his professional capacity knows as well as I do, while the general outlines of the law may be known to people, the technical details, such as those being established in this Bill, are not known to the vast majority of people."[116]

During the Committee Stage of the Seanad debate on the Companies (No. 2) Bill 1987, Minister Brennan sought to amend section 51 on the basis that it was running counter to the operation of the principle of ignorantia. He explained the amendment:

"This subsection is saying at present that, if you acquire an interest and you know that the acquisition gives rise to a legal obligation to notify the company, you must notify within five days. The second clause in the subsection is saying that, if you do not know you have acquired an interest at the time you have acquired it, you must make the notification

[115] 71 *Seanad Debates* Col. 147 – 148 (11 August 1971).
[116] 217 *Dáil Debates* Col. 100 (29 June 1965).

within five days of the date on which you first knew you had a legal obligation to do so.

The problem with this is that it would make the provision very difficult to operate as it falls into the trap of creating a legal obligation on a person only if he or she knows that he or she has such an obligation, in other words, a contradiction of the principle that ignorance of the law is no excuse, as it where. The two related amendments here rectify this by aligning the drafting of subsection (2) with that of subsection (1). In other words, the time period for notification of the occurence of a notifiable event under subsection (2) should run from the time the person becomes aware that the event itself has occurred and not when he becomes aware that the occurrence of the event gives rise to a legal obligation."[117]

This, inter alia, shows a determination on the part of the legislature that legislative provisions should not be permitted to contradict or in some way undermine the principle of ignorantia. It also demonstrates, as indicted by the Minister, that where the operation of a provision is contingent on a person's awareness, it effectively becomes inoperable and ultimately, unenforceable.

A law can only function if the people who are affected by it have knowledge of its content, either actual knowledge, or at the very least - having declined the opportunity to acquire at least some actual knowledge - constructive knowledge. Citizens cannot be required to comply with a "law" which is drawn up in secret and remains in secret. In fact, it would be incorrect to recognise such a document as a law, because of its inherent secrecy. In order to have the capacity to impose legal obligations, legislation must be promulgated and made known, in the widest way possible.

For the purpose of this work, it is accepted that the assumption made in

[117] 118 *Seanad Debates* Col. 1697 – 1698 (24 February 1988).

ignorantia juris neminem excusat is in itself a fair one. Our legal system could not operate to any degree of effectiveness if ignorance of the law was to constitute a defence. However, some degree of proportionality must be brought to bear on the application of the principle. If one were to examine the operation and effect of the principle of *ignorantia* in the context of the Irish statute book, and ask is it reasonable to impose such a burdensome principle in the current environment of an inaccessible body of legislation, fairness would compel an objective observer to conclude that the mere publication of legislation is not in itself a sufficient act on the part of the State to discharge its duties which exist under the principle of *ignorantia*.

It may be said that the simple act of publication of legislation would be sufficient if the legislation was linguistically accessible - in reasonably accessible language - and in a physically accessible form – that the meaning of the law on a particular point could be ascertained from reading one stand-alone piece of legislation. Accordingly, if the principle of *ignorantia* is to be sustained, the State must do more to communicate the meaning of legislation produced by the legislature.

Because of its turgid and convoluted language and because of the dependence of one statute upon another for its meaning, the statute book is largely inaccessible to a great many people. In fact, such is the extent of the inaccessibility of our statute book that one could go so far as to suggest that the principle of *ignorantia juris neminem excusat* is not sustainable in the long term.

Multiple Amendment

The problems which a person can experience with the Irish Statute Book in Ireland are evident through a random look at virtually any area of law. An examination of the Roads Act 1993 reveals that it has been amended or

affected in some way approximately 54 times by 7 Acts and 6 statutory instruments. A person wishing to familiarise themselves with an accurate picture of the law in this area would need to acquire the principal Act and the 13 further pieces of legislation which have amended it.

However, this problem is not limited to older Acts. Take a more recent example, the Freedom of Information Act 1997 – an Act which is about 8 years old. It is the principal Act in this area of law and has been supplemented by one "Amendment" Act in 2003. Since it has been enacted, it has been amended well over 80 times. Despite this, there has been no consolidation in this area and there has not been any Restatement. A lawyer, or any other person wanting to become familiar with the exact up to date position of the law in this area would need to acquire the principal Act and each of the 28 or so Acts and 19 statutory instruments that have amended or affected it; and in some way apply the affect of those amendments to the principal Act.

Neither is the problem limited to Acts which have not been consolidated. Take for example the Stamp Duties (Consolidation) Act 1999 which has been amended approximately 86 times. This piece of legislation is not due for updating for another 4 or 5 years. So until 2009, readers will have to piece together the amendments which have gathered over the years before they are able to assess the law on stamp duties with any degree of accuracy. Even Acts which have been consolidated more recently still pose the same problems for the reader. For example, in the space of one year, the Capital Acquisitions Tax (Consolidation) Act 2003 was amended 19 times. At that rate, before it is updated in 2013, it will have been amended 200 times. A daunting prospect for any user of legislation.

When our legislation is looked at more closely there are numerous instances of individual sections having been the subject of multiple amendments.

Section 13 of the Criminal Procedure Act 1967 has been amended 18 times to date, without any efforts being made to produce an updated or consolidated version of the legislation. The volume of amendments to this legislation cannot be dismissed by reference to its age. There are many examples of even more recent legislation having been amended extensively. For example, section 223 of the Social Welfare (Consolidation) Act 1993 has been amended 13 times.

The repeated amendment of legislation in this way can present problems for not only the layperson, but also lawyers. In fact the state of the statute book is such that even judges can be mistaken as to the law on a given matter. For example in a District Court case in 2001[118], the judge felt that on a charge of indecency, the maximum penalty which he could impose was ⌋2. The accused had been charged under section 18 of the Criminal Law Amendment Act 1935. Section 18 provided for a maximum fine of ⌋2. However, it seems that the judge and also the prosecuting solicitor was unaware that section 18 had been amended in 1990 by section 18 of the Criminal Law (Rape) (Amendment) Act 1990 which increased the applicable fine from ⌋2 to ⌋500.

A person could only become aware of the fact that the penalty in the 1935 Act had changed if they consulted the Chronological Tables or, if they had the good fortune to know every word of every Act. While this is but just one example of how the state of the statute book impacts on citizens and legal professionals at the highest level, it is representative of a greater, systematic problem with the way in which we effect legislative change in Ireland.

More than anything, this example illustrates that before any reader can arrive at an accurate representation of the law as it stands at a given moment, he or she would need to be aware of the existence of the Chronological Tables of

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[118] See, *Irish Examiner*, 11 April 2001.

the Statutes. In brief, the Chronological Tables record the effect which one Act has on another.[119] Whether a person can actually arrive at an accurate view of the up to date position of the law is very much dependent on what I have termed as a series of assumptions.

Assuming that the Chronological Tables of the Statutes is up to date; assuming all of the relevant entries in the Chronological Tables are accurate; assuming that all of the relevant amendments have actually commenced, or if commenced, remain in force; assuming that the amending provisions have not themselves been amended; assuming that there are no judicial decisions which impact directly on any of the provisions in question; and finally, assuming that the person reading the amendments applies them correctly, then the up to date position of the law in this area can be ascertained. Frankly, that is an awful lot of assumptions to make. The chances of a person making a small mistake, or being wrongly directed on any of those steps increases the likelihood that he or she will think the law to be something other than what it is.

Statute Book Online

Added to the poor state of the Irish Statute Book is the problem of the unavailability of legislation online in a timely manner.

By virtue of advances in technology, we can reasonably expect that the publication of statutes in electronic form would be virtually instantaneous and should perhaps by now have taken precedence over the traditional printed format. However, this is not yet the case in Ireland, for two principal reasons – first, availability and secondly, accuracy.

Despite the fact that there are now three official sources for electronic

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[119] The Chronological Tables are discussed in greater detail later in this Chapter.

versions of Acts of the Oireachtas, Acts are not made available instantaneously. The principal website for the Irish Statute Book is that hosted by the Office of the Attorney General[120]. Despite the fact that Acts are enacted on a virtually monthly basis, that website is only updated once per year. In practice, this meant that the Acts for 2002 did not become available on either the website hosted by the Office of the Attorney General or the website hosted by one arm of the Houses of the Oireachtas[121] until late December 2003. The only official site where Acts can be found within a reasonable time after their enactment, but in an un-searchable format, is on the legislation page of the Houses of the Oireachtas main website[122].

During the course of the Seanad Committee Stage debate on the Interpretation Bill 2000, Senator Brian Hayes proposed an amendment which required that all enactments be published on the website of the Attorney General within one day of its enactment or making. The sole reason given by Minister of State Kitt for the Government's failure to accept this idea was the unavailability of finances.[123] Along with, or perhaps in place of, the word "finances", one could read "political will".

Even with the legislation which has become available online, there are unresolved issues about its accuracy. This impinges on the reliability of the electronic statute book. If lawyers find that they cannot produce an extract or printout from the electronic statute book in court, then its usefulness as a resource is called into question.

Since its initial launch on cd-rom and the internet in 1997, the electronic version of Irish statutes developed by the Office of the Attorney General has

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120 www.irishstatutebook.ie

121 www.acts.ie

122 www.oireachtas.ie

123 "This is a question of resources. I am advised that it would be impractical. The requirements placed on the State through the Office of the Attorney General would impose a significant financial compliance requirement ..." 180 *Seanad Debates* Col. 2290 (29 June 2005).

been troubled by some errors and inaccuracies[124]. This has been exacerbated by the fact that despite the considerable amount of time and resources that have been invested in making legislation available online, both the site hosted by the Attorney General and also the site hosted by the Houses of the Oireachtas each open up with an extensive disclaimer.

Clearly, there is a need to address the accuracy of the electronic storage of legislation with a view to designating the Acts stored on it as an authentic version of the law.

AIDS TO UNDERSTANDING THE STATUTE BOOK

The very existence of aids to deciphering the statute book is testament to the fact that the statute book cannot be read without the need for such assistance. Is this testament to a statute book which is merely reflective of the complexity of the society which it governs, or is it reflective of a statute book which has been neglected, and all but abandoned? These aids are designed to offset, at least to some degree, the inaccessible state of the statute book. The very fact of their existence perhaps says something about the level of disorder inherent in the statute book.

Explanatory Memoranda

The purpose of an explanatory memorandum of a Bill is to highlight the existing law, the reasons for the present Bill and the effect of the provisions of the proposed Bill.

The requirement to publish an explanatory memorandum with a Bill exists by virtue of Order 101 of the Standing Orders of the Seanad.[125] Interestingly, there is no corresponding provision in the Standing Orders of the Dáil.

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[124] See, Editorial, "Errors in Statute Book CD-ROM" 12 (2001) *I.L.T* 186; Donaghy "Laptop Law Judged Not to Be the Whole Truth" *Irish Independent,* 4 August 2001.

[125] Seanad Éireann, Standing Orders Relative to Public Business, 1999 – Order 101 at page 111.

Drafters do not have any role in the preparation of explanatory memoranda. These are prepared by the Departmental officials who worked on preparing the heads of the Bill. At present, there are no formal guidelines in existence to assist officials in the preparation of explanatory memoranda, except for the rather brief coverage of them in the Cabinet Handbook[126]:

> "Explanatory and financial memoranda to accompany Bills on initiation. Any Bill introduced or presented by or on behalf of a member of the Government, other than a Bill dealing with Budgetary or Estimates matters, should be accompanied by an Explanatory and Financial Memorandum to explain in simple, non-technical language, the provisions of the Bill, setting out the existing law and the changes therein proposed by the Bill and providing information about the estimated Exchequer costs and staffing implications for Departments, State Bodies, Local Authorities, etc. ... unless the promoting Department consider that it is not practicable in the time available or not in the public interest to publish such information.".

Explanatory memoranda are published on the initiation of virtually every Bill. However, if a Bill is urgent and its publication is rushed, it may not be accompanied by an explanatory memorandum. A recent example of this was the Health (Amendment) (No. 2) Bill 2004. This Bill was introduced when the Government accepted that there was no legal basis for the imposition of charges on persons in public nursing homes. The Bill was introduced in December 2004 with such urgency that there was no time to produce an explanatory memorandum.

In order to fulfil its intended role, the explanatory memorandum should be written in clear and ordinary language, avoiding technical, Departmental jargon, specialist and Latin terms. The preparation of the memorandum

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[126] At Ch. 4.22. Available at: http://www.irlgov.ie/taoiseach/publication/cabinethandbook/chapter4.htm

should be seen as representing a good opportunity to explain the technical and Latin terms which have unavoidably arisen in the Bill. In the explanatory memorandum, the reader should be guided through the Bill, provision by provision – with the level of detail dependant on the complexity of the section.

Ideally, the explanatory memorandum should provide a short summary of the effect of the Bill. At present, explanatory memoranda are prepared solely for use by members of the Oireachtas but are, however, available for purchase with the Bill on its publication and also are available on the internet. Bills are drafted for a specific purpose – to enshrine policy in such a way that it will withstand attack and interpretation before the courts. Likewise, explanatory memoranda should be drafted to match the new purpose which they should serve – to communicate the meaning of legislation to members of the public. And in order to do this effectively, they should explain the meaning and effect of the legislation in plain and straightforward terms.

Other Jurisdictions

In the U.K., the Government have recently examined their own explanatory materials. This has resulted in a decision to publish a vastly enhanced version of explanatory materials called "Explanatory Notes"[127]. These have been published with all public Bills since 1999. The explanatory notes are said to:

> "make the Act of Parliament accessible to readers who are not legally qualified and who have no specialised knowledge of the matters dealt with. They are intended to allow the reader to grasp what the Act sets out to achieve and place its effect in context."[128]

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127 These have replaced the "Explanatory Memorandum and Notes on Clauses".

128 "Explanatory Notes to Public Acts" which is available at: www.hmso.##v.uk/legislation/uk-expa.htm

In the UK, explanatory notes have a consistent structure[129]. This may be due to the fact that an on-line template for the creation of Explanatory Notes is made available to those engaged in their preparation. The Notes are revised and re-published at various stages first, on the publication of the Bill, then when the Bill moves from one House to the other and are finalised on Royal Assent.

Legislative drafters in Canada use a legislative drafting programme called LIMS (Legislation Information Management System) to produce their legislation. One of the many features of the LIMS system is that it automatically generates an explanatory memorandum to accompany the Bill.

Revision of Explanatory Memoranda

The fact that the Explanatory Memoranda are not (save for exceptional occasions) revised to reflect changes made to the Bill in its passage through the Dáil, is an indication that up until now, the audience at which they have been directed has been parliamentarians. This is something that needs to change. In its passage through the Oireachtas, a Bill often emerges on its enactment as an entirely different creature, unaccompanied by an explanatory document of any kind.[130] There is a clear need for explanatory memoranda to be revised and re-published on a Bill's enactment.

This matter has been the subject of some examination by the Law Reform Commission in their Report[131] on legislative drafting. The Commission's 16th recommendation is to the effect that explanatory memoranda should be amended in tandem with the Bill so as to reflect the changes made to a Bill in

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[129] Introduction; Summary; Background; Commentary; Commencement Details; Hansard References.

[130] There are rare instances of explanatory memoranda being revised and republished. For example, in 2001, two Bills had revised explanatory memoranda – Euro Changeover (Amounts) Act 2001 and also the Extradition (European Union Conventions) Act 2001. In 2005, the Criminal Justice (Terrorist Offences) Act 2005 was accompanied by an explanatory memorandum upon its enactment.

[131] *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at par 6.36 – 6.40.

its passage through the Oireachtas. A subsequent exchange in the Dáil[132] focussed on this recommendation:

> "Mr. Quinn: There is a practice recommended in the LRC report to the effect that the explanatory memorandum, which is available on Second Stage, should be revised when the Bill is amended because many people - this is the substance of the LRC recommendation - will use the explanatory memorandum as the guide to what is contained in the Bill. If one gets the explanatory memorandum and the Bill is subsequently amended, that memorandum is deemed to be out of the date. The recommendation states that the drafters of the Bill shall also draft the explanatory memorandum and the memorandum should be amended to reflect the Bill, as amended, when it is enacted. Can the Minister of State indicate from the information available to him in his briefing whether the proposed amendments to the Interpretation Act will recommend such procedures?
>
> Mr. S. Brennan: I do not see any reference on my file to any such proposal but it is a top class idea because if we publish an explanatory memorandum with the Bill, by the time it has gone through all Stages in both Houses, it is often an entirely different Bill. Publishing an explanatory memorandum with the Act, therefore, might be useful. I do not know whether the legal people would have to interpret the Bill rather than the Houses which pass it. That is a point I have not considered but it is a top class idea and I will pursue it."

From initiation to passing, a Bill can evolve into an entirely different creature. Consequently, where substantial changes have been made to a Bill, this will not be reflected in a reading of the explanatory memoranda. It would undoubtedly prove very helpful if, once the Bill has been enacted, the original

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[132] 539 *Dáil Debates* Col. 10 (26 June, 2001).

explanatory memorandum were to be revised so as to reflect the changes made to the Bill.

Criticism of Explanatory Memoranda

While the quality of legislation has been criticised for very many years, it is only relatively recently that attention has been given to the value of explanatory memoranda. One of the earliest critics of explanatory memoranda was the late John Kelly whose words carry added weight given that he spoke as a Dáil Deputy and also as one of the finest lawyers of his time:[133]

> "I have had reason to complain about the expense of printing explanatory memoranda and the uselessness of them because very often they did not tell one what the Bill was about, the reasons which lead to its introduction or the reasons behind a particular section. The first thing a Deputy or a member of the public wants to know about new law is the reason for it. In the past, explanatory memoranda have all too often been silent on that point."

Deputy Kelly was very impressed by the explanatory memorandum whichoaccompanied the Statute Law Revision Bill 1981, and went on the highlight desirable features of a good explanatory memorandum, which were to be found in the memorandum in question:

> "The present memorandum explains the purpose of the Bill. Not only does it do that but it provides in a concise and readable form in about four pages a perfect history of Irish legislation or legislation bearing on Ireland over the last 800 years. ... I thank the Minister, his Department and the Statute Law Revision and Consolidation Office and everybody who was involved in providing such an excellent explanatory

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[133] 339 *Dáil Debates* Col. 1279 (8 February 1983).

memorandum, a very rare occurrence in the public life of the State."[134]

It was to be many years later before explanatory memoranda would be put under the microscope to any great degree. Some seventeen years later, the Law Reform Commission noted concerns that both the quality and content and also the length of the memoranda varied and was of the view that the quality had in fact declined over the years:

> "... some judges have remarked that explanatory memoranda were of more assistance to interpretation in previous times, when they were published more selectively with some Bills. A factor to be noted is the variation in quality and content of memoranda; this may result from the fact that memoranda are drafted in the various Departments of State, rather than by the Office of the Parliamentary Counsel to the Government."[135]

In the UK, proposals made by the First Parliamentary Counsel resulted in substantial improvements being made to the explanatory notes which now accompany legislation.[136] Similar and even greater improvements could be achieved in Ireland. In fact so great are the changes which need to be made that this subject matter alone could have formed the basis of a Law Reform Commission Report.

Setting Standards for Explanatory Memoranda

The established practice is that explanatory memoranda are drafted by the Department sponsoring the Bill. In their Report[137], the Law Reform Commission note the complaints concerning inconsistencies in the standard of explanatory memoranda and tentatively suggest that the Office of the

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134 339 *Dáil Debates* Cols. 1279 – 1280 (8 February 1983),.
135 *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at par 6.36.
136 "Bills and Acts – Explanatory Notes" (January 1998 Announcement).
137 At para. 6.38.

Parliamentary Counsel become involved in drafting explanatory memoranda[138] or alternatively, that the Office should set standards for explanatory memoranda. However, whilst recognising that there may be inconsistencies with regard to standards of explanatory memoranda as currently prepared, there are compelling reasons for retaining the present practice in this regard. First, the Departmental officials who prepare the heads of the Bill will be intimately familiar with the policy and intent of the provisions of the Bill. Secondly, the Departmental officials will be more disposed than the drafters to explaining the Bill in plain and understandable language, and this is a key requirement of any explanatory memorandum. Thirdly, if the explanatory memoranda were to be drafted by the same person who drafted the Bill, a court might be tempted to attribute greater weight to the terms of the memoranda than it otherwise would. Finally, if the memoranda were to be prepared by legislative drafters, any discrepancies between the memoranda and the Act might give rise to difficulties with interpretation.

As an alternative to having explanatory memoranda prepared by parliamentary counsel, they could however contribute to raising the standards of the memoranda. This could be achieved through the development of a set of guidelines. There are no formal guidelines for officials who are preparing explanatory memoranda. The setting of minimum standards could be achieved through the publication of a guide for Departmental officials which would, much in the same way as Deputy John Kelly alluded to in 1983, highlight the characteristics of a good explanatory memorandum.

In the light of the Law Reform Commission's criticisms of the decline in the quality of explanatory memoranda and also in the light of its recommendations to the effect that Parliamentary Counsel should set the standards for explanatory memoranda, the Office of the Parliamentary Counsel have examined the matter and have proposed a range of reforms in a document

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138 *ibid.*, at 6.40.

entitled "Explanatory Memoranda: An O.P.C. Perspective". According to the Taoiseach:

> "The document entitled 'Explanatory Memoranda: An OPC Perspective' was prepared in the Office of the Parliamentary Counsel to the Government in response to the Law Reform Commission Report on 'Statutory Drafting and Interpretation: Plain Language and the Law'. The paper examined explanatory memoranda to Bills and contained a set of draft guidelines to assist Departments in the preparation of explanatory memoranda."[139]

That document was submitted to the Government Chief Whip in March 2002 for his consideration.[140] If implemented, these reforms would undoubtedly enhance the informative value of explanatory memoranda – particularly for members of the public.

Chronological Tables[141]

The system by which we effect legislative change, coupled with the grossly inadequate arrangement for the publication of legislation, only continues to be viable because of the publication of the Chronological Tables of the Statutes. If the statute book is a complex tapestry, the Chronological Tables is the one thread which holds it all together. A reader of any Act must consult the Chronological Tables, only then is the reader able to ascertain with any degree of certainty what the statute law on that specific topic is. As such, the Chronological Tables is the single most important aid to the statute book.

In 1867, Lord Cairns, the then Lord Justice in England, prepared a memorandum suggesting to Lord Chancellor Chelmsford that he should

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[139] 578 *Dáil Debates* Col. 371 (27 January 2004).

[140] As stated in Mooney, "Effective Drafting Techniques" delivered at Clarity/Statute Law Society Conference, Cambridge 12 – 14 July 2002.

[141] See generally, Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at pp. 26, 33 & 63.

consider commissioning an Index to the Statutes and also a Chronological Tables of the Statutes "with a column showing also which had been repealed and by what Acts, and showing also subsequent Acts containing important amendments and alterations of such as are not repealed."[142]. Lord Cairns' memorandum went on to suggest that the works should be revised after each session of parliament. Later that year, perhaps motivated by Lord Cairns' correspondence, the Lord Chancellor wrote to the Home Secretary[143] informing him that AJ Wood and Henry Jenkyns had agreed to prepare the Index to the Statutes and also the Chronological Tables – under the supervision of the Statute Law Committee. Following this initiative, in January 1870, the first edition of the English Chronological Tables and Index of Statutes was published and continued annually thereafter.

The Chronological Tables is the one identifiable publication upon which the coherence and accessibility of our statute book rests. The system by which we effect legislative change[144], and the approach taken to the publication of the statute book[145], means that a reader of one Act may be unaware of subsequent amendments to that Act and he or she might mistakenly believe that the Act he or she reads accurately states the law at the time of reading. However, the availability of the Chronological Tables seeks to chart the history of amendments to each Act – and in this way enables the reader to piece together the law so as to arrive at its up-to-date position.

Our Chronological Tables relate to Acts dating back to the Curtesy Act 1226, right up to the present day. As shown in the extract below, the format of the Tables still follows the general content devised by Lord Thring in 1876:

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142 It is important to note that this idea did not emanate from Lord Cairns' wisdom as this was the very idea which had been advocated a few years previously by Henry Thring.

143 In a letter dated 29 October 1867. See, Parliamentary Papers, 1870, No. 116. See also, Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 64.

144 Termed "amendment heaped upon amendment". This matter is more fully discussed in Chapter 9.

145 As stated by Edmund Burke, "Laws, like houses, lean on one another." *Reflections on the Revolution in France* (1790) para. 268.

Extract from the Chronological Tables Relating to the Capital Acquisitions Taxes Consolidation Act 2003.

Year and Number	Short Title	How Affected	Affecting Provision
2003			
1	Capital Acquisitions Taxes Consolidation Act 2003.	S. 18 (5) del.	3/2003, ss. 145 (1) (a) (2), 153
		S. 25, s.	3/2003, ss. 146 (1) (a) (2), 153
		S. 45A, new s.	3/2003, ss. 147 (1) (b) (2), 153
		S. 46, (in pt.) specified.	S. I. No. 443 of 2003, reg. 2
		S. 46 (7A) (7B), subsecs. ins.	3/2003, ss. 145 (1) (b) (2), 153

Column I displays the number of the Act being examined. Column II shows the title of the Act being examined. Column III identifies the sections of that Act which have been affected in some way by a previous Act. And directly opposite each section identified in Column III, Column IV identifies the provision which has affected the section of the Act being examined.

These Tables keep track of the changes which are made to each Act. For

example, a reader who consults the Chronological Tables entry relating to the Central Bank Act 1942 will see reference to the 1997 amendment. To see the effect of the amendment then, the reader must open the 1997 volumes of the statutes. He or she must then read the 1942 Act by also reading the relevant provision of the 1997 Act. Only then is the reader able to ascertain the statute law on that specific topic.

In Ireland, the Chronological Tables are effectively as old as our statute book. Since 1923, each volume of the statutes has set out details of how each Act in that volume has impacted on existing statutes. The Tables contained at the end of each volume of the statutes were then compiled and published as the Chronological Tables of the Statutes. The practice of publishing, at the end of each volume of statutes, the details of how each Act has impacted on existing Acts ceased circa 1986. This meant that no account was being kept of the impact which statutes were having upon eachother. This meant that because of the breakdown producing an annual table of the impact of new Acts, the updating of the Chronological Tables became a significant task. The failure to update the Tables in the early 1990's was attributed to "the increased throughput of legislation" which the Office of the Parliamentary Draftsman experienced at that time.

At present, responsibility for the maintenance of the Chronological Tables resides with the Statute Law Revision Unit in the Office of the Parliamentary Counsel. A renewed commitment to, and recognition of, the importance of the Chronological Tables was given by the Office of the Attorney General in preparation for the release of the first version of the Statutes on CD-ROM[146] in 1998. It was followed by the release of the update of the Statutes in 1999 which for the first time included the Chronological Tables. Under the direction of the Statute Law Revision Unit, the CD has since been updated to incorporate the Acts up to and including 2002. Since, 1999, the Statutes and

[146] Acts of the Oireachtas 1922 – 1997.

Chronological Tables have been available on a web-site maintained by the Office of the Attorney General.[147]

However, a dedicated team of barristers has now been put in place with the intention that these Tables are updated annually and the project is overseen by the Statute Law Revision Unit. The fruits of their work is only published on the web-site of the Office of the Attorney General. For example, the Chronological Tables relating to all Acts enacted in 2002 did not become available on the website hosted by the Office of the Attorney General until late 2003. The difficulties encountered with the statute book have been somewhat worsened by the fact that there are long delays between the enactment of an Act and the time when its impact on existing Acts is charted in the Chronological Tables. There is no reason why the Chronological Tables could not be updated on an ongoing basis – such as after each Act has been enacted. A proposal to this effect was made by Senator Brian Hayes during the Seanad Committee Stage debate on the Interpretation Bill 2000, but was rejected by the Government.

The importance of the Chronological Tables to statute law in this country cannot be overstated. Despite this, until recent years, the maintenance of the Chronological Tables has been sporadic to say the least. As long as we retain the present system of effecting legislative change, the Chronological Tables will be a vital companion to those who consult the statute book. The consistent commitment of the Statute Law Revision Unit towards the maintenance of this important resource is encouraging – as are the recent developments in technology which may well be employed in the future to assist in the maintenance of the Chronological Tables in a more timely, and perhaps even automatic fashion.

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147 www.irishstatutebook.ie

Interpretation Acts[148]

Interpretation Acts play an important role in ensuring the consistency of some aspects of legislation. Their enactment tends to shorten enactments and to make their language more uniform. The gathering of specific rules on reading and interpreting legislation in one place in this way is highly commendable.

It was not until 1850 that statutes got some much needed assistance in the form of an Interpretation Act. The enactment of the Interpretation Act 1850[149] marked the beginning of a tendency towards the standardisation of terms used in legislation. A Select Committee of the House of Commons on the improvement of legislation, in 1875 advocated the preparation of a further Interpretation Act, based on Brougham's Act of 1850. The Interpretation Act 1889 generalised a number of definitions which had been frequently used in legislation at that time. The purpose of this Act was to simplify the reading of statute law by deleting from each statute and statutory instrument standard definitions and phrases and to improve the clarity of legislation by giving statutory effect to certain standard principles of statutory interpretation developed by the courts.

Virtually all Acts and also statutory instruments contain definition or interpretation provisions. Interpretation Acts help to shorten legislation by facilitating the avoidance of repetition, particularly the repetition of rote rules or concepts. By standardising certain rules and concepts, Interpretation Acts also serve to clarify the meaning of legislation and thus, assist the reader of legislation. Some interpretation matters which were once contained in individual Acts were found to repeatedly appear in later legislation. Because

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[148] On Interpretation Acts, see generally, Thring, *Practical Legislation* (London, 1902) at p. 135; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 491; Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at pp/ 68, 71 & 114; *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 136 et. seq.; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 112 et. seq.; Leitch & Donaldson, "A Commentary on the Interpretation Act (Northern Ireland) 1954" 11 NILQ 43; Leitch, "The Interpretation Act – Ten Years Later" 16 NILQ 215; Leitch, "Interpretation and the Interpretation Act 1978" [1980] Stat LR 5.

[149] Sometimes referred to as "Brougham's Act".

of their general application, provisions of this kind have been gathered together in the Interpretation Act 2005. The 2005 Act sets down general rules and common definitions which now apply to all Acts and statutory instruments.

The importance of the Interpretation Acts in the dynamic of legislative drafting cannot be overstated. Thring was unrelenting in his efforts to highlight the importance of adhering to the Interpretation Act:

> "... it is the duty of every draftsman to know it by heart and to bear its definitions in mind in every bill which he draws."[150]

The importance of the Interpretation Acts to drafters was reiterated by Minister of State Hanafin when introducing the Interpretation Bill 2000[151]:

> "An interpretation Act is an invaluable tool for those who draft, use or interpret our laws. It helps by eliminating the need for standard interpretation provisions and definitions to be set out extensively in every new Act and statutory instrument which effectively would clutter up the Statute Book. The absence of general principles of interpretation from each individual Act and statutory instrument allows our laws to be read more easily. It also ensures a coherence of interpretation across the Statute Book that would not otherwise be there. Those who draft, regularly read or interpret our laws can do so with more precision and confidence when the basic rules and definitions of interpretation are of general application, are clearly set out in an Interpretation Act and are well known and understood."

The features, and to a lesser extent, the structures of legislation are heavily influenced by the Interpretation Acts. Our Interpretation Acts derive from the old Brougham's Act of 1850. The purpose of interpretation legislation today

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150 Thring, *Practical Legislation* (London, 1902) at p. 14. He later reiterates this point at p. 95.

151 557 *Dáil Debates* Col. 671 (14 November 2002).

serves largely the same purpose as it always has. Subsequent Interpretation Acts were enacted in 1889, 1923, 1937, (with amendment Acts in 1993 and 1997), and more recently, 2005.

However, the reliance by legislative drafters on Interpretation Acts does not do justice to the occasional reader of legislation. In order to fully understand any piece of legislation, it is necessary to read the Interpretation Act as well. This is particularly true in recent years where the scope of Interpretation Acts has broadened and where drafters have become increasingly reliant on Interpretation Acts. The centralisation of the rules and more particularly, the definitions relating to legislation in an Interpretation Act, should not preclude their repetition in a piece of legislation where the failure to do so would render the legislation less coherent to the occasional reader of legislation.

A balance needs to be struck between, on the one hand, standardising rules and provisions so as to avoid repetition and on the other hand, avoiding the dangers of rendering a piece of legislation incomprehensible unless it is read alongside the Interpretation Act. Interpretation Acts are referential in nature and in this regard, an over-reliance by a drafter on its terms is likely to be detrimental to the coherence of an Act. To get around this problem, Thornton encourages drafters not to be afraid to repeat a provision or rule which is already set out in an Interpretation Act "if the need to communicate that provision effectively justifies it."[152]. While he acknowledges that this is technically not necessary, he pragmatically declares that "the drafter has a continuing need to communicate and this need can be more important than the sin of a little repetition.".

Another aspect of interpretation Acts which cannot be ignored is the fact that the reader of legislation may not even be aware of the existence of such a piece of legislation. This is likely to be very true of many of the users of

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[152] Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 113.

legislation in Ireland, particularly non-lawyers. As part of the need to improve access to legislation, a greater awareness of the Interpretation Act needs to be brought about.

An indicator of the usefulness and assistance of an Act can often be judged by seeing how often that Act has been disapplied by subsequent Acts. Take for example, the Petty Sessions (Ireland) Act 1851. It has been disapplied in well over 300 separate instances in the course of other Acts. In contrast, the Interpretation Act 1937 has rarely if ever been disapplied. Among other things, this may be taken as an indicator of just how well Irish drafters and the legislature have been served by the 1937 Act, which for a long time, remained the principal piece of legislation in this area. The same might be said of the number of times which the 1937 Act has been amended. It has been supplemented on a number of occasions (but only to a small degree), by two subsequent Interpretation Acts. However, prior to its repeal in the Interpretation Act 2005, the 1937 Act largely remained in its original form.

Interpretation Act 2005

Published in August 2000 and enacted in October 2005, the Interpretation Bill 2000, the Bill took just over five years to be enacted. The Interpretation Act 2005, (which commenced on 1 January 2006) repeals and consolidates four Interpretation Acts: the Interpretation Act 1889; the Interpretation Act 1923; the Interpretation Act 1937; and the Interpretation (Amendment) Act 1993.

The Act is divided into six parts. Part 2 includes miscellaneous rules to assist in interpreting enactments. Part 3 deals with citation, operation and commencement of enactments and reflects current law but clarifies a number of matters in that law. Part 4 and the Schedule deal with the meaning and construction of words and expressions. It incorporates a number of new matters and omits obsolete definitions. Part 5 deals with powers and duties, and Part 6 deals with the amendment of enactments, in general reflect

existing law but in more modern language.

Concluding Remarks

In the years since the establishment of the British statute book and subsequently, the Irish statute book, no changes have been made to the way in which the statute book is organised. Neither has any effort been made to control the extent to which each piece of legislation impacts on the other.

The growing complexity of our laws, coupled with the increasing mass of the statute book, has not been matched by any attempts to foster a new way of ordering the statute book. This is in stark contrast to the period of evolution which led to the statute book itself. In an Irish context, this process of evolution ceased in 1921 with the acquisition of independence and the birth of the Irish Statute Book.

In many ways, the Irish statute book resembles a fine old building. It has been continuously extended, repainted in part, cracks and leaks are occasionally tended to – but the building is structurally flawed and that has never been attended to. The Irish Statute Book has been added to and built upon for almost 80 years without any substantive analysis or review. Legislation today continues to be framed, enacted and gathered together in much the same way as legislation in the 1820's.

In view of the towering presence of *Ignorantia Juris Neminem Excusat* in our democracy, the need to address the disorderly state of the statute book is all the more pressing.

Chapter 4

Office of the Parliamentary Draftsman: Its Origin & Enduring Influence

Introduction

While much of the legislation which governs Ireland was enacted before the establishment of the Draftsman's Office, the establishment of the Office of the Parliamentary Draftsman in Ireland marked a new beginning for the Irish Statute Book. The composition and workings of the Office at that time, along with the format chosen for new legislation would be those which would remain in place for many years to come and would dictate the shape of the statute book of today.

The aim of this Chapter is to illuminate that dark corner in the history of Irish legislation which concerns the Office of the Parliamentary Draftsman. It does so by retracing the steps which led to the establishment of the Office of the Parliamentary Draftsman and examine some of the key developments which occurred before it became what it is today – the Office of the Parliamentary Counsel to the Government.

The Origins of the UK Office

Owing to the course of history, an examination of the development of the Office of the Parliamentary Draftsman[153] in Ireland, necessitates an examination of the Parliamentary Counsel's Office in England.[154]

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[153] Since September 2000, known as the Office of the Parliamentary Counsel to the Government.

[154] For a more in-depth analysis of this topic, see: Edwards, *The Law Offices of the Crown* (London, 1964); Edwards, *The Attorney General, Politics and the Public Interest* (London, 1984).

From Yeates to Thring

In 1752, a man named Robert Yeates, a Commons Clerk was receiving an additional allowance for "drawing up and preparing sundry bills".[155] He was subsequently appointed in generic terms as Treasury clerk "to do all the Parliamentary business". As noted by Lambert, Yeates was (though not titled as such), effectively the first ever Parliamentary Counsel to be appointed in England. He was succeeded by Danby Pickering a former editor of statutes, who in 1769 was appointed "to do the parliamentary business of this office performed by the late Mr Yeates with a salary of £600 a year"[156]. Pickering held office for eleven years and was succeeded by Francis Hargrave in 1781.[157] Hargrave was a barrister and legal author of considerable repute. He left office in 1789 and was replaced by William Lowndes. Lowndes continued to draft even after he was appointed Chief Commissioner of Taxes in 1798. Given his heavy workload, Lowndes requested that an assistant be appointed. The request was granted and led to the appointment of William Harrison, a special pleader at the bar[158] and he succeeded Lowndes in 1798.

In the course of his evidence to a Select Committee of the House of Commons in 1833, a William Harrison described himself as being Parliamentary Counsel to the Treasury.[159] He stated that his duties were "to draw or settle all the Bills that belong to Government in the Department of the Treasury".[160] He also described the sequence of events in the drafting process at that time:

"I receive the Minute of Instructions from the Chancellor of the

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[155] Lambert, *Bills and Acts* (Cambridge, 1971) at p. 67. See also, Donaldson, "The High Priests of Mystery: A Note on Two Centuries of Parliamentary Draftsmen" in Finnie, Himsworth, Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh, 1991) at p. 99.

[156] Lambert, *Bills and Acts* (Cambridge, 1971) at p. 68.

[157] Donaldson, "The High Priests of Mystery: A Note on Two Centuries of Parliamentary Draftsmen" in Finnie, Himsworth, Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh, 1991) at p. 100.

[158] *ibid.*,

[159] *Report on House of Commons' Officers and Fees* (1833) at p. 163.

[160] *History of PCO,* available at www.cabinet-office.gov.uk/parliamentary-counsel/1999/pco_history.htm

Exchequer; I put the Minute into heads, with details for revision and approbation, and then I prepare the Bill; and I attend meetings with the Law Officers, at his house, in consultations, not legal, but official consultations."[161]

It seems that Harrison had been providing assistance to his superior, Mr Lowndes for free, on the understanding that he would succeed Mr Lowndes, which he did. Having taken over, Harrison held that office until 1837[162], following which, his Office appears to have fallen into abeyance.

Later that year, Mr Drinkwater Bethune was appointed to a post which gave him responsibility for preparing Bills under the directions of the Home Secretary. In 1848 Mr Bethune[163] was succeeded by Mr Coulson, and in 1860 he was in turn succeeded by Henry Thring.[164] Thring clearly had an appetite for hard work and this soon crystallised into a great reputation. It is reputed that he drafted the Representation of the People Act 1867 in just one day.[165] After Thring took up office, the workload and the demands made of him appear to have increased considerably, in fact to such an extent that some Departments engaged outside counsel to draft their Bills. Aside from the high costs, this uncoordinated approach gave rise to inconsistencies in legislation – inconsistencies of style, but most worryingly, inconsistencies of substance. In 1869, these concerns led Mr Lowe, the then Chancellor of the Exchequer to devise an arrangement so as to centralise the drafting of bills.

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161 *ibid.,*

162 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 80 and 83. However, A.G.Donaldson disagrees, he believed that Harrison held the Office until his death in 1841.

163 Bethune left to take up an appointment as legal member of the Governor General's Council at Calcutta.

164 Thring wrote: "I continued to be employed in drafting Acts of Parliament during my private practice at the Bar till 1861, when I was appointed to the counsel to the Home Office … and for the remainder of my official life I was occupied almost entirely in preparing legislation.". Thring, *Practical Legislation* (London, 1902) at p. 5.

165 Samuels, "Henry Thring: the First Modern Drafter" 24(1) Stat. L R 91.

Formal Establishment of UK Parliamentary Counsel's Office[166]

Two months after he entered the Cabinet, Lowe along with Gladstone signed undoubtedly the most significant minute from any drafter's point of view - the Parliamentary Counsel's Office was established by a Treasury Minute on 8 February 1869[167]. Henry Thring[168] was appointed as head of the Office with the title of Parliamentary Counsel to the Treasury. He was immediately assigned a permanent assistant – Henry Jenkyns - and a Treasury allowance for "such outside legal assistance as he might require"[169]. At that time, there was a stipulation that "the whole time of the Parliamentary Counsel and his assistant was to be given to the public, and they were not to engage in private practice"[170]. Having held office for seventeen years, Thring's retirement in 1886 paved the way for Jenkyns to succeed him, and justifiably so. Having held office for thirteen years, Jenkyns died in 1899 and was succeeded by Courtenay Peregrine Ilbert who served an altogether shorter tenure of three years. Having been Assistant Parliamentary Counsel since 1889, Sir Mackenzie Chalmers became Parliamentary Counsel after Ilbert's departure

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166 Initially, the Office of the Parliamentary Counsel formed part of the Treasury. This continued until 1969 when it became attached to the Civil Service Department. It was at that time that the Office changed its name to the Parliamentary Counsel's Office. On the disbandment of the Civil Service Department, the Parliamentary Counsel's Office became part of Cabinet Office, which remains to be the present position.

167 The establishment of the Office under this Minute was intended to be temporary and provisional, and were not to be made permanent until after two years of operating. The arrangements under the Minute were revised and made permanent by a later Treasury Minute dated 31 January 1871. At the time of the establishment of the Office, Mr Gladstone was the First Lord of the Treasury and Mr Lowe was Chancellor of the Exchequer.

168 Thring was born in Somerset, England in 1818 and was called to the Bar by Inner Temple in 1845. He became counsel to the Home Office in 1860 and subsequently became parliamentary counsel to the Treasury in 1869. From 1868, Thring served on the Statute Law Committee which focussed on consolidation, statute law revision and publication. He retired in 1886, though he continued to serve on the Statute Law Committee until 1907. He was knighted in 1873 and some time later, in 1886, he was made a peer. He died in 1907, aged 89.

