Legal Information Management, 11 (2011), pp. 159–164

doi:10.1017/S1472669611000545

Access to Justice: Accessibility[1]

Abstract: Patricia T Rickard-Clarke writes on the complex issues relating to access to justice for the citizens of Ireland. Her article addresses the practical need for consolidation of legislation and the issues of making law accessible in a form that people can understand. The article also takes into account comparative developments in other jurisdictions.
Keywords: access to justice; Ireland

Introduction

The term access to justice from the point of view of an individual would normally refer to the right to seek a remedy before a court or tribunal and which can guarantee independence and impartiality in the application of law. The twin issues in the debate of access to justice normally relate to cost and delay. Some progress has been made on these issues in Ireland and there have been developments in case management, streamlining procedures[2] but it is necessary to look at a broader canvas.

Patricia T Rickard-Clarke

Access to the Rules

If it is acknowledged that a person has a right to seek a remedy and have the remedy measured according to a set of rules, then it is necessary that the person asserting their rights has access to the legal rules that prevail and knows what the rules are. Furthermore, where the rules are not accessible or deficient then the individual may be left without access to a remedy.

An individual has a right to assume that they will have access to the legal rules, know what the rules are and be able to understand them and assume that the law keeps pace with social change which must include modernisation and reform. The identification of important social problems, making policy decisions to address issues and then developing or amending legislation to enact that policy are all a necessary part of the formulation of the appropriate rules. Of course all policy decisions will not require legislation but this paper will focus on the legislative process.

The Need for Consolidation

Since legislation incorporates the norms by which society operates, its availability in an up to date, accessible and coherent form is crucial for the orderly and effective functioning of society, in particular the rule of law. From the perspective of both the state and the individual it is vital that up-to-date versions of legislation relevant to an issue that concerns them are capable of being identified and accessed. If legislation is not readily available and immediately accessible, finding it will prove to be a task that is beyond not only lay people but also competent and experienced lawyers[3].

An initial problem faced by someone searching for the relevant law on a particular topic in Ireland is that it is not necessarily to be found in any one Act. In many cases the relevant provisions are contained in a number of Acts. They may be scattered among a Principal Act, amending Acts and various statutory instruments. The user may often have to piece together the various texts to ascertain the current state of the law[4]. Legislation is published in its original form but there is no further re-publication to take account of later modifications[5].

Often the amending legislative provisions will be contained in an Act that deals with issues other than those with which the user is primarily concerned and whose title may give no clue to the casual reader of their relevance. This may be described as the 'buried amendment phenomenon'. For example, the *Investment Funds, Companies and Miscellaneous Provisions Act 2005* amends legislation which is in the sphere of consumer law rather than financial services or company law. Section 83(b) which is within Part 7 (Miscellaneous Amendments) of the Act amends section 7(3) of the *Package Holidays and Travel Act 1995* by increasing the timeframe within which a prosecution may be taken under that Act from 12 months to 2 years.

The Commission raised the issue of the 'buried amendment' phenomenon in its Consultation Paper on the *Legislation Directory: Towards a Best Practice Model* in 2008 but had previously raised it in its Consultation

Paper on *Statutory Drafting and Interpretation: Plain Language and the Law* in 1999. It is essential for the user to consult the Legislation Directory[6] on the electronic Irish Statute Book (eISB) to ascertain how an Act may have been modified since enactment. While there is a Legislation Directory for primary legislation there is currently no Legislation Directory for secondary legislation[7] which adds to the access problem.

In the context of legislation dealing with the key aspects of the jurisdiction of the courts, there are currently over 240 separate Courts Acts running to about 1,500 sections. About 150 of these predate the foundation of the State in 1922, the oldest forming part of the original 1215 Magna Carta (Sheriffs Act 1215). The Infants (Next Friend) Act 1285, a further Sheriffs Act of 1293 are also all still in force. So there are still Courts Acts in force from the 13th century, in other words, Acts dating back nine centuries relating to the jurisdiction of the Courts[8].

