



Provided by the author(s) and NUI Galway in accordance with publisher policies. Please cite the published version when available.

Title	A Flood of Light: Comments on the Interpretation Act 2005
Author(s)	Kennedy, Rónán; Donlan, Seán
Publication Date	2006
Publication Information	Kennedy,R. & Donlan, S. (2006) 'A Flood of Light: Comments on the Interpretation Act 2005' 6(1) Judicial Studies Institute 92
Publisher	Judicial Studies Institute
Item record	http://hdl.handle.net/10379/1519

Downloaded 2020-11-24T21:53:52Z

Some rights reserved. For more information, please see the item record link above.



**A FLOOD OF LIGHT? :
COMMENTS ON THE
INTERPRETATION ACT 2005**

DR. SEÁN PATRICK DONLAN* AND RÓNÁN KENNEDY†

I. INTRODUCTION

The Interpretation Act 2005 consolidates previous legislation and contains some new provisions inspired by a Law Reform Commission report. These may bring about a subtle but significant change in the methods of statutory interpretation. However, the Act is silent on the permissibility of extrinsic aids in interpretation, particularly parliamentary debates, traditionally prohibited by the exclusionary rule. This should indicate that the prohibition continues but an examination of the debates on the 2005 Act shows that the Oireachtas does not have a clear understanding of practice in the courts.

This article considers the impact of the Act, tracing the development of the traditional and modern approaches to interpretation. Placing these issues in a comparative context, it pays particular attention to the use of parliamentary history in light of English developments, European trends and recent Irish case law. It concludes that the Act requires the courts to take a more purposive approach to the interpretation of legislation but that in this instance, because the Oireachtas misunderstood practice, their desire to permit use of parliamentary debates is not reflected in the language of the Act.

* School of Law, University of Limerick. B.A. (Houston), J.D. (Louisiana), Ph.D. (Dublin).

† School of Law, University of Limerick. B.Comm. (N.U.I.), H.Dip.Sys.Anal. (N.U.I.), LL.B. (NUI, Galway), B.L., LL.M. (N.Y.U.). Our thanks to The Hon. Mr. Justice Ronan Keane, Mr. Brian Hunt and our colleagues Mr. Ray Friel and Dr. Nathan Gibbs for their helpful comments.

II. STATUTORY INTERPRETATION

A. Historical Overview

Methods of statutory interpretation in the English-speaking world have varied considerably, against a background of diverse views about the institutions of government.

Viewed as a whole, the canons of interpretation represent a position taken by the judiciary on their constitutional role in relation to those who establish the political programme, those who have to carry it out, and those affected by it. The interests of these groups may well conflict, so that the canons adopted by the judges will effect a balance between them.¹

Modern statutory construction is thus conducted on the basis of both formal statutory rules and judicial principles and informal, often implicit and unarticulated, assumptions.²

Judicial and legislative powers were fused for much of early English history. Law resided in the ‘common learning’ of the Inns and the courts. Most important for the future were the royal courts in which a law common to the kingdom evolved. For centuries, both judiciary and legislature were seen to *declare* the existing law rather than *make* it.³ For the same reason, statutes were read in light of pre-existing law, an assumption common to both legislators and judges. Medieval legislation was broadly phrased and both judicial and legislative reporting was limited. There were thus few authentic texts. Over time, a “new concept of legislation [and] a new reverence for the written text” emerged.⁴

¹ Bell and Engle, *Cross on Statutory Interpretation* (3rd ed., 1995), p. 4.

² For discussion of legal theory focusing on legislation, see Sunstein, “Norms in Surprising Places: The Case of Statutory Interpretation” (1990) 100 *Ethics* 803, Waldron, “The Dignity of Legislation” (1995) 54 *Maryland Law Review* 633 and Wintgens (ed.), *Legisprudence: A New Theoretical Approach to Legislation* (2002).

³ Like legislation itself, judicial “opinions were not sources of law, but simply evidence as to what the law was.” Baker, *An Introduction to English Legal History* (3rd ed., 1990), p. 227.

⁴ Baker, *An Introduction to English Legal History* (3rd ed., 1990), p. 237.

Debates about the powers of monarchy, and consequently the legislature and judiciary, came to a head in the seventeenth century. Common lawyers aligned themselves with parliament in defence of the ‘ancient constitution’ against both the king and England’s numerous other jurisdictions. With the ‘Glorious Revolution’ and the Bill of Rights 1689 came a restored and more limited monarchy. Although parliamentary supremacy was in the ascendant in the eighteenth century, Blackstone continued to articulate a theory of both unlimited parliamentary power and a judiciary that acted as “oracles of the law”.⁵

The traditional methods of statutory construction are well-known, if not always clearly differentiated. These are not strictly speaking *rules*, but are rather “general principles which guide the function of interpretation”.⁶ The ‘mischief rule’ was articulated as early as the sixteenth century (in *Heydon’s Case*⁷). This involved an analysis of existing law or social conditions to determine the problem the statute was intended to remedy. While this would seem to be a purposive approach necessitating a look at parliamentary history, it was frequently used by the courts to narrow the effect of legislation. It focused on legislative intent at only the most general and ‘objective’ level.

Where clearly authentic, statutory text has always been significant to judicial interpretation. The ‘literal rule’ gives the words of the statute their literal, plain, or ordinary meaning. The approach was important to legal certainty and honoured (at least in appearance) the increasingly central role of parliament. The necessary corollary was the ‘exclusionary rule’, the judicial principle barring the use of parliamentary debates. The rule arguably emerges from the seventeenth century and concerns about breaching the parliamentary privilege of free speech under

⁵ Blackstone, *Commentaries on the Laws of England: Book the First* (1765), p. 69.

⁶ Byrne and McCutcheon, *The Irish Legal System* (4th ed., 2001), p. 471. These have been presented as consistent with HLA Hart’s ‘rules of recognition’ as well as Dworkin’s ‘principles’ used in his critique of Hart. Cf. Bell and Engle, *Cross on Statutory Interpretation* (3rd ed., 1995), p. 42 and Freeman, *Lloyd’s Introduction to Jurisprudence* (6th ed., 1994), p. 1291.

⁷ (1584) 3 Co. Rep. 7a; 76 E.R. 637.

the Bill of Rights. Its formal expression is typically dated to Willes J. in *Millar v. Taylor* (1769).⁸

The literal approach was, however, supplemented by the ‘golden rule’. This permitted courts to avoid a literal reading when it would lead to an absurdity or, in some formulations, an injustice. This did not undermine parliament but recognised that it could not have intended such a result.

These approaches were influenced by the absence of reliable parliamentary reporting. Like the incomplete nature of judicial reports, this continued well into the nineteenth century and was an especially strong argument against the use of parliamentary materials. Private compilations of laws, slip versions of statutes and the brevity of parliamentary journals left judges with very little to work with.

On the back of critiques of the common law exemplified by Bentham, the nineteenth century saw legislative and judicial reporting improve, precedent harden into *stare decisis*, the absorption of non-common law courts into the common law, and the courts restructured with professional Law Lords at their head. Each of these came in the name of legal certainty and led to the triumph of positivism, both principled and practical, in England. This positivism was linked, too, to ideas of popular sovereignty, parliamentary supremacy, and rule of law considerations. With this came a shift towards the strict textualism and judicial formalism that still characterises the English legal system.⁹

⁸ The rule, “however, was not followed by Willes J. himself, as he subsequently referred to the bill’s history, holding that the original preamble was ‘infinitely stronger’. Consequently, the very founding case on the exclusionary prohibition seems to be of somewhat dubious origin.” Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 *McGill Law Journal* 287, 292-293.

⁹ “Unlike substantive reasons, which look to the rights of the parties of the parties to a case or the consequences of a judicial decision, formal reasons in law depend for their validity on the institutional status of the rule from which they originate. When a choice must be made between competing reasons, an applicable formal reason has in the normal run of things a mandatory force (mandatory formality). It will prevail over any contrary substantive reason that would otherwise decide the case. High mandatory formality, when it genuinely exists, makes the law more certain and predictable.” Goodall, “What Defines the Roles of a Judge?: First Steps Towards the Construction of a Comparative

For perhaps two centuries, statutes have been by far the most important source of law in common law systems. The extraordinarily detailed statutes of English law reflect an attempt by parliamentary draftsmen and the judiciary to promote legal certainty and reduce judicial discretion in the application of statutes. This has not always been successful, however, and much contemporary opinion supports the use of ‘plain language’ to promote these aims.¹⁰

Even with the rise of theories of parliamentary sovereignty in England, case law interpreting legislation has been treated in much the same manner as common law precedent. Statutory interpretation comes with the gloss of previous court decisions. Justification for this, especially with a written constitution, must rely on a different foundation than that of precedent in areas developed by the courts of common law. There remains a sense in which legislation is inchoate until judicial interpretation occurs.¹¹

B. Literal and Purposive Interpretation

The majority of legislation does not give rise to queries regarding the intention of the legislature. When the issue arises, the various methods of interpretation guide or restrain the courts to varying degrees. Each in different ways attempts to arrive at legislative intent.

