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Ireland's Legislature and Its Ability to Deliver Swift Policy and Legislative Response



Introduction

With the prospect of a no-deal, crash-out Brexit now seeming unlikely, the air of impending doom has eased, for now at least. As we lived through each news bulletin revealing the day's twists and turns of Brexit, it was easy to forget that we were in the midst of what the late Professor Ronan Fanning described as "Ireland's biggest policy test since World War II". Although, as he said, there was no threat of war, Professor Fanning saw Brexit as a great European crisis with global ramifications.

In Ireland, the threat of a no-deal Brexit forced the Government, businesses and wider society to assess the likely impact that a Brexit crash-out scenario would have had. In one sense, the prospect of Brexit was a real-life rehearsal of

the State's ability to adapt to and cope with a very significant crisis situation.

From a policy and legislative perspective, the Government's response to Brexit has been multi-faceted. Brexit preparations were underpinned by two Contingency Action Plans, which provided focus and impetus to many of the preparatory steps that had to be taken. Legislative measures are a core part of the State's response to Brexit.

Legislation as a Policy Tool

Legislation has always been a key policy tool of governments. It is often promised by politicians as a means of fixing every problem, to the point where some Ministers had in the past been

accused of over-legislating. At every election, political parties invariably promise to introduce multiple pieces of legislation to address society's ills. Abraham Maslow captured this tendency well when he wrote,¹ "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail".

However, in fairness to the current Government, the approach to tackling Brexit has had many dimensions – with legislation forming only part of the response.

Last February the Government published the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019 – a 91-section Bill that proposed a series of important changes to laws across a broad range of topics, including health, enterprise, electricity, education, taxation, financial services, the marine, transport, social welfare, employment, extradition and immigration. Enacted in a matter of weeks, the resulting Act made provision for arrangements that would apply in Ireland in the event of a no-deal Brexit, and also set out the measures that would apply in the event of an orderly Brexit. To provide additional flexibility, the Act placed a degree of reliance on the ability of Ministers to make Regulations and Orders to address the detail of some of the topics covered in the Act.

In addition to using legislation, the Government's Brexit preparations had a budgetary aspect. Last October's Budget comprised a package of more than €1.2bn to respond to Brexit. The Budget statement set out in stark terms the main financial allocations that would have to be made in the event of a hard Brexit. These included a €45m Transition Fund, a €42m Rescue and Restructuring Fund, an €8m Transformation Fund for Food and Non-Food Businesses, and on the list went. As is normally the case, certain aspects of the Budget were implemented later that evening by the passing of Financial Resolutions. On this occasion nine such Resolutions were debated and voted on. They included Resolutions

providing for an increase in the tobacco products tax, changes to the rates of mineral oil tax, changes to the carbon charge and changes to stamp duty rates. Being a most rare legislative creature, these resolutions are deemed to have "statutory effect" under s2 of the Provisional Collection of Taxes Act 1927.

Types of Legislation

We might ask ourselves what is the role and purpose of legislation. The general consensus is that legislation is vital in contributing to and maintaining order in society. As explained by the English philosopher and jurist Jeremy Bentham:



"The principal business of laws, the only business which is evidently and incontestably necessary, is the preventing of individuals from pursuing their own happiness, by the destruction of a greater portion of the happiness of others. To impose restraints upon the individual for his own welfare, is the business of education; the duty of the old towards the young; of the keeper towards the madman; it is rarely the duty of the legislator towards the people."²

There are two main categories of legislation: primary and secondary.

Primary legislation refers to Acts of the Oireachtas. Each Act begins its life as a Bill. A Bill is the vehicle by which the policies of the Executive (or other members of the Houses) are expressed and then debated and passed by the Dáil and the Seanad. A Bill that has been passed by both Houses is then presented to the President for signature. One of the features that greatly distinguish primary legislation from secondary legislation is its status under the Constitution, and directly related to that is the level of scrutiny to which each is subjected.

Secondary legislation is also referred to as Statutory Instruments. The term secondary legislation refers to a category of legislation that

¹ Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* (New York: Harper & Row, 1966), p. 15.

² Bentham, *The Works of Jeremy Bentham* (Vol. 1) (Edinburgh: William Tait, 1843).

comprises Regulations, Orders, Rules and Bye Laws. In contrast to Acts, Statutory Instruments are made by a Minister under authority conferred by an Act. A distinguishing feature of Statutory Instruments is that they usually require only the signature of the Minister to bring them into force. As a consequence, Statutory Instruments do not undergo any legislative process and therefore are not typically subjected to any form of parliamentary scrutiny.

