

The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT
ON
STATUTORY DRAFTING AND INTERPRETATION:
PLAIN LANGUAGE AND THE LAW

(LRC 61–2000)

IRELAND

The Law Reform Commission

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's First Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in January, 1977. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published sixty Reports containing proposals for reform of the law; eleven Working Papers; sixteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty one Reports in accordance with Section 6 of the 1975 Act. A full list of its publications is contained in an Appendix to this Report.

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INTRODUCTION

1.

The Law Reform Commission's First Programme for Law Reform identified Statute Law as an area to be examined for the purposes of law reform. It dealt with the subject in the following, unusually detailed and compendious terms, stressing in

particular the need for a more flexible approach to statutory interpretation and also an improvement in the style of legislative drafting.

“Statute Law

16. For some time there has been an increasing interest in common law countries in the desirability of a more flexible rule for the interpretation and construction of statutes and for a departure from what is at present largely a purely literal interpretation. Since our membership of the European Communities involves us in a very close way in legal and other matters with countries that have a much more flexible approach to statutory interpretation than is the case in this country and since Community instruments and regulations will be interpreted by the standards and methods of the European Communities, it is desirable to re-examine this whole question in the context of our own legal system. It is to be noted that in the United States of America, which is a common law country, there is a much more flexible approach to the interpretation of statutes than exists here. However, 'interpretation' covers not merely the general approach to the problem but also the question of what materials (written or other) outside the statute itself may legitimately be used for the purpose of ascertaining the intent of the legislature. Specifically, the Commission will examine the use of *travaux preparatoires* and of commentaries by experts. They will also examine such canons of interpretation as the *ejusdem generis* rule and the rule (often known as the rule in *Heydon's* case) under which the court has to consider the law before the enactment of the statute, the defect or mischief in the law and the remedy adopted to cure that defect or mischief. These canons of interpretation will, of course, have to be considered not alone in the context of

ordinary statutes but also in the context of codified law and of the International Conventions that become part of Irish law.

17. 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.”¹

¹ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain*

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2.

These observations reflected a growing awareness of the importance of this subject, and an increasing consciousness that our membership of the then European Community required that we should take note of international legal trends.

3.

Our study of this subject since that time has been informed by the objective of improving the clarity and comprehensibility of legislation, and hence the certainty with which the law on a given point may be identified and applied. It is axiomatic that the principle of the Rule of Law presupposes that those who are affected by a law should be able to ascertain its meaning and effect. Reasoned and consistent approaches to the twin activities of legislative drafting and statutory interpretation should facilitate legal advisors, and the public generally, in ascertaining the content of our legislation, and predicting the way in which it might be interpreted by a court.

4.

Our Consultation Paper on this subject was published in mid-1999. It was testimony to the legal community's view of the centrality of this subject that the Consultation Paper was discussed at (uniquely for us) two Colloquia.² We wish to express our gratitude to all those who came to these well-attended meetings and also to the other persons who took the trouble to make comments on the Paper. In preparing this Report, we have carefully considered all these sources of assistance.

5.

Statute law is, by some distance, the major source of law. To some extent, this fact has been obscured by the history of the legal system, with its emphasis on judges and the common law, and its reluctance to change assumptions laid down long before the mid-nineteenth century when, at a time of rapid economic, social and political change, statutes overtook case-law as the major source of law. Despite the central place which legal education still allocates to case-law, the reality is that the great majority of legal disputes centre around the interpretation and operation of statutes. In his 1983 Hamlyn lectures, Lord Hailsham stated that nine-tenths of all cases heard by the Court of Appeal or the House of Lords either turn upon or involve the meaning of words contained in primary or secondary legislation.³ It is true that not all of these cases involve statutory interpretation in the narrowest sense. But at the very least, it can be said that the subject matter of this Report impacts on a very large area of our law, crossing conventional boundaries as it does so.

Delegated Legislation

6.

It is sometimes possible to make an important point briefly. We should like to emphasise that in general, and with few exceptions, the same principles of interpretation and drafting apply to delegated as to principal legislation. There is no need to spend many words on this proposition since, as far as we know, it has not been doubted. However, it is well to emphasise that, as Bennion remarks; “Allowing for the difference in juridical nature and provenance, delegated legislation is to be construed in the same way as an Act”.⁴

¹ (cont'd) *Language and the Law*, (CP14–1999, 1999) p. vii.

² 13th April 2000 and 18th April 2000.

³ *Hamlyn Revisited: the British Legal System Today*, 65, cited in Bennion, *Statutory Interpretation – A Code*, (3rd ed., Butterworths, 1997) 1. Lord Hailsham was expanding upon comments he had made in the case of *Johnson v. Moreton* [1980] AC 37.

⁴ Bennion, *Statutory Interpretation – A Code* (3rd ed., Butterworths, 1997) 190.

7.

Thus, the substantive provisions of the *Interpretation Act, 1937* make reference to its applicability, both to Acts of the Oireachtas and to statutory instruments.⁵ The *Interpretation Bill, 2000*, at section 4(1), states that the Act “applies to an enactment” and “enactment” is defined to mean an Act or statutory instrument.⁶

8.

The point can certainly be made that the absence of public discussion and review of statutory instruments militates in favour of poor or obscure drafting. It is a matter of concern that there has been no effective process of review of delegated legislation since the demise, in 1981, of the Seanad Select Committee on Statutory Instruments. One commentator has referred to the “epidemic of regulation by reference”.⁷ This seems to us to be a well-taken point. However, since the question of institutional reform of the Oireachtas and its law-making or law-reviewing functions is beyond the scope of this Report, we shall pursue it no further.

Interpretation Bill, 2000 and New Style Manual

9.

This Report is published at an interesting time (December 2000) in the development of the law governing interpretation and the practice of drafting. In August, the first substantive Interpretation Bill since 1937 was published. This measure will receive its second reading in the Dáil early in 2001. Many of its provisions do not come directly within the field of interest of this Report, as they deal with significant points of detail, such as: the coming into operation of an Act; the meaning of commonly used words and expressions; or the service by post rule.⁸

10.

However, some of the issues addressed by the Bill overlap with the subject matter of this Report. Prominent among these is section 5, on the construction of a provision that is obscure, ambiguous or absurd, or would fail to reflect the plain intention of the Oireachtas; this section was, in fact, inspired by the suggestions made in Chapter 2 of the present Report. We hope that some of the other recommendations made in this Report may also be adopted as amendments to the Bill.

11.

Another development which is of interest in the context of this Report is the anticipated publication of a Drafting Manual, which is a comprehensive style guide for use in legislative drafting. This will be published for the first time, by the Office of the Parliamentary Counsel to the Government, in 2001.

Outline of this Report

12.

Chapter One of this Report provides a summary of the existing common law system of statutory interpretation, within which any changes must fit. Because

⁵ See, for example, s.11 of the Act which begins, “The following provisions shall apply and have effect in relation to the construction of every Act of the Oireachtas and of every statutory instrument...”.

⁶ Sections 4(1) and 2(1).

⁷ Humphreys, *Index to Irish Statutory Instruments*, (Butterworths, 1988) p. iii.

this subject is treated extensively in Chapter One of the Consultation Paper,⁹ this is an unusually brief treatment.

13.

Each of **Chapters Two to Five** deals with a particular area of difficulty within the broad field of interpretation. **Chapter Two** addresses the seminal problem of identifying the situations in which it is justifiable for a court to depart from the literal rule, which has always been, and it is accepted, should remain, the general guiding principle. The conclusion is reached that there are a number of judicial pointers towards acceptance and adoption of a purposive approach, in narrow and carefully defined circumstances. We support this trend and we recommend that, in order to ensure a consistent approach, it should be set out in legislation.

14.

Chapter Three is directed to a difficulty which arises where some new invention has come into existence since the relevant legislation was enacted, which may not fall within the letter of the legislation, but falls within its spirit. This might appear to be a point of detail, but case-law indicates that it is an issue which has given rise to many problems of interpretation, mainly because of the increased rate of technological advancement in recent years. In attempting to cater for this situation, one has to avoid giving the courts such free rein as in effect to confer upon them the power of legislation. We suggest a form of statutory wording, which we consider will enable cases to be more justly and appropriately decided, without going to this extreme.

15.

Chapter Four concerns the issue of determining which intrinsic aids – long and short title, preamble, marginal notes and cross-headings – may be taken into account by a court in interpreting a statute. A notable feature of Irish law in this regard is section 11(g) of the *Interpretation Act 1937*, (section 14(g) of the *Interpretation Bill, 2000* is very similar), which rigorously excludes marginal notes and cross-headings from the range of materials to which a judge may refer. While there will not be many cases in which such aids will be helpful, we believe that to prohibit a court from noting their contents is unrealistic and inflexible, and accordingly we recommend the repeal of this provision.

16.

Chapter Five is concerned with extrinsic aids, *ie* aids to interpretation which, in contrast to the subject matter of Chapter Four, are not published with the legislation. Examples include: Reports of the Law Reform Commission or similar bodies; international treaties; explanatory memoranda; statutes dealing with the same area of law; material from other jurisdictions; and Oireachtas debates. This last item on the

list is generally perceived by the legal community as being the most controversial, and Irish case-law reflects differences of opinion as to whether a court should be entitled to have regard to the official record of proceedings in the Dáil and Seanad. We recommend a broad statutory framework which would, in specified circumstances, empower a court to take account of a number of sources evidencing the legislature's intention, including Oireachtas debates. However, such legislation should emphasise that this power is to be exercised at a court's discretion, and other factors, *eg* the desirability of the public being able to rely on the ordinary meaning conveyed by the text, would have to be weighed against the exercise of this discretion.

⁹ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14–1999, 1999).

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17.

The style of legislative drafting and the rules of statutory interpretation are intimately related; the one influences the other. We wish in no way to undervalue the importance of improved techniques in drafting. However, a substantial amount of space was devoted to this subject in our Consultation Paper (Chapters Two, Three and Five). We were gratified to find almost unanimous support for these sections of our Paper at our Colloquia. It is clear, too, that the tide is running strongly in the direction of reform in this area, and this trend has manifested itself in a number of ways (See Chapter 6 of this Report). Both because of this and because drafting is so largely a matter of practice rather than of law, in the present Report we have confined most of our discussion of issues related to legislative drafting to **Chapter Six**. But we emphasise that we wholeheartedly support the current movement towards 'plain language' (to employ an 'umbrella-term', which encompasses very many means and forms). In particular, we warmly welcome the new Drafting Manual.

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CHAPTER ONE STATUTORY INTERPRETATION

Common Law Rules of Interpretation

1.01

Undoubtedly, legislative drafting and statutory interpretation are activities which have been deeply marked by their historical origins. The history of statute law-making and the manner in which it was received by the courts demonstrate that statute law, a rarity until the mid-nineteenth century, was seen as an incursion, if not an assault, upon 'our lady the common law'. One illustration of this attitude was the so-called

'mischief' rule (which developed in the 16th Century) which assumed that statute law would only be called into play to rectify some error which had occurred in the development of the common law.¹⁰ Another was the 'golden' rule, which applied in situations in which a literal approach would lead to an absurd meaning. In other words, the normal approach was to give words in a statute their ordinary meaning, except where that would produce an inconsistency or an absurdity.

1.02

The labels 'golden rule' and 'mischief rule' were used to describe approaches to interpretation which focused on the aim of a statute. However, these two rules are limited in their scope; and in the courtroom, as opposed to the lecture room, they have been mentioned increasingly fitfully. By now, it would seem better to subsume them into the more comprehensive and more accurate concept of a 'purpose rule' of interpretation. This was acknowledged by Denham J in *DPP (Ivers) v. Murphy*, where she spoke of the mischief rule, in particular, having been subsumed into a more modern purposive rule.¹¹

1.03

In the remainder of this Report we shall frequently use the terms 'literal' and 'purposive' rules of interpretation. In using this jargon, we are referring to two ends of a spectrum, one concerned with the meaning of particular words and phrases and the other with the overall result which the legislature may wish to achieve.

1.04

Other relevant rules in this context are the common law maxims, such as the *noscitur a sociis* ('a word or phrase is known by its associates') and *ejusdem generis* ('of the same kind') rules.¹² These maxims are applications of the principle that words in a statute should be interpreted according to their context. The first of these rules provides that words should be construed in the light of other words that surround them. The second means that where general words follow a list of persons or things which are all of the same type, for example where all are domestic animals, or food stuffs, the general words which follow are to be construed as implying only persons or things of the same general kind as the other items listed.

¹⁰ Cross, *Statutory Interpretation*, (3rd ed., Butterworths, 1995) 11–12, traces the history of the mischief rule back to *Heydon's* case in 1584.

¹¹ [1999] 1 ILRM 46. See Paras.2.18–22 *below*.

¹² For a full examination of the practical implications of these maxims, see *HMIL v. Minister for Agriculture and Food*, High Court, 8 February 1996, 15.

1.05

These maxims are fairly narrow in scope and we should like to emphasise that any proposals made here are not intended to affect these rules, which may be regarded as particular instances of a broad purposive approach. In fact, we believe that these rules demonstrate that the common law has always recognised that words do not always have a fixed meaning irrespective of their context, and that sometimes it is necessary to interpret words by reference to their context. In short, there have always been exceptions to the literal rule, where common sense requires it.

1.06

Another family of rules, commonly described as 'rules of interpretation', have as their objective the injection of a particular policy into statute law. Examples include the presumptions against retrospective or extraterritorial effect and the presumptions in favour of compatibility with European and International law.¹³

1.07

A final set of rules may be regarded as simple deductions from formal logic. One example is the notion that where there is a contradiction between two provisions, a general statutory provision must give way to a more specific one (*generalia specialibus non derogant*). The other rule of this type is that, where a provision expressly covers one situation and does not mention another cognate case, it is to be taken not to catch the cognate case (*expressio unius est exclusio alterius*). Our recommendations do not affect either of these rules of interpretation.

1.08

It is beyond dispute that rules of statutory interpretation are rather special. This is true not only because of their central importance in ascertaining the content of the law, but also because they are of a different character from the substantive rules of law on a particular subject. Professor Hart had a name for rules of interpretation; he called them 'rules of recognition', distinguishing them from substantive legal rules such as, for example, the rule banning speeding.¹⁴ 'Rules of recognition' were rules that guided a court in identifying the correct substantive rule on a particular point and interpreting it. However, it does not seem to us that it follows, either from their special character or from the history just summarised, that the rules of statutory interpretation must be sourced exclusively in the common law. When all is said and done, we are focusing here on statutory law – the handiwork of the legislature (which, of course, is identified by Art. 15.2.1 of the Constitution as the sole and exclusive maker of law). It is quite reasonable to suppose, therefore, that if the legislature should wish to inject a change of policy into the manner in which its laws are interpreted and applied, it should be free to do so.

1.09

Two points of central importance appear to stand out from the Report which follows:

- (a) different judges have adopted divergent attitudes to interpretation, and

the difference, broadly speaking, has been that some

- (b) judges have taken a more literal, and others a more purposive, approach.

1.10

As regards (a) above, this point is not unique to statutory interpretation; judges differ in their approaches to other areas of law. However, it is probably fair to say that the present area has been richer than any other, in what may be called 'judicial

¹³ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14-99, 1999) Paras.1.074-101.

¹⁴ Hart, *The Concept of Law*.

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a-la-cartism'. There are various reasons for this, including the large variety of rules which have developed in this area because of its long history. An element of result-oriented reasoning has probably also been present. In any case, we consider it undesirable that different judges should follow different rules. Clearly, the ideal to be pursued in law should be that a particular legal question will always be resolved in the same way, irrespective of which judge hears the case. Of course, this ideal is not always achievable in practice. However, the law should be designed in such a way as to make it more, rather than less, likely to happen.

1.11

Our first conclusion, then, is that it would be well to set down in legislation a standard approach to a number of basic points in relation to statutory interpretation, in order to encourage uniformity. This is broadly what is recommended in respect of various controversial issues, in Chapters Two to Five. The second question – as to what the content of that standard should be, in each case – will be worked out in each particular chapter.

1.12

We would like to emphasise that, under Ireland's constitutional arrangements, it is the function of the legislature to make the law, and of an independent judiciary to interpret it.¹⁵ None of the proposals which we make can, or should, undermine this vital demarcation line. Our recommendations, which we suggest should be brought about by way of an Interpretation Act, are not especially radical. They consist, in the main, of a gathering together of the best practices which have been evolved by the courts, or are in the process of evolving.

1.13

This process of evolution has occurred because judicial practice in the interpretation of statutes has changed over time. Both here and in other common law jurisdictions,

there has been an increasing judicial emphasis on giving expression to the obvious intention of statute law, rather than favouring literal and overly legalistic constructions of the wording of those statutes. One can identify very readily significant currents which – from disparate sources – seem to add up to a zeitgeist running in favour of moderate reform. We have already mentioned the *Interpretation Bill, 2000*. We mention briefly four other examples:

- **The influence of European Union law.** Judges have considered themselves bound to use a purposive approach to interpreting EU legislation and this has also begun to influence how they interpret domestic law.¹⁶

- **The drafting of other legal documents in a more accessible fashion.** Several initiatives are in place to improve the quality of drafting of contracts, wills, company documents, pension and insurance policies and other private

¹⁵ See Articles 15.2.1 and 34.1 of the Constitution.

¹⁶ This point is discussed in Paras.2.29–31.

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legislation. These seek to simplify construction by “making them as simple as possible, but no simpler.”¹⁷

- **The British project to remodel drafting of taxation law.**¹⁸

- **The Irish *Taxes (Consolidation) Act, 1997*.**

¹⁷ This point is discussed in Paras.6.02–03.

¹⁸ Also discussed at Para.6.20 *below*, and in the Appendix to Chapter Six.

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CHAPTER TWO A MODERATELY PURPOSIVE APPROACH TO STATUTORY INTERPRETATION

2.01

In our Consultation Paper, we recommended that any new Interpretation Act should include a provision stipulating that a purposive approach should be taken to interpretation, *ie* a provision similar to that contained in Section 15 AA of the *Australian Acts Interpretation Act*.¹⁹ Following our Colloquia and further consideration, we modified this recommendation and submitted a slightly different draft in writing to the Attorney General. We are pleased to note that section 5 of the *Interpretation Bill, 2000* contains a provision equivalent to our recommended draft. In this chapter we discuss in more detail the relationship between the literal rule and the purposive rule, a relationship that is at the core of the issues in this Report.

A. What is meant by a purposive approach?

'Purpose', 'object' or 'intention'

2.02

As a preliminary observation, we note that three different words might possibly be used to capture the concept to which we are referring; purpose, object or intention. It seems to us that there is very little difference between these words, especially bearing in mind the broad context in which they are being used here, and the fact that the three words are often used interchangeably.²⁰ However, we think it is helpful to select one from among these three and therefore we choose 'purpose'. The main reason for preferring this term is that 'intention' is often used in the phrase 'intention of the legislature' and we wish to distinguish between 'purpose', as a broad concept, and 'intention', as something peculiarly linked with extrinsic aids, *eg* Oireachtas debates.²¹ We should also like to emphasise that we see no merit in using more than one term at the same time, as in the phrase "purpose or object" used in the *Australian Acts Interpretation Act, 1901* (as amended).

Relationship between the literal and purposive approaches to interpretation

2.03

It is important to state, at the outset, that the literal rule is, and must remain, the general governing principle in this area: anything else would lead to chaos. Moreover, in most cases a literal construction will lead to the same result as a purposive construction. However, the central question in this chapter is whether a court, in the minority of cases in which the literal meaning of a provision is not

¹⁹ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law*, (CP14–1999, 1999) Para.6.1.

²⁰ For example, Bennion uses the phrase "purpose or object", clearly

implying that he considers the two terms as being interchangeable;
Bennion, *Statutory Interpretation*, (3rd ed., Butterworths, 1997) 732.

21 See Chapter 5, *below*.

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consistent with the purpose of the relevant Act, should look beyond the literal meaning, in order to give expression to the intended effect of the statute. In other words, is a court entitled to strain the meaning of the words in pursuit of the purpose? Broadly speaking, a literal meaning and a purposive meaning may conflict with each other in two different ways. The first occurs where a literal construction of a statutory provision is ambiguous; the second occurs where such a construction is absurd.

Ambiguity and Absurdity

2.04

The term 'ambiguity' is fairly self-explanatory – it applies to a situation where the meaning of a statutory provision, in relation to the facts of the instant case, is unclear. What constitutes absurdity, however, is not so straightforward. If one takes a narrow approach to the concept of absurdity, the literal meaning of a provision is only absurd when the wording of the particular provision fails to make sense or is self-contradictory. This approach seems to proceed from the assumption that the interpreting judge makes no reference to the context within which the provision operates.

2.05

Giving a somewhat wider meaning to 'absurdity' would mean that a provision would be considered absurd if it contradicted other elements of the same Act, presuming that the judge, in deciding the question, would at least bear in mind the other provisions of the Act in question. A wider meaning again would lead to the conclusion that the literal meaning of a provision would be absurd if its effect could not have been intended by the legislature – assuming, of course, that the judge is aware of what the legislature would have intended as the meaning of the statute. Bennion states that the English courts have preferred this last understanding of the term 'absurd'.²² Generally, the same has been true in Ireland, but there have been some exceptions (such as *Murphy v. Bord Telecom*,²³ where a result that was clearly contrary to the legislature's intention (as gleaned from the Act) was given effect, because the Court felt that the provision was not 'absurd' in the narrow sense).

2.06

There is a strong argument in favour of a common sense approach to statutory interpretation, whereby a judge, in deciding a case, is expected to avoid giving a provision a meaning which plainly thwarts the legislative intention behind the statute. On the other hand, there is a fine line between embracing this principle and empowering a judge to impose his or her own view of the most appropriate meaning, at the expense of the explicit wording of the provision. The former situation may be

regarded as desirable, common-sense judicial interpretation; the latter opens the door to the risk of judicial legislation. Drawing a balance between these competing concerns is undoubtedly difficult, but it requires a choice as to which of the senses of 'absurd' should be adopted. What is suggested here is that where there is clear evidence available of the specific effect the legislature intended a provision to have, it would be absurd if a court gave the provision a conflicting meaning.

²² Bennion, *op. cit.* fn. 20, at 751.

²³ [1986] ILRM 483.

B. Irish law on giving effect to the purpose of legislation

2.07

We must, of course, now examine the current approach of the Irish courts, before going on to recommend where the balance between literal and purposive interpretation may be drawn in the future.

Rahill v. Brady

2.08

A good example of how the common law limited the extent to which a court could look beyond the literal meaning of a provision is provided by the Supreme Court case of *Rahill v. Brady*.²⁴ The case concerned an objection made by two publicans to the granting of a licence to sell intoxicating liquor to the proprietor of a cattle mart. The licence – an 'occasional licence' – was granted on the basis that cattle marts, held twice weekly throughout the year, were 'special events' for the purposes of section 11(1) of the *Intoxicating Liquor Act, 1962*. The phrase 'special events' had not been defined in the Act. On the ordinary literal interpretation of the word 'special', it would have seemed that the mart, which occurred twice weekly throughout the year, could not reasonably be regarded as 'special' and thus as eligible for an occasional licence.²⁵

2.09

Against this view, it was argued in Court that the legislative history of the *Intoxicating Liquor Acts* showed that the legislature had specifically intended the exemption of marts from the ordinary licensing laws. The judgment of Budd J on this point in the Supreme Court directly addressed the question of how far a court is entitled to go in seeking the purpose of a provision:

“While the literal construction generally has *prima facie* preference, there is also the further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intentions of the legislature were; but the ordinary meaning of words should not

be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature.”²⁶

2.10

This judgment clearly adopted the position that the literal meaning may be departed from if, and only if, there is evidence within the Act as a whole that such a literal meaning goes against the purpose of the Act. In the instant case, the evidence which was adduced failed to establish clearly that a literal meaning would conflict with the intention of the legislature and the Supreme Court (O Dálaigh CJ, Budd J, and Fitzgerald J) unanimously allowed the publicans' appeal against the granting of the licence.

²⁴ [1971] IR 69. In a sense, this was a case about extrinsic aids (the legislative history of an Act). However, it is included here because of Budd J's classic statement of the literal rule.

²⁵ A question also arose as to whether the use of the word 'occasional' required that the events concerned be infrequent; the term 'occasional' was not defined in the Act. However, the court found that a literal interpretation of that term did not impute infrequency, but merely referred to the occurrence of the event. See Butler J, at 73.