169 Memorandum (1923) from the Parliamentary Counsel to the Treasury to the Irish Government, entitled: "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

170 *ibid.,* See also, Donaldson, "The High Priests of Mystery: A Note on Two Centuries of Parliamentary Draftsmen" in Finnie, Himsworth, Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh, 1991) at p. 105. Such a restriction still prevails in Ireland. For example, in the Office of the Parliamentary Counsel to the Government. However it appears that it may be deviated from in exceptional circumstances. For example, in 1969, the then Director of the statute Law Reform and Consolidation Office was granted 3 months special leave with pay to provide drafting services to Ghana (National Archives 2002/14/522).

in 1902. Chalmers left and he was in turn succeeded by Sir Arthur Thring. On Thring's departure in 1917, he was replaced by Sir Frederick Liddell, who was then followed by Sir William Graham-Harrison in 1928.

In 1901, Sir Courtenay Ilbert, the then First Parliamentary Counsel, wrote that the Parliamentary Counsel's Office consisted of "the Parliamentary Counsel and the Assistant Parliamentary Counsel, with three shorthand writers, an office-keeper, and an office boy."[171]. This level of staffing was more or less the same as when the Office was established in 1869 and continued to be the position up to 1923[172]. Barristers were engaged on contract and were paid fees for their work. However, at that time, the assistance of drafters engaged on a contract basis was limited to work on "Consolidation Bills or for Bills with respect to which the advice of special experts is desirable."[173]

Lord Henry Thring

Thring spent much of his time drafting Irish Bills and it is of no surprise therefore to learn that he was responsible for drafting a number of key Irish Bills, notably, he drafted the Irish Church Bill 1869; Government of Ireland Bill 1886 and also the Irish Land Bill under the personal direction of Gladstone.[174]

Thring's influence over the style of drafting which prevails in many common law countries today cannot be overstated. This is particularly true with regard to Irish legislation – even to the present day. Over the years, Thring gathered instructions, rules and directions and this collected wisdom was initially published in 1877 as a pamphlet, and later as a seminal work in 1902 entitled

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[171] *History of PCO,* available at www.cabinet-office.gov.uk/parliamentary-counsel/1999/pco_history.htm

[172] See, Memorandum (1923) from the Parliamentary Counsel to the Treasury to the Irish Government, entitled: "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

[173] *ibid.,*

[174] Thring wrote: "Mr Gladstone's was the most constructive intellect with which I was ever brought into contact and also was the most untiring in devotion to its object. He understood and revised every word of a Bill and even settled the marginal notes." Thring, *Practical Legislation* (London, 1902) p. 5.

Practical Legislation[175]. To this day, it represents a very useful guide to the best practice in legislative drafting. Its value was probably best expressed by one of his contemporaries, Sir Courtenay Ilbert, Parliamentary Counsel to the Treasury, who in his own book[176] said of Thring:

> "His 'Instructions to Draftsmen', ... have been very generally followed, and have tended materially to improve the style and arrangement of statutes."[177]

The change in drafting style referred to is said to have begun in 1854[178] when Thring, in drafting the Merchant Shipping Act, introduced the modern plan of breaking up an Act into parts, and sections into sub-sections.

The Irish Office

As the Office of the Parliamentary Counsel to the Treasury became more fully established, the existing Departmental draftsmen were phased out, and so the Office became fully responsible for drafting all Government Bills, except Irish Bills and Scotch Bills. The responsibility for drafting Scotch Bills lay with the Secretary to the Lord Advocate. Irish Bills were drafted by the draftsman attached to the Irish Office[179].

Though it is difficult to pinpoint the exact timing, it seems that a parliamentary draftsman had been assigned to the Irish Office sometime before 1875.[180] Hugo Marmaduke O'Hanlon became counsel to the Irish Office in 1801, subsequently William Lowndes drafted mainly Irish bills after 1806. Sometime

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175 Published at different times, the work was also published under the title of *The Composition and Language of Acts of Parliament.*

176 Ilbert, *Legislative Methods and Forms* (Oxford, 1901).

177 *ibid.,* at p. 69.

178 Thring had been engaged privately to draft legislation long before the establishment of the Office in 1869.

179 Established in London in 1801, the role of the Irish Office was to facilitate the exchange of correspondence between Dublin and London following the enactment of the Act of Union. The Office was abolished in 1921 following the Anglo-Irish Treaty.

180 Sir T Erskine May's evidence to the Select Committee on Acts of Parliament.

prior to 1866, a Draftsman of Bills was appointed to the Office of Chief Secretary for Ireland. In 1877, William Fitzpatrick Cullinan was appointed as a legislative draftsman at the Irish Office.[181] Appointed in 1908, Sir Francis Greer was the last person to be appointed as Draftsman of Bills to the Irish Office.

Origins of the Parliamentary Draftsman's Office

The Onset of Irish Independence

Following the Anglo-Irish Treaty in 1921, Saorstát Eireann was governed by the King. Under Article 51 of the Free State Constitution, the Executive Council was established to "aid and advise the government". Hugh Kennedy was appointed as the Law Officer to the Provisional Government. On 7 December 1922 he was appointed as Ireland's Law Officer (ie. first Attorney General) and took up office on 1 March 1923.[182] His predecessor was T.W. Brown KC, MP who had been Attorney General for Ireland up until 16 November 1921.

The constitutional changes brought about in Ireland in the 1921 Treaty gave rise to the need for new drafting arrangements in respect of Northern Ireland. The Government of Northern Ireland engaged one Arthur Scott Quekett as Parliamentary Counsel, an Office which he held for no less than twenty five years. His appointment marked the establishment of the Legislative Draftsman which still exists in Belfast today.

When the Committee of the Constitution was appointed in January 1922, and

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[181] See, Professor Nial Osborough's Introduction to the 1995 reprint of *The Irish Statutes: Revised Edition* (Dublin, 1995) at p. M.

[182] See *Iris Oifigiúil, 14 April 1922.* Notification of his appointment is expressed to having been given on 22 March 1922. He was subsequently appointed Chief Justice on 5 June 1924 until his death in 1936.

met at the Mansion House, Dublin[183], Arthur Matheson was not amongst those invited to attend as he had not been appointed at that early stage. This would seem to suggest that much of the drafting was carried out by Kennedy, possibly in conjunction with Matheson on an informal basis.

An examination of the period concerning the handover of power from Britain to Saorstát Eireann would not be complete without setting the events in context. Once the opportunity for independence arose, on the signing of the Treaty, there was a strong desire to emphasise the independence of the new nation and the drive of the politicians of that era to distinguish themselves from Britain was unrelenting. At that time the Irish had a very real desire to distance themselves from the "British way" and not merely to be "independent", but to show real independence. In advance of enacting legislation to establish a judicial system, Kennedy wrote "... in so far as the existing system is based upon English history we hope to cut it out and start afresh"[184]. In fact, such was his desire to distinguish the State from Britain that he wrote:

> "I hold very strongly the view that the Irish Bar should devise a national Bar costume of a suitable character with adequate dignity and with some distinctively national characteristic and that that costume should exclude the use of the wig, which in my opinion, is a servile appendage.".[185]

However, Kennedy and others do not appear to have blindly adopted a sceptical approach towards anything British. Quite the contrary, in fact many aspects of the British system of administration were, and still are, reflected in

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[183] The following were present at the invitation of the Chair (Michael Collins): Darrell Figgis, Hugh Kennedy K.C., James MacNeill, C.J. France, James Douglas, James Murnaghan, and John O'Byrne B.L. See Minutes of the "First Meeting of Committee Formed to Draft a Constitution for the Irish Free State held at the Manison House" (UCD Archives P.4-1680).

[184] Letter from Kennedy to MacNeill, dated 22 August 1922 (UCD Archives, P.4/IV/1).

[185] Letter from Kennedy to Louis J. Walsh, dated 31 May 1923 (UCD Archives, P.4/IV/6).

this State. Of particular interest is the level of co-operation between the Office of the Parliamentary Counsel to the Treasury and the Parliamentary Draftsman in Dublin at that time. Also of significance is the similarity of the format of Irish statutes as compared to British. It is also possible to point to the concordance of British and Irish legislation in many respects.[186]

Establishment of Office of Parliamentary Draftsman

Soon after Independence, Hugh Kennedy urged the appointment of a Parliamentary Draftsman in the following terms:

> "It is urgently necessary to appoint a Parliamentary Draftsman as there will be a large amount of legislation of an urgent character to present to the new parliament, and the preparation of legislation should be put in the hands of a draftsman at the earliest possible moment."[187]

Kennedy's efforts led to the establishment of the Office of the Parliamentary Draftsman as a division of the Office of the Attorney General[188] and a diligent barrister named Arthur Matheson was appointed as Ireland's first Parliamentary Draftsman. This truly marked the beginning of one of the great Irish adventures of the law, which continues to this day.

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[186] Dickson et. al., *Concordance of English, Northern Irish and Irish Legislation* (1997). The level of concordance evident from this study is striking. Indeed the Irish legislature's reliance on UK legislation as a precedent for its own legislation has been noted by the Irish Courts. In *People (DPP) v McDonagh* [2000] 1 ILRM 548, 570 Costello P. stated: "Irish statutes frequently and for very good reasons adopt with or without amendment the provisions of statutes enacted by the United Kingdom Parliament dealing with the same topic ...".

[187] Supplementary Minute to a Memo by Hugh Kennedy, dated 28 July, 1922. (UCD Archives, P.4-282).

[188] While it was always the *de facto* situation since independence, the Parliamentary Draftsman's Office formally became part of the Attorney General's responsibility on the enactment of the Ministers and Secretaries Act 1924, section 5 of which provides:"6.—(1) There shall be vested in the Attorney-General of Saorstát Eireann ... the business, powers, authorities, duties and functions formerly vested in or exercised by the Attorney-General for Ireland, the Solicitor-General for Ireland, the Attorney-General for Southern Ireland, the Solicitor-General for Southern Ireland, the Law Adviser to the Lord Lieutenant of Ireland and any or all of them respectively, and the administration and control of the business, powers, authorities, duties and functions of the branches and officers of the public services specified in the Ninth Part of the Schedule to this Act ..." And the Ninth Part of the Schedule specifies the Parliamentary Draftsman.

Although it is not possible to ascertain the date of his appointment with absolute certainty, Matheson kept a diary[189] for the duration of his appointment and the first entry is dated Friday, 26 January 1923.

Procedures for the Circulation of Draft Bills

On the 29 January 1923 (a mere three days after Matheson's first diary entry), a circular letter from the Executive Council informed all Ministers that the Executive Council had decided on a procedure for the circulation of draft Bills.[190] It declared that the final draft of every Bill must be submitted to the Executive Council for approval – prior to its introduction into the Houses of the Oireachtas. It went on to provide that once introduced, no Bill could be amended without the leave of the Executive Council.

Having scrutinised the procedures which emanated from the Executive Council, it was not long before the Department of Finance sought to assert a high degree of control over the activities of the Draftsman's Office. The Department of Finance were less than pleased with the procedures proposed – mainly because it did not give them what they saw as sufficient control.

In a detailed letter outlining its dissatisfaction, C.J. Gregg of the Department of Finance objected to the procedures on the basis that it "makes no provision for the duties and functions of the Ministry of Finance in relation to Bills". The letter goes on to state:

> "The Minister for Finance is the keeper of the public purse and the controller of expenditure from that purse and he therefore occupies a peculiar position in regard to Bills and legislation. ... The procedure laid down in the Circular letter of the 29th January short-circuits the Finance Ministry by allowing the Bills to go direct from the Parliamentary Draftsman to the Cabinet there perhaps to be decided upon before the

189 Available in the National Archives, 2001/49/68 – 2001/49/88.

190 See, Fanning, *The Irish Department of Finance 1922 – 58* (Dublin, 1978).

Finance Ministry can get in a word."[191]

Gregg having then outlined the procedures in place in London, went on to delicately suggest that the Parliamentary Draftsman should be under its control:

> "It will be observed that in the British machine the Parliamentary Draftsman is an officer of the Treasury and this fact enables the Treasury to exercise close financial control on the provisions inserted in Bills. The Saorstát Parliamentary Draftsman was appointed as an officer of the Ministry of Finance but was attached from the outset to the Law Officer and placed under his instructions. Although it is sound in principle that the Parliamentary Draftsman should be an officer of the Ministry for Finance it is probably expedient for the present that he should be attached to the Law Officer."[192]

Gregg then went on to outline the disadvantages (from its perspective) of the existing procedures:

> "The attachment of the Parliamentary Draftsman to the Law Officer deprives the Ministry of Finance of the control which the British Treasury exercises on British Bills by reason of the Parliamentary Draftsman being its officer."[193]

On that basis, he went on to suggest:

> "It is all the more important, therefore, to establish well defined procedure that will secure Finance Ministry control. It is suggested that in normal cases the consent of the Finance Ministry should be obtained

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[191] Letter from the Department of Finance to the President of the Executive Council, 8 February 1923. See National Archives, S. 1646/2.

[192] ibid.,

[193] ibid.,

before the Parliamentary Draftsman is asked to draft a Bill ..."[194]

He then set out a range of procedures which should be adhered to, for example, that drafts Bills should be sent to the Department of Finance before being submitted to Cabinet. The efforts of the Department of Finance were not in vain. These proposals were subsequently approved by the executive Council on 14 April 1923 in procedural instructions issued by the Attorney General in 1924[195]. These procedures directed that a Government Department promoting a Bill must submit a general scheme of the Bill "to the Ministry of Finance for consideration, accompanied by a minute directing special attention to matters of finance arising upon the proposals". The procedures of 1924 were enhanced and reissued in 1930[196], directing that in addition to being sent the scheme of the Bill, Finance must also sent a further memorandum detailing: (a) the need for, and aim of, the Bill; (b) the relationship between the Bill and existing legislation; (c) the estimated cost to the Exchequer of the proposed Bill

This series of correspondence and the formal procedures subsequently issued, represented an important victory for the Department of Finance. For the Department, it represented an important milestone, for in the State's infancy, the Department had established a precedent for having an unorthodox level of control over the activities of the State, in all respects.

Matheson's Diaries[197]

Matheson's diary entries provide a useful insight not only into the extent of his workload, but they also give an indication as to the role of the drafter at that time. For example, he frequently refers to having attended the Dáil and the Seanad. This is in stark contrast to Parliamentary Counsel of today who rarely, if ever, have reason to attend the Houses of the Oireachtas.

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194 ibid.,
195 11 March 1924.
196 14 October 1930.
197 Available in the National Archives, 2001/49/68 – 2001/49/88.

The diaries also reveal the considerable influence which Hugh Kennedy had not only on the development of the Office of the Parliamentary Draftsman, but also on its work. Quite often Matheson received oral instructions directly from Hugh Kennedy to draft particular measures and he appears to have had frequent personal contact with the Attorney. Interestingly, his direct contact with instructing officials appears to have been minimal. He occasionally met departmental officials to discuss particularly complex issues.

Probably the most significant aspect of the diaries is how they reveal the phenomenal workload of Matheson. This is best illustrated by an example; on 20 September 1923 he received verbal instructions[198] from Hugh Kennedy to draft the County Courts (Amendment) Bill. A mere two days later, he handed a draft of the Bill to the Attorney General.[199] Also of note is his diary entry on 5 November 1923 which records that, on that day, he received instructions to draft seven bills and one order.

Further demands were to be made on the Office from other sources. For example, in 1923 a Motion was moved in the Seanad calling for the appointment of a dedicated draftsman to the Seanad. In the course of the debate, Senator Comyn remarked:

> "As I understand it, we have not one draftsman, but three. In former times one assistant in London was sufficient for all Irish measures, and three draftsmen were enough to draft the legislation for Great Britain—much of it legislation dealing with the British Empire and the

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[198] It was not unusual in those days to receive purely oral instructions. Thring illustrates this point in his book: "The instructions given me were as usual, to a great extent, verbal ones, conveyed during a series of conferences with Mr Gladstone. I used to attend him at his house generally by myself.". Thring, *Practical Legislation* (London, 1902) p. 5.

[199] Similar pressures of time were experienced by Thring. In 1867, he completely redrafted the Reform Bill in one day "working with two shorthand-writers from ten till six, I completed it. The Bill was printed during the night and was laid before Cabinet on Saturday." Thring, *Practical Legislation* (London, 1902) p. 7.

Dominions."[200]

The Work of the Office

Assistance from the Parliamentary Counsel to the Treasury

Following the handover of power in 1922, the Parliamentary Counsel to the Treasury continued to play a role in ensuring the smooth transition to the Free State.[201] Sometime during 1923, the Parliamentary Counsel to the Treasury sent a helpful and detailed memorandum to the Irish Government entitled "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government"[202]. In this seminal Memorandum, the writer advised:

> "The new Irish Government will require to make arrangements for the discharge of these duties in Ireland, and they would be well advised to adopt the English system and to set up an office with similar duties as a subordinate branch of the Irish Department of Finance."

The Memorandum states that the preparation of Bills in Ireland "will require equal skill and as much care and attention in Ireland as in England, and the volume of legislation, if not as great, will certainly be considerable." [203]. The writer goes on to advise that routine legislation can be expected, such as financial legislation, legislation consequential on the establishment of the Government and minor departmental legislation.

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200 11 *Seanad Debates* Col. 227, (20 December 1928).

201 For example, in a letter dated 9 August 1922, Sir Frederick Liddell, Office of the Parliamentary Counsel to the Treasury wrote to Hugh Kennedy advising that legislation was necessary to effect a separation of the Irish health insurance from the U.K. The close co-operation is further illustrated in a letter dated 1 January 1923 from Kennedy seeking President Cosgrave's views on recommendations made by Sir Frederick Liddell (Parliamentary Counsel to the Treasury) on a draft of the Amnesty Bill. (UCD Archives P.4-498).

202 (UCD Archives P.4-981).

203 Memorandum from the Parliamentary Counsel to the Treasury to the Irish Government (1923), entitled - "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

The Parliamentary Counsel to the Treasury also advised the Irish Government on the extent of the duties which should be conferred upon the Irish drafting office:

> "It is suggested that the following additional duties should be assigned to the new Irish Office, viz:
>
> (a) The settling of Provisional Orders of Government Departments which require Parliamentary Sanction ...
> (b) The preparation or settling of statutory rules and orders, if the Irish Department of Finance so directs.
> (c) The examination and reporting upon Public Bills introduced by private members. In England this work is done by a separate Department of the Treasury. It will be of considerable importance under the Irish Parliament where private Members' Bills are likely to receive greater attention than is possible under the present system."[204]

The Work of Arthur Matheson

It is clear from the documentation available, that Hugh Kennedy had a heavy workload and worked very hard. It appears that he often worked late at night at home.[205] This enthusiasm and dedication of Kennedy was equalled by Matheson. Matheson's dedication is probably best illustrated by the fact that he worked for four years before the Minister for Finance finally agreed his salary.[206]

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[204] *ibid.*

[205] Memo by Hugh Kennedy correcting comments by Treasury on estimates, dated 28 July 1922. (UCD Archives P.4-292).

[206] This was alluded to by Senator Alexis Fitzgerald in the course of a Seanad Debate on the Unit Trusts Bill 1970 where he described Matheson as: "a dedicated man who, in fact, remained four years working for the Government before the Minister for Finance would agree on what he should be paid." 69 *Seanad Debates* Col. 782 (17 February 1971). In a Memo dated 28 July 1922, (UCD Archives P.4-

Though the format of Irish legislation is largely similar to that adopted by Thring, the format and general structure of our legislation differs from the UK legislation in some respects. This point was noted by one Senator who stated:

> "The form of our legislation here in Ireland is, I think, far superior to that generally used in Britain – this is my own view – because of the practice laid down by the first parliamentary draftsman, ... I refer to Arthur Matheson. He was a trained chancery lawyer who said that all the definitions should go into the first section so that everybody would understand what came afterwards. The British have not yet got round to that system. It is a most appalling job to try to read an English Act, where you get the definitions in the Schedules half way through the Act, and so on."[207]

Praise was often directed at Matheson for the quality of his work. In 1927, in the course of a debate on the Juries Bill, the then Minister for Justice, Deputy O'Higgins remarked:

> "The standard of drafting that prevails here, as I am sure the Deputy is aware, is very high. It is one of the things that is commented upon with admiration by officials and governmental people elsewhere."[208]

The heavy workload which Matheson bore was alluded to by Senator Dr Gogarty in 1928[209], where he said:

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282) Hugh Kennedy wrote (in an effort to correct comments made by Treasury) that his salary had not yet been agreed and that he paid a Clerk out of his own pocket for assistance.

[207] Senator Alexis FitzGerald in the course of a Committee Stage debate on the Unit Trusts Bill 1970. 69 *Seanad Debates* Col. 782 (17 February 1971).

[208] 18 *Dáil Debates* Col. 805 (23 February 1927).

[209] In a Motion seeking the services of a dedicated parliamentary draftsman to be appointed to the Senate.

> "It was held then that we could have at any time the services of the parliamentary draftsman. The parliamentary draftsman was himself snowed under with his own work."[210]

Later on in the debate, similar views were expressed by Deputy Blythe, Minister for Finance, where he explained:

> "The parliamentary draftsman, and the men in that office, have never been able to overtake the work that has poured in on them. Most Departments have had Bills for some time with the parliamentary draftsman and even these have had to be pushed aside sometimes because something that was at the moment more urgent came in on top of them."[211]

These views were also shared by Senator Brown, who stated:

> "From my personal knowledge of the present official draftsman and his first-rate assistant, I can assure the House that it would be absolutely impossible for them to do more work than they are doing. We have got probably the best draftsman in Europe, and his assistant is well worthy to be his assistant. ... To put any more work on the draftsman would be a great injustice to him, and it might in the end involve a breakdown which would deprive this nation of one of its most valuable officials."[212]

The efficiency and professionalism of Matheson caused Senator Brown to remark:

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210 11 *Seanad Debates* Col. 211 (20 December 1928).

211 *ibid.*, at Col. 220.

212 11 *Seanad Debates* Col. 225 (20 December 1928). Similar sentiments were also expressed by Senator Comyn who said: "I join with Senator Brown in commendation of the gentlemen who are in the draftsman's office. I knew them well." 11 *Seanad Debates* Col. 228 (20 December 1928).

> "It is a wonderful tribute to the draftsmanship in that office that during six years of rather hurried and most difficult legislation, including the Land Act, the Courts of Justice Act, and the Property Act, that includes patents and copyright and several other things, and hundreds of other Acts that have been passed, and that have gone through our draftsman's office, there has been only one case in which the meaning of a section has had to be interpreted by the Court. That is a wonderful tribute to our draftsman."[213]

Similar sentiments were also expressed by Senator Comyn who said: "I join with Senator Brown in commendation of the gentlemen who are in the draftsman's office. I knew them well."[214]

Staffing and Resources at the Parliamentary Draftsman's Office

In contrast to today, resources for legislative drafting were scarce, delays were commonplace, in fact to such an extent that President Cosgrave wrote to Kennedy asking if he could do anything to assist and suggested that further assistance might be required.[215] Cosgrave was again driven to raise the delays in the preparation of Bills. In a letter to Kennedy[216], Cosgrave was scathing in his criticism of Hugh Kennedy's delay in dealing with Colonial Office dispatches. In the letter, Cosgrave states that such delays suggest that there is "something seriously wrong" in the administration of Kennedy's Department. In a detailed letter of response[217], Kennedy proposed to address these problems by ensuring that he would not be as accessible and agreeable in the future!

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213 11 *Seanad Debates* Col. 225 (20 December 1928).

214 *ibid.*, at Col. 228.

215 Note from Cosgrave to Kennedy dated 15 January 1923. (UCD Archives P.4-582). In a further undated note from Cosgrave to Kennedy, Cosgrave listed 4 Bills which have been delayed and he noted that the need for an assistant draftsman had been raised. (UCD Archives P.4-583).

216 Letter from Cosgrave to Kennedy dated 30 April 1924. (UCD Archives P.4-588).

217 Dated 1 May 1924.

Despite the lack of resources, Matheson, it seems, was joined by a number of very dedicated drafters over the years. In November 1922, Matheson was joined by one Mr Hearne as Assistant Draftsman,[218] - John J. Hearne who later went on to draft the Irish Constitution[219]. He began working at the Office of the Parliamentary Draftsman in 1922 and remained there until 1929 when he became legal adviser to the Department of External Affairs. It was in this role that he was instructed by the then President of the Executive Council, Eamon De Valera, to draft the heads of a new Constitution of Ireland. When the Constitution came into operation in 1937, de Valera is said to have dedicated a copy to Hearne in the following terms:

> "Architect-in-Chief and Draftsman ... in testimony of the fundamental part he took in framing this the first Free Constitution of the Irish People."[220]

Hearne went on to become High Commissioner to Canada and Ambassador to the United States. Shortly after the completion of the mammoth task of drafting the Constitution, in 1939, Hearne was called to the inner bar in recognition of his work.

During 1923, Arthur Matheson was joined by J. Creed Meredith K.C. who drafted some Bills.[221] The heavy workload of the Office of the Parliamentary Draftsman and the strain on Matheson at that time was best illustrated by Matheson himself when he wrote to Hugh Kennedy to express his unhappiness[222]:

> "Hitherto the staff of this office has consisted of myself and one lady

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218 Arthur Matheson's Diaries, diary entry of 21 November 1922 (National Archives, 2001/49/68 – 2001/49/88).

219 In the Irish language known as Bunreacht na hÉireann.

220 Boylan (ed.), *A Dictionary of Irish Biography* (Dublin, 1998).

221 Letter from Arthur Matheson to Hugh Kennedy dated 28 April 1923. (UCD Archives P.4-638).

222 Letter from Arthur Matheson to Hugh Kennedy dated 14 September 1923. (UCD Archives P.4-640).

> clerk-typist ... I am satisfied that my health will not permit me to continue to work at the pressure at which I have had to work during the past six months, and if a complete breakdown is to be avoided, the strain on me must be relieved."

He was clearly angered by the under-resourcing of the Office and went on to outline the arrangements in place in his Office. He was dissatisfied for a number of reasons:

> "Further, I am not satisfied with the way in which the work of this office has been done; in the first place I never had time properly to consider or revise the draft bills before they were introduced in the Oirechtas."

He also complained that instructions for drafts were not furnished to the Office in sufficient time. He cited examples of errors that had occurred due to under-resourcing:

> "the hash which has been made of S. 2 of the Damage to Property (Compensation) Act by the insertion of subsection (9) and the mistakes which have been made in the citation of British Statutes in the Schedules of Acts Repealed and elsewhere."

Matheson then went on to outline his ideal requirements[223] for the Office, but wasted no time in accepting that "due to financial reasons such organisation is out of the question". Matheson prefaces his more reasonable demands for additional resources by saying that if these request are granted, he could "guarantee that the work of this Office would be done if not perfectly, at any rate in a manner which would not bring discredit on the Free State". He made three specific demands: first, the appointment of an Assistant Draftsman – a barrister of 5 to 8 years standing; secondly, the appointment of a legal clerk

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[223] These included the appointment of an Assistant Draftsman, "being an experienced conveyancer of not less than 12 years standing at the Bar".

who would proof read and check references to statutes; and, thirdly he sought an arrangement whereby the Office could get the occasional loan of a typist. He concluded this letter – in the same tone with which he began – by stating in emphatic terms: "I cannot continue to cope single-handed with the work of this Office.". By 1928, there were three draftsmen working directly under the Executive Council.[224]

In 1969, an Official at the Office of the Attorney General wrote to the Department of Finance, complaining that the staffing at the Office had not changed since 1937 despite the fact that the volume of work had "increased very considerably since then"[225]. In pressing the need for extra resources, the writer pointed to the establishment of four additional Government Departments, the volume of proposals for legislation, and the amount of actual new legislation.

Resourcing at the Office of the Attorney General was to remain a problem until relatively recently. It seems that the ongoing battle for resources was only put to rest after the eruption of a major controversy surrounding the Office of the Attorney General in 1994.[226] One of the legacies of that controversy was that the Office of the Attorney General would have a sympathetic ear at the Department of Finance when it came to seeking additional resources from time to time.

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[224] Senator Doherty, 11 *Seanad Debates* Col. 211 (20 December 1928). In July of 1937, the Parliamentary Draftsman was joined by Gerald F. McCarthy, who was initially engaged on a fee basis. Letter from Department of Finance to Department of An Taoiseach, dated 9 July 1957 (National Archives, 2002/8/522). McCarthy subsequently became Director of the Statute Law Reform and Consolidation Office until his retirement on 29 June 1957.

[225] Letter from Kevin Mangan to Department of Finance, dated 24 March 1969 (National Archives 2002/8/327).

[226] For a detailed account of these events, see Casey, *The Irish Law Officers* (Dublin, 1996) Appendix 5, 6 & 7.

Statute Law Reform & Revision[227]

Statute Law Reform and Consolidation Office

The Statute Law Reform and Consolidation Office[228] was established on 1 April 1951 as part of the Office of the Attorney General. It was the Minister for Justice, General MacEoin, who first detailed plans for the establishment of the Statute Law Reform and Consolidation Office. In the Second Stage Debate of the Joint Tortfeasors Bill, he felt it appropriate to:

> "... refer to the decision that has recently been taken to establish a new and separate branch of the Attorney-General's Office which will concentrate entirely on statute law revision and consolidation, while leaving the Parliamentary Draftman's Office, as we know it, free to deal with the ordinary day-to-day legislation. The new branch which will deal with proposals for the reform of the law as well as preparing the actual legislation and which will involve some additions to the personnel of the Attorney-General's Office, will come into being in the course of the next few months and we may hope for a steady flow of measures of consolidation and of reform to engage the time of the Dáil and Seanad for a number of years." [229]

This announcement was warmly welcomed by Professor O'Brien who emphasised the need for the revision of the statute book:

> "While welcoming this Bill I would say that I welcome still more the Minister's statement that we are going to have a complete revision of the laws of this country. This is a work which has been necessary for almost 30 years, and has been neglected in this country by successive

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227 See, Donelan, "The Role of the Parliamentary Draftsman in the Preparation of Legislation" (1992) 14 DULJ 1; Donelan, "Recent Developments in Statute Law in Ireland" 22(1) Stat. L.R. (2001).

228 Hereafter referred to as "the SLRCO".

229 39 *Seanad Debates* Cols. 108 – 109 (13 December 1950).

administrations. In the last 50 years many changes have taken place which have rendered revision of the laws in many directions desirable, and in fact necessary."[230]

In the Dáil, Eamon de Valera, the then Taoiseach was asked about the terms of reference of the SLRCO and whether the revision and codification of statute law was being considered.[231] In reply, the Taoiseach clarified that the SLRCO had not in fact come into existence, but was due to do so shortly[232]. He detailed the role of the Director of the SLRCO:

> "The Director of the Statute Law Reform and Consolidation Office will be responsible, under the general instructions of the Attorney—General, for initiating proposals for law reform and consolidation, and for preparing draft Bills to give effect to such proposals. With the help of an assistant, he will carry out all the necessary research and other preliminary work, but the various Departments of State will be consulted and kept informed in regard to measures with which they are respectively concerned."

Some 7 years later, the Tasoiseach was again called upon to detail the role of the Director and he explained in the following terms[233]:

> "The director is responsible, under the general instructions of the Attorney-General, for initiating proposals for law reform and consolidation and for preparing draft Bills to give effect to such proposals. In addition, the office prepares for publication the annual volume of the statutes, the separate index thereto and the periodical

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230 *ibid.*, at Col. 110.

231 124 *Dáil Debates* Cols. 1133 – 1134 (6 March 1951),.

232 It was at this time that plans for a Committee on Law Reform were abandoned.

233 165 *Dáil Debates* Col. 612 (26 February 1958). A briefing letter from the Office of the Attorney General was sent to the Department of An Taoiseach on 24 February 1958 (two days prior to the Taoiseach's Dáil statement on the matter), National Archives, 2002/8/522.

consolidated index to the statutes."

By this time, the SLRCO had already made substantial progress in law reform. The following Bills drafted by the SLRCO since its establishment, had been enacted prior to 1958: Defence Act 1954; State Property Act 1954; Arbitration Act 1954; Mortmain (Repeal of Enactments) Act 1954; Fisheries (Statute Law Revision) Act 1956; Civil Service Commissioners Act 1956; Civil Service Regulation Act 1956, and Statute of Limitations, 1957. It also had responsibility for the preparation of the annual volume of statutes and also the Consolidated Index to Statutes. The SLRCO also drafted the Statute Law Revision (Pre-Union Irish Statutes) Act 1962 and later, the Statute Law Revision Act 1983 and a range of consolidation Acts.

The Director of the SLRCO, Gerald F. McCarthy retired on 29 June 1957. Shortly before McCarthy's retirement, an official[234] at the Attorney General's Office wrote to the Department of An Taoiseach expressing the point that the Attorney General was:

> "... satisfied that the qualities of [a] Director and the initiative expected from the holder of this post are more than are necessary in the case of an Assistant Parliamentary Draftsman"[235]

A draftsman named Vincent Grogan took up office as the Director of the Office in July1957[236]. Sometime after his appointment, the new Director wrote to the Attorney General advising him that Statute Law Revision Bills should deal with a particular period rather than a particular subject.[237] He went on to suggest that the Statute Law Revision Bills should be sponsored by the

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234 P.P. O'Donoghue.

235 Letter from Office of the Attorney General to Department of An Taoiseach dated 19 June 1957 (National Archives2002/8/522).

236 29 July 1957 – see National Archives, 2002/8/522, Letter dated 7 Lúnasa 1957.

237 Letter from Vincent Grogan to Attorney General dated 27 January 1959 (National Archives 2002/8/522).

Taoiseach or by the Minister for Finance, with the Brief being prepared by the SLRCO. He also envisaged the production of a series of Revised Statutes. In a response dated in February 1959[238] from the the Taoiseach's office, the correspondent conveyed the Taoiseach's agreement with the Attorney General's recommendation that the work of statute law revision should be undertaken as soon as possible.

The post of Director remained unfilled for a number of years and despite an open competition in 1989, the vacancy persisted[239]. Though the SLRCO technically remained in existence throughout the 1990's, it effectively came to an end in the mid-1980's when the post of Director was vacated and subsequently remained unfilled.[240] The failure to fill the post of Director was fatal to the drive towards the improvement of the statute book. It appears that a lack of direction coupled with the lack of resources and political will also contributed to the SLRCO's extinction. In his 1996 Report on the Office of the Attorney General[241], Professor Mayson concluded that:

> "... pressures on draftsmen to give precedence to current legislation have resulted in the Statute Law Reform & Consolidation Office 'withering on the vine'. This has not been because the work of that office has ceased to exist or because it has become less important."

In so concluding, he went on to recognise some of the inevitable consequences of the demise of the Office in the following terms:

> "The absence of consolidation and particularly of regular indexing

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238 Letter from Department of An Taoisech to P.P. O'Donoghue S.C dated 16 February 1969 (National Archives 2002/8/522).

239 *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994.* (Dublin, 1995) at p. 25.

240 In an article, the then Chief Parliamentary Counsel alluded to the SLRCO's "effective demise in the mid 1980s". See, Mooney, "The Work of the Office of the Parliamentary Counsel to the Government in Ireland" 22(3) Stat. L.R. 163.

241 *Office of the Attorney General: Law Office Management Review* (May, 1996) at para. 5.2.2.

would mean that the Government and its legal advisers would be in danger of not being able to find its own legislation."[242]

The importance of the work of the SLRCO received something which amounted to posthumous recognition in 1996, when in his Report, Professor Mayson recommended the immediate re-establishment of the SLRCO, with a range of specified functions.[243] The necessity for the revival of a body to perform the functions of the SLRCO was again highlighted in the Report of the Review Group on the Law Offices of the State[244] in 1997. This recommendation was taken up and its implementation led to the establishment of the Statute Law Revision Unit as a division of the Office of the Parliamentary Counsel to the Government.

Statute Law Revision Unit

The Statute Law Revision Unit was established in 1999 to draw up and implement a programme of statute law revision and consolidation. The First Programme of the Unit involved researching and making recommendations in respect of new policies to deal with the problems associated with the Statute Book. It has made recommendations to the Attorney General in respect of policies on consolidation, revision and the management of the Chronological Tables to the Statutes and Statutory Instruments.

The first of these recommendations led to the enactment of the Statute Law (Restatement) Act 2002. The second recommendation involves the development of a programme of consolidation and revision, in consultation with all Government Departments, Offices and the Central Regulatory Reform

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242 *ibid.,*

243 In summary, those functions are: to participate in planning and co-ordinating the preparation of legislation; the development of a plan for training drafters; to work with Departments to train their in-house legal teams in drafting matters; develop a strategy for consolidations; develop a strategy for indexing legislation; to review decisions of the courts which directly or indirectly affect issues of statutory interpretation, the structure of legislation, the legislative process, and other related issues; to receive from Departments, issues of legislative interpretation, perceived in consistencies or difficulties in implementation; to develop a programme for the computerisation of drafting precedents.

244 Dublin, June 1997.

Resources Unit in the Department of the Taoiseach, in accordance with the recommendations of *Reducing Red Tape - An Action Programme of Regulatory Reform in Ireland*[245].

Concluding Remarks

The role played by the Parliamentary Draftsman's Office following its establishment was fundamental to the development of the State, and in turn, the Irish Statute Book. The significance of its contribution should not be underestimated, particularly in the light of the mammoth task of establishing a sufficient administrative structures following independence. This was succinctly expressed by Hugh Kennedy himself in 1929, writing after his appointment as Chief Justice:

> "In an old established state in undisturbed times of settled and humdrum conditions, the practising lawyer finds it no easy thing to keep his knowledge abreast of ordinary current legislation, but in the epochal seven years through which we have just passed in the Saorstát, there has been enacted and put upon the virgin pages of the new statute book a body of legislation, very large in volume, and quite outside the current of experience of even the most experienced amongst us, the experience of a stream of ordinary legislation flowing among familiar channels of precedent and principle ..."[246]

Kennedy went on further to add:

> "The legislation of the seven years contains the more or less complete mechanism of the new State, a new mechanism of local government and poor law administration, the frame of a new judicial system, the

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[245] (Dublin, 1999).

[246] Chief Justice Kennedy writing in the Foreword to Hanna, *The Statute Law of The Irish Free State 1922 to 1928* (Dublin, 1929) p. v – vi.

structure of a civil service, an army and police force, the legislative foundations for agricultural and other industries, new machinery of land purchase, reforms in the administration of criminal law, and much else besides, going to the foundations legal and constitutional of the daily lives of our citizens and therefore of the daily business of our lawyers."[247]

The true extent of the Office of the Parliamentary Draftsman's contribution to the development of the State is probably best illustrated by a brief reference to some of the Bills which were drafted in the period 1922 to 1928. A surprising 282 statutes were enacted in the period from 1922 to 1928. The breakdown is as follows:

Year	No. of Acts
1922	5
1923	50
1924	62
1925	42
1926	45
1927	40
1928	38

During this period, laws which went to the very heart of the development of the new State were drafted by the Parliamentary Draftsman. [248] For example, the Electoral Act 1923[249]; the Garda Síochána Act 1924[250]; the Ministers and

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247 *ibid.*, at p. vi.

248 *ibid.*,

249 An Act to Regulate the Dáil and Seanad Franchises in Saorstát Eireann; to Amend and Consolidate the Law Relating to the Registration of Electors and the Conduct of Elections to Dáil Eireann; and to Regulate the Conduct of Elections to Seanad Eireann and of a Referendum and for Other Purposes Connected Therewith.

250 An Act to Make Permanent Provision for the Maintenance and Regulation of The Garda Siochána.

Secretaries Act 1924[251]; the Courts of Justice Act 1926[252]; and the Provisional Collection of Taxes Act 1927[253].

The influence which Matheson and his immediate successors had on the structure and format of legislation is palpable today by looking at any of the fruits of Matheson's labour, and comparing it with any piece of legislation produced today – very many of the basic elements of Matheson's approach are still there, and remain unchanged.

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[251] An Act for Constituting and Defining the Ministers and Departments of State in Saorstát Eireann Pursuant to the Constitution and Declaring the Functions and Powers of the Attorney-General and Enabling the Appointment of Parliamentary Secretaries and for Purposes Incidental Thereto.

[252] An Act to make Further Provision for the Constitution of the Central Criminal Court and to Extend the Jurisdiction Threreof and to Transfer to That Court the Jurisdiction of the Court of the High Court Circuit and to Make Better Provision for the Trial of Accused Persons Including Accused Persons Now Awaiting Trial.

[253] An Act to Give Statutory Effect for a Limited Period to Resolutions of the Committee on Finance of Dáil Eireann Imposing, Renewing, Varying, or Abolishing Taxation, and to Make Provision with Respect to Payments, Deductions, Assessments, Charges, and Other Things Made or Done on Account of Any Temporary Tax In Anticipation of the Renewal of the Tax by the Oireachtas.

Chapter 5

Role & Function of the Office of the Parliamentary Counsel

Introduction

The Office of the Parliamentary Counsel bears some responsibility for the disorderly and inaccessible state of the statute book. The slavish adherence to tradition and "established practice" which pervaded the culture of the OPC for many decades has perpetuated the difficulties which were apparent in the statute book many years ago.

The Office of the Parliamentary Counsel to the Government is a constituent part of the Office of the Attorney General.[254] Until September 2000 it was known as the Office of the Parliamentary Draftsman.[255]

Currently the O.P.C. is comprised of 18 full-time drafters[256] and 4 consultant drafters. The Office is responsible for drafting the 40 to 50 Bills which are enacted each year and are also responsible for many of the 800 to 900 statutory instruments which are made annually.

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[254] The Office of the Attorney General has its origins in role played by a number of different office holders prior to independence. Section 6 of the Ministers and Secretaries Act 1924 vested a range of powers in the in the Attorney-General which were previously exercised by the Solicitor-General for Ireland, the Attorney-General for Southern Ireland, the Solicitor-General for Southern Ireland and the Law Adviser to the Lord Lieutenant of Ireland. The ninth schedule to this Act specifically vests the functions of the Office of the Parliamentary Draftsman in the Attorney General.

[255] The Office changed its name in September 2000. It follows on from a recommendation by Professor Mayson, who in his Report on the Office of the Attorney General (Dublin, 1996), recommended (at para. 7.2.1) that the description Parliamentary Counsel should be adopted.

[256] Incidentally, 10 of whom are women.

The Office of the Parliamentary Counsel is not part of the legislature. It is neither appointed by nor responsible to either House of the Oireachtas. The Chief Parliamentary Counsel is appointed by the Government and is accountable to the Attorney General[257].

Remit of the O.P.C.

Present Scope of the O.P.C.

The Office's primary function is to provide a legislative drafting service to the government. The limitations on the work of the Office are accurately reflected in the title of the Office which was relatively recently changed from "Office of the Parliamentary Draftsman" to "Office of the Parliamentary Counsel to the Government". Not only is this change of name more inclusive and gender neutral, it emphasised the limitation "to the Government" which had not been used previously. Though the addition of these words did not mark any departure from the existing position, it did emphasise the restrictive role of the Office.

