

Publication of Law Reform Commission Reports
“Consolidation and Reform of the Courts Acts” and
“Alternative Dispute Resolution: Mediation and Conciliation”

16th November 2010

Address of the Chief Justice, the Hon. Mr. Justice John L. Murray

President, Commissioners, [fellow members of the judiciary],
distinguished guests,

It was a great pleasure for me to accept the kind invitation of the Commission to launch these two reports – on “Consolidation and Reform of the Courts Acts” and “Alternative Dispute Resolution: Mediation and Conciliation”.

It seems particularly apposite that these reports should be published together. The report on the Courts Acts is the product of a thorough analysis of our system of administering justice, affording an insight into the opportunities for its reform and improvement. The report on Mediation and Conciliation, on the other hand, is a lucid exposition of the considerable potential – as yet not fully realised – for resolution of disputes by means alternative to the traditional adversarial assertion of rights and obligations before the Courts.

The Report on “Consolidation and Reform of the Courts Acts”

The Report on “Consolidation and Reform of the Courts Acts” is the culmination of a considerable body of work undertaken by the Commission in concert with the Department of Justice and the Courts Service through its Reform and Development Directorate, commencing in 2005 and already marked by the publication of a Consultation Paper in July of 2007.

As the Report indicates, plans had been mooted for the consolidation of the legislation on the jurisdiction and operation of the courts as far back as 1962. That such a consolidation merits serious consideration is evidenced by the fact that the legislation covering this area consists of no less than 240 Acts, well more than half of which (146) pre-date Independence. The task of tracing - often through successive amendments - the legislative history of statutory provisions affecting the jurisdiction and operation of the courts has become an increasingly arduous one, notwithstanding the availability of commendable works such as the commentary on the Courts Acts produced by former Law Reform Commissioner, Professor Hilary Biehler.

The jurisdictional framework of our courts has not significantly altered since the design put in place in the Courts of Justice Act 1924 - a framework which survived the establishment by the Courts (Establishment and Constitution) Act 1961 of the new courts envisaged by the Constitution of 1937. The longevity of that structure is all the more impressive when one considers that the Judiciary Committee tasked with formulating the courts framework in 1923 took no more than four months, under the most difficult of circumstances in the country at the time, to formulate its design.

Inevitably, over time, and in particular over the last twenty years, the landscape of the law has changed immeasurably with all courts experiencing fundamental changes in the scope of their jurisdiction as well as the nature and relative complexity of the cases which come before them. Some of the factors which have contributed to this exceptional change include:

- significant growth in population and the volume of litigation;
- the development and extension of State regulation of many areas of activity from consumer protection, the environment,

commercial competition to family law and indeed new criminal offences;

- the increased frequency, if not regularity with which the law is changed, amended, updated in so many areas which give rise to litigation and prosecution before the courts;
- the overlay and application of European Union legislation, International law and European Convention law;
- the resultant growth in the volume of very complex cases coming before the Superior Courts.

All of these and other factors have underlined the need for a serious appraisal of the structure of our courts and in particular the need for a Civil Court of Appeal in line with other 20th century court structures not to mention the present.

In 2009 the necessity for an appraisal along such lines was explained by me in detail to the then Taoiseach, Minister for Justice, Equality and Law Reform and Attorney General. This led to the Government deciding to establish a committee and the Government asked me to nominate a chairperson for such committee. This led to the establishment in May

2009 of the Working Group on a Court of Appeal which, with Mrs Justice Denham as its chairperson, produced an excellent report demonstrating unequivocally the immediate need for the establishment of the Civil Court of Appeal if an efficient and effective court system is to be maintained so as to best administer justice in the public interest and the common good. As I understand it the Government has agreed in principle to take the necessary steps for the establishment of such a Court one of which will probably be an appropriate amendment to the Constitution.

The final legislative step could well go in tandem with the legislative recommendations of the Commission as contained in their present report.