²⁶ *Op. cit.* fn.24, *per* Budd J, at 86.

Nestor v. Murphy

2.11

The *Rahill* case provides a relatively conservative version of the purpose rule. However, there is also a strong line of Irish authority which has endorsed a slightly more purposive approach. We may consider, for example, the case of *Nestor v. Murphy*.²⁷ The provision in question here was section 3(1) of the *Family Home Protection Act, 1976*, which states:

“where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then ... the purported conveyance shall be void.”

2.12

In this case the two defendants were a married couple who were refusing to complete a contract on the ground that the wife had not consented in writing to the sale before the contract was signed. It was significant that the spouses were joint tenants of the

house. Henchy J, giving judgment for the Supreme Court, upheld the decision of the High Court ordering the specific performance by the defendants of a contract of sale. In his decision he conceded that

“[a] surface or literal appraisal of s. 3. sub-s. 1, might be thought to give support to the defendants' objection to the contract ... [However] the flaw in this interpretation of s.3, sub-s. 1, is that it assumes that it was intended to apply when both spouses are parties to the 'conveyance'. That, however, is not so. The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction ... The sub-section cannot have been intended by Parliament to apply when both spouses join in the 'conveyance'. In such event no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home ... When both spouses join in the 'conveyance', the evil at which the sub-section is directed does not exist.

To construe the sub-section in the way proposed on behalf of the defendants would lead to a pointless absurdity.”²⁸

2.13

Henchy J went on to outline the practical consequences of such a literal interpretation and described them as being “outside the spirit and purpose of the Act”, stating that in such circumstances a “schematic or teleological” approach was required. The limit which he set on the extent to which a purposive approach should be pursued was as follows:

“s.3, sub-s. 1, must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act of 1976 as a whole. Therefore the words of s.3, sub-s. 1, must be given no wider meaning than is necessary [in order] to effectuate the right of avoidance ... It is only by thus confining the

²⁷ [1979] IR 326.

²⁸ *Ibid.* at 328–9. See, to similar effect, *McGrath v. McDermott* [1988] IR 258, 276 (*per* Finlay CJ).

reach of the sub-section that its operation can be kept within what must have been the legislative intent.”²⁹

Mulcahy v. Minister for the Marine

2.14

In the case of *Mulcahy v. Minister for the Marine*,³⁰ Keane J was similarly faced with what he described as a choice between a literal and a more purposive construction of a provision in an Act governing the granting of certain licences. The case centred on the granting, by the Minister for the Marine, of various licences for the operation of a salmon farm. The applicant claimed that the granting of the licences in question was unlawful.

2.15

The power to grant the licences was governed by a number of separate pieces of legislation, and principally by section 15 of the *Fisheries (Consolidation) Act, 1959*. Read literally, the relevant section allowed the Minister a wide discretion to authorise aquaculture projects. Counsel for the Minister encouraged the court to take a purely literal view of the relevant section, reading the provision in isolation from other pieces of legislation. However, the applicant argued that the legislation had to be interpreted in the light of other related statutes, particularly the *Fisheries Act, 1980*, which was plainly designed to regulate fish-farming. It was submitted that the earlier 1959 Act had been enacted at a time when fish-farming was not a widespread phenomenon and although it might appear on the face of the Act that the Minister was thereby empowered to grant such licences, this consequence would not have been intended by the legislature at the time of enactment.

2.16

Keane J rejected the Minister's arguments in favour of a literal reading ;

“While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole.”

2.17

Again, although this case may be viewed as involving the issue of whether a court may consider related statutes, the judge put it under the head of the purposive rule and offered a clear statement of this latter principle. The rule as enunciated is that a court may depart from a literal reading of an enactment where there is an alternative meaning available to the court which plainly reflects more accurately the purpose of the Act.

²⁹ *Op. cit.* fn. 27, at 329–30.

³⁰ High Court, 4 November 1994.

DPP (Ivers) v. Murphy**2.18**

A more recent decision on this point was delivered in the case of *DPP (Ivers) v. Murphy*.³¹ Here, the relevant provision before the court was section 6(1) of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*, which provides ;

“Where a person who has been arrested otherwise than under a warrant, first appears before the District Court charged with an offence, a certificate purporting to be signed by a member [of An Garda Síochána] and stating that that member did, at a specified time and place, any one or more of the following namely:

- (a) arrested that person for a specified offence,
- (b) charged that person with a specified offence, or
- (c) cautioned that person upon his or her being arrested for, or charged with, a specified offence, shall be admissible as evidence of the matters stated in the certificate.”

2.19

The facts here were that no member of An Garda Síochána had appeared before the court to give evidence as to whether the accused had been arrested otherwise than under a warrant. The prosecutor argued that the purpose behind introducing the provision was precisely that a Garda would not have to appear in court. Yet, on a literal reading of the provision, a Garda's evidence was necessary in order to enable the remainder of the provision to operate in any particular case.

2.20

Deciding in favour of the accused, McCracken J in the High Court stated:

“I would accept that the legislature probably did not intend that evidence of the nature of the arrest would have to be given, but I cannot construe a statute, which is quite clear in its wording, in accordance with what I might perceive as the intention of the

legislature. I must give the words their normal meaning.”³²

2.21

This decision was unanimously reversed by the Supreme Court. In her judgment, Denham J referred to the literal, golden and mischief rules as the three related rules of interpretation. She categorised the approach taken by McCracken J as one based on the literal rule, which she considered was not in line with contemporary judicial practice, whereby a purposive approach was preferred. In explaining why she preferred this latter approach, she referred to a passage from the groundbreaking English case of *Pepper v. Hart*,³³ quoting Lord Griffiths;

“The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The courts now adopt a purposive approach, which seeks to give effect to the true purpose of legislation.”³⁴

³¹ [1999] 1 ILRM 46.

³² *Op. cit.* fn. 31, *per* McCracken J, at 50.

³³ [1993] 1 All ER 42. See Chapter 5 on extrinsic aids to construction.

³⁴ *Ibid.* *per* Lord Griffiths, at 50.

2.22

Denham J went on to state that the literal rule should not apply if it produces an absurd result that thwarts the intention of the legislature. What is especially worthy of note in relation to this case is the fact that a purposive construction was adopted, even in a criminal case where this was to the detriment of the defendant.³⁵

Murphy v. Bord Telecom – the problem of overly-literal constructions

2.23

Despite the more purposive approach advocated in *Nestor v. Murphy*, there have still been cases where a literal meaning, which is patently inconsistent with the purpose of an Act, has prevailed. The most obvious example of this type of case is *Murphy v. Bord Telecom*.³⁶ This case centred on the meaning given to the phrase 'like work', which was the central concept in the *Anti-Discrimination (Pay) Act, 1974*. The circumstances in which two persons were considered, for the purposes of the Act, to be involved in 'like work' were defined in section 3 (c) as including;

“[a situation] where the work performed by one is equal in value

to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility or working conditions.”

2.24

The difficulty confronting the claimants was that the work being performed by these female employees was in fact of superior value to that of their male colleagues. In other words, they could find no male colleague who was being paid more for 'like work', but several who were being paid more for lesser work. The applicants argued that the relevant provision should be construed to include the words 'at least', which, they argued, was surely the effect that the draftsman had intended the provision to have. Applying a literal interpretation, the High Court held that work of equal value did not include work of superior value. The judgment of Keane J stated that no ambiguity or absurdity was evident on the face of the provision and, accordingly, there was no reason not to apply the literal meaning of the wording of the sub-section.

2.25

As a result of this literal approach taken by Keane J, the claimants could not bring themselves within the scope of the legislation. Yet, it would seem extremely unlikely that the legislature intended a person in the position of Ms. Murphy and her colleagues to be excluded from the benefit of the Act. Indeed, it was argued on behalf of the applicants that it could not have been intended that the provision should have the narrow meaning which the Court later ascribed to it, as the Act had been introduced in order to give effect to Article 119 of the EC treaty and Article 1 of EEC Council Directive 75/117. Reference was also made to the long title, which clearly stated that all discrimination in pay on the basis of sex was to be outlawed. It may be of interest to note that the case of *Murphy v. Bord Telecom* was subsequently referred to the European Court of Justice, where the decision of the High Court was held to be incorrect.³⁷

³⁵ See Para.2.46 *below*, on the rule against doubtful penalisation.

³⁶ [1986] ILRM 483 and [1989] ILRM 53.

³⁷ See Para.2.29 on EU law, *below*.

C. Other jurisdictions

English case-law

2.26

The most recent House of Lords decision in this area is *Inco Europe Ltd v. First Choice*.³⁸ The main issue in this case was whether the Court of Appeal had

jurisdiction to hear an appeal of a decision made at arbitration. The relevant provision was section 18(1) of the *Supreme Court Act, 1981*, as amended by section 107 and Schedule 3 of the *Arbitration Act, 1996*. The provision as amended stated, plainly enough, that “no appeal shall lie to the Court of Appeal”. Thus, a literal reading would obviously dictate that no appeal would lie. However, the House of Lords and the Court of Appeal each unanimously ruled that there was an entitlement to appeal.

2.27

This conclusion was mainly drawn from the history of legislation in this field and the fact that there was no evidence of any intention to change the *status quo* in this regard. Lord Nicholls, in his judgment, directly addressed this point. Responding to the charge that the preferred interpretation was overly creative, he stated;

“I freely acknowledge that this interpretation of s.18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opusculum, *Statutory Interpretation*, 3rd ed (1995) pp 93–105. He comments, at p 103:

'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.’”

2.28

Lord Nicholls went on to describe what he considered to be the proper limits of this aspect of the judicial role,

“This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the

substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of

38 [2000] 1 WLR 586 (also reported in The Times, 10th March 2000).

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the enactment would cross the boundary between construction and legislation ... In the present case these three conditions are fulfilled.”

European Union Law

2.29

As mentioned earlier, the strict literal approach is very much a creature with a common law pedigree. A major factor in the move towards a more purposive approach has been the increasingly important interface between domestic and European Union law. This was acknowledged by Barr J in *HMIL (Formerly Hibernia Meats Ltd.) v. Minister for Agriculture*,³⁹ a case concerning the administration of EU Beef Intervention schemes and associated European legislation. In that case, Barr J outlined the general approach which is considered appropriate in interpreting EU law;

“It is a primary rule of European law that a court should adopt a teleological or schematic approach to the interpretation and construction of EU legislation.”

2.30

Barr J went on to explain what he saw as the relevance of this approach to a common law jurisdiction by quoting from a decision of Lord Denning;

“They adopt a method which they call in English strange words – at any rate they were strange to me – the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly,

without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?”⁴⁰

2.31

It is notable that the case in which Barr J was giving judgment concerned the interpretation of domestic regulations which, admittedly, implemented EEC regulations of 1988. However, he went on, after this rather warm reference, to state that “the teleological approach was adopted ... in *Nestor v. Murphy* ... and more recently ... in *Lawlor v. Minister for Agriculture*”.⁴¹ The point is that while *Lawlor* involved EU law, *Nestor* was about the *Family Home Protection Act, 1976*, and Barr J made no distinction between *Nestor* and the other cases. This grouping together of European and domestic cases as part of the same general movement towards a teleological approach is surely strong evidence of the increasing influence which is being brought to bear by EU law upon our domestic legal system.

³⁹ High Court, 8 February 1996.

⁴⁰ *Buchanan and Co v. Babco Ltd* [1977] QB 208, per Denning LJ, at 213. It is worth noting that this decision was later overturned by a less enthusiastic House of Lords decision, reported at [1978] AC 141.

⁴¹ *Nestor v. Murphy* [1979] IR 326 (see Paras.2.11–13 above); *Lawlor v. Minister for Agriculture* [1990] 1 IR 356.

D. Comment

2.32

In several of the Irish cases cited above the approach to interpretation is already along the lines of the moderate purposive approach recommended in this Report. However there are a number of important cases where this has not been true, and a heavy reliance on the literal rule is still evident in cases such as *Murphy v. Bord Telecom*. The decision of Keane J in that case was effectively reversed by the European Court of Justice, and it is interesting to note his comments when the case came back before him in the High Court.⁴² In this later judgment, Keane J accepted that the primacy of EU law meant that where a teleological (purposive) interpretation would give effect to the EC treaty and other sources of EU law, that should supersede a literal interpretation. He also accepted that he had erred in law in holding that there was not an alternative teleological approach available to him.

2.33

In favour of giving the purposive approach precedence, and in line with our discussion of the relationship between drafting and interpretation in our Introduction, it is submitted that the courts have certain duties where the meaning of a provision is

uncertain. 'Separation of Powers' principles would suggest that if a judge knows, or can reasonably be expected to know, what the Oireachtas intended the effect of an Act to be, then he or she is bound to give effect to that intention. It is also a fundamental aspect of the Rule of Law that the law should be certain and accessible, and in our system, generally this means that the sole source of law should be within the four corners of the Act. However, we would emphasise that the purposive approach under examination in this chapter does not violate this principle. It is important to note that the proposal advanced in section F of this chapter relates to the purpose of the provision, as gathered from the Act itself.

2.34

An examination of the case-law in this area shows that there remains a degree of uncertainty as to what is the proper relationship between the literal and purposive rules of interpretation. Judges have differed in their views as to how far one can go, in pursuit of purpose, beyond the literal meaning of a provision.

2.35

Thus, even accepting that a consistent approach is desirable, there remains the question of what that consistent approach should be: deciding this issue as a matter of policy, the Commission prefers the moderately purposive approach already adopted in several judgments, particularly the cases of *Nestor v. Murphy* and *Mulcahy v. Minister for the Marine*, discussed above.⁴³ It is worth stating, however, that this policy decision marks only an adoption of what we believe is best practice, as reflected by, and analysed in, judgments delivered in Irish cases.

2.36

Our first conclusion, then, on this subject of alternative literal and purposive approaches to interpretation, is that it would be well to set down in legislation a standard approach, and we recommend that a moderately purposive standard should be adopted for this purpose.

⁴² *Murphy v. Bord Telecom* [1989] ILRM 53.

⁴³ At Paras. 2.11–17, *above*.

E. A statutory provision providing for a moderately purposive approach to interpretation

2.37

The next question is the level of detail that should be included in such a standard approach, so as to render it of maximum utility in assisting judges to take a consistent approach to cases.

Existing provisions in other jurisdictions

2.38

There are a number of examples available of how other jurisdictions have formulated such legislative provisions in their respective Interpretation Acts. The two most notable of these are s.15 of the Australian *Acts Interpretation Act* and the formulation recommended in the draft *Interpretation Act* of the New Zealand Law Commission. Our own Consultation Paper on this topic⁴⁴ endorsed the Australian 1901 Act (as amended), section 15 AA:

“In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”

2.39

Having considered the matter further, however, we are now of the view that there is a flaw in this provision, in so far as it states that “a construction that would promote the purpose ... underlying the Act ... shall be preferred to a construction that would not ...”. It seems to us that this reasoning is elliptical, and it fails to address the question of the relative positions of the purposive trend, established by the provision, and the literal rule. The literal rule is not mentioned, yet it can hardly have been intended that it should be uprooted by what might be termed 'a side wind'. It seems that it is left looming large – just how large is uncertain – in the background. There may be some diplomatic or tactical reason for this situation which we do not perceive. However, it can be said that in the Irish context, especially when one of the purposes of a proposed provision is to encourage consistency, it is important to be as clear as possible. This is particularly so in an area of law which, because of the breadth of its scope, inevitably contains many inherent difficulties. Accordingly, we reject the Australian provision as a model.

2.40

Another possible model is the formulation found in section 5(j) of the New Zealand *Acts Interpretation Act, 1924*:

“Every Act, and every provision or enactment thereof, shall be deemed remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit.”⁴⁵

⁴⁴ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14-1999, 1999) Paras.1.150 and 4.04–08.

⁴⁵ The Canadian Interpretation Act (as consolidated) is almost identical.

2.41

This provision seems to us to hinge on the phrase 'fair, large and liberal' – language which, to 21st Century ears, sounds rather characteristic of the 18th Century in its literary and inspirational style. We reject the formula because it seems imprecise. Again, it leaves the position of the literal rule uncertain, although it appears to downplay it; something which we would not wish to do. We might also add that, as a matter of drafting practice, phrases such as “fair and liberal construction” and “true intent, meaning and spirit” seem unnecessarily repetitious and unwieldy.

F. Recommended draft provision

2.42

In the light of the above observations, we recommend a provision which retains the literal rule as the primary rule of statutory interpretation. The other significant feature of our proposed formulation is that it specifies exceptions to this primary approach, not only in cases of ambiguity and absurdity, but also – and here is the slight change from the common law as expressed in some judgments – where a literal interpretation would defeat the intention of the Oireachtas. The draft provision which we propose also indicates that such an exception should only apply where, in respect of the issue before the court, the intention of the Oireachtas is plain.

2.43

The model which we recommend owes a good deal to the judgment of Keane J (as he then was) in the case of *Mulcahy v. Minister for the Marine*, already discussed.⁴⁶ Keane J set out the circumstances in which a court may depart from the literal meaning of a provision as follows:

“While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole.”

2.44

Based in part on this passage, we recommend the following draft:

In construing a provision of an Act

- (a) **which is ambiguous or obscure; or**

- (b) **a literal interpretation of which would be absurd or would fail to reflect the plain intention of the Oireachtas,**

a court may depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas; provided that this can be gathered from the Act as a whole.

⁴⁶ Paras.2.14–17.

G. Other issues

'May' or 'shall'

2.45

It remains to deal with two significant second order points in relation to this recommendation. The first of these is whether the provision just recommended should include the permissive phrase “a court may ...” or the mandatory phrase “a court shall ...”. In practice, the choice may not make all that much difference, since a good deal of judicial discretion is inherent in the provision, by virtue of such concepts as 'plain intention' or 'gathered from the Act as a whole'. As a result, another element of discretion more or less may not matter very much. However, the Commission must make a recommendation one way or the other. *On the whole, in order to emphasise that it is not intended to infringe unduly on judicial discretion in this area, we believe that “a court may ...” is preferable.*

Penal and taxation statutes – the principle of doubtful penalisation

2.46

Another policy issue is whether the recommended moderately purposive approach should apply to penal and taxation statutes. At our Colloquia, the view was expressed that these categories of cases could not justifiably be exempted from the proposed approach. It was felt that such an exemption would mean that a criminal defendant or taxpayer would always benefit from whichever construction, either literal or purposive, was most favourable to his or her position.

2.47

The approach taken to criminal cases in this regard was discussed comprehensively in the case of *Mullins v. District Judge William Harnett*.⁴⁷ In that case, the applicant had been charged with assault contrary to common law and the *Offences Against the*

Person Act, 1861, as amended. The common law offence of assault was abolished in August 1997, between the time when the alleged offence occurred and the time when the prosecution of the applicant came up for hearing. The applicant claimed that as the offence no longer existed and as there had been no stipulation in the Act regarding crimes committed before the date of abolition of the offence, the prosecution could not continue.

2.48

The Attorney General, a notice party in the case, argued that despite the apparent lacuna in the law, the offences were saved by section 21(1) of the *Interpretation Act, 1937*. This section states that when an Act is repealed, such repeal should not affect any penalty incurred in respect of an offence committed before the repeal. The issue was then raised as to whether there was a common law rule that a strict construction of a penal statute should be applied. O'Higgins J quoted from Bennion;

“The true principle has never been that 'a penal statute must be construed strictly' (though it is often stated in such terms). The correct formulation is that a penal statute must be construed with due regard to the principle against doubtful penalisation, along with all other relevant criteria.”⁴⁸

⁴⁷ [1998] 2 ILRM 304.

⁴⁸ *Op. cit.* fn.47, per O'Higgins J, at 311, citing Bennion, *Statutory Interpretation* (2nd ed.), at 382.

2.49

O'Higgins J went on to refer to the following passage from Maxwell, concerning this canon of construction:

“The effect of the rule ... might be summed up by saying that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. If there is no ambiguity, and the act or omission in question falls clearly within the mischief of the statute, the construction of a penal statute differs little, if at all, from that of any other.”⁴⁹

Having applied the canons of interpretation to the instant case, O'Higgins J concluded that there was no ambiguity in the relevant section, so as to require the matter to be resolved in the manner most favourable to the applicant.

2.50

It may be noted that the decision in *DPP (Ivers) v. Murphy*, discussed above,⁵⁰ casts further doubt on whether or not the Irish courts will be willing to allow a defendant in a criminal case to benefit from a literal construction of a statutory provision, where the effect of such a construction would be to frustrate the intention of the legislature.

2.51

With regard to taxation cases, in the recent Supreme Court decision in *O'Connell (Inspector of Taxes) v. Fyffes Bananas*,⁵¹ Keane CJ ruled that the defendant could not claim the benefit of manufacturing tax relief for the artificial ripening of bananas. On its face, section 39(2) of the *Finance Act, 1980* seemed to cover any company that provided a service of subjecting another company's goods to any process of manufacturing – an apparently broad category. However, the Inspector of Taxes argued that the Government had introduced a separate section, section 41 of the *Finance Act, 1990*, specifically to exclude such activities as the artificial ripening of bananas from manufacturing tax relief.

2.52

Keane CJ acknowledged that special rules of construction were applicable in cases involving taxation, but his understanding of those rules was quite novel. He stated that in order to establish that a party fell within a certain taxation category, the language of the relevant taxation statute had to be clear and unambiguous. However, he also held that the same principle applied in respect of categories of exemption from taxation. In other words, parties claiming specific exemption from a particular taxation measure similarly had to demonstrate that the relevant statutory provision was unambiguous, and that they clearly fell within the group of persons entitled to the exemption.⁵²

2.53

The principle of doubtful penalisation can be viewed as part of the broader legal concept of natural justice. The extent to which the principle is accorded weight

⁴⁹ *Ibid.* citing Maxwell (12th ed.), at 246.

⁵⁰ At Paras.2.18–2.22.

⁵¹ Irish Times, 11 September 2000. It is arguable that this case was a special one which should not be taken to reflect a change in the general approach.

⁵² For a comprehensive discussion of the approach taken by the Supreme Court to statutory interpretation in taxation cases, see Kelly, “The Construction of Statutes” (1997) 9 *Irish Tax Review* 327.

in a particular case generally depends very much on the particular facts. However, it would appear from the recent case-law in this area that the Irish courts are taking a more restrictive view of the principle and *we do not intend to make any recommendations here that would interfere with this area, where the Courts are best placed to develop the law.*

H. Section 5 of the Interpretation Bill 2000

2.54

As we pointed out at the beginning of this chapter, our recommendations in this area have been given effect by section 5 of the *Interpretation Bill, 2000* which differs only slightly from the suggested draft which we have proposed in section F, above. The main difference between the two is that the formulation used in the *Interpretation Bill, 2000* deals separately with both Acts and Statutory Instruments.

Interpretation Bill 2000

S.5

- (1) **In construing a provision of any Act –**
 - (a) **that is obscure or ambiguous, or**
 - (b) **which on a literal interpretation would be absurd or would fail to reflect the plain intention of–**
 - (i) **in the case of [an Irish Act] ... the Oireachtas, or**
 - (ii) **in the case of [an English Act which was in force before the date on which the Irish Constitution came into operation] ... the parliament concerned,**

the literal interpretation may be departed from and preference given to an interpretation based on the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.
- (2) **In construing a provision of any statutory instrument made, issued, granted or otherwise created by or under an Act –**
 - (a) **that is obscure or ambiguous; or**

- (b) **which on a literal interpretation would be absurd or would fail to reflect the plain intention of that instrument as a whole in the context of the Act by or under which it was made, issued, granted or otherwise created,**

the literal interpretation may be departed from in preference to an interpretation based on the plain intention of the person who, or the authority which, duly made the statutory instrument where that intention can be ascertained from the statutory instrument as a whole in the context of the Act by or under which it was made, issued, granted or otherwise created.

CHAPTER THREE THE PRINCIPLE OF UPDATED CONSTRUCTION: MODERN TECHNOLOGY AND THE INTERPRETATION OF OLDER STATUTES

Problem Stated

3.01

The conflict between literal and purposive approaches to statutory interpretation may be seen in attempts to interpret older legislation in a modern context. Often, tension between the literal and purposive interpretations of a statute is especially heightened where the words of the statute are those of a century or more ago. Testimony to this is the number of cases concerned with disputed meanings of older statutes that have troubled the courts in the 1990s. Where a court is faced with a statute that was enacted in a different social and technological context, the meaning of elements of the statute at the time of enactment might be very different from a literal, common sense interpretation of those elements today. Hence, the purpose of the provision at the time of enactment may be obscured from the contemporary interpreter, at least in terms of how it was intended to apply in new circumstances, and particularly in the light of modern technological developments which were unforeseeable at the time of enactment. It is the view of the Commission that, in addition to the general purposive approach recommended above (in Chapter Two), a number of distinctive features of this type of problem mean that a specific analysis of the interpretation of older statutes, in the context of modern developments, is required.

