Address of The Hon. Mr Justice Frank Clarke, Chief Justice of Ireland, to the Law Reform Commission Annual Conference, November 2017

Firstly can I thank the President for the opportunity to do the one thing I have wanted all my life; that is to be the warm up act for Michael McDowell and Dearbhail McDonald.

Those who are old enough will remember that, in a previous life, one John Quirke was a quite distinguished scrum half in rugby who represented Leinster and occasionally Ireland. So I feel now like the out-half who has just been passed the ball by the nippy scrumhalf and I have to make a number of decisions. Do I deploy the hard-running of inside-centre McDowell; or the silkier skills of outside-centre McDonald; or do I try and go for a run on my own; or do I put up a Garryowen and throw up a few ideas and see where they land. I will leave it up to you at the end of my address to determine which of these plays I have decided to deploy.

I would like to do two things. First, I hope to make some general observations on where we are at in relation to law reform, particularly so far as it affects the courts, as that is the day job and it is my job to consider these matters in relation to the courts; and second, to seek to apply those general observations to a number of areas which might benefit from future research on the part of the Law Reform Commission.

A number of years ago, I had the great honour of being asked to give the inaugural Feeney lecture, a joint initiative of the Cork Bar, the Southern Law Association and UCC which was designed to honour my late and great friend Kevin Feeney. The topic of that lecture was civil procedural reform, a topic

which need not form the basis of Law Reform Commission research at this stage as there has recently been established a significant committee to consider that area. But I did start that lecture with a number of observations about how it is that areas of law come to be in need of reform. While those comments were specifically directed at procedural reform, I think they can be of more general application. My starting point was to draw attention to an old book which lives on the shelves of my chambers called Wylie's Judicature Acts. It was one of a series of editions produced at the end of the 19th century dealing with what was then a very new system of courts introduced in the then United Kingdom of Great Britain and Ireland primarily in the 1870s. Prior to that time there were a number of separate Superior Courts. The reason that we have the Four Courts is that there were four different courts; King's Bench, Chancery and the like and each of them had a single courtroom. What the Judicature Acts achieved was a major piece of law reform for which I suspect any law reform commission would be proud; they amalgamated those courts into a single streamlined system, with a High Court of full original jurisdiction and what was then in the Irish context a court of appeal for Ireland.

The point I started with in the Feeney lecture is that if you take the current Rules of the Superior Courts, you find that the number of rules which are an exact copy of those found in Wylie's Judicature Acts are very large. I joked that the most radical change was that the numbering had changed from Roman numerals to Arabic numerals, and occasionally terminology had changed to reflect the fact that Ireland is now an independent state. But the substance of the rules was still much the same. These are the sort of conditions that merit a root and branch review of an area of the law, in that case civil procedure. Not because the fact that things are very old necessarily means that they do not work anymore, but that fact certainly requires them to be looked at to see if they continue to be fit for purpose. That is a generality that is worth keeping in mind. Laws change from

time to time in various ways, case law develops and sometimes laws become unwieldy over time. That can be a prime reason for embarking on a systematic process of law reform.

Another aspect of that question which I think is worth keeping in mind is that we often solve individual problems by specific measures. The problem is identified and an amendment is brought in to cure that problem. I sometimes feel that an area of law can be a bit like a building that evolves higgledy-piggledy over the years. It looked quite nice when it was first built, but now there is a conservatory here and an extension there, and a conversion of a couple of rooms into bathrooms, as the family develops. And while each of the individual developments probably made sense at the time for a particular purpose, what you are left with is a not very attractive and a not very functional building. I think the same can often be said about laws. We can find that we have identified a problem and a very particular solution is put together to cure that one problem but after a while, when we have done that six or seven times, what we are left with is a not very coherent whole at the end.

I think perhaps the areas that are most in need of attention are areas like that. Ones where the underlying law is ancient, ones which have developed in a very haphazard way, with either judicial or legislative responses to particular identified problems, without anyone sitting back and taking stock as to whether the area as a whole needs a root and branch review.