Primary Legislation

The legislative process for Bills centres around the Houses of the Oireachtas – the Dáil and the Seanad. In times past, governments drafted their legislation with little or no input from those who would be most affected by it. One of the lasting effects of a past government's Better Regulation initiative of some years back was the occasional practice of publishing Bills in draft form (often referred to as “heads” or “general scheme”) and then engaging in a process of consultation on the content. This practice has now evolved into a more formalised process of pre-legislative scrutiny. This process facilitates the consideration of a proposed Bill by an Oireachtas Committee. Invariably the Committee will invite interested stakeholders to make submissions, and also presentations on the proposed Bill. At the end of the pre-legislative scrutiny the Committee produces a report that may recommend that changes be made to the draft Bill.

Once the content of a Bill has been settled by the Minister and his or her officials, it is initiated in either the Dáil or the Seanad. Irrespective of which House a Bill begins its journey in, every Bill must be passed by both Houses to become law. In each House a Bill must go through five Stages: (1) Initiation, (2) Second Stage, (3) Committee Stage, (4) Report Stage, and (5) Final Stage. In reality, meaningful contributions to a Bill can be made by members of the Dáil and Seanad only at stages (2), (3) and (4).

First stage relates to the publication of a Bill. When a Bill is undergoing Second Stage the Minister presents the Bill to the House by making a speech explaining its purpose

and outlining some of its key provisions. The spokespersons from each of the main opposition parties, as well as other members of the House, then respond. The opposition generally use Second Stage as an opportunity to highlight what it views as flaws in the Bill and to signal its intent to table amendments to it. Once Second Stage has concluded, the Bill progresses to Committee Stage. Proposed amendments are then tabled by the Minister, as well as members of the opposition, and debated. In practice, what tends to happen at Committee Stage is that amendments tabled by the Minister are accepted and amendments tabled by members of the opposition are either withdrawn or rejected. Votes can be called on individual amendments. Once Committee Stage concludes, the Bill progresses to Report Stage, where there is a further opportunity to debate amendments. Once a Bill completes Report Stage, it moves to Final Stage, which is largely a formality.

Once all stages have been completed, the Bill is referred to the other House, where it goes through all of the same stages once more. Once a Bill has completed its journey through both Houses, it is printed on vellum and is presented to the President for signature. At that point the Bill becomes an Act. If the Act does not contain a commencement provision, it will come into full effect once it has been signed by the President. However, where the Act contains a commencement provision, the timing of its coming into effect will be in accordance with the commencement provision.

The process described above is applicable to all Bills, whether presented by government or opposition, but most non-government Bills never become law. A member of the Dáil or Seanad who is not a member of the government may seek the leave of either House to introduce his or her own legislation – referred to as a private members' Bill. Usually a private member's Bill will seek to address a topic that is of concern to a TD or Senator or to his or her constituents. Traditionally, the permission of the Dáil or the Seanad to initiate a private member's Bill has been granted without any

difficulty. However, once a private member's Bill has been published, it can be difficult for the private member to be allotted time to have the Bill debated at Second Stage.

In the past, governments were much more likely to oppose the progress of Bills at Second Stage, and were happy to use their vote to deny the passage of such Bills. However, in more recent times, governments have become a little more accommodating towards private members' Bills. It would not be unusual for the current minority government to "not oppose" or "accept the principles" of a private member's Bill. When the government adopts this stance, it enables the private members' Bill to pass Second Stage. But this is invariably a hollow victory for the private member, as the challenge then becomes one of securing time to have the Bill considered at Committee Stage – and not many have achieved this.³ The current Government has resorted to stopping Bills from proceeding past Second Stage through the use of a device known as a "Money Message". The Money Message requirement derives from Article 17.2 of the Constitution⁴. The effect of this is that a Private Members' Bill which involves the appropriation of public moneys cannot proceed beyond Second Stage unless a Money Message has been provided by the Government. It is for the Ceann Comhairle of the Dáil to determine whether a Money Message is required and the decision to grant it rests with the Government⁵.

Duration of the legislative process

It is difficult to estimate the length of time that it will take a government Bill to go through the Houses. The pace of the legislative process depends on a number of factors, such as the degree of priority afforded to the Bill by the government; the complexity or sensitivity of the subject-matter of the Bill; the number of

opposition and government speakers wishing to contribute to the debate; and the number of amendments that have been tabled. It is for this reason that the duration of the legislative process can vary greatly.