Presumption that an updated construction should be applied

3.02

If the interpretation of older statutes is to be realistic and meaningful, it is necessary that a court undertaking this exercise should interpret statutes according to their contemporary meaning at the time of interpretation. The basic interpretative rule governing this area is the presumption that legislation is always speaking from the present; that each enactment is to be viewed as a living part of the current legal system and not limited by circumstances which were current at the time of its enactment.⁵³ This rule is derived from the general principle underlying the literal approach to interpretation; namely that, in the interests of the Rule of Law, the courts will wish to honour the understanding of the contemporary man or woman as to what constitutes the law on a particular point. In accordance with this policy, a judge will tend to interpret the wording of a statute literally, by reference to the meaning of the wording as read in the light of the social conditions and technological advancement which prevail today. The effect of such an approach is to require an up-dated construction of the wording of an older piece of legislation.

3.03

The construction of older statutes, then, may need to accommodate a more complex type of conflict between the intention of the legislature and the literal

⁵³ See Cross, *Statutory Interpretation* (3rd ed., Butterworths, 1995) 51–54.

meaning of the words of a provision, than that discussed in Chapter Two. In the case of older statutes, this further conflict may be caused, not by failures in drafting, but simply by altered understandings with the passage of time. Generally, an updated construction of the words of a statute will allow the original intention of the statute to be fulfilled. However, in practice, as can be seen by the case-law here and elsewhere, this may not always be true, and the application of an updated construction in interpretation can then become quite problematic.

Cases where the meaning of a statute has changed over time

3.04

In some cases, the meanings of words contained in a statute at the time of its enactment may differ from the usual construction of such words today. Alternatively, words, phrases or concepts not contemplated at the date of the legislation, may now normally be used in referring to the subject matter of the earlier statute. In such situations – most commonly in areas where there has been substantial technological change – the effect of giving the words of a statute their modern meaning might be to frustrate the purpose of the Act. Therefore, the view has emerged that it is open to a judge, in certain circumstances, to take a more purposive or dynamic approach, in order that the original intention of the legislature be upheld. This may be done by ascertaining the intention behind the provisions of the Act in the context of the circumstances prevalent at the time of enactment, and going on to apply this general

objective of the legislation in the changed context of contemporary technology and modern social values.

3.05

There are, broadly speaking, three types of situation where the interpretation of older statutes involves this potential conflict between the literal and purposive approaches:

1. Cases where the word/phrase in question is 'mobile' in nature, ie where the word, phrase or concept has, by its very nature, a meaning that has changed over time.

3.06

Words and phrases are 'mobile' to a variable extent, so that a spectrum of 'mobility' exists; from words and phrases, the meaning of which has changed little over time, to those of which our understanding has altered greatly. At one end of the spectrum, however, among those words or phrases which may be considered highly mobile, two main types of words/phrases may be identified. The first is where the word or phrase involves abstract concepts or refers to standards or values of society. Such words or phrases are 'mobile' in the fullest sense and judges will naturally take a dynamic interpretative approach to these, *eg* "standards of decency", "reasonable behaviour", *etc.* The second type of highly mobile phrase is where the original legislation speaks of a broad category or generic term which, over time, extends to include other items which did not exist at the time of enactment. Modern technological innovations are one important example of where this situation may arise: *eg* phrases like "means of communication" or "written word", may now need to take account of developments like the fax, e-mail, *etc.*

3.07

Generally, neither of these types of wording cause many difficulties of interpretation. As the intention of the legislature at the time of enactment was clearly that the statute be interpreted in its context at the time of interpretation, there are no

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competing constructions. The two applicable rules of interpretation, *ie* the presumption that points towards an updated construction and the general rule in favour of the purpose of the legislature at the time of enactment, both lead to the same result.

2. There are cases where the words referred to in the original legislation had a specific meaning, but now there are words, in addition to those which were used at the time of enactment, which have an equivalent meaning.

3.08

Most of the case-law on this issue of updated construction of statutes falls into this second category, where the wording of the statute betrays the limitations of the language which was commonplace at the time of its enactment. An example of this type of situation is where older statutes refer to technological devices and some new

technology is developed between the date of the legislation and the date of its interpretation. The new technology may serve broadly the same purpose as that which was referred to in the original statute, so it may be considered that the new words or phrases used in referring to the modern technology have an equivalent meaning to the older phraseology. In such cases a judge may choose to inquire as to whether the modern development in question should be viewed as being included within the concepts contained in the statute. There are a variety of tests which a judge could apply in assessing whether a modern word/phrase has a meaning which is equivalent to an older one.

3. There are also instances where an expression had a definite meaning at the time of enactment of the relevant legislation, but has a different, although equally specific, meaning at the time of the Act's interpretation. Such cases may turn on what, if any, evidence can be admitted as to the alleged earlier meaning of the expression.

3.09

This type of case is rare, but there have been situations in which it has been plausibly argued that the ordinary usage of a word can change significantly over time, so as to make a contemporary literal interpretation of the word conflict with the original intention of the legislature. One case where this type of argument was raised was *Inspector of Taxes v. Kiernan*,⁵⁴ discussed further below,⁵⁵ where the Inspector of Taxes attempted to raise an argument that the word 'cattle' in a taxation statute should be accorded its nineteenth century meaning, so as to include pigs. In England, the so-called 'box principle' may be applied to such cases.⁵⁶ Under this principle, when such a difficulty arises it is open to a court to replace the original wording of a statute with a modern term that has the equivalent meaning to the original intention.

⁵⁴ [1981] IR 117.

⁵⁵ At Para.3.20.

⁵⁶ As stated in *The Longford* (1889) 14 PD 34. See Bennion, *Statutory Interpretation – A Code*, (3rd ed., Butterworths, 1997), 699.

B. Case-law

(i) *Keane v. An Bord Pleanála*

3.10

*Keane v. An Bord Pleanála*⁵⁷ is one of the most recent Supreme Court decisions on the issue of updated construction of the wording of statutes. The case concerned an appeal by the plaintiff from a decision of the board to grant planning permission for the erection of a mast as part of a new type of radar system on the coast of County Clare. The case turned on whether the Commissioners of Irish Lights were empowered to erect the mast under sections 634 and 638 of the *Merchant Shipping*

Act, 1894, which gave them power to erect “lighthouses, buoys or beacons”. The test used by the Court was to distinguish between ; (a) instances where “terminology used in legislation was wide enough to capture a subsequent invention”, and (b) instances in which the inclusion of the subsequent invention, in the view of the court, would amount to “altering the meaning of words”.

Murphy J in the High Court

3.11

The first question was whether or not 'beacon' fitted into category (a) referred to above, as a generic term referring to a broad category of navigational aids. On the facts of the case, Murphy J held in the High Court that the word 'beacon' could not be construed in such a way as to include a modern radar system, placing particular emphasis on the fact that the proposed system utilised electromagnetic waves which were unknown in 1894. He distinguished this case from earlier ones like *McCarthy v. O'Flynn*⁵⁸ and *Derby & Co. v. Weldon (No.9)*⁵⁹ where 'document' was taken to include X-ray photographs and computer databases, relying on the Latin etymology of the word 'document'. He would not accept that the word 'beacon' should be interpreted in such a broad manner.

Hamilton CJ's decision in the Supreme Court

3.12

In the Supreme Court, in a three: two majority decision, Hamilton CJ held that 'beacon', in the ordinary sense in which the word is used today, would include a radar system, but the meaning of 'beacon' in the Act should be assessed by reference to the intention of the legislators who created the 1894 Act. In other words, he seemed to make a distinction between a 'legal' literal meaning, decided by reference to normal language usage at the time of enactment, and an 'ordinary' literal meaning, as defined by current linguistic norms. He declared himself in favour of a literal interpretation, but referred to the true original intention of the legislature. Blayney J and Barrington J concurred, although they took slightly different approaches.

⁵⁷ [1997] 1 IR 184.

⁵⁸ [1979] IR 127.

⁵⁹ [1991] 1 WLR 652.

O'Flaherty J's dissent

3.13

O'Flaherty J, however, in his dissenting judgment, addressed the issue of whether, even if 'beacon' in its current, ordinary sense does not include radar, the wording should be reconstrued so as to include it. He stated;

“[W]e do no injustice to anyone if we allow [the Act] to operate in the light of new discoveries in science or elsewhere which can be taken to be within the ambit of what the particular Act seeks to achieve.”⁶⁰

3.14

He quoted a passage from Maxwell where the latter stated that the language of a statute was generally extended

“to new things which were not known and could not have been contemplated when the Act was passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species of it.”⁶¹

3.15

O'Flaherty J went on to state that it would be asking too much of the legislature to be on the alert to amend old legislation to take account of every new development. The guiding principle here, in his view, was that “statutes should be put to work, not let work to rule”.

⁶²

Denham J's dissent

3.16

Denham J referred to the Oxford English Dictionary definition of 'beacon' as including “a radio transmitter whose signal helps fix the position of a ship or aircraft”. She also noted that the definition of 'buoys and beacons' in the Act stated that “all other marks of the sea” were included. While she emphasised that dictionary definitions were distinct from legal meanings, the test she applied was whether there was any pressing reason why the ordinary meaning should not apply. It is noteworthy, however, that her understanding of the 'ordinary meaning' in this case differed from that of Murphy J. Denham J also made reference to the aforementioned cases of *McCarthy v. O'Flynn* and *Derby & Co. v. Weldon (No.9)*, but she invoked them to lend support to the wider meaning which she favoured, as in her view, the word 'beacon' was sufficiently generic.

(ii) Universal Studios v. Mulligan

3.17

In the subsequent case of *Universal Studios v. Mulligan*,⁶³ Laffoy J held that 'videotape' came within the meaning of the words “cinematograph film” for the purposes of the *Copyright Act, 1963*. Although Laffoy J referred approvingly to the test used by Murphy J in *Keane*, her investigation into the meaning of the relevant word in the instant case was more in line with the approach which had been taken by

⁶⁰ *Op. cit.* fn. 57, per O'Flaherty J, at 219.

61 *Ibid.*

62 *Ibid.*, at 220.

63 [1998] 1 ILRM 438.

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Denham J. Laffoy J inquired into the issue of what constituted the essence of a cinematograph, concluding that it was material on which visual images are recorded, which can then be displayed, directly or indirectly, as moving pictures. The defence had contended that the essence of a cinematograph was that the images were themselves visible on the tape.⁶⁴

(iii) Mandarin Records v MCPS (Ireland) Ltd

3.18

In the case of *Mandarin Records v. MCPS (Ireland) Ltd.*,⁶⁵ counsel for the plaintiff submitted that a “power CD”, producing both visual images and audio material, did not come within the definition of a 'record' for the purposes of Section 13 of the *Copyright Act, 1963*. The word 'record' had been defined in Section 2 of that Act, and the definition centred on the concept of a device “in which sounds are embodied”. Barr J stated that he considered it desirable that, where possible, advances in technology should be accommodated by a court engaging in statutory interpretation, but only

“where that can be done without straining the words used beyond their ordinary statutory meaning and having paid due regard to the structure and intent of the statute.”⁶⁶

3.19

Barr J again alluded to *Keane* as the relevant authority. He adopted the reasoning of Murphy J, and concluded from its application that

“[A] broad interpretation in this case does not distort the statutory definition of 'record' nor do violence to the wording thereof.”⁶⁷

(iv) Inspector of Taxes v. Kiernan

3.20

Finally, an example of the type of case where a word has a precise meaning, but one which has altered significantly over time, is *Inspector of Taxes v. Kiernan*.⁶⁸ This concerned the assessment of the respondent's income for tax purposes under s.78 of the *Income Tax Act, 1967*, which applies to an occupier of land who is a “dealer in

- 64 *Ibid.*, at 446. It is to be noted that, in this case, counsel cited cases from Malaysia, New South Wales and England dealing with the relationship between videotape and pre-videotape copyright legislation.
- 65 [1999] 1 ILRM 154. The title of the reported case records the plaintiff's name as '*Mandarin*' although '*Mandarin*' appears elsewhere in the reported version. For a commentary on the case, see Scales, *The Power CD, the Cat and the Controller*, (December 1998) 1 *Irish Business Law*, 309.
- 66 *Ibid.*, at 159.
- 67 *Ibid.* at 160. An example of how a similar scenario was dealt with by the courts in New Zealand is provided by *IBM Corp. v. Computer Imports Ltd.* [1989] 2 NZLR 395. In that case an original written programme of silicon chip, known as its source code, was held to be equivalent to a “literary work” for the purposes of the *Copyright Act, 1962*. It was also held that the series of electrical pulses which make the source code electronically readable, known as the object code, would qualify under the Act as being equivalent to a “translation”. However, there remain other cases where a very static approach has been taken by the New Zealand courts; see *McCulloch v. Anderson* [1962] NZLR 130.
- 68 [1981] IR 117.

cattle”. On this issue the 1967 Act replicated substantially a provision of the *Income Tax Act, 1918*, which, it appeared, in turn reproduced a rule in a mid-nineteenth century statute. The relevant Acts failed to provide a definition of the word “cattle”. The respondent was engaged in the keeping of pigs, which he bought, fattened and sold. The Inspector of Taxes had assessed the respondent and had decided, on the basis of old case-law, that 'cattle' included pigs, and consequently that the respondent was a “dealer in cattle”. The respondent challenged this assessment in the Circuit Court.

3.21

On a case stated to the High Court, and on appeal in the Supreme Court, it was held, in the respondent's favour, that the word “cattle” did not include pigs. Henchy J, in the Supreme Court, addressed the Inspector of Taxes' arguments that “cattle” had been defined to include pigs for the purposes of other earlier Acts, and reasoned as follows;

“There is no doubt that, at certain stages of English usage and in certain statutory contexts, the word “cattle” is wide enough in its express or implied significance to include pigs. That fact, however, does not lead us to a solution of the essential question before us. When the legislature used the word “cattle” in the Act of 1918 and again in the Act of 1967, without in either case giving it a definition, was it intended that the word should

comprehend pigs? That the word has, or has been held to have, that breadth of meaning in other statutes is not to the point.”

3.22

He accepted that where it was contended that a meaning had changed, a judge might have to investigate the meaning of a word at the time of enactment. In the instant case, McWilliam J in the High Court had looked to a nineteenth century edition of the Oxford English Dictionary, which clearly restricted the meaning of the word “cattle” to bovine animals. Therefore, on the facts of the case, the plaintiff failed to establish that the broader connotation had been prevalent either in 1918 or in the mid-nineteenth century.⁶⁹

Comment

3.23

Even a cursory examination of these few recent cases in the High Court and Supreme Court reveals that there are clearly many different approaches to, and techniques of, interpretation in this type of case. It is true that the general trend seems to be to have regard to the general objective of the legislature at the time the statute was enacted and to read this purpose in a modern context. This is in line with the general purposive approach which we have recommended and we support it, but there are, nonetheless, certain practical difficulties with the present law that must be highlighted. If we take the example of *Keane*, what we see is that different judges had different views as to what the key questions were and gave different answers to these key questions. Furthermore, even where they agreed on these points, they prescribed different consequences and results to follow from the answers, and different weightings to be given to the different issues. The following are specific criticisms of the current situation in this regard:

⁶⁹ Henchy J held that the case of *Phillips (Inspector of Taxes) v. Bourne* [1948] KB 533, where “cattle” in the 1918 Act was held to include pigs, had been wrongly decided on the facts.

1. The first point is the absence of a clear test as to when a judge should depart from the literal approach. In *Keane*, the rule seems to be that the Court should inquire as to the purpose of the legislature only where “the terminology of the legislation was wide enough to capture a subsequent invention” and should desist from “doing violence to the words of the statute”. This would seem to suggest that it is only when a word is generic in nature that it can be construed to include technology not contemplated at the time of enactment.

In *Keane* itself, as we have seen, Murphy J, Barrington J and Blayney J were guided by the ordinary meaning of the words, and defined the ordinary meaning quite narrowly. Hamilton CJ referred to the meaning of words at the time of enactment, but also reached quite a narrow definition. O'Flaherty J, on the other hand, had no difficulty in giving the legislation a wider meaning on the facts of the case.

2. The second question is how a court decides what constitutes a 'generic' term. Again, in *Keane*, Denham J preferred a broad interpretation of 'beacon', which she saw as a general term, while O'Flaherty J chose a more narrowly-defined meaning; yet both reached the same result. Hamilton CJ did not directly address the issue of whether the term should properly be viewed as a broad or narrow one, emphasising instead the intention of the legislature. It is of interest to note that in the later cases of *Mandarin Records*⁷⁰ and *Universal Studios*,⁷¹ where *Keane* was cited with approval, the High Court gave seemingly more precise words ('record' and 'cinematograph') much more strained meanings.
3. Finally, even if a court decides that it is entitled to go beyond the literal meaning of a provision (either because it is a generic term or because of the purpose of the legislature), it is unclear which test should be applied in order to decide if a new development in technology is covered by a provision. One way of resolving this problem was suggested in the *Mandarin Records* case, where it was held that a judge should interpret a contentious word, relating to modern technology, by reference to the "essence" of that word. However, such an approach does not necessarily remove the difficulty, since there will often be different views as to what is that essence. The "essence" could be determined by reference to either the function or the physical characteristics of the device in question. In *Mandarin Records*, the Court opted not to engage in a detailed examination of the nature of the product in question, similar to that which had been undertaken in *Universal Studios*.

C. Other jurisdictions

New Zealand

3.24

The New Zealand Law Commission, in their 1990 Report on a new Interpretation Act for New Zealand, examined the issue of updated construction under the heading, “Should provision be made to the effect that legislation is 'always

⁷⁰ Paras.3.18–19 *above*.

⁷¹ Para.3.17 *above*.

speaking'?”⁷² The starting point for the New Zealand Commission was an analysis of the existing statutory provision, providing that legislation is 'always speaking', contained in s.5(d) of their *Interpretation Act, 1924*;

“The law shall be considered as always speaking, and whenever any matter ... is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning.”⁷³

3.25

The New Zealand Commission found the same problem of inconsistency in their case-law that we have traced here in Irish cases.⁷⁴ Interestingly, the New Zealand Commission assessed the impact of the purposive provision just quoted and found that it had a limited effect in practice. Indeed, in their earlier Preliminary Paper of 1988, they had suggested a number of reasons why the existing statutory provision might be removed, seeing it as not serving any useful function. However, the Commission also outlined some arguments as to why it might be desirable to retain a statutory provision in principle; namely that a clear legislative statement of the principle of dynamic interpretation improves the accessibility and transparency of the law, and helps to prevent statutory proliferation. Any definite move towards a more static approach to interpretation would lead to an increasing need for amendments updating the statute book.

3.26

In the light of these arguments, the conclusion of the Law Commission was to recommend that the legislative provision in the 1924 Act be removed and replaced by a more direct statement, which would give more practical direction to judges:

“An enactment applies to circumstances as they arise so far as its text, purpose and context permit.”

International law

3.27

There have also been initiatives in international trade law to develop concepts which focus to a greater extent on the essence and function of new technology. In particular, recent developments in information technology, and the increasing importance of electronic commerce, have led UNCITRAL, the United Nations Commission on International Trade Law, to establish a set of legal principles, known as the Model Law⁷⁵. The purpose of the Model Law is to offer national

72 New Zealand Law Commission, *A New Interpretation Act – To Avoid “Prolivity and Tautology”* (Report No. 17, 1990), 34.

73 The Canadian provision is almost exactly the same, the main difference being that the Canadian Act refers to giving effect to the 'enactment', while the New Zealand provision speaks of giving effect to 'the Act and every part thereof'. This would not appear to make any significant difference to the impact of the provision. Another difference is that “true spirit, intent and meaning”, replaces “spirit, true intent, and meaning”.

74 The New Zealand Commission gave examples of the cases of *IBM Corp. v. Computer Imports Ltd.* [1989] 2 NZLR 395 and *McCulloch v Anderson* [1962] NZLR 130 to demonstrate the contrast between literal and purposive approaches in their jurisdiction.

75 The Model Law on Electronic Commerce. For a discussion of the background to this development see, “Establishing a Legal Framework for Electronic Commerce; The Work of UNCITRAL”, a paper delivered by Gerold Herrmann at the International Conference on Electronic Commerce and Intellectual Property in Geneva, 14–16 Sept 1999.

legislators a set of internationally acceptable rules which detail how a number of legal obstacles to the development of electronic commerce may be removed. There are two concepts used in the Model Law which are of special interest in the present context.

3.28

The first is the concept of 'functional equivalence'. A key issue for those involved in electronic commerce is the legal status of forms of communication that have replaced paper, given that paper transactions have been the medium of economic interaction for centuries. 'Functional equivalence' sets a general presumption of equivalence between paper and electronic modes of communication. Thus, the Model Law centres on a list of basic functions relevant to commercial relations, which were traditionally fulfilled by, for example, writing, signature or an original paper document. In developing the Model Law, the basic characteristics and functions of legal situations which commonly arose in the world of paper documents were examined, in order to determine how those situations could be transposed, reproduced or imitated in a paper-free environment.

3.29

Another principle of the Model Law is that the rules prescribed in it are designed as 'neutral' rules, in that they do not distinguish between different types of technology – different 'media' – and can therefore be applied to various methods of communication and storage of information. In relation to drafting, one of the consequences of this policy of 'media neutrality' is the adoption of new terminology, in an effort to avoid any reference to a particular, technical means of transmission or storage of information. Although both these initiatives are concerned with the drafting of new legislation, the concepts outlined share an obvious resonance with the reasoning used, for example, by Barr J in *Mandarin Records*.

Conclusions

(i) The present law is unsatisfactory

3.30

If one accepts that the inconsistencies detected in the cases referred to in the above discussion are undesirable, then a number of possible remedies are open to the Irish legislature. The main criticism is that several common law rules and doctrines may be considered applicable to such cases, and they do not point to a consistent approach. What is argued here is that clarity and predictability in the law are to be desired in the interests of transparency and for the avoidance of unnecessary litigation, and such clarity and predictability could be achieved by statute.

(ii) Any new approach must centre around the function of the new technology

3.31

Having examined the different outcomes of various cases, it would appear that technological evidence, as to the extent to which a new device is comparable, or equivalent, to a device or product referred to in original legislation,⁷⁶ will be crucial in

⁷⁶ For example, in a letter to the *New Law Journal* in 1997, (1997) 147 NLJ 716, Bennion explained why he believed that courts would hold that "Dolly", a cloned sheep, would fall within the *Animals Act 1971*. In doing so he listed seven approaches which he felt might be taken in such a case: the legal meaning of a word, the grammatical meaning, the presumption against absurdity, the common-sense construction rule, the mischief rule, the purpose rule, and the presumption in favour of an updated construction of a word.

determining the outcomes of cases of this type in the future.⁷⁷ The courts should, however, be given direction as to how to deal with such evidence. We take the view that assessment of the essence of modern technology by reference to its function is the method most in line with the purposive approach. In this regard, the approaches taken

by Laffoy J in *Universal Studios v. Mulligan*⁷⁸ and by Barr J in *Mandarin Records*⁷⁹ are considered by the Commission to be the most appropriate.

(iii) Judicial discretion is unlikely to provide a consistent rule

3.32

It might be argued that it is impracticable to legislate comprehensively for cases which will always turn on the subjective understanding of the meaning of a word by a judge in a particular case. Accordingly, it might be considered preferable not to prescribe any legislative guidelines to interpretation, but instead to leave the matter to the courts, and promoting more dynamic interpretation by informal means, such as a practice directive to judges on how to deal with cases involving modern technology. Such an approach would, however, inevitably cause a significant degree of uncertainty as to which of several possible approaches might be preferred by a judge in a particular case.

(iv) A programme of statutory amendments is impractical

3.33

It might also be contended that the only appropriate means of dealing with these problems is by way of a widespread programme of legislative amendments to the general provisions and the schedules of existing legislation. Such an approach would be in line with the more conservative view that the courts should never 'do violence' to the wording of statutes. However, the viability of such a comprehensive programme of reform is questionable, and considerations relating to resources and practicability therefore make this an undesirable proposal. Of course, there is also a fundamental flaw in such an approach, since the enactment of appropriate amendments to all our legislation, in order to perfect the statute books 'once and for all', would prove impossible. Continuing progress means that legislation is constantly becoming out-of-date, and the project could never be completed.

