THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC - CP14 -1999)

CONSULTATION PAPER

ON

STATUTORY DRAFTING AND INTERPRETATION:

PLAIN LANGUAGE AND THE LAW

IRELAND
The Law Reform Commission
I.P.C. House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4

First Published
July 1999

ISSN 1393 - 3140

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 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 fifty-eight Reports containing proposals for reform of the law; eleven Working Papers; thirteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty Reports in accordance with Section 6 of the 1975 Act. A full list of publications is contained in an Annex to this Consultation Paper.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

President:	The Hon. Mr Justice Vivian Lavan, High Court,
Full-time Commissioner:	Mr Arthur F Plunkett, Barrister-at-Law,
Part-time Commissioners:	Dr Hilary A Delany, B.L., Lecturer in Law, Trinity College, Dublin;
	Ms Patricia T Rickard-Clarke, Solicitor, Partner - McCann FitzGerald Solicitors;
	The Right Hon. Dr Turlough O'Donnell, Q.C.

The Secretary to the Commission is John Quirke

Research Staff

Director of Research:	(Professor). David Gwynn Morgan, LL.M (Lond.), Ph.D. (N.U.I.);
Legal Researchers:	Ms Lia O'Hegarty, B.C.L., LL.M. (Michigan), LL.M. (Harvard), Barrister-at-Law;
	Ms Róisín Pillay, LL.B., LL.M (Cantab.), Barrister-at-Law;
	Ms Leesha O'Driscoll, B.C.L., L.L.M. (European) Barrister-at-Law.
Legal Information Manager:	Ms Helen Bradley, B.A., M.Phil., M.L.I.S
Library Assistant:	Ms Marina Greer, B.A.

Clerical Staff
Ms Deborah McAdams, Private Secretary to the President;
Ms Lillian Jones.

Research Team on this Project
Ms. Róisín Pillay was the Researcher responsible for this project.

Contact Details
Further information can be obtained from:

The Secretary
The Law Reform Commission
I.P.C. House
35-39 Shelbourne Road
Ballsbridge
Dublin 4

Telephone: ***(01) 6377600***
Fax No: ***(01) 6377601***
Email: ***info@lawreform.ie***

ACKNOWLEDGEMENTS

The Commission wishes to record its thanks to the following people who have contributed to drafts of this consultation paper:

Mr Simon O'Leary, former Commissioner;
His Honour Judge John Buckley, former Commissioner;
Ms Rachael Hussey, former researcher;
Ms Cliona Kimber, former researcher.

The Commission would also like to thank the Office of the Parliamentary Draftsman, for their advice and assistance. Full responsibility for this paper lies with the Commission.

INTRODUCTION

Background to the Consultation Paper

1. In 1976, the Law Reform Commission's First Programme for Law Reform, under the heading of Statute Law, proposed a review of the approach to interpretation of statutes, in the light of the more "flexible" approach adopted to statutory interpretation elsewhere. The Commission also made a separate proposal to examine the style in which legislation is drafted. The appropriate paragraphs from the Programme are worth quoting in full:

> "***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."

Two Interconnected Topics

2. It is difficult to deal with either of these paragraphs in the First Programme independently. The method and style of drafting statutes is, necessarily, influenced by the way statutes are interpreted by the courts. Statutory language cannot be simplified, without addressing the methods of interpretation which are a primary cause of its present complexity. Equally, the courts as interpreters depend on the drafters of legislation to give clear expression to the intentions of the legislature; and, for legislation to be clearly understood by those it affects, there must be predictable and consistent interpretation in the courts. One writer noted that:

> "it is important to appreciate the mutual dependence of the drafter and the courts when the latter are engaged in statutory interpretation. It is the courts' duty to give effect to the intention of parliament, but their main source of information on this matter is the wording of the statute; if this is not clear there is obviously a risk that the courts will not be able to do their work properly. On the other hand the drafter will find it difficult to convey the Parliamentary intent to the courts unless he knows that they will attach the same meaning to his words as that in which he employs them."

3. Given the close relationship between drafting and interpretation, the Commission has considered the two topics together in this Consultation Paper.

The Importance of Statute Law and Drafting

4. The provisional recommendations made, both in relation to drafting and to interpretation, have the objective of improving the comprehensibility of legislation and therefore its accessibility to the people it governs. 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. A system of language and law understood by only a few, where only a few have the ability to make authoritative statements about what is and is not permitted under the law, cedes power to those few. Lord Simon of Glaisdale wrote:

> "It is important to remember why our statutes should be framed in such a way as to be clearly comprehensible to those affected by them. It is an aspect of the Rule of Law. People who live under the Rule of Law are entitled to claim that the law should be intelligible. A society whose regulations are incomprehensible lives with the Rule of Lottery, not the Rule of Law."[1]

Outline of this Consultation Paper

5. This paper begins by examining the current approach of the Irish courts to statutory interpretation, and to the use of extrinsic aids to interpretation, such as Dáil debates. Approaches to statutory interpretation in several other jurisdictions are then considered, with particular reference to jurisdictions which have enacted legislation prescribing a particular approach to statutory interpretation.

---

1 Lord Simon of Glaisdale, *The Renton Report-Ten Years On*, 1985 Stat. Law Rev. 133.

6. Chapter 2 of the paper examines the current form and style of Irish statutes, and considers some of the difficulties with Irish legislative drafting. Chapter 3 examines alternative drafting styles, in particular those advocated by the "plain language" movement.

7. A series of provisional recommendations for reform are put forward in Chapters 4 and 5. In regard to interpretation, the Commission's central recommendation is that there should be a new Interpretation Act, which would clarify the applicable rules of interpretation. The Act would prescribe a purposive interpretation of statutes, and would allow for the use of extrinsic aids to interpretation in some circumstances. In regard to statutory drafting, the Commission does not favour a radical move towards a "general principles" approach to drafting, but recommends a number of reforms in regard to the language, as well as the structure and format, of legislation, in order to enhance the readability of Acts. It is provisionally recommended that purpose clauses should be included at the head of each Act, replacing the current form of the long title. Recommendations are also made in relation to the amendment and consolidation of legislation.

The Consultation Process

8. This Consultation Paper is intended to form the basis of discussion and the recommendations in it are provisional only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. So that the Commission's Final Report may be made available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by **15 October 1999.**

TABLE OF CONTENTS

CHAPTER 1: INTERPRETATION 1
Approaches to Interpretation 1
The Literal Rule *1*
The Golden Rule *3*
The Mischief Rule *3*
Competing Literal and Purposive Approaches to Interpretation in the Irish Courts 4
Two Distinct Approaches *9*
DPP (Ivers) v Murphy *10*
The Influence of EU Jurisprudence: The Growing Importance of Teleological Interpretation 10
Maxims and Presumptions 16
The Importance of Context: The Noscitur a Sociis and Ejusdem Generis Rules *16*
Noscitur a Sociis *16*
Ejusdem Generis *17*
Acknowledging Particular Circumstances: Generalia Specialibus Non Derogant *19*
Construing Words as Limiting: Expressio Unis est Exclusio Alterius *20*
Presumption of Constitutionality *20*
Presumption of Compatibility with European Law *21*
Presumption of Compatibility with International Obligations *22*
Presumption that all Laws bear a Meaning *23*
Presumption that an Updated Construction should be Applied *23*
Presumption that Penal and Revenue Statutes be Construed Strictly *24*
Presumption Against Implicit Changes in the Law *26*
Presumption against Retrospective Effect *27*
Presumption against Extra-territorial Effect *27*
Internal Aids to Construction 28
Use of the Long Title to an Act *28*
Headings and Marginal Notes *29*
The Wider Context: The Use of Extrinsic Aids to Construction 30
Construction of Related Statutes Together *32*
Explanatory Memoranda *33*
Legislative History of a Provision *34*
Oireachtas Debates *37*
The English Law *38*
The Irish Law *38*
International Conventions and Associated Documents 40
Options for Reform 41
Interpretation Acts *41*
Australia: Sections 15 AA and AB of The Acts Interpretation Act 42
Application of Section 15AA in the Courts *44*
Application of Section 15AB in the Courts *45*
Where there is no Ambiguity *45*
Where the Legislation is Ambiguous *46*
Use of Extrinsic Materials to Confirm the Literal Meaning *47*
Relative Weight of Parliamentary Speeches *48*
Practice Directions *49*

TABLE OF CONTENTS

Victoria **49**
New Zealand **50**
United States **51**
Canada **52**
The Report of the English and Scottish Law Commissions **54**
Report of the Hong Kong Law Reform Commission **55**
Sweden **55**
Approach to Interpretation ***55***
Use of Extrinsic Materials in the Interpretation of Statutes ***55***
Finland **56**
Italy **57**

CHAPTER 2 LEGISLATIVE DRAFTING STYLE **59**
Introduction: The Evolution of Drafting Style **59**
Historical Background **59**
Fees *59*
Supremacy of Parliament *60*
Use Of Precedents and Models by Lawyers *60*
The Power in The Written Word ***61***
The Language of Statutes **62**
Ireland **63**
Why are Irish Statutes Difficult to Understand? ***67***
Amendment of Legislation *68*
The Need for Updated Legislation *70*
The Need for Uniformity *70*
To Whom Should Legislation be Addressed? *70*

CHAPTER 3 PLAIN LANGUAGE AND LEGISLATION **72**
Plain Language Or Plain English **73**
Advantages and Disadvantages of the Plain Language Approach **74**
(a) Concern that Plain Language will Lower Standards of Good Writing .. ***74***
(b) Concern For Intelligibility ***75***
(c) Concern that Plain Language can only be Achieved if Certainty is ***77***
Sacrificed ***77***
(d) Plain Language will Lead to the Loss of Established Meanings of ***79***
Words Settled over Centuries of Judicial Interpretation. ***79***
(e) Costs of Plain Language are Prohibitive ***80***
Plain Language and Legislation in Some Other Jurisdictions **83**
United Kingdom: Proposals for Law Reform ***83***
United States ***85***
Canada ***86***
Australia ***87***
European Union ***87***

CHAPTER 4 THE COMMISSIONS PROPOSALS **89**
Interpretation **89**
Codifying the Rules of Interpretation in a New Interpretation Act ***89***
Literal and Purposive Approaches to Interpretation **90**

TABLE OF CONTENTS

Ascertaining the Context of a Provision: the Use of Internal Aids to Interpretation *91*
The Use of External Aids to Interpretation *92*
A General Principles Approach to Drafting **95**

CHAPTER 5: HOW CAN DRAFTING BE IMPROVED? **98**
I. Language **98**
1. Familiar Vocabulary and Preference for Simplicity of Style *98*
2. Shorter Sentences *99*
3. Changing the Grammatical Structure of Sentences *100*
4. Splitting Subject and Verb *102*
5. Active and Passive Voice *103*
6. Omit Surplus Words *104*
7. Write Positively *106*
8. Cohesion Among/Between Sentences *107*
9. Creation of Unnecessary Concepts *107*
10. Sex Bias *108*
Pronouns *108*
Use of the plural *108*
Substitution *109*
11. Technical Language *109*
12. Consistency *109*
II. Structure And Format **110**
1. Organisation *110*
2. Numbering System *112*
3. Typography *112*
4. Improved Use of Definitions *113*
5. Index *115*
Recommendations *115*
III. Aids To Understanding **116**
1. Use of Examples *116*
2. Statements of Purpose and Long Titles *117*
Purpose of the Act *118*
3. Use of Mathematical Formulae *119*
4. Maps and Diagrams *120*
IV Amendment and Consolidation **121**
Amendment *121*
Consolidation *121*

CHAPTER 6: SUMMARY OF PROVISIONAL RECOMMENDATIONS **122**
Interpretation **122**
Statutory Drafting **124**
Language *124*
Structure and Format of Acts *125*
Aids to Understanding *125*
Amendment and Consolidation of Legislation *126*

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS **127**

CHAPTER 1: INTERPRETATION

1.001 It is fair to say that the present style of drafting has developed because of the literal approach to interpretation adopted by the courts. Indeed, in the *Renton Report on the Preparation of Legislation (1975)*[1] it is suggested that:

> "unsatisfactory rules of interpretation may lead the drafters to an over-refinement in drafting at the cost of the general intelligibility of the law."

1.002 What are these rules? The history of the common law is one of competing approaches to statutory interpretation, embodied in a series of rules which give expression to the shifting balance of powers between legislature and judiciary and attempt to preserve a delicate equilibrium between the two. The "literal" approach to statutory interpretation and the "purposive" approach, (closely related to the teleological or schematic approach) are the two often competing methods of interpretation which concern the courts today. The antecedents of the purposive approach may be seen to varying extents in the "mischief rule"[2] and the "golden rule"[3] developed by the English common law in previous centuries and still invoked by present-day courts. Today, it is most accurate to state that there is no single rule of literal or purposive interpretation, but that a principally literal approach is modified by a purposive approach, with an examination of the Act's purpose becoming more important if the Act is ambiguous or absurd.

Approaches to Interpretation

The Literal Rule

1.003 Preserving the separation of powers remains crucial to statutory interpretation. The Irish courts have been conscious of the need to clearly define and delimit their role in interpreting legislation, so as to avoid any implication that they are creating law and thereby usurping the role of the Oireachtas. The role of the courts is seen as best delimited by accepting the primacy of the text of the statute as enacted by the Oireachtas – by adopting a literal interpretation. The literal rule, in its purest form, has an inflexibility which places particular strain on the draftsperson, requiring language which expressly covers all eventualities. This extreme inflexibility can be seen in the words of Lord Esher MR in *R v The Judge of the City of London Court*[4] where he stated that "[i]f the words of an Act are clear,

---

1 *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London, 1975) Cmnd. 6053, at para.19.1.

2 *Heydon's case* (1584) 3 Co Rep 7a.

3 *Warbutton v Loveland* (1828) 1 Hud & B 623; *People (Attorney General) v McGlynn* [1967]IR 232; *DPP v Flannagan* [1979] IR 265.

4 [1892] 1 QB 273 9 CA

you must follow them, even though they lead to manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity."

1.004 The literal approach is impractical and unhelpful to the drafter, in that it fails to acknowledge the limited capacity of language, even where there is no particular ambiguity, to assert a single indisputable meaning. Neither does it acknowledge the impossibility of the drafter's taking account of every possible factual situation which may arise under a statute, and catering expressly for each of these situations in a single statutory provision. If the drafter is to write comprehensively enough to anticipate the effect of literal interpretation, it is more than likely that clarity and brevity will be sacrificed.

1.005 In the Report of the English and Scottish Law Commissions on the *Interpretation of Statutes*, it was commented that:

> "[t]o place undue emphasis on the literal meaning of the words of a provision is to assume an unattainable perfection in draftsmanship; it presupposes that the draftsmen can always choose words to describe the situations intended to be covered by the provision which will leave no room for a divergence of opinion as to their meaning."[5]

1.006 It is now generally recognised that the literal approach must be tempered by at least some flexibility in order to avoid an application of a statutory provision by a court which would be absurd or unreasonable. In the case *of McGrath v McDermott*[6] Finlay CJ set out a modified literal approach in relatively flexible terms when he said:

> "The function of the courts in interpreting a statute of the Oireachtas is ... strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable."[7]

1.007 The literal approach to interpretation is stated, also in flexible form, by Budd J in *Rahill v Brady*:[8]

> "in the absence of some special technical or acquired meaning the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has prima facie preference, there is also a 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 intention of the

---

5 Law Com No.21; Scot. Law Com. No.11(1969) at p.17.
6 [1988] IR 258
7 At p.276.
8 [1971] IR 69

> 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."[9]

1.008 Thus, for example, where there is ambiguity in the terms of a provision, the long title to the Act may be used to assist in the construction of the provision.[10]

The Golden Rule

1.009 The golden rule is still referred to by the courts today as a means of modifying stringent application of the literal rule.[11] It was set out by Lord Blackburn in *River Wear Commissioners v Adamson.*[12] The golden rule, he stated, enabled the courts:

> "to take the whole statute together, and construe it all together, giving their words their ordinary significance, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary significance, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear."[13]

1.010 This is mirrored by the more lenient application of the literal approach to interpretation now favoured by the Irish courts, whereby a literal construction is replaced by a more purposive one in cases of doubt or ambiguity.

The Mischief Rule

1.011 The mischief rule, the oldest of the rules of interpretation, reflects a balance of the legislative and judicial powers which some consider renders it inapplicable today.[14] It presumes a legal system in which legislative intervention in the common law is an exceptional occurrence, used only to address a "mischief" or "defect" in the common law. Though it may be expressed in outdated terms, however, the rule bears similarities to the purposive and schematic approaches to interpretation which have been developed by modern day courts. The mischief rule has been given legislative force in a number of common law jurisdictions[15] and is still cited by the courts. The rule was recently referred to in the Irish High Court,

---

9 At p.86. See also the dicta of Henchy J in *Minister for Industry and Commerce v Hales* [1967] IR 50 at p.74. The view that the Act as a whole should be looked at in the interpretation of one provision is however doubted by McCarthy J in *Texaco (Ireland) Ltd v Murphy* [1991] 2 IR 449. See *infra* para.1.019.

10 *Minister for Industry and Commerce v Hales* [1967] IR 50. But see *Texaco (Ireland) v Murphy* [1991] 2 IR 449

11 See Denham J in *DPP (Ivers) v Murphy* [1999] 1 ILRM 46 at p.58.

12 (1877) 2 Appeal Cas 743

13 At p.764

14 English and Scottish Law Commissions, *Report on Statutory Interpretation, 1969,* para.33.

15 See *infra.* para.1.151, para.1.175, para.1.184.

where Budd J identified the need to examine "the mischief sought to be addressed by the passing of *An Blascaod Mór National Historic Park Act, 1989.*"[16]

1.012 The mischief rule was set out in *Heydon's* case,[17] where it was held that four matters might be considered in the interpretation of statutes:

> 1) "What was the common law before the making of an Act;
> 2) What was the mischief and defect for which the common law did not provide;
> 3) What was the remedy the parliament hath resolved and appointed to cure the disease of the commonwealth;
> 4) The true reason of the remedy.
>
> And then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*"

Competing Literal and Purposive Approaches to Interpretation in the Irish Courts

1.013 The competing literal and purposive approaches to the interpretation of legislation are set out most comprehensively in *Inspector of Taxes v Kiernan*[18] and in *Howard and others; Byrne and others v The Commissioners of Public Works in Ireland.*[19]

1.014 In *Kiernan*, a case which turned on the meaning of the word "cattle", the courts approach to interpretation was set out by Henchy J. He identified the first basic principle of statutory interpretation that words, where they were used in a statutory provision which was "directed to the public at large" should be given their ordinary or colloquial meaning.

1.015 Henchy J quoted Lord Esher M.R in *Unwin v Hanson*:[20]

> "If the Act is directed to dealing with matter affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

---

16 *An Blascaod Mór Teoranta and Others v Commissioner of Public Works in Ireland*, Unrep., July 1997

17 (1584) 3 Co Rep 7a

18 [1981] IR 117. See also the judgment of Barr J in *PJ v JJ* [1992] ILRM 273

19 [1994] 1 IR 101

20 [1891] 2 QB 115 at p.119

1.016 It is notable that Henchy J made the "ordinary meaning" rule dependent on context, and on the audience to which a statute is addressed. He made it clear that, if a statute was addressed to a particular class, to whom the words would have a distinct meaning, or amongst whom the words would be used as a term of art, the "ordinary meaning" rule would not apply.[21]

1.017 The second rule of statutory interpretation which Henchy J identified related to statutory provisions creating a penal or taxation liability. In such cases,

> "the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language."[22]

1.018 Third, Henchy J noted that, in identifying the ordinary or colloquial meaning of a word, the judge should look primarily not to dictionaries or other similar sources, but to his or her own experience of the word's use. Dictionaries should only be used if confusion was caused by, for example, alternative meanings or regional usages, or a change over time in the meaning of the word. In regard to the interpretation of "cattle" on which the case turned, he held:

> "In regard to "cattle", which is an ordinary and widely used word, one's impression is that in its modern usage the word, as it would fall from the lips of the man in the street, would be intended to mean and would be taken to mean no more than bovine animals. To the ordinary person, cattle, sheep and pigs are distinct forms of livestock."[23]

1.019 Henchy J's approach was followed by McCarthy J in *Texaco (Ireland) v Murphy*[24] where he reiterated the primacy of the "plain meaning" rule, stating that

> "[w]hilst the Court must, if necessary, seek to identify the intent of the Legislature, the first rule of statutory construction remains that words be given their ordinary literal meaning."[25]

He went on to say that:

> "[t]he legal principle appears clearly to be that if the claim for allowance falls within the express wording of the permitting section, it must be upheld. Arguments based upon the application or otherwise of other sections, proximate or not, appear to me to be unsound in law."[26]

1.020 The literal approach adopted in *Kiernan* has not gone unchallenged. The decisions in the *Byrne* and *Howard* cases in both the High and Supreme Courts indicate that there is a clear division of opinion on interpretation in the Superior

---

21 See also *Minister for Industry and Commerce v Pim Brothers Ltd* [1966] IR 154 and *Minister for Industry and Commerce v Hammond Metal Co Ltd* [1947] Ir Jur Rep 59.

22 [1981] IR 117 at p.122

23 *ibid.*

24 [1991] 2 IR 449

25 At p.456

26 At p.457

Courts. The cases concerned the building of interpretative centres at Luggala and Mullaghmore. The questions at issue were whether or not a state authority required planning permission under section 26 of the *Local Government (Planning and Development) Act, 1963* and whether or not the existence of section 84 of that Act, which made special provision for a state authority consulting a planning authority before constructing or extending a building, was an indication that the legislature did not intend to place any further obligation on state authorities.

1.021 In his High Court judgment in the *Byrne* case,[27] Lynch J. took a largely purposive approach to the interpretation of the 1963 Act, grounded, *inter alia*, on the following passage from the 4th edition of Halsbury:

> "[s]tatutes must be so construed as to make them operative. If it is possible, the words of a statute must be construed so as to give them a sensible meaning. A statute must, if possible, be construed in the sense which makes it operative and does not defeat the manifest intentions of the legislature and nothing short of impossibility so to construe it should allow a Court to declare a statute unworkable. Thus where a statute has some meaning, even if it is obscure, or several meanings, even though there is little to choose between them, the Court must decide what meaning the statute is to bear rather than reject it as a nullity. It is not permissible to treat a statutory provision as void for mere uncertainty: however if the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning, it must be regarded as meaningless. Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language which may be due to want of skill or knowledge on the part of a draughtsman unless such language is intractable."[28]

1.022 He interpreted section 84 of the 1963 Act accordingly:

> "I am of the view that the intention of the legislature in enacting s.84 of the Act of 1963 was wholly to exempt the State authorities from the necessity of applying for planning permission under Part IV of that Act. Such authorities may carry out any development they wish without any reference whatsoever to the local planning authority, except where the development consists of or includes the construction or extension of a building, when they must consult with the local planning authority regarding such construction or extension but not any other aspect of their proposed development and even in the case of the construction or extension of a building, if it be in connection with afforestation by the State, they need not refer at all to the local planning authority in such a case.
>
> The philosophy behind s.84 would appear to me to be that development by a State authority will not involve any element of private profit or gain. On the contrary, development by a State authority may be presumed to be for

---

27 [1994] 1 IR 91

28 4th ed. Vol.44, para.860 quoted at [1994] 1 IR 91 at p.97.

public purposes and for the common good. As the main object of requiring planning permission by other persons is to ensure that the proposed development does not conflict with the common good, it is logically unnecessary to require planning permission for development by a State authority."[29]

1.023 In his High Court judgment on the same point, in the *Howard* case,[30] Costello J. reached a different conclusion, adopting a literal construction of the section. He cited Maxwell on *The Interpretation of Statutes*,[31] in favour of a "natural meaning" approach:

> "It may be that the court will not agree that the words give rise to an absurdity; and even if they do give rise to an admittedly incongruous state of affairs, they may still be plain, in which case the court will have no option but to place on them their natural meaning."[32]

1.024 Costello J found that the terms of section 84 were "clear and unambiguous." He stated:

> "[i]f the result is that State authorities must apply for permission in all cases under section 24 and consult in some cases under section 84, this is not such an absurd result as to require the court to construe from it legislative intent to exempt State authorities from the equally clear obligations imposed by section 24 and, in effect, re-write the section. Furthermore, I do not think that I should infer that the legislature intended by this section to create the claimed exemption when, for the reasons already given, I think there is a reasonable inference that no such intention existed."[33]

1.025 Accordingly, a difference of opinion emerged between two of the most experienced judges of the High Court, between the respective editors of Maxwell and Halsbury and between a literal and purposive approach to the interpretation of statutes.

1.026 The Supreme Court divided on similar lines, a majority taking the literal approach adopted by Costello J. The Chief Justice adopted a narrow approach to the matters which could be considered by the Court, appearing to exclude from its consideration all questions of social policy:

> "the Court is of course not in any way concerned with whether the application of the Planning Acts to the Commissioners is or is not politically or socially desirable; that is a question exclusively reserved under the separation of powers for the legislature."[34]

---

29 At p.98.
30 [1994] 1 IR 101
31 SIR PETER MAXWELL, THE INTERPRETATION OF STATUTES, (12th ed. 1969) at p.29.
32 [1994] 1 IR 101 at p.120.
33 *ibid.*
34 At p.125. This contrasts with the view of the English and Scottish Law Commissions, *op cit.* fn.

1.027 The Supreme Court decided, with particular reference to the decision in *Byrne v Ireland*[35] that there was no presumption as to whether or not the requirements of the *Planning Act, 1963* applied to State agencies. Applying the ordinary principles of interpretation to section 84 of the 1963 Act, the majority held that the State was not exempt from the provisions of the Act. Blayney J, with whom the Chief Justice agreed, refused to attribute an intention to the legislature which was not plain from the ordinary meaning of the words of the statute.[36] The application of the Act could not be regarded as altered by implication, in the absence of any ambiguity in the meaning of sections 24 and 84. In fact, he found, the meaning of the section was plain. It was not open to the Court to interpret the section by "coming to a conclusion as to the intention of the legislature without that intention being expressed in the section itself."[37] The Court should not, he held, speculate as to the intent of the legislature.[38]

1.028 Blayney J appeared to accept that his approach could lead to the courts giving effect to "absurd" provisions. He noted the submission that it would be an absurd situation if the Commissioners had to comply with section 84 and also obtain planning permission, but held that:

> "where, as here, the provisions of the sections are quite clear, the court is obliged to give effect to them even if the effect of doing so may not appear to be entirely reasonable."[39]

1.029 He quoted the uncompromising view of Maxwell:

> "Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to 'leave the remedy (if one be resolved upon) to others'."[40]

---

14 at para.46, which stated that a judge was entitled to take judicial notice of information relating to legal social and economic aspects of the society in which the statute is to operate.

35 [1972] IR. 241

36 At p.151, citing S G G EDGAR, CRAIES ON STATUTE LAW, (1971) (7th ed.) at p.65; and Maxwell, *op cit.* fn.31, at p.28. The approach of Blayney J was recently followed in the High Court by Geoghegan J in *Hegarty and Horgan v the Labour Court,* Unrep., 12 March 1999.

37 [1994] 1 IR 101 at p.153

38 *ibid.*, citing Craies, *op cit.* fn.36, at p.66 which refers to Lord Watson's judgment in *Salomon v. Salomon & Co. Ltd.* (1887) A.C. 22, 38 where he said:

" 'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."

39 At p.154.

40 *ibid.* quoting Maxwell, *op cit.* fn.31, at p.29.

1.030 Blayney J was of the view, however, that it was questionable whether the provisions of section 84 which were at issue in the case did in fact give rise to an absurdity.

1.031 Denham J was also of the view that a literal approach should be adopted. She stated that:

> "the correct conclusion to be drawn is that the plain language of the Act must not be extended beyond its natural meaning so as to supply omissions or remedy defects. The court should neither misconstrue words so as to amend defects in the legislation nor legislate to fill gaps left by the legislature. If there is a plain intention expressed by the words of a statute then the court should not speculate but rather construe the Act as enacted.
>
> Applying the rules of interpretation of statutes, in accordance with the fundamental concepts of the Constitution, it would be improper to give a strained construction to the act of 1963. Dealing with the fundamental concepts, the balancing of rights and powers under the Constitution, the primary and literal approach to the construction of the statute is appropriate."[41]

1.032 In contrast, O'Flaherty J expressed his agreement with the conclusions reached by Lynch J in the High Court, looking to the intention of the legislature and stating that it was inconceivable that section 84 would have been inserted into the Act of 1963 if it had been intended that State agencies would have to apply for planning permission.[42]

Two Distinct Approaches

1.033 The various High and Supreme Court judges who heard these cases can be divided between those who construe a statute in order to ascertain the intention of the legislature and those who construe a statute in strict accordance with its words and drafting. The latter give the ordinary meaning of the words used precedence over the actual intention of the legislature, while paying what can only be described as lip-service to the objective of following the intention of the legislature.

1.034 For example, whereas Lynch J. quotes para. 860 of Halsbury, which sets out the canon that, if possible, the words of a statute must be construed in the sense which makes it operative, Denham J. does not quote para. 860 but paras. 863 and 864 which set out the canons of "Primary Construction Without External Aids."

1.035 It is interesting to note that these paragraphs in Halsbury are preceded by the setting out of "General Principles of Construction", in paras. 855 to 858, which point to different approaches where statutes are "ambiguous" and "unambiguous". The approach of the majority, as evidenced by the passages they quote, is to a statute which is *unambiguous*. The passage quoted by Judge Lynch related to

---

41 At p.163.

42 At p.146.

ambiguous provisions. Surely, the very presence of section 84 rendered the 1963 Act ambiguous in this area? Costello J was constrained to describe his conclusion as "not such an absurd result ...", which appears to suggest that a lesser degree of absurdity might be acceptable. Blayney J acknowledged that the literal approach led to a conclusion which "may not appear to be entirely reasonable." It seems, on these dicta, that a provision must be entirely or acutely absurd or unreasonable, in order for the purpose of the legislation to be considered.

DPP (Ivers) v Murphy

1.036 The recent Supreme Court ruling in *DPP (Ivers) v Murphy*[43] suggests a move towards recognising ambiguity where a provision is absurd on its face – and therefore adopting a purposive approach in such circumstances. The judgment of Denham J (in which Barrington and Lynch JJ concurred) rejected a literal in favour of a purposive approach to the interpretation of section 6 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997.* Denham J acknowledged the need to ensure that a purposive approach to interpretation did not affect the separation of powers. In adopting a purposive interpretation, she stated a proviso that:

> "no method of interpretation may be such as to encroach on the constitutional role of the Oireachtas as the legislative organ of the State. The rules are applied to interpret the acts passed by the legislature and in so doing afford the respect appropriate from the judicial organ of government to the legislature."[44]

1.037 Denham J's judgment suggests, however, that an over-zealous application of the literal rule may do a disservice to the legislature. She stated:

> "The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take."[45]

1.038 In the case before the Court, a literal interpretation of section 6 of the 1997 Act would have resulted in the obviously absurd situation where an arresting garda would be required to attend in court in order to give evidence to establish that his own presence in court was not required under the terms of section 6. A purposive interpretation of the section was therefore adopted.

The Influence of EU Jurisprudence: The Growing Importance of Teleological Interpretation

1.039 The teleological approach to statutory interpretation originated in the civil law jurisdictions of Europe and was adopted by the European Court of Justice in the

---

43 [1999] 1 ILRM 46

44 At p.46.

45 At pp.59-60.

construction of EC legislation. In tandem with the growing importance of the law of the European Union in this jurisdiction, the teleological approach has gained recognition in the courts. It looks to the purpose or overall scheme of the Act. Denning LJ in *Buchanan and Co v Babco Limited*[46] explained the principle as follows:

> "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?"[47]

1.040 The terminology of teleological interpretation has allowed for greater examination of the purpose behind at least some Irish legislation. The Irish courts have been willing to take account of the teleological approach, particularly where there is ambiguity in the wording of a provision or the use of a literal construction would give rise to an absurdity. The teleological approach to statutory interpretation was notably applied by the Supreme Court in *Nestor v Murphy*,[48] in connection with the interpretation of section 3 (1) of the *Family Home Protection Act, 1976.* Noting that a literal construction of the section, as proposed by the defendants, would result in a "pointless absurdity" which would be "outside the spirit and purpose of the Act", Henchy J held that:

> "in such circumstances we must adopt what has been called a schematic or teleological approach. This means that section 3 (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."[49]

1.041 The courts have sometimes adopted a narrow interpretation of what constitutes an absurdity. In *Rafferty v Crowley,*[50] which concerned the definition of "prior mortgage" in section 80 of the *Building Societies Act, 1976*, Murphy J distinguished *Nestor v Murphy.* He found that a literal interpretation of the

---

46 [1977] QB 208

47 At p.213

48 [1979] IR 326. Though this was the first case in which the teleological approach was expressly applied, it was foreshadowed by the dicta of Henchy J (with whom the other members of the Supreme Court concurred) in *Frescati Estates Ltd v Walker* [1975] IR 177. Interpreting a provision of *the Local Government (Planning and Development) Act, 1963*, Henchy J at pp.189-190 referred to the need to construe the statute "so as to keep its operation within the ambit of the broad purpose of the Act" and referred to the "scheme" of the Act.

49 At p.329

50 [1984] ILRM 350

provision at issue in the case did not give rise to a "pointless absurdity" as in *Nestor v Murphy*, and applied the dicta of Lord Reid in *Luke v The Inland Revenue Commissioners*[51] that a teleological approach would be applicable where:

> "To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result."