The Commission has recently completed a project in collaboration with the Department of Justice and Law Reform and the Courts Service on the Consolidation and Reform of the Courts Acts. The Commission published a Consultation Paper in 2007 and a final Report in 2010[9]. Attached to the Report is a *Courts (Consolidation and Reform) Bill* updating and modernising the law. The Bill would, if enacted, repeal over 240 Acts and reduce 1,500 sections in those Acts to about 350 sections. The Commission expressed the view that there is a clear need for consolidation and reform[10] of the legislation concerning the jurisdiction of the courts and further that a consolidated Courts Acts should have a thematic structure. This work of the Commission (if and when enacted) would not only modernise the law in this area but also make it accessible for the citizen. The Commission notes that the Government Legislation Programme of April 2011 proposes to publish a *Courts (Consolidation and Reform) Bill* based on the Commission's 2010 Report.

Consolidation is of course the combination in a single measure of enactments relating to the same subject matter but scattered over different acts. The need for consolidation of the Statute Book was recognised as early as the 16th century in England where it was proposed that statute law should be digested into one body under titles and heads. Consolidation is a difficult exercise as there is a complexity involved as it is necessary, when dealing with a number of texts, to decide how to deal with problems caused by modifications, restrictions and constructions but the benefits are considerable[11]. However, once commenced consolidation must be carried out on a systematic basis and must be ongoing. So how does Ireland compare to other jurisdictions?

Common Law jurisdictions

Australia[12]. A programme of consolidation has been undertaken in the various States and Territories of Australia for many years and today the position is that all the States and Territories in Australia have comprehensive consolidated databases of primary and secondary legislation with free internet access. The colony of ***Victoria*** was established in 1835 and a full consolidation of the statute book took place in 1865 with further consolidations in 1890, 1915, 1928 and 1958. Since 1958 regular reprinting has taken place so the legislation is up-to-date in a consolidated form.

New South Wales carried out full consolidation of its statute book in 1937 with further consolidations undertaken since then. It now has an electronic legislation database published on the New South Wales legislation website[13]. The website has official status and is updated within three days after a change in legislation. In ***Queensland*** the public have access to an up to date database[14].

South Australia has an electronic database with up-to-date amended Acts published to coincide with the commencement of relevant amendments. ***Western Australia*** has a comprehensive legislation database in electronic format. In the ***Northern Territory*** electronic forms of legislation were introduced as early as the 1970s. In 1997 a database of ***Tasmanian*** legislation in electronic format was established.

Following a programme of systemic consolidation other jurisdictions also have comprehensive up-to-date[15] legislative databases. ***New Zealand*** has the LENZ – the Legislative Enactments of New Zealand. In all **Canadian** jurisdictions continuing electronic consolidation has now largely supplanted paper revision. **Hong Kong** has an up to date consolidated electronic database BLIS (Bilingual Laws Information System) – bilingual being English and Chinese.

In the **United Kingdom** there is an official electronic *Legislation Database* and legislation is available in its original format and with its revised text. This database is not up to date but for the most part it is up to date to about 2007.

What is the position in Europe?

The Publications Office of the EU published a report, *Access to legislation in Europe 2009*[16], that has data on 31 countries of the EU and the EEA. The vast majority of these countries have an electronic legislative database. Details of countries which have a systematic consolidation programme are also indicated. Ireland is one of four countries, Denmark, Greece and Cyprus being the other three, which do not have such a programme.

What progress in Ireland?

There has been a consolidation of social welfare legislation, the most recent being the *Social Welfare Consolidation Act 2005* (previous consolidations were undertaken in 1981 and 1993). There was a consolidation programme for the Taxes Act starting with the *Taxes*

https://doi.org/10.1017/S1472669611000545 Published online by Cambridge University Press

Consolidation Act 1997 (which reduced 40 separate acts into one) followed by the *Stamp Duties Consolidation Act 1999* and the *Capital Acquisitions Consolidation Act 2003*. However, these acts are all post 1922 statutes[17].