(v) The general purposive approach will not be effective in regard to older statutes

3.34

The point can be made that a purposive approach necessarily centres on the intention of the legislature, or the purpose of an enactment. In order for this intention to be clear and meaningful, there must be evidence capable of being adduced as to the relevant intention or purpose. In practice, evidence of the legislature's intention may

⁷⁷ To take the facts of the *Mandarin Record* case, Scales points out that some power CDs might be more analogous to records than others. There might be competing arguments for categorising such CDs as computer software applications or as databases. She believes that it is "stretching the imagination to suggest that the legislature might have intended the Section to capture a future product incorporating a mixture of different media." Scales, *The Power CD, the Cat and the Controller*, (December 1998) 1 *Irish Business Law*, 309, 311.

⁷⁸ Para.3.17 above.

very often be unavailable, or may be oblique and unhelpful, and this is particularly so in relation to older legislation. In such cases, for example those involving technology that did not exist at the time of enactment, to speak of the 'intention' of the legislature that such objects be covered by the legislation is to indulge in a fiction. It may legitimately be argued that a parliament cannot truly be said to have 'intended' an effect (in the ordinary sense of 'intention') which it could not possibly have contemplated.

3.35

In fact, many cases involving a conflict between literal and purposive constructions of statutory language fall into this category (older statutes and modern technology). It is appropriate that this be acknowledged by specific mention, if only to ensure that it is understood that the changes which we propose are intended to address such problem scenarios.

E. Recommendation

3.36

In the final analysis, the Commission is of the view that the principle of dynamic interpretation of legislation, whereby an updated construction is applied to old statutory provisions, should be adopted, and this should take the form of a statutory provision in a new Interpretation Act. As well as the benefits discussed above, this approach has the merit of being consistent with the reasoning, in Chapter Two, which led us to recommend a general provision setting out a purposive approach to interpretation.

3.37

One reason why it is submitted that such a statement of principle should be included in a specific provision in an Interpretation Bill is that the guidance provided by case-law in this area has, in our view, proved to be inadequate. We note, however, that in the *Keane* case, Hamilton CJ endorsed Bennion's view that

“In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any changes which have occurred, since the Act's passing in law, social conditions, technology, the meaning of words, and other matters.”⁸⁰

3.38

However, he went on to approve the limitation which Bennion had himself placed on the extent to which a court could accommodate changes which had occurred;

“[I]f, however, the changed technology produces something which is altogether beyond the scope of the original enactment, the Court will not treat it as covered.”⁸¹

3.39

The problems which have arisen in this and subsequent cases are largely due to the imprecision involved in reconciling these divergent ideas *ie* in interpreting in a way that makes allowances for changes which occur over time, while acknowledging

⁸⁰ *Keane v. An Bord Pleanála* [1997] 1 IR 184, 215, quoting Bennion, *Statutory Interpretation*, 618.

⁸¹ *Ibid.*

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that some changes lie beyond the scope of an original enactment. Thus, unfortunately, the observations made by Hamilton CJ have not fully succeeded in achieving the desirable level of clarity or consistency of approach in the law.

Recommended draft

3.40

We recommend a statutory provision which would authorise a court to make allowances for any changes which have occurred since the Act was passed, without going so far as to encroach on the province of the legislature.

3.41

In choosing our formulation, the Commission has borne in mind the cases where this issue has arisen and we have also considered the New Zealand model. However, because we consider that the New Zealand provision is flawed, and also in the interests of consistency with the general provision for a purposive approach proposed earlier in this Report, we recommend a new formulation, which draws on the remarks of Hamilton CJ in *Keane*. In spite of the observations made above regarding the outstanding difficulties which have not been obliterated by case-law in this area,⁸² we, too, regard Bennion's analysis, given judicial approval by Hamilton CJ in *Keane*, as a good, simple summary of desirable law and would borrow from it the formulation:

“the interpreter is to make allowances for any changes which have occurred, since the Act's passing in law, social conditions, technology, the meaning of words, and other matters.”

3.42

As regards the second element of the provision, that which indicates the limit which marks off the forbidden territory of judicial legislation, there are two candidates for a recommended form of words. Bennion's version is:

“[I]f, however, the changed technology produces something which is altogether beyond the scope of the original enactment, the Court will not treat it as covered,”

The second possibility is the proposal of the New Zealand Law Reform Commission:

“An enactment applies to circumstances as they arise so far as its text, purpose and context permit.”

3.43

We prefer this second alternative because it makes it clear that in setting the limits of this 'updated construction' approach, a court should take into account the 'text, purpose and context' of the measure. In other words, it emphasises that the problem is, at base, a particular question about context. The Irish courts have always been prepared to approach the question of interpretation from the perspective of the context within which a provision operates. Accordingly, in taking into account the factors identified in the New Zealand proposal, a court would be doing no more than applying this traditional approach to the problem under consideration here, *ie* the application of statutory provisions in altered circumstances, with the passage of time.

⁸² See Para.3.39 *above*.

3.44

As a result, we recommend the following draft:

In construing a provision of an Act, a court may make allowances for any changes, in law, social conditions, technology, the meaning of words used in the Act and other relevant matters, which have occurred since the date of the passing of the Act, so far as its text, purpose and context permit.

3.45

We were naturally very pleased to hear that an amendment to the *Interpretation Bill, 2000*, is likely to be made to introduce a change of this type. We understand that the Office of the Attorney General is considering our recommendation sympathetically, with a view to proposing an amendment along similar lines.

CHAPTER FOUR INTRINSIC AIDS TO CONSTRUCTION

A. Introduction

4.01

The phrase 'intrinsic aids' refers to any material which is published with an Act, but is not a substantive provision of the Act (or not what Bennion calls an “operative component” of the Act⁸³). Cross lists such material as: the long title, the preamble (if any), the short title, the cross-headings, marginal notes (also called side-notes), and punctuation.⁸⁴

4.02

A distinction is sometimes drawn between, on the one hand, the short title, the long title and preamble, and, on the other, the marginal notes, cross-headings and punctuation. The first three of these are distinguished on the basis that they may be amended by the Oireachtas during the legislative process and are thus under its control. Consequently, the *Interpretation Act, 1937* and the *Interpretation Bill, 2000* are both silent on the use of the long title, the preamble or the short title of an Act as aids to construction and the issue has been left to the courts. On the other hand, two of the three items in the second group identified above – marginal notes and cross-headings (punctuation is not mentioned) – are specifically excluded from consideration by a court by s.11 (g) of the *Interpretation Act, 1937*;

“No marginal note placed at the side of any section or provision to indicate the subject, contents, or effect of such section or provision and no heading or cross-line placed at the head or beginning of a Part, section or provision or a group of sections or provisions to indicate the subject, contents or effect of such Part, section, provision or group shall be taken to be part of the Act or instrument or be considered or judicially noticed in relation to the construction or interpretation of the Act or instrument or any portion thereof.”⁸⁵

We note that an equivalent provision, with similar wording, has been included in the *Interpretation Bill 2000*.⁸⁶

4.03

As we shall see, however, this prohibition has not always been strictly observed and courts have in fact made use of the proscribed material. Similarly, in the other direction, the categories of intrinsic aid which are not excluded from consideration by any legislative provision – the long title, preamble and short title – have sometimes been excluded, or at least limited in their use, by the common law. We turn therefore to consider these categories individually.

⁸³ Bennion, *Statutory Interpretation – A Code* (3rd ed., Butterworths, 1997), at 548.

⁸⁴ Cross, *Statutory Interpretation* (3rd ed., Butterworths, 1995), at 124.

⁸⁵ s. 11 (g) of the *Interpretation Act, 1937*.

⁸⁶ s. 14 (g) of the *Interpretation Bill, 2000*.

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B. Long title and preamble to an Act

4.04

The general rule relating to consideration of the long title of an Act was enunciated by Walsh J in the leading case of *East Donegal Co-operative Marts v. Attorney General*.⁸⁷ That decision established that a court should be able to look to the long title in order to confirm the context of a provision within an Act. Admittedly, *East Donegal* may be viewed as a special case, in that it was a judicial review, concerning the control of discretionary powers.⁸⁸ However, reference was also made to a long title in *DPP v. Quilligan*,⁸⁹ where the Supreme Court decided that the long title of the *Offences against the State Act, 1939* could be relevant to the interpretation of a provision within the Act, but only where the text of the relevant provision was ambiguous or equivocal. Griffin J stated:

“[I]n my opinion, the plain language used in ss.30 and 36 is so clear and unequivocal that the long title may not be looked at, or used for the purpose of limiting or modifying that language.”⁹⁰

4.05

McCarthy J went further in his judgment, however, expressing agreement with the view that the long title “is the plainest of all guides to the general objectives of a statute”.⁹¹ In *East Donegal*, Walsh J had stated that the question of whether or not the relevant provision was ambiguous did not arise, as a judge could not properly ascertain whether a provision was ambiguous, without first looking to the context of that provision in the Act as a whole.⁹²

4.06

Since then, there have been several cases, including *Lawlor v. Mr Justice Feargus Flood*,⁹³ *An Blascaod Mór Teoranta v. Commissioner of Public Works*,⁹⁴ and *In Re Article 26 and the Employment Equality Bill 1996*,⁹⁵ in each of which the courts have made use of a long title in interpreting an Act. McCarthy J's comments in the *Quilligan* case reflect the liberal approach generally taken;

“It is not, in my opinion, a question of ambiguity in the construction of particular provisions; it is a question of giving a

schematic interpretation where such is the plain intent of the statute.”⁹⁶

87 [1970] IR 317.

88 The significance of the case being a judicial review lies in the fact that there is a presumption in favour of construing discretionary powers restrictively. For a discussion of the significance of this case see Hogan and Morgan, *Administrative Law in Ireland* (3rd ed., Round Hall, Sweet and Maxwell, 1998) 623.

89 [1987] ILRM 606.

90 *Ibid.* at 635.

91 *Ibid.* at 638, citing the views of Lord Simon of Glaisdale, as expressed in *Black-Clawson Ltd v. Papierwerke AG* [1975] AC 591. See Para. 4.08 below.

92 *Op. cit.* fn. 87, at 341.

93 *Lawlor v. Mr Justice Feergus Flood*, Supreme Court, 8 October 1999.

94 *An Blascaod Mór Teoranta v. Commissioner of Public Works*, Supreme Court, 27 July 1999.

95 *In the Matter of Article 26 and in the Matter of the Employment Equality Bill 1996*, Supreme Court, 15 May 1997, where the Court consisted of Hamilton CJ, O’Flaherty J, Denham J, Barrington J and Keane J.

96 *Op. cit.*, fn.89, *per* McCarthy J at 638.

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4.07

Griffin J’s more conservative approach in *Quilligan* was informed by the dicta of Henchy J (then of the High Court) in the earlier case of *Minister of Industry and Commerce v. Hales*.⁹⁷ In that case, Henchy J recognised that there were modern authorities to the effect that the long title should be treated as part of an Act, but that the long title should not be used for limiting the interpretation of a provision that was otherwise clear and unambiguous. In *Quilligan*, Griffin J took this to mean, in the first place, that a long title should not override a clear and unambiguous provision, but furthermore, that the long title should not be considered at all unless the provision was ambiguous.

4.08

In summary, it may be stated that the long title may not often be of use, but where it can be of assistance we are of the view that it should be utilised. This common sense approach is most clearly stated in the decision of Lord Simon of Glaisdale of the House of Lords in *Black-Clawson Ltd. v. Papierwerke AG*:

“In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in the case of ambiguity – it is the plainest of all guides to the general objectives of a statute. But it will not always help as to particular provisions.”⁹⁸

C. Short title

4.09

Although it is difficult to envisage a situation where the short title would be of any assistance to a judge in interpreting the provisions of an Act, there would appear to be no good reason why it should not be open to a judge to have reference to it. For what it is worth, it may be noted that the short title is also one of those parts of an Act which come before the Oireachtas and the arguments in favour of its use as an intrinsic aid are therefore the same as in the cases of long titles and preambles.

D. Punctuation

4.10

With regard to the second type of intrinsic aid – those that are not open to amendment by the legislature – punctuation is treated somewhat differently from the other two items contained in this category (marginal notes and cross-headings) in that it is not mentioned in section 11(g) of the *Interpretation Act, 1937*, and has not been controversial in practice. The reason why punctuation might be regarded as somewhat suspect, as an aid to construction, is historical. In England, there has been a traditional distrust of punctuation in statutes, due historically to unreliable procedures involved in the printing of statutes in the early years. However, these difficulties were probably overstated and certainly do not arise in regard to modern legislation. There would appear to be no Irish case where the question arose as to whether punctuation either forms part of an Act or is available as an aid to

⁹⁷ [1967] IR 50.

⁹⁸ [1975] AC 591, 647. This case is referred to in Cross, *Statutory Interpretation* (3rd ed., Butterworths, 1995), at 127 and in Bennion, *Statutory Interpretation – A Code* (3rd ed., Butterworths, 1997) 562.

⁹⁹ Bennion discusses the historical background to the use of punctuation in interpretation; Bennion, *ibid.* at 579–585.

construction. However, it seems unlikely, given the generally realistic and perhaps less dogmatic outlook of the Irish judiciary, that there could be any serious objection to their use. Thornton deals – we believe irrefutably – with the point by stating;

“It is a curious thing that judges, whose entire reading is punctuated, should, in carefully punctuated judgments, consider themselves obliged to proclaim that the punctuation in carefully punctuated statutes is no part of the law.”¹⁰⁰

E. Marginal notes and cross-headings

4.11

The issue of whether or not a court can or should be able to refer to marginal notes and cross-headings of Acts is somewhat more complicated. It should be noted here that there are two separate aspects to s.11(g) of the *Interpretation Act, 1937*. The section goes further than merely stating that marginal notes and cross-headings are not part of an Act; it states that they should not be “considered or judicially noticed in relation to the construction or interpretation” of the statute. This exclusion from the process of construction is not a necessary consequence of their not constituting part of the Act, and it means that marginal notes, headings and cross-lines are the only material of any kind, intrinsic or extrinsic, that are specifically excluded as aids to interpretation.

Irish case-law

4.12

Probably the most noteworthy decision on the use of marginal notes was that by O'Higgins CJ in *Rowe v. Law*,¹⁰¹ where it was disputed whether section 90 of the *Succession Act, 1965* had altered the rules governing construction of wills from the common law position (which would have excluded parol evidence of a testator's intention). In expressing the view that section 90 had effected such a change, the learned judge commented that a marginal note described it as a new section and he inferred that a change in the existing law had been intended. Neither Henchy J nor Griffin J referred to the significance or otherwise of the marginal note, but it should be noted that they reached a different result on the effect of the relevant section. This might be taken to suggest that the Chief Justice's reference to the marginal note was significant in forming his dissenting view.

4.13

There have been several cases where our Superior Courts have made express use of marginal notes. In the Supreme Court case of *Dougherty & Co Ltd v. Allen Ltd*,¹⁰² which concerned the *Companies Acts, 1963–1982* and the *Agricultural Credit Act, 1978*, McCarthy J referred to a marginal note to section 36 of the *Agricultural Credit Act, 1978*. That marginal note described the section as replacing section 35 of the preceding *Agricultural Credit Act, 1947*. Similarly, in *Cox v. Ireland*,¹⁰³ Barr J considered the employment-related penalties imposed by s.34 of the *Offences Against the State Act, 1939* on certain categories of persons who were convicted by a Special Criminal Court. Barr J referred in his judgment to the fact

¹⁰⁰ Thornton, *Legislative Drafting* (3rd ed., 1987), 33–34, quoted by Cross, *op. cit.*, fn.98. at 133.

¹⁰¹ [1978] IR 55, 66.

¹⁰² [1985] IR 340.

¹⁰³ [1992] 2 IR 503.

that the marginal note to this section was the same as that to a corresponding section of the *Criminal Justice Act, 1951*.¹⁰⁴ There have also been several cases in recent years where judges have made passing reference to marginal notes in the course of cases in the Superior Courts.¹⁰⁵

4.14

Not only have judges been willing to ignore s.11 (g) of the *Interpretation Act, 1937* and look at the marginal notes in Irish legislation; some have even referred to marginal notes in English legislation. An example of this can be seen in the judgment of Ó Dálaigh CJ in *Attorney General v. Thornton*,¹⁰⁶ where Ó Dálaigh CJ referred to the marginal note in the English legislation upon which the relevant Irish Act was based. Again, there was no mention of s.11 (g). This passage was quoted with approval by Quirke J in the recent case of *DPP v. Judge O' Buachalla and Mulhall*.¹⁰⁷

4.15

However, in some cases the courts have expressed a reluctance to advert to marginal notes. In *Lawless v. Dublin Port and Docks*,¹⁰⁸ Barr J did not refer to s. 11 (g), but he preferred the wide interpretation suggested by the “plain ordinary meaning” of the text of section 46 of the *Civil Liability Act, 1961*, to the more limited construction that would have applied, if emphasis had been laid upon the marginal note to the section. In *Cork County Council v. Whillock*,¹⁰⁹ O' Flaherty J noted that there was a marginal note, which shed light on the intended effect of s.14 of the *Malicious Injuries Act, 1981*, but then went on to refer to s.11 (g) as barring him from using it.

English law

4.16

There is no statutory prohibition in England on the use of marginal notes, although there have been cases where a bar on their use in interpretation was held to exist, based on the theoretical objections set out above. Generally, however, English case-law demonstrates a willingness on the part of the judiciary to refer to marginal notes and a number of cases provide a clear statement of the position being advanced here. One example is the case of *R v. Schildkamp*,¹¹⁰ where the House of Lords took a pragmatic approach to the issue. In that case Lord Upjohn stated that even though the marginal note was an 'unsure' guide to construction, he could conceive of cases where

“very rarely it might throw some light on the intentions of Parliament”. In the same case Lord Reid took the view that while, strictly speaking, the marginal note might not be the product of Parliament, it was more realistic to treat all of a printed Act as being the product of the whole legislative process, and to give due weight to everything found in it.

104 *Op. cit.* fn. 103 at 512.

105 For example, in *Harvey v. Minister for Social Welfare* [1990] 2 IR 232, 237, there was a passing reference to a marginal note in the *Social Welfare Act, 1981*. Also, in *Browne v. A-G* [1991] 2 IR 58, 63, Murphy J makes mention in passing to the marginal note to s. 4 of the *Finance Act, 1982*.

106 [1964] IR 458.

107 [1999] 1 ILRM 362.

108 [1998] 1 ILRM 514.

109 [1993] 1 IR 231.

110 [1971] AC 1.

4.17

Bennion outlines what he perceives as the common law position in the United Kingdom very succinctly;

“Any suggestion that certain components of an Act are to be treated, for reasons connected with their parliamentary history, as not being part of the Act is unsound and contrary to principle.”¹¹¹

4.18

He states boldly that while there is a line of precedent in English law, stemming from *R v. Hare*,¹¹² to the effect that marginal notes should not be considered by the courts to be part of an Act, he believes this is wrong in principle. He argues that courts should not place themselves in the position of questioning the procedures of Parliament by which legislation comes into being.

4.19

The argument that the marginal notes are inserted by 'irresponsible persons',¹¹³ and therefore do not have the authority of the Oireachtas, is met by pointing out that whoever does draft them is subject, in theory at least, to the authority of the

Oireachtas. There is no reason, then, to assert that the marginal notes are not the voice of parliament. As regards the argument that the notes are unreliable because they are not updated to reflect amendments, one is referred to the old Latin maxim *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*— all things are presumed to be rightly and dutifully performed unless the contrary is proved. Constitutionally, it is not for the courts to inquire as to whether the Act as published has been drawn up correctly by the servants of the legislature.¹¹⁴

4.20

In 1969, partly prompted by concern at conflicting judicial dicta in this area, the (English) Law Commission recommended a draft *Bill on Interpretation*, including a provision on the use of intrinsic aids to construction. At that time they proposed that all material published with a bill as it was presented to Parliament should be used in interpretation. The Law Commission's Bill was not implemented, but its proposals were resurrected in draft Clause 1 of the Renton Report in 1975, which advocated that all intrinsic aids be used in interpretation. Again, this Report was not implemented, though Lord Scarman tried twice, unsuccessfully, to re-introduce it (in 1980 and 1981).¹¹⁵

F. Conclusion

4.21

Our general approach in this Report has been that courts should have the discretion to take into account all potentially helpful material in a consistent manner, save where there is a good reason why this should not be permitted. Accordingly, in construing a provision, its context should be considered. This approach is already

¹¹¹ Bennion, *Statutory Interpretation – A Code* (3rd ed, Butterworths, 1997), at 548.

¹¹² [1934] 1 KB 354.

¹¹³ As stated by Phillimore LJ in *Re Woking UDC* [1914] 1 Ch 300, 322.

¹¹⁴ The Commission's recommendations as to how the procedures of the Oireachtas and of the Office of the Parliamentary Counsel to the Government, in regard to the drafting of such notes, might be improved in the future are included in chapter 6.

¹¹⁵ For a history of this private member's bill, see Bennion at (1981) 131 NLJ 840.

reflected in other aspects of statutory interpretation, through such subsidiary rules as the *noscitur a sociis* and *eiusdem generis* rules.¹¹⁶

4.22

As is the case with other sources of information about the purpose of statutes, to allow judges to look at marginal notes is merely to confer on them a discretion to use the notes in instances where they may be of assistance. Although the notes are not to be considered part of the Act, it would seem that (along with the long title) the marginal notes may represent a useful source of information for a court, and provide a clear indication of an intention which is not obvious from the substantive provisions of an Act.

4.23

It is also worth noting, as a matter of practice, that it is inconceivable that judges would not notice material which is, after all, on the same printed page as the substantive provision being interpreted. Not to do so would almost require blinkers and the impossibility of such an approach can be inferred from the way in which most of the cases discussed above have been decided. Furthermore, if the actual practice is to refer to marginal notes, it would be better that this would be openly acknowledged, rather than maintaining the pretence demanded by section 11(g) of the *Interpretation Act, 1937*.

4.24

In general, we believe that judges are prepared, and should be allowed, to allocate to various sources of enlightenment their due weight, whether great or small, and that this is equally true in respect of material which is published alongside the substantive sections of a statute. The interpretation of different parts of a statute by a court should be governed by the principle which has been enunciated as a 'functional construction' rule, and explained as follows;

“It is a rule of law ... that in construing an enactment the significance to be attached to each type of component of the Act ... must be assessed in conformity with its legislative function as a component of that type.”¹¹⁷

4.25

This is also the approach which has been advocated by the New Zealand Law Commission. Section 5 (g) of the New Zealand *Interpretation Act, 1924*, does not expressly prohibit reference to marginal notes, but it excludes them from being deemed “part of” an Act. The New Zealand Law Commission considered whether this had the effect of prohibiting their use as aids to construction and cited the case of *Daganayasi v. Minister of Immigration*¹¹⁸ as suggesting that the silence of the section as to whether they could be used in interpretation constituted an “implied licence to do so”.¹¹⁹ In that case Cooke J stated that marginal notes might assist, but should not control, interpretation.

4.26

There are many arguments, both conceptual and practical, in favour of the view that marginal notes should be considered part of an Act. Bearing in mind the functional approach to interpretation, many of the concerns of those who advocate the exclusion of marginal notes from interpretation can be met. We believe that the

¹¹⁷ See also *Interpretation Act, 1937*, section 11(g).

- 116 See chapter 1, Paras.1.04–05.
- 117 Bennion, *op. cit.* fn. 111, at 547.
- 118 *Daganayasi v. Minister of Immigration* [1980] 2 NZLR 130, 142.
- 119 New Zealand Law Commission, *A New Interpretation Act – To Avoid “Prolixity and Tautology”* (Report No. 17, 1990), 38.

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precise status of intrinsic aids, and the question of whether or not they should be viewed as part of an Act, or merely as useful information published alongside an Act, are probably not that significant.¹²⁰ In practice, one may consider intrinsic aids to be some of the most valuable sources of material for interpretation outside of an Act, or view them as being some of the least useful components of the Act itself; which approach is taken matters little. We would emphasise, however, that our proposal is merely to allow courts a discretion to have regard to marginal notes. It is difficult to see any justification for singling out for exclusion from the interpretation process, the material that is closest to the active provisions of an Act.