1.042 Murphy J held that if the legislature had wanted to restrict the operation of section 80, to cases where the prior mortgage exceeded a certain amount, it would have been a simple matter to have done so. It could therefore be inferred that the legislature was aware of this option and chose not to restrict the definition. In the light of this, the court could not read restrictive clauses into section 80, but was constrained to interpret the section literally.

1.043 In *Murphy v An Bord Telecom Eireann*[52] the High Court was presented with competing interpretations of Irish equal pay legislation (which implemented requirements of EC law). On the one hand the Court was offered a traditional literal interpretation, and, on the other, a teleological approach in the tradition of EC law. Section 2 of the *Anti-Discrimination (Pay) Act, 1974* provided that it should be a term of the contract under which a woman is employed that she be entitled to the same rate of remuneration as a man who is employed in the same place by the same employer, if both were employed to do "like work".

1.044 "Like work" was defined in section 3(c)) to include the situation where the work performed by one person was equal in value to that performed by the other in terms of the demands made. In the particular case, the women's work was found to be more demanding than the men. The Labour Court decided that the plaintiffs were not entitled to relief as the work, though superior and more demanding, was not equal.

1.045 It was submitted on behalf of the appellants that the construction of the Act adopted by the equality officer and the Labour Court gave rise to consequences which could not have been intended by the Oireachtas and were contrary to the underlying policy of the Act, to Article 119 of the Treaty of Rome, 1957 and to Article 1 of the EEC Council Directive 75/117. It was submitted that the long title of the Act of 1974 and the terms of Article 119 and the directive, which the Act was designed to implement, made it clear that the legislature intended to outlaw discrimination in pay on the ground of sex. It was argued that if the view taken by the equality officer and the Labour Court was correct, it could mean in a case such as the present one that inequality of pay founded on gender discrimination would be treated by the Act as lawful. In these circumstances, it was submitted that s.3(c) should be read as though the words "at least" appeared before the words "equal in value". The words "equal in value" should not be construed as requiring equality of mathematical precision, since this again would defeat the clear intention of the legislature.

---

51 [1963] AC 557

52 [1986] ILRM 483.

1.046 On behalf of the respondents, it was submitted that the operation of s.3(c) was clearly confined to cases in which the work under consideration was "equal in value". To interpret it as applying to cases where the work was unequal in value was to do violence to the language used by the legislature. In this connection, the logical consequence of the appellants' argument was that, were the equality officer to find that the male employee's work was of superior value, the wages of the appellants would still have to be increased to the same level, since the "one" referred to in sub-paragraph (c) was not necessarily the person who brought the matter before an equality officer under the later provisions of the Act. It was argued that the instances in which women were being paid less than men for work of superior value because of sexual discrimination (as distinct from grounds which in the context of the legislation were legitimate) were probably so few that the legislature did not consider it necessary to provide specifically for them.

1.047 Keane J held that the submission made on behalf of the appellants would require the words "equal in value" to be read as applicable to cases such as the present where the work was unequal in value. To so read the words "equal in value" would be to do violence to the language used by the legislature to an impermissible extent.

> "One can readily understand that the legislature may simply have failed to remedy an alleged injustice, whether because of an oversight or otherwise, but there is no reason to impute to the legislature an intention only partially to remedy the injustice, when by the use of apt language it could have remedied it in its entirety.
>
> The words used in a statute must be construed in their ordinary and natural meaning. So construed, there is no ambiguity in the expression "equal in value" and it cannot apply to the circumstances in the present case. No doubt, the words should not be used so as to require a mathematical exactitude of equality, having regard to the statutory context in which they are used. It is not, however, permissible for the court to construe the language used so as to deal with a particular situation with which the legislature has manifestly not dealt."[53]

1.048 Keane J referred to the teleological and schematic approaches to statutory interpretation, and to the use of such methods in the Irish courts. However, he saw the applicability of this approach as limited to cases, of which the present case was not one, where there was "patent or latent" ambiguity in the terms of the statutory provision. The teleological approach did not apply, he held, where the legislature could have made statutory provision for a particular eventuality, but for whatever

---

[53] At p.486. Keane J quoted Henchy J. in *Director of Public Prosecutions v. Flanagan* [1979] IR 262 at p.282:

> "... the result of this interpretation ... is to produce an anomalous and, as many people would say, unjustifiable distinction ... It may very well be that such a consequence ... was not intended or even considered. However, the province of the courts in interpreting a statute is not to divine what intention parliament had when passing the particular statute but, by the application of the relevant canons of interpretation, to ascertain what intention is evinced by the actual statutory words used."

reason, did not do so. This limited view of the scope of teleological interpretation reflects the rigorous rule applied in *Byrne* and *Howard*.[54] The Court's approach was to be revised, however, in the light of the ruling of the European Court of Justice in the case, following a referral of several points of law to the Court by Keane J.

1.049 The ruling of the ECJ and the final judgment of Keane J in the High Court, demonstrate the increasing influence and impact of European methods of interpretation in Irish law, and the capacity of the rule of teleological interpretation to override or modify the rigidly literal approach of the common law. In *Murphy v Bord Telecom*,[55] the Court confined its adjudication to the question whether Article 119 of the EEC Treaty, which required equal pay for equal work, covered the "unequal" situation in the case under appeal. The Court decided that the principle applied *a fortiori* in situations where the lower paid worker is engaged in *more demanding work.* It held that to adopt a contrary interpretation would be tantamount to rendering the principle of equal pay ineffective and nugatory.[56]

1.050 In his final judgment,[57] Keane J noted that the construction of the relevant provisions of the 1974 Act in accordance with the canons of construction normally applied in the Irish courts had led to a conflict with Article 119 of the Treaty of Rome, as interpreted by the European Court of Justice. In these circumstances, he held, national law should yield primacy to Community law.[58] However, he held that the 1974 Act could still be applied, by giving a purposive or teleological, instead of a literal interpretation to the relevant sections.[59] He remitted the matter to the labour court for adjudication on the basis of a teleological interpretation of "like work" in the statute.[60]

1.051 Referring to his initial judgment in the case, Keane J held that the passage of his judgment which adopted a literal construction of the relevant provisions had been misleading insofar as it excluded completely a teleological interpretation. He stated that:

> "While it is true that the language used by the Oireachtas, literally interpreted, yields a result which is at variance with the law of the community, it does not follow, as this passage might have suggested, that the literal construction is the only construction available. On the contrary, in the light of the judgment of the Court of Justice of the EC, it is clear that it must give way in the present case to the teleological construction, for the reasons I have already given."[61]

1.052 Thus it can be seen that the terminology of teleological interpretation and the doctrine of the primacy of Community law have opened the door to a greater consideration of a statute's purpose, at least where the statute implements the law of

---

54 *Supra* paras. 1.020 – 1.031

55 [1989] ILRM 53

56 At p.57.

57 [1989] ILM 53 at p.58 *et seq*.

58 He cited *Crotty v An Taoiseach* [1987] ILRM 400 in this regard.

59 [1989] ILRM 53 at p.60.

60 At p.62.

61 At pp.61-66.

the European Community. The importance of a teleological approach to the interpretation of provisions of European law by the Irish courts was confirmed in *Lawlor v Minister for Agriculture,*[62] where Murphy J said:

> "It seems to me that in construing EEC regulations I am bound to apply the canons of [teleological] interpretation ... and with regard to domestic legislation it does seem to me that similar principles must be applicable at least insofar as it concerns the application of Community regulations to this State."[63]

1.053 Murphy J observed that the teleological approach to interpretation was not an entirely new departure in Irish law, since for some time a purposive approach had been adopted in the interpretation of the Constitution.

1.054 Subsequent caselaw demonstrates a consistent acceptance of teleological interpretation. The case of *Bosphorus Hava v Minister for Transport*[64] concerned Council Regulation No 990/93/EEC, and the *European Communities (Prohibition of Trade with Federal Republic of Yugoslavia, (Serbia and Montenegro)) Regulations 1993.* Murphy J confirmed that schematic and teleological interpretation was a fundamental principle of interpretation to be applied to EC Regulations and Directives.

1.055 The teleological approach to interpretation as developed in the context of European law may also assist in increasing the acceptability of a purposive approach to the interpretation of statutes generally. The decision of Keane J in *Mulcahy v Minister for the Marine* suggests that the teleological and purposive approaches may be conflated.[65] The case concerned the construction of the *Fisheries (Consolidation) Act 1959,* and the granting of a licence for a fish farm under its terms. Keane J acknowledged that both a literal and a "teleological or purposive" interpretation were open to the Court, and that the Court must choose between them. He stated that:

> "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."[66]

1.056 Keane J distinguished between a distortion of the language of section 15 of the Act, which would not be permissible, and acknowledging and applying the intention of the Oireachtas. He was satisfied that, in order to give effect to the intention of the Oireachtas, it was necessary for the Court to adopt a teleological or purposive construction.

---

62 [1990] 1 IR 356
63 At p.375
64 [1994] 2 ILRM 551
65 Unreported, High Court, 4 November 1994
66 At p. 12

Maxims and Presumptions

1.057 The maxims and presumptions developed by the common law in the interpretation of statutes perform an important function in ascribing to the legislature certain common-sense intentions. They can assist in avoiding absurdity in the plain words of a statute, and obviate the need for lengthy examination of the legislative intent in enacting a particular provision. They are not binding legal rules, however, but "axioms of experience"[67] which may provide guidance to a court in statutory interpretation.

1.058 The principal maxims and presumptions, and their application in the Irish courts, are set out below.

The Importance of Context: The Noscitur a Sociis and Ejusdem Generis Rules

Noscitur a Sociis

1.059 The rule of *noscitur a sociis* states that words of a statute are to be construed in the light of their context.[68] It may be translated as "a thing is known by its associates". In the English case of *Bourne v Norwich Crematorium Ltd*,[69] Stamp J explained the rule as follows:

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase and meaning which as a sentence or phrase it cannot bear without distortion of the English language."[70]

1.060 In *People (Attorney General) v Kennedy*,[71] the Supreme Court was required to interpret section 29 of the *Courts of Justice Act, 1924*, which granted a right of appeal without any express limitation as to who could bring the appeal. The Supreme Court rejected a literal interpretation of the section and held that the right of appeal was impliedly limited to the accused person. Black J viewed the approach of the Court in this case as part of a wider principle that statutory provisions should be interpreted in context, which encompassed both the *noscitur a sociis* and the *ejusdem generis* rules. [72]

---

67 *Per* Holmes J in *Boston Sand and Gravel Co v US* (1928) 278 US 41 at p.48.

68 See the dicta of Viscount Simonds in *AG v Prince Ernest Augustus of Hanover* [1957] AC 436 at p.461: "Words, and particularly general words, cannot be read in isolation; their colour and their content are derived from the context."

69 [1967] 2 All ER 576

70 At p.578. Cited with approval in *Dillon v Minister for Posts and Telegraphs*, Supreme Court Unreported, 3 June 1981.

71 [1946] IR 517

72 See also *Dillon v Minister for Posts and Telegraphs, op cit.* fn.70; *United States Tobacco International Inc v Minister for Health* [1990] 1 IR 394.

1.061 He explained the importance of the rules as follows:

> "A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and examines the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented."[73]

He went on to say:

> "If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of *ejusdem generis* and *noscitur a sociis* utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given quite a different meaning when viewed in the light of its context."[74]

1.062 In *HMIL Limited (Formerly Hibernia Meats International Ltd) v Minister For Agriculture and Food,*[75] the *noscitur a sociis* and *ejusdem generis* rules were applied. In construing EC regulations on the export of beef, Barr J held that, on an application of the *noscitur a sociis* rule, "the Court should recognise the common denominator between 'scraps' and 'large tendons, cartilages, pieces of fat', i.e. that all are unfit for human consumption.[76]

Ejusdem Generis

1.063 The *ejusdem generis*, or "of the same genus" rule, is similar though narrower than the more general rule of *noscitur a sociis*. It operates where a broad or open-ended term appears following a series of more restrictive terms in the text of a statute. Where the terms listed are similar enough to constitute a class or genus, the courts will presume, in interpreting the general words that follow, that they are intended to apply only to things of the same genus as the particular items listed. Bennion defines the *ejusdem generis* rule as,

> "a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character."[77]

1.064 The *ejusdem generis* rule was applied by O'Higgins J in The *People (DPP) v Farrell,*[78] in the construction of section 30 of the *Offences Against the State Act, 1939*. It was argued that the detention of the applicant in a garda car for a period of hours during the course of his questioning was unlawful and that his subsequent detention in a garda station was therefore also unlawful. The legality of the

---

73 [1946] IR 517at p.536.
74 *ibid.*
75 High Court Unreported, 8 February 1996.
76 At p.32 of the transcript.
77 FRANCIS BENNION, STATUTORY INTERPRETATION, (2nd ed. 1992) at p.858.
78 [1978] IR 13

detention turned on whether a garda car could be regarded as a "convenient place" in accordance with the legislation. O'Higgins J considered that it could not, since the *ejusdem generis* rule required that the term be construed in the light of the other places of detention listed: "Garda Síochána Station, a prison, or some other convenient place". The rule required, at a minimum, that "other convenient place" should be a building of some kind.[79]

1.065 In *HMIL Limited (Formerly Hibernia Meats International Ltd) v Minister For Agriculture And Food,*[80] the *ejusdem generis* rule was applied along with the *noscitur a sociis* rule. Barr J considered that a provision listing "other scraps left over from cutting or boning" at the end of a list of more specific items – bones, cartilages – was "an apposite illustration of the *ejusdem generis* principle in operation." He found that, according to the rule, "other scraps" should be interpreted as including all unspecified items which were not fit for human consumption."[81]

1.066 More recently, the presumption was applied in the High Court by Barr J in *Royal Dublin Society v Revenue Commissioners.*[82] Barr J held that section 7 of the *Excise Act, 1835*, which allowed the Revenue Commissioners to grant a liquor licence to " ... a theatre or other place of public entertainment" was a provision to which the *ejusdem generis* rule applied. He found that there was nothing in the Act to suggest that "other place of public entertainment" was meant in a wider sense to that applicable to "theatre" and that therefore it should be interpreted only as referring to places of public entertainment which were similar to, or within the same genus as, "theatre", in other words to "a performance for the benefit of the public with a defined time frame and where seating is provided for patrons."[83]

1.067 The *ejusdem generis* rule will not apply where there is a list of items which do not constitute a genus, or where only one item is listed. In *Kielthy v Ascon Ltd*[84] it was emphasised by O Dalaigh CJ that the *ejusdem generis* rule could only apply where antecedent categories establish a genus. He held that this was not the case where, as in the provision to be interpreted by the court, the general words were preceded by the enumeration of only one category. In *Dublin Corporation v Dublin Cinemas Ltd* [85] it was held that a list of words in a statute which included playgrounds, recreation grounds and "any building adapted for use as a shop" was too broad and included items which were too incongruous to constitute a genus, and that therefore the *ejusdem generis* rule did not apply.

---

79 However, O'Higgins J held that the detention continued to be in the Garda station, and that this encompassed the agreed journey in the car and return i.e. the detention did not end by reason of the car journey.

80 *op cit.* fn.69

81 At p.33 of the transcript. Barr J noted that the application of the *noscitur a sociis* and *ejusdem generis* rules had precisely the same effect as regards the interpretation of the statute as would an application of the principles of teleological interpretation.

82 [1998] 2 ILRM 487

83 In *Point Exhibition Company v Revenue Commissioners* [1993] 2 IR 551, Geoghegan J expressed doubt (*obiter*) that a dance hall could be described as a "place of public entertainment" under the same section, having regard to the *ejusdem generis* rule. See also *Irish Commercial Society v Plunkett* [1986] IR 258; *CW Shipping Co Ltd v Limerick Harbour Commissioners* [1989] ILRM 416.

84 [1970] IR 122

85 [1963] IR 103

1.068 The courts will also refuse to apply *ejusdem generis* where a statute contains general words, which are then followed by a list of particular items: in such cases the list of items is not regarded as limiting. In *Application of Quinn*,[86] Griffin J pointed out the limitations of *ejusdem generis*, and emphasised that it was a presumption rather than a rule: "...the *ejusdem generis* rule is one to be applied with caution as it is a mere presumption which applies in the absence of any other indications of the legislature."[87] He found that the *ejusdem generis* presumption did not apply to the construction of section 2 of the *Public Dance Halls Act, 1935,* since the general words preceded the particular words, rather than followed them.

Acknowledging Particular Circumstances: Generalia Specialibus Non Derogant

1.069 *Generalia specialibus non derogant* is the principle that a general statutory provision does not repeal a specific one. The rule may apply either to two separate statutes, or to provisions within the same Act.[88] It was applied by the Supreme Court in the case of *Hutch v the Governor of Wheatfield Prison*.[89] That case posed the question whether a young person between the ages of fifteen and seventeen years who had been convicted of an indictable offence tried summarily, could be sentenced for the period of detention applicable to an adult (under the *Criminal Justice Act, 1951*), or whether the sentence was limited to three months imprisonment under the terms of the *Summary Jurisdiction Over Children (Ireland) Act, 1884*. The Court held that since the 1951 Act was a general Act, and the 1884 Act had a special application, the maxim *generalia specialibus non derogant* applied. Therefore, the 1884 Act was not impliedly amended or repealed by the 1951 Act, and the possible sentence was limited to three months imprisonment.

1.070 The maxim was applied as regards conflicting provisions of the same Act in the High Court in *National Authority for Occupational Safety and Health v Fingal County Council*[90] In that case, there was an apparent conflict between the general terms of subsection 3 of section 51 of the *Safety Health and Welfare at Work Act, 1989*, which stipulated that certain proceedings must be instituted within one year, and subsection 4 of the same section, which stated that proceedings in more limited circumstances should be brought within six months. Murphy J, referring to the *Hutch* case, found that the more restrictive period in subsection 4 applied.[91]

---

86 [1974] IR 19

87 *ibid.* p.30.

88 See *Welch v Bowmaker (Ireland) Ltd* [1980] IR 251 where Henchy J said:

> "when you find a particular situation dealt with in special terms, and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation."

89 Supreme Court, Unreported, 17 November 1992

90 High Court, Unreported, 4 July 1996

91 See also *Dublin County Council v Hill* [1992] LRM 397 Supreme Court; *McGonagle v McGonagle* [1951] IR 123; DPP v Grey [1986] IR 317; *Duffy v Dublin Corporation* [1974] IR 33; *Short v Dublin County Council* [1982] ILRM 117; *The People (DPP) v Kelly* [1982] IR 90.

Construing Words as Limiting: Expressio Unis est Exclusio Alterius

1.071 The maxim *expressio unis est exclusio alterius* ("to express one thing is to exclude another") allows the courts to imply that where an Act applies a rule to a particular situation, the Oireachtas intended to confine the rule to that situation, and not to apply it in any wider context.

1.072 The maxim was applied in *Kiely v Minister for Social Welfare*[92]and again in *O'Connell v An t-Ard Chlaraitheoir.*[93] It was succinctly illustrated by Henchy J in *Keily* when he said:

> "The fact that article 11 (5) allows a written statement to be received in evidence in the specified limited circumstances means that it cannot be received in other circumstances: *expressio unius est exclusio alterius*".[94]

1.073 The maxim has limitations, however, and will not apply where a legislative provision merely states a particular aspect or a particular application of a more general rule of law. This was accepted by the Irish courts in *The State (Minister for Lands and Fisheries) v Judge Sealy*[95] and in *Inspector of Taxes v Arida Ltd*[96] .

Presumption of Constitutionality

1.074 Where, in the case of a statute which post-dates the 1937 Constitution,[97] two interpretations of a provision are open to a court, one which is in accordance with the Constitution and the other which would render the provision unconstitutional, the interpretation which would render the provision constitutional is presumed to have been intended by the Oireachtas. The presumption of constitutionality is a strong one, which is defeated only where the construction of a provision as constitutional would involve the effective substitution or amendment of the provision in question.[98] It may result in a highly restrictive construction of a statutory provision, in order to save it from unconstitutionality.[99]

1.075 The rule was set out by the Supreme Court by Walsh J in *East Donegal Co-op v Attorney General*:[100]

> "An Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the

---

92 [1977] IR 267

93 High Court, Unreported, 21 March 1997

94 [1977] IR at p.279.

95 [1939] IR 21

96 [1992] 2 IR 155

97 On the application of the presumption to pre-1937 statutes, see *Educational Co v Fitzpatrick* (No 2) [1981] IR 345; *State (Sheeran) v Kennedy* [1966] IR 379; *Haughey v Moriarty*, Supreme Court, Unreported, 28 July 1998. Post-1937 amendments to pre-1937 statutes enjoy the presumption of constitutionality: *Haughey v Moriarty.*

98 The presumption of constitutionality also implies the presumption that the Act will not be administered in a manner contrary to the Constitution: *McMahon v Leahy* [1984] IR 525.

99 E.g. *Colgan v Independent Radio and Television Commission* [1999] 1 ILRM 22

100 [1970] IR 317; See also *McDonald v Bord na gCon* [1965] IR 217; *Quinn v Wren* [1985] IR 322; *O'Brien v MS* [1985] ILRM 86

> Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they may both appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt."[101]

1.076 Although the presumption imports some consideration of legislative intent into the interpretation of a provision, it was stated, in *East Donegal,* to be limited by the literal approach to interpretation. Thus where the clear and unambiguous words of a provision have an effect which is unconstitutional, the provision "cannot be given an opposite meaning."[102] Any strained interpretation which amounted to a substitution of a constitutional provision for an unconstitutional one would, it was held, infringe the separation of powers.

Presumption of Compatibility with European Law

1.077 European directives and regulations, and associated legislation, will be interpreted by the courts in accordance with Community law. In *Dowling v Ireland*[103] Murphy J accepted this principle of interpretation, although he did not apply it in that case. *Dowling v Ireland* concerned the application of Council Regulation 857/84 in regard to the payment of milk quotas. The plaintiff claimed that, on their literal interpretation, the regulations discriminated against farmers such as himself who had temporarily ceased and then resumed milk production. It was therefore argued that the regulations should be interpreted in accordance with the principle of equal treatment enshrined in EC law. Murphy J held, however, that the terms of the regulations were so clear that for the court to alter them so as to ensure equal treatment for the plaintiff would amount to amendment of the regulations, something which the court was not competent to do. He made an analogy with the presumption of constitutionality in the interpretation of Irish legislation as set out in *East Donegal Co-operative Livestock Mart v Attorney General,*[104] to the effect that a provision could only be given a constitutional as opposed to an unconstitutional interpretation if both were open to the court on the wording, and that any straining of the terms of a statute so as to effectively substitute one provision for another would be to usurp the function of the legislature.

1.078 The case was subsequently appealed to the Supreme Court which referred the question of the application of Article 3 a (1) to the European Court of Justice. The Court arrived at a similar conclusion to Murphy J in the High Court, and identified restrictions on the construction of legislative provisions in accordance with the principles of the *Treaty of Rome.* [105] The court was not, it held, competent to construe a provision in accordance with the principle of equality, where that involved an interpretation of the provision which was contrary to its clear purpose as expressed in its terms. Where the aim and purpose of the provision was clearly

---

101 At p.341

102 Where on the face of a provision there is a clear violation of the Constitution, the presumption will not apply. *M v An Bord Uchtála* [1975] IR 81.

103 [1991] 2 IR 279

104 *op cit.* fn.100

105 *Dowling v Ireland and others* (Case C-85/90), [1993] 1 CMLR 288

contrary to the principle of equality, the only option open to the court was to declare the provision invalid. Thus whilst treaty principles could be used to fill in gaps in EU legislation, they could not alter its express purpose. The Court stated:

> "There is no doubt that Community legislation is to be interpreted, so far as possible, in such a way that it is in conformity with general principles of Community law, including in particular the principle of equal treatment (which in the sphere of agriculture is also laid down by Article 40(3) EEC) and the principle of the protection of legitimate expectations. Thus, in interpreting Community legislation, the Court must presume that the legislator did not intend to flout such overriding principles of Community law. There are however limits as to how much interpretation can achieve. Beyond those limits, the Court has no choice but to declare the legislation invalid for breach of Community law; for the Court does not have any general power to amend or supplement legislation which would otherwise be invalid."[106]

Presumption of Compatibility with International Obligations

1.079 The issue of the presumption of compatibility with international obligations was raised in *O Domhnaill v Merrick.*[107] The case concerned the interpretation of sections of the *Statute of Limitations*, and the Supreme Court considered whether the stipulation of Article 6 (1) of the *European Convention on Human Rights and Fundamental Freedoms* that cases should be heard "within a reasonable time" affected the meaning of the Statute. The presumption of compatibility with international obligations was stated by Henchy J for the majority as follows:

> "one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations." [108]

1.80 McCarthy J in a dissenting judgment in the same case also affirmed the general principle that,

> "a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and ... one should avoid a construction which will lead to a conflict between domestic and international law." [109]

However, McCarthy J applied the principle more cautiously, declining to limit the meaning of the *Statute of Limitations* in accordance with the requirements of the Convention, since the Convention was not incorporated within Irish law.

---

106 *ibid.* p.297.
107 [1984] IR 151
108 At p.159
109 *ibid.* p.166.

Presumption that all Laws bear a Meaning

1.081 The courts presume that no words of a statute are enacted without a reason. The presumption is illustrated in the case of *Cork Co Council v Whillock,*[110] which turned on the interpretation of the *Malicious Injuries Act, 1981.* O'Flaherty J applied a literal interpretation to the section according to the ordinary and natural meaning of its words. He also stated that "a construction which would leave without effect any part of the language of the statute will normally be rejected."[111] Egan J endorsed the same principle, stating:

> "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."[112]

1.082 The rule was reiterated in the case of *Comptroller and Auditor General v Ireland and Attorney General*[113], which concerned the interpretation of sections of the *Comptroller and Auditor General (Amendment) Act 1993*[114] Laffoy J noted the decision in *Cork County Council v Whillock* and rejected the interpretation of the provision at issue put forward by the plaintiff, since it would result in some words of the section, which were clear and unambiguous, becoming meaningless. Laffoy J noted that this could not have been the intention of the legislature.

Presumption that an Updated Construction should be Applied

1.083 This presumption derives from the principle that a statute should be construed as always speaking. The courts will presume that a statute should be read in the light of conditions prevailing today and that social and technological developments will be taken into account. The interpretation of older legislation in the context of new technologies is an increasingly important aspect of the rule.

1.084 In *The State (O'Connor) v O' Caomhanaigh*[115] it was held that:

> "it is the provisions themselves which are to be looked at and examined – not the motives of those who enacted them."[116]

1.085 A cautious approach to the adaptation of legislation to new developments was advocated by Murphy J in *Keane v An Bord Pleanála.*[117] The case concerned the interpretation of the *Merchant Shipping Act, 1894*, and the application of its definition of "beacon" to more modern navigational aids. Murphy J stated that:

---

110 [1993] 1 IR 231
111 At p.237.
112 At p.239.
113 High Court, Unreported, 20 December 1996
114 The Act established a scheme of tax amnesty.
115 [1963] IR 93
116 At p.118
117 [1997] 1 IR 184

> "Where terminology used in legislation is wide enough to capture a subsequent invention, there is no reason to exclude it from the ambit of the legislation. But a distinction must be made between giving an updated construction to the general scheme of the legislation and altering the meaning of particular words used therein."[118]

1.086 Murphy J found that the "Loran-C" a modern navigational system, did not come within the 1894 Act, since the Act referred to precise equipment rather than to navigational aids in general terms. He stated that the terms of the Act did not permit the Commissioners:

> "to engage in the construction, maintenance or operation of a navigational aid system based on the transmission and reception (by and on equipment which had not been invented) of a wave motion or impulse which had not then been identified."[119]

1.087 *Universal City Studios Incorporated v Mulligan*[120] turned on the question of whether a videotape came within the definition of a cinematograph under the *Copyright Act, 1963*. Laffoy J, despite referring to the decision in *Keane v An Bord Pleanála*,[121] found that videotape could be brought within the terms of the 1963 Act, though she acknowledged that there could be some forms of information technology which might not be within its ambit.

1.088 In *Mandarim Records v Mechanical Copyright Protection Society (Ireland) Ltd,*[122] Barr J held that a "Power CD" which contained both sound recordings and other material including text and graphics, constituted a record within the meaning of the *Copyright Act, 1963*. He held that the fact that the framers of legislation would not have envisaged that the type of technology under consideration was not in itself a bar to the inclusion of the technology within an existing statutory framework. It was, he said, patently desirable that, where possible, advances in technology, even those which could not have been envisaged by the framers of an Act, should be accommodated in statutory interpretation by the courts. However, he held that this accommodation can be made only where the words of the provision were not strained beyond their ordinary meaning. Due regard must be paid to the structure and intent of the statute.[123]

Presumption that Penal and Revenue Statutes be Construed Strictly

1.089 Given the importance of preserving the rights of the accused, statutes which are "penal" (a broad term) in their nature will be construed by the courts as strictly limited. Penal liability will not be implied by the courts in the absence of clear and unambiguous words.

---

118 At p.193

119 At p.198. The Supreme Court upheld the ruling of the High Court.

120 [1998] 1 ILRM 438

121 *op cit.* fn.117.

122 [1999] 1 ILRM 154

123 For a commentary on the case, see Linda Scales, *The Power CD, the Cat and the Controller*, Irish Business Law, Vol. 1 Issue 6 (December 1998) p.309.

1.090 Maxwell identifies four aspects of the rule that penal statutes must be strictly construed:

1) the requirement of express language for the creation of an offence;
2) strict interpretation of the words setting out an offence;
3) fulfilment to the letter of statutory conditions precedent to the infliction of punishment;
4) strict observance of technical provisions concerning criminal procedure and jurisdiction.[124]

1.091 In *Re Emergency Powers Bill, 1976*[125] O'Higgins J noted in relation to the Bill that:

> "[a] statutory provision of this nature which makes such inroads on the liberty of the person must be strictly construed. Any arrest sought to be justified by the section must be in strict conformity with it. No such arrest may be justified by importing into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section."[126]

1.092 The principle was followed in *The People (DPP) v Farrell*[127] which concerned the construction of section 30 of the *Offences Against the State Act, 1939*. O'Higgins J stated:

> "The Act of 1939 must be strictly construed. It is legislation of a penal kind which was passed for a special purpose and which has the effect of interfering with the normal rights and liberties of citizens."[128]

1.093 In *Aamand v Smithwick* [129] it was held that the provisions of an extradition statute were also subject to the rule of strict construction, since they incorporated into Irish law a penal statutory code and resulted in penal sanctions against the individual. [130]

1.094 In *Mullins v Harnett*[131] the rules regarding the interpretation of penal statutes were carefully scrutinised by O'Higgins J. Relying on Maxwell and Bennion, he found that the principle of strict interpretation was to be applied only following the application to the statute of the normal principles of statutory interpretation. Only if the application of these principles left the meaning of the statute open to continuing doubt, was the principle of strict construction to be applied in order to give the benefit of the doubt to the individual as against the State.

---

124 SIR PETER MAXWELL, MAXWELL ON THE INTERPRETATION OF STATUTES, (12th ed. 1969) at pp.239-40

125 [1977] IR 159

126 *ibid.* at p.173.

127 [1978] IR 13

128 At p.25.

129 [1995] 1 ILRM 61

130 *Per* Finlay CJ at p.67 referring to the *Extradition Act, 1965*

131 [1988] 2 ILRM 304

1.095 The application of the presumption beyond criminal statutes was emphasised by O'Higgins J in *Mullins v Hartnett* when he said: "Penal statutes are not only criminal statutes, but any statutes that impose a detriment."[132] The application of strict construction to taxation statutes was confirmed in *Inspector of Taxes v Kiernan*[133] Henchy J stated:

> "when a word or expression is used in a statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language."[134]

1.096 In *Kinsale Yacht Club v Commissioner of Valuation*[135] the Supreme Court held that the principle of strict construction did apply to section 5 of the *Valuation Act, 1988*, although the Act was not a criminal or taxation statute. The Court held that the important factor was that the provision led to the "fresh imposition of liability" as referred to in *Inspector of Taxes v Kiernan.*[136]

Presumption Against Implicit Changes in the Law

1.097 There is also a presumption, which derives from the era when the primacy of the common law was only marginally impinged upon by statute law, that a provision which is ambiguous as to whether or not it effects a change in the law shall be regarded as not effecting any such change. In *Minister for Industry and Commerce v Hales,*[137] Henchy J endorsed this presumption, citing Maxwell.[138] The case related to the *Holidays (Employees) Act, 1961*, and the validity of ministerial regulations made under the Act. Henchy J held that, since the clear intention of the legislature was to confine the Act to those employed under a contract of service or apprenticeship, it could be assumed that the use of very general words to define "worker" in section 3(3) of the Act – "any person ... who is employed" – should not be read as allowing the Minister to broaden the scope of the Act in regulations, to grant a range of important rights to those working as independent contractors, and to make these rights implied terms of the employment contract, with their breach resulting in criminal liability. Henchy J observed:

> "I cannot believe that the power to effect such radical and far-reaching changes in the law of contract was intended, or should be deemed to have been intended, by a loosely drafted sub-section in an Act that has declared its purpose and scope to be otherwise."[139]

1.098 The question of the application of the principle to criminal law statutes was raised before the Supreme Court in *DPP v Gray.*[140] The Supreme Court reiterated the general principle that general words in a later Act should not be presumed to

---

132 At p.310
133 [1982] ILRM 13
134 At p.15
135 [1994] 1 ILRM 457
136 *op cit.* fn.133.
137 [1967] IR 50
138 At p.77.
139 At pp.76-77.
140 [1987] ILRM 4

repeal or amend earlier legislation, so long as they were capable of reasonable construction without effecting any such amendment. However, McCarthy J, dissenting, noted that there was no authority regarding the application of this principle to criminal law statutes. The principle that criminal statutes should be strictly construed for the benefit of the individual could have an impact on the operation in this area of the presumption against unclear changes. The Court applied the principle and found that the two statutes which were at issue in the case could stand together and operate separately and individually, without one being considered to have implicitly repealed another.