The single exception of consolidation of pre 1922 legislation is the *Land and Conveyancing Law Reform Act 2009* which was not only a consolidation of legislation going back to the 13th century to the Statute *De Donis Conditionalibus 1285* and *Statute Quia Emptores 1290* but was a major reform and modernisation project carried out by the Law Reform Commission[18]. The consolidation process in this single Act repealed over 150 Acts the bulk of them being pre 1922 statutes. A number of former statutes were recast in a modern and simplified form for example section 2 of the *Statute of Frauds (Irl) Act 1695* which provides that a contract for land must be in writing was recast in the 2009 Act. There is a proposed amendment to the 2009 Act contained in the *Civil Law (Miscellaneous Provisions) Bill 2010* but as there is currently no consolidation procedure any such amendments will not be readily consolidated into the 2009 Act[19].

A positive development in a move towards consolidation is the enactment of the *Statute Law (Restatement) Act 2002* which authorises a statute to be made available in printed or electronic form in a single text. Since late 2006 the Law Reform Commission has responsibility for the Restatement project and it has completed its First Programme of Restatement[20] and has begun a Second Programme of Restatement, which runs from 2011 to 2012. The Commission spent some time selecting appropriate acts to include in the Programmes of Restatement to ensure that those eventually completed would be of benefit to individuals, commercial undertakings and State bodies. In addition, the Commission acknowledged that the technological aspects of the project required significant focus to ensure that the Restatement would meet international standards in eLegislation. Because of this, the Commission commissioned an editing and authoring tool and ensured that the relevant legislation database was marked up in an XML format that it could edit and search in a comprehensive manner with a view to the establishment of an electronic legislation database, which will eventually lead to eLegislation.

The first programme of Restatement consisted of 45 acts, including 6 suites of acts. The Restatement of legislation is not a simple exercise either because of the 'scatter' of the Statute Book. For example the main amending act of the *Freedom of Information Act 1997* was the *Freedom of Information (Amendment) Act 2003* yet over 50% of the 121 amendments to the 1997 Act are contained in 40 different statutes none of which had the words 'freedom of information' in their title.

So, although there has been some progress and some consolidations they are relatively modest in the overall context. In order to have a tangible effect on the Irish Statute Book, consolidation must be carried out on a regular, systematic basis and across the Statute Book as a whole. One initiative that the Commission suggested might assist in facilitating this process is that when a Restatement has been completed this could be designated the Principal Act and any amendments enacted should be made directly to the Principal Act. This is possible given that drafts of all legislation are now being prepared in electronic format[21].

Access to the Rules in a Manner that People can Understand

(i) Out of date concepts:

Apart from the advantage of having legislation relevant to particular areas of law available in single pieces of legislation for the benefit of the citizen who can easily access them, the lack of consolidation also means that the legislation is not easily comprehensible. The Irish Statute Book contains language and processes going back centuries which the ordinary citizen simply cannot understand. As already stated the work involved in the *Land and Conveyancing Law Reform Act 2009* was not only a consolidation exercise but it was a major modernisation and reform project. Some of the principles adopted by the Commission for that project were:

(a) Updating the law, so as to make it accord with changes in society,
(b) promoting simplification of the law and its language, so as to render it more easily understood and accessible
(c) promoting simplification of the conveyancing process, in particular the procedure involved, and
(d) facilitating the introduction of eConveyancing.

The 2009 Act abolished feudal tenure and concepts rooted in the feudal age and other eras not relevant to Irish society in the 21st century. As the Commission pointed out these concepts are not compatible with the relationship between the State and its citizens as enshrined in the Constitution.