Since its establishment, the Office has only ever drafted Bills for the Government. The Office's British predecessor had similar limitations in place. In the course of his evidence to a Select Committee of the House of Commons in 1833, a William Harrison described himself as being Parliamentary Counsel to the Treasury.[258] He stated that his duties were "to draw or settle all the Bills that belong to Government in the Department of the Treasury".[259]

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[257] On the role of the Attorney General, see generally Casey, *The Irish Law Officers* (Dublin, 1996); Mayson, Office of the Attorney General – Law Office Management Review (Dublin, 1996); Report of the Review Group on the Law Offices of the State (Dublin, June 1997); Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994. (Dublin, 1995); Edwards, *The Attorney General, Politics and the Public Interest* (London, 1984); Edwards, *The Law Offices of the Crown* (London, 1964).

[258] *Report on House of Commons' Officers and Fees* (1833) at p. 163.

[259] *History of PCO,* available at www.cabinet-office.gov.uk/parliamentary-

Virtually all of the State's expertise in legislative drafting is centralised in the O.P.C.[260] Without exception, all Government Bills are drafted by the Office of the Parliamentary Counsel, or by persons at its behest[261]. In contrast, not all statutory instruments are drafted by the Office. Many Government departments have their own in-house legal advisers. As work pressure increased on the OP.C., the O.P.C. has increasingly absolved itself of the responsibility for drafting all statutory instruments. As a result, it has traditionally been the case that the Department of Health and Children; the Department of Social and Family Affairs; and the Department of Environment, are responsible for drafting their own statutory instruments.[262]

In his 1996 Report, Professor Mayson[263] indicated that the O.P.C. would have to reduce even further its involvement in the production of secondary legislation:

> "Because the PDO [Parliamentary Draftsman's Office] is driven by the ever-increasing demands for legislation placed on it by Government departments, the time may come ... when the work of the PDO must be restricted to drafting Bills and substantive (as opposed to 'standard form') secondary legislation."

However, Professor Mayson[264] went on to highlight the concerns which seem to have been expressed by drafters to the effect that in-house departmental drafting could have a negative effect on the quality of legislation. This seems

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counsel/1999/pco_history.htm

260 The benefits of centralised drafting as opposed to smaller satellite offices is examined later.

261 For example, external contract drafters are engaged from time to time when the Office is operating at full capacity. For example, the initial draft of the Interpretation Bill 2000 was drafted by Peter Johnson Q.C. Chief Legislative Counsel and head of the Legislation Branch of the Federal Department of Justice, Canada.

262 Except Government Orders relating to these Departments, which are always drafted by the O.P.C..

263 Mayson, *Office of the Attorney General: Law Office Management Review* (May, 1996) at para. 5.2.2.

264 *ibid.*, at para. 5.2.4.

to raise the question as to whether the O.P.C. should seek to deepen its involvement in the drafting of secondary legislation, rather than stepping back in the manner that it has done.

As perhaps a way of meeting each side's concerns at a halfway point, Professor Mayson went so far as to suggest that the Statute Law Reform and Consolidation Office be re-established and that it be required to:

> "work with departments to introduce departmental training where departments assume or retain responsibility for the drafting of their own subordinate legislation, with the objective of maintaining the quality of the State's legislation and (so far as possible) of removing or avoiding stylistic differences within and between departments."[265]

In view of the fact that a number of Departments continue to draft and finalise their own secondary legislation without any degree of supervision, the failure to implement this recommendation is regrettable. However, if the O.P.C. are to deepen their involvement in secondary legislation, then the need for such a measure would be obviated.

One advantage of the centralised model to which the O.P.C. adheres is that it is conducive to consistency. Leaving aside all of the ills of our primary legislation, one thing that can be said about its style and form is that it is consistent. However, in the present circumstances where some statutory instruments are drafted within the O.P.C. and some drafted outside it, this can sometimes result in secondary legislation which is defective or weak.[266] The role of the O.P.C. as it specifically relates to secondary legislation is discussed in greater detail in Chapter 10.

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[265] *ibid., at* para. 7.7.2.

[266] For example, the debacle which resulted from the Government's attempts to ban the use by drivers of mobile phones through a statutory instrument which turned out to be unworkable. This is discussed in detail in Chapter 10.

The O.P.C. has never reviewed or prepared private members Bills. Members of the opposition and "back-benchers" must draft their own legislation or seek assistance elsewhere.

Efforts to Extend the Scope of the O.P.C.

The limited scope of the O.P.C. has attracted criticism and in some instances has led to calls for the services of the Office to be made more widely available. This first came in the early stages of the O.P.C.'s lifetime in the form of a somewhat unusual Motion before the Seanad in 1928.[267] The Motion[268], moved by Senator Johnson, effectively called for the services of a draftsman to be made available to the Seanad. He sought to ground his proposal in the opening line of Article 39 of the Constitution[269] which provided that a Bill may be initiated in the Seanad. Senator Johnson went on to say:

> "It is, therefore, desirable, in the interests of efficiency, that any legislation that is proposed in the Seanad should be as carefully modelled and drafted as possible."

He envisaged that members of the Seanad would present their heads of a Bill in a Motion, and if the motion were to be passed, then that member should be entitled to the assistance of a dedicated parliamentary draftsman. In seconding the Motion, Senator Dr Gogarty said that his attempts to initiate legislation in the Seanad had failed on the basis that the parliamentary

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[267] 11 *Seanad Debates* Col. 204 – 236 (20 December 1928).

[268] The Motion was: "That in the opinion of the Seanad the services of a skilled parliamentary draftsman should be available for the assistance of the Seanad in drafting Bills, and that accordingly the Seanad requests and recommends to the Executive Council that provision shall be made for this service when preparing the Estimates for the year 1929-1930.".

[269] The relevant extract of Article 39 of the Free State Constitution read: "A Bill may be initiated in Seanad Eireann ...". A similar provision appears at article 20.2 of Bunreacht na hÉireann. In the course of the Motion, there were several complaints that the amount of legislation initiated in the Seanad was negligible. Today, a substantial portion of our legislation is initiated in the Seanad by the Government purely as a means of speeding up the legislative process. In contrast, those proposing the Motion clearly envisaged a situation whereby the Seanad could – as a functioning component of the legislature - propose, draft and initiate legislation completely independent of the Dáil.

draftsman did not have sufficient time for them.[270] However, in opposing the Motion, Senator Milroy explained:

> "The point is this: it is true that the Seanad has the right to initiate legislation. That is there, but the fact that that is there is no reason, so far as I can see, why this body should deliberately embark upon a policy of wholesale manufacturing of legislation which will almost preclude it from discharging what is its real function, namely, that of reviewing and revising the legislation submitted to it by the Ministry financially responsible for the expenditure that the legislation involves. We have the right to initiate legislation, but legislation of major importance involves so much technical work that it is really useless to pass a motion involving practically the operation of the machinery which the Ministry in power for the time being require for the conduct of their business, and it is useless and futile for private members to attempt to sponsor legislation that can be termed legislation of major importance. That is the function of the Ministry."[271]

Further calls for the expansion of the role of Parliamentary Draftsmen were made some years later by Senator Lenihan in 1975 in the course of the Committee and Report Stage debate on the Law Reform Commission Bill, where he suggested:

> "The administration of the draftsmen's office should be linked in with this work so that along with the actual memorandum or proposal the commission or the Attorney General may recommend a specific drafting proposal in the form of legislation."[272]

The Attorney General was quite favourable towards such a suggestion and

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270 11 *Seanad Debates* Col. 209 (20 December 1928).
271 11 *Seanad Debates* Col. 214 (20 December 1928).
272 80 *Seanad Debates* Col. 259 (10 April 1975).

recognised the important role which Parliamentary Draftsmen would have to play in this context:

> "I agree very much with Senator Lenihan. Senators who have looked at the reports of the Law Reform Commission in England and the Scottish Law Reform Commission will see that invariably they have appended a draft Bill. Work which Senator Robinson referred to and other reports on the work of the Law Reform Commission and, indeed, personal information given to me by the Law Commission would indicate that one of the secrets of the success of the English Law Reform Commission have been the fact that a Bill has been annexed to its report. Parliamentary draftsmen are scarce and this is a field which requires considerable expertise. I would hope that the expert assistance in the Parliamentary Draftsman's Office attached to the Attorney General's Office and in the Office of Statute Law Reform and Consolidation will be available to the Law Reform Commission."[273]

It is not insignificant that the Attorney General expressed a "hope", rather than giving an undertaking, that a drafter would be made available to the Law Reform Commission. Little has changed since that exchange in 1975, as the Law Reform Commission has continued in existence without the services of a drafter. Despite this, where they advocate legislative changes, reports of the Law Reform Commission invariably contain a draft Bill or series of draft miscellaneous amendments to give effect to their proposed changes.

Regrettably, Governments have been consistently poor in giving effect to Reports of the Law Reform Commission. The practice of the Commission to include Bills in some of its Reports should, if anything, have increased the likelihood of their proposals being taken on board. However there is no evidence of change in the Government's attitude towards the Commission's

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273 *ibid.,*

proposals The appointment or secondment of a legislative drafter to the Law Reform Commission would, at the very least, greatly increase the pressure on the Government to take the Reports of the Commission more seriously.

Despite the strident and well argued calls for the assistance of the O.P.C. to be made available to opposition and backbench members of the Oireachtas, Governments have consistently rejected this plea. It is the practice in many jurisdictions that legislative drafting offices do provide some level of assistance to members wishing to bring forward their own bill.

The monopolistic position which the O.P.C. occupies has attracted criticism. In the Dáil, Deputy John Bruton, clearly angered at the O.P.C. stated:

> "Does the Taoiseach think it might now be appropriate to ask if the emperor has any clothes? It appears to be accepted that the method of drafting legislation derives from the occult and is known only to the select initiates in the Attorney General's office who must go through the seven stages of preparation before they are allowed to draft legislation. Has it occurred to the Taoisach that this may be a worldwide form of restrictive practice which benefits those engaged in it? ...
> Will the Taoiseach undertake a study of what differentiates the drafting skills of Parliamentary draftsmen from the drafting skills possessed by others which makes them special and requires that those who possess them have a monopoly in the drafting of all Government legislation apart from Revenue?"[274]

The State's expertise in legislative drafting has been accumulated in the form of the O.P.C., a centralised model of a drafting office, and despite the merits or otherwise of sharing this resource, governments have been determined to resist any attempts to make this resource more broadly available. Calls for a

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[274] 57 *Dáil Debates* Col. 57 (19 May 1999).

move away from the present centralised form of the O.P.C. towards a series of de-centralised or satellite offices have also been rejected by the Government.

At present in Canada there are a number of satellite drafting offices – whereby a small number of drafters are assigned to a particular department to draft their legislation on-site.

The location of drafters in Government Departments would greatly facilitate specialisation by drafters and would allow them to gain a deeper understanding of their sector. The establishment of satellite offices within Government Departments would also enable drafters to make a greater contribution to the development of policies which are likely to be effected through legislation.

In the budget of 2003, the Government announced an extensive decentralisation plan. Under the plan, 10,300 civil servants across all Government departments and offices are to be decentralised to 53 different locations outside of Dublin.[275] This seemed to be an apt opportunity for the Government to consider the creation of a number of smaller satellite drafting offices, or alternatively, the distribution of drafters throughout the decentralised Departments. When the Taoiseach was asked about this matter, he responded that "[i]t would not be efficient to have them dispersed among Departments. Parliamentary Counsel work in close co-operation with Advisory Counsel in the Office of the Attorney General in preparation of legislation."[276].

This response seems to be less than convincing. Given the lack of depth in the response, it perhaps reasonable to conclude that the dissolution and decentralisation of the Office of the Parliamentary Counsel has not yet been

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275 Article by O'Sullivan on Decentralisation in February 2004 edition of *Link Magazine*.

276 In response to a question tabled in the Dáil by Deputy Jim O'Keeffe TD, 27 January 2004.

given any serious consideration.

Structure of the O.P.C.

Group System

The O.P.C. currently functions under a group system. Currently there are three groups of Parliamentary Counsel within the O.P.C.. Each group is headed up by a Parliamentary Counsel with each group comprised of about six drafters.

Under the group system, responsibility for the legislation emanating from particular Departments (usually about 5 Departments) is conferred upon each group. When a Department sends a request for the drafting of a Bill to the Attorney General, it is then formally sent to the Chief Parliamentary Counsel. Once received in the O.P.C., the drafting file automatically becomes the responsibility of the group head responsible for that particular sponsoring Department. The relevant group head then allocates the task of drafting the Bill to one member of his/her group.

The introduction of the group system has greatly improved the distribution of work throughout the O.P.C.. On the other hand, the group system has engendered some degree of specialisation which can be lauded or criticised. Prior to the introduction of the group system, the allocation of files was less structured. Once a request to draft a Bill was received by the Attorney General, it was forwarded to the Parliamentary Draftsman. He then allocated a Draftsman to the Bill, depending on the complexity of the Bill and the workload of the drafter.

There are some shortcomings in the group system adopted by the O.P.C. The group system has in reality only served to limit the number of

Departments from which any one drafter can receive instructions. Despite the existence of the "Group System" which operates within the O.P.C., drafters tend to operate as independent practitioners. The group structure which is used at the Dublin office represents little more than an outer appearance of a team structure as drafters within a group, for the most part, still function as sole practitioners – a drafter takes on a Bill and completes it on his or her own.

This is in stark contrast to the U.K., or even Canadian position where teamwork is viewed as being as essential part of the drafting process. In Canada, each file is assigned to two drafters – a Francophone and an Anglophone. One of them will be designated as the lead drafter. They will be accompanied by two instructing officials, one for each language. A rather extreme example of this teamwork in Canada arose where a team comprising 18 drafters were assigned to draft anti-terrorism legislation following the events of 11 September 2001.

In contrast, in Ireland it is most unusual for the work on a Bill to be shared. However, there is at least one isolated example where an element of teamwork is deployed - in drafting the annual Finance Bill. It seems that due to its size, some aspects of the Finance Bill have in the past been worked on by more than one drafter and that some aspects of it are drafted by the Revenue Commissioners; some aspects by the Department of Finance.

The speed with which the annual Finance Bill is drafted can be contrasted with the length of time it takes for any other Bill to be drafted. This matter was raised in the Dáil by Deputy John Bruton who pointed out to the Taoiseach:

> "The Finance Bill — the most complex piece of legislation brought before the House — can be drafted within two months, while in the case of ordinary legislation it takes a minimum of two years from

inception to delivery."[277].

This itself is testament to the effectiveness and good sense of having some Bills drafted by teams rather than by individuals. It is recognised that because of the inter-locking nature of its provisions, some Bills may not lend themselves to being subdivided in the way that is necessary for sharing the task of drafting. However, despite the tangible benefits and effectiveness of drafting the Finance Bill in a team environment, this success has so far not heralded the implementation of a culture or practice of teamwork within the O.P.C.

In addition to principally serving to limit the number of Departments from which a drafter may receive instructions, the operation of a group system within the O.P.C. has meant that drafters are not exposed to different types of work across the broad spectrum of Departments. The obvious difficulties to which this gives rise – such as lack of varied work - are compounded by the fact that drafters rarely, if ever, move from one group to another.

This lack of movement inevitably leads to a degree of specialisation which may not be desirable in what should be a dynamic drafting environment. This is in contrast to drafting offices in other jurisdictions. For example, in the UK Parliamentary Counsel's Office, the view is that "... any one of the Counsel is expected to be able to deal with a Bill on any subject."[278]. Similarly, in Canada, specialisation does not incur and is in fact discouraged. A drafter may be assigned a Bill on any topic and is expected to draft it with relative ease. A general wide breadth of knowledge is encouraged. This policy derives from the recognition that drafters should be familiar with the general structure of the statute book as a whole – not just a specific aspect of it.

In contrast, in Ireland, a level of specialisation is fostered. Under the group

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277 430 *Dáil Debates* Cols. 1006 – 1007 (11 May 1993).

278 www.cabinet-office.gov.uk/parliamentary-counsel/1999/what_is_pco.htm

system, a drafter will only ever be asked to draft a Bill for one of four or five Departments for which his or her group is responsible. A natural development with this kind of system is that drafters within that group become accustomed to dealing with specific topics and they also become attuned to dealing with instructing officials from particular departments – thus deepening the level of specialisation even further.

Chief Parliamentary Counsel

The head of the Office of the Parliamentary Counsel is the Chief Parliamentary Counsel. This position was formerly known as the Parliamentary Draftsman.[279] The Chief Parliamentary Counsel is appointed by Government for a 7 year term. While the role of the Chief Parliamentary Counsel should primarily be one of monitoring and setting standards, and managing the Office, past office holders were heavily engaged in drafting legislation.

The post of Chief Parliamentary Counsel remained vacant from 1987 to 1995 – some 9 years.[280] During this period, the Parliamentary Draftsman's Office was effectively headed by the Senior Legal Assistant.[281] The absence of a Chief Parliamentary Counsel during that period took its toll on the drafters. This fact was alluded to by Mayson in his 1996 Report[282] where he spoke of a "loss of self-esteem" within the O.P.C. arising from the prolonged absence of a Chief, and he spoke of the need for its "pride to be restored". As a consequence, the failure, for nine years, to fill the vacuum at the apex of the Office undoubtedly had a negative and lasting effect on the statute book.

Even if not formally entrusted with such a role, it was incumbent on the Chief

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279 This change was effected in September, 2000 at the same time as the Office change of name.

280 Mayson, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.2.7.

281 This person was the head of the Office of the Attorney General. The equivalent position is now entitled Director General.

282 Mayson, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.2.8.

Parliamentary Counsel to strive towards achieving a more accessible and orderly statute book.

Accountability of O.P.C.

In the context of the Civil Service, no other person is so accountable for the work of his or her office as the Chief Parliamentary Counsel. The Chief Parliamentary Counsel must report weekly to the Government Chief Whip on the progress of Bills being drafted in his or her Office. The introduction of a computer tracking system has enabled the Chief Parliamentary Counsel to check the status of any Bill. So it can be said that at a macro-level, in terms of its output, the Office is highly accountable.

In the course of its enactment, each Bill drafted by the Office will be subjected to detailed consideration by the members of both Houses. Then it will be examined by the President prior to promulgation. Once enacted, most of the Bills drafted in the Office will be subjected to rigorous scrutiny by members of the legal profession. They will be examined closely by those seeking to challenge their validity. And should an Act or a provision of an Act be subject to challenge before the Courts, that piece of legislation will be subjected to meticulous examination by the Courts. So without question, absolute accuracy and quality on the part of the drafters is paramount.

Despite that, the degree of monitoring or quality checking of individual drafters' work before it leaves the O.P.C. is virtually zero.[283] With an eye to accountability and quality, in his 1996 Report on the Office of the Attorney General[284], Professor Mayson recommended as follows:

> "In assigning new work, the Parliamentary Draftsman should consider allocating Bills and substantial statutory instruments to more than one draftsman ..."

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283 This is especially true of the work of more senior drafters.

284 *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 7.2.3.

This, Professor Mayson said, would provide the opportunity for review by a second draftsman. Effect was never given to this recommendation. However, the implementation of a recommendation such as this would have led to an increase in both the quality and consistency of legislation.

There are no formal targets for drafters to meet in terms of output. And as a consequence, no system for the measurement of the workload or productivity has ever been implemented. This apparent lack of accountability at a micro-level has however given rise to some comment. In a Report produced by BearingPoint consultants[285], they noted that no records or statistics are available to management on the legislative drafting process. They went on to observe:

> "There is no process currently in place to manage the quality of drafts prepared by the OPC. Each PC manages his/her own work outputs and delivers these directly to the sponsoring Department. In our meetings with Departments and the Bills Office, both have commented on the variability of outputs from the OPC."

Perhaps one of the reasons why the work of drafters is to some extent difficult to measure was hinted at by the Taoiseach in response to Deputy Ruairi Quinn:

> "The time taken to prepare a Bill in the office of the parliamentary draftsman depends on a number of interrelated factors. These include the length, nature and complexity of the proposal in question, the urgency accorded to the proposal in the Government's legislative programme, the instructions given by the sponsoring Department and the extent to which Departments are in a position to respond to queries

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[285] *The Office of the Attorney General E-Legislation Requirements* (Dublin, 2003) at p. 23.

or issues arising during the drafting and the existing workload of the office."[286]

At a time when legislation is becoming increasingly complex and the pressures to produce it in a shorter period of time increase, it is startling that the work of individual drafters is not subject to any peer review or any form of cross-checking before it is sent to the Departments for publication. If the O.P.C. were to fully operate in a team type environment, as many other drafting offices do, the review and checking of final drafts would form a key part of that regime and no piece of legislation would leave the Office without having been scrutinised by at least one other drafter. This in turn would lead to some improvements and consistency in legislation – the building blocks of the statute book.

Instructions v Heads/Drafts[287]

The way in which legislative drafters receive their instructions to draft, can and does impact on the ultimate quality and shape of the legislation which is produced. In a seminal Memorandum from the Office of the Parliamentary Counsel to the Treasury to the fledgling O.P.C., the writers set out the procedures which they applied when receiving instructions from Departments. In the Memorandum[288], the writer explained:

"The instructions for the preparation of every Bill were to be in writing and sent by the heads of the Departments to the Parliamentary Counsel through the Treasury to which latter Department he was to be considered responsible ..."

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[286] 491 *Dáil Debates* Col. 768 – 769 (27 May 1998).

[287] See generally, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 44.

[288] Memorandum (1923) from the Parliamentary Counsel to the Treasury to the Irish Government, entitled: "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

This Memorandum goes on to say that the formal instructions to draft may be accompanied by "more specific instructions from the Minister or Department ... in the form of either a short note, or of a reference to the Report of a Commission or Committee, or of papers showing the circumstances which appear to render legislation expedient."[289].

Instructions to drafters at that time were presented in a far more raw state. In contrast to today's position, they appear to have required the drafter to carry out far more preparatory work than is expected of them today. Under today's system, on receiving full instructions the drafter may commence the drafting process immediately. In contrast, as expressed in a Memorandum in 1923[290], having received full instructions, the drafter might find it necessary to prepare a memorandum "stating the existing law, tracing the history of previous legislative enactments or proposals, or raising the preliminary questions of principle which have to be settled."[291]. This aspect of the drafter's work is something which Thring deals with in his book.[292]

The normal practice at that time was that the first draft of the Bill would "take the form of a rough 'sketch' or of 'Heads of a Bill'. The original draft, whether in the form of a Bill or otherwise, is gradually elaborated after repeated conferences with the Minister and with those whom he takes into his confidence."[293].

In the past, the responsibility for consulting other Departments on the Heads of a Bill rested with the instructing Department. However - in contrast to

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289 *ibid.*,
290 *ibid.*,
291 *ibid.*,
292 Thring, *Practical Legislation* (London, 1902) at p. 29.
293 Memorandum (1923) from the Parliamentary Counsel to the Treasury to the Irish Government, entitled: "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

today's position – the drafter often had to carry out this administrative task[294]. The role of the parliamentary draftsman was summarised in 1928 by Deputy Blythe, the Minister for Finance, where he said:

> "We send down instructions to the parliamentary draftsman for the ordinary Bill that is introduced by the Government into the Dáil. These instructions are detailed. They are set out in the form of draft sections and, as Senator Milroy stated, what the parliamentary draftsman has to do is simply to alter the language and, perhaps, add certain provisos but he has nothing to do with the substance of the Bill. Sometimes, even as it is, the parliamentary draftsman complains that the Departments want him to do their work. They send down instructions with gaps in them and it happens that the draftsman has either to seek for conferences with the representatives of the Departments or send his instructions back to be completed."[295]

It is clear from the Diary entries of Arthur Matheson that he often received oral instructions to draft a Bill. Invariably his instructions to draft came directly from the Attorney General and not from instructing officials within the Departments.[296]

However as the Office has evolved and the complexity of legislation increased, the form of instructions has to a large extent been settled and the procedures formalised. There are three principal ways in which a drafter can receive instructions: 1. Raw instructions to draft a Bill; 2. The heads of a Bill; 3. A draft of a Bill.

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294 *ibid.* This aspect of a parliamentary draftsman's work was alluded to by Senator Milroy in 1928, where he said: "That preparatory work has then to be submitted to the draftsman, who has to engage in conference with each department and institute inquiries for the purpose of elucidating what is before him before he can get down to the real work of giving the proposals practical and definite shape." 11 *Seanad Debates* Col. 212 (20 December 1928).

295 11 *Seanad Debates* Col. 216 (20 December 1928).

296 Though there are entries in his diaries which suggest that, on occasion, he met with instructing officials to tease out aspects of the more complex Bills. Available in the National Archives, 2001/49/68 – 2001/49/88.

It is very rare for a drafter to receive raw instructions to draft a Bill. It could however happen in relation to a very simple issue or in relation to emergency legislation, whereby the drafter is instructed to draft legislation to remedy a particular problem, or address a specific loophole. Instructions of this kind would have been the norm for Matheson and others when the Office was in its infancy.

The second form of instructions which a drafter can receive are what are known as the heads of a Bill. The term "heads of a Bill" is one which is often wrongly used. Strictly speaking, the heads of a Bill briefly identifies the type of provisions which are required to give effect to the policy which has been agreed. It is, in effect, the outline of a Bill. It directs the drafter to draft a section to do x or y. Traditionally, "heads" are a collection of sentences indicating the policy aspect to be provided for in each section. For example, some of the heads of a criminal justice legislation might read as follows:

> "Head 27
> Provide for an offence of being drunk in a public place.
>
> Head 28
> Penalty provision. €3,000 or six months in prison for a summary offence.".

The heads of a Bill are prepared by Departmental officials who, with an in-depth knowledge of existing legislation, are able to accurately identify the shape that the new legislation should take.

The third form which instructions to drafters can take is through a draft of the Bill itself.[297] This is the most common format of instructions received by the

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[297] The draft Intoxicating Liquor Bill 2005, a codifying Bill which was published as part of a

O.P.C.. However, the O.P.C. insist on referring to instructions in this form as being the "heads of a Bill". In terms of substantive drafting, there is relatively little work to be carried out by the drafter as most of the thinking has been done before the draft lands on the drafter's desk. Though instructions in this form have become the practice in Ireland, Thornton strenuously objects to this practice:

> "A draft Bill prepared by a non-drafter confuses the role of the instructor and the drafter and is almost certain to raise difficulties of construction and to mislead. It does not tell the drafter what the problem is and how it is to be remedied, but tells the drafter how the author thinks an unstated problem can be remedied. Instructions in this form will slow things down rather than speed them up because the drafter will have to penetrate behind the words of the draft to gain the necessary knowledge of the relevant facts and to divine the intent. Time should not be wasted on discussion and argument on what a non-drafter's draft means."[298].

In Canada, instructions to draft in the form of a Bill are not acceptable. Instructing officers must adhere to the Cabinet Directions on the preparation of legislation. The result is that the instructions to draft effectively take the form of a shopping list – setting out the type of features which the instructing officer would like the Bill to contain. According to Bergeron[299], the first draft is not a real draft, but usually takes the form of a series of questions from the drafter to the instructing officer. Only after satisfactory replies have been received should the drafter embark on the actual task of drafting the Bill. In justifying this approach, Bergeron points out that if a first draft is prepared while some questions remain outstanding, those issues will invariably be

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consultation process, is a good example of the high standard which instructions in the form of a draft bill can take.

[298] Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 130.

[299] At a presentation to the Office of the Parliamentary Counsel to the Government, Dublin on 4 December, 2002.

overlooked and will later emerge as lacunae or errors in the Act.

Because of the incomplete state of instructions in the form of the heads of a Bill, the contribution of the drafter to the legislative process is best served by instructing the drafter through the use of the heads of a Bill rather than a draft of the Bill. Instructions in this form will enable the O.P.C. and individual drafters to ensure that the legislation produced is to the highest standard that it can be.

O.P.C. Human Resource Issues

Staff Levels

The number of drafters in the O.P.C. has grown steadily over the years, particularly in the aftermath of the "Fr. Brendan Smyth Affair", a controversy which put the political spotlight firmly on the Office of the Attorney General.[300] This controversy led to a number of consultants being engaged to conduct reviews of procedures and resourcing of the O.P.C..

In 1988, there were four Parliamentary Draftsmen. However, this rose considerably in the years following the "Fr. Brendan Smyth Affair" to a situation where in 2005, where there are approximately 18 drafters, some of whom are engaged on contract.

Historically, the O.P.C. has experienced difficulty in recruiting new members of staff. This is not a recent phenomenon. The Office encountered difficulties in recruiting suitable staff even as far back as 1957, where it was decided not to fill the post of Assistant Parliamentary Draftsman as no suitable candidate could be found.[301] Such was the concern with making vacant posts seem as

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300 For a full account of these interesting events, see: Casey, *The Irish Law Officers* (Dublin, 1996).

301 Letter from Office of the Attorney General to Department of An Taoiseach, dated 19 June 1957 (National Archives, 2002/8/522).

attractive as possible, the then Attorney General became personally involved in re-wording the job advertisement.

More recently, an open competition in 1989 to fill the post of Director of the Statute Law Reform and Consolidation Office proved unsuccessful, as did then attempts to recruit an Assistant Parliamentary Draftsman.[302] In responding to criticisms from members of the opposition for the slow output of legislation, the Taoiseach alluded to the scarcity of fully trained drafters available for work being a common problem for many jurisdictions:

> "Deputy Quinn will be aware of the long-term problem, the shortage of parliamentary draftspeople across the world and particularly in this country. Even when they are trained they move on so it is a continuing problem."[303]

In giving evidence before the UK Select Committee on Public Business in 1931, Sir William Graham-Harrison, Parliamentary Counsel unequivocally expressed the difficulties he faced in recruiting drafters:

> "I should like to say that nothing is more difficult in the world than to get people to come into my office. It is highly specialised and unpopular."[304]

When pressed for the reason for this, in equally blunt terms, he responded, "Because it is slavery." He went on to explain the lengths to which he had to go to attract staff:

> "One talks to one's friends down at the Temple and Lincoln's Inn and sees if they have anyone at all likely .... I have had enormous difficulty

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302 *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994.* (Dublin, 1995) at p. 25.

303 491 *Dáil Debates* Col. 769 (27 May 1998).

304 (1931 HC 161) at 171.

in getting anybody who is competent. I have very good staff now, but it was very difficult to get them and I could not get them at all until I told the Treasury that I must have more money to pay them ... I have two men from quite large practices. I do not think they like it very much now they have come."[305]

A Report commissioned by the Taoiseach in 1994[306] recommended that in order to widen the recruitment pool, consideration be given to extending eligibility for drafter vacancies to solicitors – who were deemed ineligible. In making this recommendation, the Report noted that drafter vacancies in the UK have been open to solicitors "for some time past". This recommendation was accepted when, in 1995, recruitment to the O.P.C. was open to both barristers and solicitors. Prior to the acceptance of this recommendation, drafters are reported to have felt that it was "relatively difficult to recruit" into the O.P.C.[307]

Given the difficulty in recruiting and retaining drafters, as a short-term measure, the O.P.C. began to engage experienced drafters from within and beyond this jurisdiction. Drafters with this level of experience and expertise were well capable of taking on a heavy workload and were adept at complex Bills. As little had been done to remedy the recruitment difficulties, the O.P.C. continued to be heavily reliant on contract drafters until its recruitment drive in 2001.

Contract Drafters

It seems that contract drafters have played a key role in the functioning of the Office of the Parliamentary Counsel since its birth. During 1923, Arthur

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305 *ibid.*, at 171 – 172.

306 *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994.* (Dublin, 1995) at p. 25.

307 Mayson, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.2.1.

Matheson was joined by J. Creed Meredith K.C. who drafted some Bills.[308] In July of 1937, the then Parliamentary Draftsman was joined by Gerald F. McCarthy, who was initially engaged on a fee basis.[309]

Assistance of this kind was envisaged even as far back as 1869 when, on its establishment, the Parliamentary Counsel in the U.K., Henry Thring was provided with a "Treasury Allowance ... for such outside legal assistance as he might require..."[310].

The question of alleviating the pressure on the O.P.C. in the early 1990's through the use of additional contract drafters was raised by Deputy Harney, in the context of legislation being delayed:

> "Would the Taoiseach accept that all the expertise in this area does not rest in the parliamentary draftsman's office? Would he consider in certain circumstances contracting-out the drafting of Bills? Is the Taoiseach aware that already in this Dáil more new Bills have been drafted by Deputy Shatter and Deputy McDowell than by the parliamentary draftsman's office?"[311]

In response, the Taoiseach stated:

> "With regard to the contracting-out of the drafting of Bills, we have looked at that possibility but the skills are not readily available. If the Deputy has names which she wants to pass on for consideration I will be only too glad to have them."[312]

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308 Letter from Arthur Matheson to Hugh Kennedy dated 28 April 1923. (UCD Archives P.4-638).

309 Letter from Department of Finance to Department of An Taoiseach, dated 9 July 1957 (National Archives, 2002/8/522).

310 Memorandum from the Parliamentary Counsel to the Treasury to the Irish Government (1923), entitled - "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

311 430 *Dáil Debates* Cols. 1007 & 1008 (11 May 1993).

312 *ibid.*, .

A Report commissioned by the Taoiseach in 1994[313] recognised a shortage in the number of drafters engaged at the Office. To redress this, it recommended the immediate recruitment of drafters. However, in the light of the 5 year training period, it suggested that consideration might be given to the possibility of some drafting being contracted to lawyers outside the jurisdiction.

In the mid 1990's, there appears to have been a feeling amongst some drafters that there was a danger in the Office becoming over-reliant on the services of supernumeraries. In reporting on this aspect of staffing, Professor Mayson[314] noted:

> "... there is a widespread feeling in the PDO [O.P.C.] that relying on the availability of supernumeraries makes the Office vulnerable and that permanent staff should be found and trained in order to secure its future viability and effectiveness."

In 2002, the O.P.C. had three supernumeraries engaged. These were drafters of the highest calibre and experience who often took responsibility for very complex legislation. The vulnerability and consequences of over-reliance upon the services of supernumeraries, as alluded to by Professor Mayson some years previously, came to pass in 2003, when two of the supernumeraries decided to fully retire, but subsequently reversed their decisions and remained on.

Recruitment Criteria

There are basic skills which any drafter must have – logic, foresight, imagination, sound knowledge of the law, a sound knowledge of the

313 *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994.* (Dublin, 1995) at p. 25.

314 Mayson, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.2.1.

legislative process etc etc. In Ilbert's view, the rules of good drafting are identical to the rules applicable to a literary composition where particular precision is required. Accordingly, he contended that "any one who is competent to draw in apt and precise terms a conveyance, a commercial contract, or a pleading, is competent to draw an Act of Parliament."[315].

However, in addition to these requirements, Ireland has gone down a particular road in its pursuit of finding what it believes are the kind of characteristics that make a person an ideal drafter. When one looks at the difficulties encountered in recruiting drafters throughout the O.P.C.'s history and up to the present day, there is one consistent factor - the "essential requirements" which any prospective candidate must meet - which would seem to have materially affected the Office's ability to attract new recruits.

In order to be eligible for appointment as a drafter in Ireland, a person must be a qualified barrister or solicitor with at least 4 years post-qualification experience. While it is acknowledged that the candidates for any job must fulfil certain criteria, it is argued that the criteria applied by the O.P.C. down through the years have been consistently narrow-focussed, and particularly in the early days – somewhat misguided.

In a seminal Memorandum[316] from the Parliamentary Counsel to the Treasury, sent to the Irish Government in 1923 advising on the establishment of an Irish drafting office, the writer advised the qualifications which drafters should be required to possess. These qualifications included: a knowledge of the law; practical experience in draftsmanship, and freedom from political attachment.

However, despite this sound and well-measured guidance, the first Parliamentary Draftsman, Arthur Matheson was of the belief that

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315 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 238.

316 Memorandum from the Parliamentary Counsel to the Treasury to the Irish Government (1923), entitled - "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

conveyancers would make the best kind of drafters. In 1923, Matheson expressed a desire for the appointment of an assistant Parliamentary draftsman who should be "an experienced conveyancer of not less than 12 years standing at the Bar"[317].

Until recent years, applications were restricted to barristers only. However, two factors brought about a change to this. First, the O.P.C. found it more difficult to recruit suitable barristers, and secondly, pressure from the Law Society led the O.P.C. to broaden the pool from which it could choose suitable candidates, and so applications are now accepted from solicitors also.

While experience in the practice of the law is desirable and perhaps beneficial, it can be argued that a requirement for several years practice is unjustified. Drafting is a skill which has to be learned from the beginning. No amount of experience as a practising barrister or solicitor will adequately equip a person to draft without any specialised legislative drafting training.

In England, prospective drafters are only expected to have qualified as a solicitor or as a barrister with one year's experience. It is desirable, but not essential for candidates to have two years' post qualifying experience, but relevant postgraduate academic experience is acceptable.

In Canada, in order to be eligible for recruitment, a drafter need only be a practising lawyer of one year's standing, and must also be bi-lingual. In Australia, there is only a requirement that candidates have been admitted "as a legal practitioner of the High Court or the Supreme Court of an Australian State or Territory.".

The essential requirements demanded of drafters recruited to the O.P.C. have changed over the years, from Matheson's time when conveyancers were

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317 Letter from Arthur Matheson to Hugh Kennedy dated 14 September 1923 (UCD Archives P.4-640).

preferred, to today where barristers and solicitors are given equal consideration. However, one factor which has not evolved or altered over time is the 4 years post-qualification experience requirement. This is despite the fact that a requirement of this nature is not imposed in any other common law jurisdiction.

Training Period

A further difficulty which has inhibited the O.P.C. and which has not been fully addressed is the relatively long training period for a drafter. There are very few courses in the world for training drafters. Consequenly, in Ireland, drafters learn by an informal apprenticeship method, sometimes referred to as "sitting with Nellie".

There is a general acceptance, (at least amongst legislative drafters in Ireland), that it takes many years to fully train a legislative drafter:

> "It is said by former parliamentary draftsmen that it takes between 5 and 10 years for a draftsman to achieve full competence using the present method of training."[318]

While there is a great willingness on the part of drafters to quote this long training period, and tried as I have to ascertain its real origin, no-one is able to attribute this assertion to a particular author. It seems to have been a myth which, in the usual way, when repeated often enough, gained some currency amongst a small number of people. More worryingly perhaps is the fact that this 5 to 10 year period is repeated in various Reports commissioned on the O.P.C..[319]

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[318] Donelan, "Role of the Parliamentary Draftsman in the Preparation of Legislation in Ireland" (1992) 14 DULJ 1 at 4.

[319] A period of "in excess of 5 years" was referred to in a Report commissioned by the Taoiseach in 1994, entitled, *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994* (Dublin, 1995) at p. 25. A period of "between five and ten years" was referred to in the Report entitled, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.1.1.

Taoisigh have shown themselves to be sceptical of this 5 to 10 year training period. When Taoiseach Reynolds was asked how long it took to train a drafter, he was unaware of the exact length of time but advanced the view that "it is a skill which takes sometime to develop".[320] More recently, Taoiseach Ahern expressed the view that "It takes about three years to train a parliamentary draftsman to a useful level."[321].

In a letter to Hugh Kennedy in which he outlined his justification for the granting of additional resources to his Office, Arthur Matheson[322] alluded to the unique nature of drafting:

> "Even if an assistant is appointed immediately, it will be 2 or 3 months, before he is of any real assistance to me as parliamentary drafting is such very specialist work that even an experienced conveyancer takes some time to learn it."

It is salient to point out that Matheson was a man who did not have the luxury of legislative drafting training. Similarly, the foremost drafter of modern times – Lord Henry Thring - gained his expertise in legislative drafting by drafting private member's Bills for the opposition.[323]

While in times gone by, the "sitting with Nellie" approach to training may have sufficed, in modern times a more comprehensive approach is required. With the increasing complexity of legislation, the increasing rate at which legislation is produced, and also the litigious nature of society, training in legislative drafting is an important requirement.

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320 430 *Dáil Debates* Col. 1007 (11 May 1993).

321 491 *Dáil Debates* Col. 769 (27 May 1998).

322 Letter from Arthur Matheson to Hugh Kennedy dated 14 September 1923 (UCD Archives P.4-640).

323 His first such Bill was the Colonial Bill which he drafted in 1850. See, Thring, *Practical Legislation* (London, 1902) at p. 4.

Structured Training

While measures to meet the O.P.C.'s training requirements should have been formalised and put in place many years ago, the matter only came to the fore in 1996 when in his Office of the Attorney General – Law Office Management Review[324], Professor Mayson recommended that the Statute Law Reform and Consolidation Office be re-established and that it be required to "develop a plan for the continuing training and development of the existing and new draftsmen"[325]. When the Statute Law Reform and Consolidation was effectively re-established in 1999 and named the Statute Law Revision Unit, no such function was conferred upon it. Consequently, the O.P.C.'s approach to training has continued on in much the same vein as it had since the Office's establishment in 1923.

As in so many other aspects of legislative drafting, in training legislative drafters Ireland is out of step with what is happening in many other jurisdictions. In Canada, a formal training program is in place. However, the traditional method of assigning a new recruit to a senior drafter is still very much a key part of the training process. This is also the case in other jurisdictions. In Slovenia for example, newly recruited drafters undergo a relatively short (12 month), but intensive period of training. As part of this period of training, recruits are assigned to a mentor – in the same way as an apprenticeship. The training ends with a number of exams.

The most advanced system of training legislative drafters is, without doubt, that which currently operates in Poland.[326] In 1975, the Polish Minister for Education established the Post-graduate School for Legislative Issues as part of the University of Warsaw. The School only accepts persons who are working with legislation and they undergo 270 hours of instruction in

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324 (Dublin, 1996).

325 Para. 7.2.2.

326 Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa, 1999) at p. 303.

legislative drafting through lectures and seminars. Uniquely, the School's curriculum is maintained by three members of the most important legislative services: the Chancellery of the Prime Minister; the Chancellery of the President; the Chancellery of the Sejm, as well as members of the University. Bergeron sees the strength in this system of training, not in the fact that it is university led, but rather in the fact that "it is linked with the real world"[327] and is not just run by academics.

While the development of a formal training process for drafters in Ireland has been in the pipeline for many years, a formal, structured apprenticeship type training programme has yet to emerge. The question as to the existence of a structured training program for legislative drafters was raised by Deputy Prionsias De Rossa in the Dáil in 1993.[328] In reply, Taoiseach Albert Reynolds had this to say:

> "People need to be trained in the necessary skills and the Attorney General is considering the best way to approach this issue. A lack of necessary skills was one of the reasons the backlog built-up in the parliamentary draftsman's office over a period."[329]

The indications are that, more recently, a training plan has been devised in the O.P.C.. In response to a parliamentary question in 2004, Taoiseach Ahern stated:

> "It has always been recognised that it takes a considerable period of time to train new Parliamentary Counsel but in recent years the period has been much reduced. To further aid the process, the Office put in place in December 2002, a Training Plan which is being implemented

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327 At a presentation to the Office of the Parliamentary Counsel to the Government, Dublin on 4 December, 2002.