Presumption against Retrospective Effect

1.099 The presumption that the Oireachtas does not intend an Act to apply retrospectively was stated in *Hamilton v Hamilton.*[141] Henchy J said:

> "When an Act changes the substantive, as distinct from procedural law then, regardless of whether the Act is otherwise prospective or retrospective in its operation, it is not to be deemed to affect proceedings brought under the pre-Act law and pending at the date of the coming into operation of the Act, unless the Act expressly or by necessary intendment provides to the contrary."[142]

Henchy J characterised the rule as a universal one, and emphasised that (contrary to the statement in *Maxwell*) the rule applied to all pending enactments, unless the language irrefutably stated otherwise.[143]

Presumption against Extra-territorial Effect

1.100 Irish law presumes that legislation has effect only within the territory of the State. The presumption was applied in *Chemical Bank v McCormack*[144] which concerned the making of orders, which purported to have extra-territorial effect, under the *Bankers Books (Evidence) Act, 1879.* Carroll J held that, in the absence of clear words supporting an extra-territorial application of the Act, it should not be interpreted as applying outside the jurisdiction.

1.101 The presumption against extra-territorial effect was also at issue in *Keane v An Bord Pleanála,*[145] which points out some of the limits to the presumption. The case concerned the interpretation of the Planning Acts. It was argued before the High Court that since the Planning Acts did not have any express extra-territorial effect, the effects which a development had beyond the limits of the territorial seas

---

141 [1982] IR 466

142 At pp.480-81

143 The general common law principle that legislation does not operate retrospectively is reflected in Article 15.5 of the 1937 Constitution, which provides that the Oireachtas shall not declare to be infringements of the law Acts which were not prohibited by law at the date of their commission. On the connection between Article 15 and the common law rule, see *In re Heffron Kearns Ltd No.1* [1993] 3 IR 77

144 [1983] ILRM 350

145 [1997] 1 ILRM 508

could not be taken into account in the granting of planning permission. This argument was rejected by Carroll J in the High Court. She held that the concept of the "common good" which was referred to in the long title of the 1963 Act was a broad one, and included the effects which the development would have outside the national territory. She gave the example of sea pollution which might arise from a grant of planning permission. Such pollution would have an effect on the common good and would therefore have to be taken into account in ascertaining whether or not to grant planning permission. In the instant case, the Board could take into account the benefits of the development outside territorial waters, and this should not be equated with extending the operation of a statute beyond the jurisdiction.[146]

Internal Aids to Construction

1.102 The Irish courts recognise the importance of the statutory context of each particular provision. The courts have been willing to consider the long title of an act, as well as other sections, in interpreting one of its provisions. They are, however, prohibited from taking into account marginal notes and headings.

Use of the Long Title to an Act

1.103 The courts have used long titles and other elements of the statutory context to ascertain the purpose and legislative intent behind a provision. Early cases allowed consideration of the long title only where there was ambiguity. In *Minister for Industry and Commerce v Hales*,[147] the High Court accepted that the long title formed part of the Act, but held that it was permissible to call in aid the long title in the interpretation of a provision of an Act only where the provision was unclear or ambiguous. The leading case is *East Donegal Co-operative Marts Ltd v Attorney General*[148] in which the Court stressed the importance of the long title to the Act in forming a part of the context and background of the Act, in the light of which its provisions should be construed. Walsh J departed from the more restrictive rule in *Hales*, in allowing for a determination of ambiguity only after the long title had been considered. He stated:

> "The long title and the general scope of the Act of 1967 constitute the background and the general scope of the context in which it must be examined. The whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and the construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it. The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words and phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the

---

146 The Supreme Court upheld Carroll J's decision, though without referring to the presumption against extra-territorial effect: [1998] 2 ILRM 241

147 [1967] IR 50

148 [1970] IR 317

long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous."[149]

1.104 The general principle set out in *East Donegal* may be seen as qualified, however, by the decision of the Supreme Court in *The People (DPP) v Quilligan.*[150]. In that case, Griffin J reverted to the rule as set out in *Hales*, [151] holding that the long title may only be considered in the interpretation of a provision of an Act if the provision is ambiguous or equivocal. In the instant case, the long title could not be considered. Griffin J stated,

> "in 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."[152]

McCarthy J, however, emphasised the usefulness and importance of the long title. He stressed that the long title was as much a part of an Act as any other provision and stated:

> "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."[153]

Headings and Marginal Notes

1.105 Under the present law, as set out in the *Interpretation Act, 1937*, courts are excluded from examining the marginal notes, headings and other similar elements of an Act in the interpretation of one of its provisions. Section 11 (g) states:

> "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".

---

149 At p.341. See also, for example, *Cityview Press v An Chomhairle Oiliúna* [1980] IR 381 at p.398, where O'Higgins CJ used the long title of the *Industrial Training Act, 1967* to establish the Act's "purpose and policy".

150 [1987] ILRM 606

151 *op cit.* fn.147. The *East Donegal* case was not cited by Griffin J.

152 At p.635.

153 At p.638. See also the judgment of the Court of Criminal Appeal in *The People (DPP) v Walsh* [1986] IR 722 at p.727, where Finlay CJ, construing section 30 of the *Offences Against the State Act, 1939*, held that, since the words of the section were clear and unambiguous, "there can be no room for interpolating into that meaning and definition of a scheduled offence, a qualification arising from either the other provisions of the Act, or from the long title."

1.106 Although the courts are precluded from relying on marginal notes in interpreting legislation, they have frequently made passing reference to the content of marginal notes, suggesting that marginal notes would be of assistance to the courts in establishing the context of a provision.[154]

The Wider Context: The Use of Extrinsic Aids to Construction

1.107 If the courts are to venture beyond the literal meaning of the words in an Act, and attempt to ascertain the intention of the legislature, questions arise as to what tools may be used to discover intention. The purpose of a statutory provision may be ascertained from its context; but how wide should that context be? Should the courts confine themselves to examining the Act as a whole, and to discerning the intention of the Oireachtas from, for example, the long title? Or should the courts move beyond the text, to examine other related statutes, or international conventions, or preliminary drafts of the Act as a Bill, or parliamentary debates or even pre-parliamentary discussion documents? External aids to interpretation could encompass, for example, pre-parliamentary departmental papers, or instructions to the draftsperson. [155]

1.108 As one moves further from the text of the Act, the aids to interpretation become more controversial. Arguably, although the idea of a single "legislative intention" can be sustained on an examination of the text of an Act, an examination of the parliamentary debates may show widely varying ideas as to the purpose of the statute.[156] The intention of the legislature may not be uniform; and in relation to the particular circumstances of the case, there may not have been any clearly thought out legislative intention. Lord Wilberforce in *Salomon v Salomon*[157] remarked:

> " 'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it."[158]

If great significance is attached to extrinsic aids, there is a danger that this "speculative" version of the legislation may be enforced. This leads to diminished legal certainty.

1.109 Against these arguments, must be noted the hard cases where recourse to an external source – the text of an early draft of a Bill, for example, from which words

---

154 See for example *Lawless v Dublin Port and Docks Board* [1998] 1 ILRM 514; *Cork County Council v Whillock* [1993] 1IR 231; *Browne v Revenue Commissioners* [1991] 2 IR 58; *Cox v Ireland* [1992] 2 IR 503; *Rowe v Law* [1978] IR 55.

155 In *Wicks v Firth* [1983] 2 AC 314, the House of Lords considered the text of a press release, issued in relation to new legislation.

156 There has been much academic debate, particularly in the US, on the reality of a collective legislative intent. For a defence of the existence of collective legislative intent, see M B W Sinclair, *Statutory Reasoning*, 46 Drake L. Rev. 299, at p. 305 *et seq*.

157 [1897] AC 22

158 At p.38.

were later omitted, or a ministerial speech in the Dáil – would clarify with ease a point of interpretation and save a court from enforcing an absurdity or an unjust anomaly. Recourse to an external document, which is readily available to the court, might satisfactorily resolve an ambiguity which could otherwise only be addressed by inspired guesswork or dogmatic insistence on the primacy of text. Where an external aid would be of great assistance to a court, it seems perverse to deny its use. This dilemma is expressed very clearly in Lord Bridge's comments in *Pepper v Hart:*[159]

> "I should find it very difficult, in conscience, to reach a conclusion adverse to the appellants, on the basis of a technical rule of construction, requiring me to ignore the very material which in this case indicates unequivocally which of the two possible interpretations of section 63 (2) of the Act of 1976 was intended by Parliament."[160]

1.110 Lord Browne-Wilkinson in the same case asked "if the words are capable of bearing more than one meaning, why should not parliament's true intention be enforced rather than thwarted?"[161] The remarks of Lord Denning in *Davis v Johnson*,[162] admitting that he had recourse to Hansard despite the exclusionary rule, are also interesting:

> "In some cases Parliament is assured in the most explicit terms what the effect of a statute will be. It is on that footing that members assent to the clause being agreed to. It is on that understanding that an amendment is not pressed. In such cases I think the court should be able to look at the proceedings ... And it is obvious that there is nothing to prevent a judge from looking at these debates himself privately and getting some guidance from them. Although it may shock the purists, I may as well confess that I have sometimes done it. I have done it in this very case. It has thrown a flood of light on the position."[163]

1.111 It may be more important to place limits on the consideration of external aids, for example by specifying the use to which they may be put or by confining their use to those cases where there is ambiguity or absurdity on the text of the statute, than to exclude their use altogether.[164]

1.112 A further, practical argument against the use of extrinsic aids is that they are not readily available, either to lawyers or to the general public. This argument obviously has more force in relation to some extrinsic aids than to others. In *Fothergill v Monarch Airlines*,[165] Lord Wilberforce laid down the condition that the *travaux preparatoires* of a treaty could only be considered where the material involved was "public and accessible". It should be noted that technological developments have contributed greatly to the wider availability of much of the material used as extrinsic aids in the interpretation of legislation. The availability

---

159 [1993] 1 All E R 42
160 At p.49.
161 At p.64.
162 [1978] 2 WLR 182
163 At p.192.
164 See for example section 25 AB of the Australian *Acts Interpretation Act, 1901*
165 [1980] 3 WLR 209

on the internet, for example, of parliamentary debates from many jurisdictions, as well as the texts and *travaux* of many treaties, has greatly enhanced the accessibility of this material. The argument that the use of extrinsic aids results in an increased workload for lawyers and the courts, and therefore in increased costs and delays, may have more force. However, where the use of extrinsic aids is confined to a narrow category of cases, the problem is not so serious.[166]

1.113 Below, we consider the external aids to construction which may be pressed into service by the courts, and the attitude adopted by the Irish courts in relation to them. Once again, issues of the separation of powers are raised here, and there is an evident reluctance on the part of the courts to impinge too much on the role of the legislature.

Construction of Related Statutes Together

1.114 Where a number of statutes deal with similar subject-matter, it can be of assistance to the courts to construe them together, and to interpret terms as having the same meaning, where they are used in similar contexts in two statutes. A statute may expressly provide that it should be construed in conjunction with another, related statute. Even where this is not done, however, a court may construe statutes together, and may use an earlier Act as a guide in the interpretation of a later Act where it is satisfied that the statutes are *in pari materia* – that is, that they deal with the same subject matter. Where this is the case, the provisions are regarded as forming part of the same statutory context.[167] In particular, where particular terms of an earlier statute have been judicially construed, it is presumed that the legislature, in using the same terms in a later statute *in pari materia* with the first, envisaged that the words would be given a similar construction. [168]

1.115 In *Cronin v Youghal Carpets (Yarns) Ltd,*[169] the Supreme Court considered the meaning of the term "total income brought into charge to tax" in section 58 (3) of the *Corporation Tax Act, 1976.* The words were not defined in the Act, but the same terminology was to be found in other taxation statutes, including the *Income Tax Act, 1967.* The Supreme Court rejected a literal interpretation of the words. Griffin J, giving judgment for the Court, emphasised that the words had,

> "received judicial interpretation in a number of cases decided upwards of forty years before the passing of the Act, and that interpretation [had] been widely accepted and acted upon in the intervening years..."[170]

At the time of the passing of the 1976 Act, he stressed, there had been a settled interpretation of the words used. Griffin J noted that the 1976 Act provided that the general principles of income tax law should apply to its provisions, and that section

---

166 See the comments of Lord Browne-Wilkinson, *Pepper v Hart* [1993] 1 All E R 42, at p.63. and at pp.66-67.

167 *State (Sheehan) v Government of Ireland* [1987] IR 550

168 The *in pari materia* rule was also applied in *Action Aid Ltd v Revenue Commissioners*, High Court, Unreported, 15 January 1997; *Irish Leathers Ltd v Minister for Labour* [1986] IR 177; *Mogul of Ireland Ltd v Tipperary (North Riding) County Council* [1976] IR 260.

169 [1985] IR 312

170 At p.320.

155 of the Act stated a general rule that words and expressions used in the Act had the same meaning as they had in previous Income Tax Acts. However, he also stated a general principle:

> "It 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."[171]

1.116 In several cases, however, the courts have declined to rule statutes as *in pari materia*. In *Murphy v Dublin Corporation*[172] the Supreme Court held that the *Housing Act, 1966* and the *Local Government (Planning and Development) Act, 1963* could not be construed together, since they lacked a common subject matter or purpose and so were not *in pari materia*.

1.117 In *Irish Agricultural Machinery Ltd v O' Culacháin,*[173] the Supreme Court found that since the *Finance Act, 1975*, and the *Value Added Tax Act, 1972* were not *in pari materia*, the definition of manufacturer in the latter could not be applied to the former, and that the word should therefore be given a literal interpretation.

Explanatory Memoranda

1.118 The use in interpretation of explanatory memoranda published with Bills is accepted by the Irish courts. In *Maher v Attorney General*[174] the Supreme Court considered the explanatory memorandum published with the *Road Traffic Act, 1968*. The memorandum contained the important information that the legislation was intended to accept the main import of the recommendations of a government commission on driving under the influence of alcohol. Again, in *Rowe v Law*[175] O'Higgins CJ in the Supreme Court considered the explanatory memorandum published with the Bill which later became the *Succession Act, 1965*, in interpreting section 90 of that Act.

1.119 In *McLoughlin v The Minister for the Public Service*[176] the Supreme Court looked to the explanatory memorandum published on the introduction into the Dáil of the *Garda Síochána (Compensation) Act, 1941*. The court declined to interpret the Act in such as way as to defeat the purpose of the Act as declared in the explanatory memorandum.

---

171 At p. 321.
172 [1976] IR 143
173 [1990] 1 IR 535
174 [1973] IR 140
175 [1978] IR 55
176 [1985] IR 631

1.120 An explanatory note to regulations was considered in the High Court in *MacGabhann v The Incorporated Law Society.*[177] Blayney J referred to the explanatory note to the *Solicitors Act, 1954 (Apprenticeship and Education) (Amendment No 1) Regulations, 1974* to ascertain the legislative intent in relation to exemption from law society examinations.

Legislative History of a Provision

1.121 For some time, the Irish courts were reluctant to consider the history of an Act, as can be seen from the case of *Minister for Industry and Commerce v Hales.*[178] In that case, which concerned the interpretation of the *Holidays (Employees) Act, 1961*, extensive arguments were made by counsel relating to the legislative history of the Act, and the intentions of the Minister with regard to particular provisions. McLoughlin J held that the legislative history of the Act should not be taken into account, since "the conclusion that such evidence is inadmissible is confirmed by the most compelling authorities."[179] He held that since the statute was to be construed literally, except in the case of absurdity or incongruity,

> "it would be departing very far from this canon of interpretation if we were to admit evidence of contemporaneous circumstances which would result in giving an interpretation to a section of the statute and the regulations made under it, which would be repugnant to the intentions of the legislature as indicated by the Act in question, construed as a whole."[180]

1.122 Henchy J also held that he was unable to take into account the fact that the subsection to be construed had been inserted as an amendment when the Bill was passing through the Oireachtas, although he acknowledged that this provided an explanation for the anomalies contained in the Act.[181]

1.123 However, it would seem that this position has now been modified to allow for consideration of the legislative history of an Act in some circumstances. In *Rowe v Law,*[182] O'Higgins CJ, in a partially dissenting judgment, considered the legislative history of the *Succession Act, 1965*. However, he relied primarily on the ordinary meaning of the Act, using the legislative history to confirm its meaning. In interpreting section 90 of the Act, which related to the use of extrinsic evidence to ascertain the intention of a testator, he stated:

> "In arriving at the view that the effect of section 90 is to get rid of the common-law rule which rendered inadmissible extrinsic evidence for the purpose of ascertaining the actual intention of the testator as well as for the purpose of explaining contradictions in the will itself, I am satisfied that

---

177 [1989] ILRM 854

178 [1967] IR 50

179 At p.67. He cited *Salkeld v Johnson* 2 Exch. 256; and *The Queen v Hertford College* 3 QBD 693.

180 At p.68.

181 At p.74.

182 [1978] IR 55

> the ordinary meaning of the Act leads to this result. I am, however, fortified by the knowledge that the legislative history of the measure, particularly the introduction of the phrase 'to show the intention of the testator' before the Bill was finally enacted leads inevitably to the same conclusion."[183]

1.124 In *DPP v McDonagh*, [184] the Supreme Court held that it was permissible for a court to consider the legislative history of a statute, as an aid to its construction. Costello P, in a judgment with which the other members of the court concurred, took a very wide view both of the materials which could be used as an aid to construction, and of the circumstances in which they could be called into aid. He stated:

> "It has long been established that a court may, as an aid to the construction of a statute or one of its provisions, consider its legislative history, a term which includes the legislative antecedents of the provisions under construction as well as pre-parliamentary material and parliamentary material relating to it."

1.125 He considered that in interpreting an Irish statute the Court could also have recourse to the preparatory materials of any United Kingdom statute on which the Irish Act was based. In the case, the Court was asked to consider section 2 of *the Criminal Law (Rape) (Amendment) Act, 1981*. That provision was an almost exact replication of section 1 of the United Kingdom *Sexual Offences (Amendment) Act 1976*. Costello P considered the circumstances in which the English Act had been enacted, following a controversial judgment in the House of Lords and the subsequent publication of the report and recommendations for legislative amendment of an advisory committee. He stated that it would be wrong of the Court to ignore the legislative history of the section, given the light which it shed on the section's proper construction.

1.126 Costello P did not confine consideration of the legislative history of a provision to circumstances where the provision was ambiguous. In the case before him, the section to be construed was, on its face, clear. Costello P rejected any "rigid exclusionary rule" which would confine consideration of preparatory materials to cases of ambiguity, relying on *Bourke v Attorney General*,[185] in which the Supreme Court used the *travaux preparatoires* of the European Convention on Extradition in the construction of implementing legislation.[186]

---

183 At p.68.

184 [1996] 2 ILRM 468

185 [1972] IR 36

186 Costello P also referred to the American case of *United States v American Trucking Association* (1940)310 US 534, where it was stated:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may be on 'superficial examination'".

1.127 In *DPP v Brennan*,[187] McCracken J followed the judgment in *McDonagh* and held that, in interpreting section 19 (1) of the *Criminal Justice (Public Order) Act, 1994,* he was entitled to examine the relevant Bill, as initiated, and to compare its text with that of the final Act. The defendant was accused of assaulting a police officer. He had been charged, not with an offence under section 19, which would have entitled him to elect for a trial on indictment, but with common assault, a summary offence. After the initiation of the Bill, a passage had been added to the section to the effect that an accused could be tried summarily under section 19 only if he or she "elected for summary disposal of the offence". However, in this case, the accused had not been charged under section 19 in the first place. It was held that the Court was entitled to examine the reasons for the inclusion of these words, and to read the relevant Dáil debates for this purpose. The court found, however, that the Dáil debates did not disclose any consideration of the situation which had arisen in the case, and therefore could not be used to modify the meaning of the Act.[188]

1.128 The caselaw arising out of *An Blascaod Mór National Historic Park Act, 1989,* has raised questions regarding the use of extrinsic materials in statutory interpretation, and suggests a more cautious and restrictive approach than that in *McDonagh*. In a High Court hearing in the case in November 1992,[189] Murphy J favoured a literal approach to interpretation. On a motion for discovery, for documents in the possession of the defendant relating to the preparation and drafting of the Act, and to the manner in which the Minister had come to decisions in regard to its contents, Murphy J held that such documents would not be relevant to the case, since the decision of the court regarding the constitutionality of the Act must be made with reference only to the terms of the Act. Counsel on behalf of the Minister contended that the constitutionality of an Act could only be challenged on the basis of its contents, and not on the motives of those who promoted, drafted or enacted it. Murphy J, citing with approval the dicta of Lord Wilberforce in *Pictin v British Rys. Board*,[190] held that both as a matter of principle and as a matter of practicality, documents illustrating the purpose behind an 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

---

187 High Court, Unreported, 16 January 1996

188 See *infra.* paras. 1.139 – 1.140

189 *An Blascaod Mór Teoranta v Commissioners of Public Works* [1994] 2 IR 372

190 [1974] AC 765, at p.796. Lord Wilberforce asked:

> "How can we know who is parliament for this purpose – the members of both Houses or of either House – the members of the committee on private Bills – the counsel who advise the chairmen of these committees – the officials whose business it is to look at recitals and at the Bill?"

> 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."

1.129 At a further High Court hearing in July 1997,[191] the plaintiffs sought to adduce the text of the Bill as it had been introduced in the Oireachtas, in order to assist in the interpretation of the term "lineal descendant" in the final text of the Act. Budd J expressly departed from the approach of Murphy J, and distinguished the decision in *Howard v Commissioners for Public Works*.[192] Stressing the importance of "informed interpretation" in cases where there were constitutional considerations, Budd J noted that the term to be interpreted was ambiguous, and held that in the light of this the court was "entitled to investigate and look at what is the policy of this Act." Despite the stringency of the rule in *Howard*, he held, there must be room for relaxation of this rule in cases where there was a constitutional challenge. He went on to say that: "the Court is entitled to look at what was the mischief sought to be addressed by the passing of *An Blascaod Mór National Historic Park Act, 1989*." Budd J's ruling was confined to narrow facts, however. It was stressed that the document sought to be adduced in this instance was the text of a Bill, and this was distinguished from documents such as parliamentary debates, or other material which would enable the court to go "on an excursion into the motives or the purposes of individual members of the legislature."

1.130 In the hearing of the merits of the case,[193] Budd J considered the text of the Bill as initiated and compared it with the text of the Act. However, he stated that he was not "prepared to speculate as to why words were either initially included or subsequently deleted."[194]

Oireachtas Debates

1.131 The primary objection to reference by the courts to Oireachtas debates lies in the reluctance of the courts to look behind the final text of legislation, and the fear that this might impinge on the legislative power. The English doctrine of parliamentary sovereignty has of course given particular weight to these objections. There is therefore a less pressing reason, in this jurisdiction, to exclude scrutiny of parliamentary materials where this would be particularly helpful to the courts. There are also however, practical arguments against the use of Oireachtas debates as an aid to construction, such as the effect which this might have on legal certainty, the difficulty which lawyers and the public may have in obtaining access to the relevant documents, and the increasing pressure of work that a widespread practice of consulting the debates would place on the judiciary and on legal practitioners.

1.132 There is also an argument as to the usefulness of parliamentary debates in most cases. It is argued that a single "will of parliament" is rarely a reality in the

---

191 High Court, Unreported, 1 July 1997

192 [1994] 1 IR 122

193 Unreported, High Court, 27 February 1998.

194 At p.97.

enaction of statutes, and that consulting the debates will not yield a single, parliamentary intention.[195] This is not so in every case, however, as can be seen from the Irish caselaw. A ministerial statement which clarified a doubtful point in the statute to the satisfaction of the Oireachtas (to the extent, for example, that amendments are withdrawn) may be useful in ascertaining the meaning of a provision.

1.133 In favour of the consideration of parliamentary debates, it is arguable that, if the courts are to have regard (in any circumstances) to the purpose of legislation, they must have adequate means at their disposal to establish that purpose. Valuable statements as to the purpose of a Bill, which are authoritative and undisputed by other members of the Oireachtas, may be crucial to a court's understanding of the purpose of an Act.

The English Law

1.134 The English common law rule against the use of parliamentary debates in the interpretation of a statute was considerably eroded by the case of *Pepper v Hart.*[196] The House of Lords in that case ruled that, where the statute was ambiguous or led to an absurdity, parliamentary material, such as ministerial statements, could be used as an aid to interpretation, where the parliamentary materials relied on were clear. The House of Lords considered that the move from an absolute literal approach to interpretation to a more purposive one, had created a climate in which the old rule of the exclusion of material from Hansard could be modified.

1.135 However, it seems clear that *Pepper v Hart* did not herald any sweeping aside of all exclusions of parliamentary materials. In a practice direction issued by the House of Lords in 1993, the limits of the rule in *Pepper v Hart* were emphasised, and it was stated that "supporting documents, including extracts from *Hansard*, will only be accepted in exceptional circumstances."[197]

The Irish Law

1.136 In principle, it appears that Irish law does allow for Oireachtas debates to be considered, at least where a provision is ambiguous or obscure. In *Wavin Pipes Ltd v Hepworth Iron Ltd*[198] Costello J approved the consideration of parliamentary debates, relying on *Bourke v Attorney General.*[199] He noted the developments in the English courts whereby the *travaux preparatoires* of international conventions had

---

195 Lord Scarman in *Davis v Johnson* [1979] AC 264 at p.350 said that parliamentary debates were:

"an unreliable guide to the meaning of what is enacted. It promotes confusion not clarity. The cut and thrust of debate and the pressures of executive responsibility, the essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language."

196 [1993] 1 All E R 42

197 [1993] 1 WLR 303

198 [1982] 8 FSR 32. See J P Casey, *Statutory Interpretation – A New Departure* (1981) DULJ 110.

199 [1972] IR 36 Casey, *supra,* argues that Costello J's conclusion does not necessarily follow from *Bourke*, since one of the primary reasons why the *travaux* are admitted in the interpretation of treaties is to ensure consistency of application in all Contracting States, a consideration which is absent in the interpretation of domestic statutes.

been used in statutory interpretation[200] and the parliamentary history of the *Employment Act, 1980* had been considered in *Hadmoor Productions Ltd v Hamilton.*[201] If it was regarded as proper for the courts to refer to the history of the adoption of an international convention, he held, there could be no principled argument against the examination, in appropriate cases, of the parliamentary history of a statute. He held that the Court could look to the legislative history of the *Patents Act, 1964*, in ascertaining the intent of the legislature and construing the meaning of one of the Act's provisions.

1.137 In *FF v CF*[202] Barr J, in considering the purpose for which the Oireachtas had enacted the *Statute Law Revision (Pre-Union Statutes) Act, 1962*, considered the speech of the then Minister for Justice on the second reading of the Bill in the Dáil. The speech of the Minister clarified the point at issue in the case, that the purpose of section 2 of the Act was to preserve existing principles of law which might otherwise be affected by the repeal of statutes in the Act.

1.138 In *Wadda v Ireland*[203] it was argued in the High Court that regard should be had, in construing the provisions of the *Child Abduction and Enforcement of Custody Orders Act, 1991*, and the Convention which it implemented, to ministerial statements made in the course of Dáil debates on the Bill. Keane J held, however, that the issue did not arise in the case. Since the provisions of the Act to be construed had been taken from the text of the Convention, it was held that statements made in the Dáil could be of no assistance in clarifying the intention of those who had written the provision: the framers of the Convention. Furthermore, Keane J found that there was nothing ambiguous, obscure or absurd in the provision to be interpreted.[204] A similar conclusion was arrived at in the case of *CK v CK*[205] which also concerned the Child Abduction Convention.

1.139 In the case of *DPP v McDonagh*[206] the Supreme Court endorsed the use of a wide range of extrinsic aids to interpretation, including parliamentary debates.[207] It was held that a court could have regard to any aspect of a provision's legislative history which might be of assistance to the court. In *DPP v Brennan,*[208] McCracken J followed *McDonagh*, and was prepared to consider Dáil debates relating to section 19 of the *Criminal Justice (Public Order) Act,1994*. However, he found that the Dáil debates did not in fact assist in the resolution of the case before him.[209]

---

200 *Fothergill v Monarch Airlines*[1980] 3 WLR 209

201 [1981] 3 WLR 139

202 [1987] ILRM 1

203 [1994] ILRM 126

204 At p.137. See also *Flynn and Village Crafts Ltd v Irish Nationwide Building Society,* High Court Unreported 31 July 1995, where Lavan J declined to consult the parliamentary debates, as the provisions of section 6 of the *Building Societies Act, 1989* were sufficiently plain and unambiguous.

205 [1993] ILRM 535

206 [1996] 2 ILRM 468

207 See *supra* paras.1.124 - 1.126. The Supreme Court did not in fact rely on parliamentary debates in the case, but on other aspects of the statute's legislative history.

208 High Court, Unreported, 16 January 1996

209 See *supra* para.1.127

1.140 This approach contrasts with the comments of Finlay CJ in *Howard v Commissioners of Public Works.*[210]

> "I am 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."[211]

International Conventions and Associated Documents

1.141 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.

1.142 In *Bourke v Attorney General,*[212] O' Dálaigh J made use of *travaux preparatoires* of the *European Convention on Extradition* in interpreting Irish extradition legislation. He stated:

> "as the Convention may be examined to discover the meaning of section 11, [of the *Extradition Act, 1965*] it is no less legitimate for the court to look at article 3 and the travaux preparatoires in interpreting section 50."[213]

1.143 He examined an early draft of Article 3 of the *European Convention on Extradition*, and noted that limitations on the political offence exception which had been included in that draft had later been omitted in the final text of the Convention. O' Dálaigh J concluded from this that the States Parties had rejected a narrow conception of a connected offence. He did not rely exclusively on the *travaux*, however, stating that the same conclusion could be reached without consideration of the *travaux*.[214]

1.144 In *BB v JB*[215] Keane J referred to the *travaux preparatoires* of the *Hague Convention on International Child Abduction*, in interpreting the Convention. The question arose whether, under Article 13 of the Convention, the exceptions to the principle of the return of the child to an applicant under the Convention were directory or mandatory. Keane J noted that, in debate on an earlier draft of the text, several delegates had objected that the exceptions were too general and too wide in their scope. This had led the writer of the explanatory report which accompanied the final text of the Convention to emphasise that the exceptions did not apply

---

210 [1994] 1 IR 122 Finlay J's remarks were *obiter*. The issue of reliance on parliamentary debates was not discussed before the Court.

211 [1993] ILRM 665 at p.681. In *People (DPP) v Quilligan,* [1986] IR 495 Walsh J, *obiter*, rejected a consideration of "whatever may have been in the minds of the members of the Oireachtas when the legislation was passed. "

212 [1970] IR 36

213 At p.54.

214 At p.61.

215 Supreme Court Unreported, 28 July 1997

automatically, but merely allowed a judicial discretion in the matter.[216] Keane J voiced his reluctance to rely on the *travaux* in the particular case before him, since they had not been cited in argument. Nevertheless, he found that they confirmed his interpretation of the wording of the Convention.

1.145 A cautious attitude towards the use of *travaux preparatoires* is evident in the judgment of Barr J in the case of the *MV Kapitan Labunets*.[217] In that case, which involved the interpretation of the *Brussels Convention Relating to the Arrest of Seagoing Ships, 1952*, incorporated into Irish law by the *Jurisdiction of Courts (Maritime Convention) Act, 1989*, Barr J cautioned against over-reliance on *travaux preparatoires*. He referred with approval to the dicta of Lord Wilberforce *in Fothergill v Monarch Airlines*[218] that "the use of *travaux preparatoires* in the interpretation of treaties should be cautious" and that their use should be

> "rare and only where two conditions are fulfilled: that the material is public and accessible and that the *travaux preparatoires* clearly and indisputably point to a definite legislative intention".

Options for Reform

1.146 Statutory interpretation has been called a "non-subject".[219] It is certainly as much a matter of practice and craft as of legal rules. It can be argued that effecting law reform in this area through statutory regulation would be ineffective, since statutory interpretation is inevitably a matter for the courts. However, a number of jurisdictions have enacted legislation in this area, clarifying the principles which apply to statutory interpretation. In some other jurisdictions, law reform bodies have recommended a legislative approach.

Interpretation Acts

1.147 One method of resolving the ambiguities and inconsistencies engendered by competing approaches to Irish statutory interpretation would be to set out clear guidelines as to the interpretative approaches to be adopted, in a new Interpretation Act. A new Interpretation Act clarifying and codifying the principles according to which statutes are to be interpreted would introduce a degree of certainty into this area of the law which could be of considerable assistance to the drafter. As such it could assist in producing a clearer and less "defensive" drafting style.

---

216 Keane J also referred to the Law Reform Commission *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985) which had reached the same conclusion.