So where does that lead us to in terms of the kind of areas which could be addressed? If I could just start by discussing two areas that will not need to be addressed by the Law Reform Commission in this new Programme, although they are very important and their review is essential if we are to move towards a modern system of courts. The first is the area of civil procedural review which I

already mentioned. There is now a committee under Mr Justice Peter Kelly, President of the High Court, to investigate this issue and therefore duplication is to be avoided.[1] I would very much hope that the Committee is adequately resourced to produce a report in as quick a time as is practicable and that its recommendations are implemented in a short time frame.

Second, I am also aware that the Law Reform Commission reported earlier this year on issues relating to the law of evidence[2] and I also hope that those recommendations are swiftly implemented.

One of the things that struck me over the years as a trial judge and also occasionally as an appellate judge, is that there has been a lot of attention to the law of criminal evidence and perhaps not quite as much to the law of civil evidence. Perhaps the problems have not been quite the same because, of course, in civil litigation, proof is on the balance of probabilities and decisions are made by judges alone without juries. In such circumstances there is perhaps a perception that appearing to be too excited about the rigorous application of the laws of evidence might make it appear as though you have something to hide and might not go down too well with the judge, and that may not be to your advantage at the end of the day. But the truth is that if people begin to rely on the rules of evidence and say "No you can't bring that evidence, it's in breach of the rule against hearsay" or whatever, it can in civil cases create significant difficulty and I therefore very much welcome the report which the Commission has produced in that area.

[1] 'Tánaiste announces review of system of civil justice' http://www.justice.ie/en/JELR/Pages/PR17000097.
[2] Law Reform Commission, *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117 - 2016).

I see a lot of these matters as forming part of an overall reform of the court system but those are two elements that either have already been completed or are in the course of consideration. One might then ask, then, what areas would one recommend for this Commission to consider over the coming years. One thought I had was to look at the kinds of cases which are coming before the Supreme Court and which, therefore, are creating legal difficulties, difficulties of interpretation of the law, difficulty of the application of the law, perhaps in new circumstances. It occurred to me that this might now be an even more useful exercise than had previously been the case given the new constitutional architecture concerning appeals at the higher level of our courts. As many of you will know, with the establishment of the Court of Appeal almost exactly three years ago, it is now possible to appeal to the Supreme Court only with leave of that court. The former position whereby parties were entitled as of right to appeal a decision of the High Court to the Supreme Court is no longer present. Appeal as of right now lies to the Court of Appeal. A direct appeal from the High Court to the Supreme Court, a so-called "leapfrog appeal", or more normally an appeal from the Court of Appeal, requires an application made on paper, hopefully soon online, to the Supreme Court, setting out why it is said that the case meets the constitutional test for such appeals, hardwired into the constitution by the 33rd Amendment. That test requires that the Supreme Court be satisfied that an issue of general public importance arises or that it is otherwise in the interests of justice that an appeal be brought. In the case of a "leapfrog" appeal, there must further be "exceptional circumstances" justifying such an appeal. This is an interesting and radical change in the constitutional architecture of our courts.

One of the side effects of this new constitutional architecture is that the Supreme Court can now choose which cases meet this constitutional threshold; that is normally that they do involve issues of general public importance. I think it would be fair to say, although we have not done enough detailed research to put a number on this, that the single most common reason why an appeal is not

permitted under this regime is that the case involves no more than the application of well-established legal principles to the given circumstances. That is, there is nothing legally new about the case and it does not therefore involve an issue of general public importance. Obviously every case is important to the parties, but there needs to be something more. Perhaps the corollary of that is that if an area of law is generating a significant number of appeals to the Supreme Court, there are issues in that area which require to be resolved.

It is therefore worth reflecting on the kinds of cases that are getting through that net, those that can be said to involve issues of general public importance. Sometimes it is hard to classify cases, they are sometimes about two or more things. I hesitate to mention controversial cases, but in considering the decision in *The People* (*DPP) v JC*;[3] do we call that a criminal case, a constitutional case or an evidence case? It is a bit of all of those so classification is not an exact science. Nonetheless we have endeavoured to put each case into a single box, while acknowledging that there may be other areas of the law involved. What seems to emerge as a picture is that there are a few areas which have consistently provided a significant number of cases. Whether all of them are areas which are amenable to review by the Law Reform Commission may well be a debatable point, but I will come to that later.