328 430 *Dáil Debates* Col. 1006 (11 May 1993).

329 *ibid.*,

in respect of the five drafters recruited since August 2002."[330]

He went on to outline some aspects of the programme:

> "The plan is quite comprehensive covering Competencies, Training Topics, Guidelines for On-the-job training, Checklist for reviewing Drafts, Induction Checklist, Relationship between Advisory Counsel and Parliamentary Counsel on Drafting Files, Training Log and Online Legislative Drafting Resources."[331]

This plan falls far short of putting in place a formal apprenticeship type programme as has been introduced in other countries. It seems too that in the training, there is still a heavy reliance on the sitting with Nellie approach.

There is a line of thinking which would call into question the logic of introducing formalised structured training for lawyers newly recruited to the Office of the Parliamentary Counsel on the basis that at present, all new recruits must be qualified lawyers with at least four years experience. However, this view is somewhat misguided. Professional practice as a lawyer cannot and should not be equated with an appropriate degree of skill and knowledge attaching to the intricacies of the statute book. In their professional life, some lawyers would have minimal contact with the statute book. To assume that the recruitment of experienced lawyers negates the need for formalised training in legislative drafting and the peculiarities of the statute book is ill-advised.

Potential for Establishing a Course in Ireland

If links with universities were to be established by the O.P.C., this could ultimately lead to the development of a full-time course on legislative drafting which could be open to law students or drafters around the globe. As the

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330 578 *Dáil Debates*, Parliamentary Question No. 214, 27 January 2004.

331 578 *Dáil Debates*, Parliamentary Question, No. 215, 27 January 2004.

Polish experience has shown, this has already proven fruitful for legislative drafting offices in other jurisdictions. The Italians established the Institute for Documentation and Legislative Studies over thirty years ago.[332] This non-profit making organisation was established by a group of senior parliamentary officials with the support of parliamentarians. It runs formal training in legislative drafting and confers a Diploma on its participants.

In the world as a whole, there are currently only a small handful[333] of courses available for a person wishing to train as a legislative drafter. The inaccessibility of these courses to Parliamentary Counsel in Dublin has given rise to a situation whereby the training of drafters in Dublin has continued in the traditional on-the-job approach. There are a number of disadvantages inherent in this approach. First, the training period for a drafter undergoing this is lengthy. Secondly, the Office has little control over the quality and consistency of training as the trainee can only ever be as good at drafting as the trainer. Thirdly, as the sitting with Nellie approach is highly practical, it can leave a drafter without having a full understanding of theoretical basis of what he or she is doing.

Ireland's location, coupled with the standing of its universities, represents as good a location as any for the establishment of such courses. In what could perhaps be a small step towards this, great opportunities could be availed of if the Office of the Parliamentary Counsel in Dublin were to forge ties with any one of the universities in the country. Each of them offers a level of academic expertise which could help to address the constant pressures of training and output which the O.P.C. experiences. Aside from improving the quality of training, the establishment of some course on legislative drafting would allow practitioners at the Bar to attend the course and thus enabling them to incorporate legislative drafting into their work at the Bar.

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332 Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa, 1999) at p. 291.

333 For example, Canada and Barbados are two principal locations.

The prospect of the O.P.C. forging links with universities was first raised in a Report commissioned by the Taoiseach in 1994[334]. If the O.P.C. were to establish links with a university, this would be beneficial to the Office in two principal ways. Firstly, by conferring the O.P.C. with the ability to attract the top graduates, this would, in turn, alleviate the perpetual recruitment problems at the O.P.C.; and secondly, it would enable the O.P.C. to jointly run a formal, structured training programme.

Efforts to Improve Legislative Drafting

Drafting Manuals

One step which can greatly enhance the welfare of the statute book is the development of a drafting manual. In Thornton's view, every drafting office, regardless of its size, should have a drafting manual.[335] However, the O.P.C. has operated for almost 80 years without a formal drafting manual. This is in spite of the fact that, for many years, calls had been made for the publication of such a guide. In discussing the breadth of the role that the Law Reform Commission might have, in the course of the debate on the Law Reform Commission Bill, Senator Ryan expressed a hope that the Commission might:

> "... introduce some precedent or rule in regard to the way in which drafting of Bills should be approached. As far as draftsmen are concerned styles have varied very much in the past. It is important that some rules should be laid down."[336]

Over the years, various Chief Parliamentary Counsel would have issued directions and instructions to drafters, but these were never collated into one manual. However, in 2002, a legislative drafting manual prepared by the

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334 *Review of the Office of the Attorney General as announced by the Taoiseach on 15 November 1994.* (Dublin, 1995) at p. 25.

335 Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 128.

336 80 *Seanad Debates* Col. 217 (10 April 1975).

Chief Parliamentary Counsel was circulated within the Office of the Parliamentary Counsel for use by Parliamentary Counsel.[337] The Manual deals with the structure of legislation, the standard features of an Act, and the use of language. Many of the Law Reform Commission recommendations contained in its Report entitled *Statutory Drafting and Interpretation: Plain Language and the Law*[338] dealing with legislative drafting, particularly those dealing with style, have also been addressed by it.

A further manual received a limited release in 2003. According to the Taoiseach, copies of the new manual entitled "Statutory Instruments: Drafting Checklist and Guidelines" were "issued to Government Departments and Offices in March 2003."[339]. Despite the significance of the development of such manuals, neither of the Drafting Manuals have been formally published. In response to a parliamentary question on this matter, the Taoiseach stated that "[t]hese documents were not published as they were prepared for officials involved in drafting Statutory Instruments and for Parliamentary Counsel and are subject to review.".[340]

It is to be regretted that the Drafting Manuals have not been made available publicly. Many people with an interest in legislation – from lawyers to the layperson – would benefit from having access to these manuals. At the very least, their availability would be conducive to a greater understanding of what is presently, turgid legislation.

Boilerplate Provisions[341]

It is not unusual for Acts drafted in the same period to employ different styles, and use different phrases to express the same meaning. This is due in part to

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337 *Annual Report 2001: Office of the Attorney General,* at para. 6.18.

338 LRC61-2000.

339 578 *Dáil Debates* Col. 371 (27 July 2004).

340 *ibid.,.*

341 See generally, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at p. 69.

the relative freedom with which legislative drafters work. Though two legislative drafting manuals have been produced by the Office of the Parliamentary Counsel, there is no system of reviewing drafters' work and no requirement to conform to a particular style. In recent years, this problem has been exacerbated through the absence of any standard precedents of commonly used legislative provisions.

The need to develop a set of standard/boilerplate provisions was first raised many years ago. A Select Committee of the House of Commons on the improvement of legislation, in 1875 strongly advocated the development of a set of model clauses. The Committee saw this as being a real factor which would contribute to the improvement of legislation. In Ireland, there have been calls for the development of standard provisions both indirectly through the criticism of the inconsistencies of legislation and also, more directly, by members of the Oireachtas. In the course of the Second Stage debate on the Irish Takeover Panel Bill 1996, Senator Feargal Quinn drew attention to a matter which, because of its recurrent nature, could best be addressed by some form of boilerplate provision:

> "Could we not send a signal to the parliamentary draughtsman that, from here on, whenever an annual report is mentioned or the word appears there must be, as a matter of routine, a time limit on its presentation? The principle, I am glad to say, has now been fully accepted but we should not have to repeatedly fight for it. For the first few years, I tabled an amendment on this to every Bill which came to this House and I am delighted to see that it has been recently included in Bills."[342]

Thornton saw the development of a set of boilerplate provisions as being of equal importance to the development of a drafting manual: "In addition to a

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[342] 149 *Seanad Debates* Col. 1702 (6 February 1997).

style manual, every drafting office needs a system for noting useful precedents and other helpful material."[343].

In Canada, boilerplate provisions have been developed by a Committee which was established for that purpose. These were initially developed by the Committee who then delivered each boilerplate provision to the chief drafter who then circulated it. After a short period of consultation the boilerplate provision was then officially approved by the chief drafter who released it in the form of a "Note to Drafters".

In Ireland, the O.P.C. have sought to develop their own set of boilerplate provisions.[344] However, the Canadian approach towards developing boilerplates has been sacrificed in an attempt to reach a consensus through the involvement of all drafters in the process. This has meant that it has not been possible to secure agreement on any one boilerplate provision.

The eventual agreement on a set of standard provisions in the O.P.C. should lead to greater consistency in future legislation. The availability of a series of boilerplate provisions in conjunction with both of the drafting manuals will, in the long term, lead to considerable improvements in the quality of legislation. The boilerplate provisions and the manuals also represent a forum through which any significant future changes to the way in which legislation is shaped can be implemented and recorded.

Monitoring the Courts Interpretation of Legislation

Irish courts are frequently asked to adjudicate on the meaning which ought to be attached to obscure or ill expressed legislation. The decisions of the Courts on a daily basis will involve the interpretation of legislation and, to a lesser degree, the criticism or striking down of legislation. Even though it involves a direct adjudication of the Office's work, many of these decisions or

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343 Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 128.

344 *Annual Report 2001: Office of the Attorney General,* at para. 6.7.

criticisms pass by without the O.P.C. noticing.

Despite the fact that the Office of the Attorney General has engaged a knowledge management expert[345] to file legal advice precedents and abstract court judgments, no specific watch is kept of decisions which in particular deal with rights or wrongs of legislation. The O.P.C. could learn from errors or weaknesses in legislation which are highlighted by the Courts, so as to ensure that they are not repeated. However, aside from occasions where legislation is struck down, in the O.P.C. little note is taken of the Court's view of legislation.

In his Office of the Attorney General – Law Office Management Review[346], Professor Mayson recommended that the Statute Law Reform and Consolidation Office be re-established and that it be required to:

> "to review decisions of the courts which directly or indirectly affect issues of statutory interpretation, the structure of legislation, the legislative process, and other related issues"

This recommendation – like the fate which befell so many others – was never implemented. In practice, this meant that decisions on statutory interpretation and the structure of legislation were being delivered by the Courts, without any formalised facility to monitor these decisions and their importance in the context of legislative drafting. As a consequence, legislative drafting issues which may have been raised before the courts in relation to one piece of legislation may well have been avoidably repeated in a subsequent piece of legislation.

In the course of the Second Stage debate on the Law Reform Commission Bill

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[345] A Know-How Officer was recruited in 2000 to abstract all decisions of the superior courts. The Know-how Officer did not have any special responsibility for monitoring the judicial interpretation of legislation.

[346] (Dublin, 1996) at para. 7.2.2.

1975 in the Seanad, Senator Mary Robinson seems to have envisaged that the Law Reform Commission would play this very important role:

> "The complexity of modern life and the complexity of legislation, together with the necessity to monitor judge-made law in order to ensure that defects or anomalies do not go undetected, require the establishment of a permanent commission with sufficient staff, with a central role, and with a very direct relationship with the Attorney General ..."[347].

It seems that even today, the O.P.C. do not have a person at their disposal who is dedicated to the unique tasks detailed by Professor Mayson. This was confirmed recently when, in response to a parliamentary question, the Taoiseach proffered a standard type reply:

> "The Office, in conjunction with the Office of the Chief State Solicitor, has put in place a knowledge Management Strategy, an element of which ensures that Parliamentary Counsel are informed on a range of issues which include European Union Law, European Convention on Human Rights, International Law and decisions of the Supreme Court in respect of statutory interpretation and the constitutionality of legislation."[348]

Another related recommendation by Professor Mayson was also ignored. Again it recommended that the re-established Statute Law Reform and Consolidation Office be given the responsibility to:

> "receive and consider from departments (including the AGO [Attorney General's Office], CSSO [Chief state Solicitor's Office], and DPPO [Director of Public Prosecution's Office], as users of legislation) issues

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347 80 *Seanad Debates* Col. 228 (10 April 1975).
348 578 *Dáil Debates* Col. 371 (27 January 2004).

of legislative interpretation, perceived inconsistencies or difficulties in implementation, and any other matters connected with the effective development and use of legislation"[349]

This recommendation was quite innovative as it envisaged a 360-degree type assessment. It represented a real opportunity to ascertain the views of some of the key users of legislation. Their views, if ascertained and evaluated, could have given rise to important changes to the aesthetic, linguistic and physical accessibility of the statute book. Unfortunately, the failure to implement this particular recommendation represented a lost opportunity for the welfare of the statute book.

Issues to be Confronted on the Future of Legislative Drafting in Ireland

Outsourcing Bills

Outsourcing legislative drafting work is inherently beneficial, particularly where the Bill deals with a specialised topic or where the Bill would benefit from the contribution of a number of persons with particular skill or expertise. The idea of contracting out legislative drafting is by no means new. For example, in the UK, the Statute of Distributions is believed to have been drafted by "a distinguished citizen" named Sir Leoline Jenkins, and the Fines and Recoveries Act is said to have been drafted by a famous conveyancer named Mr Christie.[350]

During his time as Parliamentary Counsel, Thring drafted all of the important Bills. However, even he on occasion had recourse to engaging barristers in private practice to draft bills. In England, certainly in the past, surplus drafting work was outsourced to Parliamentary Agents[351].

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349 *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) para. 7.2.2.

350 See, Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 80.

351 See generally, Rydz, *The Parliamentary Agents: A History* (London, 1979).

Increasingly, Government Departments are outsourcing or seeking the assistance of large law firms in the preparation of the heads of Bills. A recent example of this is the State Airports Act 2004, the heads of which were prepared by the Department of Transport in conjunction with Matheson Ormsby Prentice, a large firm of solicitors in Dublin. In recent times, large law firms have worked on many other Bills, particularly on Bills in the financial services area. The involvement of specialists in the drafting process is something which the Renton Report[352] encouraged.

However, not all Bills lend themselves to outsourcing. It seems that the Office of the Parliamentary Counsel in Dublin would be far more likely to outsource the drafting of a large or complex Bill which has been scheduled, rather than an emergency Bill which arises at short notice. By its very nature, an urgent Bill will require the expertise of a highly skilled drafter who is familiar not only with the law in the area, but intimately familiar with the statute book itself.

One disadvantage with outsourcing is that it can give rise to inconsistencies in style and language. Each new Bill must slot into the existing framework of laws – the statute book. In order to seamlessly achieve this, not only must the drafter have a great knowledge of existing legislation, but he or she must be familiar with the terminology, style and arrangement of legislation. The number of practising lawyers with this degree of knowledge are indeed few. This was true of a relatively recent experience of the Parliamentary Counsels Office in London, when in 1995, they contracted out the drafting of some aspects of that year's Finance Bill to Freshfields, an international firm of solicitors. However, according to a Government advisor[353], using the private sector in this instance was not a complete success – "Use of the private sector didn't work because all legislation, particularly tax legislation, is so complex and full of cross references that it is very difficult unless you have

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352 *The Preparation of Legislation* (1975) (Cmnd. 6053) at para. 8.17.

353 Edward Troup, Special Advisor to the British Chancellor of the Exchequer.

lived and breathed it."[354]. According to the Taoiseach, the same may be said of the O.P.C.'s experience of private sector drafting. Having spoken with the O.P.C. and the Attorney General, he conveyed their view:

> "They are not in favour of Bills being drafted by outside parties, a view I support. Their position is that whenever drafting is attempted within Departments or by outside agencies, the quality of the drafting is not of much use to them and is not satisfactory."

Referring directly to what he had been told by the O.P.C., the Taoiseach went on:

> "... the quality of the work done by those outside is not up to a penny. I know there are people outside who will argue that it would say that, but in fairness to the people in the office of the Parliamentary Counsel, many of whom are beyond retirement age and many of whom have expertise both in this country and outside it, they do a specialist job. They do not believe we can give the work out."[355]

Whatever about that, a more real difficulty associated with outsourcing to practising lawyers is the high costs associated with the fees.[356] However, any disadvantages associated with outsourcing can be redressed by an adequate system of support and qualitative assessment and determination to achieve value for money.

In the interests of the statute book, where it is felt that the drafting of a Bill or any other legislative measure must be outsourced, the Attorney General should, as a minimum requirement, ensure that a legislative drafter has overall control of the matter, rather than it being purely a matter for the

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354 *Financial Times,* 4 January 2000.

355 593 *Dáil Debates* Col. 4 (23 November 2004).

356 Having a version of the Central Bank Bill drafted by the private sector is said to have cost €1.5million. 593 *Dáil Debates* Col. 2 (23 November 2004).

instructing Department.

Outsourcing Statutory Instruments

In contrast with the reluctance to outsource the legislative drafting of primary legislation, the outsourcing of the drafting of secondary legislation which transposes EU Directives is commonplace.

As at 1 January 2003, Ireland had failed to transpose 98 outstanding EU Directives.[357] With the advance of Ireland assuming the Presidency of the European Union on 1 January 2004, it was noted that Ireland had been lagging behind in its transposition of EU Directives. The Taoiseach, Bertie Ahern became concerned at the high number of European Directives which Ireland had failed to transpose within the prescribed time limit. At that stage, approximately 60 or 70 Directives had yet to be implemented. The Taoiseach wrote to all Government Departments urging them to transpose as many outstanding Directives as possible before the end of 2003.

Such was the degree of urgency concerning this, the Taoiseach sanctioned the engagement of barristers in private practice to carry out this work. This set a precedent for the future outsourcing of the work of the Office. The Attorney General then drew up a list of counsel whom he recommended should be used by Departments for this purpose. A number of barristers were subsequently engaged by each of the Government Departments concerned and it seems that the initiative was hugely successful.

The outsourcing of legislative drafting on such a large scale is unprecedented. The scale of the initiative was seized upon by members of the opposition. In response, the Taoiseach assured them that "The engagement of outside counsel did not arise from any failure in the service provided by the Office but rather by a desire to enable Departments to tackle within a short period of

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[357] *Irish Times*, 29 July 2003.

time a backlog of EU measures which awaited transposition."[358]

This unprecedented level of outsourcing has undoubtedly set a precedent for systematic outsourcing of the O.P.C.'s work – and possibly has paved the way for outright privatisation of legislative drafting.

Privatisation

The question of privatisation of legislative drafting services is one which arises frequently in many jurisdictions. However it is rarely raised on its own merits. Invariably it is raised by parliamentarians who are disgruntled at the pace of the Government's legislative programme.

Delays in presenting a Bill to parliament are often attributed to the parliamentary counsel. When asked of the whereabouts of a long-awaited Bill, Ministers are all too willing to respond by saying that the Bill is "with parliamentary counsel". Though this may be so, it does little to explain the real reason for the delay. A Bill may be "delayed" in the Office of the Parliamentary Counsel for any number of reasons. It may be that a legal issue has arisen in relation to a proposal contained in the Bill, or it may be that the policy aspects of the Bill require further thought, or the "delay" might be attributable to the fact that parliamentary counsel were only instructed shortly before the Minister rose to his or her feet.

Laying the blame for delays which are of a truly political origin at the door of the Office of the Parliamentary Counsel provides a convenient cover for politicians. And this practice is not new. When questioned in 1927 on the whereabouts of proposed legislation to raise the age of consent, the then Minister for Justice, Deputy O'Higgins subtly attributed his Department's inaction to the parliamentary draftsman:

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[358] 578 *Dáil Debates* Col. 372 (27 January 2004).

"It is not so much a question really of Parliamentary time as of the Parliamentary draftsman's time."[359]

In recent years, it has become increasingly common for politicians, both members of government and those of the opposition, to blame the O.P.C. for delays in the introduction of legislation. For example, in 1993, a series of exchanges took place between a number of Dáil Deputies. In response to the Taosieach's assertion that staffing levels within the Office were adequate, the following exchange ensued:

"Mr. M. McDowell: Can one take it that if there is an adequate supply of parliamentary draftsmen any delays in legislation do not originate in the parliamentary draftsman's office but rather are political and administrative delays, for which there is direct political responsibility?

The Taoiseach: No, the Deputy cannot draw that conclusion from what I said.

...

Mr. Rabbitte: If the staff available to the parliamentary draftsman is adequate, how does the Taoiseach explain the furore in the other House when we pirated legislation in order to keep the business of this House going? If it was not the fault of the parliamentary draftsman, can the Taoiseach tell the House whose fault it was?

...

Mr. J. Bruton: Can we take it that delays in the parliamentary draftsman's office are not an excuse for delays in the introduction of legislation here? ...

The Taoiseach: The Deputy cannot take from what I said that any delays in future will be of a political nature. As I have already explained

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[359] 18 *Dáil Debates* Col. 9 (25 January 1927).

to Deputy McDowell, some Bills are straightforward while in the case of others some very complicated constitutional issues can arise."[360]

The criticisms of the O.P.C. or the attribution of blame for the delays in legislation have not yet given rise to any serious debate in Ireland on the benefits or otherwise which might accrue from the privatisation of legislative drafting services.

Criticisms are also frequently leveled at the Parliamentary Counsel's Office in Britain. A Financial Times article[361] highlighted the postponement of the Utilities Bill which had been initiated in 1999. It also alluded to the fact that the Financial Services and Markets Bill had been subject to delays because of the sheer volume of amendments which had to be drafted. It was these delays which rejuvenated the idea of contracting out legislative drafting to the private sector.

In an Editorial[362] on this question, Duncan Berry, a legislative drafter of international repute, expressed his opposition to any proposals to contract out legislative drafting. He points to concerns expressed by Chris Jenkins[363] to the effect that contracting out legislative drafting services to the private sector significantly increases the cost for Government. He goes on to say that by fragmenting legislative drafting services, "a Government would at a stroke not only lose the collective expertise of its legislative drafting office but the advantages that accrue from having legislation expressed in a uniform style and a coherent statute book.".

Up until the end of the 18th Century, most Bills were drafted by lawyers engaged in private practice, while many were drafted by judges and also

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360 430 *Dáil Debates* Col. 1005 – 1007 (11 May 1993).

361 *Financial Times,* 4 January 2000.

362 *The Loophole* Journal published by the Commonwealth Association of Legislative Counsel in June 2000. See www.opc.gov.au/calc/docs/CALC

363 A former First Parliamentary Counsel of England.

members of parliament. In his Editorial, Duncan Berry rightly asks, albeit somewhat rhetorically: "Surely privatising legislative drafting services would be taking us back to the era before the first Office of the Parliamentary Counsel was established by Lord Thring in 1869. Is it really in the public interest to return to the state of affairs that existed then?" It seems that yes, it would mean a return to a pre-1869 era. Is this necessarily an undesirable thing? In Berry's view, yes it would be a bad thing – he points to "concomitant delays that resulted from a lack of co-ordination", inconsistencies in style and variations in quality.

Whatever the merits of either side of this argument, it is a debate which needs to take place. However, we should not rely on our legislative drafters to propagate a debate as important and sensitive to their own interests as this.

Concluding Remarks

It is not sufficient to point to weaknesses in the statute book and criticise its disorder without also looking at all of the factors or ingredients which contribute to the making of the statute book. The Office of the Parliamentary Counsel is one ingredient, one constituent part which contributes to the statute book.

The purpose of this Chapter has been to show that the O.P.C. has had, and will have, a significant role in influencing the structure and format of legislation and ultimately, the statute book itself. This Chapter has also shows that given the level of involvement of the O.P.C. in shaping legislation of today and the statute book of the future, there is much scope for reform.

There are a number of aspects of the O.P.C.'s work which lead to particular concerns. The unjustifiably restrictive recruitment criteria coupled with the lengthy five year training period means that the O.P.C. is not is a position to

compete with top tier law firms for the high calibre graduates. Ultimately the statute book and the reader are at a loss as a result of this.

The late, but welcome, arrival of two drafting manuals should at least ensure some degree of consistency in terms of the current drafting approach. However, the manuals will not, and nor are they intended to, introduce any significant reforms of how Irish legislation is drafted. They do however represent a vehicle which could guide more significant and major reforms.

Where there is undue pressure on drafters, an increased utilisation of outsourcing is a good, short-term alternative to further recruitment. However, a greater degree of outsourcing is only sustainable if it is matched by a greater degree of supervision and co-ordination of the outsourcing.

These and many other aspects of the modus operandi – from the acceptance of heads of Bills instead of instructions; the dearth of accountability; to the lack of formal training – serve to perpetuate the outdated and unhelpful approach towards legislative drafting and poor management of the statute book, which over many years has given rise to a statute book which is in a state of disorder.

The O.P.C. is, and has been, amongst the few players who have shaped the Irish Statute Book since 1922. While the Office should have played a far more innovative role as regards the shaping and publication of the statute book, the Office is not alone in bearing some responsibility for the present, inaccessible state of the statute book.

Chapter 6

Role of the Drafter

Introduction

Having just examined the role of the O.P.C., this Chapter sets out to look more closely at the role of the people who comprise the O.P.C. – its legislative drafters[364]. Drafters are often described in peculiar terms, however the mystique which surrounds their role perhaps disguises the real nature of their task.

The essence of the drafter's role is that they give legislative effect to the policies of the instructing Department. However, there is a lot more to the task than just this. In other jurisdictions drafters have a role in the policy making process, whereas in Ireland their role in this regard is minimal and in any event, not formally recognised.

The drafter is expected to bring a disparate set of characteristics to his or her

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[364] On the role of the drafter and the task of drafting, see generally, Thring, *Practical Legislation* (London, 1902); Thornton, *Legislative Drafting* (4th ed., London, 1996); Allen, *Law in the Making* (7th ed., Oxford, 1964); Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, 2001); Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa, 1999); Brody, et. al., *Legal Drafting* (Boston, 1994); Butt & Castle, *Modern Legal Drafting* (Cambridge, 2001); Crabbe, *Legislative Drafting* (London, 1993); Dale, *Legislative Drafting: A New Approach* (London, 1977); Dickerson, *The Fundamentals of Legal Drafting* (2nd ed., Boston, 1986); Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (2nd ed., Ottawa, 1976); Driedger, *Construction of Statutes* (Toronto, 1974); Driedger, *A Manual of Instructions for Legislative and Legal Writing* (Ottawa, 1982); Driedger (Sullivan ed.,), *On the Construction of Statutes* (3rd ed., Toronto, 1994); Ilbert, *Legislative Methods and Forms* (Oxford, 1901); Kelly, Essays on Legislative Drafting (Adelaide, 1988); Piesse, *Elements of Drafting* (7th ed., Melbourne, 1987); Russell, *Legislative Drafting and Forms* (4th ed., London, 1938); Donelan, "The Role of the Parliamentary Draftsman in the Preparation of Legislation in Ireland" [1992] 14 DULJ 1; Engle, "The Rise of the Parliamentary Counsel" a paper delivered at the Statute Law Society Annual Conference, London (1996); Hutton, "Preparation of Acts of Parliament" Law Society Gazette (June, 1967); Mackay, "The Art of Legal Composition" (1887) 3 LQR 326; Mooney, "The Work of the Office of the Parliamentary Counsel to the Government in Ireland" [2001] 22(3) Stat L.R. 163; Mooney, "Effective Drafting Techniques" a paper delivered at Clarity/Statute Law Society Conference, Cambridge 12 – 14 July 2002.

work, not least a vivid imagination. Drafters are increasingly aided in their work by developments in information technology.

Drafters have a major responsibility to get every word right and if for any reason they fail, anyone ranging from the instructing officials, to members of the legislature, to the courts are likely to pick up on any significant oversight. Their work is frequently subjected to criticism by academics, members of the judiciary – and perhaps most surprisingly, drafters are not hesitant to criticise each other.

Some commentators have attributed blame for the state of the statute book directly on the drafters. In Bennion's view, (himself a former drafter): "Statute law today is what parliamentary counsel have made it. Its virtues and defects reflect their own, and their responsibility is correspondingly great.". Not content with one attempt to fix drafters with responsibility, he again reiterated this view:

> "In the long run the most effective bar to reform is the draftsman himself, if he chooses (as he often does) to occupy that role. For some reason the rarefied atmosphere of a drafting office seems to breed (at least in England) defects which militate against reform."[365].

It seems that some Irish commentators also subscribe to this view. Byrne and McCutcheon tentatively suggest:

> "... it might be argued that the assignment of the function of drafting to specialists is itself the source of many of the problems associated with the quality of legislation. In particular, it is said that it has resulted in legislation which is opaque, complex and overly elaborative where

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[365] See, Bennion, "Reforming Statutory Drafting" *Proceedings of the Ninth International Symposium on Comparative Law* (Ottawa, 1971) at pages 5 and 15.

clarity and simplicity would better serve the public."[366]

However, it must be asked whether this proposition stands up to scrutiny.

Sequence of the Drafting Process

Every potential Bill begins life in a Government Department as a policy idea. After a process of discussion, consultation and development, it is shaped into official policy. The policy is then framed within a Memorandum for Government[367] as the general scheme of a Bill for formal submission to Cabinet for a decision to allow the drafting to begin. At that stage, the draft heads of the Bill are sent to the Office of the Parliamentary Counsel.

A drafter is then assigned by the relevant group leader. The drafter then sets about preparing a preliminary draft of the Bill. His or her work at this stage might necessitate seeking the advice of an Advisory Counsel[368] if he or she feels that some constitutional or other legal issues require more in-depth examination. In the early stages of the drafting process, the drafter would usually meet with the Departmental officials involved in order to clarify any concerns which he or she might have.

It is the responsibility of the drafter to ensure that the instructing officials have made clear the precise purpose of the legislation. This will require a deep understanding of the mischief in existing law to be addressed or the policy proposal to be implemented. If the problem in existing legislation is not correctly understood by either the instructing officials or the drafter, then the resulting new legislation may well be defective and will have to be revisited in

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366 Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001) at par.13.65.

367 The formal requirements of a Memorandum for Government, and the protocol regarding its submission are to be found in the Cabinet Handbook (1998) Chapter 3.

368 Preliminary legal issues will usually have been raised or resolved by the Department (often in conjunction with the Advisory Counsel of the Office of the Attorney General) in the policy development stage.

further corrective legislation.

In the course of the drafting process, a number of drafts may well be produced before a final agreed draft is sent to the Department. This final draft is known as a "stamped draft". When a stamped draft Bill leaves the Office of the Parliamentary Counsel, this marks the end of the Bill drafting process. The Bill then begins its journey through the legislative process, during which it will invariably be amended by parliamentarians who know little or nothing about drafting. In Ireland, the role of the drafter invariably continues long after the "stamped draft" leaves the Office of the Parliamentary Counsel. Rather like the responsibility of a parent to a child, aspects of the Bill remain the responsibility of the drafter right up until enactment. Drafters are responsible for drafting amendments and slotting them into the Bill, taking care to ensure that the structure and coherence of the Bill is not greatly upset. Drafting and incorporating these amendments can be a significant task in itself.[369]

The Bill can emerge from the legislative process as a very different (described by some as "bastardised") creature indeed. This was most colourfully expressed by Lord Chalmers[370], who said that a Bill goes to Committee:

> "like a nicely dressed young lady entering a meadow: it comes out like the same young lady after she has been chased by an angry bull [and] has struggled thro[ugh] a thickest hedge".

It is the responsibility of the drafter, all the way through the process, to ensure that the integrity of the Bill is maintained and that the Bill which emerges is reflective of the policy intent of the Department and is enforceable.

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[369] In the course of the Garda Bill's passage through the Dáil, the Minister made 138 amendments to the Bill, each of which had to be drafted and sited, by the drafter. Similarly, in the Immigration Bill 2002, the Minister for Justice brought forward a series of amendments which had the effect of turning a relatively simple 8 section Bill into a 13 section Act.

[370] Quoted by Hugh Kennedy in an undated manuscript note (UCD Archives P.4-950). Lord Chalmers was Assistant Parliamentary Counsel in England from 1889.

Mystique Surrounding the Role

Little is known about the precise role of a legislative drafter. This is not because the role of a drafter has been shrouded in secrecy, but rather because the role of the drafter has attracted little or no interest from those outside the legislative process. By virtue of the nature of their work and also their deep engagement with the detail of legislation, drafters tend to have a very low profile. This appears to be a feature of this occupation in many jurisdictions. The solitary nature of the job was concisely expressed by Christopher Hughes[371] in his book:

> "... the passions of politics and the pageantry of State, the august machinery of justice itself, are all subject to what is written in the lonely back room of the Government draftsman."

On a day-to-day basis, the drafter can reasonably be said to lead a rather monastic life, such that it led one drafter to describe a drafter as a person who is "seldom seen and never heard"[372]. This lack of public exposure has brought about what might be described as an air of mystique about the work of legislative drafters. This has inevitably led to criticisms being levelled at legislative drafters, not only in this jurisdiction but elsewhere as well.

In what could form a retort to such criticisms, it was suggested as early as 1923 that only those close to the process could fully understand the extent of the drafter's contribution[373]:

> "Comparatively few persons, except Ministers and Heads of

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371 Hughes, *The British Statute Book* (London, 1957) at p. 67.

372 Granville Ram, "The Improvement of the Statute Book" (1947-51) 1 JSPTL 452.

373 Memorandum from the Parliamentary Counsel to the Treasury to the Irish Government (1923), entitled - "Memorandum on the Duties of Parliamentary Counsel to the Treasury with Suggestions as to the Discharge of Similar Duties Under the Irish Government" (UCD Archives P.4-981).

> Departments concerned, are fully aware of the nature and extent of the services rendered by the Parliamentary Counsel, but no one who has any experience of the inner working of the present system will be likely to underrate the importance of their duties."

On the other hand, some regard drafters with contempt and might regard drafters as "doing little more than selecting words as if from a shelf and putting them in the right order."[374] However, the field of legislative drafting has been far more appropriately and fairly described as being "esoteric but hugely important".[375]

Despite the passing of time and advances in technology, the role of the drafter today remains largely the same as it was many years ago. As described in 1876, the draftsman's duties principally involved the preparation and adaptation of Government Bills to Ireland. The preparation of amendments and the attendance of Ministers in Parliament were also key aspects of the post.[376]

Exact Role of the Drafter

Thornton sees the role of the drafter of today as being to "convert a developed legislative policy to legislative shape."[377] This is the essence of what the drafter strives to achieve. The task of legislative drafting has been variously spoken of as being an art, others refer to it as being a skill[378], and others – a science.

Regardless of the label which attached to their work, the role of the drafter is

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374 As described by Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 125.

375 *Obituary for Sir Noel Hutton* – First Parliamentary Counsel to England between 1956 and 1968. See www.cabinet-office.gov.uk/parliamentary -counsel/Obits/Hutton.htm

376 Donaldson, "The High Priests of Mystery: A Note on Two Centuries of Parliamentary Draftsmen" in Finnie, Himsworth, Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh, 1991) at p. 106.

377 Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 125.

378 Byrne & McCutcheon, *The Irish Legal System* (4th ed., Dublin, 2001) at para. 13.59.

to draft legislation which, once enacted, will give effect to the principles and policies of a Government Department. In doing so, it may be said that the drafter is under servitude from a number of sources. And it is these constraints which effectively define the role of the drafter. They are as follows: 1. Minister and his/her Department; 2. Houses of the Oireachtas; 3. Constitution; 4. Courts; and 5. Existing legislative framework.

The drafter has not fulfilled his or her task if the Minister and instructing officials are not satisfied with the end result. When completing a draft of a Bill, the drafter will bear in mind the fact that the Bill will have to meet the expectations of the Dáil and the Seanad – as once famously stated by Lord Thring – "Bills are made to pass as razors are made to sell". The drafter will also draft with the boundaries of the Constitution in mind. If a Bill seeks to exceed the constraints of the Constitution, the Bill will meet an unseemly end.

In the past, draft Bills were examined by Advisory Counsel to ensure their constitutional and legal soundness – a worthy and worthwhile task. However, over time, this practice gave rise to some resentment among drafters, and there was an increasing and legitimate feeling that they were well capable of objectively examining a Bill for constitutional and legal soundness by themselves. The apparent dissatisfaction of drafters at this "peer" type review was articulated by Professor Mayson in his 1996 Report[379], where he noted the drafters' preference for drafts to be reviewed by other drafters instead.

The experiences of recent years have clearly shown that the past, habitual review of draft Bills by Advisory Counsel has been both unnecessary and unwarranted. Following the decision to remove the automatic participation of Advisory Counsel from the drafting process, it is now the responsibility of the drafter to ensure that in addition to reflecting the policy requirements of the sponsoring Department, any Bill drafted must be consistent with the

[379] Mayson, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.2.6.

Constitution, it must comply with European law, it must accord with the European Convention on Human Rights, and it must be consistent with existing legal policy.

Invariably when any aspect of an Act becomes contentious, it is only resolved with finality before the Courts. So for the most part, legislation is drafted so as to withstand intense judicial scrutiny. As a consequence, much of our legislation is drafted in a way which the Courts (as opposed to the citizen) can best understand. It is from this servitude to the Courts that our defensive style of drafting is derived. This is probably the single most significant influence on the language of our legislation[380]. The scrutiny which legislation must be able to withstand in the interpretative process means that the language must be formal, precise and at times convoluted. There is a heavy responsibility which rests on the drafter to ensure that in the eyes of the court, the wording of the statute reflects the policy of the legislature at the time of drafting. The importance of getting the task of framing legislation right was stressed by one writer:

> "The words so carefully chosen in the draftsman's office may mould the destiny of the nation and the world. The small issues ultimately may turn out to be the great ones."[381]

Several drafts will sometimes have to be produced before the final version is arrived at. When the drafter goes about the task of encapsulating policy ideas in legislative language, unforeseen legal intricacies will arise. Those new issues will then have to be resolved and a new draft prepared. Finally, although it may be drafted in isolation, as a stand alone project, a Bill, when enacted, is set to become part of the statute book. For this reason, it is important that drafters draft with an eye to the statute book in such a way that the Bill should fit seamlessly into the existing body of law.

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380 The language of legislation is discussed in greater detail in Chapter 8.

381 Hughes, The British Statute Book (London, 1957) at p. 80.

Being a legislative drafter is not just about framing the principles contained in the Departmental instructions; it is much more involved than that. In 1901, Sir Courtenay Ilbert wrote that "If a draftsman is to do his work well, he must be something more than a draftsman."[382]. The drafter of an Bill must not only be happy that he or she has complied with the instructions, drafted with precision, arranged with logic. He or she must be satisfied that what is on paper, once enacted, translates well into reality. This requires that the Act, in giving effect to the Departmental instructions, must be enforceable.

In recent years, the work of the drafter has increased substantially. This increased workload is not necessarily mirrored in the number of Acts enacted in a given year. The number of Acts enacted has not increased significantly, but rather the complexity and length of the Acts has increased. This is due to a number of factors: such as the increasing complexity of society; the expanding role of technology in society; the tendency towards consolidation; the trend towards de-regulation (which somewhat ironically gives rise to further regulation!); and the greater efficiency of the Oirechtas in recent years.

Drafter's Role in Policy Making

When Mr Lowe, the then Chancellor of the Exchequer, established the UK Parliamentary Counsel's Office in 1869, one of his objectives appears to have been to achieve better control over the policy and financial aspects of Government legislation. So clearly he envisaged Parliamentary Counsel exercising some substantive role with regard to policy. However, in Ireland at least, the formal position in this regard is very different.

At present, the principles and policies enshrined within legislation are solely the province of the relevant Minister and his or her Departmental officials. A

382 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 240.

consequence of this is that policy positions are often devised at a remove from the realities which already exist within the existing legislative framework.

Speaking in 1928 the course of the Seanad debate on a motion on the parliamentary draftsman, the words of Senator Milroy accurately state the official role of the drafter in the context of policy making in both 1928 and 2005:

> "A skilled parliamentary draftsman has nothing whatever to do with policy or the suggesting of the provisions of a measure. He has simply to give legal phraseology to the ideas of those responsible for the measure."[383]

As matters stand, a drafter is presented with principles and policies – invariably without any detailed insight into their origin, purpose etc. - which have already been approved by the Government and he or she is directed to frame these principles and policies within a Bill. In the present circumstances, the drafter's task in drafting legislation to give effect to the desired policies can often prove difficult, and in some instances the policy has to be modified or pruned so that it can be enacted to good effect. However, this is not to say that drafters have no influence over matters of policy.

The true extent of influence over policy borne by a drafter is unquantifiable and will remain so until the drafter is formally permitted to fully participate in the wider policy formulation process. In the present circumstances, drafters' influence over policy matters remains informal and unspoken of. However, to fail to recognise the contribution which drafters can and do make to the policy aspects of legislation is to deny a reality.

Some would argue that drafters become involved too late in the legislative

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[383] 11 *Seanad Debates* Col. 213 (20 December 1928).

process, when policy matters are largely settled. This gives rise to a sense of ownership on the part of Departments and a drafter's attempts to suggest any reshaping can sometimes give rise to tensions. Consequently, in some instances this can give rise to a reluctance on the part of drafters to make any useful suggestions to improve the Bill. This is unhelpful for both the process and also the legislation itself. If drafters were permitted to become involved in the legislative process at an earlier stage, it would be conducive to producing a policy which can fit in with the framework and tapestry of the existing legislation that comprises the statute book. At the end of the day, this would result in the Department achieving their aim of good and effective policy.

It is undeniable that if afforded an opportunity to do so, drafters (particularly the more experienced ones) would make a valuable contribution to the development of policy, principally towards the latter stages of policy development, where effectiveness, enforceability and legislative framing are concerned. The drafting process itself is a means by which policy can be tested. This subject was broached by Professor Mayson in his 1996 Report, where he noted the increasing complexity of legislation, and said[384]:

> "There is, therefore, a case to be made for draftsmen to become involved earlier in the legislative process so that their expertise can contribute to policy formulation and legislative planning and thus lead to more effective legislation."

He supports this proposition saying:

> "By involving draftsmen earlier, the drafting of any given piece of legislation will be improved through the draftsman's greater familiarity with its intention, purpose and planning. It also allows more time and opportunity for the draftsman to consider, research and reflect on the

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[384] Mayson, *Office of the Attorney General: Law Office Management Review* (Dublin, 1996) at para. 5.1.2.

subject-matter and structure of a Bill. Further, earlier involvement will give a better idea of the nature and volume of intended legislation, and will thus encourage more effective planning of the use of drafting resources."

At present, drafters have in their care, a statute book that is terminally ill, suffering from grave disorder. The formal and habitual involvement of Parliamentary Counsel in policy formulation would clearly enhance that process and in this way, would add greatly to the quality, strength and effectiveness of the legislation within which that policy is framed.

In the context of a complex or lengthy piece of legislation, it could be very useful if Departmental officials could engage with a drafter at the early, preparatory stages of the heads. As matters stand, the Office of the Parliamentary Counsel can only become involved when a Government decision to draft has been made. This effectively prevents any form of pre-drafting consultation.

In contrast with the practice in Ireland, pre-drafting consultation is part and parcel of legislative drafting in other jurisdictions. For example, in Australia, the Departmental Officials can engage with the legislative drafters for guidance on the preparation of the heads of a bill. As well as ensuring that the quality of the heads are dramatically improved, this level of pre-drafting consultation also ensures that when the heads arrive into the office for drafting, the drafter will already be familiar with the heads and will more importantly be aware of its genesis.