217 High Court Unreported, 2 September 1994

218 [1980] 3 WLR 209

219 Lord Wilberforce, House of Lords debates, quoted in the Report of the English Law Commission, *The Interpretation of Statutes*, Law Com No 21 at p.48. He continued: "I do not think that law reform can really grapple with it. It is a matter for educating the judges and practitioners and hoping that the work is better done."

1.148 The approach of setting out the rules of interpretation in statutory form has already been taken in a number of common law jurisdictions. Several states have enacted legislative provisions which essentially state the mischief rule. For example, the Hong Kong *Interpretation and General Clauses Ordinance (Cap 1)* states, in section 19:

> "An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."[220]

1.149 The Australian approach, discussed below, sets out a purposive method of interpretation, coupled with the use of extrinsic aids to interpretation.

Australia: Sections 15 AA and AB of The Acts Interpretation Act

1.150 The Australian *Acts Interpretation Act, 1901* (as consolidated) specifies a purposive approach to interpretation, and allows for the consideration of certain extrinsic materials in the construction of a statute. It states as follows:

> "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."[221]

1.151 Section 15 AB of the *Acts Interpretation Act 1901* allows for the consideration of extrinsic aids to interpretation in certain circumstances.[222] The section has become a model for legislation both within Australia and further afield.[223] It states:

> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into

---

220 There are similar provisions in New Zealand and Canada, (see *infra*) and Ghana legislated for reference to extrinsic aids as far back as 1960, in the *Interpretation Act, 1960*, section 19, which allows for the consideration of a range of extrinsic materials, not including parliamentary debates, "for the purpose of ascertaining the mischief and defect which an enactment was made to cure."

221 Section 15AA (1). The section was inserted by amendment of the 1901 Act in 1981. A similar provision is contained in the Victorian *Interpretation of Legislation Act, 1984*, section 35.

222 The section was influenced by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties.*

223 It has been suggested by Bennion, *Hansard – Help or Hindrance? A Draftsman's View of Pepper v Hart,* Stat. Law Rev. 149 that section 15AB is the source of the reforms instituted by the House of Lords in *Pepper v Hart.*

account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i). the provision is ambiguous or obscure; or

(ii). the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, 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 the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage."[224]

1.152 The section makes detailed provision regarding the circumstances in which external aids to interpretation must be admitted and the purposes for which they must be used. Although the section allows for the citation of extrinsic materials in a wide range of cases, for the purpose of confirming the meaning already arrived at on a literal interpretation of the text, it only allows for the admission of external material to alter the meaning of a provision where the provision is ambiguous or absurd. Where the provision has a meaning that is clear on its face, extrinsic material cannot be admitted to contradict that clear meaning. This considerably limits the impact of the rule. The impact of the section is also potentially lessened by subsection (3) which reasserts the importance of the ordinary meaning of a statutory provision, and requires courts to avoid prolonging proceedings unnecessarily through consultation of extrinsic aids to interpretation.

1.153 It is significant also that the section is permissive rather than prescriptive: it does not contain any rule of law that would require a court to make use of extrinsic evidence, but merely allows for judicial discretion as to whether such material will be admitted. Similarly, the enumeration of extrinsic aids to interpretation contained in subsection (2) is not exclusionary: other aids to interpretation may also be used. It is likely, however, that the listing of particular documents in subsection (2) indicates that the drafters of the section considered them to be particularly valuable as extrinsic aids. It has been suggested that the mention of Ministerial speeches on the second reading of a Bill in parliament accords these speeches a higher status than the generality of parliamentary speeches.[225]

Application of Section 15AA in the Courts

1.154 The Australian legislation mandating a preference for a purposive interpretation does not seem to have led to any dramatic change in the courts' approach to statutory interpretation. Section 15AA has been described by one commentator as "declaratory", as a modern, liberal re-writing of the old mischief rule.[226]

1.155 Bryson J, writing extra-judicially, with reference to the New South Wales provisions equivalent to section 15AA, has said:

> "In New South Wales the Purposive Approach is now appropriately ready at the lips of those interpreting legislation. But this is not to say at all that

---

224 Legislation allowing for the consideration of extrinsic aids has also been enacted in New South Wales: *Interpretation Act, 1987*, section 33; Queensland: *Acts Interpretation (Amendment) Act, 1991*, section 14B; Tasmania: *Acts Interpretation Act, 1992*; Western Australia: *Interpretation Act 1984*, section 19; Victoria: *Interpretation of Legislation Act, 1984*, section 35; and the Australian Capital Territory: *Interpretation Ordinance 1967*, section 11 B. Singapore has also enacted legislation based on the Australian model: *Interpretation (Amendment) Act, 1993*.

225 Patrick Brazil, *Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: with a Postscript on Simpler Drafting*, (1988) 62 ALR 503

226 Bryson J, *Statutory Interpretation: An Australian Judicial Perspective*, 14 Stat. Law Rev. 187, at p.189.

> the courts do not have the concern which they always had, and should have, with literal meaning, the very text and the search for precision if it is to be found. The Purposive Approach has not led us into an era of clarity or ready solutions, and divisions of opinion and dissents continue. When counsel talk about the Purposive Approach, what they usually want is a small re-writing, a minor modification or a few extra words to smooth out a text that is fairly obviously awkward or incomplete. They do not usually ask for any sweeping change, and they hardly could. The courts' response is highly particular to the statute and there is a close examination of its text. It is a human process, as it always will be; it is not a mechanical process. Section 15AA certainly has not brought in an age when the letter fades away and courts expound the spirit of the laws."[227]

1.156 Bryson J wrote in the context of a legal system in which a partially purposive approach to interpretation, at least where there is ambiguity in a legislative provision had been accepted by the courts prior to the introduction of section 15 AB and its equivalents at state level.

Application of Section 15AB in the Courts

1.157 The reforms instituted in 1984 by section 15AB have in general been viewed by commentators as satisfactory.[228] They do not appear to have resulted in excessive delays or an increase in legal costs. Section 15AB has been applied with care and a measure of caution by the Australian courts.[229] The majority of the caselaw has dealt with the citation of parliamentary debates, rather than of pre-parliamentary reports or other extrinsic materials. The courts have been willing to admit extrinsic material in cases where there is ambiguity, but have been at pains to stress that such materials play a subsidiary role in establishing meaning. They are to be used to provide assistance only, and are not determinative. Where there is no ambiguity in a statute's text, the courts have allowed the introduction of extrinsic materials to confirm meaning, but have ruled against their introduction to challenge the clear meaning of a text.

Where there is no Ambiguity

1.158 In *Re Coleman, ex parte Billing*[230] the Australian High Court held that section 15 AB does not allow for the use of a ministerial speech for the purpose of departing from the ordinary meaning of the legislative text, where the text is not ambiguous or absurd. It was held that:

> "Section 15AB of the *Acts Interpretation Act, 1901* (Cth), as amended, does not permit recourse to that speech for the purpose of departing from

---

227 *ibid.* at p.195.

228 See for example, Patrick Brazil, *op cit.* fn.225. The form of the section has however been criticised by Bryson *op cit.* fn.226, at p.203, for lack of clarity and for being designed "with a view to pleasing everybody".

229 See Bryson, *op cit.* fn.226.

230 (1986) 61 ALJR 37

> the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable. In our view neither of those conditions is satisfied in the present case. In any event, the Minister's speech does not purport to be an exhaustive description of the legislation and must be read in the context of the Bill itself and the explanatory memorandum."[231]

1.159 In cases where there is no ambiguity or absurdity, the courts remain slow to have recourse to extrinsic material. Where there is no obvious ambiguity, it seems that the use of extrinsic aids to interpretation continues to be viewed by the courts as an exceptional rather than a routine matter. In *Mills v Meeking*,[232] for example, the court found that there was "no need" to have recourse to extrinsic material, since a construction could be arrived at on the ordinary grammatical meaning of the Act.[233]

Where the Legislation is Ambiguous

1.160 Even where the text of the legislation is ambiguous, the courts stress the nature of an aid as interpretative rather than determinative. *R v Bolton, ex parte Beane*[234] concerned the interpretation of section 19 (1) of the *Defence (Visiting Forces) Act, 1963*. On an application for habeas corpus, the High Court considered whether the Act allowed for the arrest of the prosecutor, a former member of the US armed forces who had deserted in Vietnam. The speech of the Minister on the second reading of the Bill in Parliament disclosed that the Bill was intended to apply to desertions outside of as well as inside Australian territory, but this was not made clear on the wording of section 19. The High Court emphasised that the speech of a Minister in parliament, whilst deserving of serious consideration, was an aid to interpretation and not determinative of meaning in itself. It was stated in the majority judgment (Manson CJ, Wilson and Dawson JJ):

> "the words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."[235]

1.161 Deane J, in his judgment in the case, cautioned that the Court should not "attribute to what should be seen as no more than an aid to interpretation the effect of a substantive and retrospective amendment of prior legislation."[236]

---

231 Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

232 (1990) 91 ALR 16

233 See also *Executors of the Estate of Ball v Commissioner of Taxation* (Cth) (1984) 59 ALJR 149.

234 (1987) 61 ALJR 190

235 At p.191. See also *Lisafa Holdings Pty Ltd v Commissioner of Police* (1988) 15 NSWLR 1

236 At p.198.

1.162 The case demonstrates the secondary nature of extrinsic materials to the determination of the law, and the continuing primacy, even where there is some ambiguity, of the plain meaning of a provision's text.[237] However, the case must be read in the light of the important civil liberties issues which it raised. The lesser status which was attached to the parliamentary debates was coloured by the concern that an interpretation in accordance with the Minister's speech would have constituted a substantial derogation from the principle of personal liberty. Toohey J, in his dissenting judgment in the case, did use the Minister's speech to confirm his interpretation of section 19 as allowing for the arrest of the prosecutor. The speech, he said "put to rest any doubts" which there might be about the meaning of the section.

1.163 *Bolton* was followed in *Brennan v Comcare*[238] where the Federal Court again emphasised the primary importance of the will of parliament as expressed in the text of the statute. This was so, it was held, even where external aids showed that the statute's text mistakenly failed to give effect to the true will of the legislature.

1.164 A similar approach was taken in *Liggins v Comptroller-General of Customs*[239] which concerned the interpretation of the *Customs Tarriff Act, 1987.* The issue arose whether, in interpreting the Act, the court could use the explanatory notes of the committee established under the *Convention on Nomenclature for the Classification of Goods in Customs Tariffs, 1950.* It was held that the notes could be a secondary guide only, and could not displace the plain words of the statute, or be used where there was no ambiguity in its terms.

Use of Extrinsic Materials to Confirm the Literal Meaning

1.165 In a number of cases, the courts have used extrinsic materials to confirm the meaning of a provision. In *Queensland Electricity Commission v Commonwealth*[240] the Australian High Court relied on an explanatory memorandum published with the Bill and a parliamentary speech by the responsible Minister. Gibbs CJ noted that:

> "The ordinary meaning conveyed by the text of the Act is that the Act is intended to deal with industrial disputes which involve electricity authorities of Queensland, and that this is the meaning of the Act is confirmed by extrinsic material to which regard may be had under s 15AB of the *Acts Interpretation Act 1901* (Cth) as amended."

1.166 In *Gardner Smith Pty Ltd v Collector of Customs, Victoria*[241] the Federal Court (Keely, Neaves and Wilcox JJ) held that it was permissible under section 15 AB to use extrinsic materials to confirm the meaning of a statute even where its

---

237 See article by Bryson: *Statutory Interpretation: An Australian Judicial Perspective* 14 Stat. Law Rev. 187 at p.204.

238 122 ALR 615

239 103 ALR 565

240 (1985) 59 ALJR 699

241 (1986) 66 ALR 377

meaning was not obscure. The Court considered whether, under section 15AB, regard could be had to "Brussels Notes"[242] as material "capable of assisting in the ascertainment" of the *Customs Tariff Act 1982*. It was held:

> "The argument that the tribunal was in error in giving consideration to the explanatory notes was based on the applicant's contention that the words 'or otherwise modified' in Item 15.08 were not ambiguous or obscure nor, if given their ordinary meaning, would it lead to a result that was manifestly absurd or unreasonable. But it is plain that, to limit the use of extrinsic material to such circumstances - circumstances obviously referable to subs (1)(b) of s 15AB of the *Acts Interpretation Act 1901* - is to deprive subs (1)(a) of that section of any operation. Even if it could properly be said that the tribunal was in error in regarding the meaning of 'modified' in Item 15.08 as obscure - a proposition which it is difficult to accept having regard to the arguments presented - it would not follow that the court should intervene. It would, as we think, have been open to the tribunal to consider the explanatory notes in order to confirm the meaning which, on the other material available to it, it considered the expression bore having regard to its context in the Tariff Act."[243]

Relative Weight of Parliamentary Speeches

1.167 As regards parliamentary debates, the courts have tended to attach the most weight to speeches by sponsoring ministers, and to be wary of placing too much reliance on speeches by other deputies. In *Commissioner of Police v Curran,*[244] Wilcox J observed:

> "If the purpose of a reference to a parliamentary debate is to determine what was the intention of those who framed the draft, assistance is not likely to be gained outside the speech of the responsible Minister or other informed proponent of that draft."

1.168 The same approach is evident in the judgment of Kirby J in *Flaherty v Girgis*[245] where he stated that the observations of individual members of Parliament, other than a Minister or similar responsible deputy, on an Act were "an insubstantial basis" for determining the meaning of legislation.

---

242 Explanatory notes prepared by the Nomenclature Committee established by the *Convention on Nomenclature for the Classification of Goods in Customs Tariffs*, signed at Brussels on 15 December 1950.

243 At p.383-4. See also: *Television Capricornia v Australian Broadcasting Tribunal* (1986) 70 ALR 147; *East v Repatriation Commission* (1987) 12 ALD 389; *Kioa v West* (1985) 159 CLR 550.

244 (1984) 55 ALR 697

245 (1985) 4 NSWLR 248 at p.259.

Practice Directions

1.169 Practice Directions on the use of extrinsic documents as aids to interpretation have been issued by the Australian High Court, the Federal Court and a number of State Supreme Courts. The relevant High Court direction states:

> "Where in proceedings before the Court, a party proposes to rely on extrinsic material pursuant to section 15AB of the *Acts Interpretation Act,* that party shall give to any other party and to the Registrar at least forty-eight (48) hours notice of intention specifying the material on which it is intended to rely.
>
> The use of extrinsic material will not be allowed without leave of the Court in any case where the required notice has not been given to the other party.
>
> Subsection (2) of section 15 provides guidance as to what may constitute extrinsic material."[246]

Victoria

1.170 The Victorian legislation on the use of extrinsic materials (contained in section 35 of the *Interpretation of Legislation Act 1984*)[247] differs from the Australian federal legislation in that it does not spell out the kind of materials which may be used by a court, but leaves this matter to the discretion of the courts. Section 35 (a) provides for a purposive interpretation of legislation in terms similar to the Australian section 15AA. Section 35 (b) then goes on to provide for the use of extrinsic aids to construction. It states that:

> "consideration may be given to any matter or document that is relevant including but not limited to:
>
> (i) all indications provided by the act or subordinate instrument as printed by authority, including punctuation;
> (ii) reports of proceedings in any House of the Parliament;
> (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
> (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies."

1.171 In eschewing the form of the federal Australian legislation, which enumerates a longer list of potential extrinsic aids, and defines the purposes for which they may be used, the Victorian legislation allows for a greater measure of judicial discretion in assessing which material may be useful in the construction of a particular provision. Brazil points out, however, that in practice, the judicial discretion available to the Victorian courts has resulted in a similar approach to that

---

246 Direction No 1 of 1984.

247 Based on proposals of the Victorian Parliamentary Legal and Constitutional Committee. See Jocelynne A Scutt, *Statutory Interpretation and Recourse to Extrinsic Aids*, (1984) ALJ 483.

in the federal courts under section 15AB. [248] Victorian courts have used similar terminology to that of the federal courts in judging the acceptability or otherwise of extrinsic aids to interpretation, referring to legislation that is "obscure" and to the use of extrinsic material to "confirm" a literal interpretation. In *Humphries v Poljak*[249] the Victorian Supreme Court held that where the language of a provision was clear, the court could not have recourse to the parliamentary debates to ensure that the clear meaning was not in conflict with the parliamentary intention.

New Zealand

1.172 Current New Zealand law allows for the consideration of extrinsic aids to interpretation, but this rule has not yet been embodied in statute. However, the *Acts Interpretation Act, 1924*, does prescribe a purposive approach to interpretation. Section 5 (j) of the Act states:

> "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, 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."

1.173 The *Draft Interpretation Act* set out by the New Zealand Law Commission also proposes a (modified) statutory rule of purposive interpretation.[250] The rule would state:

> "9 (1) The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context.
>
> (2) An enactment applies to circumstances as they arise so far as its text, purpose and context permit.
>
> (3) Among the matters that may be considered in ascertaining the meaning of an enactment are all the indications provided in the enactment as printed or published under the authority of the New Zealand Government."

1.174 The New Zealand Commission deliberately excluded from the draft any reference to the intention of the legislature, citing the difficult and undefined nature of that concept.[251] They were of the view that reference to the legislative intention would not in any case add any meaning to the rule: since the consideration of the context of a provision was designed to enable the intention of the legislature to become apparent. The Commission also deliberately omitted any reference to

---

248 Patrick Brazil, *op cit.* fn.225, at p.511.

249 [1992] 2 VR 129

250 New Zealand Law Commission, *A New Interpretation Act: to Avoid 'Prolixity and Tautology*, (December 1990)

251 At para.73.

statutes as remedial, since it was felt that this misrepresented a large number of statutes.[252]

1.175 The New Zealand Commission recommended that there should not be statutory provision for the consideration by the courts of extrinsic aids to interpretation. They were of the opinion that the law on this point should be left to the development of the courts, and that a legislative intervention would not provide any significant assistance to the courts.[253] The Commission gave two further reasons for recommending against legislation for extrinsic aids. They emphasised that the user of the statute book should in general be able to place heavy reliance on it, and that therefore extended reference to material beyond its text should be rare. They also stressed that in the majority of cases, there would be no relevant parliamentary material to which the courts might usefully refer. [254]

1.176 The Commission did however specify in their draft Act that regard should be had in the interpretation of a statute to all the various elements of the enactment, including its organisation, its preamble, its divisions, section headings, and schedules and appendices. [255]

1.177 Although they recommended against legislation for the use of extrinsic aids to interpretation, the Commission did recognise the usefulness of information regarding the parliamentary history of an Act. They recommended that, in order to save time for the users of legislation, statutes should include in their text information as to the name of the Bill as introduced, the dates of the other parliamentary stages of the Bill, the number of each version of the Bill, the dates of the second reading speeches on the Bill, and a reference to any report on the Bill.[256]

United States

1.178 Traditionally, US courts have been strikingly liberal in their willingness to consider the legislative intent behind statutory provisions, and their readiness to admit a wide range of external aids to interpretation.[257] Courts attach importance to ascertaining the intent of Congress in enacting a statute, and use legislative history, parliamentary debates and other documents as evidence of this intent, sometimes to the extent that they can override the literal meaning of the statute's words.[258] Courts will examine legislative history regardless of whether the words of the statute are clear.[259]

---

252 *ibid.*

253 At para.125.

254 At para.126

255 At paras.88-99.

256 At para.115

257 The courts will consider parliamentary as well as pre-parliamentary material, and, in some circumstances, relevant material issued subsequent to the enactment of the statute: *TVA v Hill* 437 U.S. 153 (1978).

258 *Comissioner v Engle* 464 US 206 214 (1984); *Boston Sand & Gravel Co v United States* 278 US 41 (1928); *Church of the Holy Trinity v United States* 143 US 457 (1892).

259 In *TVA v Hill* 437 U.S. 153 (1978) the Supreme Court although finding that the wording of the *Endangered Species Act, 1973* was plain and unambiguous, went on to consider in detail the legislative history of the Act.

1.179 In recent years, however, some members of the US Supreme Court have moved towards a "plain meaning" or "textualist" [260] approach in cases where there is no obvious ambiguity or absurdity in the statute. Although this trend is seen as a significant shift on the part of the court towards a more conservative legislative jurisprudence,[261] Supreme Court proponents of a plain meaning approach remain willing to admit extrinsic material in a wide range of cases, at least to confirm the plain meaning of a provision. They will object only where external aids to construction are invoked to defeat the clear literal meaning of a text. In one of the first judgments to reject such use of external aids, in *Immigration & Naturalisation Service v Cardoza-Fonseca*[262] Scalia J said:

> "Although it is true that the Court in recent times has expressed approval of this doctrine [of the use of legislative history to override a statute's plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect - at least in the absence of a patent absurdity.[263]

1.180 Although this more literal approach has not been adopted by the Supreme Court as a whole, it has had some influence in discouraging ready resort to external material. [264] In *Public Citizen v United States Department of Justice,*[265] for example, the Court split on the use of legislative history. The majority favoured a reliance on legislative history where an examination of the text revealed a result which "is difficult to fathom or ... seems inconsistent with Congress' intention."[266] A minority however considered that there should be recourse to extrinsic material only where a provision was absurd or irrational.[267]

Canada

1.181 Canadian law provides for a purposive interpretation of statutes. In the Canadian *Interpretation Act*[268] under the heading "Rules of Construction" it is stated:

> "12. Every enactment is deemed remedial, and shall be given such fair large and liberal construction and interpretation as best ensures the attainment of its objects."

---

260 Some commentators draw a distinction between the plain meaning and the textualist approaches, in that the plain meaning approach addresses only the text of the provision in question, whereas the textualist approach allows for consideration of the entire text of the statute, as well as (possibly) the text of other related statutes.

261 William N Eskridge Jr, *The New Textualism*, 37 UCLA L Rev 621

262 480 U.S. 421 (1987)

263 At p.452. His judgment concurred as to the result, but dissented on the use of external aids to interpretation.

264 See Eskridge, op cit. fn.261 at p.656 et seq.

265 491 U.S. 440, 467-89 (1989)

266 At p.2565.

267 *Per* Kennedy J.

268 As consolidated. Provincial legislation contains similar provisions.

In the same section it is provided that an Act is to be construed as always speaking, and is therefore to be given an updated interpretation:

> "10. The law shall be construed as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning."

1.182 The Canadian law on the use of extrinsic aids to interpretation has developed through caselaw from the common law exclusionary rule, to the point where this rule has now been substantially relaxed.[269] The exclusionary rule was first modified in regard to constitutional cases, involving either questions of the legislative competence of provincial legislatures, or of the compliance of a statute with the *Canadian Charter of Rights and Freedoms*.[270]

1.183 There was a gradual relaxation of the exclusionary rule with regard to the interpretation of statutes, culminating in *R v Vasil* [271] where the Supreme Court held, somewhat reluctantly, that parliamentary debates could be used in the interpretation of sections of the Canadian Criminal Code. Although the Court cautioned that reference to Hansard was "usually not advisable" it nevertheless established a new rule which has been followed by the Canadian courts.[272]

1.184 The demise of the exclusionary rule was confirmed by the Supreme Court in *R v Morgentaler*.[273] In that case, the Canadian Supreme Court examined the legislative history of Nova Scotia *Medical Services Act, 1989* and related regulations. The Court found, on an examination of the parliamentary debates on the Bill, that the primary purpose of the legislation had been to prevent the accused from establishing an abortion clinic in the province, and not, as had been argued, to improve the general quality of health services. On an examination of the legislative history, the Court found that the purpose of the legislation had been to suppress what was considered by members of the parliament to be a socially undesirable practice. As such the legislation was of a criminal nature and was outside the competence of the provincial legislature.

1.185 Sopinka J, in his judgment for the Court, concluded that the caselaw had developed to the point where parliamentary debates could be admitted as an extrinsic aid to interpretation. He appeared to endorse their use in both cases which involved constitutional issues, and statutory interpretation cases generally. He held:

---

269 In the case of *AG Canada v Reader's Digest Association* (1961) 30 DLR (2d) 296, for example, parliamentary debates were excluded. A more flexible approach was evident in the two constitutional cases of: *Reference re Anti-Inflation Act (Canada)* 68 DLR (3rd) 452 and *Reference Re Residential Tenancies Act 1971* (Ontario) 123 DLR (3rd) 554. The Ontario Court of Appeal in *R v Stevenson and McClean* [1980] 57 CCC (2d) 526 allowed for the use of extrinsic aids in some cases regardless of whether there were constitutional issues.

270 In *Re Upper Churchill Water Rights Reversion Act (Newfoundland)* 8 DLR (4th) 537 parliamentary debates were admitted to show the historical context of the statute.

271 121 DLR (3rd) 41

272 Stephane Beaulac, *Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?* (1998) 43 McGill L J 287, at p.302.

273 (1993) 107 DLR (4th) 537

"The former exclusionary rule regarding evidence of legislative history [has] gradually been relaxed but until recently the courts have balked at admitting evidence of legislative debates and speeches ... The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation."[274]

The Report of the English and Scottish Law Commissions

1.186 The English and Scottish Law Commissions, in their 1969 *Report on the Interpretation of Statutes*,[275] recognised the limitations of statutory reform. They noted that "even in countries with the most highly codified systems the principles of interpretation largely rest on a body of flexible doctrine developed by legal writers and by the practice of the courts."[276] They also noted the danger that a comprehensive codification of the law of interpretation would rigidify the law in this area. However, they did recommend that some legislative measures be taken. The Commissions recommended statutory intervention for four purposes:

"(a) to clarify, and in some respects to relax the strictness of, the rules which, in the determination by our courts of the proper context of a provision, exclude altogether or exclude when the meaning is otherwise unambiguous, certain material from consideration;....

(b) to emphasise the importance in the interpretation of a provision of
(i) the general legislative purpose underlying it ...
(ii) the fulfilment of any relevant international obligation...

(c) to provide assistance to the courts in ascertaining whether a provision is or is not intended to give a remedy in damages to a person who suffers loss as a result of a breach of an obligation created by that provision ...

(d) to encourage the preparation in selected cases of explanatory material for use by the courts, which may elucidate the contextual assumptions on which legislation has been passed."

1.187 The Commissions also considered the desirability of producing an explanatory statement with a Bill (similar to the explanatory memoranda produced with Irish Bills), which would provide to the courts "authoritative, but not compelling guidance" in the interpretation of an Act.[277]

---

274 At p.553.

275 The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes,* (Law Com. No.21) (Scot. Law Com. No.11) (London, 1969)

276 *ibid.* p.49.

277 At p.43

Report of the Hong Kong Law Reform Commission

1.188 The Law Reform Commission of Hong Kong[278] in its 1997 *Report on Extrinsic Materials as an Aid to Statutory Interpretation* concluded in favour of a legislative approach, finding that it,

> "would be desirable to codify and modify the existing common law principles and in the process extend and clarify the position by way of legislation."[279]

The Commission recommended that extrinsic aids to interpretation should be used to determine the meaning of a provision where the literal meaning was ambiguous or absurd.[280] However, they recommended that consideration of extrinsic material should not be permissible in order merely to confirm the meaning of a provision. The legislation proposed by the Hong Kong Commission would allow for the use of a wide range of extrinsic aids, including relevant treaties, parliamentary debates, reports of the Hong Kong Law Commission, and reports of Law Reform Commissions in other jurisdictions, where a provision of Hong Kong legislation had been modelled on legislation from that jurisdiction which in turn had been modelled on such a report. The Commission also recommended reference to any documents which were declared, in the Act itself, to be relevant documents for the purposes of its interpretation.

Sweden

Approach to Interpretation

1.189 In general, statutory provisions are interpreted by the Swedish courts in the context of the whole statute, with preference being given to a contextual, rather than a purely literal interpretation. A court will attempt to reconcile the contextual interpretation of a statute with its purpose; the purpose of a statute is regarded as a part of its context.[281] The weight given to a statute's purpose will vary according to the area of law concerned. For example, in criminal law statutes, there will be less consideration of the statute's purpose.[282]

Use of Extrinsic Materials in the Interpretation of Statutes

1.190 Although there is no legislation or strict rule of law specifying when extrinsic materials may be taken into account, judicial practice is that parliamentary materials are taken into account in most statutory interpretation cases. Practice is consistent

---

278 The Law Reform Commission of Hong Kong, *Report on Extrinsic Materials as an Aid to Statutory Interpretation*, (March 1997).

279 At para.12.43

280 Broadly following the model contained in the Australian *Acts Interpretation Act 1901*, as amended (see *supra* paras.1.150-1.153) but with some modifications.

281 Aleksander Peczenik and Gunnar Bergholz, *Statutory Interpretation in Sweden*, in MCCORMICK AND SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY (Dartmouth, 1997) at p.332.

282 *ibid.*

to the extent that failure to take extrinsic materials into account could be considered as a misinterpretation of a statute. One academic commentator has described Swedish laws as "headlines" with the parliamentary materials providing the detail.[283]

1.191 The weight attached to extrinsic aids varies across different areas of law. For example, extrinsic aids are used extensively in relation to tax law, but very little in criminal law cases, where there is a premium on literal strict construction.[284] The courts are also more inclined to disregard the preparatory materials relating to older legislation.[285]

1.192 Extrinsic materials will not be taken into account if they provide evidence of entirely new norms which are not mentioned in the statute.[286] However, the extrinsic materials may override the language of the statute in certain limited circumstances, for example where it is expressly stated in the materials that they override the statute, or where the terms of the extrinsic materials are clear and those of the statute are vague.

1.193 There is an informal hierarchy of parliamentary materials, with more weight being attached to committee reports, ministerial reports and statements, etc, than to the general run of speeches on a Bill in parliament which may be politically motivated. Consideration may be given to the parliamentary materials relating to connected statutes.[287]

1.194 The use of extrinsic materials is facilitated by the practice of the Swedish legislature, which publishes, with an Act, the most important of the parliamentary materials relating to it. Whilst a Bill is still being debated in parliament, the relevant government department publishes an explanatory report which explains and justifies each section of the Bill.[288]

Finland

1.195 There are broad similarities between the Swedish and Finnish legal systems, the result of Finland's affiliation with Sweden until the nineteenth century. The Finnish approach to statutory interpretation is similar to the Swedish, with the exception that the intention of the legislature, and the extrinsic materials which support that, play a less prominent role in Finnish statutory interpretation. This is explained by the fact that, following Sweden's incorporation in Russia, and independence in 1917, a large amount of the old Swedish legislation remained in place. Given the age of this legislation, its preparatory materials were not seen as very useful or relevant by the courts.[289] The enactment of more up to date

---

283 Folke Schmidt, quoted in McCormick and Summers, *op cit.* fn.281, at p.325

284 *ibid.* p.326.

285 *ibid.* p.327.

286 *ibid.* p.326.

287 *ibid.* p.325

288 *ibid.* p.324. Since those drafting the legislation and the preparatory materials are aware that the materials will be used in interpretation, they are prepared to include less detail in the legislation itself: *ibid.* pp.327-328.

289 Aulis Aarnio, *Statutory Interpretation in Finland,* in McCormack and Summers, *op cit.* fn.281,

legislation has not changed the traditional approach. Nevertheless, external aids to interpretation have, by common law standards, a significant place in statutory interpretation.[290]

1.196 Regard is had by the Finnish courts to literal, contextual, and purposive interpretations. However, where a court finds that parliament has expressed in preparatory materials an unambiguous intention in regard to a statutory provision, it will be followed, and the literal interpretation may be disregarded. There must be reasons given for any departure from the meaning disclosed by the preparatory materials. (The approach is, however, a more literal one in criminal cases.) The more recent the statute, the more attention will be paid to ascertaining the legislative intention. Whilst primary reference in a case of statutory interpretation is to the literal meaning of the statute, it is accepted that, where there is clear evidence of legislative intent in the preparatory documents, the court should refer to these, Where the court does not refer to such material, the decision may be open to challenge.[291]

Italy

1.197 Article 12 of the Italian Civil Code (Preliminary Provisions) identifies three primary methods of statutory interpretation. In the order in which they are to be considered by a court these arguments are: literal, focusing on the meaning of the words concerned; syntactic, referring to the connections and other usages of the words of the provision; and intentional, (or "logical") referring to the intention of the legislature in enacting the provision.[292] Italian law also recognises the importance of historical context in interpretation, both in relation to the derivation of the rule – for example from the Roman law – and in relation to the social and historical circumstances in which the legislation was enacted.[293] The need to interpret in accordance with changes in society since the enactment of the legislation is also recognised. Further bases for interpretation are the "systematic" approach, which looks to the context of the provision in the code or statute, and the "teleological" approach, which looks to the overall function or purpose of the provision.[294]

1.198 Although parliamentary proceedings and other related materials play a significant role in Italian statutory interpretation, they are subordinate to the statute's text.[295] Recourse to parliamentary debates and other legislative history is most common in regard to recently enacted statutes.[296] Where an older statute,

---

at p.135.

290 *ibid.*

291 *ibid*, pp.149-150.

292 Massimo La Torre, Enrico Pattaro and Michele Taruffo, *Statutory Interpretation in Italy*, in McCormick and Summers, *op cit.* fn.281, p.220.

293 *ibid.* p.221

294 THOMAS GLYN WATKIN, THE ITALIAN LEGAL TRADITION, (Dartmouth, 1997) at pp.46-47; G L CERTOMA, THE ITALIAN LEGAL SYSTEM, (Butterworths, 1985) at pp.84-88.

