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Law Reform in Ireland

Implementation and Independence of Law Reform Commission

Edward Donelan[*]

Abstract

This article describes the origins and work of the Law Reform Commission in Ireland. The model follows that in Common Law countries. Its work includes both substantive law reform and statute law revision (weeding out spent or unused statutes and undertaking consolidation or other work to make statute law more accessible.) The work of the Commission focuses on 'lawyers' law' and, therefore, avoids subjects that could be politically controversial. Consequentially, the bulk of its recommendations are accepted and translated into legislation.

Keywords: law reform, statute law revision, better regulation, access to legislation, lawyer's law.

A Introduction

This article addresses two dimensions of the work of the Law Reform Commission in Ireland ('the Commission'): independence and implementation of its Reports. It also discusses these issues from three perspectives: substantive law reform, statute law revision and reforms of the form of statutes (drafting, consolidation and reprints).

B Law Reform in Ireland

The Islands of Great Britain and Ireland were tied together from the twelfth to the twentieth century. During some of this time, Ireland had an independent Parliament. However, from 1800 to 1922 Ireland was managed (or mismanaged) by Parliament in Westminster and administered, partly, from London and, partly, from Dublin. Therefore, the legal systems were closely related, and many statutes enacted in Westminster also applied in Ireland.

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C Copy-Paste

For many years after independence, Ireland copied British statute law usually with a ten-year delay,[1] though two major Acts, Civil Liability Act, 1961, and the Succession Act, 1965, were both influenced by the Civil Law.[2] This policy changed when Ireland and the UK joined the EU in 1973. From that point onwards, laws falling within the various Treaties that bound the Union were enacted in both countries with similar content within similar time frames. This meant that Ireland took its lead from European consensual ideas rather than being subservient to its nearest neighbour. Lawmakers continued to pay close attention to developments on the 'mainland'. Given close trading and other ties, it has always made sense for the laws of the two neighbours to be similar.

D Written Constitution

Ireland, unlike the UK, has a written constitution. The courts have been active, as in the case in the United States of America, in the promotion of a large variety of rights, notably, the right to fairness in administrative procedures. Ireland was ahead of the UK in some respects in law reform. Legislation was enacted in Ireland before in the UK, providing compulsory motor car passenger coverage. The Succession Act provided proper protection to widows and children, and the Civil Liability Act introduced the idea of giving compensation for mental distress.

E Why Law Commissions?

In introducing the second stage reading of the law commission bill in the United Kingdom in 1965, Lord Gardiner (the Lord Chancellor) answered the question that first occurred to me when considering the subject Why establish a body like a Law Commission and not leave the work to the relevant member of government? The answer was:

> …That being the state of the law, one might well ask: how has it got into this situation? The reason is simply this. It may be your Lordships' experience that things in life do not get done unless it is somebody's job to do them. It has never been anybody's job in England, who could do it, to see that our law is in good working order and kept up to date. I suppose that we were one of the last countries in Europe to have a Department of Law at all. Thus, it was left to Government Departments to do little bits of law reform on their own. Until 1885, the Lord Chancellor had a couple of secretaries whom he employed himself and who left office when he left office, having first torn up

1 *See, e.g.*, Law Commission Act (UK) 1965, Law Reform Commission Act (Ireland) 1975, Trades Descriptions Act (UK) 1968, Consumer Information Act (Ireland similar provisions) 1978.

2 Very 'civilian' (Scottish and European influences, expressly cited in 1962 White Paper/Programme of Law Reform).

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> all their papers. It was not until well into this century that there was any sort of Department of Law. It is still to some extent done by Government Departments, for instance, the Board of Trade take an interest in the sale of goods. But the sale of goods is only part of the law of contract, and it is nobody's business to see how the law of contract is developing as a whole.[3]

The noble and learned Lord made the case that in earlier times reform was difficult in that once Parliament had spoken it could not be seen to change its mind. However, he then conceded that times were now different (the 1960s)[4] and added:

> There is, however, a change today. This Bill has been generally welcomed by lawyers as a whole. Lawyers themselves hear people saying, and they say themselves to the industrialists and the business men, 'Come along; you are not sufficiently efficient. We are on the threshold of a scientific revolution and we must pull our socks up. We must all be more efficient.' Shall not the law be expected to display that degree of efficiency that we expect in any other walk of public life? Today lawyers feel this. They know our law as it is not efficient; and although there are always one or two elderly gentlemen who oppose things, I observed, in another place, that all the young lawyers, whether they be Labour, Liberal or Conservative, all strongly supported this Bill. I have been surprised at the number of letters I have had from Conservative lawyers—because most lawyers are Conservative—saying: 'I do not agree with your politics; but if I could help in any way about the Law Commission I should like to do so.' And some of them add: 'I do not mind whether it is full-time or part-time or whether it is paid or unpaid.'[5]

Thus, the reason for the establishment of the Law Commissions in the UK and Scotland was that the Lord Chancellor at the time, Lord Gardiner, believed that (lawyer's) law reform was necessary and that the only way to get it done was by establishing a Commission.

In other words, it was an order to a specific group of people to do something that would not otherwise get done – in short, a means to get around the problem that without a Commission neither legislative nor the executive branches of government would address matters such as lawyer's law or matters that are important but not urgent or politically expedient. This pattern is followed in other countries.

3 Law Commissions Bill, HL Deb 01 April 1965, Vol. 264 cc1140-223.

4 B. Dylan, 'The Times They Are a Changing'. Available at: https://www.google.com/search?source=hp&ei=mSOeW7iBHanjkgXE5ZmQBA&q=the+times+they+are+a+changin+lyrics&oq=the+times+they&gs_l=psy-ab.1.1.0l10.1104.4698.0.6765.15.11.0.1.1.0.386.1622.2- 5j1.6.0....0...1c.1.64.psy-ab..8.7.1635.0..35i39k1j0i131k1j0i20i263k1.0.iLKcFleTOMg.

5 *Ibid.*, footnote 4, read the debate in full – all that is missing is a voice-over by John Cleese. Available at: https://api.parliament.uk/historic-hansard/lords/1965/apr/01/law-commissions-bill.

