

Introductory note by FB

The following is a foreword I was invited to contribute to Dr Brian Hunt's book *The Irish Statute Book: A Guide to Irish Legislation* which was published by First Law Limited, Dublin in 2007. I consented to an invitation from the publishers to act as honorary consulting editor. There is on this website a review of the book by Edward Donelan (www.francisbennion.com/2008/nfb/002.htm)

The Irish Statute Book: A Guide to Irish Legislation

by Brian Hunt (Francis Bennion, Consulting Editor)

Published by FirstLaw Limited, Dublin, 2007

Foreword

by Francis Bennion

This is a remarkable book, and the author Dr Hunt is to be warmly congratulated. It is as thoroughgoing a treatment of a difficult area of law as could be wished for. Above all it is a campaigning book. The author detects grave defects in the Irish Statute Book (which was based on the British Statute Book) and wishes to see them corrected. As one who has for more than forty years similarly campaigned for improvements in the British Statute book I salute him as a fellow toiler in a socially important vineyard. The problems are similar, though the Irish have complications additional to those that plague British legislators and their hapless victims. Ireland has a much smaller population, yet needs to cope with a like mass of domestic legislation coupled with the challenges posed by the copious output of the European Union and the restricting framework of the European Convention on Human Rights. Ireland also has a written constitution, which so far the British have escaped.

Dr Hunt's book has a wide range, and is clearly the product of extensive research. He takes us back to the beginning with an account of Brehon law and the origins of the present Irish Statute Book. He describes minutely the composition of that notional yet real entity the Statute Book, and the various categories of Acts and aids to their understanding. Then he passes to the Parliamentary Draftsman's Office and its modern equivalent the Office of the Parliamentary Counsel, where all the Irish Government's legislative drafting work is done. He describes how it is done, and how it might be better done. He goes on to explain the vital role played by the courts in pronouncing on the legal meaning of legislation.

There follows a lengthy disquisition on the structure and features of legislation, with an examination of the vexed question of using plain language in the drafting of Acts, to which I shall return. Then the author deals with how Acts are amended. This is an important aspect because much of the confusion and complexity of the Statute Book arises from the way it is from time to time altered. The author turns to the important question of how Acts are published and made known to the user. A disquisition on secondary or delegated legislation concludes the book.

I pass finally to the most important problem dealt with by this work. What should be done to improve the state of the Irish Statute Book and the plight of those who have to consult it? It would be impertinent, indeed provocative, for me as an Englishman to address that problem directly. Instead I will talk about the similar problem we face in Britain with our Statute Book.

It is necessary to identify the controlling factors. The first of these is that the Statute Book *exists*. In all its complex bulk, copiously added to from year to year, it squats like a toad in the path. It contains vital rules and commands that have been fought over, even sometimes died for. They are rules and commands that closely affect every citizen. They govern his or her safety, security and property. They regulate family affairs and health, and the education of every child. By complicated provisions they impose taxes at various rates and in differing circumstances. And so on. It is a solemn undertaking for a reformer to try tinkering with these sinews of the social fabric – let alone sweeping them away in order to substitute something more fit for its purpose.

And what would that be? It is not at once apparent, and there is much dispute over it. Some reformers think all would be well if the mass of current laws were replaced by something to similar effect written in plain English, so that every ordinary citizen could understand it. That persistent notion is fallacious (and here I can put down one certain pointer amid all the confusion). *Ordinary citizens should be discouraged from trying to understand raw legislation*. Why? Because it may cause them harm to attempt it. They may think they understand a vital law and act on that belief. Their belief is likely to be mistaken, and that might lead them into harm.

Let me now change that far-fetched metaphor of the toad and substitute a Swiss watch, at the same time introducing another truth. *No Act of Parliament is complete in itself*. I could put this another way. *Every Act is an amending Act*. What does it amend? Why the Statute Book itself, which otherwise continues in force unaltered. Although the Statute Book is said to be a notional concept, that is not in essence correct. There is in actual fact a large collection of extant Acts each very much in force (literally true, because in the last resort force will be used to *enforce* them). All that is missing to make a real book is the binding. And of course many bound books would be needed to include all the Acts.

The idea of the Swiss watch as a metaphor for the Statute Book arises in this way. Suppose a small component of a Swiss watch wears out or breaks (unlikely I know). It has to be replaced. With what? No one would suggest that the repairer has a free hand here, and can replace it with anything he fancies. His replacement may not be exactly the same as the defective part, but it must fit in with the rest of the watch's mechanism. The same is true of a new Act. Even though its form may differ slightly from the Acts already comprised in the Statute Book (perhaps because it has been decided that in future headnotes will be used instead of sidenotes for sections), it still has to conform generally. There is not much room for manoeuvre, or the system really will break down.