295 McCormick and Summers, *op cit.* fn.281, at p.222

296 *ibid.* p.226

enacted in a different economic or social context, is to be interpreted, the courts will treat parliamentary materials with particular caution.[297]

[297] *ibid.* p.231

CHAPTER 2 LEGISLATIVE DRAFTING STYLE

Introduction: The Evolution of Drafting Style

2.01 Legal language and in particular statutes have long been the butt of satirists' wit because of their complexity and lack of clarity. Statutes and legal documents are often criticised for being unnecessarily long, complex and repetitious. They can be badly organised, over-elaborate and include confusing and unnecessary cross-referencing. They are often written in 'legalese', a language which includes many archaic and obsolete words and turns of phrase, terms in foreign and little used languages, and two or more synonyms when one word would do. It is not surprising, therefore, that the ordinary reader often finds legal language incomprehensible and that legalese is even regarded by some linguists "as an identifiably different dialect:"[1]

> "It is also assumed that everyone knows exactly what legalese is, but this jargon has never been systematically described, and there are no linguistic criteria for ascertaining what is and what is not legalese. Indeed, it is not entirely certain that legal language is a jargon; research could reveal it to be a dialect or sub-language of English."[2]

Historical Background

2.02 There are many reasons why legal drafting has become so complex. Latin and French were the languages of learning in Europe for many years. Latin and Law French (a mixture of French and English) were used for writing legal documents so that English did not develop technical terms and phrases. Eventually, English came to be the dominant language and began to be used in writing legal documents. The Latin or Law French word for a particular term was retained. Often, both words were even retained together with a new English word for additional comprehension.[3] This led to one of the characteristics of legalese, the doubling and trebling of synonyms.

Fees

2.03 The practice of calculating fees by the length of the document was also a factor which contributed to the verbosity of legal documents, and the use of lengthy

---

1 Law Reform Commission of Victoria, *Plain English and the Law,* Report No.9, 1987, at para.17.

2 Charrow and Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions* (1979) 79 Columbia Law Review 1306 at p.1307.

3 For a detailed discussion of the etymology of legal term and phrases see Law Reform Commission of Victoria, *op cit.* fn.1, at pp.13-15.

recitals and preambles. The extensive reliance of the common law on precedent meant that these practices were retained long after the purpose of these practices disappeared.[4] There are still cases where costs are related to the length of documents.

Supremacy of Parliament

2.04 Another factor identified as contributing to legalese was the desire of Parliament in Britain in the 17th Century to achieve supremacy as law makers. In order to establish supremacy, Parliament drafted legislation in as detailed a manner as possible so that no-one could misunderstand its intentions. Judges themselves had previously drafted statutes in terms of general principle and interpreted them liberally. This method of interpretation declined as the judges played a smaller role in law-making.[5]

Use Of Precedents and Models by Lawyers

2.05 At the time that the style of legal languages was being developed, most documents were not drawn up by skilled drafters. Research has shown that:

> "[t]he mass of routine documents of the law used in England -pleadings, writs, wills, bonds, leases, simple contracts - were not drafted by the best educated or best trained English Lawyers. More often those legal documents were drafted by others such as court clerks or the scribers. The bulk of these papers were apparently being drafted and used by those poorly trained for the law, or trained for the law *not at all.*"[6]

206 Once drafted, these documents were used by successive clerks and scribes as precedents and models. This led to the continuation of bad habits and dated procedures. Particular forms of words which found favour with the courts were retained and the risk of using a new form was not taken. From the fifteenth century onwards, statutes began to be drawn up by conveyancers, who:

> "were encouraged to prolixity by the invention of printing and diluted their native language by that cautious use of synonyms which is the common characteristic of deeds and statutes. From this time a verbose style was introduced, which continued in full use as late as 1861."[7]

2.07 The apprenticeship method of training parliamentary drafters, also heavily dependent on precedents and models, ensured that this practice continued. Turnbull summarised the position as follows:

---

4 Law Reform Commission of Victoria, *op cit.* fn.1, at paras.27-30.

5 Law Reform Commission of Victoria, *op cit.* fn.1, at paras.25-26.

6 DICK, LEGAL DRAFTING (2nd ed. 1985, Carswell, Canada) at p.173, relying on MELLINKOFF, THE LANGUAGE OF THE LAW (Boston and Toronto, Little, Brown and Co., 1963))

7 S G G EDGAR, CRAIES ON STATUTE LAW, (7th ed. Sweet and Maxwell, 1971) at p.22.

"It is unfortunate that the language of the law, at least in the English speaking world, has not moved with the times. No doubt this is because lawyers are trained in precedents, and use precedents in their profession. Legislative drafters learn their craft from studying and amending existing laws."[8]

The Power in The Written Word

2.08 There is an important connection between law and writing or, more accurately, between writing and power. This connection is not unique to modern societies. As Goodrich points out:

> "The history of systems of writing clearly evidences a constant link between the invention of writing - of pictograms (Mexico), hieroglyph (Egypt), ideograms (China) as well as alphabetic script - and knowledge or control placed in the hands of elite groups or classes within the societies in question. Writing was developed so as to retain and control information relevant to the administration of societies of an increasing size and it is in a listing and collating of information in the keeping of written accounts, and also the recording of information about persons, objects and events, that a form of power and surveillance unavailable in oral cultures, the power of encoded (cryptic) information is generated."[9]

2.09 Goodrich goes on to explain that with the advent of writing, political power in early Chinese and Egyptian societies rapidly became a question of knowledge and interpretation of the written law. Struggles for power became a question of struggles over the interpretation of the various writings. This connection was quickly grasped in many preliterate societies:

> "In imitating the note taking anthropologist, the leader of the Nambikwara borrowed note pads and traced wavy lines on to the paper. Having collected a largish number of such scribbled note pads, he began to use them as lists and would pretend to read from them when deciding upon the correct measure of exchanges amongst his people, Levi-Strauss observes that he 'immediately understood [writing's] role as sign, and the social superiority that it confers."[10]

2.10 The connection between writing and power is also well illustrated by the use of Latin in the Roman Catholic and Early Christian Church. The use of Latin and Greek in scripture and ecclesiastical writing meant that the power to interpret was vested in a priest who had undertaken the study of these languages. Through their knowledge and understanding of these languages the clergy had power to make authoritative statements as to what was and was not permissible under the rules of the Church. The translation of the Christian Bible and Christian religious services

---

8 I M L Turnbull, *Clear Legislative Drafting: New Approaches in Australia* 11 (1990) Stat. Law Rev. 161 at p.166.

9 PETER GOODRICH, READING OF THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUE. (Basic Blackwell, London, 1986) at p.22.

10 Goodrich, *ibid.*, at p.23.

reduced this authority considerably. Members of a church who could read and understand scripture, could then question the interpretations and rules which were handed down and come to alternative conclusions.

2.11 The parallels with legal language are obvious. Lawyers spend many years in training, much of which is spent learning how to understand, write and manipulate legal language. Thus, use of a language, unintelligible to most non-lawyers, is perpetuated. Surveys undertaken by the Plain Language Institute of British Columbia found that:

> "Most professional, official and legal documents leave people frustrated and angry. Many people feel excluded from controlling their own lives. A majority do not understand important documents and are therefore prevented from knowing about their rights, obligation and choices."[11]

The Language of Statutes

2.12 In the common law world, lawyers themselves have often complained of difficulty in getting the information they need quickly and easily from documents written in legal language. Take for example the experience of Sir John Donaldson in *Merkur Island Shipping Corp. v. Laughton:*[12]

> "We have had to look at three Acts of Parliament, none intelligible without the other. We have had to consider s.17 of the 1980 Act, which adopts the 'flow' method of parliamentary draftsmanship, without the benefit of a flow diagram. We have furthermore been faced with the additional complication that subsection 6 of s.17 contains definitions which distort that natural meaning of the words in the operative subsections .... My plea is that Parliament, when legislating in respect of circumstances which directly affect the man or woman in the street ... should give as high a priority to clarity and simplicity of expression as to refinements of policy."[13]

2.13 One of the most colourful criticisms of legal language remains however that of Harman L.J. in *Davy v. Leeds Corporation.*[14]

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a slough of despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side."[15]

---

11 Plain Language Institute of British Columbia, *Annual Report, 1991-1992*, at p.2.
12 [1983] 1 ALL ER 334
13 At p.351
14 [1964] 3 ALL ER 390
15 At p.394

Ireland

2.14 Irish legislation has not escaped without criticism. Article 4 of the *Disabled Persons (Maintenance Allowances) Regulations 1984*, (S.I. No. 71 of 1984), as amended provides:

> "In determining the amount of a maintenance allowance for a particular person, a Health Board shall have regard to the income of that person, the spouse of that person, and of all persons in respect of whom that person claims or is in receipt of an increase specified in the Schedules of these regulations. In this regard full account shall be taken of all income arising by way of benefit or assistance or any increase thereof in respect of a dependent, other than supplementary welfare allowance, which is payable under the Social Welfare Acts, 1981 to 1983."

In construing these regulations, Keane J. complained that:

> "These regulations are drafted with the dismal opacity with which we have become all too familiar.... [Article 4 of the regulations], literally construed, could of course extend to benefits payable to all persons mentioned in the first sentence, including in this case the husband, irrespective of whether any part of the benefit in question is attributable to the applicant's being a dependent of the recipient. But it is also open to the interpretation that it is only benefit or assistance payable to the applicant himself, or payable to another but attributable to the applicant's dependency, which is to be taken into account".[16]

2.15 Here is another example of "opacity" in Irish drafting in section 138(4) of the *Social Welfare Act, 1992:*

> " (4) Where one of a couple is entitled to disability benefit, unemployment benefit, injury benefit, disablement pension, old age (contributory) pension, old age pension, retirement pension or invalidity pension and the other is entitled to unemployment assistance, the total of the amount payable to them by way of such benefit or pension, as the case may be, and such unemployment assistance (in this section referred to as 'the relevant amount') shall not exceed the total amount of benefit or pension, as the case may be, or the total amount of unemployment assistance, whichever is the greater (in this subsection referred to as 'the greater amount') that would be payable if only one of the couple were in receipt of benefit, pension or unemployment assistance, as the case may be, and the benefit, pension or unemployment assistance included an increase in respect of the other as his adult dependant; and, if the relevant amount would but for this subsection exceed the greater amount, the amount of unemployment assistance payable to the spouse who is entitled to such unemployment assistance shall be reduced by the amount of the excess."

---

[16] *Healy v. Eastern Health Board* [1988] IR 747.

This sentence is difficult to read and understand. It contains no fewer than 9 clauses and 158 words. It creates two concepts especially for that subsection alone; 'the relevant amount' and 'the greater amount'. It repeats a litany of benefits at least five times, and uses many words and phrases which add nothing to the meaning. By the time the reader has reached the end of the sentence, he or she would have to be forgiven for having forgotten the beginning. Long meandering sentences like these force the reader to do mental gymnastics. The danger also exists that the reader will miss some vital detail in the mass presented. This certainly does not aid effective communication.

2.16 Or another example:

> "Every document *purporting* to be a record kept in *pursuance* of this Act, ... or to be a true copy, certified as such by the person required to keep the record, of any entry *therein* shall, unless the contrary is shown, be presumed to be such and be admissible as evidence of the facts *therein* without further proof."[17] [emphasis added]

How much easier it would be to read if it were written:

> Every document which claims to be a record kept for the purposes of this Act, or which claims to be a true and duly certified copy of any entry in a record, shall be presumed to be a record or a true copy unless the contrary is proven, and will be admissible as evidence that the facts in it are true.

2.17 Examples of excessive verbiage are also to be found in the most recent Acts, for example in section 10 (4) of the *Air Navigation and Transport (Amendment) Act, 1998*:

> "The Minister for Finance may, *from time to time as occasion requires*, for the purpose of compliance with *so much of the Companies Acts as requires that* there shall always be a minimum number of members of the company, transfer to any person one of his or her shares in the share capital of the company." [emphasis added]

2.18 Even relatively simple statements can sometimes become unnecessarily laboured when couched in legislative form. For example, an over-use of negatives makes the following otherwise straightforward provision of the *Firearms (Temporary Provisions) Act, 1998* less easily comprehensible than it could be:

> "A firearm certificate shall not be granted to a person not ordinarily resident in the State who has not attained the age of 16 years."

2.19 It must be acknowledged that there are many well-drafted acts on the Irish statute book. There is, however, a general tendency towards the use of anachronistic or legalistic terms, which are unnecessary, and which contribute to the inaccessibility of legislation to the non-lawyer. Words such as "hereby",[18]

---

17 Section 34 of the *Sea Pollution Act, 1991*

18 Section 26 (1) of the *Industrial Development (Enterprise Ireland) Act, 1998* reads: "the following shall be and hereby are transferred to the Agency on the establishment day..."

"thereto",[19] "therefrom",[20] "thereof",[21] "therefor", "aforesaid"[22] are in common usage in legislation. There is no reason, for example, why section 6 of the *Oil Pollution of the Sea (Civil Liability and Compensation) (Amendment) Act, 1998* should refer to "the jurisdiction or power to determine liability for pollution damage and to award compensation therefor..." and not "... to award compensation for it" or "to award compensation for the damage". Similarly, the statement in the *International War Crimes Tribunal Act, 1998*, that "the High Court may make such other orders as are appropriate" would lose none of its meaning if stated more simply "the High Court may make other appropriate orders.

2.20 Excessively formal terms are often used in Irish legislation, where terms in more common usage would be equally appropriate. "Shall" is almost always used instead of must or will; or where the use of the present tense of the verb would suffice: since every provision in an Act is enacted, it is sufficient to say "a person is liable" rather than "a person shall be liable". Similarly, "furnish" is used instead of give or provide[23], "save" is used instead of "except",[24] and "commence" is used instead of "begin".[25] Superfluous phrases such as "as the case may be", and "that is to say" are common.[26] Quaint legalisms are often used: for example "as soon as may be" (used in section 29 of the *Food Safety Authority of Ireland Act, 1998*) could be replaced with a more modern term such as "as soon as practicable."

2.21 The terms "such" and "the said" are frequently used in Irish legislation to refer back to a term mentioned earlier in the section. They lend the text an unnecessary air of remoteness and formality, and have no more precise meaning than terms familiar from everyday usage – "that", "the" or "it". The following passage from the *Housing (Traveller Accommodation) Act, 1998* uses a mixture of "such", "the said" and "that":

> "...Where, without lawful authority, a person erects, places, occupies or otherwise retains a temporary dwelling in a public place and *such* temporary dwelling ... is within a five mile radius of any site provided, managed or controlled by a housing authority ... *and the temporary dwelling concerned* could, in the opinion of the housing authority within whose functional area *such* temporary dwelling has been erected ... appropriately be accommodated on *that* site, *the housing authority* may serve a notice on *that person* requiring *that person*, within a specified period, to remove *the said* temporary dwelling from *the said* site ..." [emphasis added]

This passage would lose none of its meaning or precision if reference were made simply to "the person", "the temporary dwelling" and "the site".

---

19 For example, section 5 of the *Food Safety Authority of Ireland Act, 1998*

20 *ibid.*

21 For example, section 84 (5) of the *Central Bank Act, 1997*

22 For example, in section 2 (3) of the *Local Government Act, 1998* "...for the purposes aforesaid..."

23 Section 6 of the *Electoral Amendment Act, 1998*

24 See, for example, section 14 (9) of the *Industrial Development (Enterprise Ireland) Act, 1998*

25 See, for example, section 6 (4) of the *Parental Leave Act, 1998*

26 See, for example, section 21(.3) of the *Air Navigation and Transport (Amendment) Act, 1998*

2.22 The grammar of legislation is sometimes unnecessarily elaborate and strained: "any other person being or having been an employee" could equally well be written as "any other person who is or has been an employee".[27] The passive voice is often used in preference to the active, so that section 5 (2) of the *Local Government Act, 1998*, for example, reads: "there shall be paid into the Fund by each local authority" rather than "each local authority must pay into the fund."

2.23 These are minor matters which are generally and rightly regarded as of lessor importance to the effective working of an Act. However, if legislation can be made more accessible to its readers, without sacrificing any of its meaning or precision, then settled practice should not prevent change.

2.24 Where highly complex concepts are translated from general principle to concrete legislative terms, the price of precision in defining the scope and effect of the legislation can be confusion for the reader. Section 22 of the *Employment Equality Act, 1998*, is an example. The section is a maze of cross-references, conditions and substitutions. It achieves the difficult task of defining the precise nature of sexual discrimination for the purposes of the Act – but the meaning of the section is not at all apparent on a first reading. The text of the section is as follows:

> (1) Where a provision (whether in the nature of a requirement, practice or otherwise) which relates to any of the matters specified in paragraphs (a) to (e) of section 8 (1) or to membership of a regulatory body-
>
> (a) applies to both A and B,
> (b) is such that the proportion of persons who are disadvantaged by the provision is substantially higher in the case of those of the same sex as A than in the case of those of the same sex as B, and
> (c) cannot be justified by objective factors unrelated to A's sex,
>
> then, for the purposes of this Act, A's employer or, as the case may be, the regulatory body shall be regarded as discriminating against A on the gender ground contrary to section 8 or, as the case may require, section 13.
>
> (2) Subsection (1) shall apply to the provision of any such services as are referred to in paragraphs (a) and (b) of section 11(1) subject to the following modifications:
>
> (a) for the words "any of the matters specified in paragraphs (a) to (e) of section 8 (1)" there shall be substituted the words "a person seeking any such services or guidance as are referred to in paragraphs (a) and (b) of section 11 (1)";
> (b) the reference to the employer shall be construed as a reference to the employment agency; and
> (c) the reference to section 8 shall be construed as a reference to section 11.

---

[27] Section 50 (1) (h) of the *Food Safety Authority of Ireland Act, 1998*

(3) Subsection (1) shall apply to participation in any such course or facility as is referred to in paragraphs (a) to (c) of section 12 (1) subject to the following modifications:

(a) the reference to paragraphs (a) to (e) of section 8 (1) shall be construed as a reference to paragraphs (a) to (c) of section 12 (1);
(b) the reference to the employer shall be construed as a reference to the person offering the course or facility; and
(c) the reference to section 8 shall be construed as a reference to section 12.

(4) The reference in subsection (1) (b) to persons who are disadvantaged by a provision includes not only those who are so disadvantaged because of their sex but also those who are so disadvantaged by reference to their marital status or family status.

(5) Subsection (3) of section 8 applies for the purposes of subsection (1) as it applies for the purposes of subsection (4) to (8) of that section."

Why are Irish Statutes Difficult to Understand?

2.25 As the section quoted above illustrates, the problem with Irish statutory drafting is not solely or even principally one of language or "legalese". There are also deeper issues in the way in which Acts are structured, the amount of detail they include and the degree of precision which they are required to achieve. The common law tradition of detailed legislative drafting, with its vigilance against misinterpretation, and its aim to cater for all possible eventualities, can result in highly complex provisions, which do not read easily. When required to put highly complex and detailed concepts into a "watertight" statutory provision, it is inevitable that the drafter will have to sacrifice some measure of clarity. Section 8 of the *Central Bank Act, 1998,* for example, struggles to apply the terms of the section to different situations, involving certain licence holders (and related persons) and the Irish Central Bank on the one hand, and "reporting agents" and the European Central Bank on the other. The result is a section made up of sentences so long and complex that readability is greatly reduced. The section reads:

> "The Act of 1971 is hereby amended by the substitution of the following subsection for subsection (1) of section 18 (as substituted by section 37 of the Act of 1989):
>
> "(1) "A holder of a licence, any reporting agent designated by the European Central Bank (in this section referred to as a "reporting agent") and any person carrying on a business –
>
> (a) of an associated enterprise to which subsection (3) of this section relates,

(b) in respect of which that person is, by virtue of section 7 (4) (a) (ii) of this Act, exempted from the obligation to hold a licence,
(c) as an investment company,
(d) as a moneybroker,
(e) as a financial intermediary, or
(f) of issuing, holding or otherwise participating in any market in financial instruments including those to which Chapter VIII of the *Central Bank Act, 1989* applies,

shall each furnish the Bank –

(i). at such times as the Bank or, in the case of a reporting agent, the Bank or the European Central Bank, may specify from time to time, such information and returns concerning the business to which the license relates or the activities of a reporting agent or the carrying on of a business as aforesaid by such person, as the case may be, as the Bank or, in the case of a reporting agent, the Bank or the European Central Bank, may specify from time to time, being information and returns which the Bank considers it necessary to have for the due performance of the functions of the Bank imposed on it by law or, in the case of a reporting agent, the Bank or the European Central Bank, and

(ii). within such period as the Bank or, in the case of a reporting agent, the Bank or the European Central Bank, may specify, any information and returns (not being information or returns specified under subparagraph (i) of this subsection) concerning the business to which the license relates or the activities of a reporting agent or the carrying on of a business as aforesaid by such person, as the case may be, that the Bank or, in the case of a reporting agent, the Bank or the European Central Bank, may request in writing, being information and returns which the Bank considers it necessary to have for the due performance of the functions of the Bank imposed on it by law or, in the case of a reporting agent, the Bank or the European Central Bank"."

Amendment of Legislation

2.26 A great deal of the confusion facing the reader of Irish legislation is caused by the frequent and piecemeal amendment of legislation. An illustration is provided by section 31 (3) of the *International War Crimes Tribunals Act, 1998.* Its aim is to apply certain provisions of the *Proceeds of Crime Act, 1996* to another sub-section of section 31, with modifications. The result is inevitably convoluted. Seven subsections modify the application of the *Proceeds of Crime Act* to the section. One of them, section 31 (3) (g), states: "section 8 (1) of that [the Proceeds of

Crime] Act shall be construed as if it did not contain the words after subparagraph (ii) and before 'then'.

2.27 A further example of the problems caused by piecemeal amendment can be found in section 28 of the *Oireachtas (Allowances to Members) and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act, 1998*. The Act applies a modified form of the pensions provisions of the *Courts of Justice and Court Officers (Superannuation) Act, 1961* to some judges and court officers. The text is as follows:

> "in the case of a judge or court officer who is serving as such on or after the 19th day of December 1996, section 2 (in relation to such a judge) and section 4 (in relation to such a court officer) of the Act of 1961 shall have effect as if –
>
> (a) in subsection (2) of the applicable section –
> (i). the reference to one and one-half the yearly amount of the pension were a reference to three times the yearly amount of the pension, and
> (ii). the words "as reduced under subsection (5) of this section" were deleted,
>
> (b) in subsection (3) of the applicable section, the words "or, if greater, the gratuity that would have been payable to him under subsection (2) of this section if, on the date of his death, he had retired owing to permanent infirmity" were inserted after "at the time of his death", and
>
> (c) the following subsection were substituted for subsection (5) of the applicable section
>
> "(5) Any gratuity payable under this section shall fall to be reduced by reference to any contribution due in accordance with the terms of the Scheme of Pensions for Spouses and Children of the Judiciary and Court Officers.""

In the above example, the amendment effected by subsection (c), which substitutes a new text for the amended provision, is much more readily comprehensible than the previous amendments, which require the reader to insert or substitute words or phrases in the text of the amended provisions.

2.28 One helpful practice, in place in Ireland since the 1970s, is the use of tables in a schedule to an Act, which set out the provisions of previous legislation amended or repealed and the sections which amend them.[28] Although such tables are not contained in all legislation, they are used in many of the more lengthy and complex Acts.

[28] See for example the *Social Welfare Act, 1999* and the *Finance Act, 1999*.

The Need for Updated Legislation

2.29 The inaccessibility of much of the law on the current Irish statute book is due to the age of the legislation rather than to current drafting style. Many areas of Irish law are still governed by nineteenth or early twentieth century legislation, which is expressed in language more formal and difficult to the modern reader than the language of modern legislation. The revision and updating of legislation would go a considerable way towards enhancing the accessibility of the Irish statute book. If there is to be a "uniform" accessible style which is used in the drafting of all legislation, then, ideally, existing legislation (or at least the most antiquated statutes) should be re-drafted in this accessible style. The consolidation of much-amended legislation on a topic into a single Act would also be helpful in many areas.

The Need for Uniformity

2.30 The persistence of a style of legislative drafting which is, to varying degrees, antiquated and obscure, can in part be attributed to the lack of any guidelines which would impose some uniformity on the style of Irish drafting, and assist drafters of legislation and regulations in writing in a more modern, standardised style. In the absence of clearly determined guidelines, it is only to be expected that drafters will continue to follow well-settled, traditional drafting practices.

2.31 The absence of a uniform style creates room for confusion in the mind of the reader, and reduces the degree of certainty with which statutes may be interpreted. There is a need for greater uniformity of style in statutory drafting; and for clear guidelines which will prescribe the type of language to be used in the drafting of statutes. One means of addressing this need would be to produce a manual of style which could be used as a model by all drafters.

To Whom Should Legislation be Addressed?

2.32 Some acts will inevitably be more complex than others. The statutes drafted by the parliamentary draftsman's office cover areas as widely divergent as the law itself. Some affect the daily lives of citizens to a much greater extent than others. Some deal with highly technical or specialist topics. Legislation regulating shipping, for example, or financial services, does not have the same impact on the general public as social welfare legislation. The former types of legislation are likely to affect and be read only by a small category of professionals who are specialists in the field. Social welfare legislation, on the other hand, affects a large number of citizens in their daily lives. In the light of this, it is arguable that there is a need for different approaches to drafting different types of statute. The question arises: for whom are laws drafted? Are they always drafted with the general public in mind, and if not, should this be the case? Alternatively, should they be drafted so as to be easily understood by a legal practitioner, or by a specialist in the particular field covered by the statute?

2.33 There is a clear need, in the case of some legislation, that it should be addressed to, and readily comprehensible by, the ordinary citizen. It is arguable that a degree of pragmatism and flexibility should be allowed to inform the demand for "plain language", in relation to legislation which deals with particularly complex or technical topics. Although every statutory provision can and should be drafted with clarity, not every statute will lend itself to expression in layman's language. Often, the use of what might be considered to be jargon may be seen as preferable to the lengthy (and possibly inaccurate) explanation of technical terms. Many technical terms become part of our everyday language, or at least a part of the everyday language of particular professional group. In some cases, a statute will affect and will be used almost exclusively by a small group of professionals and administrators.

2.34 Against this, however, there is an argument from principle that, since legislation does ultimately affect and regulate the lives of all citizens, it should be capable of being understood by the reasonably well-educated layperson.

2.35 It is arguable that the need for accessibility by the layperson could be addressed by the issuing of explanatory materials to accompany the Act. The issuing of such materials has been standard practice in areas such as consumer affairs and health and safety. The argument can also be made, however, that useful though these materials are, they do not provide a solution in themselves to the difficulties with current statutory language.

CHAPTER 3 PLAIN LANGUAGE AND LEGISLATION

3.01 The plain language movement evolved as a reaction to the remoteness and complexity of legal language. Plain language is a concept which is extremely difficult to define as it means very many different things to different people. It is also a relative concept. Plain language invites the question: plain to whom? It is probably best therefore to give a number of descriptions as a starting point. Eagleson describes plain language as follows:

> "Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence structure. It is not baby talk, nor is it a simplified version of the English language".[1]

3.02 Or another description:

> "Plain English means writing that is straightforward, that reads as if it were spoken. It means writing that is unadorned with archaic, multi-syllabic words and majestic turns of phrase that even educated readers cannot understand. Plain English is clear, direct, and simple; but good plain English has both clarity and grace."[2]

3.03 The Plain Language Institute in British Columbia gives the following description:

> "Plain Language" should be defined tautologically as language that is 'plain' to its intended readers. But language that is 'plain' to one set of readers may be incomprehensible for others. 'Plain language' is a variable, not an absolute. It should be described, measured, and defined in terms of principles and rules of thumb, not algorithms or rules hard and fast. Operationally, we can and should define it as language they can understand, language that gives its readers the information they need 'plain language' refers to process insofar as our readers vary, so too will 'plainness' vary."

3.04 The essence of plain language, therefore, lies in its stress on communication. Writers of plain language keep their readers clearly in mind, so that by writing clearly and plainly the reader will be able to understand a document quickly and easily, rather than waste time making sense of complex language or sentence

---

1 ROBERT D. EAGLESON, WRITING IN PLAIN ENGLISH, (Commonwealth of Australia, 1990) at p.4.

2 J.C. Redish, *The Plain English Movement,* in SIDNEY GREENBAUM, THE ENGLISH LANGUAGE TODAY. (Pergamon Press, 1985) at p.126.

construction.[3] The plain language movement is not confined to a quest for simpler legislative drafting. In fact the movement has generally grown out of the demands of consumer associations for clearer contracts and forms. However, its proposals do have useful applications to legislative drafting.

Plain Language Or Plain English

3.05 Although the terms plain language and plain English are often used interchangeably by commentators in this area, there is a difference between the two. Plain language is perhaps the broader term, and more suitable in jurisdictions which are bilingual. In Ireland we have laws, legal documents and also our Constitution written in both Irish and in English; plain language is a term which describes the simplification of both versions. Plain language is also perhaps a broader term in that it encompasses format, design, layout and so on as well as the `plainness' of the individual words used. This is because language is any method or means of communicating ideas. It includes mathematical languages, flow charts and characters as well as words. English on the other hand is a particular type of language. For these reasons the term plain language rather than plain English is preferred in this paper.

3.06 The easiest way to understand what people mean by plain language is to look at an example. It is quite simply the difference between writing:

> "In default of the appearance of the objector before the Tribunal for the purpose of review, the Tribunal shall ... (*Accident Compensation Act 1985 (Vic.), s.222(2)).*"

and

> "If the objector fails to appear before the tribunal ...."[4]

3.07 The gap between these two sentences is more than just two lines; it is in fact several hundred years of tradition and a lot of time and effort by very many different people.

3.08 Plain language is not a monosyllabic or patronising style of writing, nor is it a style of writing that limits writers to one clause sentences. It is therefore no more than good writers, lawyers and legal drafters have always tried to do, that is write as clearly and effectively as possible.

3.09 The primary objective of plain language is communication. Most writers, especially legal writers, usually want to communicate *effectively* with their readers. A person using plain language will communicate more effectively when he or she lets the reader concentrate on the message and does not allow him or her to be distracted by complicated language. Plain language does not mean oversimplified and inexact writing, it simply means that the people who use a document must be

---

3 *ibid.*

4 Eagleson *op cit.* fn.1.at p.4.

able to "find the information they need easily, and understand it the first time they read it."[5]

3.10 This can be illustrated by some additional examples.

> "Subject to the following provisions of this section, where an order (in this section referred to as "the original order") has been made under the last foregoing section, the court, on an application under this section shall have power by order to discharge or vary the original order or to suspend any provision of it temporarily and to revive the operation of any provision so suspended."

This example is taken from section 27 of the *Matrimonial Causes Act, 1965* (U.K.). The plain language revision supplied by Clarity, a group of lawyers who advocate the use of plain English in legal writing, is as follows:

> "Orders made under section 26 may on application to the court be discharged, varied, suspended or subsequently revived."

This re-draft omits, however, the words "subject to the following provisions of this section" from the original - words which may be important.

3.11 An added dimension to plain language is the emphasis on layout and organisation of documents. In order to enable people who use a document to be able to "find the information they need easily, and understand it the first time they read it"[6], advocates of plain language reject dense blocks of text in favour of well indexed, clearly presented material. Maximum use is made of modern methods of typography and up-to-date word-processing facilities to design user-friendly documents.

Advantages and Disadvantages of the Plain Language Approach

3.12 Jurisdictions which have implemented a policy of plain language, have done so in the belief that legal documents written in plain language have two distinct advantages over documents written in traditional legal language: namely that the use of plain language makes law and justice more accessible, and that plain legal language saves time and money. There has been considerable debate within these jurisdictions, however, as to whether a plain language policy can deliver these benefits. Many commentators have expressed concern that introducing a plain language policy would cause more problems than it would solve. Below, we examine the debate in this area in order to assess whether benefits of plain language outweigh the alleged disadvantages.

(a) Concern that Plain Language will Lower Standards of Good Writing

3.13 There is a concern that the use of oversimplified language is too juvenile, unlegal or condescending, that it is simply not "good writing", and involves a

---

5 *ibid.*

6 Redish *op cit.* fn.2 at p.126.

debasement of language. This concern stems from the view that plain language consists of monosyllabic words, very short sentences and a complete rejection of complex words or sentence construction. If this were true of plain language then the criticism would be valid. It would certainly not be useful to draft statutes and legal documents in simplistic monosyllabic words. However, as other commentators have pointed out, this is to misunderstand plain language. As the Law Reform Commission of Victoria note:

> "Plain English involves the use of plain, straightforward language which avoids defects and conveys its meaning as clearly and as simply as possible, without unnecessary pretension or embellishment. It is to be contrasted with convoluted, repetitive and prolix language. The adoption of a plain English style demands simply that a document be written in a style which readily conveys its message to its audience."[7]

3.14 Plain language is therefore, by definition, good language. Far from debasing language, those in favour of the adoption of a plain language style, argue that it promotes good style and writing by removing the clumsiness, inelegance and prolixity inherent in many legal documents. It is important not to lose sight of the fact that legal documents and statutes are not meant to be works of art or literature, but are documents whose primary aim is to communicate. As working documents intended to do a job they should be designed for utility rather than beauty. As Redish puts it "the purpose of the documents that we want to put into plain English is to convey critical information."[8]

3.15 Even a reader familiar with legal language may have little time to waste searching through a disorganised document to ascertain its meaning. Lawyers hunting through disorganised and obscure legislation could waste many hours trying to identify its meaning.

(b) Concern For Intelligibility

3.16 Adopting a plain language approach to drafting does not necessarily mean that laws would be drafted so as always to be intelligible to the general public.