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F Lawyer's Law

I seem to remember from a fragment of a law lecture many years ago that the Law Commission deals with 'lawyer's law'. The concept of 'lawyer's law' was adverted to by Lord Dilhorn following Lord Gardiner in the second stage debate on the Law Commissions Bill, where he sought an assurance that

> their (the Law Commissioners) task will be confined to dealing with what is normally called lawyers' law. Because if it is not so confined, it may well be that they will be impinging upon policy and, indeed, upon the province of Parliament.

G Why a Law Commission in Ireland?

In introducing the Law Reform Commission Bill to the Dail (the lower House of Parliament), the then Attorney General, Declan Costello, offered the following explanation:

> It should, of course, be made clear that the proposed legislation which the House in considering is concerned with the concept of law reform, a term which has a distinct and definable meaning. It is used, generally, to refer to the activity of reforming laws which require legal knowledge and expertise if reforms are satisfactorily to be effected. Obviously, many legislative changes or innovations which could properly be classed reforms in the law require no specialised legal knowledge to bring them about; an alteration in the age qualification for the old age pension, or alterations in the local authority tenant purchase schemes do not require a law reform commission to assist in their enactment.[6]

He then added:

> There are, however, many areas of possible legislative action which would require expert legal knowledge for adequate action to be taken. It is with such areas that this Bill deals. These are not confined to what is sometimes referred to as 'lawyers' law', that is to say laws with a highly technical content of concern to a limited group of persons only. Law reform in the context we are now discussing will deal with reforms in the laws relating to some of the most important matters of widespread interest and concern—laws relating to the family, laws relating to consumer protection, employer and employee relationships, landlord and tenant matters, the rights of persons suffering from personal injuries and many aspects of the citizens basic human rights.

6 https://www.oireachtas.ie/en/debates/debate/dail/1975-02-04/30/.

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In the debate that followed there was general agreement that law reform (especially of lawyer's law) was an important feature of a functioning democracy. One of the more arcane points made during the debate on the Law Reform Commission Bill was:

> because the common law is based on judge-made law, law reform is necessary to ensure legislation can be enacted which overrides any unanticipated interpretation of the law by the courts. This reflects the same point made in 1975 (in the debate on the introduction of the Law Reform Commission Bill) by both Deputy John M. Kelly and Senator Mary Robinson. The point here is that judge-made law can result in an unanticipated interpretation of the law or that a finding in one case leading to deficiencies and anomalies in law which were not highlighted by the facts of the particular case in which the finding was made. Law reform allows the Legislature to ensure that any resulting deficiencies and anomalies are rectified.[7]

H The Model

The standard model for Law Reform in common law countries was created, therefore, by the establishment of the Law Commission for England and Wales and the Scottish Law Commission. Both were established as statutory, independent bodies by the Law Commissions Act 1965. These Commissions are independent in regard to the exercise of their judgment and the day-to-day performance of their functions. They are permanent bodies and typically cannot be abolished without amending legislation. The establishment of the Irish Law Reform Commission followed this model in all but nomenclature.

The general purpose of law commissions is to promote law reform. In addition, in Ireland the Commission has the specific functions of keeping the law under review with a view to its systematic development and reform, including, in particular, the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and the simplification and modernization of the law.

Provision is made for the appointment of commissioners in the enabling legislation. Commissioners in England and Wales (a chair and four other commissioners) are appointed by the Lord Chancellor. Following amendment as a consequence of devolution, commissioners in Scotland (a chair and up to four other commissioners) are appointed by Scottish ministers. Commissioners are usually appointed for a term not exceeding five years, although a limited renewal of appointment may be possible in certain circumstances. Commissioners' salaries are stipulated to be paid out of money provided by the United Kingdom Parliament and by Scottish ministers, respectively. In Ireland, the Commissioners are appointed by the Government, usually on the advice of the Attorney General.

7 Expenditure Review Initiative, 'The Law Reform Commission', para. 37. Available at: www.attorneygeneral.ie/pub/Value_for_Money_Policy_Review_The_Law_Reform.pdf.

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Though in line with recent Government policy, the full-time Commissioner appointed in 2016 was appointed after a TLAC/PAS public competition.

The statutory criteria for appointment include suitable qualification in Ireland includes, the holding of judicial office, experience as an advocate or barrister, solicitor or equivalent, experience as a teacher of law in a university. Those appointed as commissioners are usually experts in a particular area or areas of the law included in the Commission's current programme of law reform projects.[8] A commissioner's role under this model is as a law reformer, leading and carrying out the law reform work and undertaking peer review of the work of the other commissioners.

In the same manner as is the approach for the Law Commissions in England and Scotland, provision in the Irish Law Reform Commission Act for the preparation of programmes for the examination of different branches of the law with a view to reform, for the preparation of programmes of consolidation and statute law revision; for preparing draft bills, for providing advice and information to government and authorities, for the laying before the Parliament of any programmes and proposals for reform and for the making of an annual report to ministers. Each programme lasts for a specified number of years and comprises a number of individual law reform projects of varying size. The Irish Law Reform Commission Reports also include reports on implementation.[9]

I Development of Law Reform in Ireland

The first initiatives on law reform in Ireland were concerned with the implementation of a statute law revision programme in 1957. Substantive law reform, as distinct from the statute law revision concept, emerged in 1962 with the publication of a White Paper setting out a Programme of Law Reform. A division was appointed in the Department of Justice with responsibility for the implementation of that programme.[10] Ireland had been aiming at adapting pre-independence legislation to the post-independence era and, subsequently, the introduction of legislation reflective of Irish mores.[11] The 1962 Programme had considerable success with the enactment of important reforming legislation such as the Guardianship of Infants Act 1964 and the Succession Act 1965, by 1966. Law reforms slowed later for want of political leadership and resources.

I Law Reform Tradition in Ireland

A Law Reform Commission ('the Commission') was established in Ireland in 1975 to address law reform issues. It consisted of a President and four other members

8 A sociologist and a psychologist have also been appointed Commissioners.

9 *See*, https://www.lawreform.ie/publications/table-of-implementation-of-law-reform-commission-recommendations.171.html.

10 For background, *see* address of Charles J. Haughey, then Minister for Justice: C.J. Haughey, 'Law Reform in Ireland', *The International and Comparative Law Quarterly*, Vol. 13, No. 4, 1964, pp. 1300-1315.