(ii) Terminology:

Terminology and the consistency in the use of language in the legislation are also very important so that the citizen can readily comprehend. At present under existing court legislation many different terms are used for the person who makes an application to court. These include 'plaintiff' (in many proceedings for money compensation), 'petitioner' (in company law and family proceedings), and 'applicant' (in judicial review cases). Similarly, the terms used for initiating civil proceedings vary depending on the context and depending on the Court. For example the variety of terms include 'civil process', 'civil bill', 'petition', 'writ' and 'summons'. To add to the confusion a

https://doi.org/10.1017/S1472669611000545 Published online by Cambridge University Press

summons can also vary in different contexts and different courts. These include a 'summary summons', a 'plenary summons', a 'special summons' a 'revenue summons', 'debtors summons' and there are more.

In the Courts Acts project the Commission recommended simplification (in addition to modernisation and reform) in that a single term could be used in any application to Court and regardless at which level the application is being made, a simple 'application' to Court. A person making the application no matter in what context would be the 'applicant' and the Commission also suggested a single term 'respondent' for the person served with an application in civil proceedings.

The issue of terminology was starkly brought home to the Commission in its research for its *Report on Personal Debt Management and Debt Enforcement*[22] arising out of the studies carried out by FLAC[23] which focussed on the engagement or the lack of engagement by debtors in the Court process in relation to debt. The FLAC studies highlighted the bewilderment of debtors in trying to engage in the legal process with the use of archaic, confusing and legalistic language. Examples are *Fieri Facias, Nulla Bonna, Bailiwick, Praecipe, Garnishee* and *execution, seizure and distress*. Consistency in the use of language is also an issue. For example an order for the seizure of goods is *fieri facias* in the High Court, an *execution order* in the Circuit Court and an *execution warrant* in the District Court.

The Commission has made detailed recommendations for change to simplified comprehensible language in its Courts Acts and Debt Reports. However, this further illustrates the need for ongoing consolidation and updating of language from past centuries.

(iii) Lack of Consistency in drafting:

There is a further point that requires consideration on the issue of accessibility and that is the lack of consistency in drafting which gives rise to additional complication and inhibits easy comprehension. The Commission is currently finalising a project on Search Warrants and Bench Warrants. First to allude to the 'scatter' issue referred to earlier, commencing in 1831 there are about 117 different pieces of primary legislation and 173 different statutory instruments containing provisions for search warrants. The drafting inconsistencies can be seen in the different statutes for the evidential threshold required of the applicant applying for a search warrant from '*reasonable grounds for suspecting*', '*reasonable ground for believing*', '*reasonable cause to believe*'. A comment in relation to European Community legislation is even more apt in relation to internal national legislation.

> In order for Community legislation to be better understood and correctly implemented, it is essential to ensure that it is well drafted. Acts adopted by the Community institutions must be drawn up in an intelligible and consistent manner, in accordance with uniform principles of presentation and legislative drafting, so that citizens and economic operators can identify their rights and obligations and the courts can enforce them, and so that, where necessary, the Member States can correctly transpose those acts in due time[24].

(iv) Lack of Clarity and Consistency in Processes:

Reverting to the principle of an effective remedy and accessibility it is important that the procedures and processes in place can give effect to what is required. Taking another example from the Commission, research for its Debt project indicated that there are different requirements for applications for an execution order to Courts in different Circuits in relation to the collection of debt. Also the filing requirement and the content of documents differ from county to county. When a court order is obtained there also appears to be difficulties in having the orders enforced. There is widespread dissatisfaction in relation to the procedure of execution against goods, compounded by the fact that the relevant legislation dates back to the early part of the last century. During 2007 7,535 execution orders were lodged or already held in County Registrars' offices throughout the country. Approximately only 30% of these orders were enforced, while the average number of orders returned marked 'no goods' amounted to 35% – less than a 10% rate. Again what is significant is that the operation of this remedy varies considerably throughout the country which means that a remedy may be enforced in some areas but not in others. It is also worth noting that the Revenue has a very effective enforcement procedure that is properly resourced and monitored. While recognising that it may be appropriate for the State to have different rules to enable it to collect its debts, the public law rules applied by the State to enable the individual or enterprise to collect debt should not be any less efficient or less rigorous than the enforcement remedy available to the State itself.