The drafter's involvement in the formulation of policy would, as pointed out by Professor Pratchett[385], afford greater insight for drafters, particularly in their endless quest to match policy intent with legislative meaning:

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[385] Pratchett, *Getting In on the Act: Dilemmas in Training in Legislative Drafting* (2000).

> "New drafters often find difficulty in developing the analytical skills necessary for working out what legal provisions are needed to give effect to the project objectives. This can be remedied to an extent by providing a better understanding of the factors that should go into policy choices, and the methodology by which the various components of a legislative scheme can be effectively aimed at."

While it would be unwise to suggest that drafters should be competent to influence the substantive policy, their presence during the debate would enable them to gain a greater insight into the thinking behind the policy. Their presence would also give them the opportunity to comment on how a policy might be provided for in legislation, and to assess whether what is being proposed is workable in the context of legislation. Thornton concedes that drafters could add something to the development of complex proposals on the grounds that "Involvement and input by an experienced drafter before the policy has been fully developed and accepted are likely to avoid delays during the drafting process."[386] Another advantage of the drafter being involved in the policy making process is that, because of his or her familiarity with what is being proposed, the drafting process should be faster, and less time is likely to be taken up with questions to the Department or with meeting the instructing officials during the actual drafting process.

It is recognised that at present in Ireland, there are a number of obstacles which would prevent the participation of drafters in the policy making process. Time is a fundamental problem. Despite the fact that it would shorten the drafting time, the drafters' involvement at an earlier stage in the process would require each drafter to expend quite a bit more time on a Bill. The present demands on the Office of the Parliamentary Counsel are unlikely to allow for this. Any meaningful involvement of drafters at an early stage in the

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386 Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 126.

process would undoubtedly necessitate the recruitment of a substantial number of additional drafters. However, this obstacle is by no means insurmountable if the requisite political will existed.

Thornton points out that, in the present circumstances, "The drafter may have to work very hard to achieve an accurate and complete understanding of the goals of the sponsors of the proposed legislation."[387]. The converse would clearly be the case if the drafter was involved at an earlier stage in the policy formulation process.

It seems that the interests of the statute book and society in general would be better served by the involvement of Parliamentary Counsel in the formulation of policy which is to be enshrined within legislation. However, suggesting this is not to lose sight of the fact that the principal role of the drafter is to draft legislation, not develop the policy behind it. At the very least, the potential contribution which drafters could make to the policy stage of the legislative process should be objectively evaluated.

LEGISLATIVE DRAFTERS AND JUDGES: LOCKED IN A DUEL OR ENGAGED IN A DIALOGUE

Statute Law and Common Law

Is there any justification for saying that the dynamic between the drafter and the judge is a duel rather than a dialogue? In addressing this question, it is helpful to first consider whether or not statute law is superior to judge made law, or whether they in fact complement each other.

While statutes, having been enacted by the elected representatives of the people, are generally regarded as being superior to judge-made law, the law which is made by judges often results in the creation of binding precedents

387 *ibid.*, at p. 129.

which are complementary to, and it would seem, of equal import and effect, as statute law.

The separation of powers doctrine[388] as contained in our Constitution, forms an important part of our democracy. It is this doctrine which, inter alia, ensures that the legislature does not impinge on the role of the judiciary, and vice versa. It therefore follows that the judiciary are precluded from interfering with the form or content of our laws. It is for this reason that the legislature can not venture beyond interpreting and commenting upon those laws which are presented to it.[389]

In this regard, the Courts may feel that their hands are tied to a large degree, and it is this which perhaps causes them some degree of frustration when they are presented with a piece of legislation which, in their view, is in some way defective[390]. It is this then which can, on occasion, bring the judiciary into conflict with legislative drafters.

However, since the 1960's the Supreme Court has been more actively involved in the developing provisions of the Constitution with the effect that they have been effectively making law. Many areas of law that would normally be developed or regulated by statute were first developed by decisions of the courts.

All of the major constitutional law cases of recent years, such as *Crotty v An Taoiseach*[391], *Magee v Attorney General*[392], *Ryan v Attorney General*[393], and

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[388] See, Gwynn-Morgan, *The Separation of Powers in the Irish Constitution* (Dublin, 1997); Hogan & Whyte, *JM Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 3.2.66 et. Seq. See also, Gwynn-Morgan, "Benchmark" (2003) 97(8) *Law Society Gazette* 14.

[389] That is of course, save for the important power to find an Act to be invalid having regard to the Constitution.

[390] "Defective legislation" can range from legislation which contains drafting errors (examined in Chapter 9) to legislation which contains Henry VIII provisions (examined in Chapter 10), or is in some other way, unconstitutional (see Chapter 7).

[391] [1987] IR 713.

[392] [1973] IR 140.

McKenna v An Taoiseach[394] have all broken new ground.

While legislation and judge-made law stand side-by-side, they each arise from very different circumstances and emanate from very different fora. Statutes are the product of a rational deliberative process and tend not to be focussed on the facts arising from one particular set of circumstances.

In weighing up judge made law as against statute law, Professor Lucke[395] places a considerable degree of significance in the adjudicative role which judges carry out. On basis, he disagrees with any suggestion that statute law is superior to judge made law:

> "Adjudication is the judge's most important function and the responsibility which it casts upon him is a personal and heavy one. Like all human activity, adjudication must become routine to some extent, but it is difficult to see how the sense of occasion which affects every trial, civil or criminal, and to which barristers so readily testify, can ever be completely lost on the judge himself. Law, which grows out of adjudication, stems from a situation of judicial engagement must be intensified by both proximity and the judge's special responsibility. Nothing comparable could exist in the remote atmosphere of ministries of justice, law reform commissions, or even parliaments where statute law is prepared and made. A rule or principle which grows out of live adjudication differs from a legal opinion formed *in abstracto* in much the same way as a live performance differs from a mere rehearsal, real combat from a manoeuvre, the final race from a mere practice run.
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> All this is unmistakably reflected in a fundamental feature of common law jurisprudence: hard, binding law emerges from judgments only to the extent to which the judge's faculties are sharpened and engaged by

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[393] [1965] IR 294.
[394] [1995] 2 IR 1.
[395] Lucke, "The Common-Law: Judicial Impartiality and Judge Made Law" (1982) 98 *LQR* 29 at 62.

his duty to adjudicate a real dispute.".

Perhaps unsurprisingly, Lord Reid[396], coming as he does from the perspective of a judge, advanced in rather facile terms, the belief that judge made law to be superior to statute law:

> "... may I make some comparison between the common law and statute law. I am tempted to take as an analogy the difference between old-fashioned, hand-made, expensive, quality goods and the brash products of modern technology. If you think in months, want an instant solution for your problems and don't mind that it won't wear well, then go for legislation. If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law. But do not seek a middle way by speeding up and streamlining the development of the common law.".

Acts are enacted by the Oireachtas and are presumed to be consistent with the Constitution. Acts are regarded with respect by the courts, though the respect does not prevent them from vigorously scrutinising legislation from a number of points of view.

Justice Harlan Stone argued that there is "no adequate reason for our failure to treat a statute much more than we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning."[397] One would have to take issue with Stone where he asserts that "there is no adequate reason" for our failure in this regard. The reasons why precedents are afforded and thus represent a greater source of the law are entirely rational.

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[396] Lord Reid, "The Judge as Law Maker" *Journal of the Society of Public Teachers of Law* (1972) 12 N.S. 28.

[397] Harlan Stone, "The Common Law in the United States" 50 *Harvard L. Rev.* 4, 11-14 (1937).

It is true to say that in common law jurisdictions, precedents are more highly regarded in so far as they represent a declaration and a source of law, as well as a premise for legal reasoning. This is because of the relative inflexibility of legislation in common law jurisdictions. The rigid terms in which our legislation is drafted means that there is little room for the development of the concepts expressed in it. Neither does our legislation pose much opportunity for expansion of the scope of the matters governed by it.

In contrast, the legislation of civil law jurisdictions is far more malleable and flexible. In this way, it represents a declaration and a source of law, as well as a premise for legal reasoning.

Whereas, a precedent represents the considered views of a judge, who is not constrained by parliamentary protocol and the restrictions which are imposed on information in the form of legislative instruments. Accordingly, in common law jurisdictions, a precedent offers much more scope for a more free form of expression and development of legal thinking.

Hart and Sacks advocated the legal process theory, which supported the view that statutes are an important part of the legal system and they argued in defence of the "legitimacy" of the statute as an objective and not subjective means by which society could be regulated. Hart and Sacks emphasised the central role that procedure plays in assuring judicial and legislative objectivity and hence the legitimacy of law, i.e., that laws are not capricious or arbitrary but the result of a process of reasoning concerned with an objectively determinable result.

Law, according to Hart and Sacks, is a continuous striving to solve the basic problems of social living and that, therefore, statutes have a place of fundamental importance in society. The balance to be achieved in legislation is that statutes are an expression of public policy articulated through a

process which reconciles ideology with an objective process to achieve a just, fair and proper outcome. It is arguable that the legislative process shares some the same characteristics as the judicial process in that both involve a result which flows from a process of deliberation. However, that, it would seem, is where the similarities end.

Dialogue - Core of the Drafter's Task

Lord Thring is often credited with having famously said that "Bills are made to pass as razors are made to sell."[398] However, it is asserted that the passing of a Bill is but just one of the objectives of the drafter or sponsoring Minister. Thring should have also gone on to state in equally vivid terms that it is also the drafter's aim that upon enactment, a Bill will convey to the Courts, the exact meaning which the sponsoring Minister and the legislature intended.

As described by Sir Noel Hutton[399]:

> "The same document has to be designed to satisfy two distinct legislative audiences: first (in point of time) the parliamentary audience, mainly composed of laymen, whose primary need is to ascertain, with the minimum of labour and preferably no reference to any document other than the Bill itself, what is the general purpose and effect of each clause or section itself, what is the general purpose and effect of each clause or section which they are asked to pass; and secondly, the expert lawyers and other professionals who will seek to find in the Act as passed a specific answer to each specific question upon which they have to advise or decide. One customer wants a picture and the other wants a Bradshaw."

It is for the drafter to meet both of these challenges when drafting a Bill[400],

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[398] For the origins of this comment see, Engle "'Bills are made to pass as razors are made to sell': Practical constraints in the preparation of legislation" [1983] Stat. Law Rev. at 7-9.
[399] (1961) 24 *Modern Law Review* 21.

and striving to satisfy the parliamentarian, the layman, and the judge, is an unenviable and, perhaps onerous, task. It is this, which, on occasion, brings the drafter and the judge into conflict with each other.

The drafter's principal task is to ensure that he or she encapsulates the intent of the legislature within the four corners of the legislation which he or she drafts. The ultimate decider of whether or not the drafter succeeds in this task, are the courts. Therefore, the inescapable reality for legislative drafters is that in order to achieve his or her aim, and that of the legislature, he or she must approach the task of drafting as if he or she were engaging in a process of dialogue with the judiciary on precisely what he or she is striving to achieve.

Another aim of the drafter is to ensure that, in so far as possible, that his or her Bill does not give rise to contention to such an extent that it requires the intervention of the courts. And so it follows that, by virtue of the task which he or she has to fulfill, it is the drafters' desire that a duel with the judiciary be avoided.

Judiciary Giving Effect to Intent of Legislature

When the interpretation of a piece of legislation is at the centre of a dispute between parties, the onus is on the judge, in the first instance, to interpret the legislation based on its terms. On occasion, this can give rise to an interpretation which runs counter to the intent of the legislature, however these are very much the exception. There are isolated instances, such as section 5 of the Criminal Justice Act 1999, which the judiciary have set their face against.

However, in the vast majority of cases, the judge's decision is consistent with the intent of the legislature. In Ireland, the legislature rarely have cause to

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[400] There are of course other challenges, such as the need for accuracy and simplicity, the constraints of the Constitution etc., all of which he or she must have in the forefront of their mind when drafting a Bill.

criticize the judiciary for failing to give effect to their intent. Having said that, there are some issues which irritate members of the legislature. The duration of sentences served by criminals is one which frequently comes to the fore, and when it does, it always rejuvenates a healthy degree of tension between the legislature and the judiciary.

This point was recognized by the Minister for Justice:

> "Few aspects of our criminal justice system generate quite as much controversy from time to time as the sentences handed down by our courts. Seemingly similar cases result in greatly differing sentences."[401]

In Ireland, where a criminal is convicted, the judiciary decide on an appropriate penalty, which in some cases is a term of imprisonment. Most terms of imprisonment attract a remission rate of up to 40% for good behaviour etc. This means that in temporal terms, the sentence handed down by the sentencing judge is rarely, if ever, served in full.

On occasions such as that, there are the inevitable assertions by the legislature that criminals are getting an easy ride and this leads to suggestions that the criminal justice system is failing, or more particularly, that the judiciary are failing in their duties. This also gives rise to calls for sentencing guidelines to be issued to the judiciary, or calls for the establishment of more mandatory sentences.

For example, in the Dáil recently, the Taoiseach is on the record as having stated that "A life sentence should mean life".[402] He is reported to have said on the previous day, that sentences imposed for serious crimes were "just too

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[401] Address by Michael McDowell TD Minister for Justice, Equality and Law Reform at the First Edward O'Donnell McDevitt Annual Symposium – "Sentencing in Ireland" on 28 February 2004.
[402] 616 *Dáil Debates* Col. 45 (7 March 2006).

lenient"[403].

However, when it was put to him that he was blaming the judiciary for the leniency of sentences, the Taoiseach was incredibly anxious to refute any suggestion that he was criticizing the judiciary: "I did not make any reference, either yesterday or today, to the judiciary" and he asked that the suggestion that he had engaged in criticism of the judiciary, be withdrawn.[404]

If a piece of legislation is well drafted, as is virtually always the case, the intent of the legislature will be accurately reflected in the terms of the legislation, and it will be reflected in such a way that it is only capable of one interpretation. While it is acknowledged that this is a goal which is sometimes difficult to achieve, it is nevertheless the principal role of the drafter.

It is of course inevitable, particularly in the lower courts, that judges will feel inclined to interpret some laws in a generous way so as to facilitate the facts of a case before him or her. Equally, some judges who are angry about a particular issue, may apply an overly restrictive interpretation to legislation so as to enable them to make their point. However, there is a safeguard in place - the option of appeal to a higher court - which can operate to remedy, and indeed prevent, such departures from the terms of the legislation.

It is possible to identify a series of situations which are likely to give rise to a duel between the judge and the drafter. For example, if the drafter fails to ensure that his or her Bill does not conflict with any existing law, then the fruits of his or her labour are likely to be subjected to the critical eye of the courts. Another example of a situation in which the dynamics of a duel are likely to be brought into being are where the Bill is deficient in some way. Deficiencies often give rise to contention, which invariably has to be resolved by the

[403] *Irish Times,* 7 March 2006.
[404] 616 *Dáil Debates* Cols. 46 - 47 (7 March 2006).

courts[405].

There are some example of cases which clearly show the judiciary interpreting legislation in a way which runs counter to the intent of the legislature.

Section 46 of the Offences Against the Person Act 1961, provides:

> "... nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements or hereditaments, or any interest therein or accruing therefrom."

A literal reading of this provision suggests that a judge of the District Court does not have jurisdiction to hear a case of assault or battery in which involves "any question ... as to the title to any lands" or interest in land. The use of the words "any question" would suggest that the gravity or scope of such a question is irrelevant, the consequence being that if such a question is involved, the Court is denied jurisdiction.

In *Curtis v District Judge Flann Brennan*[406], Moriarty J. saw it differently, wherein he lent a very unusual construction to section 46 of the Offences Against the Person Act 1961, which appears on its face to be a very clear and straightforward legislative provision.

The facts of this case center around a "violent and tempestuous confrontation" between a mother and her son over the ownership of land. Upon the local gardai being involved, both applicants were summonsed in relation to alleged assaults before Ardee District Court.

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[405] Where they have found legislation to contain errors, the Courts have not been slow to criticise drafters. Criticism of this nature has been discussed in Chapter 9.
[406] [1997] 1IR 292.

The applicants contended that the jurisdiction of the District Court was ousted by virtue of s. 46 of the Offences Against the Person Act 1861, in that a question as to title to lands arose in the prosecution. The first respondent held that his jurisdiction was not ousted and that he proposed to hear and determine the prosecution.

The applicant sought to have the District Judge's decision judicially reviewed. In the High Court, counsel for the applicants contended that the plain words of the section clearly applied to the facts of this case, and that having been apprised of all material facts, the first respondent ought to have acceded to the application to oust jurisdiction. Moriarty J. took an opposing view, saying that jurisdiction was not ousted pursuant to s. 46 of the Offences Against the Person Act 1861 and that the second respondent should be at liberty to proceed with the relevant prosecution before the first respondent. He stated:

> "It seems to me that, unless specifically provided to the contrary, a court seeking to determine a criminal matter should assess all relevant constituent factors on the basis of the date of the alleged offence, and that, just as the *actus reus* or *mens rea* of the alleged assault would have to be examined as of the time of the alleged occurrence, so any matter going to jurisdiction must also be assessed as of that time."[407]

Moriarty J. went on to add:

> "it appears to me an inescapable conclusion that for ouster to apply, the alleged question of title to lands must go to the very heart of the matter to such an extent that an adjudication on the criminal summons or charge will fundamentally depend on such question of title."[408]

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[407] *ibid.*, at 296.
[408] *ibid.*, at 297.

The effect of Moriarty J.'s decision in this regard is that, notwithstanding the clear and unambiguous terms in which section 46 of the Act is framed, the trial should proceed with a view to ascertaining the extent to which the dispute itself involves an assault or battery relating to lands. This would seem to run totally counter to the intent of the legislature in this regard.

However, the closing remarks of Moriarty J. do in an unintended revelatory manner, give us some insight into his somewhat unorthodox approach towards the interpretation of what appears to have been a clear and straightforward legislative provision:

> "Although the Oireachtas, in having regard to the existence of s. 46 of the Offences Against the Person Act, 1861, in the context of other recent legislation, implicitly confirmed that it remained part of our adopted statute law, it may well be that, in the context of the enhanced jurisdiction of the District Court and recent dispositions towards a subjective test in assessing certain criminal defences (which would not require a binding finding of title in a summary prosecution), that its star is waning, if not approaching the status of anachronism, but that does not fall to be decided here."[409]

While Moriarty J. accepted that the Oireachtas had left section 46 on the Statute Book, he then went on to purport to justify his rather unusual interpretation of the provision by stating that times had moved on and that the District Court now enjoyed an "enhanced jurisdiction", which he took as an indication that section 46's "star is waning".

The interpretation of section 43(1)(b) of the European Arrest Warrant Act 2003 was the subject of the Courts' attention in *O'Rourke v Governor of*

[409] *Ibid.*, at 298.

Cloverhill Prison[410]. The applicant had been arrested and detained on foot of a number of arrest warrants. In the High Court, the applicant failed in his efforts to challenge the validity of his detention. The issue centred around the correct meaning to be attributed to the phrase "produced to the Commissioner of the Garda Síochána". In the High Court, Peart J. reached his decision in the absence of any evidence which proved that the warrants had been so produced.

In reversing Peart J.'s decision, Denham J. stated:

> "Receipt of the warrants by non-designated persons is so far removed from the concept of production of the warrants to a designated person that I am satisfied it may not be inferred. It would be a step too far from the clear words of the statute."[411]

In stressing the importance of giving effect to the intent of the legislature, Denham J. emphasized that:

> "It is the duty of the court to give effect to the intention of the legislature. That intent is obtained from the words of the legislation. If the legislation is clear and unambiguous, the intent is plain. In this case, the words are clear and unambiguous and the intent of the legislature is clear."[412]

Even in circumstances where the Courts fail, at first instance, to give effect to the intent of the legislature, the Supreme Court will very often remedy any misapplication of the law so that on appeal, effect will be given to the intent of the legislature as expressed in legislation.

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[410] [2004] 2IR 456.
[411] *ibid.*, at 464.
[412] *ibid.*, at 465.

However, on occasion, members of the Supreme Court can misconstrue legislative intent, as was demonstrated in the dissenting judgment of Fennelly J. in *Sheedy v Information Commissioner*[413].

In that case, it was argued on behalf of the appellant that the introductory words of section 53 of the Education Act 1998[414]– "Notwithstanding any other enactment" operated to disapply the provisions of the Freedom of Information Act 1997 to the information being sought by the second Notice Party. Fennelly J. was of the view that in enacting the 1998 Act, the Oireachtas could not have intended such a result as contended by counsel for the appellant.

Instead, he believed that "there is a harmonious co-existence between statutory non-disclosure provisions in other legislation and those contained in the 1997 Act."[415]

The fact that Fennelly J. failed to grasp the legislative intent in relation to section 53 is palpable from the following extract from his judgment:

> "Having enacted in such clear terms legislation of purportedly universal application providing for public access to all State documents, the Oireachtas is, according to the Appellant, to be deemed, within a year, and without any express reference to the 1997 act, to have intended to remove a poorly defined category of information contained in publicly held records entirely from the purview of the Act and to submit its

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413 Supreme Court, unreported, 30 May 2005.

414 53.—Notwithstanding any other enactment the Minister may— (a) refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein, including, without prejudice to the generality of the foregoing—(i) the overall results in any year of students in a particular school in an examination, or(ii) the comparative overall results in any year of students in different schools in an examination,and (b) refuse access to information relating to the identity of examiners.

415 Supeme Court, Unreported, 30 May 2005 at p. 5.

disclosure exclusively to the unfettered discretion of the Oireachtas."[416]

In the belief that "the result postulated is redolent of conflict and cannot have been intended"[417], Fennelly J. stated that "there are strong intuitive reasons for favouring a harmonious interpretation of the two provisions."[418]

In so doing, Fennelly J. failed to give effect to the intent of the legislature. While he demonstrated a strong desire to give effect to their intent, he in fact failed to do so, and was alone in that regard[419].

In addition to the foregoing circumstances, the judiciary can sometimes depart from the stated intent of the legislature where they venture that little bit too far, or to put it another way, bend over backwards, to meet the needs of some litigants.

Bending Over Backwards

In *McGrath v McDermott*[420]the appellants had engaged in activities which treaded that dangerous line between tax avoidance and tax evasion by seeking to offset the gains which arose on the disposal of assets by carrying out a series of transactions which were designed to create losses, and then claimed to set off the gains against the losses so created. They purported to do this by exploiting section 102 of the Corporation Tax Act 1976 and section 33 of the Capital Gains Tax Act 1975. The Inspector of Taxes had concluded that the losses claimed by the appellants must be disallowed on the basis that no real loss had occurred. The principal issue in this case rested on the interpretation to be given to those provisions, and whether on foot of that, the actions of the appellants would be regarded as being legitimate and thus constituted tax avoidance.

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[416] *ibid.*, at 6.
[417] *ibid.*, at 7.
[418] *ibid.*, at 8.
[419] Alone in the sense that he had dissented from the decisions of Kearns J. and Denham J.
[420] [1988] IR 258.

While the transactions may have been "real" in the sense that they actually took place, they were not real in the sense that the legislative provisions which they relied upon were not intended to cover circumstances where persons would go through the charade of performing certain actions solely with the intention of deriving a benefit, as the appellants had.

However, despite that, both the High Court and the Supreme Court applied a very particular interpretation to the legislative provisions and their applicability to the actions of the appellants, such that the appellants actions were given the blessing of the Court, eventhough it was clear that it was not the intention of the legislature that persons, such as the appellants, who had engaged in somewhat artificial actions, would benefit from those provisions.

In the High Court, Carroll J.'s acceptance of the principle developed in *Ramsay v Inland Revenue Commissioners*[421] and *Furniss v Dawson*[422] cases evidenced the distance which she want to ensure that the actions of the appellants were safeguarded. She placed a great degree of significance in what she saw as the absence of a statutory prohibition on what the appellants had done:

> "However in my opinion the imposition of tax and the granting of relief from tax is solely a matter for the legislature. It is for Parliament if it thinks fit to confer on the courts the power to determine whether a scheme was conceived primarily for the purpose of tax avoidance and be disallowed accordingly. If the legislature has failed to "plug a hole" in advance or has failed to pass a law which strikes generally at tax avoidance schemes, then I am strongly of the opinion that it is not the function of the court to intervene."[423]

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[421] [1982] AC 300.
[422] [1984] AC 474.
[423] [1988] IR 258 at 272.

And she went on further to add:

> "In the absence of a general power conferred by statute to disallow tax avoidance schemes whether as a fiscal nullity or otherwise, this scheme succeeds. The appellant who, (with the assistance of no doubt highly trained and highly paid guides) has worked his way through the jungle of taxation, avoiding fiscal pitfalls and utilising the terrain to his advantage, has found, in my opinion, a path which allows him to retain a capital gain. He can now pause for a while in a resting area provided by the High Court before plunging into the unknown territory which lies ahead."[424]

Upon reading Carroll J.'s vivid closing remarks, one cannot help but form the impression that she harboured some degree of admiration for, if not the actions, the ingenuity of the appellants, and based on that, she seemed to be determined to bend over backwards to ensure that their actions did not fall on the wrong side of that aforementioned thin line between avoidance and evasion.

When the Inspector of Taxes appealed Carroll J.'s decision to the Supreme Court, Finlay C.J. expressed his full agreement with the decision of Carroll J.:

> "It is, however, contended on behalf of the Revenue that this Court should introduce into the application of these statutory provisions a rule or principle which renders them inoperative unless the taxpayer can establish a real loss. It is with some hesitation conceded on their behalf that it is difficult to avoid the logical conclusion that a similar precondition would have to apply to the computation of a gain under the subsection.

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[424] *ibid.*, at 272..

> Such a principle, it is suggested, would be justified by the general undesirability and unfairness of tax avoidance and by the necessity for the courts to look on such schemes with disfavour."[425]

Emphasising the fact that the Courts have no role to play in adding to or detracting from legislative provisions, Finlay C.J. made it clear that he was not going to see the appellants being badly done by:

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective. What is urged upon the court by the Revenue in this case is no more and no less than the implication into the provisions of either s. 12 or s. 33 of the Act of 1975 of a new subclause or sub-section ..."[426]

In response to the Revenue Commissioner's suggestion that the losses of the appellants were not "real", Finlay C.J. stated:

> "I must reject this contention. Having regard to the finding in the case stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that

[425] *ibid.*, at 275.
[426] *ibid.*, at 276.

shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.
In those circumstances, for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers."[427]

The Court demonstrated a rare fear of venturing into areas of law in which they doe not have an established expertise:

> "Not only am I quite satisfied that it is outside the functions of the courts to condemn tax-avoidance schemes which have not been prohibited by statute law, but I would consider it probable that such a role would be undesirable even if it were permissible. It is the Revenue Commissioners (whose advice is available to the Oireachtas in enacting taxation legislation) who have the practical expertise and experience to know the most likely types of avoidance to be anticipated and prohibited, and most importantly of all, the predictable consequences and side-effects of the terms of any prohibiting enactment."[428]

When looked at in conjunction with the facts, the dicta of Carroll J. and Finlay C.J. in this case does seem to evidence a determination on the part of the Court to ensure that the actions of the appellants were not adjudged to be unlawful.

The case of *DB v Minister for Health*[429] is a further example of a case in which

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[427] *ibid.*, at 276.
[428] *ibid.*, at 277.
[429] [2003]3IR 12.

a member of the judiciary effectively bent over backwards so as facilitate a litigant. The case concerned the interpretation of provisions of the Hepatitis C Compensation Tribunal Act 1997. In the following terms, section 5(9)(a) stated that a claimant could, within one month, accept or reject an award made to him or her:

> "(9) (a) Subject to subsection (13), where the Tribunal makes an award to a claimant, the claimant shall have a period of one month or such greater period as may be prescribed from the date of receiving notice of the making of the award during which the claimant may decide in writing either to accept or reject the award or to appeal the award under subsection (15)."

Section 5(15) provided that a person could appeal any decision made by the awarding Tribunal, to the High Court. The applicant accepted an award made to him, but then outside of the one month deadline, sought to appeal the initial award.

Despite the fact that the applicant had clearly accepted the initial award, and despite the unambiguous terms in which section 5(9)(a) is framed, O'Neill J. somewhat erroneously declared:

> "(i) s. 5(9)(a) of the Hepatitis C Compensation Tribunal act 1997 does not give rise to a statutory time limit of one month on the making of an appeal to the High Court;
> (ii) the acceptance of an award of the Tribunal pursuant to s. 5(9) of the Act does not exclude an appeal to the High court under s. 5(15) of the Act;"[430]

Casting the terms of the Act aside, O'Neill J. found that in accord with O.

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[430] *ibid.*, at 16.

122(7) of the Rules of the Superior Courts, the Court had jurisdiction to extend the time within which an appeal could be made.

On considering the matter in the Supreme Court, Denham J. stressed that the "cardinal rule" for the construction of statutes, as described by Blayney J. in *Howard v Commissioners of Public Works*[431], is that they be construed according to the intention expressed in the Acts themselves. This led Denham J. to express the view that:

> "The words in s. 5(9)(a) are plain, they are precise and unambiguous. Thus the natural and ordinary meaning of the words apply, for they declare best the intention of the legislature. A literal approach should be taken to the section."[432]

This led Denham J. to find:

> "The period of one month is an integral and indispensable part of the scheme. The words are plain and unambiguous. It is a clear statutory time limit for the scheme. It is a statutory time bar. I am satisfied that this is a mandatory provision. I am satisfied that the time limits expressed in the subsection are mandatory express statutory time limits. Thus actions must occur within these set time limits."[433]

In finding that the claimant is barred from appealing an award of the Tribunal, Denham J. stated:

> "I am satisfied that the words in s. 5(9)(a) of the Act of 1997 are clear and unambiguous and that the trial judge erred in taking a purposive

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[431] *ibid.*, at 21.
[432] *ibid.*, at 22.
[433] *ibid.*, at 22.

approach to the interpretation of the statute."[434]

The Supreme Court put a large body of clear blue water between their view on this matter and that of O'Neill J. in the High Court. Some insight into O'Neill J.'s thinking can be gleaned from the reasoning which he expressed in his judgment. With reference to the application of the one month time limit, O'Neill J. stated:

> "It is impossible to fathom what reason could justify such an interpretation particularly having regard to the fact that the purpose of the act is to provide for the awarding of compensation to persons who had been the victims of a public health disaster and many of whom at the time of the hearing of their claims before the Tribunal were in exceedingly poor health and in the immediate aftermath of the determination of their claims by the Tribunal might have great difficulty because of their state of health in focusing on and deciding whether or not they wished at that point to appeal or not to appeal."[435]

It is clear that O'Neill J.'s interpretation of the 1997 Act was informed by a large measure of human empathy with the circumstances of the claimants, and lack of appreciation of the thinking or intent of the legislature. That is what led him to then believe that despite the clear terms of the legislation, he had, through the Rules of the Superior Courts, jurisdiction to extend the statutory time limit.

In *Grianán an Aileach Centre v Donegal County Council (No. 2)*[436] Kelly J. in the High Court was presented with a case in which the Defendant planning authority refused to consent to a proposed change of use of a building, put forward by the Plaintiffs. Having considered the matter, Kelly J. declared that

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[434] *ibid.*, at 25.
[435] At page 20 of his judgment.
[436] [2003] 3IR 572.

the proposed change of use was permissible. Kelly J.'s decision came in for some criticism on appeal before the Supreme Court.

In the decision of the Supreme Court, it became apparent that not only did the High Court not have jurisdiction to make such a declaration, but also, that the declaration granted by Kelly J., had not been sought by either party. As stated by Keane C.J.:

> "In the present case, the trial judge, quite understandably, was concerned to resolve issues which had been brought before the High Court in a manner which was fair to both the defendant and the public interest which it represents on the one hand and the legitimate interests of the plaintiff on the other hand. This resulted, however, in the granting of a declaration in a form which had not been sought by either party and which clearly creates further difficulties."[437]

As Keane C.J. recognized, Kelly J. was motivated by a desire to bend over backwards and be of assistance to the Plaintiff. However, in so doing, he erred in two fundamental respects, which led his decision being firstly, criticized, and then, overturned.

Deferential Legislature

In some respects, it may be said that the legislature are very deferential when it comes to any possible encroachment on the judicial development of some aspects of law, particularly statutory interpretation. This view is supported by some exchanges which occurred during the Report Stage of the Interpretation Bill 2000 in the Seanad. Senator Ryan had tabled an amendment to give effect to a recommendation of the Law Reform Commission[438] which would advocated that the Courts be allowed to have recourse to parliamentary debates when seeking to interpret a statute. The proposed new subsection

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[437] [2004] 2IR 625, 639.

[438] *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at para. 5.73.

(d) would have read as follows:

> "7(1) In construing a provision of an Act for the purpose of section 5 or 6, a court may, notwithstanding section 18(g), make use of all matters that accompany and are set out in –
>
> ...
>
> (d) in the appropriate debates of the Houses of the Oireachtas.".

The proposed new section was rejected by the Minister of State on the basis that the Courts thinking in this area is still in the process of development[439]:

> "I must oppose it. This area is developing. Mr. Justice Costello considered Dáil debates in the case of *Wavin Pipes Limited v. Hepworth Iron Limited*, and the courts in England took account of parliamentary debates in *Pepper v. Hart*. Debates of the House constitute many different views. We would not agree with this provision."

The Courts involvement in the development and refinement of particular approaches to statutory interpretation should not of itself operate to preclude the Oireachtas from developing legal policy in this area in a more substantive way. However, despite that, in deference to the courts role in this area, the Minister of State has gracefully stood back so as to allow the courts to further refine this aspect of statutory interpretation for themselves.

However, this deference is less obvious when one looks at the many legislative provisions which seek to oust the jurisdiction of the courts.

Ousting the Jurisdiction of the Courts

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[439] 180 *Seanad Debates* (29 June 2005) col. 2307 – 2308.

The drafting of provisions which seek to omit or limit the involvement of the Courts must irk, not only litigants, but also to some degree, the Courts themselves.

Statutory provisions which oust the jurisdiction of the Courts exist in many different forms on the Irish Statute Book. Some are more explicit than others. For example, some legislative provisions purport to extinguish or restrict the right of appeal, while others provide for the lapse of any right of appeal after a certain time period. Another way in which the legislature are increasingly seeking to oust the jurisdiction of the Courts is by removing the right of appeal and replacing it with a right to seek judicial review. These particular approaches merit further scrutiny.

Restriction on Right of Appeal

The jurisdiction of the Courts is occasionally ousted where the legislature have removed or restricted the right of appeal in certain circumstances. It can manifest itself in the removal of the right to appeal to the Supreme Court, the High Court, or to appeal at all.

The appellate jurisdiction of the Supreme Court is enshrined in Article 34.4.3 of the Constitution, which provides:

> "The Supreme court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

Accordingly, it may be said that legislative provisions which oust the jurisdiction of the courts, go to the heart of the individual's right of access to the Court as guaranteed by the Constitution. In a direct reference to that

provision, Keane C.J. in *In re Illegal Immigrants (Trafficking) Bill 1999*[440] stated as follows:

> "It would be contrary to the very notion of a State founded on the rule of law, as this state is, and one in which, pursuant to Article 34 justice is administered in Courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the Courts to enforce their legal rights."[441]

In *State (Brown) v Feran*[442], Walsh J. stated that:

> "Subject only to the extent to which such limitation is imposed by Act of the Oireachtas, the appellate jurisdiction of this court from decisions of the High Court is unlimited."[443]

A similar view was echoed, again by the Supreme Court some years later in *Tormey v Attorney General*[444] wherein Henchy J. stated:

> "Save to the extent required by the terms of the Constitution itself, no justiciable matter may be excluded from the range of the original jurisdiction of the High Court."[445]

Henchy J.'s remark causes Hogan & Morgan to suspect that such provisions may well be unconstitutional:

> "This is a clear indication that legislative ouster clauses are

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[440] Supreme Court, Unreported, 28 August 2000.
[441] *ibid.*, at 31.
[442] [1967] IR 147.
[443] *ibid.*, at 156.
[444] [1985] IR 289.
[445] *ibid.*, at 296 – 297.

unconstitutional, at least where the lower court or tribunal has been vested with exclusive jurisdiction to determine particular justiciable controversies."[446]

In a series of decisions on this issue, the Courts have emphasized their view that the ousting of the courts jurisdiction will never be inferred. If the legislature seek to oust the jurisdiction of the courts in relation to a particular matter, there must be clear and unambiguous language in order to achieve this. For example, in *People v Conmey*[447], Walsh J. stated that:

"... any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision seeking to confine the scope of such appeals within particular time limits, would of necessity have to be clear and unambiguous."

A similar point was made by Hamilton C.J. in *Hanafin v Minister for the Environment*[448]:

"if it is the intention of the legislature to oust, except from or regulate the appellate jurisdiction of this Court to hear and determine appeals from the decisions of the High Court, such intention must be expressed in clear and unambiguous terms and it is a matter for interpretation by the Court as to whether or not any provision of any law which purports to except from or regulate the appellate jurisdiction of this Court is effective to do so."[449]

In *B v Minister for Justice*[450], Geoghegan J. stated that "For the right of appeal

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[446] Hogan & Morgan, *Administrative Law* (3rd ed., Dublin, 1998) at p. 455.
[447] [1975] IR 341.
[448] [1996] 2 IR 321.
[449] *ibid.*, at 389.
[450] Supreme Court, Unreported, 30 January 2002.

against a refusal to extend the fourteen day time limit to be ousted there must, in my view, be clear words to that effect."[451] He reiterated this at a later point in his judgment:

> "I find it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time. If the Oireachtas had intended that, it should have said so. ... there is certainly not a clear and unambiguous ouster of the right of appeal which is required ..."[452]

This point was also made by McGuinness J. in the same case, where she "accepted that access to the Courts may be regulated by legislation. Such legislation should, however, be clear and unambiguous in its terms."[453] In reference to Article 34.4.3 of the Constitution, she stated:

> "This general right of appeal is an inherent part of the right of access to the Courts. While it may be curtailed in certain circumstances, it is well settled ... that it may be curtailed only if such curtailment is set out in the most clear and unambiguous terms."[454]

Provisions of this nature are usually used so as to ensure that the legislature affords "protection" to the decisions of administrative bodies. An example of a provision of this kind may be found in section 34(1) of the Freedom of Information Act 1997, as follows:

> "A party to a review under section 34 or any other person affected by the decision of the Commissioner following such a review may appeal to the High Court on a point of law from the decision."

This provides for a limited appeal, form a decision of the Information

[451] *ibid.*, at 9.
[452] *ibid.*, at 10 – 11.
[453] Supreme Court, Unreported, 30 January 2002 at 4.
[454] *ibid.*, at 5.

Commissioner, to the High Court, but only in so far as the appeal is concerned with a point of law.

While, section 42(8) of the Act provided:

> "(8) The decision of the High Court on an appeal or reference under this section shall be final and conclusive."

However, the legislature obviously felt that this ouster provision was a step too far and they removed that bar through the enactment of section 27 of the Freedom of Information (Amendment) Act 2003, which deleted section 42(8) of the 1997 Act.

The removal of the section 42(8) bar was a positive step for the legislature to take, as it indicates that the impact of particular ouster provisions is kept under review, and where the operation of such provisions are believed to be unhelpful, they can and do take action to remove them.

While it is true to say that provisions such as section 42(8) are designed to bring a degree of finality to administrative decisions, provisions of this nature may derive from a mistrust of the judiciary. The same degree of mistrust may also be gleaned from those provisions of legislation which have sought to be exhaustive, in other words, the result of over drafting[455]. In making a decision to be exhaustive, the drafter consciously chooses to legislate on a particular matter to the nth degree rather than running the risk of permitting the judge some degree of discretion, which might possibly afford him or her an opportunity to deviate from the drafter's intended path. This again has the potential to put the drafter and the judge on a collision course.

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[455] The term overdrafting refers to the approach taken by some drafters to attempt cover every conceivable eventuality. The result invariably is grossly inaccessible legislation. Overdrafting is discussed in Chapter 6 and it is closely linked to defensive drafting which is discussed in Chapter 8.

Section 9 of the Military service Pensions Act 1934 was designed to ensure that the "Referee" are final and thus not appealable:

> "9.—The findings of the Referee as set out in a report under this Act shall, subject to any revision of such report made by the Referee under the subsequent provisions of this Act, be final and conclusive and binding on all persons and tribunals whatsoever."

This provision was the subject of judicial scrutiny in *The State (McCarthy) v O'Donnell*[456], where the Supreme Court held that notwithstanding section 9, the appellants' right to certiorari was not taken away by reason of the Referee's Report being made final and conclusive since the Referee had acted in excess of jurisdiction.[457]

A further example of a provision which seeks to oust the appellate jurisdiction of the courts is section 30 of the Dublin Transport Authority Act 1986[458], which relates to the granting of licences by the Minister, and purports to totally exclude the Courts from having any role, subsection (3) of which provides:

> "(3) A decision of the Minister on an appeal under this section shall be final and binding on the parties to the appeal."

In similar terms, section 30 of the Finance Act 1940, which deals with the power of the Registrar of Friendly Societies to settle disputes, is drafted in such a way as to ensure that matters can not be appealed or otherwise brought before the Courts:

> "(d) the award of the said Registrar on any such dispute shall be final and binding on all parties;"

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[456] [1945] IR 126.
[457] See, Donaldson, *Some Comparative Aspects of Irish Law* (London, 1957) at p. 209.
[458] Incidentally, this Act never came into force.

Section 11(1) of Worker Participation (State Enterprises) Act 1977 empowers the "returning officer" to adjudicate upon the validity of nominations to the body, and by stating that "his decision shall be final and shall not be appealable", it is drafted so as to prevent the Courts from having any role in adjudicating upon his decision.

In *B v Minister for Justice*[459], Fennelly J. commented on the special position of litigants in this jurisdiction whereby they are normally afforded a right of appeal following the trial of their matter at first instance:

> "The notion that a double degree of jurisdiction is an important part of the normal judicial system is widespread in modern legal systems. It is not necessarily a fundamentally guaranteed right. It is, however, recognized throughout the legal structure of this State."[460]

Importantly, he went on to stress that this right:

> "... should not be lightly encroached upon or invaded by ambiguous language. The least that is required is that, if the right is to be excluded, this should be done by unambiguous words."

It seems reasonable to infer that like many members of the judiciary, Fennelly J. harbours a dislike for provisions which seek to oust the jurisdiction of the Courts. However, inherent in his comments is an acceptance that it is inevitable that the legislature will, on occasion, seek to oust that jurisdiction. In what could be regarded as an attempt at dialogue between the judiciary and the legislature, Fennelly J. and a number of his colleagues have sounded a warning that where the legislature desires to exclude a right of appeal, they must do so in unambiguous terms.

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[459] Supreme Court, Unreported, 30 January 2002.
[460] *ibid.*, at 5.