Both the ‘intention’ and ‘purpose’ of the legislature are problematic concepts.¹² Beyond the normal difficulties associated with any interpretation, attributing a genuinely common intent or purpose to a diverse body of individuals is unrealistic. This is particularly true in the case of legislation. Deputies may vote for a

Method” (2000) 51 N.I.L.Q. 535, 537-538. The author also makes a number of preliminary observations about Ireland.

¹⁰ See Law Reform Commission, *Statutory Drafting and Interpretation: Plain Language and the Law* (L.R.C. 61 – 2000), pp. 70-75. See also generally the Law Reform Commission’s *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (C.P. 14 – 1999).

¹¹ See Munday, “The Common Lawyer’s Philosophy of Legislation” (1983) 14 *Rechtstheorie* 191-203.

¹² See, e.g., MacCullum, “Legislative intent” (1965-1966) 75 *Yale Law Journal* 754 and Vogenauer, “What is the Proper Role of Legislative Intent in Judicial Interpretation?” (1997) 18 *Statute Law Review* 235.

bill for wider political purposes rather than support for the actual text.

In the initial evaluation of the statute, the literal ‘rule’ is still the preferred method. This is complicated by what H.L.A. Hart called the “open texture” of language.¹³ While this approach can be very narrowly literal, it is perhaps better seen as a ‘plain’ or ‘ordinary’ meaning approach to statutory text.¹⁴ As such, it need

not imply that the judge attributes a meaning to the words of a statute independently of their context or of the purpose of the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used.¹⁵

The approach is qualified by an exception for technical terms-of-art (including legal) which are to be given the meaning specific to that field and may be liberal enough to include the text of the Act as a whole. This approach is commonly accepted here but even in its more robust expression has been strongly criticised in other jurisdictions.¹⁶

C. Aids to Interpretation

There are a number of additional aids available to the court. These are typically based on linguistic or institutional considerations and include general presumptions, maxims, and intrinsic and extrinsic material aids to interpretation.

¹³ Hart, *The Concept of Law* (2nd ed., 1994), p. 128. See also pp. 127-136.

¹⁴ See Summers and Marshall, “The Argument from Ordinary Meaning in Statutory Interpretation” (1992) 43 N.I.L.Q. 213.

¹⁵ Bell and Engle, *Cross on Statutory Interpretation* (3rd ed., 1995), p. 32.

¹⁶ “In reality, the ‘plain meaning’ *can be nothing but* the result of an *implicit process* of interpretation.” Justice L’Heureux-Dube, dissenting in *Québec Inc. v. Québec (Régie des permis d’alcool)* [1996] 3 S.C.R. 919 at 997 (emphasis in original). See also Sullivan, “Statutory Interpretation in the Supreme Court of Canada” (1998-1999) 30 *Ottawa Law Review/Revue de droit d’Ottawa* 175 and Zander, *The Law-Making Process* (1999), pp. 121-30.

The general presumptions which apply to legislation include: constitutionality; compatibility with EU and international law; that all words in a statute have meaning; that those meanings are updated with time (the principle of updated construction or dynamic interpretation); that the legislature intends to make clear changes in the law; that penal, revenue, and similar statutes are to be strictly construed; and that statutes are not to have retroactive or extra-territorial effect.

There are also numerous legal maxims, for example, *noscitur a sociis* (a thing is known by its associates); *generalia specialibus non derogant* (“a statute containing general subject matter is taken not to affect one which applies to a specific topic [unless it says so expressly]”); and *expressio unius est exclusio alterius* (to express one thing is to exclude another).¹⁷

Finally, there are material aids specific to the particular provision or enactment being interpreted, generally texts with definite relevance to the issue.

Intrinsic or internal aids are “any material which is published with an Act, but is not a substantive provision of the Act”.¹⁸ This includes the long and short titles, the preamble, cross-headings, marginal notes, and punctuation. The last three are not always considered as they are not under the direct control of the Oireachtas. The 2005 Act generally excludes cross-headings and marginal notes from consideration in construing an enactment, despite the Law Reform Commission recommending that this be permitted.¹⁹ There is a limited exception under section 7 of the Act, discussed below.

Extrinsic or external aids that go beyond the four corners of the statute are much broader, being “any material which sheds light on the background of the enactment of a particular statute”.²⁰ These can serve to highlight the problem the legislation is intended to address or the solution it offers.²¹ As a matter of judicial policy, some extrinsic aids are accepted by the courts.

¹⁷ Graham, “In Defence of Maxims” (2001) 22 *Statute Law Review* 45.

¹⁸ L.R.C. 61 – 2000, p. 38.

¹⁹ L.R.C. 61 – 2000, p. 47.

²⁰ L.R.C. 61 – 2000, p. 48.

²¹ L.R.C. 61 – 2000, p. 48.

Prior statutes have long been permissible extrinsic aids.²² Deciding which legislation met this requirement is typically left to judges, although it may be expressly stated in the statute. Law Reform Commission reports are also generally accepted.²³ Legislative history, including amendments made to the text of a Bill in its progress through the Oireachtas, might also be included here. Numerous other extrinsic aids continue to be prohibited by the exclusionary rule. Most notably, Oireachtas debates are generally excluded.

The various approaches to the interpretation of legislation and the aids in that interpretation make clear that the process is neither simplistic nor mechanical.²⁴

D. The Exclusionary Rule

The exclusionary rule is a judicial policy which has not always been consistently applied.²⁵ A number of rationales have been put forward for it.²⁶

Some of these rationales relate to the relationship between the courts and parliament. First, the history of the Act is not known because it is not properly reported (a rationale which no longer applies). Also, to use parliamentary debates would be to admit parol evidence to construe a record (in its technical meaning). Further, Article 9 of the Bill of Rights (1689) states that “the freedom of speech, and debates and proceedings in parliament, ought not to be impeached or questioned in any court of place out of parliament”. Finally, the requirement of comity between the two branches of government should preclude the courts from discussing proceedings in parliament.

²² L.R.C. 61 – 2000, p. 55.

²³ L.R.C. 61 – 2000, pp. 51-53.

²⁴ For a ‘realistic’ note, see Llewellyn, ‘Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed’ (1950) 3 *Vanderbilt Law Review* 395.

²⁵ Oliver, “Pepper v Hart: A Suitable Case for Reference to Hansard” 1993 *Public Law* 5, 7.

²⁶ The summary that follows is based on Bennion, “Hansard – Help or Hindrance? A Draftsman’s View of *Pepper v. Hart*” (1993) 14 *Statute Law Review* 149, 151-155. See also Vogenauer, “A Retreat from *Pepper v Hart*? A Reply to Lord Steyn” (2005) 25 *Oxford Journal of Legal Studies* 629, 631-633.

There are also practical arguments. First, allowing reference to parliamentary debates in court might significantly alter legislative practice. Members of parliament might be more inclined to embed statements about legislation in debates in the hope that those comments could come to control the statute's meaning. Second, the use of these materials would require additional time and skill from practitioners. This would, in turn, increase the cost of litigation. Third, the material found may not be a reliable indicator of the meaning of an enactment. Finally, even if instructed to maintain fidelity to statutory text, the use of parliamentary history will tend to undermine the authority of the text.

Perhaps the strongest argument for the exclusionary rule is that the text is the paramount document which the courts, lawyers and citizens consult in attempting to ascertain the intention of the legislature. This argument is thus rooted in the judicial policy and legislative acquiescence of at least a century.²⁷ In several common law jurisdictions, however, the trend has been towards the relaxation or elimination of the rule.

III. PARLIAMENTARY HISTORY AND THE EXCLUSIONARY RULE

A. Other Common Law Countries

This is most obvious in the United States. There, as a result of historical and institutional factors, contemporary statutory interpretation routinely includes both the literal approach to construction *and* the use of parliamentary history to discover legislative purpose.²⁸

The exclusionary rule was important in constitutional and statutory interpretation for much of America's first century.²⁹ That began to change, at least at the federal level, as early as

²⁷ For additional arguments for and against the rule, see Lord Lester, "*Pepper v. Hart Revisited*" (1994) 15 *Statute Law Review* 10, 18-20.

²⁸ Eskridge et al., *Legislation and Statutory Interpretation* (2000), p. 289.

²⁹ Baade, "'Original Intent' in Historical Perspective: Some Critical Glosses" (1991) 69 *Texas Law Review* 1001.