11 R. Byrne and P. McCutcheon, *The Irish Legal System*, 6th ed., Bloomsbury, 2014, p. 395.

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appointed by the Government.[12] Its functions were prescribed by Section 4 of the Law Reform Commission Act, 1975, as set out in Box 'A'.

Box 'A'

Functions of Commission.

4.

1 The Commission shall keep the law under review and in accordance with the provisions of this Act shall undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform.

2 Without prejudice to the generality of subsection (1) of this section, the Commission shall—

a in consultation with the Attorney General, from time to time prepare for submission by the Taoiseach to the Government programmes for the examination of different branches of the law with a view to their reform, and such programmes may recommend the agency (including the Commission or another body) by which such examination should be made and by which proposals for the reform of a branch of the law with which the examination is concerned should be formulated

b pursuant to a recommendation contained in a programme approved of under *Section 5* of this Act, undertake an examination of and conduct research in relation to any branch of the law and, if the Commission thinks fit, formulate and submit to the Taoiseach proposals for its reform,

c at the request of the Attorney General, undertake an examination of and conduct research in relation to any particular branch or matter of law whether or not such branch or matter is included in a programme approved of under the said Section 5 and, if so requested, formulate and submit to the Attorney General proposals for its reform.

3 Where in the performance of its functions it considers it appropriate so to do, the Commission may—

a receive and consider for inclusion in a programme being prepared by it, proposals for law reform,

b examine and conduct such research in relation to the legal systems of countries other than the State as appears to the Commission likely to facilitate the performance of its functions,

c prepare, or cause to be prepared, and include in its proposals for law reform, draft Bills,

d consult, on any particular matter which the Commission considers relevant, persons qualified to give opinions thereon,

12 20th October 1975, S.I. No. 214/1975 – Law Reform Commission (Establishment Day) Order, 1975.

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e establish working parties or advisory committees,
f publish preliminary working papers prior to formulating any proposal for law reform,
g indicate the desirability, priority, scope and extent of any proposals for law reform.

The definition of 'law reform' is very wide:

"Reform" includes, in relation to the law or a branch of the law, its development, its codification (including, in particular, its simplification and modernisation) and the revision and consolidation of statute law, and kindred words shall be construed accordingly.

This definition suggests that the Law Reform Commission is not confined to 'lawyer's law'.

J Independence

In introducing the Law Reform Commission bill to the Dail (the lower House of Parliament),[13] the then Attorney General, Declan Costello, stated that:

> Whilst the commission which is now proposed will be independent and adopt its own procedures, it is certain that experience gained elsewhere will be utilised. In the light of that experience, it can be anticipated that the commission will operate, broadly, on the following lines. The five commissioners will be assisted by a full-time professional staff. Obviously, legal knowledge and expertise will be necessary to examine the legal problems with which it will be seized, to draft reports and prepare legislation. Equally obviously, the assistance of outside experts from other fields, such as the social sciences, would facilitate the work of the commission and it can be anticipated that such experts can be associated with the commission in some appropriate form. The commission will make proposals from time to time for the examination of the laws with a view to their revision and programmes prepared by the commission will suggest how such examination should be carried out, that is to say whether the commission itself should undertake the work or some other agency or body, for example a Government Department or a special committee established for the purpose.[14]

In order to clarify what he meant by independence, the Attorney General emphasized the importance of cooperation between the commission and the government. He saw this cooperation as being central to the speedy formulation and implementation of law reform. He explained the issue of independence as follows:

13 Ireland has a bicameral parliament, with a lower house (the Dail) and an upper house, a senate (in the Irish language Seanad). Once enacted by the houses, the Bills are sent for signature to the President, who may refer them to the Supreme Court if he or she is concerned that there may be concerns about the constitutionality of a proposal.

14 https://www.oireachtas.ie/en/debates/debate/dail/1975-02-04/30/.

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> The commission is to be independent in the proposals which it formulates but such independence will not preclude close liaison with the Government in this field of law reform. The skills and knowledge available to the commission will eminently qualify it to advise and consider the programmes of law reform to be undertaken and whilst it is clear that the Government must approve such programmes—it must accept ultimate responsibility for priorities in this field—the commission's independence is not affected by this fact and its considered expert professional judgment will be given without fear or favour. Its link with the Administration will be through the office of the Attorney General. The reasons for this are readily understandable. The Office of the Attorney General advises all Government Departments and is uniquely situated to appreciate the needs for legislative changes which become apparent from the work in the office. A free flow of information between the Government and the commission will be made possible by the arrangements which are envisaged.

As regards the day-to-day operation of the Commission, the Attorney General returned to the theme of independence and stated that:

> The commission is to be an independent body. It is right, therefore, that it should be free to regulate its own procedures and business as it thinks proper and this is so provided for in subsection (14) of Section 3. The remaining subsections are formal and require little comment at this stage. As a matter of practical convenience, the commission is to be a body corporate and the section gives the commission the necessary powers ancillary to a body with such a status.[15]

Interestingly, there were few mentions of the concept of independence in the debates about the bill. There were references to political favouritism and 'jobs for the boys'. The fact that funding for the operation of the Commission would be provided from funds controlled by the Department of Finance did not give rise to the suggestion that the work of the Commission would be controlled by limiting finance.

However, there seems to be no evidence that the independence of the Commission in its selection of topics has ever been tainted with political favouritism, and to this extent the independence of the Commission has been respected. The 'jobs for the boys' issue did not to arise, and neither did 'jobs for the girls'.

The independence of the Commission is also underpinned by the fact that it is free to select topics for inclusion in its reviews and then have them approved of by government, unlike the case in Australia and Hong Kong, where the government selects the topics for inclusion in programmes of law reform and directs law reform bodies to undertake reform work.

15 *Ibid*., footnote 2.

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K Implementation

One measure of the success of the Law Commission in Ireland is the number of its reports that have been translated into legislation. To date, the Commission has published over 200 project publications (Working Papers, Issues Papers, Consultation Papers and Reports) containing proposals for law reform. The Commission claims[16] that 'The majority (70 per cent) of these proposals have influenced the drafting and content of reforming legislation'. This is in line with the rate of implementation for comparable bodies.[17]

However, the programme of the Commission is drawn up by the Commission and then either approved of or not by the government. In Australia and Hong Kong, the rate of implementation of the Commissions' Reports is higher. This appears to be a direct result of the work of the Commissions being determined by the Government, which, if it refers an issue to the Commission, clearly has an interest in pursuing law reform in that area.[18]

L Reform of Statute Law

A second aspect of law reform was also adverted to in the debates leading to the enactment of the Law Reform Commission Bill – that of statute law reform. Apart from reforms of substantive law, there remained the important issue of the reform of statute law. The work of statute law reform – more accurately described as statute law revision – was, initially, the responsibility of the Statute Law Reform and Consolidation Office in the Office of the Attorney General.