3.17 Bennion believes that the biggest stumbling block in this area is communicating the law to *lawyers*.

> "Unless they are clear about the nature and characteristics of legislative texts, there is not much chance that anyone else will be.

The man or woman in the street should not attempt to interpret legislation ... in the form in which it was enacted. What the lay person needs is explanations and summaries.

---

7 Law Reform Commission of Victoria, *Plain English and the Law*, (1987), at p.39.

8 Redish *op. cit.* fn.2, at p.134.

> ... It may be positively dangerous to encourage non-lawyers to think they can understand legal texts unaided by expert advice ... [I]t takes a lawyer to know whether simple words in what should be a technical text really carry their apparent simple meaning."[9]

3.18 Bennion's advice is:

> " Do not look for savings by trying to make the law easier for lay persons to understand. Instead, make it easier for lawyers to use. Plain English and reducing jargon have only a small part to play in this."[10]

3.19 In our Report on Dishonesty, we also were of the view that it was a mistake to leave the interpretation of legislation to the "ordinary" man on the street. Advocating the maintenance of settled law, we said:

> "When one "pitches" legislation at the Bench, that does not mean that one uses obscure language. It simply means that one uses terms whose meaning is well settled *in law*; terms that are tried and tested in Court, that are trouble-free and have pedigree. When one uses a new term, one defines it clearly and thoroughly, preferably by using 'old' terminology. Why waste all the time and effort taken in so many cases to settle concepts and terms only to discard them?"[11]

3.20 The same point has been made with force in New Zealand:

> "No sensible person could expect a statute to be as easy to read as a work of popular fiction or a tabloid newspaper. Works of popular fiction eschew unusual or long words and tabloid newspapers usually make each sentence into a paragraph. If such literary works or newspapers represent the level of comprehension of most of the adult population, no amount of effort by the drafter will render the statutes comprehensible to the average adult reader".[12]

3.21 Opponents of plain language would argue that the way to make legal documents accessible is to educate the average citizen to such a degree that he can read and understand documents which affect him.

3.22 These concerns are valid, and must be taken into account by plain language advocates. However, the plain language movement does not contend that all legal documents and particularly statutes, can be made intelligible to all citizens. Clearly a certain level of education is necessary. Nevertheless by drafting in plain language, the number of those who can understand a document, is hugely increased. This argument is put by the Law Reform Commission of Victoria as follows:

> "The plain English movement does not require that laws always be drafted in such a way as to make them intelligible to the average citizen.

---

9 Francis Bennion, *Don't Put the Law into Public Hands,* The Times, January 24th 1995.

10 *ibid.*

11 Law Reform Commission *Report on Dishonesty* (LRC 43 - 1992) para. 15.6.

12 *ibid.* at p.26.

However, it does require that every effort be made to make them intelligible to the widest possible audience. There is no justification for the defects in language and structure which were noted in [earlier chapters] and which sharply reduce the range of people who are capable of comprehending a document. Many legal documents are written in such a way that not only the people to whom they are directed but also judges and skilled lawyers have extreme difficulty in comprehending them. In such a case, it is not unfamiliarity with the subject matter or a lack of technical knowledge which causes the problem; it is the language and structure of the document itself. These should be improved, not in the hope of making the document intelligible to the average citizen, but in order to make it intelligible -and immediately intelligible- to as many of those as possible who are concerned with the relevant activities".[13]

3.23 This is not to say that education does not have a role to play, or that simplification by omission is not a real danger. The best view is that the struggle for accessibility must be fought on all fronts, and a plain language policy has a role to play in this struggle.

(c) Concern that Plain Language can only be Achieved if Certainty is Sacrificed

3.24 One of the major concerns attached to the adoption of a policy of plain language, is that drafting legal documents and particularly legislation in this style may lead to a loss of precision and certainty.[14]

3.25 Gowers expresses this concern as follows:

> "Legal drafting must therefore be unambiguous, precise, comprehensive and largely conventional. If it is readily intelligible, so much the better; but it is by far more important that it should yield its meaning accurately than that it should yield it on the first reading, and legal draftsmen cannot afford to give much attention, if any, to euphony or literary elegance. What matters most to them is that no one will succeed in persuading a court of law that their words bear a meaning they did not intend, and, if possible, that no one will think it worth while to try".[15]

3.26 The tension between simplicity and certainty was also recognised in the Renton Report,[16] and by parliamentary drafters who are of the view that drafting in plain language will lead to an increase in problems, ambiguities and ultimately to litigation. This concern however, has as its basic premise, the belief that legal language is at present precise, comprehensive and unambiguous. Proponents of plain language argue that in fact, this is not the case, and that existing legal

---

13 Law Reform Commission of Victoria, *op cit.* fn.7 at p.45.

14 I M L Turnbull, *Problems of Legislative Drafting* (1986), *Stat. Law Rev.* 67, Comment, *Drafting Laws in Plain English, Can the Drafter Win*, 1988 NZLJ 25, at p.26.

15 GOWERS THE COMPLETE PLAIN WORDS (3rd ed. 1986: H.M.S.O), at p.7.

16 *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London, 1975) Cmnd. 6053, at para.11.7.

language buries certainty and precision in "jargon, convoluted syntax and ritualistic formulas".[17]

3.27 As regards statute law, where the need for precision is greatest, Dale makes the point that:

> "There is abundant evidence of the uncertainty produced by United Kingdom statutes. In *AG v Prince of Hanover* [1957] A.C. 436 Lord Simonds said that "a large and ever increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes". The twelfth edition of Maxwell on *The Interpretation of Statutes* refers, on a rough computation, to 640 statutes and 1890 judicial decisions. The Law Commission state, that an analysis of the cases, coming from England and Wales, reported in the Queen's Bench, Chancery and Probate volumes of the Law Reports for 1965, seemed to show that 56 per cent involved a point of statutory interpretation (compared with 42 per cent in 1905). For appeals to the House of Lords the figure was 75 per cent (57 per cent in 1905)".[18]

3.28 It is worth noting the comments of Lord Radcliffe on the language of the law in an address to Cambridge University Law Society:

> "And in what a language are the citizen's rights and duties expressed today! I have once or twice referred to the law today as being unintelligible. First of all, the volume and comparative inaccessibility of the material defeat even the willing enquirer. Secondly, the jargon and the deplorable habit of legislation by reference make even accessible material incapable of being understood."[19]

3.29 The remarks of Bray C.J. in *City of Marion v Lady Becker* are also interesting:

> "The luxuriant growth of this legislative jungle abounds in ambiguities, inconsistencies, incoherences and lacunae and it is too much to hope that every judge who has had to consider these proceedings would choose to enter the jungle at the same point, still less to emerge from it by the same route".[20]

3.30 The argument, therefore, is that legal language is hardly precise and unambiguous at present. Proponents of plain language would argue that by adopting a plain language style, legal language increases in precision and certainty. By removing the structural defects in language, by omitting unnecessary words and phrases, by using shorter sentences and better organisation and typography, the meaning of the law becomes more rather than less clear. That clarity and precision

---

17 Benson, *Plain English Comes to Court* (1986) 13.1 *Litigation*, 21 at p.23.

18 WILLIAM DALE, LEGISLATIVE DRAFTING : A NEW APPROACH (London, Butterworths, 1977) at p.319

19 Lord Radcliffe, *Some Reflections on Law and Lawyers* (1950)10 *CLJ* 361 at p.368.

20 (1976) 6 SASR 13, 29.

are not competing goals is demonstrated by rewriting programs that have been undertaken.[21] In fact as Thornton notes:

> "The purposes of legislation are most likely to be achieved by the draftsman who is ardently concerned to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood by the affected parties, is best satisfied by writing with simplicity and precision... A law which is drafted in precise but not simple terms may, on account of its incomprehensibility, fail to achieve the result intended. The blind pursuit of precision will inevitably lead to complexity; and the complexity is a definite step along the way to obscurity".[22]

3.31 If this is true of legislation, where the demand for precision is greatest, it is probably also true of other legal writing. The irony is that in striving for precision at the expense of all other goals and especially at the expense of clarity, precision is lost. This irony has led Lord Campbell of Alloway to say:

> "We should abandon that vain search for certainty in a statute, the cause of unintelligible and complex drafting which itself gives rise to uncertainty".[23]

(d) Plain Language will Lead to the Loss of Established Meanings of Words Settled over Centuries of Judicial Interpretation.

3.32 We have expressed already one concern for the maintenance of well settled law. Many of the criticisms of legalese have centred around the use of Latin and law-French terms, as well as archaic and outmoded turns of phrase. It was argued that in order to write in plain language these words and turns of phrase should be abandoned. The objection is made that in doing this, plain language enthusiasts are throwing out the baby with the bathwater. Many of these phrases, it is argued, have been honed and refined over the centuries, to the extent that they have now become terms of art, capturing in a few terse words a complex legal concept.

3.33 Plain language advocates accept that there are certain phrases that have in fact attained this status. There is a small area of relative precision in the language of the law but they point out that the extent of this area of precision can be grossly overestimated.[24] Much of what are considered terms of art are only meaningless jargon. In examining which traditional words are in fact precise, Mellinkoff has this to say:

---

21 For example, the rewrite of the *Companies (Acquisition of Shares) (Victoria) Code*, by the Law Reform Commission of Victoria, Appendix 2 to *the Report on Plain English and the Law, op cit.* fn..7. at p.42

22 G.C. THORNTON, LEGISLATIVE DRAFTING, (3rd ed. Butterworths), (London, 1987) p.49 as quoted. in Law Reform Commission Victoria, *op cit* fn.7 at p.42

23 *Law in Plain Language*, March 1983, Law Society's Gazette 621.

24 Joseph Kimble, *A Plain English Primer*, (1987) 33 The Practical Lawyer, 83 at p.86.

> "Many of the words that lawyers traditionally use never have had any definite meaning. Foremost among these are the deliberately flexible and some of the archaic. Words like reasonable, substantial, and satisfactory blatantly flaunt their lack of precision. [They] have for so long been a part of a language described as precise it is easy to forget that lack of precision is their only reason for existence."[25]

3.34 Mellinkoff then goes on to examine many of the terms used in law to show that they are not as precise as had been previously thought. The words "hereby" and "herein" are prime examples. They are peppered throughout legal documents and statutes to give a sense of precision, but in fact add nothing except uncertainty. Mellinkoff points out that:

> "Hereby" is noteworthy for being vague in two dimensions - in space and time. Its ordinary meaning is by-means-of-this, and if no one is snapping at your heels, that's all there is to hereby. But lawyers *want to know first of all whether* hereby means only by-means-of-this-writing, or right-now-by-means-of-this-writing. And whichever choice is made, the answer still leaves in doubt whether this-writing refers to the entire document or to only a part of it".[26]

> "Litigated for years, herein has still not settled down to any fixed meaning. It means in-this well enough, but in -this-what? This sentence, this paragraph, this contract, this statute? The exact point of reference remains obscure, and depends completely on context, which is another way of saying that your writing is going to be interpreted.....The antique flavour of herein gives the illusion of a precision whose substance is better obtained by ordinary English "in this paragraph" "in this statute" "in this contract"".[27]

3.36 There are many other terms of art, which would not bear up to the type of examination to which Mellinkoff and others subject them.[28] The objection that plain language robs the law of terms of art needs, therefore, to be revised in the light of this criticism. While genuine terms of art must be retained, this status cannot be given without proper examination.

(e) Costs of Plain Language are Prohibitive

3.36 At first glance, the costs of implementing a policy of plain language would appear to be prohibitive. Rewriting and reprinting existing documents is expensive and time consuming. It costs money to train people in a new style of writing. Drafting in the new plain language style initially would take more time, and this would cost both Government and the private sector more money. Thus it would seem that one of the benefits of the plain language policy, that of cutting costs, would not be achieved.

---

25 DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963) at p.301.

26 At p.314.

27 At p.315.

28 Benson, *Plain English Comes to Court* (1986) Litigation 21, at p.24.

3.37 If the experience of other countries in implementing a general plain language policy is examined, however, it is clear that costs of implementation are not prohibitive. While in the short term some money must be spent running training courses, and rewriting and reprinting documents, this expenditure is recouped several times over in the long run.

3.38 Statistics are not available for plain language savings for legislation. The Law Reform Commission of Victoria conducted a study to determine whether legislation drafted in traditional language is more difficult to understand than plain language versions of the same statutes.[29] Passages from the *Companies (Acquisition of Shares) Act*, and the *Futures Industry Act, 1986 (Cth)*, in both the traditional and plain language versions, were given to separate groups of lawyers, who were asked to apply the legislation to a number of hypothetical cases.

> "There was no significant difference in the level of accuracy of the answers given by participants. However, there was a significant improvement in the time taken to reach that level. The mean time for comprehending the plain English versions of the test passages was between $^1/_2$ and $^1/_3$ the mean time for comprehending the traditional versions. These findings strongly suggest that considerable savings could be made for lawyers and the community if legislation were drafted in plain English".[30]

3.39 It seems, therefore, that once again, the tension is between short term expenditure and long term gain. From the above discussion, it appears that if the money is spent by government in adopting plain language, costs will be substantially reduced in the long term.[31]

(f) Pressure of Time

3.40 It is a common complaint that the parliamentary drafter is overworked. Large numbers of bills are drafted in the office of the parliamentary drafters each year. The availability of sufficient time is an important consideration in their drafting of law.

3.41 Drafters argue that the time given to prepare a draft Bill from the instructions given to them from the various departments is simply not long enough to prepare a

---

29 For a detailed discussion of the study see Law Reform Commission of Victoria, *op cit.* fn.7, at pp.61-62.

30 *ibid.* at p.62.

31 An entertaining but informative 'joust' over the use of plainer language took place when Mr Martin Cutts, a noted plain language campaigner published a re-draft of the *TimeShare Act, 1993 (Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament* [1993] Conp.248) and elicited a response from the Parliamentary Counsel who drafted it, Mr Euan Sutherland. ([1993] 14 Stat. L.R. 162).
Mr Sutherland's reply suggested that a price had been paid for clarification in matters of definition and incomplete elucidation of certain provisions which would leave the reader requiring legal advice. He pointed out that the Bill had been a private members measure picked unexpectedly for attention at a time when he was busy drafting another, larger Bill. The joust, although entertaining, was inconclusive.

Bill or Act written in plain language.[32] Time is one of the chief problems listed by Ian Turnbull, First Parliamentary Counsel in Australia:

> "I firmly believe that it takes more time to draft simply, if one is also drafting precisely. Of course, if one has the habit of writing simply, provisions will tend to be simple from the start. But this describes only part of the whole process. Very often what starts out as a simple proposition becomes more and more complex as further problems emerge or the policy is changed. When a provision is finally right, ... the drafter should review the whole structure of the provision and consider whether there are ways of recasting it to make it more readable. This last step is often denied through lack of time".[33]

3.42 While the Victorian Law Reform Commission understands that drafters work under considerable time pressure, it does not think that a plain language statute takes longer to draft. In its view the problems lie elsewhere:

> "It is by no means clear that the reason for legislative obscurity lies in a lack of time for a final edit of the material. In the Commission's view, the reason is more deep seated than that. Some drafters fail to recognise the needs of the various audiences to whom the legislation is directed. They follow established styles and drafting conventions which legitimise excessive caution, repetitions and convolution. They see no need for the type of editing which is necessary to remove or minimise obscurity. They lack a forum for reassessing the long-held assumptions about legislative drafting".[34]

3.43 Plain language drafting may take longer if the statute or legal document is first of all written in legalese and then translated into plain language. If however the opposite approach is taken, and plain language is used from the beginning, the draft is not necessarily longer.[35] Essentially the tension is between long term and short term goals. The adoption of a plain language style would initially mean more time would have to be spent in drafting, but once the style and method of drafting became established, the change is permanent and takes no longer than writing legalese. In the long term, benefits of this expenditure of time and effort would outweigh any initial disadvantages, and be compensated in time and effort saved by other government departments who would now understand statutes and legal documents more quickly. In the short term, however, there simply may not be enough drafters to spend the time adopting a new style. The solution may be the commitment of more resources to the Office of the Parliamentary Draftsman.

3.44 Drafters point out that they are continuously receiving amendments to their instructions, amendments which are often contradictory. These amendments are often received when the structure of the Bill has already been formulated, and

---

32 Engle, *Bills Are Made to Pass as Razors are Made to Sell: Practical Constraints in the Preparation of Legislation,* (1983) Stat. Law Rev. 7.

33 I.M.L. Turnbull, (1987) Australian Current Law 36047 at 36048.

34 Law Reform Commission of Victoria, *op cit.* fn.7 at p.47.

35 Prather, *In Defence of the People's Use of Three Syllable Words* (1978) 39 Ala. Law Rev. 394.

cannot easily be changed. Continuous redesign to achieve the most efficient and economic structure is often not possible.[36]

Plain Language and Legislation in Some Other Jurisdictions

United Kingdom: Proposals for Law Reform

3.45 An examination of legislative drafting was undertaken some years ago in the United Kingdom by the *Renton Committee on the Preparation of Legislation*.[37] Its terms of reference were as follows:

> "With a view to achieving greater simplicity and clarity in statute law, to review the form in which public bills are drafted, excluding consideration of matters relating to policy formulation and the legislative programme, to consider any consequential implications for parliamentary procedure; and to make recommendations".[38]

3.46 The Renton Committee undertook a review of the statutes which ranged over the historical background to the drafting of statutes, the adequacy of present statute law and current drafting methods, amendment and consolidation of legislation, interpretation of statutes and parliamentary procedure in enacting statutes. The Committee made numerous criticisms of Statute Law in the United Kingdom. It acknowledged a lack of simplicity and clarity, and noted that this was a concern:

> "expressed to us in evidence by the judiciary, by bodies representing the legal and other professions, by the Statute Law Society, by non-professional bodies and by prominent laymen familiar with the problems of preparing legislation".[39]

3.47 Broadly speaking, the Committee's criticisms of statute law were fourfold:

(a) that the language used is obscure and complex, its meaning elusive and its effect uncertain;

(b) that the desire for certainty leads to over-elaboration;

(c) that the internal structure of acts is illogical and unhelpful;

(d) that the subject matter of Acts is not properly arranged - similar topics are regulated in several acts and disparate subjects in one Act. This confusion is aggravated by the amendment process.[40]

The Committee then went on to make a number of recommendations as to how greater simplicity and clarity in statute law could be achieved. Many of these recommendations were procedural, concerning British parliamentary procedure and

---

36 Engle, *op cit.* fn.32, at pp.14-15.

37 *op cit.* fn.16.

38 *ibid.* at para.1.1.

39 *ibid.* at para. 6.1.

40 See Chapter VI of the Renton Report, for a detailed critique of legislation.

the Office of Parliamentary Counsel. Other recommendations, however, concerned drafting techniques which would improve the readability of statutes.

3.48 In examining the language of statute law, the Committee recommended, above all, that preference be given to simplicity of style, vocabulary and syntax.[41] Sentences could be usefully shortened and properly paragraphed.[42] Statutes could be better divided and arranged, with the insertion of headings, subheadings and marginal notes.[43] The Committee also recommended that aids to understanding, such as statements of purpose and mathematical formulae, be used where appropriate.[44] Other recommendations included the use of modern computer technology and typographical technique.[45]

3.49 The Renton Committee's Report was well received by press and Parliament. However, as Lord Simon of Glaisdale noted "the response of the Government of the day was pretty tepid".[46] While some recommendations made by the Report were implemented, mainly those concerning consolidation and method of amendment,[47] the main thrust of the Report, namely the attempt to end over-elaboration in statutory drafting, was largely ignored.[48]

3.50 The criticisms made of statute law in 1975 are still true of statute law in the United Kingdom today. These problems have led to calls from within the legal profession for the use of plain language in statutes. For example, the organisation Clarity, in a detailed submission to the Hansard Society for Parliamentary Government, echoed many of the criticisms of statute law made by the Renton Committee, and suggested solutions. The central point of the submission was that plain language should be used in the drafting of statutes if their accessibility and quality is to be improved. The organisation saw access to law as one of the primary goals of reform, but was also mindful of the cost advantages attached to adopting a plain language policy:

> "Unnecessarily complex language, redundant words, and language which fails to communicate, impose an enormous financial burden on all levels of society. Even minor improvements to the language of the law can bring substantial savings of time; time which can then be put to more productive use".[49]

3.51 As with other proponents of plain language, Clarity advocates the abandonment of archaic and unnecessary words, and the use instead of short sentences, simpler language, improved layout and design. It also favours the use of aids to understanding such as diagrams, mathematical formulae, questions and

---

41 Renton Report, *op cit.* fn. 16. at para.11.2.
42 *ibid.* at paras.11.9-11.12.
43 *ibid.* at paras.11.13.
44 *ibid.* at paras.11.6-11.8, and 11.20.
45 *ibid.* at chapter XVI, and para.11.21.
46 Lord Simon of Glaisdale, *The Renton Report-Ten Years On*, (1985) Stat. Law Rev. 133 at p.133.
47 The Renton Report recommended that amendments whenever possible, should be textual (Recommendation 41).
48 Glaisdale, *op cit.* fn.46 at p.135.
49 Submission of Clarity to the Hansard Society for Parliamentary Government, *Using Plain English in Statutes*, (June 1992).

especially the use of examples to illustrate specific points. Clarity goes further, however, and argues that there should be a fundamental re-appraisal of the approach to drafting statutes. In its view, statutes should be seen as documents conveying specific information to specific readers, and drafted in a way which conveys this information as quickly and easily as possible.

United States

3.52 In the United States, there has for some time been a movement towards the use of plain language. This has primarily been in the areas of consumer contracts and other private legal documents, as well as government forms and other non-legislative documents.[50] However, it has also had an impact on the style of legislative drafting. Legislative Drafting Manuals adopted in many States set out rules of clear plain language drafting.[51]

3.53 The National Conference of Commissioners on Uniform State Laws, has also produced *Drafting Rules for Uniform or Model Acts* in 1991. These rules recommend plain language principles and include the following recommendations:

> "The essentials of good bill drafting are accuracy, brevity, clarity, and simplicity. Choose words that are plain and commonly understood. Use language that conveys the intended meaning to every reader. Omit unnecessary words".
>
> Rule 1: "Use short, simple sentences".
>
> Rule 2: "Unless it is clear from the context, use as the subject of each sentence the person or entity to whom a power, right, or privilege is granted or upon whom a duty, obligation, or prohibition is imposed".
>
> Rule 3(a): "Avoid use of the passive voice".
>
> Rule 5(a): "Be consistent in the use of language throughout the Act. Do not use the same word or phrase to convey different meanings. Do not use different language to convey the same meaning".
>
> Rule 5(b): "Be consistent in the arrangement of comparable provisions. Arrange in the same way sections containing similar material".
>
> Rules 6(a)-(c): "Omit needless language. If a word has the same meaning as a phrase, use the word. Use the shortest sentence that conveys the intended meaning".

---

50 See, for example, the New Jersey Plain Language Law, NJSA 56; Minnesota *Plain Language Contract Act*, 1981, MINN STAT ANN SS.325.6 to 36.

51 See, for example, the Maine Legislative Drafting Manual, prepared by the Office of the Reviser of Statutes: www.state.me.us/legis/ros/publications.htm

Rule 7(a): "Select short, familiar words and phrases that best express the intended meaning according to common and approved usage. Avoid 'legalese'".

Rule 14(a): "Break a sentence into parts and present them in tabular form only if this makes the meaning substantially clearer".[52]

3.54 In an executive memorandum of 1 June 1998, federal government agencies were directed to adopt a plain language policy, as regards various forms of documentation, including government regulations. The memorandum set an objective for all new federal regulations to be written in plain language by 1 January 1999, and also directed that existing regulations should be re-written in plain language where the resources to do so were available. [53]

Canada

3.55 In Canada, the Uniform Law Conference Drafting Conventions set out standards for legislative drafting,[54] which have not only been followed in the drafting of uniform laws, but have also become a model for provincial legislatures.[55] The Conventions make stipulations regarding the logical organisation of acts, stipulating that they should proceed from the general to the particular, and follow the chronological sequence of events. Regarding the style of drafting, the Conventions state that "An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language." They note that "it is important not to exaggerate the degree of precision that is required."

3.56 The Conventions state that legislation "should be written in a style that is correct and up to date without being either faddish or excessively conservative." It is recommended in the Conventions that technical language should be avoided as much as possible, and should only be used if precision requires it.

3.57 The Conventions also lay down guidelines on the arrangement of legislation, the numbering of sections, the use of definitions and transitional provisions, etc. They discourage the use of statements of purpose stating that:

> "Explicit statements of purpose are rarely necessary, since the object of a well-drafted Act should become clear to the person who reads it as a whole. In general, legislation should not contain statements of a non-legislative nature. However, a specific statement of purpose is occasionally required (for example, to give guidance to the courts)."

---

52 Joseph Kimble, *Plain English: A Charter for Clear Writing* (1992) 9.1. T.M. Cooley Law Rev. 1 at p.45.

53 The White House, Office of the Press Secretary, June 1 1998, *Memorandum for the Heads of Executive Departments and Agencies on Plain Language in Government Writing.*

54 Uniform Law Conference of Canada, *Drafting Conventions*, adopted at the seventy-first annual meeting, August 1989.

55 For example, the Ontario *Legislative Drafting Conventions*, Office of Legislative Counsel, (Ontario, 1991) are based on the Uniform Law Conference Drafting Regulations.

Australia

3.58 A plain language policy has long been in operation in Australia. The obscurity and incomprehensibility of legal English was examined by the federal Senate Standing Committee on Education and the Arts in 1984.[56] The Victorian Law Reform Commission, in particular, has done extensive work in this area.[57]

3.59 The Victorian Law Reform Commission's Report on plain language seems to have made a substantial impact on the legal community in Victoria and also throughout Australia. The Law Institute of Victoria, for example, co-operated with the Commission in the development of plain language re-drafts of a number of its forms. Several government departments have also been attempting to implement the Commission's recommendations. The Commission ran conferences on plain language for Australia's legislative drafters and for members of the Australian Parliament. Training sessions on drafting were also available for legal firms. The Commission had also set up a subsidiary to provide plain language drafting services to private clients, such as banks, insurance companies, computer companies, law firms and government departments.

European Union

3.60 The problems caused by complex drafting have also been addressed in the context of European Law. A Council Resolution of 8 June 1993 on the quality of drafting in Community legislation[58] sets out a series of rules of good drafting as follows:

> "1. The wording of the act should be clear, simple, concise and unambiguous; unnecessary abbreviations, "community jargon" and excessively long sentences should be avoided;
> 2. imprecise references to other acts should be avoided as should too many cross-references which make the text difficult to understand;
> 3. the various provisions of the act should be consistent with each other; the same term should be used throughout to express a given concept;
> 4. the rights and obligations of those to whom the act is to apply should be clearly defined;
> 5. the act should be laid out according to the standard structure (chapters, sections, articles, paragraphs);
> 6. the preamble should justify the enacting provisions in simple terms;

---

56 See *Ending Legal Gobbledegook*, comment in (1981) 55 ALJ 514; *Legalise and Courtspeak*, Current Topics (1985) 59 ALJ 189.

57 Initially, a Discussion Paper entitled *Legislation, Legal Rights and Plain English*, was published. The Commission then went on to publish its Report *Plain English and the Law* in 1987. The Report comprises a Report proper and eight appendices, which include a drafting manual, a rewrite of the *Takeovers Code*, and a rewrite of court forms and other legal documents.

58 Official Journal 1993, C166, 1.

7. provisions without legislative character should be avoided (wishes, political statements);
8. inconsistency with existing legislation should be avoided as should pointless repetition of existing provisions. Any amendment, extension or repeal of an act should be clearly set out;
9. an act amending an earlier act should not contain autonomous substantive provisions, but only provisions to be directly incorporated into the act to be amended;
10. the date of entry into force of the act and any transitional provisions which might be necessary should be clearly stated."

CHAPTER 4 THE COMMISSIONS PROPOSALS

Interpretation

Codifying the Rules of Interpretation in a New Interpretation Act

4.01 Clarity in legislation can best be facilitated by clarity in the rules of interpretation. Therefore, reform of statutory drafting should be undertaken together with a reconsideration of the rules of statutory interpretation. It may be argued that even if the difficulties involved in drafting in plain language are overcome, the literal approach to statutory interpretation will undo much of the benefit gained by drafting in a simpler style. It is felt that any abandonment of detail or legal language will create gaps which the courts will not fill if they continue to follow current canons of statutory interpretation. The Law Reform Commission of Victoria point out that this concern:

> "is based on a fear that judges, in particular, will fail to appreciate the significance of a change to plain English drafting. They will continue to interpret legislation and other legal documents on the basis that they have been drafted to cover the finest of details; if gaps appear to have been left, they must have been intended".[1]

4.02 An excessively literal approach to interpretation can lead to excessively detailed drafting.[2] This was recognised in the Renton Committee Report, and the judicial advice given to it. Lord Denning went so far as to say:

> "It is because the judges have not felt it right to fill in the gaps and have been giving a literal interpretation for many years that the draftsman has felt that he has to try and think of every conceivable thing and put it in as far as he can so that even the person unwilling to understand will follow it. I think the rules of interpretation which the judges have applied have been one of the primary causes why draftsmen have felt that they must have a system of over-detail, over-long sentences, and obscurity".[3]

4.03 In our recommendations below, we propose that the basic rules of statutory interpretation should be set out in legislative form. We do not, however, recommend a comprehensive codification of all of the many rules of statutory interpretation, since this would introduce excessive rigidity into the law. The statutory intervention which we propose is a minimal one, to set out the general principle that the purpose of legislation should be borne in mind in interpretation,

---

1 Law Reform Commission of Victoria, *Plain English and the Law*, (1987) at para.84.

2 SIR RUBERT CROSS, STATUTORY INTERPRETATION (2nd ed. Engle & Bell, 1987).

3 *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London, 1975) Cmnd. 6053 at para.19.1

and that it should be permissible (though not required) for the courts to look to extrinsic aids in the interpretation of statutes in certain circumstances.

Literal and Purposive Approaches to Interpretation

4.04 As we noted in Chapter 1, the literal approach to interpretation has exacerbated the excessively detailed and convoluted style of legislative drafting. An approach which permitted a court to take some account of the object and purpose of a statute, whilst still giving primacy to the ordinary meaning of the text, would lessen the pressure on drafters to achieve absolute and comprehensive certainty. The Commission does not consider that the purpose of a statute or of a provision of a statute should only be considered where there is significant ambiguity or absurdity. Confining purposive interpretation in this way means that evidence of the context of an Act and of legislative intention can be excluded on the grounds that a provision is clear on its face, regardless of whether the clear meaning accords with the legislative intention. The strict approach which the courts have taken to determining whether there is an absurdity sufficient to have recourse to a purposive interpretation suggests that the purposive approach will only be permitted on these grounds where the provision is nonsensical, rather than where the literal interpretation would merely contradict the obvious intention of the Oireachtas.[4]

4.05 We emphasise, however, that our recommendation does not endorse a disregard for the plain meaning of the text. A consideration of a statute's purpose is intended to inform the application of the words of the statute, not to overturn them completely. The process of interpretation is inevitably grounded in the words of the text: it does not allow the interpreter to transform the meaning of the text so completely that "black" will come to mean "white". The purport of our recommendation below is that, where the plain words of a provision would allow for more than one meaning on their face, it is the meaning that is in accordance with the statute's purpose which should prevail.

4.06 There are also certain situations where a purposive interpretation will not be appropriate. A purposive approach to interpretation must give way to a stricter construction where the statute concerned is a criminal one, or imposes a serious burden on the individual – for example a tax statute. In such circumstances, the common law presumption that penal statutes should be construed strictly in favour of the accused (or the burdened individual) operates. In the interests of the protection of civil liberties, we do not recommend that the law in this regard should be altered. The presumption that the Oireachtas intended that penal statutes should be construed strictly should override any general provision for purposive interpretation.

4.07 As we have noted in Chapter 1 above, both the Hong Kong and New Zealand Law Commissions, as well as the English Law Commission, favoured a statutory provision setting out a purposive approach to statutory interpretation. A large number of common law jurisdictions now have legislation which adopts a purposive approach to interpretation. Some of this legislation (such as that in the

---

[4] See for example the *Howard* case, discussed *supra*, Chapter 1, paras 1.026 *et seq*.

Australian jurisdictions) is of recent origin, and some (such as that of Ghana) dates back to the 1960s, and is based on the mischief rule.

4.08 The approach which we propose here is based on the Australian *Acts Interpretation Act.* This provision gives a purposive meaning of legislation precedence over an interpretation which is contrary to the legislation's purpose.

4.09 The Commission provisionally recommends that statutes should be interpreted in accordance with their ordinary meaning in the light of their object and purpose. Interpretation in accordance with the object and purpose of an Act should not be confined to cases where there is ambiguity or absurdity on the face of a provision. Provision for a purposive construction of statutes should be made in an amending Interpretation Act. This provision should not however affect the common law rule that penal statutes (including criminal and taxation statutes) should be construed strictly and in favour of the person accused or penalised. We recommend that the provision be modelled on section 15AA of the Australian Acts Interpretation Act, to read as follows:

> *"1. In the interpretation of a provision of an Act (other than a penal 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."*

Ascertaining the Context of a Provision: the Use of Internal Aids to Interpretation

4.10 The adoption of a purposive approach to interpretation has consequences for the instruments used in interpreting a statutory provision. A purposive interpretation implies that the context of the provision will be looked to, to provide a broader perspective on the enactment of the provision. Initially, the context looked to should be that of the Act itself, and of the other provisions of the Act, its long title or purpose clause. Under the present law, as set out in the *Interpretation Act, 1937,* courts are excluded from examining the marginal notes, headings and other similar elements of an Act in the interpretation of one of its provisions. Section 11 (g) states as follows:

> "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;"

4.11 This provision is unhelpful to a court which is charged with the task of examining the context of a statutory provision in order to ascertain the legislative intent. On a practical level, a reader of a statute will quite naturally look to the headings and marginal notes as an aid to understanding the meaning of the statute.