1860.³⁰ The use of parliamentary history was made explicit in 1892 in *Holy Trinity Church v. U.S.*³¹ In the early twentieth century, American legal realism and political progressivism further undermined confidence in literalism and judicial formalism. The exclusionary rule was formally repudiated in 1940 in *United States v. American Trucking Associations*.³² This was linked to the jurisprudential thought of Lon Fuller and the ‘legal process’ school of H.M. Hart and A.M. Sacks. Each emphasised the search for legislative purpose and highlighted the collaborative role of the judiciary in the development of statutes.³³

In addition to its history, the American relaxation of the exclusionary rule is related to divergent constitutional structures, institutional and intellectual differences corresponding to these structures, and cultural differences. American institutions, and consequently politics, are far more fragmented. Perhaps most importantly, the American separation of powers differs markedly from a parliamentary system in which the Executive and Legislature are effectively fused.³⁴ The role of jurisprudence, doctrinal writing, formal codifications and model laws in the United States is also far greater. English law is more reliant on legislation and the result is that, in general, “English judges tend to adopt a more textual, literal approach, while American courts tend to take a more purposive and, therefore, substantive, approach.”³⁵ Such differences are related to, among other things,

³⁰ Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 *McGill Law Journal* 287, 298. The availability of legislative records at the state level varies considerably.

³¹ 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892).

³² 310 U.S. 534, 60 S. Ct. 1059 (1939).

³³ See Eskridge, ‘Interpretation of Statutes’ in Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (1999), pp. 200-208. Fuller’s “The Case of the Speluncean Explorers” contrasted a series of then contemporary judicial styles in (1949) 62 *Harvard Law Review* 616. Cf. Cahn, Calmore, Coombs, Green, Miller, Paul, and Stein, “The Case of the Speluncean explorers: Contemporary proceedings” (1993) 61 *George Washington Law Review* 1754.

³⁴ See, e.g., Breyer, “On the Uses of Legislative History in Interpreting Statutes” (1992) 65 *Southern California Law Review* 845, 871.

³⁵ Atiyah and Summers, *Form and Substance in Anglo-American law* (1987), pp. 100-101. See especially chapters 4 and 11. See also Posner, “Reply: The

more precise English drafting, the greater likelihood of legislative correction and the value placed on formal legal certainty.³⁶ In recent decades, American “[l]egislation scholarship has become cacophonous.”³⁷ A wide variety of theories giving different values to statutory intent, purpose, and text have been expressed amongst American jurists, judges, and legislators. A decade ago, it was stated that

[t]he three main theories today emphasize (1) the actual or presumed intent of the legislature enacting the statute (“intentionalism”); (2) the actual or presumed purpose of the statute (“purposivism” or “modified intentionalism”); and (3) the literal commands of the statutory text (“textualism”).³⁸

In general, the use of parliamentary history is not unusual. Statutory interpretation “includes consideration of the common law, legislative history, and agency interpretations even when the statutory text has an apparent plain meaning... [but] these ... usually do not trump a clear text”.³⁹

In recent years a renascent textualism associated with Supreme Court Justice Scalia has emerged.⁴⁰ This, too, has

Institutional Dimension of Statutory and Constitutional Interpretation” (2003) *Michigan Law Review* 952, 954 (comparing formalistic and pragmatic judicial roles) and Goodall, “What Defines the Roles of a Judge?: First Steps Towards the Construction of a Comparative Method” (2000) 51 *N.I.L.Q.* 535, 537-538.

³⁶ One commentator has suggested that American legislation has swelled to civilian proportions and consequently receives civilian treatment. Glenn, *Legal Traditions of the World* (2000), p. 231.

³⁷ Posner, “Legislation and its Interpretation: A Primer” (1989) *Nebraska Law Review* 431, 434.

³⁸ Eskridge and Frickey, “Statutory Interpretation as Practical Reasoning” (1989-1990) 42 *Stanford Law Review* 321, 324. The authors argue that judicial pragmatism is and ought to be the favoured policy. See also Freeman, “Positivism and Statutory Construction: An essay in the Retrieval of Democracy” in Freeman, *Positivism today* (1996).

³⁹ Eskridge et al, *Legislation and Statutory Interpretation* (2000), pp. 289-290.

⁴⁰ See Eskridge, “The New Textualism” (1989-1990) 37 *UCLA Law Review* 621 and Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1998).

generated significant criticism, especially of the politically conservative nature of American literalism.

Textualism is not a theory about the semantics of language; as such it would have been too obviously mistaken. The preoccupation with ‘ordinary meaning’ reflects a political stance, and one which is mostly concerned with the desirable limits of statutory regulation. The more judicial interpretation of statutes is confined to their ‘ordinary meanings’, real or imagined, the more the ability of the legislature to achieve broad regulatory policies is constrained.⁴¹

In American practice the ‘intentional’, ‘purposive’ and ‘textual’ methods of interpretation are not exclusive to one another.

With institutional and intellectual influences different from either the United States or the United Kingdom, other common law jurisdictions have moved in a similar direction.⁴²

In Australia, the exclusionary rule was “firmly entrenched”⁴³ at the federal level until it was amended by the Acts Interpretation Amendment Act 1984. Several of the states (New South Wales, Victoria, Western Australia and the Australian Capital Territory) have also enacted similar legislation.⁴⁴

In Canada, the exclusionary rule still officially applies but has been relaxed somewhat, particularly in constitutional and human rights cases. In Quebec, the traditional civil law approach,

⁴¹ Marmor, “The Immorality of Textualism” (2005) 38 *Loyola Law Review* 2063, 2077-2078.

⁴² See Zander, *The Law-Making Process* (1999), pp. 160-163 and Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 *McGill Law Journal* 287, 296-308. See also L.R.C. 61 – 2000, 19-20 (on Australia and New Zealand).

⁴³ *Commissioner for Prices and Consumer Affairs (S.A.) v. Charles Moore (Aust.) Ltd.* (1977) 51 A.J.L.R. 715, 729, cited in Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 *McGill Law Journal* 287, 296.

⁴⁴ Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?” (1998) 43 *McGill Law Journal* 287, 296.

which allows the use of parliamentary history, is generally accepted but the Supreme Court of Canada has raised questions regarding the weight to given to them.

In New Zealand, the exclusionary rule was not strongly established and the courts began to shift away from it in 1985. The New Zealand Law Commission considered this question in 1990 and thought it best to leave it to the courts to continue developing their own rules on the matter.

B. The United Kingdom

1. 'Peeking'

Positivism, formalism, and textualism have long been dominant in English law.⁴⁵ British practice was, however, changed in *Pepper v Hart*.⁴⁶ There the House of Lords declared itself willing to examine parliamentary debates in particular circumstances. While the decision surprised many, it was clear that movement in the direction of admitting parliamentary history had begun some time before. English and Scottish Law Commissions had considered it a quarter-century earlier. The Renton Committee had done so again in the 1970s. Parliament also attempted to alter the rule by Interpretation Acts in the 1980s. There were even moves from that direction from the bench. None of these was successful.

Lord Denning led efforts to relax the exclusionary rule while on the Court of Appeal in the 1940s.⁴⁷ He first rejected the strict application of the rule in *Seaford Court Estates Ltd v. Asher*⁴⁸ but when he repeated this approach in *Magor and St. Mellons RDC v. Newport Corporation*,⁴⁹ he earned a sharp

⁴⁵ See Posner, *Law and Legal Theory in England and America* (1996), especially the discussion of "The Continental Character of the English Legal System" at p. 20 *et seq.*

⁴⁶ [1993] A.C. 593 (HL).

⁴⁷ The discussion that follows draws on Mullan, "Purposeful Interpretation and Parliamentary Materials: *Pepper v Hart*" in O'Dell (ed.), *Leading Cases of the Twentieth Century* (2000), pp. 469-72.

⁴⁸ [1949] 2 K.B. 481 (CA).

⁴⁹ [1950] 2 All E.R. 1226 at 1236 (CA).

rebuke from the House of Lords.⁵⁰ This did not discourage him. In *Davis v. Johnson* he said:

Some may say – and indeed have said – that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view ... it is obvious that there is nothing to prevent a judge looking at these debates himself privately and getting some guidance from them. Although it may shock the purists, I may as well confess that I have sometimes done it. I have done it in this very case. It has thrown a flood of light on the position.⁵¹

As Lord Lester points out, judicial ‘peeking’ may be “unfair to the parties, who [have] no opportunity to make submissions as to the relevance of the parliamentary record to the issues before the court.”⁵²

In the event, all of the Law Lords disagreed with Denning’s approach, but he was unrepentant. He went on to call the literal method “completely out of date”,⁵³ a position which the Lords did not support,⁵⁴ used excerpts from Hansard (reproduced in a textbook and consequently admissible),⁵⁵ and again referred to parliamentary debates.⁵⁶ The House of Lords was once more

⁵⁰ [1952] A.C. 189 at 191 (HL) per Lord Simonds.

⁵¹ [1979] A.C. 264 at 276-77 (CA and HL).