That leads to another point. You can't repair a Swiss watch unless you are an expert in that particular line of work. The same applies to drafting an Act of Parliament. It also applies to arriving at the legal meaning of an Act of Parliament (as opposed to the grammatical meaning, which may be different). The whole subject is an expertise, as indeed is that of law generally. That is why we need lawyers.

So we should reluctantly accept that the new reformed Statute Book must be designed for use by the legal profession, not the ordinary citizen. Moreover it must at all times be available to the legal profession in fully updated form. Dr Hunt exposes in pitiless detail the present shortcomings on that point, which are mirrored in the case of the British Statute Book. In both countries they show a disgraceful failure by Governments to perform their basic duty of making the law available.

The citizen needs, and the state must provide, adequate information, in lay terms, about what the law enacts. The citizen must not be encouraged to go direct to an Act of Parliament for information because, as I have said, no Act is complete in itself. It must be read in context, and the context for every Act is the whole of the law. An individual Act is the single part that must fit into the mechanism of the Swiss watch and assist its efficient working. It is the legal experts who know about that – or should do.

When it comes to statutory interpretation, this truth is expressed in what is called the informed interpretation rule. If the drafter had to frame the new Act in terms suitable for a reader ignorant of past and contemporary facts and of legal principles (and in particular the principles of statutory interpretation), it would be necessary for the drafter to use far more words than is practicable in order to convey the meaning intended. This informed interpretation rule is to be applied no matter how plain the statutory words may seem at first glance. Indeed the plainer they seem, the more the reader needs to be on guard. A first glance at an enactment is not a fully-informed glance. Without exception, statutory words require careful assessment of themselves *and their context* if they are to be construed correctly.

The ordinary citizen is not equipped to carry out this assessment, which confirms the need to draft for the expert. I cite as one authority a book of which I was unaware until I came across it in Dr Hunt's work, whereupon I immediately sent for it. The title is *The British Statute Book*. It was published in 1957, and the author is Christopher Hughes, who also wrote a book on the Swiss Constitution. He drew on his knowledge of that when he wrote (p. 67):

“One of the most striking features of the Statute Book of the United Kingdom is the method of speaking it adopts. A foreign code, such as the Swiss Civil Code, is supposed to be read by the citizen: ‘A wife shall run the household,’ it says. This type of precept, a mixture of commonplaces with things unenforceable, is not the subject matter of Acts of Parliament . . . The British rule deals with the marginal case, and is addressed to the specialist; the foreign code is couched in the form of a series of platitudinous maxims for the citizen.”

The last words of the Hughes book (p. 164) are telling on the question of a lay reader trying to look up legislation for himself or herself: “The reader need hardly be warned not to rely too much on his own researches in a pursuit which is full of pitfalls even for the experienced.”

If a new kind of Statute Book is to be produced, the first thing needed is a substantial addition to the corps of expert drafters. It is said to take ten years to produce a fully competent legislative drafter. I can confirm that. I slaved away in the Westminster Parliamentary Counsel Office for twelve years from 1953 to 1965, and still had not been promoted to the full rank of Parliamentary Counsel - and that was not unusual. So I got tired of waiting and left to do something else. (I was invited back later, at the full rank.)

That is one problem, to find the necessary drafters. Another problem is to decide on the form the new Statute Book should take. I believe there should be much more discipline about Government use of legislation. The new Statute Book should be arranged under titles according to subject-matter. When thereafter it is amended, as amended it is bound to be, this structure should be carefully preserved by the amending Acts. Above all, there should be far less legislation. A country's laws should not be constantly churned into new shapes.

For years there has been a constantly-increasing tendency on the part of politicians to think that it will benefit them electorally if they promote frequent legislation. By this law-churning a Government does serious damage. The nation's legal system cannot perform its social function properly if it is constantly uprooted and replanted in this way. Lawyers cannot know the law. Law students cannot be taught the law. More unproductive lawyers are needed to work the system. Judges are thrown into confusion. In the book from which I must not keep you much longer, the Dr Hunt cites Lord Radcliffe:

‘The respect for the law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted.’¹

Two final things are required, and these are the most difficult of all. The Government must be persuaded to back to the hilt this grandiose project, and put big money behind it. The legal

¹ Lord Radcliffe, “Some Reflections on Law and Lawyers” 10 C.L.J. 361 at 366.

profession must really want it, and take pains to dispel a notion I have spent my professional life seeking to dispel, namely that lawyers like obscurity because it is good for business.