Take the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019 as an example of the pace of the legislative process – this Bill was debated over five days in the Dáil and just two in the Seanad. This is a remarkably short period of time for a 91-section Bill spanning a wide range of areas.

Legislation tends to be rushed for a number of reasons, such as to remedy an emergency that has arisen, to ensure the passage of the legislation before the end of a parliamentary session, or simply out of political expediency. One means of rushing legislation is to leave little or no time between the conclusion of one stage and the beginning of another. In some instances this can involve the taking of all stages consecutively on the same day in one or both Houses. For example, the Insurance (Amendment) Bill 2018 was passed by the Dáil having been debated there for only a number of hours spread over two days. When the Bill was before the Seanad, it passed all stages in less than one hour. Another device which can be used to rush a debate can involve the application of the parliamentary guillotine.

The application of the parliamentary guillotine can have a significant bearing on the duration of the legislative process. The effect of the parliamentary guillotine is to impose a time-referenced deadline on a stage of the debate on a Bill, at which time the debate will be brought to an end. If the guillotine is applied at Committee or Report Stage, all amendments

³ Owing to the unkind environment for private members' Bills, only a handful have ever succeeded in becoming law – one being the Construction Contracts Bill tabled by the late Senator Feargal Quinn in 2010, which was enacted three years later as the Construction Contracts Act 2013.

⁴ Article 17.2 provides: Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.

⁵ The use of Money Messages as a means of halting the progress of Private Members' Bills has become an issue of contention in recent times. On 6 November 2019, four opposition TDs secured permission from the High Court to initiate a Judicial Review against the decision of the Ceann Comhairle's to refuse to allow a vote on changing Dáil Standing Orders so as to prevent the Government from blocking the progress of private members' Bills.

to the legislation that have been tabled by the government but not yet reached will be deemed to be accepted, and all amendments tabled by the opposition but not yet reached will be deemed to have been rejected. In this way the guillotine can be a fairly blunt tool to bring about the speedy passage of legislation. It has rarely been used by the current government as the imposition of a guillotine can be secured only through a majority vote.

The controversial Judicial Appointments Commission Bill 2017 was, at the behest of members of the opposition, debated at Committee Stage in the Seanad for 38 days spanning a period of 12 months. The extended nature of Committee Stage in the Seanad caused the Government to attempt to impose a guillotine. The attempt failed, and the Taoiseach, speaking in the Dáil, did not hide his frustration at the length of time consumed by the Seanad debate on the Bill:



“There comes a time when the use of a guillotine or limiting debate is merited – and that is when debate has gone on for four, five or six days and people are just repeating themselves or deliberately using filibustering tactics to prevent the majority from having its view.”⁶

Secondary Legislation

Very few Acts form a standalone, definitive statement of the law on a particular topic. Invariably Acts are supplemented by secondary legislation. So to fully understand the law on a given topic, it is sometimes necessary to look at the associated secondary legislation.

In the region of 30,000 pieces of secondary legislation have been made since the foundation of the State, and this body of law is growing at the rate of approximately 600 each year. Setting out the law in the form of a Statutory Instrument is inherently attractive to Ministers and their officials as it spares them the time and commitment that would otherwise

be required if the same provisions were to be set out in a Bill, which would then have to be steered through the Dáil and the Seanad. For a Minister, the most appealing aspect of secondary legislation is that it can be brought into force by the stroke of a Ministerial pen. However, Statutory Instruments are subject to certain limitations.

Firstly, a Statutory Instrument must derive its authority from the principles and policies of its parent legislation – in other words, the Act under which the instrument has been made. Article 15.2.1 of the Constitution makes clear that “[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas”. Therefore the power to make Statutory Instruments takes the form of a delegation, by the Houses of the Oireachtas, of that law-making power to a Minister. That delegation and its scope must be spelled out in an Act. However, considerable care must be taken when exercising the delegated power to make secondary legislation.

The “principles and policies” test derives from a Supreme Court case – *Cityview Press v An Comhairle Oiliúna*⁷ – in which the court made clear that for it to be permissible, secondary legislation must not venture into the territory of introducing new principles or new policies beyond those already expressed in its parent Act. The effect of the decision in *Cityview* is that primary legislation must encompass more matters of detail, and in particular, the legislature has to take great care to articulate adequately the principles and policies of any secondary legislation that is envisaged.