⁵² Lord Lester of Herne Hill, “Pepper v. Hart Revisited” (1994) 15 *Statute Law Review* 10, 17. He goes on to give an example from his own experience of litigation before the House of Lords in which he alluded to the possibility of the point at issue being discussed in parliament without explicitly referring to the record of the debate.

⁵³ *Nothman v. London Borough of Barnett* [1978] 1 All E.R. 1243 at 1246 (CA).

⁵⁴ [1979] 1 All E.R. 142 at 151 (HL).

⁵⁵ *R. v. Local Commissioner for Administration (ex parte Bradford Metropolitan City Council* [1979] 2 All E.R. 881 at 898 (CA), referring to Wade, *Administrative Law* (4th ed., 1977), p. 821.

⁵⁶ *Hadmor Productions Ltd. v. Hamilton* [1981] 2 All E.R. 724 (CA) 731 at 733.

quick to quash these attempts to relax the exclusionary rule.⁵⁷ During this time, however, other factors inclined towards purposivism. The experience of English judges with the more purposive European approach was important, as was the practice of other common law jurisdictions.⁵⁸ The judicial use of other extrinsic aids, parliamentary acceptance of citation to Hansard (1980), and ever-wider wider access to parliamentary materials all contributed. The acknowledgement of ‘peeking’ also suggested that the use of parliamentary history was inevitable.⁵⁹ Finally, changes in personnel in the House of Lords created scope for a re-examination of the rule.⁶⁰

2. *Pepper v. Hart*

The facts and judgment in *Pepper v. Hart* have been dealt with in detail elsewhere. For our purposes, a brief summary will suffice. Malvern College gave fee concessions to its staff: their sons could be educated at the school for one-fifth of the fees charged to other pupils. The school retained an absolute discretion to withdraw this at any time but at the relevant time, it had surplus capacity and was able to admit the children of staff without turning away other boys.

This concession was treated as an “emolument” for the purpose of income tax paid by the staff. The issue was whether the cash equivalent of this benefit should be determined by the marginal cost of educating one additional boy or a proportion of the overall costs of educating all of the pupils. The first method provided a smaller figure than the second and had been the

⁵⁷ [1982] 1 All E.R. 1042 at 1055 (HL), *per* Lord Diplock.

⁵⁸ See Levitsky, ‘The Europeanization of the British Legal Style’ (1994) 42 *American Journal of Comparative Law* 347 and Lewis, ‘Europeanisation of the Common Law’ in Jagtenberg, Örüçü, and de Roo (eds), *Transfrontier Mobility of Law* (1995).

⁵⁹ See the confession of Lord Hailsham L.C. in 418 1 IL Official Reports (5th series) col 1346. Discussing Lord Scarman’s Bill on the Interpretation of Legislation in the House of Lords on the 26th March 1981, Lord Hailsham said “The idea that we do not read these things is quite rubbish”.

⁶⁰ See Mullan, “Purposive Interpretation and Parliamentary Materials: *Pepper v. Hart*” in O’Dell (ed.), *Leading Cases of the Twentieth Century* (2000), pp. 473-476.

practice of the Inland Revenue to use this for some time. The Inland Revenue then sought to use the second method. The taxpayers appealed this unsuccessfully to the High Court and to the Court of Appeal.

In the House of Lords, the Appellate Committee heard the appeal and then before giving judgment decided that there would be a further hearing before an enlarged (from five to seven members) Appellate Committee to consider whether the exclusionary rule should be relaxed. The reason for this was that the Financial Secretary had made statements in Standing Committee dealing with the situation at issue which supported the argument of the taxpayers.⁶¹ On this basis, the appeal was successful, with six of the seven Law Lords holding that marginal cost was the appropriate basis for calculation.

The decision was much more limited than it might first appear. Lord Browne-Wilkinson stated the new exception as:

subject to any question of Parliamentary privilege, the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.⁶²

In addition to this ‘triple-lock’,⁶³ Browne-Wilkinson went so far as to note that attempts to introduce parliamentary materials that

⁶¹ Oliver, “Pepper v Hart: A Suitable Case for Reference to Hansard” 1993 *Public Law* 5, 6.

⁶² [1993] A.C. 593 at 640 (HL). For a full discussion of how this rule was initially applied in the English courts, see Bates, “The Contemporary Use of Legislative History in the United Kingdom” (1995) 54 *Cambridge Law Journal* 127, 138-150.

⁶³ Mullan, “Purposive Interpretation and Parliamentary Materials: *Pepper v. Hart*” in O’Dell (ed.), *Leading Cases of the Twentieth Century* (2000), p. 495.

did not meet these requirements would be met with orders for costs.

3. Practice after Pepper

The decision in *Pepper* was not as dramatic a change in judicial policy as was claimed at the time, but brought England closer to Commonwealth countries and to American strict textualism.⁶⁴ This was greeted with both enthusiasm and criticism.⁶⁵ It has been argued, however, that the courts have embraced a more liberal approach than *Pepper* permitted.⁶⁶ Indeed, for many the decision suggested that the courts had approved an explicitly purposive approach in which parliamentary materials were always permissible.⁶⁷ This judicial reaction may have undermined the limited *ratio* of *Pepper*. Criticism of the decision, combining practical and increasingly political arguments focusing on the separation of powers,⁶⁸ seems to have gained ground over time.

In *Melluish (Inspector of Taxes) v. BMI (No 3) Ltd.*,⁶⁹ Lord Browne-Wilkinson rebuked counsel for being over-enthusiastic about introducing parliamentary materials and seemed to add a fourth requirement that the statements cited should be “directed to the specific statutory provision under consideration or to the

⁶⁴ Girvin, “Hansard and the Interpretation of Statutes” (1993) 22 *Anglo-American Law Review* 475.

⁶⁵ See, e.g. Davenport, “Perfection—But at What Cost?” (1993) 109 L.Q.R. 149; Styles, “The Rule of Parliament: Statutory Interpretation after *Pepper v Hart*” (1994) 14 *Oxford Journal of Legal Studies* 151; Bennion, “Hansard – Help or Hindrance? A Draftsman’s View of *Pepper v. Hart*” (1993) 14 *Statute Law Review* 149; Bennion, “How They All Got It Wrong in *Pepper v. Hart*” (1995) *British Tax Review* 325.

⁶⁶ Mullan, “Purposive Interpretation and Parliamentary Materials: *Pepper v. Hart*” in O’Dell (ed.), *Leading Cases of the Twentieth Century* (2000), p. 476.

⁶⁷ Healy, “Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of *Pepper v Hart*” (1999) 35 *Stanford Journal of International Law* 231.

⁶⁸ Vogenauer, “A Retreat from *Pepper v Hart*? A Reply to Lord Steyn” (2005) 25 *Oxford Journal of Legal Studies* 629, 636.

⁶⁹ [1996] A.C. 454 (HL) at 481-482.

problem raised by the litigation”.⁷⁰ Speaking at the 1995 Inaugural Lecture of the Statute Law Society, Lord Renton suggested that the relaxation of the rule led to an increase in the cost of litigation and would be superseded.⁷¹ Even Lord Lester, who had been counsel for the taxpayer in *Pepper*, expressed concern about the need to exercise “a strict and disciplined approach to the use of extrinsic aids to construction”.⁷² In an article, Lord Hoffman raised some practical difficulties with the decision.⁷³ Two years later, Lord Millet went so far as to call for it to be abolished by statute.⁷⁴ There followed the Hart Lecture which Lord Steyn, a Lord of Appeal, gave at Oxford in May 2000.⁷⁵ Initially a supporter of the decision,⁷⁶ he became concerned about its implications.⁷⁷ Most of these concerns mirror those discussed in Section II. Over time, he concluded that the case did not represent good law.⁷⁸

The issue came up for consideration again in the House of Lords in *R v. Secretary of State for the Environment, Transport and the Regions Ex p. Spath Holme Ltd.*⁷⁹ There, both Lords Bingham and Hope sought to ensure the strict requirements of *Pepper* be met. In *Spath Holme* and subsequently in *R v. A*,⁸⁰ Lord Steyn put forward an argument that *Pepper* allows

⁷⁰ [1996] A.C. 454 at 481, cited in Vogenauer, “A Retreat from *Pepper v Hart*? A Reply to Lord Steyn” (2005) 25 *Oxford Journal of Legal Studies* 629, 631.

⁷¹ Mullan, “*What is the Case for Pepper v Hart?*” (2004) 26 D.U.L.J. (n.s.) 235, 240.

⁷² Lord Lester of Herne Hill, “*Pepper v. Hart Revisited*” (1994) 15 *Statute Law Review* 10, 21.

⁷³ Lord Hoffmann, “The Intolerable Wrestle with Words and Meanings” (1997) 111 *South Africa Law Journal* 656.

⁷⁴ Lord Millett, “Construing Statutes” (1999) 20 *Statute Law Review* 107.

⁷⁵ Subsequently published as Steyn, “*Pepper v Hart: A Re-examination*” (2001) 21 *Oxford Journal of Legal Studies* 59.