The main areas which seem to be giving rise to significant legal issues, in the sense that they are creating legal issues that need a Supreme Court decision to resolve them, include first environmental cases. I think that the public would be surprised to know the number of cases coming through this new system which are environmental and I will come back to why that may be so. Second, extradition, and particularly European Arrest Warrant cases. Third, child care cases, both domestic, and cases involving international issues under the Brussels Regulation as to which state has

[3] [2015] IESC 31.

jurisdiction over particular types of cases. The largest single area involves criminal cases but that is not a big surprise. The kinds of cases that have not really emerged are, again perhaps not surprisingly, personal injuries cases. If you look to the High Court, the numbers are dominated by personal injuries cases but the number of those cases which involve legal issues requiring determination even by the Court of Appeal, let alone the Supreme Court, are a tiny fraction.

What can we learn from the identification of the kind of areas that seem to be generating legal issues? First, there is an overlay of European law in most of those areas. Our environmental law is very heavily influenced by EU law; European Arrest Warrants are of course a creature of EU law. EU law has not featured to the same extent in criminal law, although somewhat more so recently, and it certainly plays some role in the child law field.

From the perspective of the Irish courts, there can be two different categories of difficulties created by EU law. First, the European law itself can be difficult to interpret. There is for example a whole series of cases currently before the Court of Justice of the European Union in the field of European Arrest Warrants which are concerned with the proper interpretation of the relevant EU Directives as to what is "the trial" for the purposes of the trial *in absentia* rules. There have been references to the CJEU from a number of different countries, and indeed the Supreme Court is this very day writing a letter to the CJEU stating that we no longer need the answer to a question we asked because it has been answered in some other cases.

This is not especially an Irish problem. As we know, sometimes EU law is drafted in a way that does not fit neatly into the interpretive approaches of 27 or 28 different Member States. But sometimes it is a domestic issue and I would in this instance refer to the environmental field. I think it is fair to say

that Ireland has not been good at implementing in a clear, coherent and easily approachable way our obligations under a variety of EU Environmental Directives. One of the clearest memories I have from sitting as a High Court judge was a case that involved the interpretation of an almost impenetrable piece of Irish environmental law.[4] I was lucky to have the assistance of what could reasonably be regarded as four of the leading senior counsel in that field and the most common look on the face of all the participants in that case was bemusement and puzzlement.

Any time one person put forward what seemed to be a coherent suggestion for what the legislation meant, a new problem would emerge. That meant, at a mundane level, that there were real matters which could not progress, not because of the merits, but because the law was so complex that it was taking a large number of very skilled senior counsel and a lot of judicial time to come up with an interpretation of the law. I described the interpretation which I ultimately put on the legislation as being the "least bad" interpretation open to me.

So, we certainly have not always been very good at transposing EU law into our own law.

However, in certain areas we have also created very unwieldy structures for deciding many things; we have questions, part of which go to local authorities, part to An Bord Pleanála and part to the Environmental Protection Agency, and that in turn creates legal difficulties. What are the solutions to these problems? Well there was an attempt to consolidate these matters in the *Planning and Development Act 2000*, but that Act itself has been amended so many times, sometimes even amended and then having those amendments removed, that it itself has become very unwieldy. The case has been made that there is a right under EU law to allow the public ready access to being able

[4] *Cork County Council v Shackleton and Others* [2011] 1 IR 443

to participate in environmental decision making. And yet if the legislation is so complex that even experts find it hard to navigate, how are ordinary people to engage with it?

So perhaps that is an area that does bear some consideration, not so much the substantive merits of environmental law, which are to a considerable extent policy driven, but the legal structures in that field, the way we put together our compliance with EU law and the way in which we create a decision making process that hopefully gives less cause for litigation or, where there is cause for litigation, makes it as straightforward as possible.

Let me just mention one example, which I should not say too much about as it involves a case which has been heard but not decided. In this case, there is a question as to whether a particular decision should be taken by An Bord Pleanála or by a local authority. This is an unnecessary complication in a system which is already liable to be difficult. This is at least one area where, notwithstanding the EU dimension, there is something we can do to remedy the situation.