M Three Stages

Three stages may therefore be observed in the evolution of a policy on statute law reform (revision) in Ireland. The first was the establishment, in 1957, of a Statute Law Reform and Consolidation Office within the Office of the Attorney General in Dublin.[19] That office was responsible for drafting a substantial volume of legislation of a law reform nature and had some responsibility for statute law revision.

Prior to the establishment of the Law Reform Commission, Law Reform was driven by the Department of Justice. The system for drafting legislation in Ire-

16 www.lawreform.ie/news/law-reform-commission-publishes-draft-subject-based-inventory-of-international-agreements-entered-into-by-the-state.833.html.

17 *See*, Byrne and McCutcheon, 2014, p. 397. *See also*, https://www.lawreform.ie/_fileupload/AnnualConference2017/AnnualConference2017-2.pdf. It would be worthwhile but a difficult task to assess what happened to the other 30 per cent. *See also*, B.R. Opeskin and D. Weisbrot, *The Promise of Law Reform,* 2005. *See*, https://www.lawreform.ie/publications/table-of-implementation-of-law-reform-commission-recommendations.171.html.

18 This argument was made in the Report at para. 143 but was not substantiated by evidence; the Report simply states that "the rate of implementation of the Commissions' Reports is quite high".

19 The first and only director of this office was Vincent Grogan, S.C. Available at: https://www.irishtimes.com/opinion/vincent-grogan-sc-1.108637.

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land follows the Common Law or Westminster model, with policies being formulated in Ministries and then drafted by specialist lawyers in the Office of the Parliamentary Counsel to the Government.[20] Though there have been six private members' bills in the last five years, the political will and the drive to get the work of the Statute Law Reform and Consolidation Office and the Department of Justice through cabinet and Parliament was provided by the then Minister for Justice, Mr. Haughey (later to be Taoiseach (prime minister)).

N Statute Law Revision Unit

The Second Phase of Statute Law Reform began in 1999 with the establishment of the Statute Law Revision Unit in the Office of the Attorney General. Its genesis is worth a detour as it reveals something of the issues relating to independence and statute law reform. The creation of that Unit can be traced to the controversy surrounding the delay in the extradition of the paedophile priest, Brendan Smyth, to Northern Ireland. That delay eventually led to the fall of the Fianna Fail-Labour coalition in November 1994. The delay was attributable to a number of factors, including the administration and management of the Office of the Attorney General. However, the fall of the government led to increased attention being paid to the wider issue of the adoption by the Irish public service of the Strategic Management Initiative (SMI).

SMI was the principal vehicle for Civil service reform in Ireland and traced its immediate origin to 1994 and the work of the Co-ordinating Group of Secretaries of Government departments who visited New Zealand as part of their preparation for a master's degree in Public Administration.

That group's second memorandum to Government was published as Delivering Better Government and became the mandate for the continuing reform programme.[21] Up to the collapse of the government in 1994, SMI was dismissed by the Office of the Attorney General as a passing fashion and not relevant to a law office.

However, the fall of the Government led to the appointment of an Attorney General[22] with a good understanding of the necessity to apply management science to the operation of his office. A review of management processes was undertaken, led by a law office management consultant[23] and supported by an internal facilitator.[24]

On the successful modernization of the Office of the Attorney General, the internal facilitator was asked what other reforms were needed, and I advised that a programme of statute law revision was necessary to modernize the statute book

20 That Office is part of the Office of the Attorney General, unlike the similar Office in London, which is part of the Cabinet Office.

21 https://www.tcd.ie/policy-institute/assets/pdf/PIWP01_JohnMurray.pdf.

22 Dermot Gleeson, S.C., 25th Attorney General of Ireland from 1994 to 1997.

23 S. Mayson, 'Legal Services Market Specialist and Author of *Law Firm Strategy*'. Available at: https://global.oup.com/academic/product/law-firm-strategy-9780199231744?cc=fr&lang=en&.

24 Edward Donelan.

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and repeal spent and unused legislation, of which there was a substantial volume dating from 1214, and to undertake a programme of consolidation and statute law reform.

However, no money was made available for that work despite the creation of a Statute Law Revision Unit. A change of Attorney General resulted in the addition of the task of publishing what were named by that Attorney General[25] as Restatements.

O Restatements

Instead of following the simple route of reprinting legislation, as is the case in Australia,[26] Attorney General McDowell caused the enactment of the Statute Law Restatement Act 2002. The Restatement Act provided that the Attorney General may authorize a statute, or portion of a statute, to be made available in printed or electronic form in the form of a single text certified by the Attorney General to be a statement of the law contained in the provisions of the statutes to which it relates, which form shall be known and is in this Act referred to as a restatement.

No resources were allocated to support his idea, so very little progress was made with the work of restatement. The government fell soon after the decision to enact the Restatement legislation. The incoming government appointed a new Attorney General in 2002.[27] That Attorney had no interest in restatements or revising statutes from the point of view of the Better Regulation agenda. Instead, he directed that the work of the Statute Law Revision Unit focus on 'all those old laws relating to whipping'. When advised that there were no such laws in force, his response was to repeat in a louder voice: "Did you not hear me – I want to get rid of all those old laws on whipping." With that enlightened exchange of policy instructions any discussions about resources were flogged to death.

However, limited funding was provided by a 'Change Management Fund' created to promote reforms arising from SMI that were not funded. With those funds, the Statute Law Revision Unit was able to engage the services of an experienced solicitor and six recent law graduates and a drafter from Botswana.[28] The work of statute law reform got underway on a small budget. Support was not available from the Office of the Parliamentary Counsel, whose head complained that the Unit was using the photocopier too much but added no value to the work of the Unit.