⁷⁶ See Steyn, “Does Legal Formalism Hold Sway in England?” (1996) CLP 43.

⁷⁷ See Steyn, “Interpretation: Legal Texts and their Landscapes: The Coming Together of the Common Law and Civil Law” in Markesinis (ed.) *The Clifford Chance Millennium Lectures* (2000).

⁷⁸ Steyn, “*Pepper v Hart: A Re-examination*” (2001) 21 *Oxford Journal of Legal Studies* 59, 70.

⁷⁹ [2001] 2 W.L.R. 15 (HL).

⁸⁰ [2001] 3 All E.R. 1.

parliamentary material to be used only as an estoppel against the executive.

In *Robinson v. Secretary of State for Northern Ireland*,⁸¹ all of the Law Lords refused to consider ministerial statements on the grounds that they were unclear and inconclusive. In *R (on the application of Westminster City Council) v. National Asylum Support Service*,⁸² Lord Steyn again appeared to limit the scope of *Pepper*.⁸³ He repeated his arguments in a lecture in 2002.⁸⁴ They were echoed judicially in *Wilson v. First County Trust*,⁸⁵ where the House of Lords reversed the Court of Appeal for being too permissive in admitting parliamentary materials.⁸⁶ While Steyn's argument that *Pepper* creates an estoppel mechanism has been widely supported,⁸⁷ his appraisal has been challenged.⁸⁸

This debate over the limits of the exclusionary rule suggests again the importance of legal conventions in different common law jurisdictions.⁸⁹ It may also suggest a gap between principle and practice. Contrary to judicial commentary on *Pepper*, the leading English texts on statutory interpretation suggest that there is a single, if multifaceted, rule that attempts to balance text and context. As Bennion writes:

The so-called literal rule of interpretation nowadays dissolves into a rule that the text is the primary indication of legislative intention, but that

⁸¹ [2002] UKHL 32.

⁸² [2002] 4 All E.R. 654.

⁸³ [2002] 4 All E.R. 654 at 658.

⁸⁴ Lord Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 *Sydney Law Review* 5.

⁸⁵ [2003] 4 All E.R. 97.

⁸⁶ See Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) L.Q.R. 98, 112-114 for a full discussion of this case.

⁸⁷ See *McDonnell v Congregation of Christian Brothers Trustees* [2004] 1 All E.R. 641 at 654-655 and Bennion, "Pepper v Hart and Executive Estoppel" (2006) 170 J.P. 167. Cf. Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 L.Q.R. 98.

⁸⁸ See the strong critique of Steyn in Vogenauer, "A Retreat from *Pepper v Hart*: A Reply to Lord Steyn" (2005) 25 *Oxford Journal of Legal Studies* 629.

⁸⁹ Some American commentators have written that "[a] final lesson of *Pepper* is that "plain meaning" is itself highly artifactual." Eskridge et al., *Legislation and Statutory Interpretation* (2000), p. 312.

the enactment is to be given a literal meaning only where this is not outweighed by more powerful interpretative factors.⁹⁰

He elsewhere articulates this as the ‘Global method’ of interpretation across the common law world. These comments are perhaps best understood as descriptive expressions of actual judicial practice.⁹¹ If this is true, Bennion’s hostility to the decision in *Pepper* is a critical evaluation of such practice.

C. Continental and European jurisdictions

In light of the impact which European continental approaches to statutory interpretation are beginning to have on the common law, it is useful to consider these briefly.⁹²

Continental jurisdictions vary widely and, as with the common law, modern approaches to the interpretation of legislation are rooted in unique historical traditions. Following the revolution in France, a “*référé législatif*” was introduced by the legislature which forced judges to refer a case to the legislature on questions of statutory construction.... [It] soon proved unworkable and was finally abolished in 1837.”⁹³ Similarly, the doctrines of the nineteenth-century school of exegesis suggested a mechanical process of adjudication in which judgments were the result of straightforward syllogistic reasoning. This paralleled similar developments in the Anglo-American world and complimented French theories of parliamentary sovereignty and Rousseau’s *volonté générale* (‘general will’). While there remain

⁹⁰ Bennion, *Understanding Common Law Legislation*, p. 41 and on the ‘Global method’ of common law interpretation, see p. 84.

⁹¹ Cf. Bell and Engle, *Cross on Statutory Interpretation* (3rd ed., 1995), p. 49; Freeman, “The Modern English Approach to Statutory Construction” in Freeman (ed.), *Legislation and the Courts* (1997); Twining and Miers, *How to do Things with Rules: a Primer of Interpretation* (1999), pp. 281-282.

⁹² See MacCormick and Summers (eds), *Interpreting Statutes: A Comparative Study* (1991) and Goodall, “Comparative Statutory Interpretation in the British Isles” (2000) 13 *Ratio Juris* 364.

⁹³ Steiner, *French Legal Method* (2002), 71.

traces of this continental formalism, it was long ago the subject of a more realistic appraisal.⁹⁴

As in the common law, legislative drafting and statutory interpretation are closely connected. Drafting, especially of codifications, is characterized by broad language and rarely descends into the detail of the common law statute.⁹⁵ While judges are also constrained by legislative text, its phrasing makes reference to statutory context both more necessary and more common. Precisely because both texts and conventions are different, continental judges make more use of parliamentary history or *travaux préparatoires*.

This might seem to invite considerable discretion, but is limited in a number of ways. Parliamentary history is generally used only where the text is unclear and may not displace plain meaning. There is also a strong institutional emphasis on the limited role of the judge. Finally, the absence of a strong doctrine of precedent in continental law means that individual judicial decisions do not normally result in binding law beyond the instant case (*res judicata*).⁹⁶

The different methods of interpretation and the terms used to identify the methods vary considerably. While civilians may draw on centuries of experience with doctrinal and judicial interpretation of texts, the past two centuries have been importantly influenced by codification and constitutionalism. Civilians seek parliamentary intent, the '*ratio legis*'. Where a literal reading results in absurdity, it may give way to systemic interpretation in which the text is contextualised within existing laws and legal principles. The age of the legislation, its place in the legal system and general coherence in the legal order are all relevant factors. Because interpretive assumptions are shared with

⁹⁴ See for example Gény, *Méthode d'interprétation et sources en droit privé positif* 2 vols, (2nd ed., 1954).

⁹⁵ Smith, "Legislative Drafting: English and Continental" (1980) 1 *Statute Law Review* 14, 16. The 'special' or supplementary legislation that surrounds the codes and administrative decrees may be as detailed as English statutes.

⁹⁶ Civilians frequently maintain a system of persuasive, rather than binding, precedent. Previous decisions are followed on equitable grounds, especially when a consistent stream of decisions (*jurisprudence constante*) suggests itself as best evidence of the meaning of the law interpreted.

the legislature, legislation is drafted with judicial use of such materials in mind.

The interpretation of the law of the European Union is more complicated.⁹⁷ European law necessitates a more permissive approach to the use of *travaux préparatoires*. Even more than in the national systems of the continent, European legislation is drafted in general terms and in pursuit of broad aims and purposes. As a result, European courts have long followed ‘schematic’ and ‘teleological’ approaches to interpretation. In this context, the former “involves placing the provision in question in its context and interpreting it in relation to the broader scheme of which it forms a part.”⁹⁸ The provision is thus integrated into existing law. The latter method of teleological interpretation is the most important, but the two are often used together.⁹⁹ While this resembles the national continental approaches, the investigation of purpose appears to happen more quickly in European law. In fact, it has been suggested that even for civilian jurisdictions,

Europeanisation gives rise to two conflicting developments. On the one hand, it reinforces deductive reasoning in the areas covered by EC directives, on the other hand it gives rise to more explicit policy reasoning where the courts draw inspiration from comparative law.¹⁰⁰

In this way, European law has influenced (and indeed been influenced by) both civil and common law jurisdictions.

⁹⁷ See Bell and Engle, 105-12 and McLeod, “Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common law Perspectives” (2003-2004) 29 *Brooklyn Journal of International Law* 1109.

⁹⁸ Millett, “Rules of Interpretation of EEC legislation” (1989) 10 *Statute Law Review* 163, 168. See *Ibid.*, 168-169.

⁹⁹ Fennelly, “Legal Interpretation at the European Court of Justice” (1997) 20 *Fordham International Law Journal* 656, 664. This was articulated as early as *Van Gend en Loos* (1963). Cf. Lord Denning in *Buchanan & Co v Babco Ltd* [1977] Q.B. 208, 213.

¹⁰⁰ Smits, “The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries” in Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (2004).