This lack of consistency in procedures causes major delay and in some cases leaves citizens without an effective remedy. Those outside the jurisdiction doing business in Ireland cannot understand how such inconsistencies are tolerated.

The Timing and Policy Issues in the Formulation of Rules

As already stated, the concept of access to justice also assumes that there are appropriate rules in place, that they keep pace with social change and where there are no rules that they will be formulated in a timely manner. Ireland's membership of international institutions is a positive influence which at times obliges it to comply

https://doi.org/10.1017/S1472669611000545 Published online by Cambridge University Press

with the rules of membership by amending its laws or introducing new laws. However, our record in bringing our laws up to date has not been inspiring either internally or in spite of our international obligations.

As the Foreword to the Commission's *Third Programme of Law Reform 2008–2014* states "the law has a significant impact on all our lives and, as our society changes, it is necessary for our laws to respond to these changes". So when legislation is being enacted or updated it is important that the model or structure being proposed is based on clear policy decisions that have been fully debated and thought out, in other words the legislation must be fit for purpose.

The *Bankruptcy Act* was enacted in 1988 following a Report delivered in 1972[25] and that report was 10 years in the making with a further delay of 16 years before the legislation was finally enacted. While the 1988 Act amended court procedures and process it did not update the underlying penal philosophy of the 19th century even during a period when many jurisdictions had moved on from a punitive framework and recognised the distinction between debtors who 'can't pay' and those who 'won't pay'. The underlying principles did not recognise the new economic reality of consumer credit of the 20th century. Although a relatively recent piece of legislation it did not fulfil the criteria of being conceptually sound at the time of enactment and in the current climate that is obvious.

A further example of legislation which actually attempts to embrace the fundamental shift in philosophy from old legislation and so one would argue is conceptually sounds but fails in its provisions to transpose the underlying structure or framework to accommodate the new order is the *Scheme of the Mental Capacity Bill* which was published in 2008 (the detailed Bill has yet to be published)[26]. This Bill followed extensive work of the Law Reform Commission culminating in its 2006 *Report on Vulnerable Adults and the Law*[27]. This recommended the move from a medical model for the assessment of capacity to a functional model (time specific and issue specific) which is the most widely accepted international model for the assessment of capacity and respects the autonomy of the individual to make decision to the extent that they can make them. This recommendation towards a functional approach and the general principles to support that approach were followed in the initial heads of the draft Scheme of the Bill. However the structure and framework proposed by the Commission to accommodate this new model was not followed through in the formulation of the procedures for the assessment of capacity. The Commission recommended that it was necessary to move away from the current Wards of Court system where an assessment of capacity is made by the court in the absence of the person whose capacity is being assessed and where the predominant criteria for taking a person into wardship is on the ownership of property. It was therefore disappointing to see that the draft Scheme of the Bill did not attempt to move for the existing 19th century procedures nor attempt to formulate new structures that would be compatible with the informed modern approach.

Conclusion

It is important to highlight the difficulties that still need to be addressed to allow citizens to fully engage in the civil justice system in Ireland. Therefore, access to the law might in future be taken to include the need to ensure that the substantive law is up-to-date, reflecting current needs which includes modernisation and reform, as well as the issues of access to competent and timely advice which the Legal Aid Board must be directly concerned with.

Footnotes

[1]This is a revised version of a paper first presented at the Legal Aid Board's 30th Anniversary Conference in September 2010.

[2]Order 63A of the *Rules of the Superior Courts 1986*, inserted by the *Rules of the Superior Courts (Commercial Proceedings) 2004* (SI No.2 of 2004) and *Circuit Court Rules (Case Progression in Family Law Proceedings) 2008 (*SI No.358 of 2008).

[3]Duncan Berry: Keeping the Statute Book up to date: a personal view, Commonwealth Law Bulletin March 2010.

[4]*Legislation Directory: Towards a Best Practice Model* (LRC CP 49 2008). In 2007 the Law Reform Commission took over responsibility for the Legislation Directory to the Statutes and has delivered updates to the Directory from 2006 to date. The Legislation Directory is the index to the Statutes and contains an index to all amendments. There is no Legislation Directory to Statutory Instruments.