4.27

We note that a solid and modern argument has been adduced in favour of s.11 (g) of the *Interpretation Act, 1937*; namely that if sidenotes and cross-headings were to become *part of* an Act, it would not be possible to deviate or delete them as part of projects that will arise out of the *Statute Law (Restatement) Bill, 2000*. This could mean that the initiatives envisaged by the Bill would be seriously undermined by being hand-tied into maintaining a structure that would become irrelevant because of subsequent, piecemeal, legislative amendment or obsolescence.

4.28

Bearing in mind the huge pressure on parliamentary time, which renders the time available for consolidation measures very scarce, the *Statute Law (Restatement) Bill* represents, if we may say so, a very significant, practical improvement in the law and we should certainly not propose anything which would jeopardise its efficiency. However, we doubt whether the change which we recommend would have such an effect. Two points are relevant here; first, the replacement of s.11 (g), which we propose, merely establishes a discretion. Our recommendation provides that a court *may* use these intrinsic materials in cases where it feels that they would be useful. We do not suggest – and this is the crucial point – that they be made formally 'part of the Act'.

4.29

Furthermore, as one would expect, there is a provision in the *Statute Law (Restatement) Bill, 2000* to the effect that “... a restatement may exclude spent, repealed or otherwise surplus provisions” (section 2 (2)). If the powers contained in

the Bill were used, as they well might be, to conflate two provisions (for instance one from an original Act and another from an amending Act), then the side-notes in the original Act would no longer be appropriate to the new 'conflated' version. In that case, these notes would be 'surplus', and could be omitted, in accordance with section 2 (2).

Arguments against allowing reference to marginal notes

4.30

- Parts of an Act which are intended merely for guidance, and which may not have been carefully formulated, could potentially override carefully drafted, enacting provisions of the same statute.

- Only provisions debated and fully considered by the Oireachtas should be given the force of law.

¹²⁰ The New Zealand Law Commission made a similar observation with regard to notes of the origin of a provision; *op. cit.* fn. 119, at 39.

- The objectives of the *Statute Law (Restatement) Bill* might be frustrated by a repeal of section 11(g) of the *Interpretation Act, 1937*.

Arguments for allowing reference to marginal notes

4.31

- – The principle of functional construction and the discretionary nature of the power being granted to the judiciary mean that there can be no necessity for maintaining the bar on reference to intrinsic aids, whether or not one advocates a change to their status.

- It is clearly anomalous that the only material which Irish courts are specifically prevented from using in interpretation is published by the Oireachtas itself. If we accept the general purposive approach, it is illogical that the court should be allowed to look at other sources of contextual evidence of the purpose of an Act, but not at material published with the Act

itself.

- In practice, judges will inevitably see the marginal notes and to claim that they do notice their contents is to engage in a fiction that serves no useful purpose.

G. Recommendations

4.32

There should be a clear rule on how to deal with intrinsic aids. Because of the existence of section 11(g) of the *Interpretation Act, 1937*, much of our discussion here has focused on marginal notes and cross-headings. However, we believe that the same rule should apply to all intrinsic aids in the same way, and we see no compelling reason why any should be treated differently.

4.33

We recommend that all intrinsic aids should be available for use in interpretation and that their use should not be contingent on establishing, as a prerequisite, that there is some ambiguity in the text.

4.34

In order to enable this to be achieved, section 11(g) of the Interpretation Act, 1937, should be repealed. But, because of the uncertainty of the common law in this area, the repeal of section 11(g) is not sufficient to establish the general principle that all intrinsic aids may be referred to by a court in appropriate circumstances. We also recommend, therefore, the enactment of a provision which would positively authorise a court to use intrinsic aids.

4.35

The following are the draft provisions which we recommend;

Section 4

- (1) **Section 11 (g) of the *Interpretation Act, 1937*, is hereby repealed.**
- (2) **In construing the provisions of an Act, a court may make use of all matters that are set out in the document containing the text of the Act as officially printed.**

4.36

At the time of publication of this Report, we understand that the Office of the Attorney General is giving sympathetic consideration to the recommendations which we have made in this Chapter, and it is likely that the *Interpretation Bill, 2000* may be amended to take account of the issues which we have raised.

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CHAPTER FIVE EXTRINSIC AIDS TO CONSTRUCTION

A. What are extrinsic aids to interpretation?

5.01

The most difficult aspect of the purposive approach advocated in this Report arises when that purpose is not obvious from an Act or from any of the intrinsic aids dealt with in the previous chapter. We would emphasise again that the ideal is to be able to resolve disputes regarding the meaning of an Act simply by reference to the Act itself, and situations where the text of the Act fails to resolve such conflicts, so that one is obliged to look beyond it, are generally undesirable. Indeed, the recommendations of this Report, especially those relating to the drafting of new legislation, are aimed at reducing the number of cases where such difficulties arise. Nevertheless, the nature of language itself and the unpredictability of new and novel fact scenarios in future cases mean that there will always be a limit as to how clear and complete legislative language can be. It is also possible that the apparent meaning of a statutory provision, when it is applied to particular facts, will conflict with what the legislature intended.

5.02

Therefore, extrinsic aids to interpretation may become important in two ways. Firstly, having accepted the purposive approach in principle, one is inevitably faced with the question of how precisely to deal with those, admittedly rare, cases where the meaning of a statutory provision is ambiguous, or obscure, or cannot be found anywhere in the text of an Act. Secondly, the purposive approach would require courts to give effect to the purpose of legislation, so that it would be wrong for a court to enforce the literal meaning of a statute if that was clearly at odds with what the legislature intended. What both these situations have in common is that the means of ascertaining the correct meaning or purpose of the Act may lie outside the Act itself. The aims of this chapter are to specify when a court should look beyond the statute in an effort to ascertain its purposive meaning and to direct the interpreter as to where this purposive meaning should be sought.

5.03

The term 'extrinsic aids', then, refers to any material which sheds light on the background to the enactment of a particular statute. The range of such aids includes Oireachtas debates, various reports and investigations that led to the enactment of

legislation, and material explaining the meaning of equivalent legislation in foreign jurisdictions, where an Irish Act was modelled on that legislation.

Different functions of extrinsic aids

5.04

Having noted the variety of materials that might be regarded as extrinsic aids, it should also be observed that these materials may serve different functions for a court as aids to interpretation. Generally, a distinction can be drawn between those extrinsic aids which provide evidence of the 'mischief' (the flaw in the existing law) which a given piece of legislation was intended to remedy and, on the other hand, those that provide evidence of the nature of the remedy itself.

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5.05

Another distinction may be drawn regarding the stage in the legislative process on which a particular type of extrinsic aid may shed light. In particular, there is a difference between those extrinsic aids which were available to the draftsman at the time of drafting a Bill and those which were only produced after drafting was completed. The first type of aid could possibly have influenced the drafting of the Bill, or may at least have been in the mind of the draftsman. This is not true of the other type of extrinsic aid, which is associated with the parliamentary stage of a Bill.

5.06

Extrinsic aids which provide evidence of the background to the enactment of legislation may be useful, since legislation does not come into existence in a vacuum. Certain political, social and legal considerations form the background to an Act and the potential utility of this type of material becomes obvious when one considers the traditional 'mischief' rule. Legislation is usually enacted, even today, as a response to some perceived 'mischief', or shortcoming, in the existing law, which may have developed through legislation or case-law. Many types of extrinsic aids set out what these perceived shortcomings were and thus help a court, perhaps many years later, to discern the purpose which motivated the legislature to introduce the Act. By consulting such extrinsic materials, a court is enabled to glean, admittedly indirectly and not always precisely, the effect that the legislation was intended to have.

5.07

Examples of such aids include Law Reform Commission Reports and Reports of Oireachtas Committees. These materials explain the recommendations which are made in relation to a legal issue and may point to the objective which the legislation is designed to achieve. Where such recommendations are acted upon and become law, it can usually be implied that the legislative purpose is the same as that outlined in the preceding recommendations.

5.08

Other types of materials may have been borne in mind by the drafter of legislation at the time of drafting the provisions in question. These might include legislative formulations used in other jurisdictions to address the same issue or previous Irish legislation dealing with related issues. They might also include international treaties with which the legislature may be presumed to have intended to comply. Reports of such bodies as the Law Reform Commission may show that a point of interpretation was considered and a view taken on it. Similarly, evidence relating to equivalent statutes in other jurisdictions may explain a simple ambiguity. As will be seen from the cases referred to below, whenever this type of evidence is relevant to the legislative intention, it is often conclusive.

5.09

The final, and perhaps most controversial, category of extrinsic aid includes those that are associated with the legislative process. These aids may record the legislature's own statements as to what the intended meaning and effect of particular legislation was, although the category might also include previous legislative acts. As we shall see at paras.5.36–67, more objections may be raised to the use of this type of extrinsic aid, than to the other types already discussed. This is principally because of the difficulty involved in distinguishing between the true intention of the legislature and the statements made by the government about that intention.

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B. Types of Extrinsic aids

(i) Reports and other publications of the Law Reform Commission or other similar bodies

Whitely v. Minister for Defence

5.10

The case of *Whitely v. Minister for Defence*¹²¹ illustrates how a court may obtain guidance from a Law Reform Commission Report. This case concerned a claim for compensation against the Minister for Defence and the State arising from damage to hearing which was allegedly sustained by the plaintiff while undergoing training in the armed forces some thirty years previously. The High Court found that negligence had been established. The case then turned on whether the action had been brought within the appropriate period of limitation.

5.11

The plaintiff claimed that he had commenced proceedings within the period of three years from his “date of knowledge ... that the injury in question was significant”, and had therefore complied with section 2(1) of the *Statute of Limitations (Amendment) Act, 1991*.

5.12

Section 2(2) goes on to stipulate that

“[f]or the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire ...”.

5.13

It was contended on behalf of the plaintiff that while he had knowledge as early as 1979 or 1980 that he had been injured, he did not have knowledge that the injury in question was “significant” until some time between 1993 and 1995. Accordingly, he claimed that his “date of knowledge” was no earlier than 1993 and accordingly, his action was not barred.

5.14

Quirke J noted that, although there has been no judicial consideration of section 2 of the 1991 Act in Ireland, the “date of knowledge” for the purposes of the *Statute of Limitations (Amendment) Act, 1991* was virtually identical to the “date of knowledge” contemplated in section 14 of the English *Limitation Act, 1980*.

5.15

He then referred to the Law Reform Commission Report, *The Statute of Limitations: Claims In Respect Of Latent Personal Injuries*, on which the 1991 Irish Act was based.¹²² This Report considered the definition contained in s.14 of the English Act and pointed out that it had been criticised on various grounds. The Commission then expressed the view that “the best approach would be for the legislation to require that, for time to begin to run, the plaintiff ought to have been aware that the injury is significant”.¹²³ A “General Scheme of a Bill” was also provided in the Report, which made no provision for a definition of the kind contained in section 14 of the English Act. Quirke J noted that this “General

¹²¹ [1997] 2 ILRM 416.

¹²² Law Reform Commission, *Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries* (LRC 21–1987, 1987).

¹²³ *Ibid*, at 44.

Scheme” appeared to have been enacted into legislation more or less without amendment by the legislature, which had refrained from adding to it a definition of what was meant by a “significant” injury. On this basis, he took the view in *Whitely* that the intention of the Irish legislature in enacting the 1991 Act had been to avoid confining the sense in which the word “significant” ought to be understood to the terms of the definition contained in section 14(2) of the English Act, or indeed to any particular terms.

5.16

On the facts of the particular case, it was found that the evidence pointed to a date of knowledge for the plaintiff which was before 1992 and probably as early as 1979. Therefore the plaintiff's action was barred. What the case illustrates, however, is the process whereby certain Law Reform Commission recommendations were accepted as evidence of the legislature and used to resolve a complex point of interpretation. Indeed, it is likely that Quirke J would have found it most difficult to discover the intended purpose of the provision without the aid of such evidence.

Maher v. Attorney General

5.17

The case of *Maher v. Attorney General*¹²⁴ involved a reference to both the explanatory memorandum and the recommendations of the 1963 *Commission on Driving while Under the Influence of Drink or a Drug*. This was a criminal case in which the plaintiff was convicted under the *Road Traffic Act, 1961* (as amended by the *Road Traffic Act, 1968*) for having driven a motor vehicle while the level of alcohol in his blood was higher than that permitted. The plaintiff challenged the constitutionality of section 44(2) of the Act of 1968. The provision stated that a certificate declaring that the person exceeded the limit was conclusive evidence of that fact.

5.18

The view expressed by Fitzgerald CJ was that the crucial problematic element in the provision was the use of the word “conclusive”. Article 34.1 of the Constitution provides that criminal justice shall be administered only by judges in courts and the 1968 Act seemed to suggest that a District Justice was precluded from forming his own view on the issue of whether the concentration of alcohol in the blood of the accused had exceeded the legal limit. In so far as it removed the District Justice's power to determine this question, section 44(2) of the Act was repugnant to the Constitution, and was therefore invalid.

5.19

It was submitted, however, that it was open to the Court to remove, or 'sever' the offending word “conclusive” from the section, and allow the remainder of the provision to stand. The Supreme Court therefore turned to consider the doctrine of severability.

5.20

The operation of the doctrine of severability in this context was dependent on ascertaining the legislative intention behind the provision in question,¹²⁵ and then deciding whether an amended formulation of the provision, with the offending word “conclusive” omitted, would conflict with the purpose of the legislature. In seeking to

¹²⁴ [1973] IR 140.

¹²⁵ *Ibid.* at 147.

identify the intention of the legislature at the time of enactment, the Court made reference to the 1968 Act's origin in the preceding Report of the 1963 *Commission on Driving while under the Influence of Drink or a Drug*. It was noted that the explanatory memorandum published with the Act clearly stated that, while the main elements of the Report had been accepted, the legislators had decided to reject the recommendations of the Commission on the issue of the status of a particular type of certificate. The Commission had recommended that the certificate of the analysing authority regarding the results of analysis of urine specimens should be merely *prima facie* evidence of what was certified.¹²⁶ However, the legislators chose to enact a different formulation, whereby the certificate was to be *conclusive* evidence. Reluctantly, then, the Court held that it could not sever the word “conclusive” and allow the remainder of the provision to stand without it, as to do so would be to go against the deliberate intention of the legislature. The explanatory memorandum was held to demonstrate that the legislature had considered the recommendation of the Commission on the wording of the provision and had made a deliberate choice in favour of the formulation which was included in the legislation.¹²⁷

(ii) *International treaties*

5.21

The Irish legal position in respect of one type of extrinsic aid is clear, because it has been established that international treaties and their *travaux preparatoires* may be used in constructing a statute. The general rule was stated in Para. 1.141 of our Consultation Paper:

“Where an Act implements, either expressly or impliedly, an International Convention, both the terms of the convention and its *travaux preparatoires* may be considered by a court in interpreting any ambiguous provision of the legislation.”¹²⁸

5.22

This rule has been approved by the courts in the cases of *Bourke v. Attorney General*,¹²⁹ *BB v. JB*,¹³⁰ and *MK Kapitan Labunets*.¹³¹ As was pointed out in our Consultation Paper, the only qualifying statement in this regard is found in the judgment of Barr J in the last of these cases, in which he urged that the courts, in using *travaux preparatoires*, should exercise a degree of caution. He stated that they should only be referred to when two conditions were fulfilled, *ie* when

¹²⁶ Paragraph 61(7) of the Report.

¹²⁷ The case of *Quinlivan v. Governor of Portlaoise Prison*, High Court, 9 December 1997, is another recent example of a court referring to a Law Reform Commission Report on which legislation was based. The applicant had been charged with kidnapping and McGuinness J referred to the *Law Reform Commission Report on Non-Fatal Offences Against the Person* (LRC45-1994, 1994) which had drawn attention to

a number of difficulties regarding the common law offences of kidnapping and false imprisonment and made recommendations for statutory reform. Although she referred to the Report in thus outlining the background to the legislation, she did not, however, use it as a guide to the particular point of interpretation of the *Non-Fatal Offences Against the Person Act, 1997*, which was before the Court.

128 Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14–1999, 1999) 40.

129 [1972] IR 36.

130 Supreme Court, 28 July 1997.

131 High Court, 2 September 1994.

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“the material is public and accessible and ... the *travaux préparatoires* clearly and indisputably point to a definite legislative intention.”¹³²

The cautious approach of Barr J may be taken as representative of the general approach to extrinsic aids recommended in this chapter.

(iii) *Explanatory Memoranda*

5.23

In Ireland, explanatory memoranda are published with some Bills at the time of their introduction into the Oireachtas. The purpose of such a memorandum is to act as a summary and guide to a Bill, and provide information, particularly for the members of the legislature. In several cases, however, the courts have also found explanatory memoranda useful and they have often been considered in conjunction with other extrinsic material. We have already seen one such example in *Maker v. Attorney General*.¹³³

5.24

In another example, *McLoughlin v. Minister for the Public Service*,¹³⁴ the plaintiffs were the family of a member of the Garda Síochána who had been fatally injured in the course of his duties. They sought a decree of compensation from the respondent under the *Garda Síochána (Compensation) Acts, 1941–1945*. Apart from the compensation which was the subject of this application, the Garda's widow was entitled to receive a special pension, by virtue of the fact that her late husband had died in the line of duty as a result of a crime. A point of contention in the case was section 10(3) of the *Garda Síochána (Compensation) Act, 1941*, which provided that a judge, in fixing the amount of compensation, should take into consideration the fact that the applicant was entitled

“... to a pension, allowance, or gratuity out of public funds in respect of the death or injuries which is or are the subject of the application, but shall not regard the amount of such pension, allowance, or gratuity (if any) as a measure or standard by reference to which the amount of the compensation is to be fixed.”

This provision had been amended by s.2(2) of the 1945 Act, which directed the court not to take into account any property to which the applicant became entitled by virtue of the Garda's death.

5.25

The case stated sought clarification of whether, in the assessment of compensation, the value of the special pension and allowances should be deducted, or whether only the difference between the amounts payable under the special pension (because of non-accidental death) and the ordinary statutory pension should be deducted.

¹³² *Op.cit.* fn.131, *per* Barr J, citing the dicta of Wilberforce L in *Fothergill v. Monarch Airlines* [1980] 3 WLR 209.

¹³³ See Paras.5.17–20 *above*.

¹³⁴ [1985] IR 631.

5.26

It was the view of Henchy J that what was intended by section 10(3) of the 1941 Act was that the fact of entitlement to a pension, and not the amount, was to be taken into account. He supported this view by reference to the explanatory memorandum which accompanied the 1941 Act when it was introduced as a Bill. He quoted from a passage in the memorandum that stated: “Any benefits conferred by the present Bill are intended to supplement, but not to replace, these existing provisions.”

5.27

In this case the judge considered that he was entitled to examine the explanatory memorandum of a Bill in order to divine the intention of the legislature at the time of enactment of the 1941 Act. However, it is important to note that, despite their origin, the explanatory notes and other similar material enjoy no distinct status as a more authoritative type of extrinsic aid than the other categories already discussed. At our Colloquia, the view was also expressed that explanatory memoranda had been of greater use in previous times when they were published with only a smaller number of Bills, when, presumably, more time went into their drafting.¹³⁵

(iv) *Related Statutes*

5.28

Another issue, which we raised in our Consultation Paper, is the relevance to statutory interpretation of other, related statutes, *ie* those dealing with the same subject area. There is a common law maxim to the effect that statutes can be construed together when they are *in pari materia*, *ie* they deal with the same subject matter. A presumption then arises that the legislature intended words and concepts which are common to these related statutes to have the same meaning in each. This approach may be particularly useful where there has been as yet no judicial consideration of a particular provision of a new Act, but where the same word or concept has acquired an established meaning in the context of a similar Act. The rule here is a common sense approach, allowing the court to clarify the intended meaning of a provision by reference to existing law, which must be presumed to have been in mind at the time of drafting the later provision.

5.29

The Irish case-law on this area was examined in our Consultation Paper,¹³⁶ but it is worth restating a number of points about how the *in pan materia* principle has been applied by the Irish courts. The leading case in the area is *Cronin v. Youghal Carpets (Yarns) Ltd*,¹³⁷ where Griffin J observed that:

“[i]t is a well established principle to be applied in the consideration of an Act that, where a word or expression in an Act has received a clear judicial interpretation, there is a presumption that the subsequent Act which incorporates the same word or expression in a similar context should be construed so that the word or expression is interpreted according to the meaning that has previously been ascribed to it, unless a contrary intention appears.”¹³⁸

¹³⁵ See Chapter 6.

¹³⁶ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14–1999, 1999), Paras. 1.114–1.117.

¹³⁷ [1985] IR 312.

¹³⁸ *Ibid.* at 321.

5.30

It seems to us an obviously sensible rule that the legislature is to be presumed to have intended words and phrases to have their established meaning, unless a contrary intention can be shown. We note that the rule has sometimes been stated to be limited

to situations where the subject matter of the statutes under consideration was the same. In the Consultation Paper we referred to two such cases where a literal construction of a provision was preferred in circumstances where the statutes being compared dealt with different areas of law.¹³⁹ However, we are of the view that the rule is a useful tool to interpretation in the cases where it is applied at present and recommend simply that it be applied in a more purposive manner. We consider that the fact that an earlier Act did not deal with the same area of law should not prevent words or phrases used in it, which have the same significance and context, from being considered in *pari materia*.

5.31

Another case, of broadly the same type, is *Greene v. Hughes Haulage*.¹⁴⁰ However, this case seems to go rather further than the principle just stated, in that what the statute being interpreted and the related statute had in common was not a word or expression, which is usually indisputable, but a policy. Admittedly, the identification of a policy may be rather subjective. Under examination in *Greene* was section 2 of the *Civil Liability (Amendment) Act, 1964*, which states that;

“In assessing damages in an action to recover damages in respect of a wrongful act (including a crime) resulting in personal injury not causing death, account shall not be taken of:

- (a) any sum payable in respect of the injury under any contract of insurance...”.

5.32

The net question in the case was whether the expression 'any contract of insurance' covered a contract to which the injured person had not been a party. As to this, Geoghegan J in the High Court drew an analogy between section 2 of the 1964 Act and section 50 of the *Civil Liability Act 1961*, as follows;

“the whole purpose of s.2 of [the 1964 Act] was to provide a corresponding statutory provision for personal injury actions to s. 50 of [the 1961 Act], which provided for equivalent non-deductions in fatal injury claims. The 1964 Act ... [covered] relevant matters not already provided for or inadequately provided for in [the 1961 Act]. But s. 50 of the 1961 Act is largely a re-enactment of earlier statutory provisions in the interpretation of which the courts have held that the deceased need not be a party to the contract of insurance and need not have paid the premiums. *It seems reasonable in the circumstances to assume that s.2 of the 1964 Act was intended by the Oireachtas to be interpreted similarly to s.50 of the 1961 Act and therefore, as I see it, the Oireachtas would not have intended that the injured party had to be a party to the contract of insurance...*”¹⁴¹

139 *Murphy v. Dublin Corporation* [1976] IR 143 and *Irish Agricultural Machinery Ltd. v. O'Culacháin* [1990] 1 IR 535.

140 [1998] 1 ILRM 34.

141 *Ibid.* at 41.

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5.33

We have already discussed, in Chapter Two, the case of *Mulcahy v. Minister for the Marine*.¹⁴² There, the applicant submitted that the legislation at the centre of the case had to be interpreted in the context of other statutes governing the same area of law. As well as setting out an important principle regarding the purposive approach to interpretation, Keane J's judgment in the case also provides an indication of the relevance of pre-existing law to the exercise of judicial statutory interpretation.

(v) *Comparative Material*

DPP v. McDonagh

5.34

The case of *DPP v. McDonagh*,¹⁴³ in which judgment was delivered by Costello P, involved an appeal against conviction under the *Criminal Law (Rape) Act, 1981*. The contention of the appellants was that the trial judge had misdirected the jury by failing to recite section 2(2) of the Act to the jury and explain the meaning of that sub-section to them. The appellants argued that the provision set out the *mens rea* requirement in regard to consent and was therefore crucial in defining the nature of the alleged crime.

5.35

The Court undertook an examination of the sub-section and found that the trial judge was not always bound to lay it before the jury. In discussing this issue, Costello P referred to the fact that the Act was modelled on an equivalent English statute. He also noted that the corresponding provision in the English Act had been introduced specifically to deal with a fact situation similar to that in the case before him.¹⁴⁴ Accordingly, he was prepared to apply the construction which had been accepted in England. Thus, the case established that such materials could be looked at – even in circumstances where the wording of the relevant provision was unambiguous.