While “[t]he British doctrine of purposive construction ... is markedly more literalist than the European variety, and permits strained construction only in comparatively rare cases”, neither similarities nor differences should be exaggerated.¹⁰¹ These various legislative and judicial policies in common, civil, and European law have been influenced by their unique history, conventions and institutions. They underscore the fact that “[u]ltimately, the choice of what to consider in statutory interpretation must be decided within the context of the particular system.”¹⁰²

IV. THE IRISH COURTS

A. The Literal and Purposive Approaches

The Law Reform Commission discussed the different approaches to statutory interpretation here.¹⁰³ ‘Literal’ and ‘purposive’ interpretation “refer to two ends of a spectrum, one concerned with the meaning of particular words and phrases and the other with the overall result which the legislature may wish to achieve.”¹⁰⁴ While they saw their proposal as a ‘moderately purposive approach’, they did not believe that this was a change in practice.

The literal approach, exemplified in *Rahill v. Brady*, is somewhat conservative.¹⁰⁵ This concerned whether a cattle mart, held twice weekly throughout the year, was entitled to a ‘special event’ licence under the Intoxicating Liquor Act 1962. Budd J. in the Supreme Court, stated that “the ordinary meaning of words should not be departed from unless adequate grounds can be

¹⁰¹ Bennion, *Understanding Common Law Legislation*, 154. Cf. the discussion in Freeman, *Lloyd’s Introduction to Jurisprudence* (7th ed., 2001), pp. 1410-1421.

¹⁰² Jordan, “Legislative History and Statutory Interpretation: The Relevance of English Practice” (1994-1995) 29 *University of San Francisco Law Review* 1, 28.

¹⁰³ The summary which follows draws heavily on Chapter 2 of L.R.C. 61 – 2000.

¹⁰⁴ L.R.C. 61 – 2000, p. 5. See comments on ‘purpose’, ‘object’, and ‘intention’ in *Ibid.*, 9.

¹⁰⁵ [1971] I.R. 69 (SC).

found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature.”¹⁰⁶

A similar approach was taken in *Murphy v. Bord Telecom*,¹⁰⁷ where Keane J. held that if female claimants under the Anti-Discrimination (Pay) Act 1974 could only point to male colleagues who were paid more for lesser work rather than more for ‘like work’ as the literal reading of the act required, their claim had to fail. (This decision was subsequently held to be incorrect by the European Court of Justice.¹⁰⁸)

There is also a more purposive approach. In *Nestor v. Murphy*,¹⁰⁹ the Supreme Court held that a literal reading of the Family Home Protection Act 1976 to prevent the sale of a family home where the wife had not given her consent in advance but (because she was a joint tenant of the property) she was joining in the conveyance was “outside the spirit and purpose of the Act”.¹¹⁰

In *Mulcahy v. Minister for the Marine*,¹¹¹ Keane J. limited the wide-ranging powers of the Minister to grant licences for aquaculture projects under the Fisheries (Consolidation) Act 1959 in light of the regulatory framework set out in other statutes, particularly the Fisheries Act 1980.¹¹² He felt that

[w]hile the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the

¹⁰⁶ [1971] I.R. 69 at 86 (SC).

¹⁰⁷ [1986] I.L.R.M. 483 (HC) and [1989] I.L.R.M. 53.

¹⁰⁸ Case 157/86, *Murphy v. Bord Telecom* [1988] E.C.R. 445; [1988] C.M.L.R. 879.

¹⁰⁹ [1979] I.R. 326 (SC).

¹¹⁰ [1979] I.R. 326 at 328 (SC).

¹¹¹ High Court, 4 November 1994.

¹¹² See the discussion of the case in L.R.C. 61 – 2000, p. 3.

true legislative intention gathered from the Act as a whole.¹¹³

Although the Interpretation Act 2005 does not adopt the wider purposive approach of the Law Reform Commission, the Commission singled out the case as an exemplar of a purposive method.¹¹⁴ As they saw it, “[t]he rule as enunciated is that a court may depart from a literal reading of an enactment where there is an alternative meaning available to the court which plainly reflects more accurately the purpose of the Act.”¹¹⁵ While the wording of the judgment and parts of the Commission’s Report might suggest a single reading of text for purpose, both the *ratio* of *Mulcahy* and the Commission’s recommendations are probably better seen as the two-step process discussed below.

It should be noted that the issue of whether the two Fisheries Acts involved were *in pari materia* did not arise as an issue to be decided because the 1980 Act explicitly provided that all of the Fisheries Acts were to be ‘construed together as one’. It is therefore unclear where the boundaries of “as a whole” would be drawn if this was not stated in the legislation.

This purposive approach has even been used in criminal cases, where it can be to the disadvantage of a defendant. In *DPP (Ivers) v. Murphy*,¹¹⁶ the Supreme Court unanimously reversed a High Court decision based on the literal interpretation of section 6(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997. Here, a measure designed to reduce the need for members of An Garda Síochána to attend court allowed for the use of a certificate as proof of arrest, charge and caution but not as proof of the condition precedent to the use of that certificate, namely an arrest otherwise than under a warrant. The court felt that a more modern

¹¹³ High Court, 4 November 1994 at 23. On ‘construction as a whole’, see Bennion, *Understanding Common Law Legislation*, 55.

¹¹⁴ L.R.C. 61 – 2000, p. 20.

¹¹⁵ L.R.C. 61 – 2000, p. 13.

¹¹⁶ [1999] 1 I.L.R.M. 46 (SC). See the comments on *DPP (Ivers)* and the Law Reform Commission in Kirby, “Towards a Grand Theory of Interpretation: The case of Statutes and Contracts” (2003) 24 *Statute Law Review* 95, 104-105.

approach would allow this to be proved also by the certificate as to do otherwise would defeat the purpose of the section.

It is important to note that the 2005 Act does not go this far. Any alteration to existing methods of statutory interpretation only applies to civil matters. To go further might be unconstitutional as provisions imposing penal and other sanctions must be interpreted strictly.¹¹⁷

From the foregoing caselaw, therefore, as in England, ‘purposive’ interpretation refers to departures from the literal approach.¹¹⁸ The traditional mischief and golden rules seem to have merged into a single ‘schematic-teleological’ approach.¹¹⁹ Any distinction between the two words is probably of greater interest to academics than to modern practitioners.¹²⁰ In general, it would seem that the new approach is restricted to looking at intrinsic aids (discussed below) and the wider statutory context or legislation *in pari materia*, *i.e.* dealing with the same subject matter, as an indicator of purpose. It does not appear to extend to other extrinsic aids. The Irish judiciary look to the ‘objective’ meaning of the words used rather than the ‘subjective’ or actual intentions of the Parliament concerned.¹²¹ The search for this objective intent remains problematic, but aims to reduce judicial discretion and promote clarity in legislation.¹²²

There are two steps involved in this approach. First, the judge examines the ‘plain language’ of the Act. Second, if on this literal interpretation, there remains ambiguity, obscurity or absurdity, the judge may move to divine the ‘plain intention’ of

¹¹⁷ Byrne and McCutcheon, *The Irish Legal System* (4th ed., 2001), pp. 503-505.

¹¹⁸ Bennion, *Understanding Common Law Legislation*, p. 42.

¹¹⁹ See for example Denham J. in *DPP (Ivers) v. Murphy*, [1999] 1 I.L.R.M. 46 at 109-111 (SC).

¹²⁰ L.R.C. 61 – 2000, p. 5.

¹²¹ *Cf.* “We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what the Parliament meant but the true meaning of what they said.” *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg (A.G.)* [1975] A.C. 591 at 626; All E.R. 810 (H.L.) (Lord Reid).

¹²² Greenberg, “The Nature of Legislative Intent and Its Implications for Legislative Drafting” (2006) 27 *Statute Law Review* 15.

the Oireachtas through the text of the Act as a whole and any additional permitted aids to interpretation. If this reflects current practice, it is perhaps the most limited purposive approach in any common law jurisdiction.

Note that the line dividing literal and purposive interpretations may not always be clear. As a practical matter, it will be difficult to read the whole text literally without also reading it purposively. Also, the schematic-teleological approach resembles Irish constitutional methods of interpretation as well as the approaches taken in interpreting European law.¹²³ The same terminology has, however, far broader applications in European law, both national continental and European Union law.¹²⁴

B. Parliamentary History and the Exclusionary Rule

Over time, the attitude of the Irish courts to the use of parliamentary history has become less clear, despite the issue being considered in a recent Supreme Court decision.¹²⁵ There is, as yet, no *Pepper v. Hart* in this jurisdiction. The indications are that there will not be.

Although Costello J. strongly approved of their use in *Wavin Pipes v. Hepworth Iron Ltd.*,¹²⁶ Keane J. in *Wadda v. Ireland* felt there must be some “obscurity, ambiguity or potential absurdity in the relevant provisions which would justify the court having recourse to what was said in the Oireachtas in order to ascertain the legislative intention.”¹²⁷ Walsh J. in *DPP v. Quilligan* stated that the search for intention is confined to the text of legislation: “Whatever may have been in the minds of the members of the Oireachtas when the legislation was passed, in so

¹²³ Cf. chapter 1.1 of Kelly (Hogan and Whyte, eds.), *The Irish Constitution* (4th ed., 2003).