Section 17(4) of the Housing (Miscellaneous Provisions) Act 1931 is perhaps at the extreme end of the scale in terms of ousting the jurisdiction of the courts through the removal of the right of appeal. It provides:

> "(4) Subject to the provisions of the last preceding sub-section, an order shall not, either before or after its confirmation, be questioned by prohibition or certiorari or in any legal proceedings whatsoever ..."

In similar terms, section 78(4) of the Housing Act 1966 provides:

> "Subject to the provisions of subsection (2) of this section, a person shall not question a compulsory purchase order by prohibition or certiorari or in any legal proceedings whatsoever."

These provisions sought to clothe compulsory purchase orders in absolute protection by preventing the courts from having jurisdiction to adjudicate on such matters in "any legal proceedings whatsoever". Provisions such as this which are so absolute and extreme tend to be very much the exception.

Section 17(4) of the Housing (Miscellaneous Provisions) Act 1931 was however the subject of judicial scrutiny in *The State (Wood) v West Cork Board of Health*[461] where a divisional High Court held that despite the clear terms of section 17(4), the compulsory purchase order in question could be challenged by way of certiorari.[462]

Notwithstanding that decision, where the Courts jurisdiction to hear appeals in relation to particular matters is removed, the Courts have generally shown that they will respect the intent of the legislature in that regard. The Courts are particularly anxious to avoid situations which give rise to an overlap in

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[461] [1936] IR 401.

[462] See, Donaldson, *Some Comparative Aspects of Irish Law* (London, 1957) at p. 209.

jurisdictions. This was evidenced by Henchy J. in *Tormey v Ireland*[463], where he stated:

> "The jurisdiction to try thus vested by the Constitution in courts, tribunals, persons or bodies other than the High Court must be taken to be capable of being exercised, at least in certain instances, to the exclusion of the High Court, for the allocation of jurisdiction would otherwise be overlapping and unworkable."[464]

The issue of overlapping jurisdiction also arose in *Grianán Aileach Centre v Donegal County Council (No. 2)*[465]. This case concerned a declaration by Kelly J. in the High Court to the effect that the proposed uses for a development by the Plaintiff were permissible. The Defendant appealed to the Supreme Court, contending that the High Court had no jurisdiction to grant such relief. In finding that the correct forum for reaching such a decision was An Bord Pleanála, Keane C.J. stated that the High Court should have refrained from adjudicating upon this matter. Keane C.J. characterized the problem in the following way:

> "Thus, in the present case, if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with a determination by the High Court."[466]

In allowing the appeal, Keane C.J. stated that in his view, the only way in

[463] [1985] IR 289.
[464] *ibid.*, at 25.
[465] [2004] 2 IR 625.
[466] *ibid.*, at 638.

which the High Court could resolve the issues which were presented to it in this case was by acting "as a form of planning tribunal" and that, he felt, was beyond the Court's competence, and in such circumstances, ought to be left to the appropriate appeals body – in this case, An Bord Pleanála.

Time-Limits

The legislature sometimes act to oust the jurisdiction by narrowing the window of opportunity within which litigants must seek to invoke their rights before the Courts. This often occurs in relation to decision making processes – such as the planning process – where the Oireachtas have obviously found it desirable that certainty be brought to bear on an issue after the effluxion of a relatively short period of time.

The Statute of Limitations 1957 (as amended) effectively ousts the jurisdiction of the Courts in relation to a whole range of circumstances in which an action might otherwise lie.

Another example of provisions of this nature was section 82 (3A) of the Local Government (Planning and Development Act 1963 (as amended) which imposed a two month time-limit, beyond which challenges to a planning decision could not be mounted.

That provision was the source of controversy in *State (Pine Valley Development Ltd) v Dublin County Council*[467], where the Supreme Court was faced with a set of circumstances in which section 82(3A) of the Local Government (Planning and Development) Act 1963 - an ouster clause which prevented a person from resorting to the Courts once a two month time limit had elapsed, had not in fact been commenced, eventhough decisions to which that provision related, had begun to be made. The Court found that no reliance could be placed in the ouster provision as it had not been

[467] [1984] IR 417.

commenced. Henchy J. stated as follows:

> "I deem it to be a fundamental rule of judicial interpretation that, when a statutory provision purports to oust, after a specified period, the jurisdiction of the Courts to question the validity of a decision which, up to then, would have been open to question in the Courts, the purported ouster will not have effect unless the exclusionary provision was in operation when the decision in question was made. The ouster of jurisdiction aimed at by s. 82, sub-s. 3A, of the Act of 1963 was intended to remove at the end of two months the risk that the grant of permission could be questioned in the Courts at any time, thus enabling a duly granted development to be retarded by delaying tactics in the Courts long after the grant of permission had been made. Therefore, s. 82, sub-s. 3A, partakes of the characteristics of a statute of limitations. Apart from the fact that the Courts should be reluctant to surrender their inherent right to enter on a question of the validity of what are prima facie justiciable matters, it would be a wrong and unjust method of statutory interpretation to attribute to the legislature the intention that a developer could rely on s. 82, sub-s. 3A, so as to get the benefit of a demonstrably void decision, when the full period of two months allowed for questioning the decision was not available for the simple reason that s. 82, sub-s. 3A, did not become operative until after the decision had been made."[468]

Section 82(3A) was again the subject of judicial scrutiny in *Brady v Donegal County Council*[469], where Costello J. expressed the view that "A law which imposes a very short time limit which may well deprive the plaintiff of a judicial remedy before he knew he had a cause of action can obviously cause considerable hardship." He then went on to conclude that "the present serious restriction on the exercise of the plaintiff's constitutional rights

[468] *ibid.*, at 425 - 426.
[469] [1989] ILRM 282.

imposed by the two-month limitation period cannot reasonably be justified. Unmodified, the section is unreasonable, being unreasonable in that it is unconstitutional, and I will so declare."

In so stating, Costello J. had gone one step further than his peers. While many of his colleagues were suspicious or in some respects, critical of ouster provisions, few if any, had taken the brave step of finding an ouster provision to be unconstitutional, as he had.

Right of Appeal Replaced by Judicial Review

The jurisdiction of the courts is increasingly being ousted by legislative provisions which state that a particular action or decision cannot be challenged before the courts, except for by way of judicial review. Without embarking on a discussion of the characteristics of judicial review, in preference to the drawn out nature of a full-blown appeal, judicial review is preferred by the legislature because it restricts the courts' power to considering the decision making process, rather than the decision itself. Particularly in more recent years, there has been a tendency on the part of the legislature to restrict the right of appeal in favour of a right to seek judicial review[470].

Section 5(1) of the Illegal Immigrants (Trafficking) Act 2000 is one such example of this:

> "5.—(1) A person shall not question the validity of—
> (a) a notification under section 3(3)(a) of the Immigration Act, 1999,
> (b) a notification under section 3(3)(b)(ii) of the Immigration Act, 1999,
> (c) a deportation order under section 3(1) of the Immigration Act, 1999,

[470] Further examples are: section 50 of the Planning and Development Act 2000, section 13 of the Irish Takeover Panel Act 1997, section 6 of the Roads Act 1993, and section 38 of the Aviation Regulation Act 2001.

(d) a refusal under Article 5 of the Aliens (Amendment) (No. 2) Order, 1999 (S.I. No. 24 of 1999),

(e) an exclusion order under section 4 of the Immigration Act, 1999,

(f) a decision by or on behalf of the Minister to refuse an application for refugee status or a recommendation of an Appeal Authority referred to in paragraph 13 of the document entitled "Procedures for Processing Asylum Claims in Ireland" which, as amended, was laid by the Minister for Justice, Equality and Law Reform before the Houses of the Oireachtas in March 1998,

(g) a recommendation under section 12 (as amended by section 11(1)(h) of the Immigration Act, 1999) of the Refugee Act, 1996,

(h) a recommendation of the Refugee Applications Commissioner under section 13 (as amended by section 11(1)(i) of the Immigration Act, 1999) of the Refugee Act, 1996,

(i) a decision of the Refugee Appeals Tribunal under section 16 (as amended by section 11(1)(k) of the Immigration Act, 1999) of the Refugee Act, 1996,

(j) a determination of the Commissioner or a decision of the Refugee Appeals Tribunal under section 22 (as amended by section 11(1)(p) of the Immigration Act, 1999) of the Refugee Act, 1996,

(k) a refusal under section 17 (as amended by section 11(1)(l) of the Immigration Act, 1999) of the Refugee Act, 1996,

(l) a determination of an officer appointed under section 22(4)(a) of the Refugee Act, 1996,

(m) a decision of an officer appointed under section 22(4)(b) of the Refugee Act, 1996, or

(n) a decision under section 21 (as amended by section 11(1)(o) of the Immigration Act, 1999) of the Refugee Act, 1996,

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as "the Order")."

This provision removes the power of the courts to adjudicate on appeals arising from any one of fourteen procedural steps identified, and it was the subject of detailed consideration by the Supreme Court in *In re Illegal Immigrants (Trafficking) Bill 1999*[471], which held that the requirements to proceed by way of judicial review, rather than appeal, and within a limited period, served the legitimate public policy objective of seeking to bring about, at an early stage, legal certainty as regards administrative decisions. It also held that the discretion of the High Court to extend time was sufficiently wide so as to avoid injustice. Accordingly, the Court held that the approach proposed by section 5(1) of the Bill was consistent with the constitutional right of access to the courts and the principles of constitutional justice. It stated, in somewhat deferential terms:

> "It is within the competence of the Oireachtas to regulate by law, by primary legislation or, in the due exercise of its powers, by way of secondary legislation, such as statutory instruments, procedural matters, including procedural remedies, before the courts provided constitutional rights and other provisions of the Constitution relating to the courts are not infringed."[472]

It may be said that in that decision, the Supreme Court had effectively conferred a degree of acceptability on the ousting of its own jurisdiction in the circumstances proposed by section 5(1).

Commenting on this provision, Geoghegan J. in *B v Minister for Justice*[473],

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[471] Supreme Court, Unreported, 28 August 2000.
[472] *ibid.*, at 17.
[473] Supreme Court, Unreported, 30 January 2002.

perhaps with a hint of distaste, stated:

> "The Oireachtas in its wisdom decided that it would not permit challenges to the validity of any of fourteen different categories of documents or steps taken under the legislation as listed in section 5(1) to be litigated through the lengthy procedures involved in plenary proceedings."

Section 12 of the Planning and Development Act 2000 is comprised of 17 subsections, many of which impose a requirement on planning authorities to act in a certain way, and within a certain time period. Despite that, section 12(16) effectively prevents the Courts from intervening or imposing a sanction where those time periods are not adhered to.

Section 12(16) provides as follows:

> "A person shall not question the validity of the development plan by reason only that the procedures as set out under subsections (3) to (5) of section 11 and subsections (1), (4), (5), (6), (8) and (9) of this section were not completed within the time required under the relevant subsection."

So while on the one hand statutory time periods exist, the jurisdiction of the Courts has been ousted by the legislature denying the Courts of the jurisdiction to adjudicate on the failure to comply with such deadlines. This is a most unusual ouster provision as it effectively detracts from the weight or import which the relevant deadlines would otherwise have carried.

A shift in the attitude of the judiciary is discernible from the relatively recent cases which have been examined here, as against the series of older cases

which were examined by Donaldson[474]. The Courts now, albeit rather grudgingly, give effect to ouster provisions. In contrast, in times past, by turning clear and unambiguous ouster provisions on their head, the judiciary did not hide their dislike or provisions of this kind.

Dialogue Between the Judiciary and the Legislature

Judges do on occasion seek to draw the legislature's attention to what they regard as weaknesses or gaps in existing laws. They tend to go about this in one of two ways, firstly, by highlighting a matter in one of their judgments in a way which is likely to attract controversy, or at least, attention. The second way in which they seek to achieve this is by making public statements on a particular matter.

In the past, Keane C.J. suggested that the mandatory life sentence for murder should be replaced with a system whereby judges would have discretion to decide on an appropriate sentence. In a similar vein, Finnegan P. has commented that in his view, some murderers did not merit any custodial sentence at all. Carney J. has proposed the abolition of the distinction between murder and manslaughter. He has also made a number of calls for legislation dealing with insanity in the context of murder charges to be introduced.[475]

The failure of the then Government, and the legislature to grasp the true significance of the *In Re McInerney*[476] decision dating back to 1976, led to the fiasco surrounding the unlawful imposition of charges upon persons in nursing homes, which eventually gave rise to the Health (Amendment) Act 2005. That decision was a clear example of a situation in which a member of the judiciary had engaged in a dialogue with the legislature, but the legislature was not

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[474] Donaldson, *Some Comparative Aspects of Irish Law* (London, 1957).

[475] Some of these examples were alluded to in Address by Michael McDowell TD Minister for Justice, Equality and Law Reform at the First Edward O'Donnell McDevitt Annual Symposium – "Sentencing in Ireland" on 28 February 2004.

[476] High Court, unreported, 1976.

listening. As recent history has shown, the failure to listen to the judiciary on that occasion has cost the State the State dearly.

A more recent example of such a discourse is the decision of Laffoy J. in *Irwin v Deasy*[477], where she caused some upset when she ruled that there was in fact no legislative basis whatsoever for the Courts ordering the sale of a registered property in order to satisfy a judgment mortgage, in circumstances where the property was jointly owned, but the judgment mortgage related only to the interest of one of the owners. Laffoy J. was characteristically clear on this issue:

> "The court never had, and does not now have, jurisdiction to order sale in lieu of partition independently of the statutory jurisdiction conferred by the Act of 1868. Apart from whatever power the court is given under s. 71(4), there is no doubt but that the court has no jurisdiction whatsoever to order a sale in lieu of partition at the suit of a person in the position of the plaintiff, a judgment creditor whose judgment mortgage affects the interest of one co-owner of the registered land."[478]

This conclusion arose from what might be described as a more conscientious and more accurate application of the existing law[479], and it sends a clear message to the legislature that where they perhaps once thought there was sound law on the issue, there now stands a gaping loophole which requires attendance.

As discussed in Chapter 7, on occasion, drafters make provision for a fixed or mandatory penalty. The effect of a mandatory penalty is to remove the Courts

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[477] High Court, unreported, 31 January 2006.
[478] *ibid.*, at p. 19.
[479] Laffoy J. referred to previous cases where the existence of the courts power was never questioned. For example, in *First National Building Scoeity v Ring* [1992] IR 375, an assumption was made to the effect that the jurisdiction existed. A similar assumption was made in *Farrell v Donnelly* [1913] 1 IR 50.

discretion to determine what penalty is appropriate based on the facts before him. The Courts have shown a tendency to dislike provisions of this nature and, this became very evident in relation to section 5 of the Criminal Justice Act 1999, which provides for a minimum sentence of 10 years for persons convicted of drug trafficking. This provision has been avoided by judges to a far greater degree than it has been applied. Since 1999, of the 180 people convicted under Section 15A of the Misuse of Drugs Act 1977 to 1984, as inserted by the Criminal Justice Act 1999, the number of persons who had received the mandatory prison sentences of ten years stands at 12.[480]

This illustrates that, try as the drafter might, to tie the hands of the judiciary, it really is very difficult for the drafter to be successful in dictating how the judiciary should act, particularly in matters pertaining to their own discretion.

The Courts avoidance of section 15A has irked the Minister for Justice, to such a degree that he has on a number of occasions stressed that the mandatory sentence is the rule, not the exception. One such example arose in 2004, where he stated:

> "But the law requires that departure from the mandatory sentence should not merely be case-specific but also exceptional. Unfortunately that extra element seems to be lost in present practice where departure from the mandatory sentence seems to be the norm rather than the exception.
>
> I would like to add that this law carries with it the presumption of constitutionality and deserves to be enforced with the respect that the Constitution accords to the deliberate and considered decisions of the legislature. It was not enacted as a knee-jerk exercise in populism.

[480] 585 *Dáil Debates* Col. 1388.

It was enacted by legislators who have to deal with the day to day consequences if the crimes to which it applies ..."[481]

The separation of powers doctrine, combined with the inability of the Courts to remedy defects in legislation ensures that even where the Courts have real difficulty with a provision of legislation, they cannot amend legislation even in a small way. Errors or omissions on the part of the drafter can give rise to expressions of frustration by members of the judiciary.[482] This has the potential to bring the judge and the drafter into a contentious situation.

The way in which the Courts have reacted to the persistent use of Henry VIII provisions in legislation, particularly in recent years, is very much in the nature of a duel. There has been a succession of cases in which the Courts have had to castigate various Ministers, and by implication, their officials, which include legislative drafters, for firstly, inserting Henry VIII provisions into Bills, and secondly, for making statutory instruments off the back of those provisions, which wrongly purport to amend primary legislation.[483]

There has been a fairly long-running duel between legislative drafters and the legislature on the one hand and the judiciary on the other, concerning the use of constitutional saving provisions[484]. A typical constitutional saving provision will read as follows:

"If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect."[485]

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[481] Address by Michael McDowell TD Minister for Justice, Equality and Law Reform at the First Edward O'Donnell McDevitt Annual Symposium – "Sentencing in Ireland" on 28 February 2004.
[482] Judicial criticisms in this regard is considered in Chapter 9.
[483] Provisions of this nature are discussed in Chapter 10.
[484] Provisions of this kind are discussed in Chapter 7.
[485] Section 2(2) of the Immigration Act 1999.

The use of such provisions is discussed in detail in Chapter 7. In brief, these are provisions which are inserted immediately following a provision in a Bill over whose constitutionality, there is great doubt. The use of such provisions is a flagrant attempt by the legislature, ably assisted by the drafter, to seek to ensure that a possibly unconstitutional provision is not struck down in its entirety. The judiciary have not been attracted by the use of provisions of this kind, and it may be assumed that through their non-reliance on such provisions, that they do not favour their use.

The features of a duel also tend to materialize when the courts are unable to find the principles and policies in an Act. It may be the case that the principles and policies necessary to support a particular piece of secondary legislation are not present. However, as discussed in Chapter 10, there have been situations in which the necessary principles and policies have been present, but have been overlooked by the Court. The absence of the necessary principles and policies to support a pieces of secondary legislation is likely to irk a judge. However, an incorrect or misguided finding by a judge that the necessary principles and policies are absent from an Act, is likely to irk the drafter.

Many of the instances just outlined serve to indicate that at times, the relationship between the judge and the drafter can become slightly contentious. But these instances are very much the exception. By and large, the relationship between the judge and the drafter is a harmonious one, whereby the drafter seeks to communicate the wishes of the legislature to, among others, the judge. Thus, it may be concluded that, while at times the judge and the drafter engage with each other in a way which is more characteristic of a duel rather than a dialogue, by and large, it may be stated that the dynamic which prevails between the drafter and the judge is judge may be most accurately characterized as being a dialogue rather than a duel.

Traits of the Drafter

Not Necessarily a Great Lawyer

It seems that there has always been a degree of consensus that good lawyers do not always make good drafters. In 1931, Sir William Graham-Harrison pointed out that "a man may be an admirable lawyer in many respects, but without any aptitude at all for this 'peculiar duty'"[486]. Kolts agreed, but placed some emphasis on the need for a healthy imagination:

> "... a good basic legal knowledge, a feeling for the proper use of the English language, a critical ability, lots of imagination and plenty of practice. Experience has shown that general legal ability by itself is not sufficient and that a competent lawyer without practical experience in legislative draftsmanship cannot perform the craft satisfactorily."[487]

The Irish experience would seem to suggest that our legislation is drafted to a very high standard by competent lawyers. It goes without saying that in order to be an accomplished drafter, one must have an extensive knowledge of the statute book.

Good Imagination

Legislative drafting demands a great deal of abstract reasoning, an ability to think beyond the present and an aptitude for anticipating different circumstances. These requirements could probably be captured in one word – imagination. The need for the drafter to possess great imagination was touched on by that great authority on statutory interpretation – Sir Francis Bennion.[488] In stressing the need for a drafter to "possess and use

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[486] In an unpublished monograph. See Bennion, "Reforming Statutory Drafting" *Proceedings of the Ninth International Symposium on Comparative Law* (Ottawa, 1971).

[487] Kolts, "Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries" [1980] Stat LR 144.

[488] Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, 2001).

imagination", Bennion referred to the Offences Against the State (Amendment) Act 1998 which was enacted in the immediate aftermath of the Omagh bomb in 1998. Bennion asserted[489] that no arrests could be made on the basis that the drafter of the Bill had "overlooked the need to give the Act some retrospective effect..."[490].

The drafters' capacity for imagination and foresight is also crucial in ensuring his or her legislation is sufficiently dynamic so as to withstand the test of time. However, where there have been shortcomings in legislation in this regard, the Courts have shown themselves to be uncharacteristically understanding. Recognising the need for legislation to withstand the test of time as against the desire that legislation should not be exhaustive, Denning LJ showed a great degree of pragmatism when he stated:

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise; and that, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised."[491]

Timelessness

A further significant, but related factor which makes the task of the drafter quite difficult is the fact that the drafter is frequently asked to draft laws which will be in force indefinitely. This task is made ever more difficult by virtue of the necessity for the drafter to ensure that the legislation will be applicable to a range of conditions and circumstances beyond his or her perception at the time of drafting.

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[489] An assertion first made by him in, *Sunday Times,* 6 September 1998.

[490] Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, 2001) at p. 69.

[491] *Seaford Court v Asher* [1949] 2 KB 481, 498.

This requires a certain degree of flexibility, or what could be termed "timelessness" to be in-built into legislation. A perfect example of this in practice is the Child Trafficking and Pornography Act 1996. The Act was drafted to deal with the growth of child pornography and the Act also dealt with child trafficking. By virtue of the good drafting of the Bill, it contained sufficient latitude so as to embrace the concept of internet grooming[492] which was unknown at the time of drafting, but which has become an increasing problem on the internet.

This need to provide for the future, and cover every possible contingency is what often gives rise to excessive detail and in turn, overdrafting. While this requirement to make provision for future events and unanticipated changes is a skill which the drafter must master, it is one which requires him or her to strike the right balance between overdrafting and avoidance of ambiguity.

Ability to Respond to Emergency Situations

The ability to meet tight deadlines and to produce drafts for emergency situations with sparse instructions is a quality expected of most drafters. Pressures of time were experienced by Thring. In 1867, he completely redrafted the Reform Bill in one day "working with two shorthand-writers from ten till six, I completed it. The Bill was printed during the night and was laid before Cabinet on Saturday."[493].

The O.P.C. has always possessed the ability to respond effectively to emergency type situations which have arisen in the State from time to time. On 23 September 1923, the then Parliamentary Draftsman received verbal

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[492] The term "internet grooming" refers to the recently established practice whereby predatory adults make contact with children, become friendly over time, with a view to meeting them for the purpose of sexual exploitation.

[493] Thring, *Practical Legislation* (London, 1902) p. 7.

instructions[494] from Hugh Kennedy to draft the County Courts (Amendment) Bill. A mere two days later, he handed a draft of the Bill to the Attorney General. Subsequently, in November of that year, Matheson was instructed to draft a Foot and Mouth Disease Order as a counter-measure to an outbreak of the disease.[495] He completed the order by the following day.

The demands which arise from situations of this nature have been matched in recent years by the professionalism and dedication of members of the Office. For example, a foot and mouth disease outbreak was detected in the UK in February 2001. Shortly after, the Office of the Parliamentary Counsel was instructed to draft a number of Orders restricting the movement of animals, and also a Bill to underpin those measures. A series of statutory instruments were signed into law by the Minister for Agriculture by the Minister on 28 February 2001 merely days after the drafter had been instructed. One week later a comprehensive Bill dealing with the issue was published on the 7 March and enacted on the following day.

A further example arose following the shooting dead of Veronica Guerin, investigative journalist. The Government instructed the Office to draft special legislation within a very short time and within days of the murder, the Government published and enacted a number of pieces of anti-crime legislation.

Aside from emergency situations, drafters frequently come under pressure from their political masters to produce a Bill in less than adequate time. As pointed out by Renton, the pressure to deliver can increase dramatically with a change of Government:

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[494] It was not unusual in those days to receive purely oral instructions. Thring illustrates this point in his book: "The instructions given me were as usual, to a great extent, verbal ones, conveyed during a series of conferences with Mr Gladstone. I used to attend him at his house generally by myself.". Thring, *Practical Legislation* (London, 1902) p. 5.

[495] Arthur Matheson's Diaries, diary entry of 23 November 1923 (National Archives, 2001/49/68).

> "There is usually great pressure to get things done quickly, both before and after introduction, and this makes the draftsman's task much more difficult. Such pressure is sometimes unavoidable, especially in the weeks following a change of government."[496]

The pressures which the drafter comes under are probably at their greatest after a new Government has taken office. The new Cabinet will be eager to turn the previous administration's legislative programme upside down in order to put their stamp on the legislative path to be taken. This can mean the abandonment of some Bills, matched by the need to swiftly draft further Bills in order to give effect to the new regime's priorities.

However, the more rushed the drafting process is, the likelihood of mistakes in that Bill increases correspondingly. As pointed out by Driedger:

> "There is for each Bill an irreducible period for preparation ... as the time is cut down the quality deteriorates so that ultimately the point is reached where no Bill fit for introduction can be produced."[497]

This point was well made by a former Chief Parliamentary Draftsman in England of 13 years standing, Sir Noel Hutton, where he said:

> "In a more perfect world, draft Bills would be prepared at leisure and matured in bottle before introduction, but this ideal is not a practical one. Under any system of programming, the date of introduction will eventually become more important than the precise content of the Bill when introduced and the process of drafting will have to be continued after introduction by means of government amendments moved in

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[496] *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (1975) (Cmnd. 6053) at para. 3.8.

[497] Ilbert, *Legislative Methods and Forms* (Oxford, 1901).

Parliament."[498]

On that basis, it is to be accepted that it rarely if ever happens that a drafter hands over a Bill without having been pressurised by the instructing department to some degree, or without having to embark on "a last minute rush" to get every detail right.

Role of Information Technology in the Work of the Drafter

Many of the drafters in the Office of the Parliamentary Counsel in Dublin produce their initial drafts in handwriting and they subsequently amend the typed text in handwriting also. Even though the role of computers and information technology in the preparation of legislation has increased, these old habits and traditions still persist.

Technology in legislative drafting has been put to different uses in other countries. In Canada, some of the drafting takes place in what are known as "Drafting Rooms"[499]. This facility enables the drafter to prepare a draft in the presence of the instructing officials. So it allows matters to be progressed at a far quicker pace than through traditional correspondence. This facility also enables the drafter along with the instructing officer to search for suitable precedents.

A system of computer aided legislative drafting, the LEDA system is currently in use in the Netherlands.[500] LEDA is a Legislative Design and Advisory System designed to provide legislative drafting assistance on the basis of the Directives for Regulations in a methodical way, concurrent with the

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[498] As quoted by Bennion in, "Reforming Statutory Drafting" *Proceedings of the Ninth International Symposium on Comparative Law* (Ottawa, 1971) at p.11.

[499] Sometimes referred to as the "War Office".

[500] Voermans, "Computer-assisted Legislative Drafting in the Netherlands: the LEDA System" paper delivered at the National Conference on Legislative Drafting in the Global Village hosted by CIAJ, 16 & 17 November 2000.

information needs during the different drafting activities of the drafting process. This program also provides a form of knowledge-based IT support for some specific drafting activities. For example, it is possible to check a draft bill for its conformity with some of drafting protocols.

Similar systems are in use on Belgium, Austria and Italy. However, by far the most advanced system of computer aided legislative drafting is that used in Tasmania. The Tasmanian system is holistic in nature in that it has computerised, and to a large degree, it has integrated the preparation and publication of legislation.

Information technology has been deployed to a minimal degree in aiding the preparation of legislation in Ireland. Until recently, a poorly developed template style programme has been used to assist support staff in the typing of Bills and statutory instruments. In Ireland, all of the key partners in the legislative process have been united in a project to introduce a legislative drafting package which supports the creation, amendment, translation and multi-channel publishing of legislation. The programme chosen is known as PropelX Parliamentary Workbench, developed by Propylon, a Dublin based company, using the XML format.

XML is quite unique in that it permits the manipulation of the information stored so that it can be used for many different purposes or be produced in different formats. This ensures that the information stored in XML will not become obsolete because of the transience of technology. The Parliamentary Workbench system is what might be described as an end-to-end solution. It enables a Bill undergoing the legislative process, at all stages of its life to be fully automated so that a Bill can be authored, published in Bill form, amended, and then published – all on the same programme.

It is hoped that Ireland's use of information technology in the legislative

drafting process will help to improve the statute book, and in so doing, reduce the amount of criticism levelled at drafters.

Criticism of Drafters

In forewarning parliamentary counsel that their work will be the subject of criticism, Thring advised:

> "... when the Bill becomes law, it will have to run the gauntlet of the judicial bench, whose ermined judicial dignitaries delight in pointing out the shortcomings of the legislature in approving such an imperfect performance."[501]

The difficulty faced by drafters was appreciated by Lord St Leonards, a judge who had some drafting experience:

> "... we ought to make great allowance for the framers of Acts of Parliament in these days; nothing is so easy as to pull them to pieces, nothing is so difficult as to construct them properly, as the law now stands."[502]

In laying the blame for verbose and ill drafted statutes at the door of not only the drafters, but those who engaged them, in 1876 Cockburn[503] stated:

> "the work of framing them is committed to few hands, while the task is a Herculean one, far beyond the strength of the men employed properly to discharge."

Few would argue that Cockburn's words hold any truth today. In all common law jurisdictions, prospective drafters are subject to a rigorous application

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501 Thring, *Practical Legislation* (London, 1902) at p. 9.

502 In *O'Flaherty v M'Dowell* (857) 6 HLC 142, 179.

503 Andrew Cockburn, in a speech at the Guildhall, 9 March 1876. See, Edgar, *Craies on Statute Law* (7th ed., London, 1971) at 23.

process which ensures that only those with the capability for the task are actually engaged.

On occasion, legislative drafters in Ireland are occasionally subjected to criticism by the Courts. With reference to the amendments effected by section 15 of the National Monuments (Amendment) Act 1994, Keane C.J. in *Mulcreevy v Minister for the Environment*[504] wryly remarked "It can be said immediately that they were effected in a remarkably tortuous and oblique fashion.". In a similar tone, he later added: "Despite the manner in which it has been drafted, the effect of this amendment is clear."[505].

Drafters are sometimes criticised by members of the opposition, particularly where a Bill is turgid. However, they are sometimes criticised by Ministers. As highlighted by Senator Feargal Quinn:

> "Ministers have told me again and again of their frustration in drawing up the heads of a Bill which they are satisfied with, and which they find are subtly changed when the text of the Bill emerges. In the process, they have said to me, the essential point can at worst be missed – and at best obscured.
>
> Small wonder that some of them come to look on the parliamentary draftsman's office as a kind of Procrustean bed, where the real world of today is stretched or squeezed to fit into a strange, abstract format."[506]

Though far more rare, drafters are occasionally complemented for their work. In the course of the debate on the Defence (Amendment) Bill 1998, Minister for Defence Smith commented:

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504 [2004] 1 I.R. 72 at 83.

505 *ibid.*, at p. 84.

506 Quinn, "How We Should Write Our Laws" Conference Paper Delivered at "Legislative Drafting: Emerging Trends" 6 October 2000, Dublin Castle.

> "the expert advice of the parliamentary draughtsman's office has determined our approach. I would like to record my appreciation for its considerable assistance in clarifying many difficult legal issues where a layman might easily be led astray."[507]

At the conclusion of the Report and Final Stages of the Maritime Safety Bill 2004 in the Seanad, Minister of State Gallagher made a particular point of personally thanking the drafter involved:

> "I thank the Parliamentary Counsel and Jack Hazlett and his colleagues in the Office of the Attorney General for all of their work in bringing the Bill to a successful conclusion in this House."[508]

Legislative drafters are a particular kind of species. As if criticism from the outside world was not enough, they have no qualms about criticising each other's work. A perfect example of this is Sir Courtenay Ilbert's criticism of William Harrison, Parliamentary Counsel to the Treasury. In 1833, Harrison in giving evidence to a Select Committee of the House of Commons, described his role and function.[509] Commenting on what Harrison had said, Ilbert stated:

> "Very little appears to be remembered about Mr Harrison or his work, and it is probably that in giving evidence he exaggerated the duties and importance of his office. The Acts which he said he drew are not masterpieces of draftsmanship."[510].

This criticism did not go unnoticed by A.G. Donaldson who noted that Ilbert had been "somewhat dismissive of Harrison's work"[511]. In finding it necessary

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507 493 *Dáil Debates* Col. 544 – 545 (30 June 1998).

508 180 *Seanad Debates* Col. 526 (4 May 2005).

509 See Chapter 4.

510 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 82.

511 Donaldson, "The High Priests of Mystery: A Note on Two Centuries of Parliamentary Draftsmen" in Finnie, Himsworth, Walker (eds.), *Edinburgh Essays in Public Law* (Edinburgh, 1991) at p. 100.

to criticise his predecessors, Lord Thring said that when he examined the statute book of modern times, he found:

> "statutes, made with great deliberation and by learned and judicious lawyers, have been expressed so obscurely or have been constructed so inaptly that decisions interpreting the sense of these provisions, or supplying and correcting the provisions ex ratione legis, have been of necessity been heaped upon them by the courts of justice."[512]

This gratuitous criticism is characteristic of the kind of esteem in which some drafters hold each other's work.

Concluding Remarks

All too many of the ills of the statute book derive from tradition and established drafting practice. The repetition of these practices has served to perpetuate both the good and the bad, which together have brought us the statute book in its present state.

A drafter is but part of the O.P.C. and gives effect to the policies of his or her instructing officials in the manner set down by established drafting practice, including standards set down by the Chief Parliamentary Counsel. If legislation is not to be drafted by specialist parliamentary counsel, it follows that we should instead have legislation drafted with greater simplicity by other lawyers or even laypersons. Given that certainty of the law is desirable, if not fundamental, and given the particular meaning which legislative language has, and given the importance attached to those words by the judiciary, the task of choosing the right words is a difficult one and worthy of specialists. While the drafters must bear some blame for the present state of the statute book, the solution to the current problem is not as facile as Byrne and

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[512] Thring, *Practical Legislation* (London, 1902) at p. 3.

McCutcheon would lead one to believe. So clearly, it is not reasonable for the drafter, as an individual to be held responsible for the present state of the statute book.

The same cannot be said of the Chief Parliamentary Counsel and his or her predecessors. It is within the gift of the Chief Parliamentary Counsel to set standards and implement change. In the context of the statute book, this has not been done over many years. The recent introduction of Drafting Manuals is a significant step forward in terms of setting about introducing change. However, as discussed in the previous Chapter, the manuals, to a large extent, merely articulate and perpetuate the past problematic practices.

While the previous Chapter has examined the O.P.C. in its collective form, this Chapter has taken a closer look at the individual drafters that comprise that Office. This Chapter has shown that like the O.P.C., drafters play a key role in the shaping of legislation and accordingly, they bear some, (albeit limited) degree of responsibility for the present state of the statute book.

More needs to be done so as to ensure that the role of the drafter is fully incorporated into any measures directed at the reform of the statute book. There is no two-step, magic solution to improving the statute book. The improvement of the statute book is a process which must involve all of the stakeholders. Any programme for reform of the statute book must, if it is to be effective, incorporate reforms in relation to the role of the drafter.

Chapter 7

Structure & Features of Legislation

Introduction

The structure and features of legislation can have a major influence over whether that legislation is accessible to the reader. It follows then that the poor structuring and inappropriate or unjustified use of certain features can have a negative effect on the accessibility of legislation.

This Chapter first looks at the number of factors which influence the structure and organisation within a piece of legislation. There are three principal influencing factors, and a well balanced piece of legislation will probably draw equally from all three. There then follows an examination of the divisions which are used within a piece of legislation.

The principal feature of this Chapter is the examination of the many and varied features and devices which are used in legislation. The structure and features of any piece of legislation are the building blocks of what becomes an Act. And all of the pieces of legislation are the building block of what has become the statute book. When looking at the overall state of the statute book, it is not sufficient to merely look at the statute book at macro level. The statute book and, consequently, legislation itself needs to be pared down so that a clear picture is painted as to what exactly a piece of legislation is comprised of, and what influences the shape and form of those pieces.

Factors Which Influence Structure

Thring's Influence on Structure

Lord Thring is credited with devising the present structure which our Acts follow. He first employed his novel approach to the arrangement of Acts when in 1854, he was asked to draft a Merchant Shipping Bill. This later became the Merchant Shipping Act 1854. From a drafting point of view, this Bill was significant for a number of reasons, particularly as it was the first time a Bill had been divided into distinct Parts. In his book, Thring describes how he went about this task:

> "I divided the Bill into parts and then divided the parts under separate titles, arranging the clauses of the Bill in a logical order so that a glance at the table of contents would convey to the reader a correct idea of the effect of the Bill."[513]

To a reader today, these steps may sound trite and mundane. However, these simple tasks which Thring recounted would influence the format of Irish and UK legislation for many years to come.

Over many years, these tasks and protocols became known collectively as established drafting practice. Adherence to drafting practice is one of the principal factors which influences the features, but in particular the structure of legislation. However, political considerations can also have a significant influence on the structure of legislation.

Political Influences on Structure

In the not too distant past, the sequence of the Bill was of significant political importance, so much so that political considerations significantly influenced how the drafter shaped the Bill. The belief was that the principal features

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[513] Thring, *Practical Legislation* (London, 1902) at p. 4.

should be at the beginning of the Bill, subordinate matters should be at the end of the Bill and matters of detail were to be placed in schedules. The Bill was to be arranged in such a way as to facilitate discussion at Committee Stage. In England, in particular, consideration had to be given to reducing the opportunities for debate on the "Clause stand part" aspect of the debate. To circumvent this, drafters were encouraged to cram the contents of the Bill into the least number of clauses possible.

Considerations of logical order of the Bill were only in second place to political expediency. Writing in 1901, Ilbert wrote:

> "So far as parliamentary exigencies will admit, the subject matter of a Bill should be arranged with reference to administrative convenience; in other words, its arrangement should be orderly and logical."[514].

Particular regard was had to the divisions taken on Bill. Thring gives us an indication of the thinking on the issue:

> "Such questions must be determined by the Minister, rather than by the draftsman, but it is impossible to overrate their importance, as an Act not unfrequently is lost or won according as a division is taken on the right point and at the right time, on a simple or complicated issue."[515]

On occasion, a Minister or Departmental officials may ask that the Bill be arranged, or even re-arranged for purposes other than good drafting practice. Such requests might arise for a number of different reasons. For example, they might want the Bill to be structured in such a way so as to deflect attention from a particular feature of it. This might require a controversial section to be subsumed into another section so as to disguise its real significance. Conversely, the drafter might be asked to review the Bill's

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514 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 245.

515 Thring, *Practical Legislation* (London, 1902) at p. 38.

structure where it is desired to highlight the more popular aspects of it. This can have a negative effect on the logical flow and coherence of the Bill.

Drafting Practice Influence on Structure

The rules and protocols associated with legislative drafting have evolved and have been established over several years. Many of the rules of drafting practice have their origins in logic, with the sequential structure of legislation being dictated mainly by a desire to establish the context and basic principles of the legislation before getting into the more substantive and detailed aspects of it. Thring[516] devised a series of rules for the sequential structure of an Act, it comprises five rules, which, given their equal applicability today, merit repeating:

> Rule I. – Provisions declaring the law should be separated from and take precedence of provisions relating to the administration of the law.
>
> Rule II. – The simpler proposition should precede the more complex and in an ascending scale of propositions the less should come before the greater.
>
> Rule III. – Principal provisions should be separated from subordinate provisions. The latter should be placed towards the end of the Act, while the former should occupy their proper position in the narrative of the occurrence to which they refer.
>
> Rule IV. – (a) Local or exceptional provisions, (b) temporary provisions, (c) provisions relating to repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings.
>
> Rule V. – Procedure and matters of detail should be set apart by

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[516] *ibid.*, at pp. 38 – 44.

themselves, and should not, except under very special circumstances, find any place in the body of the Act.

For guidance on best practice regarding the structure of legislation, the drafters of today are reliant on the two drafting manuals which have been produced within the O.P.C. As discussed in Chapter 5, drafting manuals largely encapsulate old drafting practices, conventions and traditions. In the Irish legislative drafting sphere, little seems to have been learned from the wise old adage - the repetition of a vice does not render it a virtue. The senseless, unquestioning slavery to tradition is, in no small part, responsible for the present inaccessible state of the statute book. While old wisdom is to be valued and much is to be learned from the experiences of the past, there is little evidence over the years, of any efforts to change or improve the way in which legislation has been drafted.

Division of Acts

There are well established rules for the subdivision of Acts. Longer Acts tend to be divided into Parts, and the Parts may be further divided into sections. All Acts are comprised of sections, which may themselves be further subdivided. The division of Acts is designed to be helpful to the reader, so that sections dealing with one particular matter may be grouped together.

Sections

A section represents the basic division of any Act[517]. Sections tend to consist of one sentence. The general rule is that if more than one sentence is required, then the drafter must consider dividing the section so that each sentence becomes a subsection.

Post 1487, conveyancers were engaged to draft legislation. As well as their

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[517] See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 612 et. seq.

tendency for prolixity, they also brought their practice of dealing with issues in one sentence, regardless of its length. In practice, this has meant that it is not unusual to find a section which runs for 10 or 20 lines. In Craies' view, "the length of these sentences is only one of the objections to them; they are as ill-arranged as they are lengthy."[518] In the past, in a Bill, sections were referred to as clauses and once the Bill was enacted, the clauses became sections. However, this distinction is no longer employed.

Every section has a sequential number. It appears that the numbers prefixed to each clause of the early Acts was wholly the work of the King's Printer.[519] However, this practice then became part of drafting practice and is now a convenient way of referring to a particular section.

Sections may be divided into subsections, paragraphs, subparagraphs, clauses and subclauses. The simplest Act has to have at least 2 sections, a substantive section and a short title section. Section 6(2) of the Interpretation Act 1937 provides for the division of Acts into "sections numbered consecutively and any such section may be sub-divided in such manner and to such extent as is convenient.". However, there is no comparable provision in the new Interpretation Act 2005.

Parts

As already stated, it was Thring who, when drafting the Merchant Shipping Bill in 1854, devised the very logical idea of breaking an Act down into parts, sections and subsections. Prior to this, the practice was to gather groups of sections under a heading[520].

The division of a Bill into Parts requires that groups of related and consecutive sections are placed under a parent heading, which indicates the general

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518 Edgar, *Craies on Statute Law* (7th ed., London, 1971) at 24.

519 Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 48.

520 See generally, Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 177 et. seq..

subject matter dealt with in those sections. The structure of a long Bill will be improved and made more intelligible if it is divided into Parts.

Thring's idea to divide Acts into parts came from his examination of the Code of New York, and he favoured sub-division on the basis that "if used judiciously, it facilitates considerably the understanding of an Act."[521].