(vi) *Oireachtas Debates*

5.36

The most seemingly obvious and yet also the most controversial source of assistance as to the 'intention of the legislature' is the record of debates in the Houses of the Oireachtas. In Britain, as is well known, there was a tradition of not invoking this sort of legislative material and this approach was consistently followed throughout the

history of the Westminster Parliament, until it was reversed, or at least significantly qualified, by a seven member House of Lords (the then Lord Chancellor dissenting), in the case of *Pepper v. Hart*.¹⁴⁵ This case has launched a thousand comments and articles and provoked both criticism and praise. Many of the arguments, both of those who view the increased reliance on Hansard as a positive

142 High Court, 4 November 1994.

143 [1996] 2 ILRM 468.

144 This case is a good example of how significant the context of an Act can be to its interpretation. The English Act in question had been introduced to reverse the effect of the decision in *DPP v. Morgan* [1975] 2 All ER 347, which had established a subjective test, in relation to whether an accused in a rape case had held a reasonable belief that the victim consented.

145 [1993] AC 593.

progression and those who view it as a dangerous development, are referred to below. However, we must first examine the approach of the Irish courts to this issue. In general, there has been no uniformity as to the question of whether reference to Oireachtas debates is permissible and an authoritative Supreme Court decision on the point is awaited with interest.

*Wavin Pipes v. Hepworth Iron Ltd*¹⁴⁶

5.37

The first discussion of this issue in Ireland dates back almost twenty years to *Wavin Pipes v. Hepworth Iron*, where Costello J strongly approved the consideration by the judiciary of Oireachtas debates. The case considered the meaning of the word 'published', as it appeared in the *Patents Act, 1964*. The defendants claimed that the term was only intended to encompass material published in the State and that if the Oireachtas had intended to include material published abroad, this would have been expressly stated. While Costello J could have reached the conclusion that the provision was intended to have the broader meaning by contrasting, as he did, the relevant section with other sections of the Act which included the limiting phrase "in the State". However, he also made reference to the parliamentary history of the Act in question. In particular, he referred to the relevant Minister's speech in the Dáil, where the suggestion that the qualifying words "in the State" be included was rejected, because of concern over Ireland's international obligations in regard to patent law. The case, then, provides a clear example of an instance where evidence from Oireachtas debates strengthened a preferred construction which might otherwise have been questionable.

Crilly v. T & J Farrington Ltd

5.38

The decision of Geoghegan J in the case of *Crilly v T&J Farrington Ltd*¹⁴⁷ also took a liberal approach to the use of Oireachtas debates. This case concerned the interpretation of section 2(1) of the *Health (Amendment) Act, 1986*. The section regulated the power of a hospital to charge patients for care which they had required as a result of injuries sustained in a road traffic accident and an issue arose as to the appropriate hospital charge for such a patient. Geoghegan J stated that if extrinsic evidence of legislative intention supported a construction which would be “just about open under the ordinary rules of construction but which would not have occurred to the judge, the judge [was] entitled at least to take it into account”. Furthermore, he took the view that counsel was entitled to bring a ministerial statement to a court's attention with a view to persuading a judge that the view he appeared to be adopting was wrong. Geoghegan J also outlined what he considered to be the significance of the McDonagh case (already discussed¹⁴⁸);

“The passage from the judgment of Costello P [in *McDonagh*] begins with the words “it has long been established”. Quite clearly it has not long been established in Ireland that a Minister's statement could be used in aid of

¹⁴⁶ High Court, 8 May 1981, reported in (1982) 8 *Fleet Street Reports* 32. For a full discussion of the case, see Casey, (1981) DULJ 110.

¹⁴⁷ High Court, 21st December 1999. See also Ramsay, (2000) 13 *Irish Tax Review*, at 443.

¹⁴⁸ See Paras.5.34–35 above.

construction. I do not think that Costello P had that in mind at all when he used that expression. But at the same time I think that it is well within the spirit and intent of the passage cited to deduce from it that he would have been of the view that in certain circumstances such a ministerial statement could be availed of.”

5.39

Interestingly, Geoghegan J cited as authority for his view, not only *Pepper v. Hart* and *DPP v. McDonagh*, but also the American case of *United States of the American Trucking Association*.¹⁴⁹

*In the Matter of National Irish Bank*¹⁵⁰

5.40

This case concerned an investigation by the Minister for Enterprise and Employment into the operations of National Irish Bank. Employees of the bank had claimed the right to be accompanied by legal representatives while being interviewed by the inspectors appointed by the Department. The inspectors applied to the High Court for directions. Section 10 of the *Companies Act, 1990* detailed the powers and duties of inspectors in such investigations and obliged directors and others to give assistance to the inspectors. The court was asked to decide if that section had abrogated the asserted 'right to silence' of the employees.

5.41

Shanley J, in the High Court, held that on the face of the statute, the right to silence had indeed been abrogated;

“I am satisfied that I cannot construe section 10 of the Act as preserving the privilege against self-incrimination: to do so would require a qualification on the duty imposed by the Act such that the duty to answer applied save where the giving of such answers would tend to incriminate the witness. No such saver appears in section 10. It seems to me clear that, had the Oireachtas intended to save the privilege, it could easily have done so ... I am fortified in this view by the large number of instances where our Courts have allowed that statutory provisions have impliedly abrogated the right to self-incrimination.”¹⁵¹

5.42

Counsel for the employees submitted that the Dáil debates showed that the legislature had not intended the Act to have this effect. Shanley J addressed this point separately, noting that;

“...the Minister for State at the Department of Industry and Commerce said

'...[T]he idea behind the amendment may be covered in Section 10(5) which provides that, if a person refuses to answer an Inspector's question, the Inspector may refer the matter to the Court. Where this happens the Court can enquire into the case and after hearing evidence for the defence can punish the person concerned as if he had been guilty of contempt of Court. If a

¹⁴⁹ (1940) 310 US 530, at 543–544.

¹⁵⁰ [1999] 1 ILRM 321.

person persisted in claiming that his refusal to answer a question was based on fear that he might incriminate himself the Court would be in a fairly good position to adjudicate on any such claim under Section 10(5).'

This view as expressed by the Minister, it is urged, assists the Court in concluding that Section 10, far from abrogating the privilege against self-incrimination, was providing a forum for its existence. While of course respecting the views expressed by the Minister it does not appear to me, on a perusal of the debate, that his contribution to that debate had the effect of indicating a legislative intention to preserve the privilege against self-incrimination. His contribution represented Dáil material more evidencing his own personal view of the effect of Section 10 than material disclosing the legislative intention behind the section. Having regard to the unambiguous language used in Part II of the Companies Act, 1990 (which clearly indicates, in my view, a legislative intention to abrogate the privilege against self-incrimination) I do not feel it would be safe to rely upon what was said by the Minister at the Committee stage of the Companies Bill, 1987 as a guide to the legislative intention behind Part II of the Act.”¹⁵²

This judgment supports the view, which is shared by the Commission, that while it should be open to a court to refer to Oireachtas debates, in practice they will usually not be capable of demonstrating a clear legislative purpose.

Howard v. Commissioners of Public Works

5.43

However, there is also a strong line of judicial opinion which takes exception to the use of parliamentary material. One of the clearest examples of such an approach is the judgment of Finlay CJ in *Howard v. Commissioners of Public Works*.¹⁵³ Although his comments were *obiter*, and the issue was not argued before the court, the Chief Justice stated quite clearly that he was

“satisfied that it would not be permissible to interpret a statute upon the basis of either speculation, or indeed, even of actual information obtained with regard to the belief of individuals who either drafted the statute or took part as legislators in its

enactment, with regard to the question of the appropriate legal principles applicable to matters being dealt with in the statute.”¹⁵⁴

*An Blascaod Mór Teoranta v. Commissioners of Public Works*¹⁵⁵

5.44

A restrictive approach was also reflected in the judgment delivered by Murphy J in one of a series of actions involving the compulsory purchase of land on the Blasket Islands. This case concerned the rather narrow issue of the

¹⁵² *Op. cit.* fn. 150, at 339.

¹⁵³ [1994] 1 IR 101.

¹⁵⁴ *Ibid.* at 140. See, to the same effect, *DPP v. Quilligan (No. 1)* [1986] IR 496, *per* Walsh J, at 571.

¹⁵⁵ High Court, 1 July 1997.

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constitutionality of an Act of the Oireachtas which provided for the compulsory purchase of land on one of the islands. It should be pointed out that this case may be distinguishable from the other cases which we discuss here, by virtue of the fact that the material to which the Court was asked to refer was not Oireachtas debate records, but earlier preparatory documents.

5.45

Murphy J in the High Court delivered judgment on a motion for discovery of documents that were in the possession of the defendants.¹⁵⁶ The documents sought related to the manner in which the Minister had arrived at decisions regarding the Act, and to its preparation and drafting. Murphy J held that the documents were irrelevant to the dispute, since any court decision on the constitutionality of the Act would have to be made by reference to the terms of the Act itself. His decision was thus based on the view that documents which might have disclosed the motivation or purpose behind the Act could not be used in its interpretation. He stated;

“It would seem to me to be absurd and offensive to members of the Oireachtas to assume that, whatever purpose or motive the promoters of a Bill might have, such motive or purpose would be the effective cause of the enactment of the legislation. To know how or why legislation was enacted would require a far-reaching examination and analysis of members of the Oireachtas who supported or opposed the legislation or indeed who absented themselves during its passage ... In legal terms an

analysis of the motivation for legislation would be meaningless in practice, and in my view wholly unjustified by the doctrine of the separation of powers. The validity of legislation must be tested by reference to the document ultimately enacted by the Oireachtas and not on the basis of the motive, intention or purpose of the Minister by whom the legislation is introduced or those of any member of the Oireachtas who supports or opposes it.”

5.46

At a further High Court hearing in 1997, on 1 July 1997, Budd J, having considered the earlier decisions in the *Blascaod Mór* series and the *Howard* case, took a slightly different approach. Stressing the importance of “informed interpretation” in cases where there were important constitutional considerations, Budd J noted that the term to be interpreted was ambiguous, and held that in the context of a constitutional challenge the court was “entitled to investigate and look at ... the policy of this Act”. Although he clearly felt constrained by the decision in *Howard*, Budd J went on to distinguish that decision and took a much warmer approach to the admissibility of the extrinsic evidence before him;

“While I am very aware of the stringency of the decision of the Supreme Court in the *Howard v. Commissioners of Public Works* case, nevertheless it seems to me that there must be some leeway for the relaxation of the exclusionary rule in considering a case concerning a constitutional challenge involving as it does the double construction rule and other principles such as the rule about severability.

I think that the Bill also differs from the parliamentary records of debates. My conclusion from section 5 of the *Documentary Evidence Act, 1925* is that a Bill is published under the authority of the Stationery Office. It is the words of the Bill that are there to be read and considered and one can look and narrow one's focus to the relevant section of the Bill and one is not

¹⁵⁶ [1994] 2IR 372.

going on an excursion into the motives or the purposes of individual members of the legislature.”¹⁵⁷

Lawlor v. Mr Justice Flood

5.47

In the more recent High Court case of *Lawlor v. Mr Justice Flood*¹⁵⁸ Kearns J made extensive reference, both to the parliamentary history of the *Tribunal of Inquiry (Evidence) (Amendment) Act, 1979*, and to the history of the body of legislation which governs Tribunals of Inquiry. The case involved an appeal against certain orders made by the defendant requiring, among other things, that Mr Lawlor should appear at the offices of the Flood Tribunal for private questioning by counsel for the Tribunal. The orders were made under s.4 of the *Tribunals of Inquiry (Evidence) (Amendment) Act, 1979*, which provides that;

“A tribunal may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders.”

5.48

The case is notable for a number of reasons. The High Court reiterated the general position that extrinsic aids could be considered by a court, but that this should only be done where the provision in question was ambiguous. Then, on the facts of the case, Kearns J found that there was an ambiguity present which justified him in scrutinising the parliamentary history of the Act. On appeal, the Supreme Court did not find it necessary to do this.

5.49

In his submissions, the Sole Member of the Tribunal had contended that the words contained in the provision quoted earlier, “... as are vested in the High Court ...” did not in any way limit the operation of the first part of the provision. In other words, the Tribunal could exercise such powers as it deemed appropriate and necessary for the purposes of its functions, *including* those held by the High Court. However, the Oireachtas debates relating to the provision's enactment, including Ministerial statements, provided particularly clear evidence that a tribunal was intended to have *only* powers equivalent to those of the High Court.

5.50

Having found that there was an ambiguity in section 4, Kearns J, in the High Court, regarded the fact that the Oireachtas was directly involved in establishing the terms of reference of the Flood Tribunal as tending to justify the Court in referring to Oireachtas debates. He also found that there was a clear conflict between the construction suggested by the respondent and that evidenced by the Oireachtas debates. For these reasons he allowed the arguments of Counsel for the applicant and quashed the orders of the Tribunal.

5.51

It is perhaps noteworthy that, despite this use of the parliamentary history of the relevant legislation in the High Court, Counsel for Mr Lawlor saw fit (possibly advisedly) to make no argument based on the parliamentary record at the later Supreme Court hearing of the appeal of Kearns J's decision. Although the Supreme

157 It might be noted that in this decision Budd J was not dealing directly with Oireachtas debates, but with early drafts of a Bill, which later became the Act at the centre of these proceedings.

158 High Court, 2 July 1999; Supreme Court, 8 October 1999.

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Court upheld the High Court ruling, Hamilton CJ and Denham J both found that the purpose of the section was clear. The Chief Justice was of the view that its meaning could be discerned from “the Act as a whole and in the context of the relevant legislation”. Denham J, on the other hand, considered that the correct meaning could be discovered by way of a literal interpretation of the section. On the surface, at least, these approaches might be viewed as a restriction of the rule in *McDonagh* (discussed above).

C. Should Oireachtas debates be treated separately?

5.52

The advantages and disadvantages of allowing the use of extrinsic aids to interpretation may be discussed under the following headings;

(i) The historical exclusionary rule

5.53

English case-law (before *Pepper v. Hart*) exhibited a strict adherence to the historical rule that reference should not be made in the course of judicial proceedings to Hansard.¹⁵⁹ This traditional bar dated from a resolution of the English Parliament in 1818, which permitted such reference to be made only where appropriate leave was granted. It would appear that this, in fact, never occurred. However, there are a number of important points worth noting about the background to the passage of the resolution. Its primary concern was the protection of the staff of Parliament from being obliged to give evidence in court. It was also introduced at a time when parliamentary debates were not fully recorded. Clearly, in regard to each of these facts, the historical context of the exclusionary bar has shifted considerably.

5.54

Another issue which has been raised in relation to the exclusionary rule is the principle that one organ of state should not question the workings of another. This concern is anchored in the doctrine of comity between different arms of government – a doctrine which has been emphasised in England, in accordance with the traditionally strict approach taken there to the doctrine of parliamentary sovereignty. It should be noted that this approach is reflected in the stronger character of parliamentary privilege which prevails in England, and in the precept that a court may not investigate the internal workings of Parliament; neither of these principles is considered particularly influential in Irish jurisprudence today.¹⁶⁰

(ii) Serious policy objections

5.55

At the core of the theoretical argument against allowing reference to Oireachtas debates is a fear of undermining the statute book by setting up an alternative locus of legislative authority. It has been pointed out that there is a danger that frequent reference to parliamentary records might draw the attention of those

¹⁵⁹ For a full discussion of the history of the exclusionary rule, see Miers, (1983) *Statute Law Review*, at 98.

¹⁶⁰ The case of *In Re Haughey* [1971] IR 217 clearly demonstrates the very different attitude of the Irish courts to the doctrines of parliamentary privilege and separation of powers. See also Morgan, *Constitutional Law in Ireland* (2nd ed., Round Hall, Sweet and Maxwell, 1990) at 160–2.

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interpreting legislation away from the Acts, which should constitute their primary source of law.¹⁶¹

5.56

The short answer to this argument is that the use of parliamentary debates would only undermine the statute book if the judiciary allowed it to do so. The most important aspect of the approach which we advocate here is that judges should enjoy a discretion to use such parliamentary materials if clarification of a provision is required and if these materials would be of use in the instant case. In other words, a court would have a wide discretion to use the records in interpreting a statute, but would only be likely to do so when they provided clear evidence of legislative intention. As has already been pointed out, the reason that preparatory materials are more likely to be useful to a court in this situation is that they are more likely to give clear evidence of the purpose of the statute. Oireachtas debates are unlikely to give such clear evidence in many cases, but certainly would do so in some.

5.57

We have outlined the general arguments in favour of conferring on the courts a discretion to refer to extrinsic aids. If these are accepted, then consistency demands that Oireachtas debates should not be excluded from such an approach. Clearly, on the plane of principle, it would be odd if judges were allowed to look at what might have influenced the legislature in forming its opinion, while being prohibited from reading what the legislature itself considered to be its objective.

(iii) Objections to the value of the debates as evidence of parliamentary intention

5.58

Perhaps the most commonly voiced concerns on this topic relate to the quality of the material which would be disclosed by Oireachtas reports. On occasion, it has been suggested that the concept of the 'intention of the legislature' is itself a fiction and that the speeches (even of the Minister at second stage) in the Oireachtas may reflect the purposes of the Government or pressure groups, rather than those of the 'legislature'. It has also been remarked, in the context of statutes governing taxation, that

“the time constraints in Ireland on the debate on the Finance Bill make reliance on Oireachtas debates in this area particularly unsatisfactory. The weight to be attached to particular parliamentary answers hurriedly prepared by Civil Servants for Ministers must be questionable.”¹⁶²

5.59

The approach in England, in the wake of the House of Lords decision in *Pepper v. Hart*, has been that the Minister's speech has been accorded particular weight as an aid to interpretation.¹⁶³ Similarly, in Australia, the relevant provision in the *Acts Interpretation Act*, which was inserted in 1984, identifies the main categories of extrinsic material to which a court may allude, and in doing so it mentions

¹⁶¹ For example, see Bennion, (1993) *Statute Law Review* 149, at 158, where he quotes from the Canadian academic, Corry, who feels that this has occurred in the United States.

¹⁶² Hunt, “Statutory Interpretation, *Pepper v. Hart*— The Irish Situation” (1996) 8 *Irish Tax Review*, 17.

¹⁶³ For a discussion of *Pepper v. Hart* and its aftermath, see St. John Bates, (1993) 38 *Journal of the Law Society of Scotland*, 251. See also Lester, (1994) 15 *Statute Law Review*, 10.

specifically the speech of the sponsoring Minister at the Second Reading.¹⁶⁴ In the majority of cases, it is probable that if any clear indication of the purpose of a statute exists, it will be found in this speech. Admittedly, the fact that this is therefore the material most likely to be examined in an effort to discern the purpose of an Act, will exacerbate the concerns of those who consider the statements of politicians, as to this purpose, to be unreliable. Bennion quotes, in this regard, a statement by J.A. Corry which highlights the basis for such concerns;

“The debate on a Bill is a battle of wits often carried out under extreme pressure and excitement where much more than the passage of this Bill may be at stake.”¹⁶⁵

5.60

Thus, it is sometimes suggested that a Minister, for political reasons or in order to capture favourable media attention, may either mis-state the true purpose of legislation or, at least, seek to divert attention away from the less popular elements of it. To take a hypothetical example: a measure may give a moderate degree of protection to tenants vis-à-vis landlords. However, assuming that landlords are politically unpopular, it might suit the Minister in such a situation to exaggerate the element of protection for the tenant and the incursion into the landlord's position. Alternatively, he might be goaded by the opposition into making an extreme anti-landlord statement as to what the Bill contained. So the statements of a Minister may not always provide an accurate insight into what the legislature sought to achieve. It may be noted that this observation attracted a good deal of support at our Colloquia.

5.61

Of course, a clear distinction requires to be drawn here between, on the one hand, using the Minister's speech to gain a better understanding of the intention of the legislators, and on the other hand, elevating the government's statement of intent to such a degree that it acquires the status of authoritative law. It should be emphasised that it is the intention of the legislature, and not the executive, that is to be given effect in interpreting legislation, and the intention of the legislature is often a rather nebulous concept. While it may often be difficult to distinguish the two, one can nevertheless reasonably expect a court to be sophisticated enough to be capable of bearing the distinction in mind in using these materials.

(iv) Court proceedings

5.62

It is sometimes argued that the process of trawling through a collection of Oireachtas debates would inevitably lengthen court proceedings. At our Colloquia, concern about the practical repercussions of any proposed change in the law in this area was voiced by individuals working in various quarters of the legal world. The argument was made that a thorough search of multiple extrinsic materials might reveal several possible interpretations of a provision, and that these meanings would often conflict with each other. This would require counsel to raise complex evidence from parliamentary records on behalf of his client, which would cause great delay in

¹⁶⁴ For an analysis of recent Australian case-law on section 15AB of the *Australian Acts Interpretation Act, 1901* (as amended), see Brazil, "Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting" (1988) 62 ALJ 503.

¹⁶⁵ Corry, "The Use of Legislative History in the Interpretation of Statutes" (1954) 32 Can Bar Rev 624, cited in Bennion, *Statutory Interpretation – A Code* (3rd ed., Butterworths, 1997), 519.

proceedings and undermine legal certainty. Indeed, if reference to Oireachtas debates was permissible in formulating a possible line of argument in a case, it might follow that counsel was in fact bound to investigate this possibility. These observations obviously reflect an underlying concern about escalating legal costs.

5.63

In response to this prediction that proceedings would be lengthened, however, some commentators have expressed an alternative view. They have argued that a decision to grant to the courts a greater degree of freedom to look at parliamentary records, in order to resolve difficulties of construction, would in fact have the opposite effect, shortening proceedings and encouraging more settlements. Among those who subscribe to this opinion is Lord Bridge of Harwich, who was one of the majority in *Pepper v. Hart*. The basis for his view, as expressed in the later case of *Chief Adjudication Officer v. Foster*,¹⁶⁶ is that sometimes, reference to the parliamentary record may provide a quick and clear solution to a problem created by statutory ambiguity. In the latter case, Bridge L was of the opinion that if it had been possible to take account of parliamentary material at the outset, it would have been clear that the material refuted the appellant's contentions, so that she might well have been disinclined to bring her appeal in the first place.

5.64

In answer to the concern that there could be over-reliance on parliamentary records, it should be recalled that a court has various 'tools of discipline', most notably relating to the award of costs, against parties who waste the Court's time. Empirical evidence from other jurisdictions, as to their experiences on this point, speaks with two voices. In the United Kingdom, most commentators are of the view that, since *Pepper v. Hart*, there has been an increase in the number of arguments led, concerning legislative intention.¹⁶⁷ However, in Australia it seems that the courts have been able to regulate such arguments quite effectively.¹⁶⁸ In this regard, we are nonetheless conscious that while in principle, the situations in which debates may be invoked may be strictly defined, and adherence to these limits could be expected initially, slippage is likely to occur as the years go by, resulting in a progressive relaxation of the rules.

(v) *Judicial practice*

5.65

In an article published in 1994, Lord Lester referred to the widespread practice among the judiciary in England of referring informally to Hansard, or as he put it, taking "a surreptitious peek" at the debates without informing the parties.¹⁶⁹ Similarly, another judge remarked to us that he often looked at the debates himself, yet counsel was forbidden to raise them. This is objectionable on the basis of the fundamental precept that judges should not utilise any arguments other than those which have been stated in open court, so that both sides have an opportunity to controvert them and make submissions as to their relevance to the case.¹⁷⁰

¹⁶⁶ [1993] 2 WLR 292.

¹⁶⁷ Tunkel, "Research after *Pepper v. Hart*", 90 *Gazette*, 17.

- 168 Bryson (1992) 8 *Australian Bar Review* 185.
- 169 Lester, (1994) 15 *Statute Law Review* 10, 17. Lord Lester cites, in particular, the case of *Charter v. Race Relations Board* [1973] AC 868.
- 170 For a somewhat analogous case, see *Kiely v. Min. for Social Welfare* [1977] IR 267, where an appeal was allowed against the decision of an appeals officer in the then Dept. of Social Welfare because the assessor did not disclose to the parties an issue which was taken into account in his

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5.66

The importance of this principle was recognised by the House of Lords in the rather notorious case of *Hadmor Productions v. Hamilton*.¹⁷¹ Here, Lord Denning was censured by the Law Lords, having admitted in a judgment that he had read Hansard in private. This admission was made after both parties had concluded their arguments, in which no reference had been made to the parliamentary record.