¹²⁴ Fennelly, “Legal Interpretation at the European Court of Justice” (1997) 20 *Fordham International Law Journal* 656, 656.

¹²⁵ L.R.C. 61 – 2000, p. 57. Our discussion of Irish case law draws heavily on L.R.C. 61 – 2000, pp. 57-62.

¹²⁶ High Court, 8 May 1981, reported in (1982) 8 Fleet Street Reports 32. See Casey, “Statutory interpretation: A new departure” (1981) 3 D.U.L.J. (n.s.) 110. See also Donelan, “The role of the Parliamentary Draftsman in the Preparation of Legislation in Ireland” (1992) 14 D.U.L.J. (n.s.) 1, especially 9-13.

¹²⁷ [1994] I.L.R.M. 126 at 137 (HC).

far as their intention can be deduced, as it must be, from the words of the statute.”¹²⁸

Amongst the issues which arose in *Howard v. Commissioners of Public Works* was the admissibility of parliamentary materials. In the Supreme Court, Finlay C.J. felt that reference to parliamentary debates as an aid to interpretation was not permitted.¹²⁹

In *DPP v. McDonagh*, Costello P. stated that

Our courts do not and should not adopt such a rigid exclusionary rule ... and it seems to me that the Court should have regard to any aspect of the enactment's legislative history which may be of assistance. ... As the legislative history of the section being considered in this case throws very considerable light on its proper construction it would be wrong of this Court to ignore it.¹³⁰

Significantly, he did not expressly refer to or quote from any parliamentary material as such. His source of information was a textbook, a source held to be acceptable.¹³¹ He also used ‘legislative history’ in a broad sense, discussing the background to the change in the law rather than the parliamentary debates while that change was being made.

In *In re National Irish Bank Ltd.*¹³² counsel urged the court to examine the Dáil Debates. Relying on the statement quoted above from *McDonagh*, Shanley J. held that “Dáil Debates are, of course, a record of part of the legislative history of an Act of the Oireachtas, and it seems clear that I can look at these debates in construing [the section at issue].”¹³³ However, an examination of the debate to which counsel referred him proved of little

¹²⁸ [1986] I.R. 495 at 511 (emphasis added).

¹²⁹ [1994] 1 I.R. 101 at 140 (SC). See Hogan, “Statutory Interpretation—The Mullaghmore Case” (1993) 15 D.U.L.J. (n.s.) 243, 248-253.

¹³⁰ [1996] 1 I.R. 565 at 570 (SC).

¹³¹ [1996] 1 I.R. 565 at 572 (SC).

¹³² [1999] 3 I.R. 145 (HC).

¹³³ [1999] 3 I.R. 145 at 164 (HC).

assistance. Although the decision was appealed to the Supreme Court, the debates were not referred to there.

In *An Blascaod Mór Teo. v. Commissioners of Public Works (No. 2)*, Budd J. contended that a Bill “differs from the parliamentary records of debates.” He therefore thought, “with some trepidation, ... that the court [was] entitled to look at the wording of the Bill relevant to [the section being interpreted] ... as it may assist in interpreting the Act and the section.”¹³⁴ Again, it must be noted that Budd J. was examining the text of the Bill rather the debates in the Oireachtas.

C. Crilly v. Farrington

The most extensive (but unfortunately not definitive) Supreme Court decision on the issue is *Crilly v. Farrington*,¹³⁵ in which final judgment was given in early July 2001. Here, in the wake of the Commission’s Report, the Supreme Court went to great lengths to express its reluctance to relax the exclusionary rule.¹³⁶ In the High Court, Geoghegan J. referred in passing to *Pepper* but relied instead on the more liberal precedent of *McDonagh*, which he held permitted him to rely on parliamentary papers in construing legislation even where there was no ambiguity. He dismissed *Howard* on the grounds that any statements there were *obiter*. He held that the statements of Costello P. in *McDonagh* were also *obiter*. Without claiming that ministerial statements had long been used for statutory construction in Ireland, he noted that it was “well within the spirit and intent” of *Howard* “that in certain circumstances such a ministerial statement could be availed of.”¹³⁷ He did not say what those circumstances were but went on to examine the relevant ministerial statement and found that it was of assistance in confirming the view which he had already formed.

¹³⁴ [2000] 1 I.R. 1 at 4.

¹³⁵ [2001] 3 I.R. 251 (SC).

¹³⁶ Mullan, “What is the case for *Pepper v Hart*” (2004) 26 D.U.L.J. 235, 257. See also *Ibid.*, 249 *et seq.*; Mullan, “Purposive Interpretation and Parliamentary Materials: *Pepper v Hart*” in O’Dell (ed.), *Leading Cases of the Twentieth Century* (2000), 491; L.R.C. 61 – 2000, 57.

¹³⁷ [2001] 3 I.R. 251 at 265 (SC).

In the Supreme Court, this issue was dealt with at some length by four members of the unanimous five-judge court which heard the appeal.

Denham J. found that section was “a clear section. The words are plain. There is no ambiguity. It is a situation where no complex canons of construction are needed.”¹³⁸ Although this meant that it was “not necessary to proceed to determine the admissibility in evidence of parliamentary debates”, she struck “a note of caution” on this issue.¹³⁹ She set out a number of reasons why she was “not persuaded that good reason has been indicated in this case for changing or developing the common law in this jurisdiction”,¹⁴⁰ chiefly that “[t]o hold that parliamentary debates are admissible would be an alteration in the law and an alteration which would have a profound effect”.¹⁴¹ However, she went on to say that she “agreed then and ... now with Costello P.'s judgment in *McDonagh* that such an approach should not be excluded. A court has a discretion to consider such legislative history.”¹⁴² She emphasised that *McDonagh* does not deal with the admissibility of parliamentary debates.¹⁴³ Murphy J. agreed with her decision.¹⁴⁴

Murray J. surveyed the status of the exclusionary rule in the United Kingdom and the United States but expressly refused to consider whether *Pepper* was correctly decided. He distinguished *Bourke v. Attorney General*¹⁴⁵ on the grounds that it dealt with the interpretation of an international treaty, where the use of *travaux préparatoires* is common. He also emphasised the distinction between ‘legislative history’ and ‘parliamentary history’ noted above¹⁴⁶ and distinguished *McDonagh* on the question of the admissibility of parliamentary debates as any statements on the matter there were *obiter*. He preferred instead

¹³⁸ [2001] 3 I.R. 251 at 278 (SC).

¹³⁹ [2001] 3 I.R. 251 at 280 (SC).

¹⁴⁰ [2001] 3 I.R. 251 at 283 (SC).

¹⁴¹ [2001] 3 I.R. 251 at 282 (SC).

¹⁴² [2001] 3 I.R. 251 at 283 (SC).

¹⁴³ [2001] 3 I.R. 251 at 281 (SC).

¹⁴⁴ [2001] 3 I.R. 251 at 285 (SC).

¹⁴⁵ [1972] I.R. 36.

¹⁴⁶ [2001] 3 I.R. 251 at 292 (SC).

Quilligan and *Howard* which excluded the use of such material. He went on to summarise the constitutional provisions dealing with the passage of legislation and said:

It is by laws so adopted and promulgated that the citizens are bound. It is to the text of those laws as promulgated that they, or their legal advisors, look to ascertain the obligations or rights for which they provide or regulate.¹⁴⁷

In insisting on this objective intention of the Oireachtas' words rather than their subjective intentions, he cited Lord Nicholls in *Spath Holme Ltd.*¹⁴⁸ As a consequence of this,

[a]ny proposal that the courts should go behind the constitutionally expressed will of the Oireachtas so as to rely on the statement of one member of one house, whatever his or her status, must be approached with circumspection and constitutional prudence. To go behind a will so expressed so as to look at such statement and impute an intent expressed by one member to the Oireachtas as a whole may, and I use that word guardedly, risk compromising the legislative process and the role of other members of the Oireachtas.¹⁴⁹

He identified two difficulties which would arise as a result of the admissibility of parliamentary debates: a distortion of those debates¹⁵⁰ and an increase in the complexity and cost of litigation.¹⁵¹ He felt that these outweighed any advantages.¹⁵² Even if they did not, the difficulties in identifying parliamentary

¹⁴⁷ [2001] 3 I.R. 251 at 295 (SC). Cf. Gallagher, "Parliament" in Coakley and Gallagher (eds.), *Politics in the Republic of Ireland* (3rd ed., 1999).

¹⁴⁸ [2001] 3 I.R. 251 at 295-96 (SC).

¹⁴⁹ [2001] 3 I.R. 251 at 296 (SC).

¹⁵⁰ [2001] 3 I.R. 251 at 297 (SC).