The approach of the 1924 Act in stating the jurisdictional remit of the new courts it established was to refer back to the jurisdictional competence exercised by the courts of equivalent jurisdiction immediately before commencement of that Act, as well as identifying the new areas of jurisdiction exercisable. Little attempt was made to explain the extent of the jurisdiction thus “inherited” by enumerating the areas of jurisdiction or rights of action concerned.

The Courts (Supplemental Provisions) Act 1961 - with the notable exception of the Circuit Court – adopted a broadly similar approach. To take the example of the High Court, that court was invested - as one part of its jurisdictional remit - with “all jurisdiction vested in or capable of being exercised by the High Court of Justice in Southern Ireland or any division or judge thereof” remaining extant at the time of commencement of the 1961 Act.

While acknowledging that, in the case of the High Court, the nature of the jurisdiction of that court as conferred by the Constitution would not admit in any event of an exhaustive enumeration in statute of its jurisdictional competence, this approach to defining jurisdiction in the 1961 Act hardly serves as a model of clarity.

One may therefore welcome the fact that one of the guiding principles informing preparation of the Draft Courts (Consolidation and Reform) Bill was that

“[t]he proposed ... Bill should contain as complete a statement as possible of the essential jurisdiction of all the courts in Ireland”.

The Draft Bill contains a non-exhaustive enumeration of the respective civil jurisdictions of the High Court, Circuit Court and District Court,

complemented by a listing of the powers and remedies available to the courts of first instance. In the process, divers pre-Independence Acts which continue to indirectly inform the jurisdictional competence of our courts are fully repealed.

Those repeals form part of a much more comprehensive process in the Draft Bill of cleansing the statute book of outmoded legislation affecting the courts. The 240 separate Acts I have mentioned contain over 1,500 sections, and the Draft Bill contemplates a repeal in full of 192 of those Acts - 135 of which are pre-Independence statutes, including three dating back to the 13th Century - and a partial repeal of those remaining.

In addition to its provisions on jurisdiction, the Draft Bill contains provisions concerning the administration of court business by the judiciary (in Part 3), the conduct of court proceedings and associated matters (in Parts 2 and 4), appeals and references of questions of law (Part 5), and court offices and officers (Part 6).

It is noteworthy – and entirely understandable, it might be said - that the Commission in its report has reaffirmed its earlier provisional recommendation that the sections of the Courts (Establishment and

Constitution) Act 1961 concerned with the establishment of the existing courts should remain untouched by the Draft Bill.

True to its statutory mandate, the Commission has incorporated a range of proposals of a reforming nature in the Draft Bill additional to its restatement of court jurisdiction. Thus, attempts have been made to simplify the terminology relating to court proceedings, to articulate principles informing the conduct and management of civil proceedings, and to reflect these principles in a proposed revised mandate for the court rules committees.

[The Commission has also taken the view that certain functions – in respect of the permanent assignment of Circuit Court judges to circuits and of District Court judges to districts - currently exercised in relation to the courts by the Executive branch of government should be transferred to the Judicial branch. Another function exercised by the Executive – that of modifying circuits of the Circuit Court – is proposed for assignment to the Courts Service..]

The proposals for reform contained in the Report are obviously a matter for the policy-makers. Whatever may be the outcome in this regard, the Commission's endeavours already offer a comprehensive view of the

landscape of our court system which will be of very considerable benefit to those who require to traverse it, be they judges, members of the legal profession, litigants or public officials. In a legal order which places such importance on the right of access to our courts, the Commission is to be commended for its assistance in making the laws on our courts accessible and comprehensible in a single Draft Bill.

The Report on “Alternative Dispute Resolution: Mediation and Conciliation”

Turning to the second report published this evening - that on “Alternative Dispute Resolution: Mediation and Conciliation”- the Commission in its earlier Consultation Paper of 2008 described its subject as

“a fast moving and emerging area, in respect of which there is no clear framework of relevant principles”.