Thring encouraged drafters to think of each Part of a Bill as if each were itself a Bill:

> "In a complex Act, the principles should be arranged in different parts of the Act, and each part of the Act should be treated as a simple Act, and contain its principle enunciated in the most concise form at the outset of the part."[522]

However, he urged caution in the habitual or unjustified sub-division of Acts:

> "It is, however, a mistake to imagine that a mere mechanical subdivision into parts insures clearness ... As a general rule the division into parts should only be used where the subject matter of the Act involves different heads of law ...."[523]

The subdivision of an Act in this way might not be either helpful or desirable in some Bills, particularly in short Bills or in Bills where the subject matter cannot be neatly divided into discrete elements.

Chapters

A Chapter is what results from the subdivision of a Part of an Act. Chapters are numbered in an Act in the same way as Parts. They are a relatively rare

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521 Thring, *Practical Legislation* (London, 1902) at p. 59.
522 *ibid.*, at p. 29.
523 *ibid.*, at p. 59.

feature of Acts, as their use can only be justified in very long or complicated Acts. For example, the Defence Act 1954 which is comprised of over 300 sections, is itself broken down into ten Parts, and each Part is further subdivided into a number of Chapters.

Headings

Headings were introduced into legislation by private enterprise printers without any official sanction or legal basis. Headings made their first official appearance in an Act passed by Parliament in 1845. Each subdivision of Acts, whether Parts or Chapters, are invariably accompanied by a heading, indicating the subject matter dealt with in that division.

General Structure & Features

In sequential terms, an Irish Act usually contains some or all of the following. It will begin with an Arrangement of Sections, followed by the long title, short title and commencement provisions, interpretation provisions, followed by the substantive provisions. These will invariably be supported by penalty provisions and in certain situations, transitional provisions will also be featured. Increasingly, the final feature in many Acts are schedules.

Arrangement of Sections/Table of Contents

Since 1997, the marginal notes have been accumulated at the beginning of every Act and they form what has become known as the Arrangement of Sections. Acts prior to that year do not have an Arrangement of Sections and as a consequence, this makes those Acts more difficult for the reader to navigate.

In a well ordered Act, a reading of the Arrangement of Sections will give the reader a clear outline of the subject matter of the Act. Thring saw the Arrangement of Sections as providing assistance to the drafter:

> "... a good Index is in practice a not ineffectual cure for any defects in the arrangement of a code ..."[524]

In deference to Thring's belief, in Canada, a table of provisions is prepared after every draft as it highlights to overall structure and order of the Bill. In their experience, it can expose any flaws in the logical ordering and coherence of the Bill.

In the context of reprinting or restating any pre-1997 Acts, there is a real need for each to be prefaced by an Arrangement of Sections. It is, and should be, a basic feature of any Act and is often the first point where any reader will turn to in seeking out the law on a particular matter.

Enacting Formula[525]

The words of enactment are a vital feature of all Acts, including Acts to amend the Constitution. The words of enactment which are to be found at the beginning of every Act, read as follows:

> "Be it therefore enacted by the Oireachtas as follows:"

Our words of enactment are derived from those used in Britain, which read:

> "Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same."

In their Consultation Paper entitled *Statutory Drafting and Interpretation: Plain*

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524 Thring, *Practical Legislation* (London, 1902) at p. 17.

525 See generally, Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 199.

Language and the Law[526], the Law Reform Commission favoured the simplification of the words of enactment to read "The Oireachtas enacts ...". Interestingly, this matter was not alluded to in their subsequent Report[527].

However, given that they serve a solely formal role, shortening or replacing the words of enactment will have little or no effect in contributing to the improvement of legislation and in turn, the statute book.

Long Title[528]

By virtue of Standing Order 118(1), each Bill should contain a long title, and in many cases the long title serves to highlight the purpose of the Bill. The long title of an Act must, in a general way, address the substantive aspects of the Bill. The long title is the final matter to be agreed when the Bill is at Committee Stage. As such, it is a formal part of the Act and its terms may be visited to assist in interpretation.[529]

The long title also serves to delimit the scope of the Act. All of the provisions of the Bill must fall within the scope of the long title. It is the nearest thing which we have to a purpose provision in our legislation. Framing the title of a Bill requires a great degree of care – because it must be wide enough to encompass all provisions of the Bill, while on the other hand, it must be narrow enough so as to fend off proposed amendments which are unconnected to the real purpose of the Bill.

In circumstances where a Bill outgrows the scope of its long title, the long title should be amended so that it is reflective of its expanded scope. So significant were the changes made to the Criminal Justice (Terrorist Offences)

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526 (July 1999) CP14-1999 at para. 5.45.

527 (LRC 61-2000).

528 See generally, Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at p. 40; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 620; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 193.

529 See, Hogan & Whyte, *Kelly: The Irish Constitution* (Dublin, 4th ed., 2003) para. 6.2.268.

Bill 2002 in the course of its passage through the Houses, the Minister felt compelled to amend the long title of the Bill at Committee Stage in the Seanad, so as to ensure that the more broad scope of the Bill, particularly regarding data retention and European arrest warrants, was adequately reflected in the long title.

Where there is uncertainty or ambiguity in an Act, the Courts may look to the long title for assistance. Accordingly, the drafter must ensure that the long title covers the principal purposes of the Act.

However, the value of the long title of a Bill to a reader can sometimes be very limited. Long titles can range from being informative to merely discharging the formal requirement of having a long title. An example of a wholly inadequate long title is to be found in the Irish Nationality and Citizenship Act 2004[530] which reads "An Act to Amend the Irish Nationality and Citizenship Act 1956". This Act, comprised of 16 sections, makes a broad range of changes to citizenship laws, the principal ones which should have been alluded to in the long title.

The seeming decline in the informative nature of long titles has not gone unnoticed by the Courts. In *Sheedy v Information Commissioner*[531] the long title of the Freedom of Information Act 1997 caused Fennelly J. to remark:

> "The long title to the 1997 Act did something which has regrettably become uncommon. It proclaimed its purposes in a long title. This is deserving of full citation.".

The long title is the first substantive aspect of an Act to which a reader will have recourse. The informative value ought to be restored to the long titles of

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[530] The purpose of this Act was to make the necessary legislative changes in order to give effect to the decision of the people in a referendum on 11 June 2004 to restrict the entitlement to citizenship.

[531] Supreme Court, unreported, 30 May 2005 at p. 1.

Acts. If this is not done by the drafter, it should be done at the behest of the legislature.

Purpose Provisions[532]

Bentham regarded the promulgation of the reasons for the law as being equally important as the promulgation of the laws themselves. He seemed to advance this argument on the basis that if people can know the reasoning behind a law, they are more likely to comply with its terms. He believed that illustrating the reasons behind a law would:

> "... render the laws more easily understood. A rule, the reason of which is unknown, takes no hold upon the understanding: those things are best comprehended, of which we know the why and the wherefore. The terms of the law may be clear and familiar: add to them the reason of the law, and the light is increased..."[533]

At present, there is no requirement to include a purpose provision in Irish legislation or even in all EU originating legislation. In other jurisdictions, purpose provisions appear in all Bills. Purpose provisions may be used as a precursor to every section, or each Part of a Bill, or alternatively there may be just one purpose provision at the beginning of the Bill.

In the absence of a specific requirement to include a purpose provision in Bills, drafters have been reluctant to insert purpose provisions. Despite this, some more innovative drafters have, in limited instances, inserted a purpose provision. For example, the Water Services Bill 2003[534] and also the Air Navigation and Transport (International Conventions) Act 2004[535] both contain

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[532] See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 625; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 154.

[533] Bentham, *Of Promulgation of the Laws and Promulgation of the Reasons Thereof* (Edinburgh, 1843).

[534] See section 5.

[535] See section 2.

a long title and also a purpose provision.

Aside from the absence of any tradition of using such provisions, the reluctance of drafters to include such provisions might also stem from the difficulty faced by drafters in trying to accurately encapsulate the purpose of a whole Bill into one or two short sentences. Coupled with this is the danger of the purpose provision leading to an interpretation which conflicts with the intended meaning of the Act or section concerned.

The Law Reform Commission are of the view that the inclusion of a provision of this kind might help to resolve a point of uncertainty in interpretation. In its Report[536], the Law Reform Commission recommends that purpose clauses should be included where appropriate, particularly where an Act gives effect to European legislation, which itself invariably contains a purpose provision.

However, it could be argued that the long title of an Act already serves as a purpose provision and appears to do so adequately. Ideally, a reading of the long title of an Act should reveal the purpose of the legislation in a concise manner and this, some would argue, has negated the need for Bills to contain a purpose provision.

However, as detailed above, the presence of a long title in every Bill has not prevented some Bills from having both a long title and also a purpose provision. So it is clear that in some instances, the drafter and indeed the legislature see purpose provisions and long titles as being compatible with each other.

In an exchange with Senator Sheila Terry during the course of the Report Stage of the Transfer of Execution of Sentences Bill 2003[537], the Minister for

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[536] *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at para. 6.34.

[537] 177 *Seanad Debates* Col. 273 (23 June 2004).

Justice, Michael McDowell indicated that he would be giving serious consideration to the possibility of using purpose provisions more widely:

> "I fully accept that every Bill should at some stage state its purpose, but there has been a long tradition that the Long Title of a Bill is the place in which to set that out. ... The real question, the policy issue which arises from Senator Terry's observations, which I fully respect, is whether we should have Long Titles at all. If we are to go down that road, why not have a Short Title and a purposes section in every Bill? ... I would want to consult the Attorney General and the Parliamentary Counsel as to whether it was desirable in future to simply have Short Titles and purpose sections in every Bill for the guidance of the reader and the courts."

Despite the Minister's openness to examining this issue, as at the time of writing, no proposals on this issue have emerged.

Preambles & Recitals[538]

Today, preambles are occasionally used in legislation. In the past, their use was more frequent. Their purpose is to explain certain matters for the reader in order to enable him or her to fully understand the basis or purpose of the provisions which follow it. According to Thring, a preamble may well have been inserted for political purposes, where the object of the Act was popular and it was beneficial to set out the purpose of the Act in a sentence or two.[539]

Where used, preambles are found after the long title and they set out the background of, and reason for, the legislation. Its effect is to lend some context and authority to the measure being proposed. While recitals perform

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[538] See generally, Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at p. 40; Thring, *Practical Legislation* (London, 1902) at p. 92; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 623; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 196.

[539] Thring, *Practical Legislation* (London, 1902) at p. 93.

the same function as a preamble, they relate only to a single section.

The initial sentence of a preamble will usually begin with the word "WHEREAS" and all subsequent ones begin with "AND WHEREAS". In Irish legislation, preambles are mainly found in Acts to amend the Constitution, and Private Acts[540]. The Royal College of Surgeons in Ireland (Charters Amendment) Act 2003 contained a lengthy preamble which set out in detail the chronology of significant steps in the establishment and the life of the College. The preamble then goes on to explain why the present Act is required.

It is rare to find a preamble in a Public Act. All of the Acts enacted in 1922 (except for Act No.1 which was the Constitution) contained preambles, as did a number of Acts enacted in 1923. Thereafter the practise of habitually including preambles seems to have effectively ceased, though not entirely so. Preambles are a rare feature of more modern public Acts, a more recent example being the Prices Act 1958.

The Preambles in the Acts of 1922 and 1923 invariably set out the circumstances giving rise to the need for that particular piece of legislation, and they also indicate the purpose of the legislation. For example, the preamble to the Oireachtas (Payment of Members) Act 1923 states:

> "WHEREAS it is enacted by Article 23 of the Constitution of Saorstát Eireann that the Oireachtas shall make provision for the payment of its members and may in addition provide them with free travelling facilities in Ireland:
> AND WHEREAS on the 10th day of January, 1923, Seanad Eireann resolved that the remuneration payable to members of Seanad Eireann should be the same as might be fixed by Dáil Eireann for its members

[540] For example, Limerick Markets Act 1992; The Altamount (Amendment of Deed of Trust) Act 1993.

and that First class vouchers or season tickets to or from the houses of Senators should be provided:

AND WHEREAS on the 24th day of January, 1923, Dáil Eireann resolved that each of its members should be allowed a sum of ⌋30 per month towards expenses and be provided with free first class railway travelling facilities between Dublin and his constituency:

AND WHEREAS it is expedient that provision should be made pursuant to the said Article 23 of the Constitution for the payment to members of the Oireachtas of the allowances mentioned in the said Resolutions and for providing them with free travelling facilities in accordance with the same Resolutions"

The information contained in this and in other preambles is clearly of great assistance to the reader. In a short few minutes, the reader of this preamble is able to know the background to this Act and also learns of the Act's precise purpose. This is no longer possible with our modern legislation, which, following the long title, immediately begins with substantive provisions.

The decision to effectively abandon the use of preambles is very questionable, particularly in the light of the recent calls by the Law Reform Commission[541] for the general principles and purpose of each Act to be articulated before it gets into the actual detail:

> "The Commission provisionally recommends that there should be a standard structure applied in the drafting of legislation, by which in each part of an Act, the general principles should be set out first, followed by the detail of the provision, and any exceptions or conditions applying to the general principle."[542]

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[541] Law Reform Commission (Consultation Paper), *Statutory Drafting and Interpretation: Plain Language and the Law* (July 1999) CP14-1999.

[542] *ibid.*, at para. 5.64.

The Commission further went on to say:

> "The Commission provisionally recommends that purpose clauses should be included at the head of an Act, in as many cases as possible. The long title to an Act should no longer be given, since it can serve no additional useful purpose where there is a purpose clause. In longer Acts, purpose clauses should be used at the head of each Part of the Act."[543]

After consultation and discussion, the Commission affirmed the tenor of their provisional recommendations to state in their Report[544]:

> "We recommend that the Office of the Parliamentary Counsel to the Government should consider including purpose clauses in some Acts of the Oireachtas, and support the view that this ought to be done, in particular, where an Act gives effect to European legislation which itself has a purpose clause."[545]

Preambles feature prominently in much European legislation. A Council Resolution of 8 June 1993[546] on the quality of drafting in Community legislation sets out a series of rules of good drafting, one of which was that the preamble should justify the enacting provisions in simple terms.

In their Report[547], the Law Reform Commission also criticised the under-use of preambles and recitals and they level some criticism at the Drafting Manual prepared in the O.P.C. for failing to promote their use sufficiently.

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543 *ibid.*, at para. 5.82.

544 Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000).

545 *ibid.*, at para. 6.40.

546 OJ 1993 C 166, p. 1.

547 Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at para. 6.31.

It can of course be argued that the preamble should never carry too much weight, particularly as it physically appears before the words of enactment, and is therefore, not technically part of the substantive aspect enactment.

Date of Promulgation[548]

The date which appears just below the long title of an Act is the date upon which the Act was signed into law by the President. This is known formally as the date of promulgation and should not be confused with the date of commencement.

In Acts which do not contain a commencement provision, the date of promulgation is taken as the date on which the legislation commenced.

Marginal Notes[549]

Today, marginal notes are intended to assist the reader by providing short descriptive notes of what each section contains. The content of these notes can be of considerable assistance to a reader, particularly when faced with a lengthy and complex section.

Thring advises that:

> "Each note should express in a concise form the main object of the section on which it is made, or should at least indicate distinctly its subject matter..."[550]

In the 18th and early 19th Centuries, marginal notes were of little significance

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548 See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 633 et. seq.; Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 33.

549 See generally, Thring, *Practical Legislation* (London, 1902) at p. 60 et. seq.; Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at p. 42; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 185; Simamba, "Should Marginal Notes be Used in the Interpretation of Legislation?" 26 Stat. LR 103 (2005).

550 Thring, *Practical Legislation* (London, 1902) at p. 60.

as they were inserted by the printers after the Act had passed through Parliament.

The value and use of marginal notes in Irish legislation has been somewhat stymied by section 11(g) of the Interpretation Act 1937, which precludes a court from examining marginal notes and headings when interpreting an Act. A similar provision also featured in section 9 of the Interpretation Act 1923. A slightly more relaxed approach is taken in section 18(g) of the Interpretation Act 2005[551]. In the Houses of the Oireachtas and also in Westminister, marginal notes and cross-headings are not voted upon by parliament.

Marginal notes in legislation have proven to be of some contention in the context of judicial interpretation. However, in contrast with the position in Ireland, the UK courts are not subject to a statutory prohibition on the use of marginal notes. Consequently, the judicial tendency in the U.K. leans towards favouring the use of marginal notes as an aid to interpretation.[552] The benefits of being able to refer to marginal notes in the resolution of a difficulty with interpretation have been highlighted in the U.K. - Vinelott J.[553] described marginal notes as "a permissive and useful guide that threw a light on the mischief at which the section was aimed".

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[551] Section 18(g) provides: "Subject to section 7, none of the following shall be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of the enactment: (i) a marginal note placed at the side, or a shoulder note placed at the beginning, of a section or other provision to indicate the subject, contents or effect of the section or provision,
(ii) a heading or cross-line placed in or at the head of or at the beginning of a Part, Chapter, section, or other provision or group of sections or provisions to indicate the subject, contents or effect of the Part, Chapter, section, provision or group;". Section 7 states that when construing a provision of an Act for the purposes of sections 5 and 6, then the court may make use of all matters that are set out in the Act as enrolled in the Supreme Court. Section 7 therefore permits the use of marginal note and headings contained in an Act for the purpose of interpretation, albeit in the limited circumstances described. This amounts to a significant departure from pre-existing practice which was enshrined in section 11(g) of the 1937 Act.

[552] Bennion, *Statutory Interpretation* (3rd ed., London, 1997) 548 at 570 is of the view that an Act comprises three distinct components and that marginal notes and headings fall into the third category known as "unamendable descriptive component" to which he says "little weight is attached". However, in the U.K., despite the fact that marginal notes do constitute part of the Act, they may be used in aiding interpretation.

[553] In *Re Phelps* [1980] Ch. 275 at 280.

The overly restrictive approach imposed by the 1937 Act has long been criticised by the judiciary and academics alike. Despite the existence of section 11(g), it is clear that judges can, and do, have regard to marginal notes. A practical example of this was in the Supreme Court case of *Rowe v Law*[554], where O'Higgins C.J. made it clear that he had read the marginal note accompanying section 90 of the Succession Act 1965 and was in fact placing considerable weight upon it.

From a purely pragmatic point of view, when a judge is reading a section of a statute, they do not close their eyes when they see the marginal note, merely a few millimetres away from the section they read. Pragmatists will recognise this fact. Even Mr Justice Hardiman alluded to this reality when speaking at a legislative drafting conference.[555] He was critical of the notion that judges were not allowed to look at marginal notes, particularly when they were printed on the same page which they were reading. Similar disapproval has been expressed by Cross, who in criticising attempts to limit the extent to which courts may have recourse to marginal notes, had this to say: "No judge can be expected to treat something which is before his eyes as though it were not there"[556].

The Law Reform Commission's sixth recommendation is to the effect that "the courts should have a discretion to take into account all potentially helpful material in interpreting a statutory provision, save where there is a good reason to the contrary. As a consequence, judges should enjoy a discretion to have regard to material that is published alongside the substantive sections of a statute, allocating whatever weight is apt, to these various sources of enlightenment"[557].

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554 [1978] I.R. 55 at 66.

555 "Legislative Drafting – Emerging Trends" Conference 6 - 7 October, 2000 Dublin, Ireland.

556 Cross, *Statutory Interpretation* (2nd ed., London, 1987) at 130.

557 Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at p. 86.

However, the reasoning behind the restriction on the use of marginal notes and cross-headings for interpretation has been based on the argument that marginal notes are inserted merely as an aid to the reader.[558] These notes do not purport to summarise or explain the law and in this context the level of assistance which they might provide in interpretation is questionable. As already stated, marginal notes and cross-headings are not voted upon as a Bill proceeds through the Oireachtas, therefore they do not constitute part of the Act as passed by the Oireachtas. Those opposed to proposals to lend weight to marginal notes argue that lending them some degree of status would mean that it would not be possible to delete them in Consolidation Bills and Statute Law Restatements. However, this argument bears no weight at all.

The Commission's seventh recommendation is that section 11(g) of the Interpretation Act 1937 be repealed. Section 18(g) of the Interpretation Act 2005 was framed with the intention of going some of the way towards giving effect to the Commission's recommendation. However, the restriction on the use of marginal notes and cross headings is largely retained.[559] It has been decided to limit the extent to which a court may have recourse to marginal notes and cross-headings for the reasons outlined above.

In recognition of the possibility that recourse to marginal notes and cross-headings might assist in the resolution of a difficulty with interpretation in a limited number of circumstances, a new section 7 was inserted into the Interpretation Act 2005 by way of Committee Stage amendment. The effect of

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[558] There is a considerable body of judicial pronouncements in support of maintaining the rule that marginal notes should not be used for the purposes of interpretation. See further: Bennion, *Statutory Interpretation* (3rd ed., London, 1997) at page 577.

[559] Section 18(g) reads: "Subject to *section 7*, none of the following shall be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of the enactment: (i) a marginal note placed at the side, or a shoulder note placed at the beginning, of a section or other provision to indicate the subject, contents or effect of the section or provision, (ii) a heading or cross-line placed in or at the head of or at the beginning of a part, chapter, section, or other provision or group of sections or provisions to indicate the subject, contents or effect of the part, chapter, section, provision or group;''.

section 7 is that it will allow the courts to refer to "all matters that accompany and are set out" in an Act, including marginal notes in order to assist the court in cases where it is faced with a provision which is obscure, ambiguous or where an updated meaning needs to be gleaned.

When proposing the insertion of section 7 at Committee Stage, Minister Hanafin explained[560]:

> "This amendment takes into account views expressed to the Attorney General by the Law Reform Commission and contained in its report ... Case law demonstrates the willingness of the Judiciary to refer to marginal notes. There is a fine balance required between allowing the Judiciary to make use of side notes which are printed with the Act signed by the President and the fact that, although accompanying an Act when it was a Bill going through the Houses of the Oireachtas, they were never voted upon. They could, however, be of assistance in cases of difficult interpretation, for example in cases where section 5 of the Bill or proposed section 6 of the Bill apply."

The relaxation of the rule is a recognition, (though a somewhat limited one) of reality. The rule should have been abandoned completely – at least in a prospective sense. This would eliminate the argument that in the past, drafters did not expect that judicial weight would be given to the words chosen to comprise the marginal note.

In view of the provisions of section 7 of the Interpretation Act 2005, greater care will now need to be taken in drafting marginal notes – as there is a real possibility that they may be formally considered by the judiciary when interpreting the Act.

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560 *Dáil Debates* (22 January 2003).

Short Title & Citation of Acts[561]

Virtually all Acts are now referred to by their short title. In the past, there was no formal requirement for English Acts to be given an official or short title. As a result, many old English Acts are cited by reference to the location of the Parliament in which they were made – one obvious example being the Statute of Westminister. Others were named according to their subject matter, so for example, we have De Donis Conditionalibus. There are also a number of Acts whose title derives from the initial words of the Act itself, such as Quia Emptores.

After 1867, English statutes were cited by the year of the Monarch's reign, for example – "the sixth year of the reign of King ...". This system of citation changed in 1896, and British statutes are now, like Irish statutes, most often referred to by their short title. The Short Titles Act 1896[562] was enacted to give short titles to all Public General Acts passed since the Union with Scotland, and also to some Acts passed prior to that date. The Short Titles Act 1962 was enacted in Ireland to give short titles to Acts dating as far back as 1275.

The short title attributed to Acts in recent years are usually descriptive of its subject matter and indicates the year in which it was passed. The short title is usually found in section 1 of the Act. However, drafting protocol dictates that if the Bill is not divided into Parts, the short title must be located in a section at the end of the Bill.

Once a Bill has been enacted, it is given an individual number. At the beginning of each year, the numbers begin at number 1. Thus, as an

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[561] See generally, Thring, *Practical Legislation* (London, 1902) at p. 93; Law Reform Commission (Report), *Statutory Drafting and Interpretation: Plain Language and the Law* (December 2000) (LRC 61-2000) at p. 41; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 626; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 200.

[562] 59 & 60 Vict. C. 14. In addition, the Statute Law Revision Act 1948 and the Statute Law Revision (Scotland) Act 1964 were enacted to give short titles to remaining Acts.

alternative to using the short title, the year of enactment accompanied by the number of the Act is a convenient way of referring to a particular Act. This is in accord with section 14(1) of the Interpretation Act 2005 which provides that "An Act may be cited in any enactment or other document – (a) by the long title or short title of the Act, (b) where appropriate, by the consecutive number of the Act in the calendar year and by the calendar year in which it was passed, ..."[563].

Commencement[564]

The term "date of commencement" means the date on which some or all of the provisions of an Act come into operation. Where no commencement date is fixed in the legislation, or there is no provision for a future date of commencement, then each Act commences once it has been signed into law by the President.[565]

At common law, until 1793, every Act of Parliament was held to have commenced on the first day of the session in which it was passed:

> "... every Act of Parliament in which the commencement thereof is not directed to be from a specific time, doth commence from the first day of the session of Parliament in which such Act is passed."[566]

This is a less than satisfactory situation as, at the very least it imposed constructive knowledge on persons even before the instrument had been

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[563] Section 7(1) of the Interpretation Act 1937 provided: "Every Act of the, Oireachtas may be cited in any other Act of the Oireachtas or in any instrument or other document either by the short title of the Act so cited or by the calendar year in which the Act so cited was passed and the consecutive number of such Act in such year.".

[564] See Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.5.33; Thring, *Practical Legislation* (London, 1902) at p. 94; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 229 et. seq.; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 204; Edgar, *Craies on Statute Law* (7th ed., London, 1971) at p. 383.

[565] Section 15(1) of the Interpretation Act 2005 provides: "The date of the passing of an Act of the Oireachtas is the date of the day on which the Bill for the Act is signed by the President.". Section 8(1) of the Interpretation Act 1937 contains a very similar provision.

[566] Acts of Parliament (Commencement) Act 1793.

published. Of greater concern however was the degree of retrospectivity inherent in a rule of this kind.

As regards Irish legislation, section 16 (1) and (2) of the Interpretation Act 2005[567] provide:

> "16.—(1) Subject to subsection (2), every provision of an Act comes into operation on the date of its passing.
> (2) Where an Act or a provision of an Act is expressed to come into operation on a particular day (whether the day is before or after the date of the passing of the Act and whether the day is named in the Act or is to be fixed or ascertained in a particular manner), the Act or provision comes into operation at the end of the day before the particular day."

Effectively this means that every Act which does not contain a commencement provision is deemed to commence at the beginning of the day on which the Act is passed (promulgated by the President). Interestingly, this involves some degree of retrospectivity and means that some legislation takes effect a number of hours before its exact terms can be known by the public.

It has been possible to identify a number of different approaches which have been taken to the inclusion and form of commencement provisions in Irish legislation. There are five principal approaches to the commencement of legislation, as set out in the Table (below):

Commencement Provisions in Irish Legislation

[567] Section 8(3) of the Interpretation Act 1937 provides: "Every enactment contained in an Act of the Oireachtas shall, unless the contrary intention is expressed in such Act, be deemed to be in operation as from the end of the day before the date of the passing of such Act."

	Type of Commencement Provision	Text of Commencement Provision	Effect
1	No commencement provision	----	Whole Act commences on its passing
2	Commence three months after passing	(2) This Act shall come into operation three months after the date of its passing.	Whole Act commences three months after its passing
3	Act to commence by order	(3) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be appointed for different purposes or different provisions.	Whole Act commences on the date or dates specified in the order

4	Some sections commence on its passing, specified others to commence by order	(4) Sections 11, 13, 15, 16, 17, 18, 20, 21, 23 and 24 of this Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so fixed for different purposes and different provisions and for the amendments effected by the said section 24 to the Pensions Act 1990.	Part of the Act commences on its passing, while other provisions to be commenced by order
5	Commencement provision with deadline	(7) This Act shall come into operation one month after its passing.	Whole Act commences not before, or not later than the deadline

Phased/Delayed Commencement

The purpose of phased commencements is to allow the Minister to put in place the necessary administrative frameworks or changes that might be required. A good example of an Act which had a phased commencement was the Personal Injuries Assessment Board Act 2003. Section 2 of the Act provided that the Act "comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to

any particular purpose or provision and different days may be so appointed for different purposes or different provisions.". Aspects of the Act which dealt with the establishment and membership of the Board and other related matters were commenced on 13 April 2004.[568] The same date was fixed as the establishment day of the Board.[569] A regulation made on the 31 May 2004 set the level of fees which the Board could charge.[570] The remaining sections of the Act were then commenced on 1 June 2004.[571]

Delayed commencements can give rise to a very lengthy period before which the Act becomes fully operational. An example of this is the Children Act 2001 which has so far been the subject of two commencement orders. Despite that, and despite the fact that it was enacted four years ago, the Act is still not fully operational.

A further consequence of delegating the power to commence an Act is that some sections might never be commenced. For example section 60 of the Civil Liability Act 1961 has never been commenced. Section 60(1) makes a road authority "liable for damage caused as a result of their failure to maintain adequately a public road". Obviously, the burden which would be imposed by a provision such as this was deemed to be too onerous to take on.[572]

As bad as the failure to commence a section may seem, what is a great deal worse is the fact that some Acts have never commenced. The Health (Mental Services) Act 1981 was never commenced[573] and was only repealed in

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[568] S.I. 155 of 2004. – Personal Injuries Assessment Board Act 2003 (Commencement) Order 2004.

[569] S.I. 156 of 2004 - Personal Injuries Assessment Board Act 2003 (Establishment Day) Order 2004.

[570] S.I. 251 of 2004. – Personal Injuries Assessment Board (Fees) Regulations 2004.

[571] S.I. 252 of 2004. – Personal Injuries Assessment Board Act 2003 (Commencement) (No 2) Order 2004.

[572] This matter was fully considered by the Supreme Court in *State (Sheehan) v Government of Ireland* [1987] I.R. 550.

[573] As Minister Desmond explained some years after its enactment: "I have always considered the provisions of the Health (Mental Services) Act 1981 to be not only inoperable in practice in certain respects but not fulfilling the objective of producing a legislative base upon which the mental health services could be developed. When I became Minister I had a detailed review of the Act undertaken and I will, in the course of the next few months, be drafting new legislation which will take into

2001[574]. A further example is the Dublin Transport Authority Act 1986, which was never commenced and it lies dormant on the statute book.[575] This would appear to contravene the intent of the legislature who passed the Bill. If the Houses of the Oireachtas had intended that a section or Act would never be commenced, then it seems reasonable to assert that scarce parliamentary time would not have been taken up debating and enacting such a measure.

Concerns about Bills being passed but never commenced was raised by Deputy Alan Shatter in the course of the Report Stage debate on the Criminal Law Evidence Bill 1992, where he said:

> "I take the view that it is reasonable that the Minister has some time in which to make the various regulations which the legislation will require prior to it becoming operational. ... What I do not like is a Bill that is so open-ended, where there is no guarantee that parts of it will come into force by any particular date. ... I want this Bill to come into force and I want a "sell-by" date."[576]

Deputy Shatter's concerns in this regard were in all likelihood later compounded by the decision of the High Court in *State (Sheehan) v Government of Ireland*[577]. In that case, the Court held that in circumstances where a Minister has been conferred with the power to commence an Act or part of it at his or her discretion, he or she cannot be compelled by the courts to make the necessary commencement order.

As legislation becomes ever more complex, Ministers sponsoring legislation

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account any changes required by the recommendations in the planning framework report. This report is now being studied by the interested bodies and I hope to have their views without undue delay." 357 *Dáil Debates* Col. 1279 (23 April 1985).

574 Repealed by Mental Health Act 2001.

575 An Act to Provide for the Establishment of a Body to be Known As Iomparas Bhaile Átha Cliath or, in the English Language, the Dublin Transport Authority, to Define its Functions and to Provide for Related Matters and for the Designation of Busways and fro Related Matters.

576 421 *Dáil Debates* Col. 1149 – 1150 (24 June 1992).

577 [1987] I.R. 550.

are increasingly opting to have the facility to commence different sections of legislation on different days. This results in a multitude of different commencement dates for one piece of legislation. Inherent in this is a great degree of confusion and it can cause real difficulty for the reader of that legislation, because when they read the Act, they have no way of knowing whether or not any of it has commenced at all. However, the availability of a fully electronic statute book would eliminate this problem completely.

Collective Citation

The purpose of a collective citation provision is to allow Acts which are directly related to each other to be cited in one title[578]. A provision of this kind will invariably be used where an "amendment" Act is being used to make a series of amendments to a parent/principal Act. This avoids the need to cite each of those Acts individually.[579] For example if a person wished to refer to the Companies Acts 1963 in such a way as to include all amending Acts right up to the most recent amendment in 2005, rather than reciting the title of each Companies (Amendment) Act, section 1(2) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 provides for all of those Acts to be collectively cited as the Companies Acts 1963 to 2005.

Collective Construction

A collective construction provision in an Act directs that the Act and other recited Acts are to be read together as one Act.[580] Provisions of this kind direct that the most recent Act and an earlier, related Act are to be read as if they are one Act. This means that the later Act is treated as being supplementary to the earlier Act. In this way, provisions which are contained in the later Act are deemed to be incorporated into the earlier Act.

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[578] See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 653 et. seq.

[579] It addition to giving short titles to all Acts passed since the date of the Union with Scotland, the Short Titles Act 1896 also gave collective titles to many groups of Acts.

[580] See generally, Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 651 et. seq.

However, it must be pointed out that collective construction provisions are unable to carry over matters of a substantive nature from an earlier Act into a later Act. Provisions of this kind are however suitable for carrying over matters of a procedural nature. The inability of collective construction provisions to carry over matters of a substantive nature has presented some difficulties.

An example of a substantive matter in which a collective construction provision has limited effect is the power to prosecute.

For example, it would seem that the Central Bank would not have power to prosecute for any of the offences created by the Central Bank Act 1997 as section 10 of the 1989 Act only gives the Bank the power to prosecute offences "under the Central Bank Acts 1942 to 1989". Also, it seems that offences created under the Wildlife (Amendment) Act 2000 would also encounter similar difficulties.

Interestingly, section 8 of the Interpretation Act 2005 contains a provision which it seems would address problems such as this. It provides:

> "Where—
>
> (a) an Act or portion of an Act (whenever passed)—
>
> (i) provides that summary proceedings for offences under it may be prosecuted by a specified person, and
>
> (ii) it is subsequently read together as one with any other provision of another Act, and
>
> (b) an offence is created under that other provision which can be prosecuted in a summary manner but no express power is given to the specified person to so prosecute,
>
> then, the specified person may bring summary proceedings for an

offence under that other provision unless some other person is specified to bring such proceedings."

When this section was inserted as an amendment at Committee Stage, Minister of State Hanafin justified it in the following terms:

> "If a later Act makes a textual amendment to the earlier Act's offence provisions, then it is clear that if a Minister was given the power to prosecute under the earlier Act, he still has the power to prosecute under the amended Act. Where the later Act, or part of it, relating to an offence is not a textual amendment of the earlier Act, but those Acts or development provisions are to be read together as one Act, the question arises as to whether the Minister could prosecute in the absence of an expressed power given in the later Act. If the later Act, or the relevant portion, is to be read together with the earlier Act containing the power of the Minister to prosecute, the Minister will have the power to prosecute under the new provision as well, unless someone else is expressly given that power in the later Act. It can be noted that this provision covers all Acts whenever passed."[581]

Section 8 of the Interpretation Act 2005 should remedy problems that might otherwise have been encountered in maintaining prosecutions under the Wildlife (Amendment) Act or the Central Bank Act.

Definitions[582]

The purpose of defining a term used in legislation is to allow the drafter to delimit or more refine the exact meaning of a word. Definitions are an important aid to the reader of any piece of legislation. They explain the meaning of particular terms used in that legislation. Definitions are more useful where a compromise between popular and technical language is

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581 Debates of the Select Committee on Finance and the Public Service, 22 January 2003.

582 See generally, Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 144.

desired. A technical or complex concept may be given a detailed definition, but for the purpose of the legislation, may be given a relatively simple label. While on the face of it this enables legislation to be read more easily, in practical terms, it can disguise the real meaning of those words. This can be unhelpful to the reader. Thring urges drafters to use definitions as sparingly as possible:

> "The fewer definitions the better, and as a general rule, the draftsman should endeavour to draw his Act without definitions, and insert them only when he finds that they are absolutely necessary."[583]

He goes on to make it clear that drafters should not attempt to define words whose ordinary meaning is sufficiently clear and is applicable in the context of the Act. Most drafters accept that definitions should not be used to create meanings which are different from the ordinary meaning of the word.

However, definitions provided for in legislation very often stretch the meaning of words beyond what they are commonly understood to mean. It can be unhelpful to the reader if the drafter attributes a fictitious meaning to words which have a well established meaning. Thring was critical of this practice:

> "A word should never be defined to mean something which it does not properly include, eg., 'piracy' ought not to be defined to include 'mutiny', and so forth."[584]

The established practice in Ireland is that definitions appear at the beginning of the Act, usually after the short title. In the course of a Seanad Debate in 1971, Senator Alexis FitzGerald was anxious to point out the benefits of locating the definition/interpretation matters at the beginning of a Bill:

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583 Thring, *Practical Legislation* (London, 1902) at p. 95.

584 *ibid.*,

> "The form of our legislation here in Ireland is, I think, far superior to that generally used in Britain – this is my own view – because of the practice laid down by the first parliamentary draftsman, ... I refer to Arthur Matheson. He was a trained chancery lawyer who said that all the definitions should go into the first section so that everybody would understand what came afterwards.
> The British have not yet got round to that system. It is a most appalling job to try to read an English Act, where you get the definitions in the Schedules half way through the Act, and so on."[585]

Acts which are divided into Parts will often have definitions in a number of different locations. First, the general definitions will appear in the normal way at the beginning of the Act. In addition, each Part will usually begin with a set of definitions, containing definitions which apply only to that Part. The locating of definitions in this way was the subject of some criticism by Senator Ryan some years ago, when he said:

> "It very often happens that there is a list of definitions at the beginning of the Bill but in addition to that list throughout the Bill there are further definitions. This certainly makes life very difficult for anybody reading the Bill or referring to it for help in deciding what is the law."[586]

The question as to the most appropriate location of definitions was something which exercised Thring. He fails to offer any definitive view of their best location:

> "Logically, their proper place is at the beginning of the Act, as the reader cannot understand the Act till he is master of the definitions or explanations of the terms used in the Act. Politically, their proper place is at the end of the Act, as a definition frequently narrows or widens the

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585 69 *Seanad Debates* Col. 782 (17 February 1971).
586 80 *Seanad Debates* Col. 217 (10 April 1975).

whole scope of an Act, and Parliament cannot possibly judge whether such narrowing or widening is or is not expedient till they are acquainted with the Act itself."[587]

Thring distinguishes between their logical placement and their placement in terms of political expediency. Inappropriate as this may sound, it recognises the reality of parliamentary debates. For example, with regard to the Disabilities Bill 2003, the definitions were contained in section 1. The Committee Stage Debate went on for many days. A large amount of time was spent focussing on the framing of a number of definitions, such as "special educational needs". It was a central provision as, some might argue, it delimited the application of the Act. Consequently, what some might regard as a disproportionate amount of time was spent on debating the definitions section of the Bill.

If the definitions section had been placed at the end of the Disabilities Bill, rather than at the beginning, much of the debate of the substantive provisions would have been uninformed and perhaps even more contentious. The fact that the central definitions were addressed at an early stage in the debate meant that all members were clear in their mind as to the extent of the application of the rest of the Bill.

Legislative Fictions

The word "deemed" is regarded by many drafters as a magical word which can "deem" something to be, in the eyes of the law, what it patently is not. The concept of deeming something to be so is exclusive to legislation. It is a convenient but much utilised device of regarding some thing or situation to be in existence, when it clearly is not.

For example, section 15(2) of the Criminal Law Act 1997 creates a legislative

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587 Thring, *Practical Legislation* (London, 1902) at p. 96.

fiction in the following terms:

> "(2) Where a person is arraigned after the commencement of this Act on an indictment for a felony committed before that commencement, then, for the purposes of trial on that indictment, the offence shall be deemed always to have been a misdemeanour and, notwithstanding that the indictment is framed as an indictment for felony, shall be deemed to be charged as a misdemeanour in the indictment."

A further example is section 25(3) of the Seanad Electoral (Panel Members) Act 1947 which provides:

> "(3) For the purposes of subsections (1) and (2) of this section with respect to the nominations at a Seanad general election in a case in which a further dissolution of Dáil Éireann has occurred after the dissolution which occasioned that Seanad general election, the further dissolution of Dáil Éireann shall be deemed not to have occurred."

As discussed earlier, legislative fictions can also arise in the framing of definitions, where a word with a well established meaning is defined to include other altogether different matters.

Retrospectivity in Criminal Sphere

It is well established that in the context of criminal law, legislation cannot have retrospective effect – Article 15.5.1 of the Constitution providing "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.". Accordingly, it is not permissible to create a criminal offence today and make it apply retrospectively.[588]

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[588] See Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.91 et. seq.; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 265 et. seq.

In *Magee v Culligan*[589] the Supreme Court interpreted Article 15.5 as constituting "an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or the criminal law. It does not contain any general prohibition on retrospection of legislation, nor can it be by any means interpreted as a general prohibition of that description.". Effectively this means that the Oireachtas may not retrospectively create a new civil wrong. This point was illustrated by Murphy J. in *Dublin Heating Co. Ltd v Hefferon*[590] when, in assessing the application of section 33 (the reckless trading provision) of the Companies Act 1990, he said that this civil wrong did not exist prior to the enactment and that "to declare retrospectively innocent actions as constituting that wrong would necessarily amount to a breach of Article 15."[591]. Hogan and Whyte[592] are of the view that there is a general leaning of the courts against injurious retrospection. This view was very clearly borne out in relation to the Health (Amendment) (No 2) Bill 2004, where the Supreme Court struck down the Bill as it contained a very controversial provision which was designed to have retrospective effect.

Section 1(6) of the Bill provided:

> "(5) Subject to subsection (6), it is hereby declared that the imposition and payment of a relevant charge is, and always has been, lawful.".

However, when the Bill was presented to the President for her signature, she decided to exercise her discretion under Article 26 of the Constitution so as to have the Bill tested in the Supreme Court. The number of people specifically affected by this retrospectivity inherent in the Bill combined with the interference with persons property rights seemed to put the Bill out in a league

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589 [1992] 1IR 223.
590 [1992] I.L.R.M. 51.
591 *ibid.*, at 59.
592 Hogan & Whyte, *JM Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 4.2.109 et. seq.

of its own. The Supreme Court[593] found the Bill to be unconstitutional interference in the property rights of citizens and despite the cost which would be imposed on the Exchequer arising from the obligation to repay the monies, the Supreme Court felt that the amount involved would not be excessive in view of the present, healthy state of the economy.

Retrospectivity in Civil Sphere

Craies on Statute Law[594] expresses the view that a statute which "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past" is deemed to be retrospective.

In the context of civil law, there is a presumption that civil legislation does not have retrospective effect. This presumption may be rebutted by the use of clear words. Craies on Statute Law[595] expresses the view that a statute which "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past" is deemed to be retrospective.