The work of the Unit led initially to the enactment of the Statute Law Revision (Pre-1922) Bill 2004. During the final stage of the debate on the bill in the

25 Michael McDowell, Attorney General, 1999-2002.

26 If an act has been amended a number of times, the government printer will reissue the act in a new pamphlet version incorporating all of the changes up to a specified date. Reprinted acts are a bit like an online compilation, except that they potentially become out of date over time if subsequent amendments are made to provisions of the act. Reprinted acts are not passed again by Parliament but are compiled by the executive branch of government under legislative authority.

27 Rory Brady, 2002-2007.

28 Stella Dabutha, now head of the drafting services in the Office of the Attorney General, Botswana.

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Senate the Minister of State paid tribute to the staff of the Office of the Attorney General for the ongoing research and considerable work in recent years in detailing irrelevant legislation in the Statute Book. No mention was made of the ingenuity of the officials who managed to scrounge money for what was acknowledged in Parliament to be a very important initiative. However, reference was made to the person who established that unit and that 'he left the unit as his legacy to the rest of us'.

P Progress Reported

Despite the lack of resources, the Taoiseach (Prime Minister) reported with pride that:

> Substantial progress has been made by the statute law revision unit on a programme of consolidation and revision of statute law. This work has been carried out in consultation with all Departments, offices and the better regulation unit in my Department. It has included the drafting of the Stamp Duties Consolidation Act 1999 and the Capital Acquisitions Tax Consolidation Act 2003, together with a number of other Bills and Acts involving consolidation and law reform measures, such as the Industrial Designs Act 2001 and the Water Services Bill 2003. Other Bills which are being worked on include a consolidation of company law, a codification of liquor licensing law and a consolidation and reform of the law relating to archaeological objects and national monuments.
>
> The Statute Law Revision Unit has been involved with my Department in work that has led to the publication of the White Paper, Regulating Better, and before that the OECD report, Regulatory Reform in Ireland. As a result, in 2003, the statute law revision unit undertook an audit of all pre-1922 legislation to identify legislation which is no longer useful and therefore suitable for repeal. The audit also looked at the statutes which remain with a view to re-enacting them while removing any anomalies in the process. The results of that audit will be the subject of consultation with Departments, offices and interested parties. As a result, the statute law revision unit is now in the process of drafting a Statute Law Revision Bill which identifies some 100 statutes to be repealed, subject to these consultations taking place, and a further 400 statutes that need further consideration as candidates for repeal and re-enactment, consolidation, restatement or other action.
>
> This is the first step in an ongoing drive to streamline and simplify Ireland's statute book. This exercise, in reducing the size of the statute book and bringing greater clarity to its contents, will make it easier for people to understand where they stand under the law. I am informed that drafting of legislation has not been subcontracted out by the office of the Attorney General to outside bodies or commercial firms.
>
> The Statute Law (Restatement) Act 2002 now makes it possible for the Attorney General to restate the law from related statutes and statutory

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instruments in one document. Because there is no change to the existing law, this can be done without having to prepare new Bills which would need to be debated in this House. This type of consolidation helps to make the statute book easier to use and understand. Two officers have been appointed by the Attorney General to perform functions under the Act. A programme of statute law restatement has been drawn up which gives priority to particular groups of connected statutes where restatement would improve the coherence of the law, for example, the Sale of Goods Act restatement.

The process of preparing restatements is extremely labour and time intensive and I understand the statute law revision unit is considering a number of policy options to improve the productivity of the process. Every effort will be made to restate as many groups of Acts as possible but for this year the priority of the unit will be to complete its work on pre-1922 legislation.[29]

Q Third Phase of Statute Law Reform (Revision)

A Third Phase of Statute Law Reform began when the functions of the Statute Law Revision Unit were transferred to the Law Reform Commission. Among the activities of the Law Reform Commission was to abandon Restatements and, instead, adopt a programme of publishing Revised Acts. A Revised Act is an administrative consolidation of an Act. It brings together in a single text all amendments and changes to an Act, making the law more accessible to all users. In Ireland, as in most other states, once an Act on a specific legal topic is enacted it is often amended subsequently, sometimes in significant respects. For example, the Planning and Development Act 2000 has been amended by almost 40 Acts since it was originally enacted. The costly exercise of assembling, reading and understanding the amendments made to the 2000 Act that would otherwise fall on all users of legislation (including those regulated by the 2000 Act, members of the public who want to look up the law, lawyers and their clients, and civil and public servants) is avoided by the availability of a consolidated Revised Act version of the Planning and Development Act 2000. 350 frequently used Acts are available as Revised Acts.

Since the Commission was given functional responsibility for this area in 2006, it has published over 300 Revised Acts. These comprise the following:

1. Around 135 pre-2006 Acts, such as the Planning and Development Act 2000, selected on the basis of the Commission's ongoing public consultation as to which Acts are the most frequently used; and
2. All Acts enacted from 2005 onwards that have been textually amended (with the exception of Finance Acts and Social Welfare Acts).

29 https://www.oireachtas.ie/en/debates/question/2004-03-10/11/?highlight%5B0%5D=consolidation&highlight%5B1%5D=statute&highlight%5B2%5D=law&highlight%5B3%5D=statute&highlight%5B4%5D=law&highlight%5B5%5D=reform&highlight%5B6%5D=reform.

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The Commission maintains all these Acts on an ongoing basis. In addition, because it is committed to publishing Revised versions of all Acts enacted since 2006 (with the exceptions mentioned), the list of published Revised Acts now comprises a significant percentage of the most used Acts that remain in force in the State. The Commission has published an alphabetical list of all Revised Acts[30] and a chronological list.[31]

R Revised Acts and Better Regulation

The availability of Revised Acts contributes to making the cost of doing business or consulting legislation in Ireland cheaper and more efficient. Revised Acts therefore have a key role to play in the wider context of principles of Better Regulation, which are listed in the Government policy on better regulation.[32] These include the principle of transparency, which aims to ensure that legislation is accessible to all, notably by making legislation available online: this is usually known as an e. Legislation strategy. Significant elements of this strategy are already in place.