By contrast, with European Arrest Warrants, I suspect there are difficulties of interpretation of EU law and there may be limits to what we can do about it.

These comments in respect of environmental law led me to consider what might be quite a big project, but a project which I think would be well worth considering as a companion project to the civil procedure review being undertaken by Mr Justice Peter Kelly's Committee. The more I think about it, the more I think that the decision making structures, both in the courts and in tribunals that decide legal rights, wrongs and obligations and which sometimes feed into the courts, have become

extremely unwieldy and often give rise to disputes about whether parties are going about issues in the right way, rather than focusing on the merits of the issue.

I do not know how many of you are familiar with the system of tribunals in the UK, and by that I do not mean Tribunals of Inquiry, but rather bodies that which make legally binding decisions in expert areas. Whether we would want to go down exactly the same route as the UK is a matter to be considered but at the same time, at the moment, the UK has now evolved a system where there are formal tribunals in a layer just below the courts. The persons appointed are appointed in much the same way as ordinary judges, although they are not always lawyers as expert tribunals often require particular expertise. They have a structure, their own internal appellate rules, and clear rules about how you get from there to the higher courts.

There are some criticisms of that system, but it stands in very stark contrast to what we have in Ireland. Every time there is a new form of right or obligation created, we create a new body. Sometimes there is a regulatory body, and a regulatory appeal body, and sometimes the legislation says you can appeal from that body to the courts on a point of law, sometimes to the Circuit Court and sometimes to the High Court. Sometimes you may even appeal on the merits to the Circuit Court. Of course, behind that there is always the right to seek judicial review and there is a great deal of case law about whether or not the internal appellate systems in the regulatory bodies should have been exhausted before seeking judicial review. However, often a party argues that if they had done that, it would have been too late and that then it might be considered as an impermissible collateral attack on the original decision.

I think we have gotten ourselves into significant difficulties in this area. The judiciary may have played their own role in this, in creating concepts that perhaps make sense in a limited way but not quite so much in the bigger picture. And then we have all the different forms of appeal from such bodies. I wrote a judgment in *Fitzgibbon v Law Society*[5] a couple of years ago in which I made a plaintive plea for greater clarity from the legislature about what they mean by appeal. It is very easy to say, "Oh we must have an appeal from this to the courts" and then all is well, there is more transparency. However, an appeal can mean many things, as anyone with practical experiences of the law knows. At one end of the spectrum, it can be a complete rehearing on the merits, where you start from scratch and the appellate body hears the case again. In the courts context for example, an appeal of a summary criminal matter from the District Court to the Circuit Court fits that description. If you appeal a conviction by the District Court, the case starts again from scratch in the Circuit Court. Then you can have appeal on the record where you do not hear all the evidence again but the appellate body looks at the record of the lower court and decides if that court got it right or wrong.

Then there is a phrase that is frequently used in legislation, an "appeal on a point of law". Of course, any judicial determination is amenable to judicial review, notwithstanding the absence of an express statutory procedure. This leads to the obvious inference that a statutory appeal on a point of law must mean something more than judicial review, but how much more is debatable in any given case.

Can I suggest then that our system of *ad hoc* bodies set up on a one off basis to determine rights and obligations in a whole range of areas is unwieldy and is likely to lead to disputes that are not about the merits of the issues, but about procedural issues such as whether parties have used judicial review when they should have used an appeal or *vice versa*. It is making the whole system of the determination by tribunals unnecessarily complex, unnecessarily unwieldy and therefore ultimately

[5] [2015] 1 IR 516.

more costly for parties and less likely to deliver whatever rights and obligations the tribunal is meant to be about. I think that carries on within the courts system where we have myriad different types of review of lower court decisions. The position is now relatively clear at the upper end thanks to the 33rd Amendment, but below that we have a whole range of different review systems. There is the case-stated, the consultative case stated, the appeal by case stated, the full rehearing and the appeal on a point of law and so on. I think when you put all of this together, both within the courts and within those outside bodies, we have a system that is far too unwieldy and I find it difficult not to believe that a much more straightforward, simple and streamlined system would make it much clearer for parties, would greatly reduce the extent to which litigation turns into collateral disputes about whether the case is in the right place or being done in the right way and would be more likely to ensure that litigation concentrates on what should be the issue; that is who is in the right and who is in the wrong.