5.67

Lord Diplock, delivering judgment for the House of Lords, laid strong emphasis on the principle that counsel had a right to know what material would be considered by the Court. He went on to explain the reason why he took exception to this type of judicial practice;

“Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied on by the judge and to be given an opportunity of stating what his answer to it is. In the instant case counsel ... complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill ... and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise [that speech] but he would also have wished to rely on other speeches disagreeing [with it].”¹⁷²

D. Conclusion

5.68

In principle, we believe that extrinsic aids should be available to a judge who is faced with a provision which is unclear, even when it is read in the light of the Act as a whole, or which, when given a literal interpretation, fails to reflect the plain intention

of the legislature. In response, it may be argued that once a judge is permitted to look at sources outside the Act, they will have a bearing on his decision as to whether they should influence his interpretation of the text of the statute. We recognise the dangers of this and therefore we aim to limit the cases in which recourse should be taken to material outside an Act. We acknowledge that such recourse should be the exception rather than the rule, notwithstanding the desirability of what Budd J has described as “informed interpretation”.¹⁷³

5.69

It is also worth emphasising again that many judges admit to looking at these contextual materials in private, but omitting to refer to them in their judgments. It is our strong view that any material which influences the decision of a court should be available to litigants. Thus, our position is intended to place what is currently widespread judicial practice on a more solid and transparent footing. The countervailing dangers, relating to legal uncertainty, are probably overstated when one considers that the judiciary would retain a wide discretion to allow or disallow

¹⁷⁰ decision.

¹⁷¹ [1982] 1 All ER 1042 (House of Lords), overturning the Court of Appeal decision, at [1981] 2 All ER 724.

¹⁷² *Op. cit.* fn 171.

¹⁷³ See Para.5.46 *above*.

reference to extrinsic aids in a particular case. The value of such a discretion would be that a judge would at least have the option of looking at material which could resolve a difficulty.

5.70

This recommendation is made with cases like *Murphy v. Bord Telecom* very much in mind.¹⁷⁴ It is the view of the Commission that the courts should never be forced to come to such a counter-intuitive and unjust decision, when this could have been avoided simply by reference to materials freely available in the public domain.

5.71

As regards Oireachtas debates, we take the view that decisions regarding the aids to which reference may be made should always be left to the discretion of the Court. In seeking to strike the correct balance, thus allowing sufficient discretion, while also limiting it in the interests of certainty, we do not see why any particular category of extrinsic aid should be singled out for different treatment. The most important yardstick here is relevance – some types of material (*eg* the history of Irish legislation governing the particular area of law) will naturally be more likely to be useful than

others (eg Law Commission Reports from England), which will be of use far less often. However, each type of material is related in a slightly different way to the drafting of legislation, so it is pertinent to consider how each could potentially contain evidence of the intention of the legislature.

5.72

We noted earlier, at Para.5.02, that there are two situations in which extrinsic aids may be relevant. The first of these is where the meaning of a statute is ambiguous. The other is where the meaning is, on its face, clear; yet it contradicts the purpose of the legislature. There is obviously a case for confining the use of extrinsic aids to the first category, since the second involves a departure from the literal meaning of the provision. However, in practice there is likely to be substantial overlap between the two categories; the sort of case in which a provision has only one plain meaning on its face, which contradicts the plain purpose of the legislation, is likely to be rare. And where such a situation, or something close to it, occurs, one would expect the Court to clarify matters expressly, so as to ensure that no-one would be misled by relying on the plain words of the provision. Accordingly, we do not recommend the adoption of this distinction, and it is not utilised in the draft proposed.

5.73

While the arguments for and against the use of Oireachtas debates are finely balanced, we do not think that this category of extrinsic materials should be excluded from the approach which we recommend, provided that they are only used where there is a clear case for their utility, and subject to the safeguards recommended in this chapter.

E. Formulation of a new statutory provision

5.74

Taking account of these factors, the Commission would adopt a moderate position. *We recommend the creation of a legislative framework to regulate this area, rather than a decision to leave the matter entirely to the common law. However, we would recommend building into this framework a large measure of judicial discretion. We would favour a provision allowing for the use of extrinsic aids in certain situations (section 2(1) below) but would then go on to restrict it in two ways; first, (in section 2(2)) by an exhaustive list of the categories of aids to which reference may be*

¹⁷⁴ See Paras.2.23–25 above.

made, and second, (in section 2(3)), by reference to matters which a court must take into account before admitting extrinsic aids.

5.75

The shape which this strategy might take, in the form of a statutory provision, is set out in the final page of this Chapter.¹⁷⁵ Section 1 of our draft provision, which we have already recommended at Para. 2.44, is qualified by the phrase, “provided that this can be gathered ...”. Accordingly, we have included the phrase, “Notwithstanding anything in section 1 ...” at the start of our proposed section 2(1), so as to authorise a court to make use of extrinsic aids. Since this provision builds upon section 1, which we proposed in Chapter 2, we repeat that section here, for the convenience of the reader.

5.76

The following points, in particular, may be worth noting:

1. The exhaustiveness of the list in sub-section (2) is designed to promote certainty and to keep the courts' search for enlightenment within some reasonable bounds. On the other hand, paragraph (h) is (we intend) a narrow concession to such a possibility as Costello P's recourse to United Kingdom Parliamentary records in the case of *DPP v. McDonagh*.¹⁷⁶ The phrase “for a particular reason” is included to emphasise that reference to materials, other than those listed at (a) to (g), should be made only in exceptional cases.
2. A good deal of judicial discretion is deliberately built into this model, especially in section 2(3). We believe that, for instance, the wording of section 2(3)(a) (“the desirability ...”), would allow a court to take a pro-accused or pro-tax payer approach, in the case of penal or taxation cases.
3. Section 2(3)(b) reflects the general feeling that 'case management' is a necessary and legitimate factor to be taken into account. In answer to the criticism that reference to extrinsic aids will prolong litigation, it is submitted that this is not inevitable – the contrary may also be true. Case-law suggests that there will be instances where reference to extrinsic aids will yield a 'knockdown' argument, which will clarify a complex point of law and may even render litigation predictably futile.

¹⁷⁵ This represents a fairly light redraft of the Australian 1901 *Acts Interpretation Act*, which was the model utilised in our *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14–1999, 1999), 94–5, and again at 122.

F. Recommended provision

Section 1

In construing a provision of an Act

- (a) **which is ambiguous or obscure; or**
- (b) **a literal interpretation of which would be absurd or would fail to reflect the plain intention of the Oireachtas,**

a court may depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas; provided that this can be gathered from the Act as a whole.

Section 2

- (1) **Notwithstanding anything in section 1, in determining the intention of the Oireachtas, for the purposes of that section, a court may also, at its discretion, make use of extrinsic aids to construction.**
- (2) **The only extrinsic aids that may be considered in determining the intention of the Oireachtas are:**
 - (a) **any document that is declared by the Act to be a relevant document for the purposes of this section;**
 - (b) **any relevant report of an Oireachtas committee;**
 - (c) **any treaty or other international agreement referred to in the Act;**

- (d) **any official explanatory memorandum relating to the Bill containing the provision;**
 - (e) **the speech made by a Minister on the second reading of a Bill;**
 - (f) **any other material from the official record of debates on the Bill in the Dáil or Seanad;**
 - (g) **any publication of the Law Reform Commission or other official body that was published before the time when the provision was enacted;**
 - (h) **legislation dealing with the same subject area as the provision being construed;**
 - (i) **such other document as the court, for a particular reason, considers essential.**
- (3) **In determining whether consideration should be given to any extrinsic aid in accordance with subsection (1), or in considering the weight to be given to any such aid, a court shall have regard, in addition to any other relevant matters, to—**
- (a) **the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act; and**

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- (b) **the need to avoid prolonging any legal or other proceedings without compensating advantage.**

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CHAPTER SIX LEGISLATIVE DRAFTING

6.01

Much of this Report deals with the question of how a judge interpreting a statute should approach the cases, which occasionally arise, where the purpose of a statutory provision is unclear or when the literal and purposive meanings of a provision are not the same. Of course, it would be better if such difficulties did not arise in the first instance and in this chapter we investigate certain strategies that may be used in the drafting process to ensure that the purpose of a statute is clear.

6.02

The movement towards plain language in legislative drafting reflects a broader movement towards more comprehensible language in contracts, forms and other legal documents. There has already been much reform in these areas. One practising solicitor, whose practice includes work in the areas of construction and arbitration, informed us that he has been working on a project for developing construction forms and other documents that are “as simple as possible but no simpler”. He referred to the use of “ordinary language, reinforced ... with graphics and other drafting tools, and with constant emphasis on purpose”.

6.03

One can discern a more general trend in this direction in the wider legal and commercial worlds. Indeed, this issue is now considered so significant that an insurance company recently thought it worthwhile to highlight the fact that their policies were drafted in plain English, in an effective radio advertisement which included the punch-line (referring to the drafting of their policies); “no guff; no guitar solo”.

6.04

In spite of these general trends, it must be admitted that the language and style of statute law has remained largely unchanged. However, many jurisdictions have embarked on reform projects to improve the quality of their legislation and we intend to refer briefly to some of those projects below. It is our view that Ireland and the rest of the common law world can benefit from each other's experiments in this field.

6.05

As in our earlier Consultation Paper, we have divided the topic of drafting reform into four broad areas.¹⁷⁷ The first three of these are concerned with the 'readability' of statutes *ie* they are directed to ways in which the quality and clarity of statute law can be improved and ambiguity thus avoided. The fourth area investigates the question of whether it is possible to make a clear authoritative statement of the purpose of an Act, either within the Act itself, or in material published with it.

¹⁷⁷ The categorisation used here differs slightly from that used in our *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14–1999, 1999), at Para.5.01. The main difference is that in the present Report, we have grouped the topic 'Structure of Statutes' together with our discussion of the utilisation in legislative instruments of devices such as examples and mathematical

formulae. The second difference is that we have created a separate category, termed 'Legislative Statements of Purpose'. This is in recognition of the importance that was ascribed to this topic during our consultation process.

6.06

The four areas which we will examine in this Chapter are;

- A. Language
- B. Structure and Content of Statutes
- C. Amendment and Consolidation
- D. Legislative Statements of Purpose

A. Language

Familiar vocabulary should be used in legislative drafting

6.07

The use of Latin and French terminology or other archaic language obscures the meaning of the law. Latin and French are now rarely used in ordinary conversation in Ireland, but words such as 'herein', 'heretofore', 'aforesaid' and 'aforementioned' are frequently used in legislation. Because their use is now largely confined to legal contexts, they are not always readily comprehensible to most members of the public. Similarly, the persistent use of the word 'shall', when the modern meaning of the word 'must' would be more appropriate, can obscure the meaning of even simple legislative provisions. Peter Rodney, legislative draftsman for Gibraltar, recommends the *Data Protection Act, 1998*, in the United Kingdom, as an example of how 'must' is now being used in place of 'shall' to improve the clarity of statute law. The ongoing use of archaic words also extends to the use of certain specialised formulae, such as "An Act may be cited as...", which might usefully be replaced by a more modern phrase such as "An Act is called...".

6.08

Similarly, there has been a tendency to use excessively formalised words in legislation, long after those words were replaced in common usage by simpler expressions. For example, the legislature continues to use the word 'facsimile', in spite of the fact that the public, almost universally, prefers the term 'fax'.¹⁷⁸ Another example of this legislative characteristic is provided by the *Electronic Commerce Act*,

2000, which uses the obscure term 'electronic communication', in place of the common term 'e-mail'.¹⁷⁹

Shorter sentences should be used in legislative drafting

6.09

In general, it is recommended that sentences should not exceed 20–25 words in length, as over-lengthy sentences obscure the central message of a sentence. One of the main reasons for the prevalence of long sentences in legislation is the convention that a section within an Act should consist of one sentence only. It would appear that most draftsmen still follow this convention, even though there would appear to be no pressing reason for its strict observance. Very often, too, draftsmen include words that appear superfluous. This is probably a symptom of an excess of the traditional care taken to ensure that there is no omission in a section. The common practice of using two or three words, with a similar meaning, in succession, when one noun would suffice, seems to us to be equally unnecessary.

¹⁷⁸ For example, see the *Criminal Evidence Act, 1992*, s.30(2).

¹⁷⁹ *Electronic Commerce Act, 2000*, s.12.

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6.10

For instance, section 27(2) of the *Local Government (Planning and Development) Act, 1976*, (as substituted by section 19(4)(g) of the *Local Government (Planning and Development) Act, 1992*), states:

“... the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not that person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be...”.

6.11

Typical examples of unnecessary use of synonyms and words with similar meanings are;

last will and testament,

give, and bequeath,

null and void,

rest, residue and remainder,

act and deed.

6.12

The Law Reform Commission of Victoria addressed this issue in its Discussion Paper, *Legislation, Legal Rights and Plain English*.¹⁸⁰ It concluded that the use of surplus words, particularly synonyms, often caused confusion by suggesting a distinction between those words when in fact none existed or was intended. As a consequence, unnecessary repetition of words is no longer seen in Victorian legislation.

Complex and obscure sentence structures

6.13

A major problem with present drafting practice is the use of sentence constructions that are unusual and not readily understandable. There have been several studies and recommendations made on this point over the years, generally to the effect that sentences should be direct and as close to common English usage as possible.¹⁸¹ The excessive use of conditional clauses and the passive voice, the preference for negative over positive expressions and the separation of subject and verb, are the most pronounced examples of this.

6.14

The customary separation of subject and verb within a sentence often means that a reader will have to read through a series of clauses before gaining an understanding of the principal significance of a sentence. A simple example of this problem is provided by section 294 H (2) of the *Social Welfare (Consolidation) Act 1981*, as inserted by section 27 of the *Social Welfare Act, 1993*. The section, as drafted, reads as follows:

“An employer or any servant or agent who aids, abets, counsels or procures an employee in the employment of that employer to commit any offence under subsection (1) shall be guilty of an offence.”

¹⁸⁰ Law Reform Commission of Victoria, Discussion Paper No. 1, Para.24.

¹⁸¹ Examples of such studies include Eagleson, *Writing in Plain English*, (Commonwealth of Australia, 1990) and Redish, “The Plain English Movement”, in Greenbaum, *The English Language Today* (Pergamon Press, 1985).

6.15

When one brings the subject and verb of the sentence together, however, it is more easily understood;

“An employer or any servant or agent of an employer shall be guilty of an offence if he aids, abets, counsels or procures an employee in the employment of that employer to commit any offence under subsection (1).”

6.16

A second point is that there should, generally, be greater use of the active instead of the passive voice. There are occasions when it is more appropriate to use the passive voice to emphasise an act rather than its agent. However, on the whole, present drafting style makes far too much use of the passive voice, often obscuring the central message of a section.

6.17

Thirdly, there is an unfortunate tendency in drafting to make a statement in the negative sense rather than in the direct positive sense. Again, there may be times when this is appropriate, but generally a positive statement is clearer and more to the point.

Cohesion among sections

6.18

The practice of constantly referring back to other sections and sub-sections of an Act, in order to explain the context of a provision, is often unnecessary. Where the sections or sub-sections involved are contained in the same document, this constant cross-referencing often merely confuses and obscures the meaning of the provision.

The creation of unnecessary concepts

6.19

Similarly, constant use of concepts, such as “the relevant period” and “the appropriate date”, in an Act forces the reader to look elsewhere for information which could just as easily be given directly in place of those phrases. This use of unnecessary concepts also tends to obscure the significance of a particular provision

Other Jurisdictions

6.20

The United Kingdom Tax Law Rewrite Project,¹⁸² which commenced in 1996, will re-write almost the entirety of direct tax legislation in plainer language and in more accessible format, without changing or making less certain its effects. In this re-writing, the major technique used is the arrangement of the material around a more logical structure. Similar rules are grouped together and greater use is made of signposts to guide the reader to other relevant provisions. Other techniques which make the legislation more accessible include method statements, examples and formulae. In addition, the drafting style is characterised by the following: shorter

sentences; use of the active rather than the passive voice; and the replacement of archaic expressions. Care is taken however to avoid 're-writing' words or expressions

¹⁸² See *Draft Capital Allowances Bill*, Vols.1–4, July 2000, (available from Tax Law Rewrite, Inland Revenue).

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on which legal usage has stamped a well understood meaning. The British Parliament has adopted a new streamlined procedure which will allow it to scrutinise the re-written legislation properly, without opening up a debate on a full range of fiscal policy matters. Likewise, a 'Corporations Law Simplification Programme' was established in the New South Wales Attorney General's Department as far back as 1993.

Comment and Analysis

6.21

Most of the recommendations which we make in relation to plain language are non-controversial. Generally, they are designed to make legislation easier to read, both for lawyers and lay persons; many of them amount to little more than common sense. An updating of the language and structure of statutes would reflect the evolution of the English language and of the needs of today's consumers of legislative instruments.

6.22

Sometimes brevity does not imply clarity; slightly more obscure words may sometimes be appropriate. In essence, plain language is just one of the factors to be considered in the drafting process, and its relative weight will vary according to the circumstances. Plain language should never be utilised at the expense of legal certainty, particularly where certain words and grammatical constructions, though not in common usage, have acquired a fixed and clear legal meaning. However, in cases such as the examples given above, it is difficult to see how anyone could be misled by modern language which merely clarifies the meaning of a provision for a reader. It is noteworthy in this regard that, by and large, the judgments of our courts are written in comprehensible and precise, but also readable, English.

6.23

Concern has sometimes been expressed about the resources which would be required to implement a programme of plain language reform. The conclusion reached in our Consultation Paper on this point was that any short-term costs would be outweighed by the long-term benefits of removing much of the ambiguity and uncertainty which currently affects statutory interpretation.¹⁸³ We wish to reiterate that view here and also to point out that plain language reform is a project which will probably have to be undertaken at some stage in the near future, bearing in mind the continuing increase in the amount of new legislation coming before the Oireachtas.

6.24

Accordingly we recommend a comprehensive programme of plain language reform in Irish statute law. In this regard we support the initiatives currently being undertaken by the Office of the Parliamentary Counsel to the Government and the Statute Law Revision Unit.

B. Structure and Content of Statutes

6.25

The layout and structure of statutes are also important. Issues which arise under these topics include general points such as the organisation and numbering of statutes and improved typography. For example, the highlighting in bold of terms which have been defined earlier in an Act directs a reader to the statutory definitions

¹⁸³ Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (CP14–1999, 1999), at paras.3.36–39.

provided. These issues are all currently under consideration in the Office of the Parliamentary Counsel to the Government, with a view to inclusion in the forthcoming Drafting Manual.¹⁸⁴ However, the following recommendations are offered as examples of innovative methods which might be used to good effect in future drafting of statutes.

Use of examples

6.26

We are of the view that there should be increased use of examples in statutes, given that research in the general area of communication has shown that examples increase the ability of a reader to understand complex concepts.¹⁸⁵ There has been some concern expressed that examples should not form part of a substantive Act, as they may constitute restatements of the enacting provisions of the Act.

6.27

The use of examples violates the precept – once thought to be fundamental to drafting style – that a statute should contain no repetition. It has been argued that an example within an Act could possibly conflict in some way with the literal meaning of the provision itself, and that if the example had also been given authoritative status, confusion would result. However, our Colloquia disclosed that judges no longer regard the rule against repetition as inviolable.

Use of maps, diagrams, mathematical formulae, etc.

6.28

The Commission favours the use of maps, diagrams and mathematical formulae when these can clarify the context or effects of a statute. In particular, simple mathematical formulae can be used in legislation in place of complex jargon which may require many words and a tortuous series of clauses and sub-clauses to convey the same meaning in English. For instance, at the end of this chapter, we reproduce an extract from the United Kingdom Tax Rewrite Project Tax law, which demonstrates the possible use of mathematical formulae, charts and diagrams in the context of plain language reform. The project is widely regarded as a great success. We believe that tax law, in particular, is an area which would benefit greatly from the use of mathematical formulae which make it much easier for a practitioner to understand the effect of a tax statute.

C. Amendment and Consolidation

6.29

As we have already noted, updating and consolidation of the statute book are important issues in maintaining the accessibility of the law. These twin issues are primarily matters for the Office of the Attorney General and the Parliamentary Counsel. We welcome the fact that they are presently engaged in a number of projects designed to address these issues and, while we do not intend to discuss this area in great depth here, we note briefly some of these projects.

¹⁸⁴ The then Office of the Parliamentary Draftsman issued this Manual in 1998 and is presently completing an updated version to be published shortly.

¹⁸⁵ *Op. cit.* fn.183, Paras.5.68–5.75.

- A Statute Law Revision Unit was established in the Office of the Attorney General in February 1998 to draw up and co-ordinate a programme of revision and consolidation.

- In August 2000, the Law Reform Commission submitted to the Attorney General a *Law Reform (Miscellaneous Provisions) Bill*, setting out a series of proposed statutory amendments on a range of topics. The purpose of the Bill is to effect minor, but valuable, reforms in a variety of legal areas; reforms that would not in themselves justify the introduction of individual Bills.

- The Revenue Commissioners have published two major consolidating statutes in recent years; the *Taxes (Consolidation) Act, 1997* and the *Stamp Duties (Consolidation) Act, 2000*. The Department of Social, Community and Family Affairs has also published Consolidation Acts at intervals of ten years in the area of social welfare law.

D. Legislative Statements of Purpose

6.30

One strategy that would help in avoiding the need to look outside an Act for evidence of legislative intention, would be the inclusion of a statement of purpose in the statute itself. There are several ways in which a draftsman can present such a definitive statement of the object or purpose of an Act, namely through a preamble, a purpose clause or a recital.¹⁸⁶ Essentially there are no significant differences among these options. An alternative approach would be to include a statement of purpose with explanatory material that would be published with the statute. Generally, such explanatory material is presented in the form of explanatory memoranda (but it may also, for example, take the form of explanatory notes, as occurs in England).

Statements of legislative purpose in an Act

Preamble and Recital

6.31

The 'preamble' is an optional part of an Act, which, if present, is placed after the long title and states the reason for the enactment of the statute.¹⁸⁷ It serves as a form of introduction to an Act, indicating the purpose of the substantive provisions which follow. A 'recital' has the same function as a preamble, but its scope is confined to a single section of an Act. In other words it is a comment upon, or introduction to, a particular section, setting out the purpose of the section. One might think that a useful source of explanatory material could be provided by the inclusion of such features within an Act. However, actual practice in Ireland has tended not to make maximal use of either preambles or recitals, and this is reflected in the latest Manual of Drafting Style, which omits to list either preambles or recitals as part of the sequence of provisions of an Act.

¹⁸⁶ The long title of an Act may also disclose the purpose of the Act. Every Act has a long title and its utility as an aid to interpretation is discussed in Chapter 4 of the present Report.

¹⁸⁷ Indeed the long title and preamble have, on occasion, been referred to interchangeably in the Irish Courts. In the case of *Croke v. Smith*, Supreme Court, July 31 1996, Hamilton CJ uses the term 'preamble' to refer to the long title of the *Mental Health Act, 1945*.

Purpose Clauses

6.32

Neither has it been the practice in Ireland to include purpose clauses in the drafting of statutes. The only recent example of such a clause that we found in the course of our research was in the *Taxes (Consolidation) Act, 1997*, where section 806(3) states

“This section shall apply for the purpose of preventing the avoidance by individuals ordinarily resident in the State of liability to income tax by means of transfers of assets by virtue or in consequence of which either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State.”¹⁸⁸

6.33

On further investigation, however, we discovered that this section of the Act is based on a section contained in a corresponding English statute. The reasoning behind the inclusion of sub-section (3) in the Irish Act was that it would be inappropriate to import the whole section from the English Act without including all its constituent parts – including the purpose clause. It would appear, then, that the section cannot be taken as evidence of any new policy in Ireland to make use of such clauses. As in the case of preambles and recitals, the last Parliamentary Draftsman's Manual of Drafting Style makes no mention of the use of purpose clauses. It may be of interest to note that in Bermuda, all Acts have an 'objects' section setting out the purposes of the act in question.¹⁸⁹

Comment

6.34

It is significant that the use of purpose clauses is standard practice in European Union legislation, an increasingly important source of Irish law. It is, of course, possible to envisage cases where a legislative statement of purpose could resolve a point of uncertainty in statutory interpretation, in much the same way as an intrinsic aid. For example, the case of *Murphy v. Bord Telecom*¹⁹⁰ would almost certainly have been decided differently if there had been a clause in the *Equal Pay Act* setting out the objects of the Act. The controversies about the origin and status of the material would most probably never have arisen.