S Working Methods – General

The Commission conducts its research by reference to a programme of law reform, drawn up by it, from time to time, where it sets out the projects to prioritise and work on. It may also work on the basis of specific requests or references from the Attorney General. The programme for law reform is required to be prepared by the Commission in consultation with the Attorney General for submission to the Taoiseach (Prime Minister), who then submits it to Government and, if agreed, lays it before the Houses of the Oireachtas (Parliament). The Attorney General can also refer areas of law for examination by the Commission. The Commission is required by Section 6 of the 1975 Act to report on its activities to the Attorney General at the end of each year. The Attorney General forwards the Report to the Taoiseach, who submits it to Government and lays it before the Houses of the Oireachtas.

T Programmes

To date the Commission has prepared five Programmes of Law Reform, each of which has, in accordance with the *Law Reform Commission Act 1975,* been approved by the Government and placed before the Houses of the Oireachtas (Parliament). A fifth programme is currently under consideration.

30 http://revisedacts.lawreform.ie/revacts/alpha.
31 http://revisedacts.lawreform.ie/revacts/chron.
32 https://www.taoiseach.gov.ie/eng/Publications/Publications_2013/Policy_Statement_on_Economic_Regulation_2013.pdf.

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In drawing up a programme, as well as its statutory duties, the Commission considers the following criteria: the importance of the change, the resources that are available and whether or not the Commission is the most suitable body to perform the work.

In deciding the importance of the change, the Commission assesses the problems with the current legislation and the impact that these problems have, as well as what the benefits to be gained from reform will be. A further criterion to be considered is the resources that are available to the Commission and how best to allocate its resources. Proposed projects need to be carefully weighed up to ensure that adequate funding is available to undertake reform. An important factor in this regard is the availability and knowledge of appropriate Commissioners to research and implement the suggestions. This in turn is related to the final criteria for the choice of projects, namely whether or not the Law Commission is the most suitable body to perform the work.

Interested bodies also contribute to the formulation of the Commission's programmes. For example, the Law Society of Ireland made a submission to the Commission for inclusion in its 5th programme.[33] The submission included: Probate, Administration and Trusts, Human Rights and the criminal justice system. The criminal justice system submissions included proposals on:

- disciplinary mechanisms in prisons,
- the defence of not guilty by reason of insanity,
- the need for legislation to protect the role of solicitors in police station detentions,
- the need to examine mandatory sentencing impacts and reform initiatives.

The submission set out the concerns of the Law Society and the benefits it considered would flow from the proposals being adopted.

U Working Methods – Particular

When the Commission is considering the examination of a particular area of law, it first establishes the scope of its work in conjunction with the relevant government department. It then researches the existing law in Ireland and other relevant states and researches whether work has been done in the State or elsewhere proposing reform in the subject concerned.

The Commission then draws up an issues paper and invites consultation either general or particular. The Reports usually contain draft Bills. The Commission's website enjoins interested parties to become involved in the process of law reform in Ireland by contacting it with suggestions or comments on any of the Commission's current reports, consultations or issues paper. A project by the Commission on Ireland's implementation of international agreements, for example, will involve the publication of a Discussion Paper that will examine the methodology and models used in the implementation of the State's international obligations, as well as Ireland's implementation practices, including a number of illus-

33 February 2018.

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trative case studies. The Discussion Paper differs from many other Commission publications in that it will be descriptive and will not contain recommendations for reform. Expected to be published in 2019.

V Good Example

A good example of the effectiveness of the Commission's approach to consultation is to be found in the Central Bank's Response to the Commission's paper on *Regulatory Enforcement and Corporate Offences,* where the Bank responds as follows:

> The Issues Paper asked if there are circumstances in the regulation of financial services in which civil financial sanctions would not be appropriate. There will be circumstances in which a civil financial sanction is not an appropriate regulatory response. In some instances, supervisory engagement will be more appropriate and, by contrast, in egregious circumstances a very robust response such as revocation of authorisation may be warranted. The appropriate regulatory tool and response must be considered in the particular circumstances and within the overall regulatory context.[34]

W Trade-Off between Implementation and Independence

The trade-off between implementation and independence is a topic that was analysed especially by Shona Wilson Stark in her monograph "The Work of the British Law Commissions. Law Reform Now?" In the UL, the 2010 Protocol between the Lord Chancellor and the Law Commission gave rise to concerns in the UK from this perspective. Geoff Mc Lay, former Law Commissioner in New Zealand, also wrote an article on such a trade-off in New Zealand.[35]

X At the Time of Writing This Article

At the time of writing this article, the Law Reform Commission had the following projects in hand:

1 A paper on Regulatory Enforcement and Corporate Offences. The paper addresses such issues as whether the supervisory and enforcement powers of the State's main financial and economic regulators (such as the Central Bank, ComReg, the Competition and Consumer Protection Commission and the Director of Corporate Enforcement) are adequate or need to be supplemented. Other issues include whether there are gaps in the criminal law, particu-

34 https://www.centralbank.ie/docs/default-source/publications/correspondence/general-correspondence/central-bank-of-ireland-response-to-the-law-reform-commission-issues-paper-%27regulatory-enforcement-and-corporate-offences%27.pdf.

35 *See also*, https://www.tandfonline.com/doi/full/10.1080/20508840.2017.1406440. The 2 volume Report resulting from that Paper will be published on 23rd October.

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larly in relation to fraud, that need to be filled in order to respond more effectively to serious wrongdoing by corporate bodies and whether there is a case for introducing an offence of reckless trading.

2 The Commission is involved in three connected activities under the heading Access to Legislation (Revised Acts, the Legislation Directory and the Classified List of In-Force Legislation). These activities derive from one of the Commission's statutory functions under the Law Reform Commission Act 1975 to keep the law under review and to conduct research with a view to reforming the law, which includes the revision and consolidation of legislation. The Commission is also engaged in a project to support the consolidation or codification of legislation.
3 A third project examines the principles that courts apply when deciding whether to impose a suspended sentence.
4 A fourth project involves reforming legislation relating to compulsory acquisition of land.
5 A sixth project involves the examination of the methodology for and models of implementing international obligations and the monitoring of and accountability for state obligations.
6 Finally, it has on hand a project to examine the law concerning court reports and the Defamation Act 2009.

Y Strengths

The strengths of the Law Commission have included the quality of the personnel. This in turn has given it a credibility which means that it is respected by the Houses of the Oireachtas (Parliament) and is seen as a national asset and not as a deep state. Also, fears that the Commission would be a job scheme for failed politicians have not been realised owing to the quality of the work of the Commissioners and their integrity.