This is one of those systems that fits into the box that I described earlier, one that has grown up higgledy-piggledy over the years, new tribunals being established for this, that and the other, new court procedures being established, so that the edifice that we now have is unwieldy.

If the Law Reform Commission could make recommendations on a much more streamlined system, consider the UK experience, adopt or adapt it, as it thinks appropriate, I think that would be a hugely valuable contribution to a better and more tightly functioning system for the establishment of rights and obligations and might well work as a very good companion piece of work to the procedural review under Mr Justice Kelly's remit.

If I might add one further point which is I think coming into increasing focus at the upper end of the courts. For doubtless understandable reasons over the years, as a means of preventing parties playing the system by prolonging litigation in areas where there was perceived to be a policy basis for bringing litigation to a swifter conclusion, we have created a few categories of case, immigration cases and environmental cases being perhaps the most common examples, where there is a limit on the right of appeal within the superior courts. In such cases, it is typically necessary to obtain a certificate from the High Court judge certifying that the case involves a point of law of "exceptional public importance", and that it is in the interests of justice that an appeal be brought. I can see why such measures were adopted. They were designed to stop people bringing unmeritorious appeals, slowing up planning permission or cases that delayed finality in the immigration system, so I am not in any way criticising the policy objective behind it all.

However, I think it has become very complicated, not least because of the new parallel constitutional architecture. Almost the single largest number of applications for leave to appeal to the Supreme Court now come in cases where a person has brought an immigration or environmental case in the High Court, has lost, has sought a certificate to appeal to the Court of Appeal, has been refused, and is now using the constitutional procedure in the 33rd amendment to say that the Supreme Court has an independent jurisdiction to hear an appeal direct from the High Court. Interestingly, the language approved by the people in the 33rd amendment is slightly lighter in terms of the threshold for appeal. The term in the Constitution is "general public importance", whereas in most of the legislation, the term is "exceptional public importance". Is there a difference? Are there points of law of general public importance but not exceptional public importance? Probably.

We now have a very unwieldy system where we have a High Court judge determining whether there can be an appeal from that court and if he or she refuses then the party tries to use the back door to the Supreme Court. Quite a lot of applications before the Supreme Court, as I say, comprise of those cases and some of them have been allowed and others not. Apart altogether from that, I always felt that it is a slightly embarrassing aspect of process whereby you are being asked, as the High Court judge who has found against someone, to give a certificate to appeal against your own decision. Many judges do not mind too much, they are used to the possibility of being overturned. Optically, I am not sure that it is a great idea that a person who has just said no to a particular case is the one who is the gatekeeper as to whether there should be an appeal from that decision. Perhaps it should be a different judge, either of the same court or a higher one. Can I suggest, President, that that is a big area, but one that would be well worth consideration as a companion to the evidential review which you have already conducted and to the procedural review being conducted by Mr Justice Kelly.

There are other things needed to ensure our courts system works well. I have gone on in other for a about resources, although I do not think this is the place to discuss that issue further. But the structures into which resources go have to be fit for purpose as well. One of the points I tried to emphasise in my address at the beginning of the new legal year[6] is that I do believe we need more resources if we are to have a modern, effective courts system, but that it is not enough to provide more resources for a system that is not working properly. You need to solve two sides of the problem. You need to streamline the processes you have, before you have a creditable case for more resources. Simply throwing money at a problem, at a system, that is not working optimally is not the answer. I suspect the increased funding the health service received during the boom time is

[6] Available at http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/B137A31686073CA5802581A800536B5E?opendocument.

as good an example of that problem as anyone would want. Lots of money was given but the underlying problems were not solved. I would have thought that doing it the other way round would have been a lot more effective. I am mindful that it is not appropriate for the court system to simply demand more resources; the case must be tied to more streamlined processes, more logical structures, and if we have better systems, and better resources, then we might move towards having the kind of system to which we would all aspire. I hope that it is of some assistance to put forward, from a courts perspective, areas that would merit review by the Law Reform Commission. Thank you very much.

ENDS