It is artificial to exclude what is inescapably a part of the statute, and a part of the immediate context of a statutory provision.

4.12 The Commission provisionally recommends that a court should be permitted, in ascertaining the object or purpose of a statutory provision to look to the context of the provision within the statute as a whole. Section 11 (g) of the Interpretation Act 1937, which excludes the use of material such as marginal notes in the interpretation of statutory provisions, should be repealed and a new provision inserted which would allow a court to look to all sections of an Act, and to marginal notes, headings, and any purpose clause, in determining the object and purpose of a particular provision.

The Use of External Aids to Interpretation

4.13 The Irish caselaw has developed to the point where the use of a wide range of extrinsic aids to interpretation is now permissible. However, commentators have pointed out that in practice documents such as Oireachtas debates are not widely cited or used in the courts. Some caution as regards the use of extrinsic aids to interpretation is warranted, and the number of cases in which extrinsic aids to interpretation will be useful is likely to be limited. Nevertheless, in a minority of cases, reference to them may be crucial. In his speech in *Pepper v Hart*,[5] Lord Browne-Wilkinson noted that:

> "In many cases references to parliamentary materials would not throw any light on the matter. But in a few cases it might emerge that the very question was considered by Parliament in passing the legislation. Why in such cases should the courts blind themselves to a clear indication of what parliament intended in using those words? Why should not Parliament's true intention be enforced rather than thwarted"?[6]

4.14 He also noted that loosening the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation, was merely an express acknowledgement of the regular, informal perusal of Hansard in the judges' private chambers.

4.15 Consultation of external evidence is not without its difficulties. It will never be possible to relive completely the history of the text because of the costs of consulting large numbers of documents, many of which may be unavailable, particularly as regards older statutes. As Kirby puts it:

> "The crushing burden of legal data is already oppressive. It is difficult to see how courts could function if they were required in every case - or even in every case of ambiguity - to go beyond the already bulky statute book to the wide range of background material".[7]

---

5 [1993] 1 All E R 42

6 *ibid.* at p.64.

7 Kirby, *Statutory Interpretation and the Rule of Law - Whose Rule, What Law*, in Kelly ed., ESSAYS ON LEGISLATIVE DRAFTING, (Adelaide Law Review Association, 1988) at p.97.

4.16 This fear is echoed by the dissent of the Lord Chancellor in *Pepper v Hart*:

> "If reference to parliamentary material is permitted as an aid to the construction of legislation which is ambiguous, or obscure or the literal meaning of which leads to an absurdity, I believe ... that in practically every case it will be incumbent on those preparing the argument to examine the whole proceedings on the Bill in question in both Houses of Parliament."[8]

4.17 Lord Browne-Wilkinson specified one possible limitation on the use of parliamentary materials which would assist in overcoming these difficulties. He would only allow references to parliamentary material where such material was a clear statement of the legislative intent underlying the Act, and went on to say:

> "any statement other than that of the Minister or other promoter of a Bill would be unlikely to meet those criteria".[9]

4.18 We do not favour making such a distinction. Legislation is the product of the Oireachtas, not of the executive. Although, as a matter of practice, the fullest commentary on a Bill will often be that of the sponsoring Minister, there may be circumstances in which other statements made in the Oireachtas will be useful to a court and they should not be excluded entirely.

4.19 The Commission is of the view that of all the documents which may be used as external aids to interpretation, parliamentary debates are the least reliable. Statements in the Dáil or Seanad may be motivated more by political considerations than by careful consideration of the legal impact of a Bill. They may not be informed by legal advice. Caution should therefore be practised in relying on parliamentary debates as an aid to interpretation, and recourse should be had to them only when the ambiguity or absurdity of a legislative provision on its face makes this imperative, and when the debates can be particularly useful to the court in ascertaining the meaning of a statutory provision. The Commission does not, however, consider that the above considerations necessitate the exclusion of parliamentary debates in the interpretation of statutes. Although it is likely and desirable that they should not be consulted routinely or frequently by the courts, there will be some cases where their citation may be crucial to ascertaining the meaning of a provision and the true intention of the legislature and they should not be excluded in these cases.

4.20 Some of the Commissioners favour an enumeration, in an Interpretation Act, of the extrinsic aids which may be called upon by a court. Any such list of extrinsic aids would be inclusive rather than exclusive, and would be designed to assist courts by providing guidance as to the kind of materials to be consulted.

4.21 Other Commissioners consider however that the determination of which extrinsic aids are appropriate is a matter best left to the consideration of the court, in the circumstances of each particular case. They consider that an exclusive

---

8 *op cit.* fn.5 at p.48.

9 *ibid.* p.64.

enumeration might fetter the courts unduly, since there may be a document which would be particularly useful in a case, the relevance of which was not foreseen by the legislation. They also consider that a non-exclusive enumeration, such as that contained in section 15 AB of the Australian *Acts Interpretation Act*, which is illustrative only, does not add a great deal to the provision, since the available extrinsic aids are well known, and the simple phrase "any extrinsic aids to construction which the court finds useful" adequately conveys the required meaning.

4.22 The Commission provisionally recommends that the courts should be permitted to have recourse to external aids to construction, where the use of such external aids would assist the court in ascertaining the meaning of a statutory provision which is otherwise ambiguous or obscure. The circumstances in which there may be recourse to external aids to construction should be set out in legislation, in a new Interpretation Act.

4.23 The Commission provisionally recommends that statutory provision should be made as follows:

> *"2.(1) A court may, in determining the object and purpose of a provision of an Act, and in ascertaining its meaning, make use of any extrinsic aids to construction which the court finds useful, where:*
>
> (a) *the provision is, in the opinion of the court, ambiguous or obscure; or*
> (b) *the ordinary meaning of the provision is manifestly absurd or unreasonable."*
>
> *(2) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard should be had, 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 the purpose or object underlying the Act; and*
> (b) *the need to avoid prolonging legal or other proceedings without compensating advantage."*

4.24 The Commission's provisional view is that no external aids to interpretation should be excluded from a court's consideration by the legislation. Some aids to construction, such as Oireachtas debates, are likely to be of use only in rare cases, but they should not be excluded on those grounds alone.

4.25 Some of the Commissioners are provisionally of the opinion that the Act should not specify or delimit the aids to construction which may be used by a court; rather, the aids to construction which may be called into service should be left to the discretion of the court, to be assessed in the light of the circumstances of the case, and of the weight and usefulness attaching to a particular document.

4.26 Some of the Commissioners, by contrast, provisionally favour a non-exclusive listing of the external aids to interpretation which may be referred to by a court. They propose an additional subsection as follows:

> *"The material that may be considered in the interpretation of a provision of an Act includes:*
>
> (a) *all matters not forming part of the Act that are set out in the document containing the text of the Act as printed;*
> (b) *any relevant report of the Law Reform Commission or other similar body that was published before the time when the provision was enacted;*
> (c) *any relevant report of an Oireachtas committee;*
> (d) *any treaty or other International Agreement referred to in the Act;*
> (e) *any explanatory memorandum relating to the Bill containing the provision;*
> (f) *any material from the official record of debates in the Dáil or Seanad;*
> (g) *the speech made by a Minister on the second reading of a Bill;*
> (h) *any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section."*

A General Principles Approach to Drafting

4.27 The solution to the problems of statutory drafting is often seen as the drafting of statutes more in the form of general principles, coupled with a more purposive approach to statutory interpretation. The Renton Committee favoured this approach, contending that it would lead to greater simplicity and clarity in statute law.[10] Dale reached the same conclusion following a lengthy and detailed comparison of legislation and legislative drafting in Sweden, France, Germany and the United Kingdom.

4.28 He maintains that the jurisdictions draft in a way which is lucid and succinct and that "continental lawmakers … think out their laws in terms of principle, or at least of broad intention, and express the principle or intention in the legislation".[11] Dale believes that this difference is due to the purposive approach to interpretation followed in civil law systems.[12]

4.29 Yet there are many problems with drafting statutes in terms of general principles and leaving the judiciary to fill in the gaps with a purposive interpretation. The first problem is that it would involve a shift in power to the judiciary. This is acknowledged by the judiciary in various jurisdictions.

---

10 Renton Report, *op cit.* fn. 3 at para. 10.13.

11 DALE, LEGISLATIVE DRAFTING: A NEW APPROACH (London, Butterworths, 1977) at p.332.

12 *ibid.* at p.339.

4.30 Alloway says:

> "The common objective - to render statute law intelligible -involves not only the adoption of new procedures at the incubation stage, an adaptation of existing parliamentary procedures, but also the grant of a very wide measure of discretion to the judiciary".[13]

4.31 However, apart from judgements on constitutional matters, the judgements of Irish Courts will only hold sway until and to the extent that the law, so interpreted, is not changed by fresh legislation.

4.32 On the other hand it can be said that the view of the judiciary as objective referees who merely determine and apply the will of the legislature, is merely a fiction which is used to preserve the theory of the separation of powers.[14]

4.33 The second problem is that if detail is not incorporated in statutes, it must go elsewhere, either in case law if detail is supplied by judicial interpretation, or in secondary legislation. In France, although the primary legislation is simpler, it is supplemented by subordinate legislation and administrative circulars.[15] Cross points out that:

> "While the statute becomes easier to read, the citizen concerned to discuss the law is sent on a paper chase and has to collate the material found in all these different sources".[16]

4.34 In this jurisdiction, there is also some constitutional limitation on the use of secondary legislation. The stipulation, in Article 15.2 of the Constitution that "the sole and exclusive power of making laws for the State is ... vested in the Oireachtas" has been interpreted by the courts as restricting the power of the Oireachtas to delegate law-making powers to Ministers or other executive bodies. In *Cityview Press v An Comhairle Oiliúna* [17] the Supreme Court held that the courts had a responsibility to ensure that "the executive authority of the National Parliament is not eroded by a delegation of power neither contemplated nor permitted by the Constitution."[18] Under the rule in the *Cityview* case, delegated legislation will only be permissible where it is no more than "a mere giving effect to principles and policies which are contained in the statute itself."[19]

---

13 Lord Campbell of Alloway, *Law in Plain Language*, March 1983, Law Society's Gazette 621 at p.621.

14 Kirby, *op cit.* fn.7.

15 SIR RUPERT CROSS, STATUTORY INTERPRETATION, (3rd ed., 1995). at p.202.

16 *ibid.*

17 [1980] IR 381

18 *ibid.* p.399.

19 *ibid.* See also *Cooke v Walsh* [1984] IR 710; *The State (Gallagher, Shatter & Co.) v de Valera* [1986] ILRM 3; *Harvey v Minister for Social Welfare* [1990] 2 IR 232; *McDaid v Sheehy* [1991] 1 IR 1; *Meagher v Minister for Agriculture and Food,* High Court, Unreported, 1 April 1993; *Lovett v Minister for Education* [1997] 1 ILRM 89; *Laurentiu v Minister for Justice, Equality and Law Reform,* Supreme Court, Unreported, 20 May 1999; See generally J M KELLY, THE IRISH CONSTITUTION, (3rd ed. 1994) at pp.105-114; JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND (2nd ed. 1992) pp.181-185; DAVID MORGAN, THE SEPARATION OF POWERS IN THE IRISH CONSTITUTION, (1997), chap. 10

4.35 The third problem with a general principles approach to drafting is that it is not acceptable for certain types of legislation, particularly fiscal and penal legislation which set out the rights and obligations of citizens to the state. This is in fact accepted by the Renton Committee.[20]

4.36 For the above reasons, it could be argued that drafting statutes purely in terms of general principles might not achieve better access to law.

4.37 Finally it is useful to remember that excessive detail is only one of many criticisms that may be made of statutory drafting practice. Canons of statutory interpretation do not prohibit remedying poor sentence construction, grammar and organisation, nor the use of appropriate headings, subheadings and paragraph division. They do not require the use of tortuous or obscure language in the drafting of statutes.

4.38 The Commission does not favour a shift towards a general principles approach to drafting which would omit detail from legislation, as this would simply involve the shifting of detail to other documents.

---

[20] Renton Report, *op cit* fn. 3 at para.10.13.

CHAPTER 5: HOW CAN DRAFTING BE IMPROVED?

5.01 There are many recommendations and suggestions for improving the quality of legislation. They can be usefully grouped into four categories.

I. Language
II. Structure and Format
III. Aids to Understanding
IV. Amendment and Consolidation

I. Language

1. Familiar Vocabulary and Preference for Simplicity of Style

5.02 Plain language proponents assert that in the language of the law, words and expressions are frequently archaic and anachronistic. As Thornton puts it, law "habitually wraps its meaning in a mist of unnecessary jargon".[1] Archaic and obsolete language as well as French and Latin terms are found. The use of such words like herein, hereby, heretofore, hereinafter, aforesaid, and aforementioned find a home that they have long lost in other writing. It is said that this language may create a false sense of precision which obscures a dangerous ambiguity of meaning.[2]

5.03 For example s.34 of the *Sea Pollution Act, 1991* provides:

> "34 Every document purporting to be a record kept in *pursuance* of this Act, ... or to be a true copy, certified as such by the person required to keep the record, of any entry *therein* shall, unless the contrary is shown, be presumed to be such and be admissible as evidence of the facts *therein* without further proof."

This could be re-written as:

> "Every document which claims to be a record kept for the purposes of this act, or which claims to be a true copy of any entry in a record, as certified by the person required to keep the record shall be presumed to be a record or a true copy unless the contrary is proven, and will be admissible as evidence that the facts in it are true".

---

1 G.C. THORNTON, LEGISLATIVE DRAFTING (Butterworths, 1987) at p.91.

2 Richard C. Wydick, *Plain English for Lawyers* (1978) 66 Cal. Law Rev. 727, at p. 739.

5.04 The difficulty associated with words such as therein and heretofore have led writers like Thornton to argue that they should be avoided at all costs. They also argue that other expressions should be used carefully as their overuse can lead to ambiguity and confusion. Words in this category include such, said, relevant, hereby, and deem.[3] Replacing the jargon and archaic terminology with simpler more everyday speech would make statutes easier to read for both lawyers and non-lawyers.

5.05 Other problems with vocabulary include using inflated words where a simpler one would do, for example, `institute' instead of `start', `detain' instead of `keep', `moneys' instead of money, or using ordinary words in an archaic sense, such as `instrument' when document is really meant. Sometimes these phrases are necessary, when they are genuine terms of art, such as *`res ipsa loquitur'* or *`habeas corpus'*.

5.06 There is a strong argument for the abandonment of such a vocabulary in favour of simplicity of style. The Renton Committee went so far as to say that simplicity of vocabulary and syntax was the most important change which should be made to statute law, if the most difficult to achieve. To achieve this it recommended that language in statutes should be as near as possible to ordinary communication.[4] However the Commission would warn drafters against discarding archaic expressions whose meaning is clear and well settled.

2. Shorter Sentences

5.07 To facilitate understanding, shorter sentences should be used in legislation. Excessive sentence length creates difficulties for the reader and obscures the central message. In addition, the single, long, sentence format of much legislation causes the author to distort the logical order of the pieces of information in a sentence, and can lead to complex constructions.

5.08 To solve this problem, an average sentence length of 20-25 words is proposed by many writing manuals and proponents of plain English.[5] They also recommend having only one or two ideas per sentence. On the other hand, they recognise that too many short sentences can make a provision very broken up and difficult to understand. If it is necessary to keep related ideas together in one sentence, then presenting the sentence in a tabulated layout makes the material easier to absorb.

---

3 Thornton, *op cit.* fn.1, Chapter 4; Black, *A Model Plain Language Law* (1981) 33 Stan. Law Rev. 255 at p.256; Joseph Kimble, *A Plain English Primer*, (1987) 33 The Practical Lawyer, 83.

4 *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London, 1975) Cmnd. 6053, at para.11.2.

5 Wydick, *op cit.* fn.2; Law Reform Commission of Victoria, *Report on Plain English and the Law*, 1987; ROBERT D. EAGLESON, WRITING IN PLAIN ENGLISH (Australian Government Publishing Service 1990).

3. *Changing the Grammatical Structure of Sentences*

5.09 The grammatical structure and syntax of sentences in statutes are major contributors to difficulty in understanding. Complex and rambling sentences as well as being difficult to understand, are often ambiguous and uncertain. This leads to litigation to understand their meaning.

> "It is the misfortune of many legislative sentences to be obliged to communicate complicated meanings: in such cases the sentence patterns are inevitably complex and the careful arrangement of the grouping of words in the sentence pattern is absolutely vital. Many sentences are ambiguous because the groupings of words are inappropriate or misplaced."[6]

5.10 Sentence constructions are also used which are not common in everyday speech. For example, s.25(2) of the *Sea Pollution Act, 1991* uses a construction which splits the subject and the verb, putting adjuncts between them.

> "(2) Any person who -
>
> (a) fails to comply with a requirement of a harbour - master under this section, or
>
> (b) wilfully impedes a harbour master in the exercise of his function under this section,
>
> shall be guilty of an offence."

As the Law Reform Commission of Victoria show, there are two other grammatical possibilities open to the drafter, both of which keep the subject next to its verb:

> (a) A person will be guilty of an offence if that person ...
> (b) A person will be guilty of an offence who ...[7]

Either of these constructions can make a sentence much easier to understand, particularly if the sentence is a long one.

5.11 Criticisms of syntax in statutes is not new. As long ago as 1843, Code developed a rule of practice as regards sentence structure. His view was that legislation should resort to "the common popular structure of plain English".[8] However, where there are multiple and complex modifications to a provision, this is not always possible.[9]

5.12 If one puts a conditional clause at the beginning of a sentence, readers are met with the exception before they know what the substantive position is, and have no context to put it in before they reach the end of the sentence. For example

---

6 Thornton, *op cit.* fn.1, at p.17.

7 Law Reform Commission of Victoria, *Drafting Manual,* Appendix 1 to the Report, *op cit.* fn.5, at para.76.

8 George Code, *On Legislative Expression,* reprinted in E.A. DRIEDGER'S, THE COMPOSITION OF LEGISLATION (2nd ed.), pp.317 *et seq.*

9 Thornton, *op cit.* fn.1, at p.22.

s.142(1) of the *Social Welfare (Consolidation) Act, 1981* as inserted by s.27 of *Social Welfare, Act 1992* provides:

> "If, for the purpose of obtaining or establishing entitlement to any payment of unemployment assistance for himself or for any other person, or of avoiding the making by himself or any other person of any repayment under this Chapter, any person makes any statement or representation (whether written or verbal) which is to his knowledge false or misleading in any material respect or conceals any material fact, he shall be guilty of an offence under this section and shall be liable- ...."

The essence of the provision is to make it an offence to give false statements in order to obtain unemployment assistance. As this sentence is overloaded with modifying and conditional clauses, this purpose is difficult to see.

5.13 Another example is s.138(4) of the Social Welfare Act (Consolidation Act) 1981 as added by the Social Welfare Act, 1992:

> "Where one of a couple is entitled to disability benefit, unemployment benefit, injury benefit, disablement pension, old age (contributory) pension, old age pension, retirement pension or invalidity pension and the other is entitled to unemployment assistance, the total of the amount payable to them by way of such benefit or pension, as the case may be, and such unemployment assistance (in this subsection referred to as 'the relevant amount') shall not exceed the total amount of benefit or pension, as the case may be, or the total amount of unemployment assistance, whichever is the greater (in this subsection referred to as 'the greater amount'), that would be payable if only one of the couple were in receipt of benefit, pension or unemployment assistance, as the case may be, and the benefit, pension or unemployment assistance included an increase in respect of the other as his adult dependant; and, if the relevant amount would but for this subsection exceed the greater amount, the amount of unemployment assistance payable to the spouse who is entitled to such unemployment assistance shall be reduced by the amount of the excess."

5.14 Thornton recommended putting the main clause first and breaking up the condition or modifiers into a series of paragraphs to help the reader in understanding the provision.[10] Applying this method to the above example leads it to be drafted as follows:

> The total amount payable to a couple shall not exceed ..., where one of the couple is entitled to
>
> disability benefit;
> unemployment benefit;
> injury benefit;
> disablement pension;
> old age pension (contributory or non-contributory);

---

[10] Thornton, *op cit.* fn.1, at pp.22-23.

retirement pension; or
invalidity pension;

and the other is entitled to unemployment assistance ....

This method was in fact adopted elsewhere in the Act.

> "A person shall be disqualified for receiving unemployment assistance while he is-
>
> resident, whether temporarily or permanently, outside the state
> undergoing penal servitude...
> .. (d) .. (e) "

If there is only one conditional clause, and it fits in with the structure of the sentence, it can be put at the start.

4. Splitting Subject and Verb

5.15 Similarly, legislative drafting puts too many clauses between the subject and the verb, thus straining the reader's memory and comprehension. Every effort should be made to keep these as close together as possible. Contrast s.142(2) of the *Social Welfare Act 1992* as originally drafted:

> "An employer or servant or agent of an employer 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 under this subsection and shall be liable-"
>
> and
>
> "An employer or servant or agent of an employer shall be guilty of an offence under this subsection if they aid, abet, counsel or procure an employee in the employment of that employer to commit any offence under subsection (1). They shall be liable ..."

5.16 Statutes are easier to understand if the auxiliary and main verb are not separated. Instead the subject should be kept close to the verb, and the verb close to the object. In everyday speech and in most writing these components of a sentence are kept together. In statutes, however, a reader is often confronted with unexpected arrangements of verbs. As Wydick puts it, "Lawyers like to test the agility of their readers by making them leap wide gaps between the subject and the verb and between the verb and the object."[11] Unfortunately this does not aid comprehension. For example, the verb "shall" and auxiliary "give notice" are split in s.316B (2) of the *Social Welfare (Consolidation) Act, 1981* (as added by s.22 of the *Social Welfare Act, 1992*):

---

[11] Richard C. Wydick, *Plain English for Lawyers* (1978) 66 Cal. Law Rev. 727 at p.748.

"Where an attachment of earnings order is served on any person and the liable relative is not in his employment or the liable relative subsequently ceases to be in his employment, that person **shall** (in either case) within ten days from the date of service or, as the case may be, the cesser, **give notice** of that fact to the District Court." [emphasis added]

The second half of the provision is much easier to read and understand when the two verbs are kept together

"... that person shall give notice of that fact to the District Court (in either case) within ten days from the date of service, or as the case may be, the cesser."

5.17 If we apply the other suggestions for writing plain language, such as omitting unnecessary words, using familiar language, using the active rather than the passive voice, and so on, the provision improves remarkably.

"Where an attachment of earnings order is served on a person and the liable relative is not employed by him or her, or subsequently stops being employed by him or her, that person shall give notice of that fact to the District Court within ten days from the date of service of the order or ending of employment."

5. Active and Passive Voice

5.18 Increased use of the active rather than the passive voice improves clarity in drafting. Often legislation confers a power or imposes an obligation on a person and if the passive voice is used it can be unclear who is to have the power or obligation. Even if the agent is specified, this can make a provision less straightforward than it could be. For example, s.80(1) of the *Patents Bill, 1991* provides:

"Where a patent is applied for by, or is granted to, two or more persons, each of those persons shall, unless an agreement to the contrary is in force, be entitled to an equal undivided share in common in the patent application or patent, as the case may be."

Contrast with:

"Where two or more persons apply for or are granted a patent, each of them shall ...."

5.19 If surplus words are omitted and the verbs are kept together, the provision becomes even clearer:

"Where two or more persons apply for, or are granted a patent, each of them shall be entitled to an equal undivided share in common in the patent application or patent, unless a contrary agreement is in force."

or alternatively:

> "Where two or more persons apply for, or are granted a patent, unless a contrary agreement is in force, each of them shall be entitled to an equal undivided share in common in the patent application or patent."

5.20 Another example comes from the *Victorian Penalties and Sentences Act*, 1985 which provides:

> "where a recognisance is entered into the offender shall be released from custody..."

5.21 The Law Reform Commission of Victoria point out that often the context in which the provision appeared helps readers work out the missing agent, and that the following clauses give a strong indication of it. They argue that this is however, no excuse for putting readers to the trouble when there is an easier and more straightforward way of drafting this provision so that ambiguity is completely removed.

> "If an offender enters into a recognisance, he or she must be released from custody."[12]

With the active voice the reader can clearly see who is doing what to whom.[13]

5.22 There are however occasions when the use of the passive voice is appropriate, for example to emphasise the act done rather than the agent doing it, or where the agent is unknown. The drafter should use her or his discretion.

6. Omit Surplus Words

5.23 The use of surplus words when drafting a statute is called "obesity" by Dickerson.[14] What is meant here is the practice, common among drafters of legal documents and particularly statutes, of using unnecessary words and phrases which add nothing to the meaning.[15] Not only do unnecessary words work against easy communication, they can also lead to confusion and ambiguity. Thornton summarises the position as follows:

> "In legislation, a word used without purpose or needlessly is not merely a tedious imposition upon the time and attention of the reader; it creates a danger because every word in a statute is construed so as bear a meaning if possible. A superfluous word is therefore a potential source of contention.

---

12 Law Reform Commission of Victoria, Discussion Paper No. 1, *Legislation, Legal Rights and Plain English*.

13 See also Wydick, *op cit.* fn.11, at p.746.

14 REID DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING, (Little Brown and Co, 1965) at p.30.

15 DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963) Chapter XII.

If one word will communicate the intended sense exactly, two or more should never be used".[16]

5.24 A characteristic of legal writing is that two or three words which have similar meanings are used and additional meaningless phrases are added. This is a hangover from the time when lawyers were paid by the length of the document. As Dickerson argues:

> "no word or phrase should be used in a legal instrument unless there is good reason for including it. If none appears it should be got rid of".[17]

5.25 Thornton looks at the following examples in the *Berryfruit Levy Act 1967* [N.Z.], s2(2) and points out that the italicised words just state what is obvious:

> I. "The Governor-General may from time to time, by Order in Council, add to or omit from the Schedule to this Act the name of any kind of berryfruit, *and every such order in Council shall take effect according to its tenor"*
>
> II. "In this Act, except where the context otherwise requires, the following expressions have the following meanings respectively, that is to say-"

and that example II, is just a wordy way of saying 'In this Act, unless the context otherwise requires'.[18]

5.26 Continual repetition of the phrases "as the case many be" or "unless the context otherwise requires" add nothing to either clarity or meaning. The Law Reform Commission of Victoria have this to say about this practice:

> "these words amount to saying no more than 'x may mean y', which offers little help to readers. It is an abdication of responsibility and it is inexcusable in these days of word processors and computers which allow us to check easily every occurrence of a word in a text. If drafters are not prepared to give readers precise guidance, they should leave the matter alone entirely. Otherwise, having had a meaning suggested to them, readers may forget the qualification when they come across the word at a later stage."[19]

5.27 This practice is also common in Irish statutes. For example, Section 27 (2) of the *Local Government (Planning and Development) Act 1963* as amended by the *Local Government (Planning and Development) Act, 1992* states:

> "...The High Court or Supreme Court may, on the application of a planning authority or any other person, whether or not that person has an interest in

---

16 G. C. THORNTON, LEGISLATIVE DRAFTING (London, Butterworths, 1987) at p.66.
17 Dickerson, *op. cit.* fn.14 at p.31.
18 Thornton, *op cit.* fn.16, at p.51.
19 Law Reform Commission of Victoria, Discussion Paper, *op cit.* fn.12..

land, by order require any person *to do or not to do, or cease to do, as the case may be...* "

Section 3(1) of the *Electoral (No 2) Bill, 1991* states:

"The Minister may make regulations prescribing *any matter or thing* that is referred to in this Act as prescribed."

5.28 The practice has now been discontinued in legislation from the State of Victoria. It is felt that if the reader has succeeded in understanding the meaning of the statute, they can manage to adapt meaning to context.

5.29 Another practice which leads to the inclusion of surplus words is the doubling and trebling of synonyms. The use of various languages by the law in the centuries of its development have led to a curious legacy, the use of two or three words to describe the same thing. This practice of not using one word where three will do is fondly retained by drafters of legal documents and legislation. Some examples include;

last will and testament
give, and bequeath
null and void
rest, residue and remainder,
act and deed[20]

5.30 These should be omitted as they confuse the reader, suggesting a distinction between the terms which does not in fact exist.

7. Write Positively

5.31 Using a positive phrase is generally more direct and shorter than a negative. Negative phrases also have the disadvantage that they force people to convert to the positive in order to find out what they can do. Studies have shown that positive statements are usually easier to understand than negative.[21]

5.32 In particular multiple negatives should be avoided. As the Law Reform Commission of Victoria point out:

> "They force readers to follow a tangled web, subtracting and then adding, and then subtracting again, so that they cannot get the basic information easily."[22]

5.33 Of course when one is not legislating there are circumstances where negatives are effectively used, as for example in the classic phrase "no smoking". If

---

20 Law Reform Commission of Victoria, Report, *op cit.* fn.5, at para.24.

21 Law Reform Commission of Victoria, *Drafting Manual*, Appendix to Report, *op cit.* fn.5, at pp.39-40. See also MARK ADLER, CLARITY FOR LAWYERS: THE USE OF PLAIN ENGLISH IN LEGAL DRAFTING (The Law Society, 1990) Chapter 4.

22 Law Reform Commission of Victoria, *Drafting Manual, ibid* at p.40.

however a drafter wishes to make legislation clear, negative constructions should be used only when appropriate.

8. Cohesion Among/Between Sentences

5.34 In ordinary writing, readers accept that sentences follow from one another and must be construed together. In statutes also, sentences which follow one another are read together and understood together. It should not, therefore, be necessary to repeat material from earlier sentences. For example s.13 of the *Regional Technical Colleges Bill, 1991* purports to regulate the details of programmes and budgets. S.13(4) provides:

> "The Vocational Education Committee shall on or before the 1st day of May in each year submit to the Minister for approval the programmes and budget as submitted by the governing body together with such modifications as may have been made by the committee."

S.13 (5) then goes on:

> The Minister may, in respect of the programmes and budget submitted under subsection (4), approve of such programmes and budget with or without modification and subject to such conditions as the Minister may specify.

5.35 It is arguable that the phrase "in respect of the programmes and budget submitted under subsection (4)" is redundant. Because (5) follows directly on (4) and is part of the same section, it should be obvious that the budgets and programmes mentioned are the same as those in (4) and indeed in the whole of section 13. If this were accepted 13(5) could appear more simply as:

> The Minister may approve of such programmes and budget with or without modification and subject to such conditions as the Minister may specify.

5.36 This is the practice in other jurisdictions. For example Australian federal drafters no longer bind later subsections to earlier ones by expressions like "an application made by a corporation under subsection (1) ...". Instead they simply write "an application".[23] This method is also used by civil law drafters.

9. Creation of Unnecessary Concepts

5.37 Concepts are often created in statutes such as "the relevant period" and "the appropriate date" without simply specifying the period. A reader therefore has to bear in mind the meaning of the concept from the time it is first explained through to every time the concept is mentioned. This leads to a lot of referring back and forth through statutes to figure out the meaning of a provision. Not only does

---

[23] I M L Turnbull, *Clear Legislative Drafting: New Approaches in Australia 11* (3) (1990) Stat. Law Rev. 161 at p.167.

this waste time, but it adds to the confusion when the reader is already referring back and forth in the statute because one subsection is said to be "without prejudice" or "subject to" the provisions of another. For example, s.26(5)(a) of the *Local Government (Planning and Development) Act 1963* as amended by section 3 of the *Local Government (Planning and Development) Act 1992*) states:

> "(5)(a) Any person may, at any time before the expiration of the **appropriate period,** appeal to the Board against a decision of a planning authority under this section." [emphasis added]

It is not until the reader reaches paragraph (f) that they learn what is meant by the **appropriate period.**

> (f) In paragraph (a) of this subsection, 'the appropriate period' means-
>
> (i) in case the appellant is the applicant, the period of one month beginning on the day of receipt by him of the decision of the planning authority,
>
> (ii) in any other case, the period of one month beginning on the day of the giving of the decision of the planning authority,

5.38 Would it not be better to give the time periods involved when they are first mentioned rather than create a concept which the reader has to bear in mind until it is defined at some later stage?

10. Sex Bias

5.39 S.(1) of the *Interpretation (Amendment) Act, 1993* provides:

> "In every Act of the Oireachtas passed on or after the date of the passing of this act and in every instrument made wholly or partly under any such Act every word importing the feminine gender shall, unless the contrary intention appears, be construed as if it also imported the masculine gender."

English does not adapt well to genderless language and some effort must be made to avoid clumsy writing. The sex-bias of the language can be mitigated in the following ways:

Pronouns

5.40 The masculine pronoun need not be used when the referent is not necessarily male. "He or she" can be used in moderation, but used too often this phrase can destroy the flow of the document. Sentences can be recast to omit the pronoun altogether.

Use of the plural

The plural can also be used e.g.

Each juror believes that he has done something worthwhile

becomes:

All jurors believe that they have done something worthwhile.