The Commission has been well resourced, which means that it has been able to perform at a high level.[36] An additional factor in the success of the Commission has been the quality of law graduates, which has ensured that staffing has not presented a problem even though there are much greater financial rewards available in the private sector. Ireland was once known as the island of saints and scholars, and the fact that the Commission has no difficulty in recruiting and retaining high-quality personnel supports the view that at least the 'island of scholars' tag remains valid.

Ireland has been successful at managing its stock of legislation, though more could be done to bring legislation up to date when amended. Countries like Croatia and Slovenia publish consolidated texts once an Act is amended, a policy that makes legislation easier to read. Being a common law country, there has not been any move to codify statute law in the manner in which it is codified in civil law

36 Budget cut by 33 per cent in 2012, not since restored. This is better than being abolished, as was recommended by a report by an economist (2009).

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countries.[37] Nevertheless, Ireland is well served by publishers and writers of text-books, which helps users find and follow statute law.[38]

The Commission is value for money, according to a report in 2007 entitled *'Expenditure Review Initiative the Law Reform Commission'* ('the Report'). That Report noted:

> It is clear from what the stakeholders have said that the changes which have taken place in the way in which the Commission goes about its work are considered beneficial. The consultation process which now precedes the scoping of the project is clearly welcomed, as is the continued involvement in projects by legal and other professionals. It would seem clear, therefore, that not only from the international perspective but also domestically the continued allocation of public money to the Commission is justified.[39]

A further strength of the Commission noted by the Report was the capacity of the Commission to take on new challenges. Two such challenges were the taking on of the work on Statute Law Restatements and the preparation of the Chronological Tables (the indexes to the statutes) and its capacity to adopt new procedures such as:

> The work at the front-end of a project has been expanded and projects are now scoped in such a manner as to ensure that they meet the requirements of interested parties. The Commission decided some years ago that, as a matter of policy, there should be regular liaison with the Departments of State. This is reflected by, for example, the biannual meetings with the Department of Justice, Equality and Law Reform, which deal with both civil and criminal law. This ensures that the Commission remains aware of any relevant developments with the Department that might affect the Commission's ongoing work programme.

The Report further noted how:

> the objective of communicating with others is now more vigorously pursued with the Commission conducting extensive consultations at the beginning of projects, holding seminars to discuss Consultation Papers and draft recommendations and expanding its working groups to include many non-Commission members. The Commission is also more effectively promoting its own work with well-planned launches of its reports and the inclusion on its working groups of the relevant departmental officials.

37 For a discussion on this issue *see* J. O'Connor, 'The Law Reform Commission and the Codification of Irish Law', *Irish Jurist*, Vol. 9, 1974, p. 14.

38 *See, e.g.*, Donelan, King and Grogan, *Sale of Goods and Supply of Services Acts Annotated and Donelan, Energy and Mineral Resources Law*, 1985.

39 *Ibid,* note 9.

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Z Weaknesses

A weakness of the Commission, in my view, is that the staff are all lawyers and there are no social scientists. Interestingly, in introducing the Law Commission Bill to the Dail, Declan Costello, the then Attorney General, adverted to the need for the Commission to engage, from time to time, social scientists.[40] "The activity of reforming laws" requires particular "legal knowledge and expertise," but the necessary reform should not be confined to what he called 'lawyers' law'.

The employment of economists, sociologists or psychologists might help move the culture of the Commission away from traditional 'command and control' legal solutions to social problems. However, there is no real evidence to suggest that the Law Reform Commission is not well served by people who think outside the legal box.

Other OECD countries are looking more closely at such issues as the use of alternatives to command and control regulations, the use of behavioural insights for the development of public policies, the role of risk analysis in public, international cooperation on standard setting and the actual impacts of information technology on policymaking and law drafting.[41]

A further weakness is the lack of sufficient political will, time, and so on to bring some of its sensible suggestions into force. Law Reform is everyone's responsibility and no one's responsibility in Parliament, and there are not too many votes in dealing with the humdrum task of keeping the law (especially lawyers' law) up to date. On the other hand, reform of matters of morality in Ireland are of intense interest. A Web search with the phrase 'law reform in Ireland' throws up materials on abortion, divorce and prostitution but not too many hits on the reform of the rule in Haydon's case.

Note the point made earlier about a possible weakness in the drawing up of reform priorities, but it will need more research to determine with certainty that law commission reports bespoken, as distinct from approved of, by governments have a higher chance of adoption and enactment.

AA Opportunities

The Commission has done very good work since its establishment, giving it an opportunity to expand its activities further. One area of expansion could be in the provision of technical assistance, either directly, by providing services to developing or transitional countries, or indirectly, by promoting exchanges with or facilitating study visits by officials from China as well as from developing or transitional countries.

A further opportunity for the Commission is that it can continue to develop its role. The Commission was established initially with a view to addressing

40 https://www.oireachtas.ie/en/debates/debate/dail/1975-02-04/30/.

41 Legal Innovation. Available at: www.lawtechnologytoday.org/2016/11/a-legal-innovation-reading-list./ *See, e.g.*, also Law Reform Commission Report *on Harmful Communications and Digital Safety*, 2016.

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anomalies in the law and making the law more accessible. These objectives remain, but there are also wider objectives of reforming society through law reform and the objective of ensuring that law reflects society. The Report concluded that, in regard to the objective of law reform, the role of the Commission is of greater relevance today than heretofore.

AB Threats

There are no obvious threats to the Commission, but it is a soft target for budgetary cutbacks. It is also an obvious target for a reform-minded government. I would argue that case to the Commission could be run in a more cost-effective manner by merging it into the structure of the Office of the Attorney General. Integration could result in a reduction of expenses on the provision of library and IT services to both the Commission and the Office of the Attorney General. There is a case for integrating the Statute Law Revision functions and the management of the stock of legislation (making it available online, drafting consolidation and revision bills) into the work of the Office of the Parliamentary Counsel to the Government. Often the creation of these bodies and the allocation of responsibilities is a bit like the drawing of borders by Imperialist powers – a function of the personalities and politics of the day rather than with a coherent strategy in mind.