With reference to Article 15.5.1, Finlay C.J. in *Magee v Culligan*[596] stated that this provision of the Constitution is:

> "... an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or criminal law. It does not contain any prohibition on retrospection of legislation, nor can it be by any means interpreted as a general prohibition of that description.".

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593 *In Re Article 26 of the Constitution and the Health (Amendment) (No 2) Bill 2004* Supreme Court, unreported, 16 February 2005.

594 Edgar, *Craies on Statute Law* (London, 1971) at p. 387.

595 *ibid.*

596 [1992] 1 IR 233, 272.

According to Blayney J. in *Dublin County Council v Grealy*[597], in order for the presumption against restrospectivity to be rebutted, "the Act must express a clear and unambiguous intention to the contrary, or there must be some circumstances rendering it inevitable that the court should conclude that the Act is retrospective, or the change effected by the statute must be purely procedural.".

Such obstacles or difficulties do not arise with regard to the retrospective elements of civil legislation. Some civil laws may be entirely retrospective in their effect. For example, the Marriages Act 1972 is a prime example of an Act whose sole purpose is retrospective. It was enacted so as to apply to marriages conducted in Lourdes which would otherwise have been invalid marriages. Such a degree of retrospectivity could never be accomplished in the criminal law sphere.

The question of retrospectivity also arose in the course of the debate on the Committees of the Houses of the Oirechtas (Compellability, Privileges, and Immunities of Witnesses) (Amendment) Bill 2004. This Bill conferred the power of compellability upon an Oireachtas Committee established to investigate the conduct of Circuit Court Judge Brian Curtin, whose trial for the possession of child pornography collapsed.

Deputy Olwyn Enright expressed some concern about what she felt was a retrospective element of the proposed new section 3A(b) which would allow a committee to have the additional powers in relation to the behaviour or capacity of a judge "whether occurring or first arising before or after such passing". Deputy Enright saw "potential difficulties in that because we are enacting legislation to deal with something that has already happened."[598]. Minister of State Hanafin sought to reject this assertion on the basis that the

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[597] [1990] IR 77, 82.

[598] 586 *Dáil Debates* Col. 901.

retrospective element had been included so as to ensure that the power to compel cannot be challenged on the basis that the conduct occurred before the Bill was enacted. [599]

Section 5 of the Diseases of Animals (Amendment) Act 2001 effectively conferred retrospective validity on eleven statutory instruments which were made in a very short space of time to implement restrictions when foot and mouth disease became problematic in the UK. Despite the fact that many of the statutory instruments were initially made without a completely sound legal basis, the conferral of retrospective validity was sufficient to affirm the eleven regulations.[600]

Sunset Provisions[601]

As defined by the Government's White Paper on legislation, entitled *Regulating Better*, "sunsetting is when, at the time a regulation is made, a specific date is set on which that regulation will expire unless it is re-made. This ensures that a regulation is formally reviewed at an agreed date in the future, to establish whether or not it is still valid, or if it could be improved, reduced or even revoked."[602].

Sunset provisions have been a rare feature of Irish legislation since the foundation of the Sate. For example, section 4(2) of the Summer Time Act 1923 provides: "(2) This Act shall continue in force until the thirty-first day of December, nineteen hundred and twenty-three, and no longer, unless the Oireachtas otherwise determines.". If an Act is temporary, or requires positive action for its continuance, it is deemed to have been enacted on the date on which it was first passed, and not on the date on which it was renewed or continued in effect.

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599 *ibid.*, at Col. 910.

600 See, *Podger v Minister for Agriculture* High Court, unreported, 15 May, 2002, O'Caoimh J.

601 See generally, Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 216.

602 *Regulating Better* (Dublin, 2004) at p. 5.

Section 18 of the Offences Against the State (Amendment) Act 1998 contained a complex sunset provision which meant that some sections of the Act would cease to be in operation on a fixed date unless they were continued in force by the passing of a resolution in the Dáil and the Seanad.[603] In the interim, several such resolutions have been passed.

However, more recently, the Government's White Paper on legislation advocated the greater use of sunset provisions. It stated that "In terms of improving internal consistency of regulation in particular sectors, the Government will: ... Examine the advantages and disadvantages of using review mechanisms such as 'sunsetting'[604]".

Naturally, then, this should have heralded the more frequent use of such provisions in legislation, or at the very least, a Government more receptive to giving serious consideration to the inclusion of such provisions.

At the Committee Stage debate of the Criminal Justice (Terrorist Offences) Bill 2001, Senator Maurice Cummins proposed that a sunset provision be inserted into the Bill so that after 5 years the Act would lapse or else be reviewed and continued for a further period.[605] In response, Minister

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603 Section 18 reads as follows:18.—(1) Each of the following sections, namely *sections 2* to *12* and *14* and *17* shall, subject to *subsection (2)*, cease to be in operation on and from the 30th day of June, 2000, unless a resolution has been passed by each House of the Oireachtas resolving that that section should continue in operation.(2) A section referred to in *subsection (1)* may be continued in operation from time to time by a resolution passed by each House of the Oireachtas before its expiry for such period as may be specified in the resolutions.(3) Before a resolution under this section in relation to a section specified in *subsection (1)* is passed by either House of the Oireachtas, the Minister for Justice, Equality and Law Reform shall prepare a report, and shall cause a copy of it to be laid before that House, of the operation of the section during the period beginning on the passing of this Act or, as may be appropriate, the date of the latest previous report under this subsection in relation to that section and ending not later than 21 days before the date of the moving of the resolution in that House.(4) For the avoidance of doubt, any enactment the amendment of which is effected by a section of this Act that ceases to be in operation on and from the day referred to in *subsection (1)* or, as the case may be, the expiry of the period for which it is continued in operation under *subsection (2)* ("the expiry") shall, an and from that day or, as the case may be, the expiry, apply and have effect as it applied and had effect immediately before the passing of this Act but subject to any amendments made by any other Act of the Oireachtas after such passing.

604 *Regulating Better* (Dublin, 2004) at p. 36.

605 The text of the amendment was as follows:3.-(1) This Act shall, subject to *subsection (2),* expire

McDowell was less than receptive:

> "No legislation is permanent in the sense that it cannot be changed, but this Bill is intended to be a standing part of our legislation. I remind Senator Cummins that the central purpose of the Bill is to give effect to Ireland's international obligations under the UN convention on terrorism and the EU framework decision on combating terrorism. Perhaps those international instruments will be revoked, repealed, amended or developed at some future stage, but Ireland has certain obligations, as a member of the UN and a member state of the EU, to give effect to them as long as they are in place. I do not think it would be appropriate to include in law a provision that Ireland's obligation in international law to honour a permanent obligation in international law will cease periodically. Therefore, I do not favour the inclusion of a sunset clause in the Bill."[606]

The effect of the Minister's response was that he might have been disposed to the idea of a sunset provision had the Bill not been one which was intended to discharge our international obligations. However, the Government showed no enthusiasm for the concept of sunsetting when, at the Seanad Committee Stage of the Interpretation Bill 2000, the Minister rejected outright an amendment tabled by Senator Brian Hayes which proposed that as a matter

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as and from the 31st day of December 2010, unless a resolution has been passed by each House of the Oireachtas resolving that the Act should continue in operation. (2) A section referred to in *subsection (1)* may be continued in operation from time to time by a resolution passed by each House of the Oireachtas before its expiry for such period as may be specified in the resolutions. (3) Before a resolution under this section in relation to a section specified in *subsection (1)* is passed by either House of the Oireachtas, the Minister for Justice, Equality and Law Reform shall prepare a report, and shall cause a copy of it to be laid before that House, of the operation of the section during the period beginning on the passing of this Act or, as may be appropriate, the date of the latest previous report under this subsection in relation to that section and ending not later than 21 days before the date of the moving of the resolution in that House.(4) For the avoidance of doubt, any enactment the amendment of which is effected by a section of this Act that ceases to be in operation on and from the day referred to in *subsection (1)* or, as the case may be, the expiry of the period for which it is continued in operation under *subsection (2)* ('the expiry') shall, as and from that day or, as the case may be, the expiry, apply and have effect as it applied and had effect immediately before the passing of this Act but subject to any amendments made by any other Act of the Oireachtas after such passing."

[606] 179 *Seanad Debates* (3 February 2005).

of good governance, all Acts would automatically lapse after three years, unless a resolution was passed to ensure its continuance. By way of response, Minister of State Kitt asserted that the acceptance of such an amendment would be "constitutionally problematic", and he perceptively noted:

> "The automatic lapsing of all primary legislation after a period of time would be a fundamental departure from the manner in which legislation is enacted and applied in this jurisdiction."[607]

The sunsetting of legislation is undeniably good legislative practice. At the very least, it forces the Minister and his or her officials to assess the law after a period of operation, to report on its use and justify its continuance.

Regrettably, Ireland seems still a long way off adopting the practice of sunsetting legislation – a feature which is habitually included by drafters in many other jurisdictions. If sunsetting had been put in place many years ago, the statute book would be more relevant and manageable than it is today. In reforming the statute book, sunsetting will need to be more widely adopted.

Transitional and Savings Provisions

While drafters consider the transitional aspects in the drafting of almost every piece of legislation, there are particular circumstances which give rise to a greater need for transitional provisions[608]. Though they are not the same thing, transitional and saving provisions are to a great extent inseparable.

The main function of a transitional provision is to provide for the application of legislation to a set of circumstances existing at the time those provisions come into force, whereas a saving provision is said to "narrow the effect of the

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607 *Seanad Debates* Col. 2278 (28 June 2005).

608 On transitional provisions, see generally Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 263 et. seq.

enactment to which it refers so as to preserve some existing legal rule or right from its operation."[609] Put simply, its aim is to save a law or a right which would otherwise be regarded as having been repealed or extinguished.

Transitional provisions will have varying degrees of effect, depending on the circumstances requiring their use. The occasions where transitional provisions will feature as a substantive part of legislation may be divided into three categories: 1. First Time Regulation 2. Transfer of Functions and Powers 3. Significant Change in Circumstances.

Where a completely new or previously unregulated activity is to be formalised or put on a statutory footing, such legislation will often feature a range of transitional provisions. Transitional provisions are used in these circumstances so as to ensure that the transition from the "old" or even informal style of conducting affairs to the new circumstances involving some level of regulation is a smooth one which also safeguards past decisions, appointments etc as deemed necessary.

Where it is desired to transfer functions and powers from one or a number of bodies to one newly established body, transitional provisions will usually be a substantial feature in any such legislation. Transitional provisions are required in these situations so as to ensure the seamless transfer of functions, powers etc to the new body. It is of particular importance to ensure that applications made, decisions taken etc. do not fall upon the transfer. These matters may be dealt with by way of a savings provision. The transitional provisions which feature in instances such as this will often (but not always) contain a number of provisions dealing with the dissolution of the previous body.

Where it is desired to radically alter by legislation an existing situation which is well established, such legislation will usually contain provisions which are

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609 Bennion, *Statutory Interpretation* (London, 3rd ed., 1997) at 558.

inherently transitional in nature so as to facilitate that change. A good example of this are the provisions of the Euro Changeover (Amounts) Act 2001 which contained a range of transitional provisions concerning the introduction of the Euro. A further example is the Finance Act 2001, which provided for a change in the tax year. Schedule 2 of the Act contains a number of transitional provisions which concerned the short tax year of 2001. Such provisions are "transitional" in the sense that they usually apply for a relatively short period of time, and within that time they will have exhausted their purpose and become redundant. They are also "transitional" in the sense that they facilitate a period of transition from an existing state of affairs to a new set of circumstances.

Transitional provisions falling within the latter category may well set down a lead-in time. A lead-in time may be required so as to provide adequate notice so as to afford sufficient time for compliance to those who will be affected by the changes, or it may be used so as to afford an opportunity for affected persons to avail of opportunities or rights which will be diminished or extinguished following the passing of the lead in time. The duration of the lead in time will vary depending on the circumstances. For example, where rights are to be extinguished or restricted, a reasonably lengthy period of time might be required, whereas where it is desired to afford time to facilitate compliance with new requirements, a shorter period might be appropriate.

Thornton[610] is of the view that due to their tendency to focus on the actual operation of the scheme rather than the mechanics of transition, "[I]nstructing officers are notoriously inadequate in the area of savings and transitional provisions". Consequently, he cautions that it is essential for a drafter to know what questions should be put to the instructing officer concerning transitional matters.

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610 Thornton, *Legislative Drafting* (London, 4th ed., 1996) at p. 383.

In the context of saving and transitional provisions, Thring believed that the drafter "must be prepared to reconcile the provisions of the old and the new law by the insertion of such provisions as his legal knowledge will be necessary for the proper working of the law."[611]. In his text, Bennion[612] is of the view that:

> "Where the Act fails to include such provisions expressly, the court is required to draw such inferences as to the intended transitional arrangements as, in the light of the interpretative criteria, it considers Parliament to have intended ...".

The danger in making oversights of this kind were alluded to by Thring, over one hundred years ago, albeit in the context of the expiration of an Act:

> "... care must be taken to provide that offences committed and obligations incurred before the day appointed for its expiration [or commencement] may be punished or enforced after that day, or else the law will, in a great degree, fail of its purpose."[613]

Thring's words are as pertinent today as they were in 1902, as the consequences of the omission of transitional provisions from an Act can be quite serious.

Savings Provisions[614]

By virtue of its intended purpose, a saving provision will invariably relate to a law, right or a procedure which is already in place. A saver can render the newly commenced law to be inapplicable to steps or measures initiated, but not completed prior to the commencement of the legislation. In the same

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611 Thring, *Practical Legislation* (London, 1902) at p. 99.

612 Bennion, *Statutory Interpretation* (4th ed., London, 2002) at p. 263 - 264.

613 Thring, *Practical Legislation* (London, 1902) at p. 100.

614 See generally, Thring, *Practical Legislation* (London, 1902) at p. 98; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 387 et. seq.

manner, it can deem the newly commenced law to be applicable to actions or measures initiated prior to the commencement date and consequently, require compliance with all of its requirements.

The repeal of an Act will have the effect of automatically repealing all subordinate legislation made under that Act. So that where a number of statutory instruments have been made under an Act and that Act is later repealed, the absence of a saving provision concerning subordinate legislation made under that Act will cause all of the statutory instruments made under that Act to fall with the Act itself, which could have widespread consequences. It is possible to restrict the saving of subordinate legislation to that which is compatible with the newly introduced primary legislation.[615]

The effect of repealing an Act in the absence of any savings provision was stated by Tindal C.J. in *Kay v Goodwin*[616]as being:

> "I take the effect of repealing a statute to be to obliterate it completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law."

This view was also expressed by Lord Trenterden in *Surtees v Ellison*[617] who said:

> "It has long been established that, when an Act of Parliament, is repealed, it must be considered (except as to transactions past and closed) as if it had never existed."

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615 See for example section 89(1) of 15/1997.
616 (1830) 6 Bing. 576, 582.
617 (1829) 9 B & C 750, 752.

Bennion[618] is of the view that saving provisions "are often included by way of reassurance, for avoidance of doubt or from an abundance of caution.". However, in this jurisdiction, savings provisions seem to serve an altogether more significant purpose – as in some instances they confer legal validity an actions which heretofore (whilst not illegal) were devoid of any statutory basis.[619]

As with all aspects of drafting, a tendency to become specific, and the more frequent use of saving provisions could give rise to undesired consequences arising out of the application of the principle of expressio unius est exclusio alterius. As a consequence, saving provisions should only feature where absolutely necessary.

Constitutional Savings

Saving provisions of this kind seek to declare that if a provision of the enactment is subsequently found to be invalid having regard to the Constitution, then its effect shall be limited to the extent that it accords with the Constitution.[620] Such provisions are an occasional feature on the statute book[621] and have been subject to judicial scrutiny on a number of occasions.

This type of saving provision was given some attention by both Denham J. and Keane C.J. in *Grealis v D.P.P.*[622] and reluctantly afforded some level of approval. With reference to section 1(4) of the Interpretation (Amendment) Act 1997, Keane C.J. said that such a provision had been used "as a form of constitutional safety net to ward off a possible of unconstitutionality."[623] He went on to say that "A judge at any level is obliged to uphold the constitutional rights of persons who may be prosecuted in reliance on the provisions of the

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618 Bennion, *Statutory Interpretation* (London, 3rd ed., 1997) at page 558.

619 Section 5 Diseases of Animals (Amendment) Act 2001.

620 See Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 6.1.104 et. seq.

621 For example, see section 1(4) of 36/1997; section 3(5) of 37/1997; section 4 of 1/1997; section 3(3) of 15/1995; section 2(3) of 1/1993.

622 [2001] 3 IR 144.

623 *ibid.*, at 160.

1997 Interpretation Act and, if that was all the subsection was intended to ensure, it was wholly unnecessary"[624]. He went on to infer that by inserting such a provision, the Oireachtas must have envisaged that but for that provision, the Act would have infringed a person's constitutional rights.

Denham J. said that constitutional savers of this kind serve to "protect individuals from the said law infringing their constitutional rights. Whether it is a sound method of drafting statutes or not, it is the method chosen by the legislature"[625] and went on to say that by virtue of this constitutional saving provision, the court has a duty to determine whether the preceding provisions conflict with the constitutional rights of the individual.

The effectiveness of constitutional savings was the subject of some comment by Finlay-Geoghegan J. in the joint case of *Leontjava and Chang v D.P.P.*[626]. One aspect of the case concerned section 2(1) of the Immigration Act 1999 which provided: "Every order made before the passing of this Act under section 5 of the Act of 1935 other than then orders or provisions of orders specified in the schedule to this Act shall have statutory effect as if it were an Act of the Oireachtas.". In considering the constitutionality of section 2(1) of the Immigration Act 1999, Finlay-Geoghegan J. had regard to a constitutional saving provision in section 2(2) which read: "If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect.".

Having formed the opinion that section 2(1) was unconstitutional, Finlay-Geoghegan J. then turned to consider whether section 2(2) could prevent

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624 *ibid.*, at 161. Here Keane J. has dismissed the use of a constitutional saver in the Act in question as being wholly unnecessary, yet at page 162 of his judgment he states – "In the absence of subs. (4), [section 1] might have been said to constitute and unjustifiable interference in litigation pending before the courts by, in effect, requiring the courts to decide the cases in question on a different legal basis".

625 *ibid.*, at 187.

626 High Court & Supreme Court, [2004] 1I.R. 591.

such a finding:

> "it does not appear to me ... that sub-s (2) of s. 2 of the Act of 1999 can assist in avoiding a declaration of invalidity of sub-s 2(1) of the Act of 1999. The reasons for the repugnancy do not relate to a specific conflict with a constitutional right of some person."[627].

So in the context of the present case, Finlay-Geoghegan J. found this particular constitutional saving to be worthless. Some solace may be taken from the last sentence quoted as it seems to suggest that if the Court had been examining section 2(1) in the course of a claim that the constitutional rights of a person were at issue, then the saving provision may have been found to be of some effect.

Judicial Comment on Savings Provisions

Saving provisions have been the subject of much judicial consideration, particularly in the context of the abolition of common law offences on the introduction of new statutory offences, and also the abolition of existing statutory offences. The former category is addressed in the Interpretation (Amendment) Act 1997[628] and the latter are generally resolved satisfactorily by reference to section 27 of the Interpretation Act 2005 and also section 21[629] of the Interpretation Act 1937.

In *People v Kavanagh*[630], the Court bemoaned the absence of a saving provision. It described it as "surprising and most unfortunate"[631] that section 15 of the Non-Fatal Offences Against the Person Act 1997 abolished prior common law offences without providing a saver for past offences. This view

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627 *ibid.*, at 613.

628 Section 1 of this Act provides for transitional arrangements so as to ensure that prosecutions in respect of abolished common law offences may proceed.

629 Section 21 of this Act provides for transitional arrangements so as to ensure that prosecutions in respect of abolished statutory offences may proceed.

630 Special Criminal Court, unreported, 29 October, 1997, Barr J.

631 *ibid.*, at 3.

was shared by McGuinness J. in *Quinlivan v Governor of Portlaoise Prison*[632] who said that "the inclusion of an explicit saver is the preferable legislative practice".

The absence of transitional provisions in the Non-Fatal Offences Against the Person Act 1997 was also considered in *Grealis v D.P.P.*[633]. In the High Court, O'Donovan J. found that assault occasioning actual bodily harm was a statutory offence and section 21 of the Interpretation Act 1937 enabled the continuance of the prosecution. However, the Court found that in the absence of a transitional provision regarding the time when the proceedings were commenced, the proceedings could not have been lawfully instituted as the offence had been abolished. Of further significance was O'Donovan J's finding that the Interpretation (Amendment) Act 1997 which sought to insert a transitional provision retrospectively was repugnant to the Constitution, based on a number of grounds.[634]

On appeal to the Supreme Court[635], Denham J.[636] said that "the words used in a statute best declare the intent of the Act and statutes should be construed according to the intent expressed in the legislation"[637] and having applied this approach to section 28(1) of the Non-Fatal Offences Against the Person Act 1997, she concluded "The meaning is plain. There is no ambiguity".[638] Consequently she affirmed the trial judge's finding on this point - that the common law offences of assault and battery were abolished by section 28(1) without any transitional provisions, with the effect that no prosecutions

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632 [1998] 2 I.R. 113 at 126.

633 High Court, unreported, October 1999, O'Donovan J.

634 The reasons given by O'Donovan J. are as follows: "(a). Section 1(4) purports to permit judges of the District Court to determine its constitutionality contrary to the provisions of Section 34 (3) (2) of Bunreacht na hÉireann, (b). Section 1(4) purports to divest the authority of the legislature in favour of the courts contrary to the provisions of Article 15 (2) (I) and (ii) of Bunreacht na hÉireann, (c). Section 1(4) purports to permit inequality before the law for citizens of the State contrary to the provisions of Article 40 (1) of Bunreacht na hÉireann and (d). The Act, generally, purports to permit interference in a judicial process in being".

635 [2001] 3 IR 177.

636 Relying on the decision in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101.

637 Denham J. at 12.

638 *ibid.*, at 13. Keane C.J. was also of this view at page 26 of his judgment.

regarding these offences could be sustained after the commencement of section 28(1). Denham J. went on to say that there are no words in the Non-Fatal Offences Against the Person Act 1997 from which to infer an intention to establish transitional provisions. Of particular interest was her view that "it is not appropriate to seek or make a determination that if the Oireachtas had thought about it they would have introduced transitional provisions".[639]

In relation to the additional charge of assault occasioning actual bodily harm, Denham J. said that this was a common law offence[640], the penalty for which is to be found in statute and went on to find that this offence had been abolished under the Non-Fatal Offences Against the Person Act 1997 without any transitional arrangements.

The Supreme Court reversed the trial judge's finding that the Interpretation (Amendment) Act 1997 was unconstitutional. In response to the respondent's contention that section 1 of that Act applied so as to facilitate a prosecution, Keane C.J. stated that section 1(4) of the Interpretation (Amendment) Act 1997 had the effect of preventing the retrospective validation of prosecutions instituted before the commencement of the Act.[641] On this point, Denham J. said that a retrospective application of the Act would be in conflict with one's right to a trial in due course of law and added that "[i]t is an Act which, in accordance with constitutional principles, applies prospectively"[642].

As a consequence of the absence of transitional provisions in the Non-Fatal Offences Against the Person Act 1997, the Supreme Court in Grealis found that the prosecutions against the applicants could not be sustained.

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639 *ibid.*, at 15.

640 However, Keane C.J. disagreed, expressing the view that it is not a common law offence but is a statutory offence, but remains "unaffected by the fact that the 1997 Act, as we have seen, describes it as a common law offence" at page 42 and then adds that this "error" in description is immaterial in these circumstances (at page 43). Hardiman J. (at page 3) also shares the view that an incorrect description of the offence as being common law as opposed to a statutory offence is of no consequence in the present circumstances.

641 Keane C.J. at 32.

642 Denham J. at 27.

Section 3(3) of the Criminal Justice (Theft and Fraud Offences) Act 2001 contains a saving provision which has the effect of ensuring that prosecutions in respect of common law offences committed prior to their abolition will be able to proceed. This saving provision seems to have been inserted out of an abundance of caution following the Courts decision in Grealis.

Penalty Provisions[643]

As discussed in Chapter 2, it is widely accepted that if legislative directions, prohibitions etc are to be honoured, consequences must arise from non-compliance and these consequences must be expressly stated. Consequently, almost all legislation contains some form of offence provision and corresponding penalty provision. The penalty can take the form of a fine or a prison sentence and very often a penalty provision will carry both.

There are many fines in our legislation which have not been amended or updated and as such, they do not serve as a sufficient deterrent or as an adequate penalty. When they are imposed and highlighted by the Courts, such low penalties bring the law into disrepute and cause the law to become the subject of derision. For example, in September 2002, a mother was convicted on a charge of being drunk and in charge of a three-year-old child and as a result was fined €2.00.[644] Also, in October 2003, a 14 year old boy was fined €5.00 and banned from driving for one year.

Given the important role which legislation plays in any democracy, the legislature needs to ensure that penalties are such that they are proportionate to the offence and that they reflect an appropriate penalty in today's monetary terms.

While some Acts have updated penalties on a piecemeal basis, this approach

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643 See generally, Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 349 et. seq.

644 *Irish Examiner,* 27 September 2002.

has proven to be inadequate. The introduction of the Euro represented a unique occasion for fines in our legislation to be totally revamped. However, the opportunity was passed up. Instead, the Minister for Finance introduced the Euro Changeover (Amounts) Act 2001, which among other things, made piecemeal textual changes to fines in a number of pieces of legislation. All other fines which remain in the Punt denomination must be converted by reference to the Euro conversion rate.

In order to update the fines in legislation, what is needed is the establishment of a procedure whereby penalties would be updated automatically, without the need for the legislature to approve each and every change. There have been many Reports and proposals in this area, however, without any real progress being made.

In October 1991, the Law Reform Commission published its Report on the Indexation of Fines.[645] No proposals were ever brought forward to implement this in a comprehensive way. Some seven years later, in 1998, the Taoiseach, informed the House that an Indexation of Fines Bill was "at an early stage of preparation"[646] and that it would be published in 1999. Without any further progress having been made, in July 2002, the Law Reform Commission published a Report entitled The Indexation of Fines: A Review of Developments.[647] In response to a Dáil question in 2002[648], the Minister stated that a Bill to deal with the indexation of fines would be published in 2003.

Evidencing some concern for the sheer volume of inadequate fines which are on the statute book, in October 2004, Fine Gael published a Fines Bill[649]. The

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645 (October 1991) LRC 37-1991.

646 492 *Dáil Debates* Col. 256 (10 June 1998).

647 (July 2002) LRC 65-2002.

648 555 *Dáil Debates* Col. 1133 (17 October 2002).

649 "An Act to update fines and other monetary amounts in legislation in line with inflation in respect of any past enactments and to provide for the prospective indexation of fines and other monetary amounts contained in any future enactments; to amend the Statute Law (Restatement) Act 2002; to

Bill was comprised of a table which would automatically update the fines in legislation. Provision was also made for the updating of the Table periodically so that it kept apace with inflation. As at the time of writing, the Second Stage debate of the Bill had yet to take place.

Having previously appeared in other legislative programmes, the commitment to publish a Bill on the indexation of fines during 2005 was contained in the Government's legislative programme early in 2005[650] and it also forms part of the Government's White Paper on *Regulating Better*[651]. Despite this, there are still no concrete legislative proposals emerging from the Government to put in place a mechanism for the systematic updating of fines already on the statute book.

The question of mandatory or minimum penalties is one which frequently arises for discussion, particularly in the aftermath of a high profile criminal case where the common consensus is that the sentence imposed was too lenient.[652] Article 34.1 of the Constitution categorically states that justice shall be administered by the courts. In the light of this, and also having regard to the doctrine of the separation of powers, the fettering of judicial discretion in this way could give rise to constitutional difficulties. It could reasonably be argued that legislative provisions which prescribe the imposition of fixed fines on conviction, essentially constitutes the administration of justice by the legislature.

Despite this, some of our legislation provides for the imposition of fixed fines in the event of conviction. For example, section 19 of the National Monuments (Amendment) Act 1994 provides for a mandatory penalty of

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provide for the payment of fines by instalments; to provide for means to be taken into consideration in the imposition of fines and to provide for related matters.".

650 Government Legislative Programme, Spring Session 2005.

651 January 2004.

652 Mandatory penalties are discussed in Hogan & Whyte, *Kelly The Irish Constitution* (4th ed., Dublin, 2003) at para. 6.1.113.

£50,000[653]. Section 5 of the Criminal Justice Act 1999 provides for a minimum sentence of 10 years for persons convicted of drug trafficking. Probably the most well known mandatory penalty is the life imprisonment under the Criminal Justice Act 1990 which must be imposed when a person is convicted of murder.

The principle of proportionality as established in *Cox v Ireland*[654] is now part of the "in due course of law" guarantee as contained in Article 38.1 of the Constitution. Proposals to impose a mandatory penalties have often been retreated from due to the constitutional sensitivity. In his text[655], Thornton is of a similar mind: "The prescription of a minimum punishment is to be avoided as such a provision may prevent a court from doing justice in exceptional cases." And he added that the inclusion of such a provision might lead to an "undesirable reluctance to convict.".

In recent years, there has been something of a consensus on what exactly constitutes the maximum penalty which can be imposed following conviction for a summary offence. The present Minister for Justice is of the view that €3,000 or six moths imprisonment is the upper limit of a penalty which may be imposed for a summary offence. This seems to be reflective of a thinking which requires that care be taken to ensure that the penalties which are contained in the legislation are effective, but not excessive.

Continuing Offences

Provisions creating continuing offences occasionally arise in Irish legislation. Where the creation of a continuing offence is deemed necessary, it is important to use clear words to clearly express the intent to deem the continuation to be a new and separate offence. In the context of continuing offences, it is important to be mindful of section 14 of the Interpretation Act

653 Section 19(8)(ii).
654 [1992] 2 I.R. 503.
655 Thornton, *Legislative Drafting* (4th ed., London, 1996) at 372.

1937[656], which states that a person shall not be punished twice for the same offence.

Prosecution of Offences

Article 30.3 of the Constitution ascribes the prosecutorial function of the State to the Attorney General. This prosecutorial function is now exercised by the D.P.P. In the light of the Supreme Court decision in *Cumann Lthchleas Gael Teo v Judge Windle*[657], a statute using very clear language may permit specified persons/bodies to prosecute an indictable offence. Legislation now frequently provides for prosecutions to be initiated by a Minister or some other specified officer/body. In addition, some legislation stipulates that the consent of the D.P.P. is required before any prosecution can proceed.[658]

Dis-application of s. 10(4) of the Petty Sessions (Ireland) Act 1851

In the context of the prosecution of offences, exceptions to section 10(4) of the Petty Sessions (Ireland) Act 1851[659] arise quite frequently. In essence, section 10(4) states that "complaints" regarding summary offences shall be made within six months of the cause of complaint arising. However, the provision also sets out some exceptions to the general six month rule. Where reliance on one of the exceptions as set out in section 10(4) is desired, further examination should be made in order to determine whether the exceptions have been amended, repealed etc.

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656 Section 14 reads: "Where any act, whether of commission or omission, constitutes an offence under two or more statutes or under a statute and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those statutes or at common law, but shall not be liable to be punished twice for the same offence.". There is no equivalent provision in the Interpretation Act 2005.

657 [1994]1IR 525.

658 For example: section 16(1) of 1/1998; section 7(5) of 14/1997; section 25(3) of 25/1997; section 16(5) of 26/1997; section 17 of 31/1996 and section 36(2) of 15/1994.

659 Section 10(4) reads: "In all cases of summary jurisdiction the complaint shall be made, when it shall relate to the non-payment of any poor rate, county rate, or other public tax, at any time after the date of the warrant authorizing the collection of the same, and, when it shall relate to the non-payment of money for wages, hire, or tuition, within one year from the termination of the term or period in respect of which it shall be payable, and, when it shall relate to any trespass, within two months from the time when the trespass shall have occurred, and in any other case within six months from the time when the cause of complaint shall have arisen, but not otherwise: ...".

Depending on the nature of the offence committed, it is sometimes necessary to provide for the extension of the time limit within which the proceedings must be instituted. Notable is the fact that such provisions have been in use for some time now and have not given rise to any judicial controversy of note. It seems possible to identify three distinct types of provisions which appear in legislation in this area.

First, there is the straightforward provision which simply seeks to extend the period within which proceedings can be instituted, from the date of the offence:

> "44(4) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act 1851, summary proceedings for an offence under any provision of this Act may be instituted within 12 months from the date of the offence."[660]

The second type of provision is one which introduces a "date of knowledge" type concept, similar in nature to that found in the Statute of Limitations (Amendment) Act 1991. The inclusion of the date of knowledge aspect has the potential to allow many years to pass before the institution of proceedings. A typical provision of this nature might be worded as follows:

> "37(5) Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act, 1851, proceedings for an offence under this Act may be instituted within 12 months from the date of discovery of the offence."[661]

The third type is that which extends the period for the institution of proceedings until a period of time has elapsed after the accumulation of sufficient evidence:

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660 Section 44(4) of 8/2000.
661 Section 37(5) of 5/2000.

"6(2) Notwithstanding the provisions of section 10(4) of the Petty Sessions (Ireland) Act, 1851, summary proceedings for an offence under this Act may be commenced at any time within 12 months from the date on which evidence sufficient in the opinion of the Authority to justify initiating the proceedings comes to the Authority's knowledge not being later than 5 years from the date on which the offence concerned was committed."[662]

In accord with the provisions of section 5(4) of the European Communities Act 1993[663], Regulations creating offences under the European Communities Act 1972, requiring a two year period within which a prosecution may be taken no longer requires the exclusion of the application of section 10(4) of the Petty Sessions Act. Section 5(4) of the European Communities Act 1993 had the effect of automatically applying a two year period within which proceedings must be instituted to all regulations made under the 1972 Act.

The period of the extension of the time within which proceedings must be instituted, varies greatly – tending to range from 12 months[664] to, in some cases, 10 years[665]. The decision as to whether an extension is required will be very much dependent on the nature of the offences in the legislation. Many offence provisions in our legislation do not stipulate a time limit within which proceedings must be instituted[666]. In such instances, the time period applicable is that as prescribed by section 10(4) of Petty Sessions (Ireland) Act 1851 and accordingly dispenses with the need to refer to that fact. However, where it is desirable to extend the period beyond that contained in

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662 Section 6(2) of 29/1998.

663 Section 5(4) reads as follows: "Notwithstanding section 10(4) of the Petty Sessions Ireland Act, 1851, proceedings in respect of offences committed after the passing of this Act under regulations (whether made before or after such passing) under the Act of 1972 may be instituted at any time within two years from the date of the commission of the offence.".

664 For example: section 37(5) of 5/2000; section 44(4) of 8/2000; section 100(4) of 21/1998; section 8(3) of 24/1998; section 4(2) of 11/1997.

665 For example, section 1064 of 39/1997; section 13 of 22/1997; section 94(7) of 15/1983; section 29 of 11/1979.

666 For example: section 6 of 15/1999; section 4 of 19/1999; section 9 of 22/1999; section 7 of 22/2000; section 5 of 16/2000; section 3 of 11/2000.

section 10(4), this intention must be clearly stated. Where a provision for the extension of the standard six months is featured, the most common period of extension is 12 months from the date of the offence.

Whilst the practice of extending the standard six month period is a well established feature of our legislation, the frequency with which the standard six month period is extended and the length of the extension must inevitably give rise to consideration as to whether this is appropriate in all cases. In this context, regard must be had to the "due course of law" requirement as enshrined in Article 38.1 of the Constitution. The extension of the period from six months to twelve months, or even two years does not seem excessive. It must be remembered that the Petty Sessions (Ireland) Act 1851 is now over 150 years old and needless to say, that, in addition to the evolution of many and varied types of new offences, the nature of offences envisaged by the drafters of the 1851 Act have also changed.

The extension of the six month period may be expressed as being applicable to all offences contained in the Act or its application may be limited to specific sections. Where, for example, an extension of 10 years from the date of commission of the offence is to be deemed applicable to all offences in an Act, this is likely to give rise to difficulties of a constitutional and an evidential nature. Such problems are likely to be exacerbated where the 10 year period only commences at the date of discovery of the offence.[667] Where it is desirable to provide for an extension commencing at the date of knowledge, or the date of discovery, or the date of collection of sufficient evidence, which could potentially run to infinity, the practice has been to safeguard such a provision by inserting a cut-off point of five or three years after the commission of the offence, beyond which no action will lie.[668]

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[667] For example an offence may have been committed in 1986 and be discovered in 1994. Under the ten year extension, proceedings would not have to issued until 2004 which is 18 years after the commission of the offence.

[668] For example, see: section 6(2) of 29/1998; section 13(3)&(4) of 7/1997; section 22(2) of 24/1996; section 11(3) of 10/1996.

However, section 1064 of the Taxes Consolidation Act 1997 is an example of a provision where an extension of 10 years from the date of commission, in the absence of any such safeguard, would seem to be justified. Section 1064 provides for an extension of 10 years from the date of commission of the offence, but only with regard to three specified sections. On examination, the offences under these sections deal with matters which could potentially go undiscovered by the authorities for several years after the date of commission of the offence, and this seems to justify such a lengthy period.

The question as to whether an extension beyond the six month period should be provided for might arise in the drafting of almost all pieces of legislation under which offences are created. In the interests of clarity and consistency, a consensus needs to be reached on the circumstances in which it is appropriate to extend the period beyond the standard six months. When asked if he had any intention of increasing the six month time limit, the Minister for Justice has indicated that he had "no plans for a general review of the six months time limit"[669].

As exceptions to section 10(4) are so often created in our legislation, some consideration perhaps needs to be given to reforming the law in this area, by repealing or amending section 10(4) so as to extend the standard period to 12 months, and lay down the circumstances in which the period may be extended beyond that to two years, five years and ten years.

Schedules[670]

Schedules in legislation have derived their authority from common usage rather than from any statutory authority. The use of schedules in legislation has never been formally provided for or formally recognised either through the

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669 578 *Dáil Debates* Col. 1071 (28 January 2004).

670 See generally, Thring, *Practical Legislation* (London, 1902) at p. 100; Bennion, *Statutory Interpretation: A Code* (4th ed., London, 2002) at p. 614; Thornton, *Legislative Drafting* (4th ed., London, 1996) at p. 400; Ilbert, *Legislative Methods and Forms* (Oxford, 1901) at p. 37.

Interpretation Acts or other means. Despite that, the Interpretation Act 1937 itself contained a Schedule.[671] Schedules have been a feature of Irish legislation since the inception of the statute book in 1922.

It is now clear that a Schedule forms part of the Act and can often contain substantive material. Addressing a particular matter in the form of a Schedule in no way detracts from its force. Material expressed in a Schedule is every bit as effective as the sections which precede it.

There are no rigid rules as to when it is or is not appropriate to use a schedule. As stated by Brett L.J. in *Attorney General v Lamplough*[672]: "A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part.". Where an Act is complex, or where its provisions demand detail, this detail can be shifted to the end of the Act by placing it in a Schedule. The intention is that the reader need not be overwhelmed by procedural or other matters of detail which may not be pertinent at all times. Where a drafter has employed schedules intelligently, the Bill should be perfectly coherent and informative for the reader who can look to the Schedules in the event that he or she wishes to delve into the detail contained in it.

Whether it is appropriate to relegate aspects of the Bill to Schedules is principally decided by reference to whether the matter is administrative detail, as distinct from a principle or policy to be contained in the Bill. Thring has expressed a clear view on this question:

> "It is desirable to include in a schedule matters of detail; it is improper to put in a schedule matters of principle. The drawing [of] the proper

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671 It is interesting to note that the 1937 Act is due to be repealed and replaced by the Interpretation Bill 2000, which also contains a number of references to Schedules.

672 (1878) 3 Ex. D 214, 229.

> line of demarcation between the two classes of matters is often difficult. All that can be said is that nothing should be placed in a schedule to which the attention of Parliament should be particularly directed..."[673]

The increasing complexity of legislation has led to a greater use of schedules as a device for addressing matters of detail. It has become more common for drafters to avail of the use of schedules. Schedules are commonly used to fulfill a range of tasks, including: to set out a list of repeals (in table format); to set out forms; maps; and procedural rules. When used effectively, they prevent the cluttering up of legislation and their use is intended to be in ease of the reader. For example, they are particularly favoured in an Act which establishes a statutory body. The establishment, functions and composition of the statutory body will be dealt with in the main part of the Act, while the rules and procedures of the body will often be dealt with in a Schedule.

Where schedules are used sensibly in an Act, it enables the reader to focus on the substantive aspects of the legislation. In a similar way, their use tends to facilitate the passage of the Bill through the Houses of the Oireachtas. However, the extensive use of schedules can have a detrimental effect on the coherence of an Act. On this very point, the Law Reform Commission[674] has expressed disquiet about the use of schedules:

> "The Commission does not favour the shifting of the detail of legislation to schedules, as this requires the reader to read the section and the schedules together and further complicates the structure of the Act."[675]

An over reliance on Schedules in a piece of legislation will require the reader to flick back and forth between the body of the Act and the schedule of the Act in order to ascertain its meaning and effect. Striking the right balance

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673 Thring, *Practical Legislation* (London, 1902) at p. 100.

674 Law Reform Commission (Consultation Paper), *Statutory Drafting and Interpretation: Plain Language and the Law* (July 1999) CP14-1999.

675 *ibid.*, at para. 5.65.

between using schedules or sections to set out matters of procedure or detail can be difficult. Even though the political pressures can be great, hiding away substantive or potentially controversial matters in a schedule is to be deeply criticised.

Concluding Remarks

One issue which emerges from this Chapter is the impact which the adherence to drafting practice has had on the statute book. What this Chapter has also shown is that the amount of features and devices which may be used in any one piece of legislation are virtually limitless. Depending on the permutations and combinations chosen, this can either increase or reduce the complexity of legislation. In general terms, a provision or device should not be used in legislation unless it can be fully justified.

Some features used in Acts have served to complicate legislation and in turn, the statute book. Take for example the repeated dis-application of section 10(4) of the Petty Sessions (Ireland) Act 1851 throughout the statute book. This has created uncertainty in situations where it would otherwise have been safe to assume that the six month rule applied. Likewise, the over-use of legislative fictions can also be confusing for the reader and do not enhance the accessibility of the statute book.

In contrast, some provisions may be criticised on the basis of their under-use in legislation. For example, purpose provisions have been under utilised. While their presence would not alter the substance of the legislation, they would provide a signpost to the reader as to the exact reasoning behind the legislation – this is not always clear from the long title.

Perhaps the single greatest failing of the statute book, in terms of individual provisions, has been the absence of sunset provisions. Sunset provisions

have been a rare feature in the Irish Statute Book. If sunset provisions had been used in the past, the content of statute book would be a great deal more relevant and less weighty than it is today.