[5]Since 2006 the Commission is now responsible for the Statute Law Restatement function. Statute Law Restatement involves incorporation of all amendments to an Act into a single text, making legislation more accessible. See www.lawreform.ie

[6]Following the Law Reform Commission's assumption of responsibility, the Commission made the decision in November 2007 to change the name of the 'Chronological Tables of the Statutes' to 'Legislation Directory'.

[7]*Legislation Directory Report* (LRC 102–2010) at 1.15 and 2.135. In 2010 510 SIs were produced of which 330 contained amendments ie 65%.

[8]Even the use of language dating back many centuries gives rise to issues of access to legislation.

[9]*Consolidation and Reform of the Courts Acts* (LRC CP 46 2007) and *Consolidation and Reform of the Courts Acts* (LRC 97 2010).

https://doi.org/10.1017/S1472669611000545 Published online by Cambridge University Press

[10]In considering the reform recommendations for the Courts Acts, the Law Reform Commission took into account a number of proposals made by other bodies, including the Working Group on a Courts Commission (whose reports let to the establishment of the Courts Service), the Committee on Court Practice and Procedure and the Working Group on the Jurisdiction of the Courts.
[11]*Legislation Directory: Towards a Best Practice Model* (LRC CP 49 2008) at 1.85.
[12]Information on common law jurisdictions has been obtained from Duncan Berry: Keeping the Statute Book up to date: a personal view, Commonwealth Law Bulletin March 2010 and from websites of the jurisdictions.
[13]www.legislation.nsw.gov.au. The LEGIS system is an integrated system for drafting, storing, tracking and publishing legislation.
[14]This is updated on a weekly basis.
[15]Up to date in most jurisdictions updating of the database on a daily basis or within 3 – 7 days of any changes in legislation.
[16]*Access to legislation in Europe: Guide to the legal gazettes and other official information sources in the European Union and the European Free Trade Association* Publications Office of the European Union 2009.
[17]There are currently about 3000 Acts in force of which over one third (about 1,100) predate the foundation of the State.
[18]The *Law Reform Commission Act 1975* provides that the role of the Commission is to keep the law under review and formulate proposals for reform. Reform includes the development of law, its codification (including its simplification and modernisation) and the revision and consolidation of statute law.
[19]The original draft Bill was published in 2010 but reference to the Bill is now contained in the Legislative Programme published 5 April 2011.
[20]*Statute Law Restatement* (LRC CP 45 2007) and *Statute Law Restatement* (LRC 91 2008).
[21]The Commission has stated that it is desirable that Ireland move towards the comprehensive implementation of eLegislation. See LRC CP 49 2008 at 4.34–4.41.
[22]*Personal Debt Management and Debt Enforcement* (LRC 100–2010).
[23]Free Legal Advice Centres Ltd *An End based on Means* 2003 and *To No One's Credit* 2009.
[24]In *Access to European Law: Joint Practical Guide: Guide of the European Parliament, Council and the Commission* (updated in 2009).
[25]*Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons "the Budd Committee Report"* (Prl 2714, 1972).
[26]Government Legislative Programme published 5 April 2011 proposes to publish the detailed Bill before the end of 2011.
[27]LRC 82-2006.

Biography

Patricia Rickard-Clarke is a Commissioner with the Law Reform Commission in Dublin. Formerly, she was a partner in McCann FitzGerald Solicitors specialising in taxation and trusts. In 2010 she was appointed by the Minister for Finance to the Expert Group on Mortgage Arrears and Personal Debt. She is a member of the HSE's National Financial Abuse of Older People Working Group and a member of the National Centre for the Protection of Older People (NCPOP) User Group at University College Dublin. She is Chair of the Law Society's Mental Health and Capacity Task Force. She is a member of STEP (Society of Trust and Estate Practitioners).

https://doi.org/10.1017/S1472669611000545 Published online by Cambridge University Press