However, the 'merger' argument is based on the approach 'if I was going there, I would not start here', and to make that argument more credibly, it would be necessary to undertake a cost-benefit analysis of the options. My sense from reading the debates on the establishment of the Commission and the Report justifying its continued existence is that other options were not considered and that perhaps it is time to do so. My thinking is influenced by my current experience, which is developing a strategy for law reform in Botswana. However, the emphasis on law reform in Botswana is on improving the business-enabling environment and human rights, the latter being influenced by the fact that the project is UNDP funded.

Other issues, such as Statute Law revision and technical reforms of law, are less of a priority. I am also influenced by the fact that the Government of Botswana decided to establish a Law Revision in the Office of the Attorney General and not a commission for budgetary reasons and also to limit mission creep. Once established, organizations are very hard to abolish and are usually adept at making themselves indispensable.

This raises the question of whether a law commission has ever been closed down. The Canadian Law Reform Commission was abolished in 1992. The Ontario and British Colombia Commissions were closed in 1996 and 1997, respectively. The Canadian Law Reform Commission was re-established in 1996 and the provincial Commissions have been resurrected.

On the other hand, the reasons why law commissions survive is that they do a good job and that there is a need for a body in countries to take a strategic view

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of law reform issues. The case was well made by William H. Hulburt Q.C.,[42] who argued that

> … there still remains a place for separate law reform machinery activated by concerns which are different from those of the executive government of the day and which are also different from the concerns of government departments and agencies. That place includes the technical law, areas of social policy not fully occupied by existing government machinery, and areas of social policy in which the expertise and independence of the separate law reform machinery are useful to government. Failing separate law reform machinery, the necessary work of law reform is likely to be neglected and the law will become less and less suitable to change to conditions and values of society …

A similar view was expressed by the South African Deputy Minister for Justice and Constitutional Development, in the following way:

> As society is dynamic, there is a constant need for law reform. Law reform is a continuing task, especially in our day and age with its intricate and rapidly changing social climate hence the phenomenon of standing law reform agencies…[43]

However, these are better arguments in support of the need for law reform than arguments to persuade the proverbial cat skinner that there is more than one way to skin a cat. The arguments also assume that parliaments will never change and become engaged with strategies longer than their election cycles. Even the briefest readings of the debates in the UK or Irish parliaments on the establishment of law commissions illustrate the way parliaments work, and if the work of law reform was left to the legislative branch of government little reform would take place.

AC Law Reform Part of Better Regulation Policy

Law reform and statute law revision fall squarely into the policy on Better Regulation. That policy, as set out in the White Paper on *Regulating Better,*[44] decided that legislation should reflect the principles set out in Box 'B'.

42 Law Reform Commissions in the United Kingdom, Australia and Canada, Edmonton, Juriliber, 1986.

43 Advocate Johnny de Lange, MP, South African Deputy Minister for Justice and Constitutional Development, at the *Association of Law Reform Agencies of Eastern and Southern Africa's Law Reform Conference*, Cape Town. Cited in the Report at para. 139.

44 https://www.taoiseach.gov.ie/DOT/eng/Publications/Publications_Archive/Publications_2011/Regulating_Better_Government_White_Paper.pdf.

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Box 'B'

NECESSITY – is the regulation necessary? Can we reduce red tape in this area? Are the rules and structures that govern this area still valid?

EFFECTIVENESS – is the regulation properly targeted? Is it going to be properly complied with and enforced?

PROPORTIONALITY – are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?

TRANSPARENCY – have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?

ACCOUNTABILITY – is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?

CONSISTENCY – will the regulation give rise to anomalies and inconsistencies given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?

These principles also apply to the work of the Commission. Indeed, two of the principles, 'transparency' and 'accountability', are reflected by the website of the Commission, where it states that "to be successful, law reform must be an inclusive process".[45] Consequently, the consultation processes usually involve requests for written submissions, but occasionally meetings are also held.

The consultation process of the Commission ensures from the outset that projects are scoped with input of those in society concerned with the particular area of law so as to ensure that the project itself meets the requirements of society in that particular area. A good example can be found in the consultative process that took place in scoping the 'Law and the Elderly Project'.

AD Conclusion

This article addressed two dimensions of the work of the Law Reform Commission in Ireland: independence and implementation of its Reports. It also discussed these issues from three perspectives: substantive law reform, statute law revision and reforms of the form of statutes (drafting, consolidation and reprints) and considered the strengths and weaknesses of the Commission and the opportunities and threats faced by it.

There is no doubt that the Commission is independent to the extent that it draws up its own programmes and has intellectual independence in the opinions it forms. Evidence from a report on the value for money of the Commission suggests that it does a good job given the constraints imposed on it. The constraints

45 www.lawreform.ie/.

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are twofold: budgetary and control over whether its reports are implemented depend on the executive and legislative branches of government.

The Commission has moved with the times and has developed state-of-the-art consultation techniques and has shown itself to be politically astute in drawing up programmes that support rather than threaten sensitive souls in the executive and legislative branches of government.

Despite the fact that appointments to the Commission at the level of Commissioners are political choices, there is no evidence that the body has been used as a vehicle to give 'jobs to the boys or girls'. Ireland has been very well served by those who have acted as Commissioners and worked as staff in the Commission.

While a technical argument can be made that the Commission should be a division of the Office of the Attorney General or the Ministry of Justice, there is no compelling empirical evidence to support that argument. Indeed, in a conversation with Professor Weisbrot[46] on the margins of a recent workshop setting up a Law Reform Unit in the Office of the Attorney General, Botswana, he convinced me that his experience with Law Reform Commissions is that having a separate Commission gives Commissioners and staff the time to think strategically and that independent Commissions get far more information in consultations than bodies that are part of government.

The passage of time has necessitated the Commission's taking on more tasks and moving away from technical and arcane issues of 'lawyer's law' – tasks that it has undertaken with the political skill and intellectual acuity that such a body needs to survive in a world fraught with the risks of snap headlines and politically motivated decisions. Added to the fact that there is no end in sight to the need for law reform, there is ample evidence to suggest the Law Reform Commission is an institution that will endure to contribute free of political interference to the recommendation and implementation of many more reforms.

46 Emeritus Professor David Weisbrot was President of the Australian Law Reform Commission from June 1999 to November 2009; he was also the Acting President of the Commonwealth Association of Law Reform Agencies (CALRAs).

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