6.35

However, some speakers at our Colloquia were somewhat sceptical about whether the use of purpose clauses would have such a clarifying effect. Admittedly, it is difficult to see how a single purpose clause could resolve all, or even most, of the potential ambiguities in a statute. And there may be other problems associated with the use of purpose clauses. At our Colloquia there were some suggestions that a

¹⁸⁸ An earlier, analogous provision – section 57 of the *Finance Act, 1974*,

contained the following, more complex formulation; “For the purpose of preventing the avoiding by individuals ordinarily resident in the State of liability to tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State, it is hereby enacted as follows...”

189 Rodney, Legislative Counsel for Gibraltar, in a Paper delivered to “Emerging Trends in Legislative Drafting”, a Conference hosted by the Attorney General, Dublin Castle, 6–7 October 2000.

190 [1986] ILRM 483 (see Paras.2.23–25.)

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purpose clause could become the focus of debate in the Oireachtas, diverting attention from the substantive provisions of a Bill. There is certainly a perception that such clauses might be open to abuse by members of the Oireachtas, who might propose purpose clauses designed to give legislation the appearance of being something other than it is. Such clauses might not accurately reflect the content of the substantive provisions of a Bill and there may be a danger of conflict between the actual provisions contained in a Bill and its politically-motivated purpose clause.¹⁹¹

Explanatory Memoranda

6.36

Explanatory memoranda are published with Bills, for the purpose of providing guidance to members of the Oireachtas when Bills come before the Dáil and Seanad. The use of explanatory memoranda has become more common in recent years. However, 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. Very often, these Departments may have little or no in-house legal expertise.

Explanatory Notes in England

6.37

In England, explanatory and (usually brief) financial memoranda have been replaced by fuller “explanatory notes” since the beginning of the 1998–1999 parliamentary session.¹⁹² These notes are the result of a recommendation of the House of Commons Select Committee on Modernisation,¹⁹³ and are published with all Bills. They are prepared when a Bill is first introduced to Parliament and are later revised, both when the Bill moves to the House of Lords and when it receives Royal Assent. These updated versions reflect any amendments that may have been made since the earlier version. Another innovative development is that these notes are made available in both printed form and on the internet. However, the notes are prepared in the relevant

Departments and do not receive the draftsman's approval. Also, and most importantly, they do not form part of the Bill itself.

Comment

6.38

Explanatory memoranda have the status of extrinsic aids, given that they do not constitute part of the Act itself. Nonetheless, it has been suggested that the involvement of draftsmen or Parliamentary Counsel in the preparation of explanatory memoranda or notes, or at least some standardisation of these materials, would improve their usefulness. At our Colloquia many judges expressed concern that both

¹⁹¹ We note that similar concerns have been expressed in relation to statements made during Oireachtas debates and consequential dangers in their use as extrinsic aids.

¹⁹² For a full discussion of the practical implications of this change, see Jenkins, "Helping the Reader of Bills and Acts", (1999) NLJ 798.

¹⁹³ Select Committee on Modernisation, Second Report, *Explanatory Material for Bills*, December 1997.

the length and the quality of explanatory memoranda are quite variable. Against this, the point has been made, in the English context,¹⁹⁴ that there is a greater degree of flexibility associated with the drafting of explanatory notes within government departments. The draftsman's customary methods are informed by the goals of consistency, certainty and precision. If explanatory materials had to be drafted or approved by draftsmen, it is likely that they might be in a more rigidly standardised form.

6.39

At our Colloquia it was a major concern, particularly of the parliamentarians present, that explanatory memoranda could often become misleading in a situation where a Bill had been heavily amended in the Oireachtas. In response to this, we would point out that it is difficult to see why a later, definitive, version of the memorandum should not be published when a Bill actually becomes law. Indeed, it would appear that updated versions of explanatory memoranda have been published with important Acts in the past.

Recommendations

6.40

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.

We recommend that the viability of direct involvement by Parliamentary Counsel in drafting, or setting standards for, explanatory memoranda, should be investigated.

Where an explanatory memorandum is published, it should be updated, if necessary, to reflect amendments made during a bill's passage through the Houses of the Oireachtas.

Explanatory memoranda should be made available on the internet.

¹⁹⁴ Jenkins, *op. cit.* fn.192, at 798.

Appendix to Chapter Six : Extract from the United Kingdom Tax Rewrite Project

6.41

The following is an example of the work of the United Kingdom Tax Law Rewrite Project, which illustrates the effect of implementing some of the drafting changes which we have endorsed above. This example is copied from an article written by the Director of the project, Neil Munro.¹⁹⁵

6.42

He first reproduced the traditionally-drafted English *Income and Corporation Taxes Act, 1988*, which reads as follows;

Original Text

‘ICTA 1988

PT.V

CH.II

S.163

INCOME AND CORPORATION TAXES ACT 1988

Expenses connected with living accommodation [1976 s.63A; 1977 s.34]

163.

- (1) This section applies where, in the case of a person employed in [employment to which this Chapter applies], living accommodation is provided by reason

of the employment and, accordingly, a charge to tax would arise in his case under section 145 but for the case being one of those specified in subsection (4) of that section.

- (2) Where, by reason of expenditure incurred in one or more of the following, that is to say, –
 - (a) heating, lighting or cleaning the premises concerned;
 - (b) repairs to the premises, their maintenance or decoration;
 - (c) the provision in the premises of furniture or other appurtenances or effects which are normal for domestic occupation;

or by reason of such expenditure being reimbursed to the employee, an amount falls to be included in the emoluments of his employment, that amount shall not exceed the limit specified in subsection (3) below.

- (3) That limit is –
 - (a) 10 per cent of the net amount of the emoluments of the employment or, if the

¹⁹⁵ See Munro, “Tax Law for the 21st Century”, (1999) *Taxation Practitioner*, 10, at 12–13.

accommodation is provided for a period of less than a year, so much of that percentage of the net amount as is attributable to the period; less

- (b) where the expenditure is incurred by a person other than the employee, so much as is properly attributable to the expenditure of any sum made good by the employee to that other.

- (4) The net amount of the emoluments of a person's employment for the purposes of subsection (3) above is the amount of those emoluments (leaving out of account the expenditure in question) after –
- (a) any capital allowance; and
- (b) any deductions allowable under section 198, 199, 201, 332(3), 592(7), 594 or 219(1)(a);

and, for the purposes of this subsection, in the case of employment by a company there shall be taken into account, as emoluments of the employment, the emoluments of any employment by an associated company.

- (5) For the purposes of subsection (4) above, a company is an associated company of another if one of them has control of the other or both are under the control of the same person.”

New Simplified Version

6.43

Munro then provides, in his article, the text of the new, simplified version of the same legislation;

“Part 4 – Employment Income

Chapter 4.7 – Taxable Benefits: living accommodation

4.7.20 Limit on charge to tax on expenses connected with living accommodation

- (1) This section applies where there would be a charge to tax under this Chapter on the benefit of living accommodation but for the case falling within –

section 4.7.3(1) (accommodation necessary for proper performance of duties),

section 4.7.3(2) (accommodation provided for better performance of duties), or

section 4.7.4 (accommodation provided due to security threat).

- (2) It applies where –
- (a) expenditure is incurred on –
 - (i) heating, lighting or cleaning the premises,
 - (ii) repairs to the premises, their maintenance or decoration, or
 - (iii) the provision in the premises of furniture or other appurtenances or effects which are normal for domestic occupation; or
 - (b) the employee is reimbursed for any such expenditure,

and consequently an amount falls to be taxed as earnings of the employee.

Note; For the amount to be treated as earnings in these circumstances, see section 4.2.1 (all emoluments treated as earnings) and Chapter 4.12 (taxable benefits: residual liability to charge).

- (3) Where this section applies the amount falling to be taxed as earnings in respect of the items in subsection (2) is limited to the amount given by the formula –

$(0.1 \times NE \times ND/365) - SMG$

where –

NE is the net amount of the earnings of the employment;

ND is the number of days in the tax year for which the accommodation is provided; and

SMG is, where the expenditure is incurred by a person other than the employee, so much of any sum made good by the employee to that other as is properly attributable to the expenditure.

- (4) For this purpose the *net amount of the earnings of the employment* is calculated as follows –

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Step One

Take the earnings of the employment, leaving out of account the expenditure in question.

Step Two

Add, in the case of employment by a company, the earnings of any employment by an associated company.

A company is *associated* with another for this purpose if one has control of the other or both are under the control of

the same person.

Step Three

Deduct –

- (a) any capital allowance, and
- (b) any deductions allowable under [ICTA ss. 198, 199, 201, 332(3), 592(7), 594 or 609(1)(a)].

Defined terms; company – ICTA s.832(1) “company” control – ICTA ss. 168(12), 840; living accommodation – section 4.7.1; tax year – section 1.1.2.

Origin; subs.(1) – ICTA s.163(1); subs.(2),(3); subs.(4) – ICTA s. 163(4),(5).

Income Tax Bill”

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CHAPTER SEVEN SUMMARY OF RECOMMENDATIONS

Moderately Purposive Approach to Statutory Interpretation

1.

The Commission recommends that a standard approach to statutory interpretation should be set out in legislation. [Para.1.11]

2.

The Commission recommends that the literal rule should remain the primary rule of statutory interpretation. [Para.2.42]

3.

However, the Commission recommends that a court should be enabled to depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas, where a provision of an Act is ambiguous or obscure; or when a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas. The plain intention of the Oireachtas in such cases should be gleaned from a reading of the Act as a whole. [Para.2.44]

4.

The Commission is of the view that a provision enacted in accordance with the above recommendations need not contain any express exception for penal or tax statutes. [Para.2.53]

Updated Construction of Older Statutes in the light of Recent Developments

5.

The Commission recommends a provision which would authorise a court to make allowances for changes which have occurred in law, social conditions, technology, the meaning of words used in an Act and other relevant matters, which have occurred since an Act was passed; yet without going so far as to encroach upon the province of the legislature. [Paras.3.40–44]

Intrinsic Aids to Construction

6.

The Commission is of the opinion 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. [Paras.4.32–35]

7.

To achieve this, the Commission recommends that s.11(g) of the *Interpretation Act, 1937* should be repealed, and that a provision should be

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enacted which would positively authorise a court to have regard to intrinsic aids. [Para.4.35]

Extrinsic Aids to Construction

8.

The Commission is of the view that a court should be free to make reference to extrinsic aids 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. [Para.5.68]

9.

The Commission considers that while it is appropriate that a large measure of judicial discretion should be retained in this area, a legislative framework should nonetheless be put in place, rather than leaving the matter entirely to the courts. [Para.5.74]

10.

The Commission recommends that the use of extrinsic aids for these purposes should be restricted in two ways: first, by an exhaustive list of the permissible categories of extrinsic aids to which a court may refer; and secondly, by the stipulation of certain contra-indications which a court must consider before using extrinsic aids to construction (Sections 2(2) and 2(3) of our Draft Legislative Provisions, in Appendix 1). [Para.5.74]

11.

The Commission recommends that the official record of debates in the Dáil or Seanad should be included among the extrinsic aids to which a court may refer. [Para.5.73]

Legislative Drafting

12.

The Commission recommends 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. In this regard we support the initiatives currently being undertaken by the Office of the Parliamentary Counsel to the Government and the Statute Law Revision Unit. [Para.6.24]

13.

The following policies or devices should be adopted where possible and appropriate:

- (a) familiar and contemporary vocabulary in legislative drafting;
- (b) shorter and less complex sentences;
- (c) the active, rather than the passive, voice;
- (d) positive statements, rather than negative ones;
- (e) the avoidance of multiple cross-references between sections and subsections of the same Act;
- (f) the replacement of concepts, such as 'the relevant period', or 'the appropriate date', with more specific information where this would be clearer;
- (g) increased use of examples, maps, diagrams and mathematical formulae; and

(h) the highlighting in bold font of terms defined earlier in an enactment. [Paras.6.07–19, and 6.25–28]

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14.

However, the Commission wishes to emphasise that while the use of plain language is desirable, 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. [Para.6.22]

15.

The Commission recommends that 'purpose clauses' should be included where appropriate, and supports the view that this ought to be done, in particular, where an Act gives effect to European legislation which itself has such a 'purpose clause'. [Paras.6.30–35]

16.

The Commission recommends that explanatory memoranda should accompany legislation where appropriate; such explanatory memoranda should 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. [Paras.6.36–40]

17.

In Appendix 1, which follows, we provide a suggested draft for the various legislative provisions, recommended above.

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APPENDIX 1: DRAFT LEGISLATIVE PROVISIONS

Section 1

In construing a provision of an Act

- (a) **which is ambiguous or obscure; or**

- (b) **a literal interpretation of which would be absurd or would fail to reflect the plain intention of the Oireachtas,**

a court may depart from the literal interpretation and prefer an interpretation based on the plain intention of the Oireachtas; provided that this can be gathered from the Act as a whole.

Section 2

- (1) **Notwithstanding anything in section 1, in determining the intention of the Oireachtas, for the purposes of that section, a court may also, at its discretion, make use of extrinsic aids to construction.**
- (2) **The only extrinsic aids that may be considered in determining the intention of the Oireachtas are:**
 - (a) **any document that is declared by the Act to be a relevant document for the purposes of this section;**
 - (b) **any relevant report of an Oireachtas committee;**
 - (c) **any treaty or other International Agreement referred to in the Act;**
 - (d) **any official explanatory memorandum relating to the Bill containing the provision;**
 - (e) **the speech made by a Minister on the second reading of a Bill;**
 - (f) **any other material from the official record of debates on the Bill in the Dáil or Seanad;**
 - (g) **any publication of the Law Reform Commission or other official body that was published before the time when the provision was enacted;**
 - (h) **legislation dealing with the same subject area as the**

provision being construed;

- (i) **such other document as the court, for a particular reason, considers essential.**

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- (3) **In determining whether consideration should be given to any extrinsic aid in accordance with subsection (1), or in considering the weight to be given to any such aid, a court shall have regard, in addition to any other relevant matters, to-**
 - (a) **the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act; and**
 - (b) **the need to avoid prolonging any legal or other proceedings without compensating advantage.**

Section 3

In construing a provision of an Act, a court may make allowances for any changes, in law, social conditions, technology, the meaning of words used in the Act and other relevant matters, which have occurred since the date of the passing of the Act, so far as its text, purpose and context permit.

Section 4

- (1) **Section 11 (g) of the *Interpretation Act, 1937* is hereby repealed.**
- (2) **In construing the provisions of an Act, a court may make use of all matters that are set out in the document containing the text of the Act as officially printed.**

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The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

APPENDIX 2: LIST OF LAW REFORM COMMISSION PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl. 5984) [out of print] [10p Net]

Working Paper No. 1–1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977) [£ 1.50 Net]

Working Paper No. 2–1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977) [£ 1.00 Net]

Working Paper No. 3–1977, Civil Liability for Animals (November 1977) [£ 2.50 Net]

First (Annual) Report (1977) (Prl. 6961) [40p Net]

Working Paper No. 4–1978, The Law Relating to Breach of Promise of Marriage (November 1978) [£ 1.00 Net]

Working Paper No. 5–1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978) [£ 1.00 Net]

Working Paper No. 6–1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (February 1979) [£ 1.50 Net]

Working Paper No. 7–1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) [£ 1.00 Net]

Working Paper No. 8–1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979) [£ 1.50 Net]

Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]

Working Paper No. 9–1980, The Rule Against Hearsay (April 1980) [£ 2.00 Net]

Third (Annual) Report (1980) (Prl. 9733) [75p Net]

First Report on Family Law – Criminal Conversation, Enticement

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and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1–1981) (March 1981) [£ 2.00 Net]

Working Paper No. 10–1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981) [£ 1.75 Net]

Fourth (Annual) Report (1981) (Pl. 742) [75p Net]

Report on Civil Liability for Animals (LRC 2–1982) (May 1982) [£ 1.00 Net]

Report on Defective Premises (LRC 3–1982) (May 1982) [£ 1.00 Net]

Report on Illegitimacy (LRC 4–1982) (September 1982) [£ 3.50 Net]

Fifth (Annual) Report (1982) (Pl. 1795) [75p Net]

Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5–1983) (April 1983) [£ 1.50 Net]

Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6–1983) (November 1983) [£ 1.00 Net]

Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7–1983) (December 1983) [£ 1.50 Net]

Report on Divorce a Mensa et Thoro and Related Matters (LRC 8–1983) (December 1983) [£ 3.00 Net]

Sixth (Annual) Report (1983) (Pl. 2622) [£ 1.00 Net]

Report on Nullity of Marriage (LRC 9–1984) (October 1984) [£ 3.50 Net]

Working Paper No. 11–1984, Recognition of Foreign Divorces and Legal Separations (October 1984) [£ 2.00 Net]

Seventh (Annual) Report (1984) (Pl. 3313) [£ 1.00 Net]

Report on Recognition of Foreign Divorces and Legal Separations (LRC 10–1985) (April 1985) [£ 1.00 Net]

Report on Vagrancy and Related Offenses (LRC 11–1985) (June 1985) [£ 3.00 Net]

Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12–1985) (June 1985) [£ 2.00 Net]

Report on Competence and Compellability of Spouses as Witnesses (LRC 13–1985) (July 1985) [£ 2.50 Net]

Report on Offenses Under the Dublin Police Acts and Related

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Offences (LRC 14–1985) (July 1985) [£2.50 Net]

Report on Minors' Contracts (LRC 15–1985) (August 1985) [£3.50 Net]

Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16–1985) (August 1985) [£2.00 Net]

Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17–1985) (September 1985) [£3.00 Net]

Report on the Liability in Tort of Mentally Disabled Persons (LRC 18–1985) (September 1985) [£2.00 Net]

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19–1985) (October 1985) [£3.50 Net]

Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20–1985) (October 1985) [£2.00 Net]

Eighth (Annual) Report (1985) (Pl. 4281) [£1.00 Net]

Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21–1987) (September 1987) [£4.50 Net]

Consultation Paper on Rape (December 1987) [£6.00 Net]

Report on the Service of Documents Abroad re Civil Proceedings – the Hague Convention (LRC 22–1987) (December 1987) [£2.00 Net]

Report on Receiving Stolen Property (LRC 23–1987) (December 1987) [£7.00 Net]

Ninth (Annual) Report (1986–1987) (Pl. 5625) [£1.50 Net]

Report on Rape and Allied Offences (LRC 24–1988) (May 1988) [£3.00 Net]

Report on the Rule Against Hearsay in Civil Cases (LRC 25–1988) (September 1988) [£3.00 Net]

Report on Malicious Damage (LRC 26–1988) (September 1988) [£4.00 Net]

Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27–1988) (October 1988) [£5.00 Net]

Tenth (Annual) Report (1988) (Pl. 6542) [£1.50 Net]

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Report on Debt Collection: (2) Retention of Title (LRC 28–1988) (April 1989) [£4.00 Net]

Report on the Recognition of Foreign Adoption Decrees (LRC 29–1989) (June 1989) [£5.00 Net]

Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30–1989) (June 1989) [£5.00 Net]

Consultation Paper on Child Sexual Abuse (August 1989) [£10.00 Net]

Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31–1989) (October 1989) [£4.00 Net]

Eleventh (Annual) Report (1989) (Pl. 7448) [£1.50 Net]

Report on Child Sexual Abuse (LRC 32–1990) (September 1990) [**out of print**] [£7.00 Net]

Report on Sexual Offences against the Mentally Handicapped (LRC 33–1990) (September 1990) [£4.00 Net]

Report on Oaths and Affirmations (LRC 34–1990) (December 1990) [£5.00 Net]

Report on Confiscation of the Proceeds of Crime (LRC 35–1991) (January 1991) [£6.00 Net]

Consultation Paper on the Civil Law of Defamation (March 1991) [£20.00 Net]

Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36–1991) (May 1991) [£7.00 Net]

Twelfth (Annual) Report (1990) (Pl. 8292) [£1.50 Net]

Consultation Paper on Contempt of Court (July 1991) [£20.00 Net]

Consultation Paper on the Crime of Libel (August 1991) [£11.00 Net]

Report on the Indexation of Fines (LRC 37–1991) (October 1991) [£6.50 Net]

Report on the Civil Law of Defamation (LRC 38–1991) (December 1991) [£7.00 Net]

Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39–1991) (December 1991); (4) Service of Completion Notices (LRC 40–1991) (December 1991) [£6.00 Net]

Report on the Crime of Libel (LRC 41–1991) (December 1991) [£4.00 Net]

Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42–1992) (May 1992) [£8.00 Net]

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Thirteenth (Annual) Report (1991) (Pl. 9214) [£2.00 Net]

Report on The Law Relating to Dishonesty (LRC 43–1992) (September 1992) [£20.00 Net]

Land Law and Conveyancing Law; (5) Further General Proposals (LRC 44–1992) (October 1992) [**out of print**] [£6.00 Net]

Consultation Paper on Sentencing (March 1993) [£20.00 Net]

Consultation Paper on Occupiers' Liability (June 1993) [**out of print**] [£10.00 Net]

Fourteenth (Annual) Report (1992) (PN. 0051) [£2.00 Net]

Report on Non-Fatal Offences Against The Person (LRC 45–1994) (February 1994) [£20.00 Net]

Consultation Paper on Family Courts (March 1994) [£10.00 Net]

Report on Occupiers' Liability (LRC 46–1994) (April 1994) [£6.00 Net]

Report on Contempt of Court (LRC 47–1994) (September 1994) [£10.00 Net]

Fifteenth (Annual) Report (1993) (PN. 1122) [£2.00 Net]

Report on the Hague Convention Abolishing the Requirement of Legalisation for Public Documents (LRC 48–1995) (February 1995) [£10.00 Net]

Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995) [£10.00 Net]

Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion (LRC 49–1995) (April 1995) [£8.00 Net]

Sixteenth (Annual) Report (1994) (PN. 1919) [£2.00 Net]

An Examination of the Law of Bail (LRC 50–1995) (August 1995) [£10.00 Net]

Report on Intoxication (LRC 51–1995) (November 1995) [£2.00 Net]

Report on Family Courts (LRC 52–1996) (March 1996) [£10.00 Net]

Seventeenth (Annual) Report (1995) (PN. 2960) [£2.50 Net]

Report on Sentencing (LRC 53–1996) (August 1996) [£8.00 Net]

Consultation Paper on Privacy: Surveillance and the Interception of Communications (September 1996) [£20.00 Net]

Report on Personal Injuries (LRC 54–1996) (December 1996) [£10.00 Net]

Consultation Paper on the Implementation of The Hague

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Convention on Protection of Children and Co-operation in Respect on Intercountry Adoption, 1993 (September 1997) [£10.00 Net]

Report on The Unidroit Convention on Stolen or Illegally Exported Cultural Objects (LRC 55–1997) (October 1997) [£15.00 Net]

Report on Land Law and Conveyancing Law; (6) Further General Proposals including the execution of deeds (LRC56–1998) (May 1998) [£8.00 Net]

Consultation Paper on Aggravated, Exemplary and Restitutionary Damages (May 1998) [£15.00 Net]

Report on Privacy: Surveillance and the Interception of Communications (LRC 57–1998)(June 1998) [£20.00 Net]

Report on the Hague Convention on Protection of Children and Co-operation in Respect on Intercountry Adoption,1993 (LRC–58) (June 1998) [£10.00 Net]

Consultation Paper on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other Than Personal Injury) (November 1998) [£5.00 Net]

Consultation Paper on Statutory Drafting and Interpretation: *Plain Language and the Law* (July 1999) (CP14–1999) [£6.00 Net]

Consultation Paper on Section 2 of the Civil Liability (*Amendment*) Act, 1964: *The Deductibility of Collateral Benefits from Awards of Damages* (August 1999) (CP15–1999) [£7.50 Net]

Report on Gazumping (LRC 59–1999) (October 1999) [£5.00 Net]

Twenty First (Annual) Report (1999) (PN. 8643) [£3.00 Net]

Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60 – 2000) (August 2000) [£6.00 Net]

Consultation Paper on the Law of Limitation of Actions Arising [£6.00 Net]

From Non-Sexual Abuse Of Children (LRC-CP16–2000) (September 2000)