Building on the very considerable research undertaken for the purpose of that Consultation Paper, the report attempts to address this deficiency. No less than 108 recommendations bear testimony to the breadth and depth of the Commission’s deliberations, many of which find their way into the Draft Bill appended to the report.

Amongst other matters, the Draft Bill seeks -

- to define the scope, respectively, of mediation and conciliation, offering definitions of those processes,
- to prescribe a set of general principles which should apply to them,
- to create a distinct form of privilege to support confidentiality in mediation and conciliation, and
- to provide for enforceability of agreements reached as a result of either process.

The Commission's attempt to provide definitions of mediation and conciliation respectively will, one expects, be welcomed by many practitioners for whom the boundaries between those processes may often appear blurred.

The Draft Bill also makes provision for the publication of a Code of Conduct for Mediators and Conciliators. Having drawn attention to the variation in standards in training and accrediting mediators and conciliators, the Commission saw such a code as being necessary to alleviate any concerns which may exist as to the competency and quality of individual practitioners, and to enhance the profile of and confidence in the processes of mediation and conciliation.

Importantly, the Commission has attempted, in Part 3 of the Draft Bill, to regulate the relationship between litigation and mediation or conciliation. In this respect, the Commission has rightly acknowledged in its report the practice of judges of encouraging and facilitating parties, where appropriate, to have recourse to alternative dispute resolution mechanisms.

The Commission has also very properly referred to initiatives by the court rules committees for the various jurisdictions designed to promote such recourse - ranging from the procedures for referral to ADR in use in the Commercial Court and in the Circuit Court, to the form of mediation provided in the District Court by the Small Claims Registrars.

Indeed, it is perhaps appropriate that this report is published today – the day on which the Rules of the Superior Courts (Mediation and Conciliation) 2010 come into operation. Those rules to a large extent anticipate section 16 of the Draft Bill in facilitating the court in inviting parties to consider using mediation or conciliation.

[The rules concerned empower the Court, on the application of any of the parties or on its own initiative, in appropriate cases, to adjourn the proceedings or an issue therein for a suitable length of time to

- invite the parties to use an ADR process to settle or determine the proceedings or issue or
- where the parties consent, refer the proceedings or issue to an ADR process.

The Court may for that purpose invite the parties to attend an information session specified by it on the use of mediation, where available. Where the parties decide to use an ADR process, the Court may extend the time for compliance with any provision of the Rules, or any order of the Court in the proceedings.

These rules, while applying to proceedings generally, also facilitate implementation of Article 5 of the Directive of the European Council and Parliament of 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, which of course has application only to disputes having a cross-border aspect.]

Court rules-based reforms in the area of ADR have taken place in parallel with reforms under primary legislation, a recent example being that effected by section 32 of the Arbitration Act of this year, which enables the High Court or the Circuit Court to refer a dispute in proceedings before it to arbitration with the consent of the parties.

While, as the Commission acknowledges, mediation and conciliation may not be suitable – or indeed legally feasible – in all types of dispute, well structured and competently operated ADR processes have the capacity to complement and support our justice system, reducing the pressure of caseloads on our courts, with the attendant delays these cause, and containing the costs – material and otherwise - to society of resolving disputes.

In conclusion, I think it is important to note that it is not sufficient to simply establish the structures and procedures which facilitate recourse to ADR by persons or corporations in dispute. If the State were simply to do that it would be a passive and inadequate approach. If the use of ADR is to develop it must be actively promoted so that not only professionals but , more important, the public generally are informed and educated as to its effectiveness, fairness and availability as a means of resolving disputes.

In parallel with promoting ADR the State should take the necessary measures for the establishment of an official register of approved mediators as many other States have done.

The Commission is to be warmly congratulated and deserves our gratitude for these two important initiatives, which I am sure will be of enormous value in helping to make our system of justice and approaches to dispute resolution more effective.