Substitution

Although the practice need not be carried to extremes, substitutes can often appropriately be used for nouns which refer to "man" or "men".

11. Technical Language

5.41 Some of the legislation on the Irish statute book deals with highly technical subjects. Financial legislation, for example, or legislation regulating telecommunications, deals with topics which are the preserve of a small professional group. It is likely that this group will be the primary users of such legislation. In the light of this, it is the general practice of drafters to regard such legislation as addressed to this small professional group, and to pitch the language used in the legislation to them. This permits the use of terms current in the profession, including commercial or scientific terminology which is not well understood by the general public – which is, to the majority of people, jargon. Undoubtedly, it is often difficult and laborious to define or translate technical terms into layperson's language. However, insofar as is possible, it is preferable that such terms either be avoided, or be explained in the definitions section of the Act.

5.42 Legislation governs the citizens of the state. Although specialised legislation may directly affect a small group with a professional or commercial interest in the subject matter, it ultimately governs and affects the lives, to varying degrees, of ordinary citizens. As a matter of principle, then, legislation should be as comprehensible as is possible to the ordinarily well-educated individual.

5.43 The Commission provisionally recommends that technical or specialist jargon should be used in legislation only where necessary, and that where they are used, technical terms should be defined in the definitions section of the Act. This follows the principle that although some legislation may be inevitably complex and may be directed at and used by a small number of specialists, it ultimately governs ordinary citizens, and should therefore be as readily accessible and comprehensible to the well-educated layperson as is possible.

12. Consistency

5.44 Alongside all of these matters, the need for consistency of style and language in the statute book must be kept in mind. Even where legislation is well drafted, lack of consistency between texts prepared by drafters with differing personal styles can give rise to confusion. At present, there are no written guidelines regarding the drafting of Irish legislation. In a number of other jurisdictions, including New Zealand and the Australian state of Victoria, there is a

manual of style which sets out some of the basic rules of good writing discussed above, and prescribes standards for the style and structure of legislation. Similar standardisation would be of benefit to Irish legislative drafting.

5.45 The Commission provisionally recommends the adoption of standard drafting practices which would ensure consistency in the statute book. General guidelines concerning the language and style of drafting, based on objectives of clarity and effective communication, should be contained in a drafting manual. Some of the standard practices which we favour include:

> The simplification of standard clauses such as transitional provisions, and repeals of pre-existing laws;
> The use of shorter sentences;
> The use of familiar vocabulary;
> The use of familiar and clear grammatical structures;
> The greater use of the active voice;
> The use of positive rather than negative statements;
> Drafting in the present tense where possible and appropriate;
> Replacement of Latin terms with English terms, where possible, and where this would not lead to uncertainty regarding well defined terms;
> The simplification of the enactment formula to read "The Oireachtas enacts: ...".

II. Structure And Format

5.46 The comprehensibility of legal documents is often diminished by poor design and layout and by a lack of adequate aids for finding information. This is a particular problem with legislation. Improvements could be made in a number of areas, including typography, headings, the use of visual aids, the provision of examples and indexing. Particular suggestions will be discussed in more detail in the sections that follow.

1. Organisation

5.47 Research in the United States has concluded that organisation and layout of documents is at least as important as the length of the sentence and the difficulty of specific words.

> "It is becoming increasingly accepted that documents should be organised to help the most likely reader find what they need without undue effort. Legislation is, after all, read to get information, and not for pleasure. So, from a reader's point of view, good writing enables readers to get information as efficiently as possible. No matter how clearly individual sentences are drafted, if there is bad organisation, finding relevant information can be as difficult as finding a needle in a haystack. Good organisation is therefore essential." [24]

---

[24] See J.C. Redish, *The Plain English Movement*, in SIDNEY GREENBAUM, THE ENGLISH LANGUAGE TODAY. (Pergamon Press, 1985), at p.132, discussing the research at Carnegie-

The First Parliamentary Counsel for the Commonwealth of Australia writes:

> "The words and sentences in a Bill may be clear, but if the provisions are not properly arranged, the Bill will be more difficult to understand. We are trying to arrange Bills so that the relationship between provisions is as clear as possible. If the reader can see a pattern in the provisions, they are easier to understand because the reader has a mental framework into which information can be fitted as it is absorbed. Ways of improving the coherence of a Bill include:
>
> Grouping together provisions that have a common subject;
> Arranging provisions in a temporal sequence, for example, dealing with the issue of a licence first, then the conditions imposed by a licence, then renewals and finally revocation;
> Expressing similar ideas in provisions of a parallel structure;
> Putting general or important propositions first, followed by subsidiary or particular propositions, followed again by exceptions."[25]

5.48 Clearly the most fundamental part of organisation is to have a good structure. This means that provisions dealing with similar matters should be kept together and material should progress in an orderly and sequenced fashion. This is what a reader expects, and legislation which does not adopt this practice delays comprehension of the changes in the law brought in by the legislation.

5.49 The Law Reform Commission of Victoria suggest that important matters should be dealt with first. The Report argues that a reader may overlook or underestimate the main point of an Act if it is buried in the middle of the text, and that readers tend to remember and spend more time on the opening parts of a division or section of an Act and remember them.[26]

5.50 While this suggestion can be borne in mind by drafters, it is important to remember that a reader consults an Act for an answer to a specific question of law, and is therefore unlikely to be reading an Act from start to finish, but will flip through an index or table of contents to find the answer sought. An Act is more like a repair manual than a novel, and it is therefore important that there be clear structure and organisation to the statute which enables the answer to the particular problem to be found quickly. The question of importance is, of course, a relative concept, and what may be important to one reader may be of no importance to another.

5.51 The structure is best revealed by a detailed plan or table of contents, and also by various headings on each section labelling and identifying the various sections. In a guide or manual of any kind, this labelling and identification is done by putting in headings which correspond to headings in a table of contents, by having running heads on the top corners of pages, and by headings clearly stating what each section is about.

Mellon.

25 Turnbull, *op cit.* fn.23 at p.170.

26 Law Reform Commission of Victoria, *Drafting Manual*, *op cit.* fn.7, at paras.36-37.

2. *Numbering System*

5.52 Another suggestion for improving the structure and format of legislation put forward is that the numbering system of legislation should be changed from roman to Arabic numerals.[27] Others have suggested using a decimal numbering system, similar to that already used in the Irish Constitution. The latter would have the advantage that new subsections and amendments could be introduced while retaining the overall structure of the Act. Take for example, section 100 of the *Social Welfare (Consolidation) Act, 1981* which deals with the entitlement to deserted wife's benefit. If the legislature wish to add a new section between section 100(1)(b) and 100(1)(c), but retain the existing structure, using the traditional numbering system this is done either by adding a new paragraph (bb), so that the new addition is labelled section 100(1)(bb) or by using sub-paragraphing beginning with capital letters. Using a decimal system the original provisions would have been numbered section 100.1.2 and 100.1.3 , the new provision would be 100.1.2.1. The disadvantage however, would be that the new system could be very confusing, in Acts with large numbers of provisions.

5.53 Another suggestion is that Acts, when consolidated, should be automatically renumbered in sequence. While this might make the Act itself easier to read, it would destroy a familiarity with an Act built up over a period of time.

3. *Typography*

> "An attractive layout with a legible size of type, appropriate length of lines, plenty of white space around the print, clear headings, and so on, improves readability. A publication in which everything is jammed together and the type size is ridiculously small complicates the task of reading."[28]

5.54 The typography of legislation is clearly very important if legislation is to become easier to read. At a basic level drafters could experiment with different fonts and font sizes, adding emphasis by the use of italics or underlining or bold. Other suggestions include:

> The use of running heads at the top of each page to indicate the sections included on the page, and the Part and Division in which they are located.
> The use of larger type for the section number and its relocation in the margin to make it easier to find.
> The positioning of the section number beside the section heading to make the heading an integral part of the section and to use the number and heading in combination to divide the section from the previous one.
> The making of a sharper contrast between the style of section headings and Part and Division headings to facilitate access to information.
> The printing of Schedules in the same size of type as the body of the Act.

---

27 Law Reform Commission of Victoria, *Drafting Manual*, *op cit.* fn.7, at para.47.

28 Law Reform Commission of Victoria Discussion Paper, *op cit.* fn.5, at para.37.

4. Improved Use of Definitions

5.55 There are many differing suggestions about improving the use of definitions in legislation. The location of definitions is one thing that many writers would like to change. Traditionally, definitions are placed at the start of an Act, or at the beginning of various parts if the Act is long. Some plain language drafters contend that they should be placed at the end of an Act, saying that definitions at the start of an Act create a hurdle for the reader before they get to the substantive part of the legislation.[29] This argument does not find favour with parliamentary drafters in Australia. Turnbull writes:

> "There is no advantage in being able to start reading the substantive parts of a Bill on the first page if one has to refer immediately to definitions at the end of a Bill in order to understand the provisions. Moreover, definitions at the end of a Bill are harder to find."[30]

5.56 A further possibility is that additional definitions of commonly-used words could be inserted in an Interpretation Act, thus reducing the number of definitions which would be necessary in each Act. However, although this would allow for the removal of some additional material from legislation, it has the disadvantage that the reader of an Act would have to refer more often to the Interpretation Act as well as to the legislation itself. It thus adds further to the complexity involved in understanding legislation.

5.67 Definitions could be used more often as a drafting technique to remove descriptive and repetitive material from the body of the Act, so leaving a simpler sentence. As the Law Reform Commission of Victoria note:

> "This could be done quite conveniently if defined words were identified typographically (for example, by italics or bold type) to warn readers that they should check definitions of those words. A footnote should then refer the reader to the section in which the word is defined. This saves readers from continually turning to the definition section at the front or the back of the Act."[31]

5.59 The Renton Report and the Municipal Statutes Revision Committee also advocate printing defined expressions in a particular type or identifying them with an asterisk or some other sign whenever they appear in an Act. The reader could then turn to a definition section in the Act to construe the defined expression.[32]

5.60 While the use of definitions in this way goes a long way to making statutes clearer, the overuse of definitions or the use of unnecessary definitions, creates added confusion.[33] Too often, words and phrases are defined unnecessarily, while

---

29 Law Reform Commission of Victoria, *Drafting Manual, op cit.* fn.7, at para.118.

30 Turnbull, *op cit.* fn.23, at p.171.

31 Law Reform Commission of Victoria, Drafting Manual, *op cit.* fn.7, at para.55.

32 *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London, 1975) Cmnd. 6053 at para.11.18.

33 Eagleson, *op cit.* fn.5 at p.24 gives an example from the Australian *Social Security Act, 1974*,

difficult concepts are thrown in without thought. The *Electoral Act, 1992* provides us with numerous definitions of the word elector:

> 2- (1) In this Act-
>
> ...
>
> "Dáil elector" means a person entitled to vote at a Dáil election;
>
> ...
>
> "local government elector" means a person entitled to vote at a local election;
>
> ...
>
> "presidential elector" has the meaning assigned to it by section 7.
>
> 6- In this Part, and in the Second Schedule,- .....
>
> "elector" means, as the context may require, a presidential elector, a Dáil elector, a European elector, or a local government elector;

5.61 These multiple definitions will be either disregarded by the reader or lead to confusion on the part of the reader as to what exactly is meant by elector. The readers confusion is increased when she arrives at sections 7, 8, 9, and 10 of the Act which define in detail who exactly is entitled to vote in a Presidential, Dáil, European or Local Government Election.

> 7-(1) A person shall be entitled to be registered as a presidential elector in a constituency if he has reached the age of eighteen years and if he was, on the qualifying date-
>
> (a) a citizen of Ireland, and
>
> (b) ordinarily resident in that constituency
>
> (2) For the purposes of-
>
> (i). the Presidential Elections Acts, 1937 to 1992,
>
> (ii). the Referendum Acts, 1942 to 1992, and
>
> (iii). this Act,
>
> "presidential elector" means a person entitled to vote at an election of a person to the office of President of Ireland.

Other definitions given (in section 2) are;

---

which defines an unmarried persons as a person who is not married.

"Dáil" means Dáil Eireann;

"Seanad" means Seanad Eireann;

"European Communities" has the same meaning as in the European Communities Acts, 1972 to 1986;

"Dáil", and "Seanad Eireann" are already defined in the *Interpretation Act 1937.*

5.62 Definitions are best used to stipulate meaning in an area of marginal uncertainty, not as a pedantic attempt to provide for imagined ambiguity. Nonetheless, it is perhaps fair to say that the absence of a definition has led to more difficulties of interpretation than the presence of an unnecessary definition.

5. Index

5.63 Most modern documents and manuals use indexes to help readers find information in a document. There is no legal reason why indexes cannot be used in statutes. Their use is put forward by many plain language writers as a useful tool to help readers negotiate their way around statutes. In fact the Law Reform Commission of Victoria goes so far as to say that the absence of indexes is a major defect in legislation.[34] Given the extent of technological advances, the making and preparation of indexes has become much easier and less expensive.

Recommendations

5.64 *The Commission provisionally recommends that there should be a standard structure applied in the drafting of legislation, by which in each part of an Act, the general principles should be set out first, followed by the detail of the provision, and any exceptions or conditions applying to the general principle.*

5.65 *The Commission does not favour the shifting of the detail of legislation to schedules, as this requires the reader to read the section and the schedules together and further complicates the structure of the Act.*

5.66 *The Commission provisionally recommends the following alterations to the format of legislation, in order to enhance readability:*

- *the greater use of headings;*
- *the highlighting of words defined in the definitions section;*
- *the avoidance of too many subsections within a section;*
- *a modernised typesetting format for legislation.*

5.67 *The Commission does not favour the inclusion of additional definition of commonly used words in an Interpretation Act. Definitions are more readily accessible when included in the definitions section of each Act.*

---

[34] Report, *op cit.* fn.5, at para.173.

III. Aids To Understanding

1. Use of Examples

5.68 There is increasing evidence to show that the use of examples substantially improves understanding. Research at the Communications Design Centre in Pittsburgh unearthed the so-called "scenario principle", that is the tendency of readers when confronted with difficult concepts to create scenarios to help them understand the meaning.[35]

5.69 The intelligibility of Acts could also be improved by the use of examples showing how provisions apply to particular cases. In its comprehensive examination of statute law, the Renton Committee recommended that more use be made of examples and that these should be set out in schedules.[36] This practice has also been recommended by the Law Reform Commission of Victoria and used in their rewrites of existing legislation.

5.70 Examples would help not only the general public and administrators who have the day to day administrating of legislation, but also the legal profession and the judiciary in that they would have a speedier and more complete understanding of the intention of the legislature and how the legislation applies to the matter in hand.[37]

5.71 There are many ways of using examples. Simple illustrations can be used. Illustrations can also be given of how a complicated section works. This technique was used in the *Consumer Credit Act, 1974 (U.K.)*. Numerous definitions and examples were put in a Schedule to the Act.

5.72 In the codes of India examples were used in a third way, to explain the meaning of a particular section. Section 5 of the *Indian Evidence Act, 1872*, reads:

> "5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of others.
>
> Illustrations
>
> (a) A is tried for the murder of B by beating him with a club with the intention of causing his death.
>
> At A's trial the following facts are in issue:-
>
> A's beating B with a club;
> A's causing B's death by such beating;
> A's intention to cause B's death."

---

35 Flower, Hayes and Swartz, *Revising Functional Documents: the Scenario Principle*, Communications Design Centre Carnegie-Mellon University, (Pittsburgh 1950), Technical Report No. 10.

36 Renton Report, *op cit.* fn.32, at para.10.7.

37 Appendix to Clarity's submission to the Hansard Society, June 1992, at pp.1-2.

5.73 How are examples to be interpreted? As part of the Act, as superior to the Act or as having no binding effect? Bennion is of the view that examples in an Act should be treated as detailed indications of how Parliament intend the legislation to operate, but that the example is not to be given precedence over the Act. If there is a conflict of meaning, the Act is given preference.[38] This is the same solution reached in Australia. Section 15AD of the *Interpretation Act (Australia)* provides:

> "Where an Act includes an example of the operation of a provision:
>
> (a) the example shall not be taken to be exhaustive; and
> (b) if the example is inconsistent with the provision, the provision prevails."

5.74 In the Irish context, we would suggest that, in general, the best place to give examples would be in the explanatory memorandum which is produced with every Bill. However, the Commission recognises that examples are extremely useful where there are, for example, complex mathematical formulae included in an Act. In such cases examples in the text of the act would be appropriate.

5.75 The Commission provisionally recommends that examples should be used in legislation where they would assist in the application of a formula. The Commission does not however favour the use of examples in legislation as a general rule, and, except in the case of formulae, would provisionally recommend the use of examples in explanatory memoranda rather than in the text of an Act.

2. Statements of Purpose and Long Titles

5.76 The Law Reform Commission of Victoria recommends the use of a clear statement of purpose at the start of an Act. They see a statement of purpose as giving readers an understanding of the background to the document and a context in which to interpret it.[39] In particular, they believe that Acts should begin with an informative and understandable statement of their purpose setting out what the legislature intends to achieve. This will help readers to understand the significance and intended scope of the change.

5.77 A purpose clause may be more limited however, and refer only to the purpose of a Part or a section. Dickerson prefers such clauses saying:

> "the most useful (purpose) clauses are those introducing particular sentences, which offer the advantage of focused specificity.[40]

5.78 For example the plain English rewrite of the *Companies (Acquisition of Shares) (Victoria) Code* begins with a short Part I stating the general principles of

---

38 BENNION, STATUTORY INTERPRETATION (2nd ed. 1992) at p.504.

39 Law Reform Commission of Victoria, Drafting Manual *op cit.* fn.7, at para.17. See also Clarity's submission to the Hansard Society *op cit.* fn.37, at fn.10.

40 Reid Dickerson, *Statutory Interpretation in America: Dipping into Legislative History - II* (1984) Stat. Law Rev. 141 as quoted in Thornton, *op cit.* fn.16.at p.180.

the Act. Similarly the plain English rewrite of the *Equal Opportunity Act* begins with a statement of purpose which is easily understandable. That a statement of purpose is not the same as preambles currently used in statutes can be seen from a comparison of the original Act and the plain language rewrite.

Original:

> "An Act to render unlawful certain Kinds of Discrimination, to promote Equality of Opportunity between persons of different status, to amend the *Companies (Consequential Amendments) Act, 1981*, to repeal the *Equal Opportunity Act, 1977* and the *Equal Opportunity (Discrimination Against Disabled Persons) Act, 1982* and for other purposes. (*Equal Opportunity Act, 1984* Victoria)."

Re-write:

Purpose of the Act

> "101 The purpose of this Act is to protect people against unfair discrimination in employment, education, accommodation and certain other areas of activity. It does so by prohibiting discrimination on the ground of certain attributes in specified areas of activity, unless an exemption applies, and by establishing agencies and procedures to deal with contravention."[41]

5.79 Another good example of a statement of purpose is s.16(1) of the U.K. *Food and Environment Protection Act, 1985*:

> "II The provisions of this Part of this Act shall have effect -
>
> (a) with a view to the continuous development of means -
>
> (i) to protect the health of human beings, creatures and plants;
>
> (ii) to safeguard the environment;
>
> (iii) to secure safe, efficient and humane methods of controlling pests; and
>
> (b) with a view to making information about pesticides available to the public;
>
> and references in this Part of this Act to the general purposes of this Part of this Act are references to the purposes mentioned in this subsection.

5.80 There are of course problems with purpose sections. The major objection of writers is that they will be used to obscure what the writer thinks is otherwise

---

[41] Draft Equal Opportunities Bill, in Law Reform Commission of Victoria, *Review of the Equal Opportunities Act*, Report No.36, 1990, at p.67.

clear.[42] Another objection is that purpose sections will simply restate in different words what is said more specifically in the Act. There is a danger that the drafter will simply use the same language as in the statutory provisions. Thus purpose sections would be about as useful as explanatory memoranda which substantially restate the statutory provisions in a separate document. As Thornton puts it,

> "Unless the (purpose) clause is in such terms that it will be of assistance in the interpretation of ambiguous provisions of the Act by revealing the intended purposes of the legislature, it will be at best redundant and at worst misleading".[43]

5.81 There is of course the danger that a purpose section would be merely descriptive or even a political manifesto. There is a difference between a statement of purpose which is designed to throw some light on the Bill and its legal effect, and a mere manifesto. It is felt that statements of purpose in Preambles are vulnerable to being mere manifestos and that if such statements are to be of any use that they should be contained in a clause in a Bill. The Renton Report recommended that they should be used when they are the most convenient way to clarify the scope and effect of legislation.[44] They are also supported by Lord Campbell of Alloway Q.C.:

> "We should legislate in general terms on matters of principle, using when convenient a 'purpose clause' to express the intention of Parliament and to clarify the intended scope and effect of the delegated legislation which will deal with matters of detail under statutory instrument."[45]

5.82 The Commission provisionally recommends that purpose clauses should be included at the head of an Act, in as many cases as possible. The long title to an Act should no longer be given, since it can serve no additional useful purpose where there is a purpose clause. In longer Acts, purpose clauses should be used at the head of each Part of the Act.

3. Use of Mathematical Formulae

5.83 Mathematical formulae are increasingly used to replace tortuous and ambiguous legal provisions. This would seem sensible as often the legal provisions are simply the drafters attempt to describe the mathematical formulae in words. It is simpler and easier to use the formula in the first place.[46]

5.84 Failure to use mathematical formulae contributes enormously to the difficulty in comprehending legislation. As Driedger writes,

---

42 Clarity's submission to the Hansard Society, *op cit.* fn.37.at p.11.

43 Thornton, *op cit.* fn.1. at p.180.

44 Renton Report, *op cit.* fn.32, at para. 11.8.

45 Lord Campbell of Alloway, *Law in Plain Language,* March 1983, Law Society's Gazette 621at p.621.

46 M. Casen and J.M. Steiner, *Mathematical Functions and Legal Drafting* (1986) 102 L.Q.R. 585 which discusses techniques for replacing ambiguous legal jargon with a precise mathematical formula.

"In my opinion one of the reasons why our Income Tax Act is complicated and difficult to comprehend is that many provisions are prose descriptions of a mathematical process. That is very difficult to do .... It would be much simpler to set up a mathematical formulae, followed by an explanation of what each letter or symbol represents. This technique is quite common in Australia."[47]

5.85 The Renton Committee also approved of this practice.

"We welcome the increased use of fractions and other formulae where this enables the draftsman to avoid a verbal description, necessarily complicated of a mathematical process, provided the formulae are simple ones that can be readily understood by people who are not expert mathematicians. The attractions of the technique ought not to lead to the use of elaborate mathematical forms of expression, which might do more harm than good."[48]

4. Maps and Diagrams

5.86 The occasional use of maps and diagrams could help to make legislation more understandable.[49] For example, so called "road maps" can be used to give a good indication of how a Bill works or where to find its provisions.

Order of Provisions/Structure of Parts

2.1.A.1. (1) In each part dealing with a pension, benefit or allowance, this is the order in which the provisions are presented:

(a) qualification provisions (who is entitled to the payment);
(b) claim provisions (how a claim is made);
(c) rates provisions (how much will the payment be);
(d) payment provisions (how much will payment be and how will it commence);
(e) recipient obligations (what does the recipient need to do);
(f) .....

(2) Other relevant provisions are referred to in notes at the bottom of key provisions in the Part.[50]

5.87 Although diagrams, maps and flow charts may not be useful in all circumstances, they are tools available to the drafter which can be used as appropriate to make statutes more intelligible.

---

47 *A Manual of Instructions of Legislative and Legal Writing* (Dept of Justice, Canada, 1982) at p.555.

48 Renton Report, *op cit.* fn.32. at para.11.20.

49 Thornton, *op cit.* fn.1, at p.46.

50 Turnbull, *op cit.* fn.23, at p.178, giving an example of the new approach in the *Social Security Bill, 1990 (U.K).*

5.88 The Commission provisionally favours the use of maps, diagrams, flow-charts and formulas as aids to understanding in legislation.

IV Amendment and Consolidation

Amendment

5.89 As we have discussed above,[51] the difficulties experienced by the reader of Irish statutes are the result not only of their language and style, but also of their frequent amendment and of the complex and piecemeal way in which amendment is sometimes effected. Rather than inserting, deleting or substituting particular words or phrases in a provision to be amended, it is preferable to re-write the entire provision as amended, so that the reader will be able to see the full effect of the amendment, and will not have to move between two or more texts in order to ascertain the meaning of the provision.

5.90 The Commission provisionally recommends that, where a statute amends a previous provision, the entire text of the amended section should be set out, and that recourse should not be had to complex amendments inserting or altering words or short passages within a provision.

Consolidation

5.91 Related to the issue of legislative amendment is the need for consolidation and revision of Irish legislation. In areas where a large number of amending statutes govern a single area, a single consolidating statute would facilitate the reader and greatly contribute to the accessibility of the law.

5.92 Problems with Irish legislation are also in part due, not to the current style of drafting, but to the drafting style of previous decades and even previous centuries, since a great deal of older law remains on the statute book. The revision of older legislation and its re-drafting in more modern language according to a standard style as set out above, would also contribute to the comprehensibility of Irish legislation.

5.93 The Commission provisionally recommends that priority should be given to the consolidation of statutes, in order to facilitate readability. Attention should also be given to the updating of older legislation, and its re-drafting in modern language and format.

---

[51] *supra* paras.2.26-2.28.

CHAPTER 6: SUMMARY OF PROVISIONAL RECOMMENDATIONS

Interpretation

1. The Commission provisionally recommends that statutes should be interpreted in accordance with their ordinary meaning in the light of their object and purpose. Interpretation in accordance with the object and purpose of an Act should not be confined to cases where there is ambiguity or absurdity on the face of a provision. Provision for a purposive construction of statutes should be made in an amending Interpretation Act. This provision should not however affect the common law rule that penal statutes (including criminal and taxation statutes) should be construed strictly and in favour of the person accused or penalised. We recommend that the provision be modelled on section 15AA of the Australian *Acts Interpretation Act*, to read as follows:

   > "1. In the interpretation of a provision of an Act (other than a penal 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. The Commission provisionally recommends that a court should be permitted, in ascertaining the object or purpose of a statutory provision, to look to the context of the provision within the statute as a whole. Section 11 (g) of the *Interpretation Act, 1937,* which excludes the use of material such as marginal notes in the interpretation of statutory provisions, should be repealed, and a new provision inserted which would allow a court to look to all sections of an Act, and to marginal notes, headings, and any purpose clause, in determining the object and purpose of a particular provision.

3. The Commission provisionally recommends that the courts should be permitted to have recourse to external aids to construction, where the use of such external aids would assist the court in ascertaining the meaning of a statutory provision which is otherwise ambiguous or obscure. The circumstances in which there may be recourse to external aids to construction should be set out in legislation, in a new Interpretation Act.

The Commission provisionally recommends that statutory provision should be made as follows:

"2.(1) A court may, in determining the object and purpose of a provision of an Act, and in ascertaining its meaning, make use of any extrinsic aids to construction which the court finds useful, where:

(a) the provision is, in the opinion of the court, ambiguous or obscure; or

(b) the ordinary meaning of the provision is manifestly absurd or unreasonable."

(2) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard should be had, 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 the purpose or object underlying the Act; and

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

The Commission's provisional view is that no external aids to interpretation should be excluded from a court's consideration by the legislation. Some aids to construction, such as Oireachtas debates, are likely to be of use only in rare cases, but they should not be excluded on those grounds alone.

Some of the Commissioners are provisionally of the opinion that the Act should not list the aids to construction which may be used by a court; rather, the aids to construction which may be called into service should be left to the discretion of the court, to be assessed in the light of the circumstances of the case, and of the weight and usefulness attaching to a particular document.

Some of the Commissioners, by contrast, provisionally favour a non-exclusive listing of the external aids to interpretation which may be referred to by a court. They propose an additional subsection as follows:

"The material that may be considered in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed;
(b) any relevant report of the Law Reform Commission or other similar body that was published before the time when the provision was enacted;

(c) any relevant report of an Oireachtas committee;
(d) any treaty or other International Agreement referred to in the Act;
(e) any explanatory memorandum relating to the Bill containing the provision;
(f) any material from the official record of debates in the Dáil or Seanad;
(g) the speech made by a Minister or other sponsoring deputy on the second reading of a Bill;
(h) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section."

Statutory Drafting

4. The Commission does not favour a shift towards a general principles approach to drafting which would omit detail from legislation, as this would simply involve the shifting of detail to other documents.

Language

5. The Commission provisionally recommends the adoption of standard drafting practices which would ensure consistency in the statute book. General guidelines concerning the language and style of drafting, based on objectives of clarity and effective communication, should be contained in a drafting manual. Some of the standard practices which we favour include:

- The simplification of standard clauses such as transitional provisions, and repeals of pre-existing laws;
- The use of shorter sentences;
- The use of familiar vocabulary;
- The use of familiar and clear grammatical structures;
- The greater use of the active voice;
- The use of positive rather than negative statements;
- Drafting in the present tense where possible and appropriate;
- Replacement of Latin terms with English terms, where possible, and where this would not lead to uncertainty regarding well defined terms;
- The simplification of the enactment formula to read "The Oireachtas enacts: ...".

6. The Commission provisionally recommends that technical or specialist jargon should be used in legislation only where necessary, and that where they are used, technical terms should be defined in the definitions section of the Act. This follows the principle that although some legislation may be inevitably complex and may be

directed at and used by a small number of specialists, it ultimately governs ordinary citizens, and should therefore be as readily accessible and comprehensible to the well-educated layperson as is possible.

Structure and Format of Acts

7. The Commission provisionally recommends that there should be a standard structure applied in the drafting of legislation, by which in each part of an Act, the general principles should be set out first, followed by the detail of the provision, and any exceptions or conditions applying to the general principle.

8. The Commission does not favour the shifting of the detail of legislation to schedules, as this requires the reader to read the section and the schedules together and further complicates the structure of the Act.

9. The Commission provisionally recommends the following alterations to the format of legislation, in order to enhance readability:

    - the greater use of headings;
    - the highlighting of words defined in the definitions section;
    - the avoidance of too many subsections within a section;
    - a modernised typesetting format for legislation.

10. The Commission does not favour the inclusion of additional definition of commonly used words in an Interpretation Act. Definitions are more readily accessible when included in the definitions section of each Act.

Aids to Understanding

11. The Commission provisionally favours the use of maps, diagrams, flow-charts and formulas as aids to understanding in legislation, where these would be appropriate.

12. The Commission provisionally recommends that examples should be used in legislation where they would assist in the application of a formula. The Commission does not however favour the use of examples in legislation as a general rule, and, except in the case of formulae, would provisionally recommend the use of examples in explanatory memoranda rather than in the text of an Act.

13. The Commission provisionally recommends that purpose clauses should be included at the head of an Act, in as many cases as possible. The long title to an Act should no longer be given, since it can serve no additional useful purpose where there is a purpose clause. In longer Acts, purpose clauses should be used at the head of each Part of the Act.

Amendment and Consolidation of Legislation

14. The Commission provisionally recommends that priority should be given to the consolidation of statutes, in order to facilitate readability. Attention should also be given to the updating of older legislation, and its re-drafting in modern language and format.

15. The Commission provisionally recommends that, where a statute amends a previous provision, the entire text of the amended provision should be set out, and that recourse should not be had to complex amendments inserting or altering words or short passages within a provision.

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) **[out of print] [photocopy available]** [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 (Nov 1977)**[out of print]** [£ 2.00 Net]

Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977) [£ 1.50 Net]

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

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

Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse (Dec 1978)**[out of print]** [£ 1.50 Net]

Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harbouring of a Child (Feb 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 (Dec 1979) [£ 1.50 Net]

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

Working Paper No. 9-1980, The Rule Against Hearsay (April 1980) [£ 4.00 Net]

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

First Report on Family Law - Criminal Conversation, Enticement and Harbouring 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 (Sep 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) (Sep 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) (Nov 1983) [£ 1.00 Net]

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

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

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

Report on Nullity of Marriage (LRC 9-1984 (Oct 1984) [£ 3.50 Net]

Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (Oct 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 Offences (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 Offences Under the Dublin Police Acts and Related 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) (Sep 1985) [£ 3.00 Net]

Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (Sep 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) (Oct 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) (Oct 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) (Sep 1987) [£ 4.50 Net]

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

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

Report on Receiving Stolen Property (LRC 23-1987) (Dec 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) (Sep 1988) [£ 3.00 Net]

Report on Malicious Damage (LRC 26-1988) (Sep 1988) **[out of print]** [£ 4.00 Net]

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

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

Report on Debt Collection: (2) Retention of Title (LRC 28-1989) (April 1989) **[out of print]** [£ 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) [£10.00Net]

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

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

Report on Child Sexual Abuse (September 1990) (LRC 32-1990) [£ 7.00 Net]

Report on Sexual Offences Against the Mentally Handicapped (September 1990) (LRC 33-1990) [£ 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) [£20.00Net]

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) (PI 8292) [£ 1.50 Net]

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

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

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]

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

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

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)**[out of print]** [£20.00Net]

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

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

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

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

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

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

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

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

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

Report on Interests of Vendor and Purchaser in Land during 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) [£10.00Net]

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

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

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) [£20.00Net]

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

Eighteenth (Annual) Report (1996) (PN. 3760) [£ 2.50 Net]

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

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

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

Report on Land Law and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds (LRC 56-1998) (May 1998) [£ 8.00 Net]

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

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

Nineteenth (Annual) Report (1997) (PN. 6218) [£3.00 Net]

Consultation Paper on The Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury) (November 1998)[£15.00Net]