Another restriction on the effectiveness of secondary legislation is that, save for one main exception, a Statutory Instrument cannot amend an Act. The exception relates to Statutory Instruments that are used to transpose EU Directives into Irish law. These Statutory Instruments are made under s3 of the European Communities Act 1972. More than 200 such Regulations were made during 2018. Transposing

6 Dáil Debates, 17 April 2019; see <https://www.oireachtas.ie/en/debates/debate/dail/2019-04-17/18/>.

7 [1980] IR 381.

EU laws by way of Statutory Instrument is the preferred approach of Ministers and their civil servants as it avoids the need to have the proposed legislation debated and scrutinised in the Dáil and Seanad. For this reason, it is a form of legislation that is conducive to greater speed and efficiency than would apply if primary legislation were always required.

Irish Statute Book

Once enacted or made, primary and secondary legislation form part of the collective body of legislation that governs us – the Irish Statute Book. The Irish Statute Book is a significant body of law, now consisting of more than 3,000 Acts and approximately 30,000 Statutory Instruments. To this, our legislature adds approximately 40 Acts and 600 Statutory Instruments each year.

For a considerable period of time, the Irish Statute Book has been in a state of disarray. Legislation has not been accessible in its truest sense. The degree of inaccessibility of our legislation, and in turn the Statute Book, can be attributed to a number of factors, principally, the approach adopted to publishing legislation and the approach used to amend it.

The publication of legislation has traditionally been viewed as being ancillary to the task of enactment. Once legislation is enacted or made, it is published in its “as enacted” or “as made” form. Where a new law amends a pre-existing law, save for some rare exceptions, there has not been a tendency to publish the law in its “as amended” or “in force” state. Very few Acts form a standalone, definitive statement of the law on a particular topic. So to understand the law on a given topic, it is often necessary to extend the search to cover other acts as well as secondary legislation.

Anyone who has tried to identify the current state of the law by trawling through various pieces of legislation will be well aware of just how challenging a task it can be. Those difficulties have been nicely captured by Harman LJ:⁸



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

For a long time, successive governments and public servants in Ireland seem to have taken the view that once a law is enacted or made, all that remains is to publish and implement it.

Thankfully the situation outlined above is improving considerably, even if slowly. The Law Reform Commission has been busily progressing with its Revised Acts initiative. A Revised Act is an administrative consolidation of an Act, setting out the principal Act and all amendments made to it in a single document. This makes legislation much more accessible for everyone.

Since being conferred with responsibility for Revised Acts,⁹ the Law Reform Commission has published more than 350.¹⁰ At this point, the Commission has produced a Revised Act in respect of approximately 150 pre-2005 Acts. The Commission has selected Acts for publication in Revised form having identified those Acts that are most frequently used. It has also produced Revised versions of all Acts enacted from 2005 onwards that have been textually amended (with the exception of Finance Acts and Social Welfare Acts). Collectively, the Revised Acts produced by the Commission constitute a significant percentage of the most-used Acts that are in force in the State.

Crucially, the Commission has committed to maintaining all Revised Acts on an ongoing basis. With spartan resources, through its Revised Acts project, the Commission has

⁸ In *Davy v Leeds Corporation* [1964] 1 WLR 1218 at 1224.

⁹ The seed for Revised Acts stems from the concept of Statute Law Restatements – also a form of administrative consolidation, which was advanced by Michael McDowell SC when he was Attorney General. See the Statute Law (Restatement) Act 2002.

¹⁰ See <http://revisedacts.lawreform.ie/revacts/alpha>.

managed to make significant progress towards making legislation much more accessible.

Conclusion

In spite of the electorate's having delivered a Dáil whose arithmetic was not conducive to a coalition government, the confidence-and-supply arrangement between Fine Gael and Fianna Fáil has delivered a stable government for three-and-a-half years. Through a combination of Fianna Fáil abstention and active support in certain key areas, the Fine Gael-led Government has managed to pass the policy and legislative measures that formed a key part of Ireland's readiness for Brexit.

Whether Brexit occurs in an orderly or a disorderly way, the functioning of the State will undoubtedly require further legislation to address issues or challenges that will inevitably arise. Where problems emerge and new legislation is needed, the Government, aided by the required level of political unity across the Houses, is capable of legislating swiftly to address any gaps that emerge. The power of Ministers to act quickly in making Regulations and Orders is also a valuable tool in providing a legislative response to unforeseen issues that are likely to arise.

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The Policy Development and Legislative Process