¹⁵¹ [2001] 3 I.R. 251 at 298 (SC).

¹⁵² [2001] 3 I.R. 251 at 299 (SC).

intent in the debates (particularly as the question of ambiguity is most likely to arise in situations which the Oireachtas did not consider) ruled them out.¹⁵³ However, like Denham J., he was not willing to prohibit them out completely:

recourse to statements of ministers could have implications for the parliamentary process, I put it no further than that, which the courts should avoid unless there are cogent and countervailing judicial reasons for doing so. In my view the existence of such cogent or countervailing judicial reasons have not been demonstrated by the claimant.¹⁵⁴

He acknowledges, however, that this is not a strict constitutional rule:

The judicial aids to the construction of statutes ... are not fundamental principles.... They may be changed or adapted.... There is no rule of law which prohibits a review of a rule of construction.¹⁵⁵

McGuinness J. shared these concerns of principle and practice and felt, like her colleagues, that there was no need to refer to the parliamentary debates in resolving the case but that the question was open for the future.¹⁵⁶

Fennelly J. was in agreement. He considered *McDonagh* but set out as a counterpoint an extensive quotation from *In re Illegal Immigrants (Trafficking) Bill*. There, counsel quoted extensively from Oireachtas debates but the court refused to make use of these.¹⁵⁷ He acknowledged that it was not clear whether that court had intended to make a distinction between the meaning and the purpose of a statutory provision but felt that in any case, “such a distinction must be too theoretical to be a reliable guide to the

¹⁵³ [2001] 3 I.R. 251 at 299 (SC).

¹⁵⁴ [2001] 3 I.R. 251 at 300 (SC).

¹⁵⁵ [2001] 3 I.R. 251 at 288 (SC).

¹⁵⁶ [2001] 3 I.R. 251 at 301-303 (SC).

¹⁵⁷ [2000] 2 I.R. 360 at 370-372 (SC).

circumstances in which extraneous materials will be admissible”.¹⁵⁸

He echoed the distinction of *Bourke* and *McDonagh* and felt that the approach of American courts was not familiar enough to the Irish courts to serve as a useful source of inspiration.¹⁵⁹ Nor did he consider it necessary to consider the situation in Australia, New Zealand or Canada.¹⁶⁰ He did, however, deal with *Pepper* at some length. He felt that the first condition for admissibility of parliamentary debates (that the legislation is ambiguous, obscure or leads to an absurdity) was not workable, particularly given the division of the House of Lords as to whether or not it was met in *Spath Holme Ltd.*

This remains the most definitive statement to date from the Supreme Court on this issue.¹⁶¹ It is, on one level, somewhat unsatisfactory. All of the judges make it clear both that the issue was not directly relevant to the instant case and that they reserved a final ruling. This means that all of the foregoing is *obiter*. However, it is clear that the general feeling on the Supreme Court is strongly against doing away with the exclusionary rule. The difficulty this creates, as will be noted below, is that these statements made by judges in defence of the legislature may not reflect the Oireachtas’ understanding of the process. It is also possible that such judicial pronouncements do not accurately reflect practice.

V. THE INTERPRETATION ACT 2005

A. An Overview

The Interpretation Act 2005 had a relatively long gestation.¹⁶² The Bill was initiated in August 2000 but was not

¹⁵⁸ [2001] 3 I.R. 251 at 306 (SC).

¹⁵⁹ [2001] 3 I.R. 251 at 308 (SC).

¹⁶⁰ [2001] 3 I.R. 251 at 310 (SC).

¹⁶¹ Cf. the discussion of the judgment in *O’C. (S.) v. Governor of Curragh Prison* [2001] IESC 68 in Mullan, “*What is the Case for Pepper v Hart?*” (2004) 26 D.U.L.J. (n.s.) 235, 254.

¹⁶² Senator Brendan Ryan commented that “[t]his legislation ... has been stewed over for the best part of five years.” 180 *Seanad Debates* 2272 (Committee Stage, 29 June 2005).

passed by the Dáil until July 2003 and took almost two years to go through the Seanad. It was passed by that house in June 2005¹⁶³ and, after its final stages in the Dáil, came into force on 1 January 2006.¹⁶⁴

As the Bill was beginning this journey through the Houses of the Oireachtas, the Law Reform Commission published its report on *Statutory Drafting and Interpretation: Plain Language and the Law*¹⁶⁵ in December 2000. This included a useful discussion of the principles of statutory interpretation and recent developments in other jurisdictions. It also contained recommended draft legislative provisions on the topic. The report led to some of the amendments which were moved by the Government while the Bill was making its way through the Dáil.¹⁶⁶

Part 1 of the Act contains the usual preliminary material: title, commencement and interpretation. It repeals several previous Interpretation Acts, those of 1889, 1923, 1937 and the Amendment Act of 1993,¹⁶⁷ although this is not to change the intent of some other enactment or create an absurdity in it.¹⁶⁸ The first two acts, of 1889 and 1923, had been largely superseded in any case, as section 18 of the 1923 Act and section 5 of the 1937 Act, respectively, had declared that they were no longer to be applied prospectively.

The previous acts did not repeal their predecessors but they did not apply to acts or instruments made after the succeeding act came into force. It does not repeal the Interpretation (Amendment) Act 1997 which operates only to protect the previous operation of common law rules which are repealed and any penalties incurred or proceedings brought under them.¹⁶⁹

¹⁶³

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2000/5300/default.htm>

¹⁶⁴ Section 1 (2) of the Interpretation Act 2005.

¹⁶⁵ L.R.C. 61 – 2000, p. 61.

¹⁶⁶ Minister Mary Hanafin, 557 *Dáil Debates* 670-71 (Second Stage, 14 November 2002).

¹⁶⁷ Section 3 (1).

¹⁶⁸ Section 3 (2).

¹⁶⁹ See 557 *Dáil Debates* 669-70 (Second Stage, 14 November 2002). See also White, “The Present Prosecution of Abolished Offences”, (1998) 8 *Irish*

Part 2 of the Act is entitled ‘Miscellaneous Rules’. Section 5 is the most important section here, and will be dealt with below. Section 6 provides that when construing legislation, a court may make allowances for changes in the law, social conditions, technology, the meaning of words used and “other relevant matters”. This section emerges from the Law Reform Commission report, which was critical of the current application of the ‘principle of updated construction’.¹⁷⁰ The Commission recommended that the principle be explicitly adopted as part of the Act. “[T]his approach”, they argued, “has the merit of being consistent with the reasoning ... recommend[ing] a general provision setting out a purposive approach to interpretation.”¹⁷¹ While the legislature may not have adopted the Commission’s wider recommendations on purposive legislation, the draft provision is included in the final Act.

Section 7 specifies what version of the text of an Act which a court may make use of when construing a provision of an Act for the purposes of sections 5 or 6. This definitive text of an act is generally the signed text enrolled with the Office of the Registrar of the Supreme Court. This is specified to be “notwithstanding section 18(g)”, which continues a long-standing, although sometimes ignored,¹⁷² prohibition on the use of marginal notes in interpretation. It seems, therefore, that when applying these two sections (but not at other times), the courts can consider marginal notes that appear in the enrolled version of the Act.

Section 8 deals with a situation where an act provides that a specified person may prosecute a summary offence, that act is read together with another to create a summary offence, but it is not clear who is to prosecute this new offence: it can be prosecuted by the person specified in the first act. Section 9 provides that references to divisions (parts, chapters, sections, etc.) of an act or provision are to be read as references to divisions within that act or provision.

Criminal Law Journal 196, *Grealis v. DPP* [2002] 1 I.L.R.M. 241 (SC) and *Cummins v. McCartan* [2005] IESC 67.

¹⁷⁰ See L.R.C. 61 – 2000, 26-7. See L.R.C. 61 – 2000, 41 *et seq.* See the case law at L.R.C. 61 – 2000, pp. 28 *et seq.*

¹⁷¹ L.R.C. 61 – 2000, p. 36.

¹⁷² L.R.C. 61 – 2000, pp. 41-42.

Section 10 provides simply that “[a]n enactment continues to have effect and may be applied from time to time as occasion requires.” (Unlike previous Interpretation Acts, this act uses ‘enactments’ to refer to both primary and secondary legislation, a simplification which avoids the clumsy repetition of similar provisions for both categories in previous acts.) This is best explained by the marginal note, “Enactment always speaking.” This, presumably, is to be read as meaning that legislation, as with the Constitution, speaks in the present tense. A long-standing common law convention, this provision is a novelty in the 2005 Act.

Section 11 provides that examples of the operation of a provision given in legislation do not exhaust the meaning of the provision, which should facilitate their use, recommended by the Commission.¹⁷³ Section 12 protects non-material deviation from a form prescribed in legislation from invalidating that form. These are also new in the 2005 Act.

Part 3 deals with the citation, commencement and exercise of powers under legislation. Section 13 provides that an act is a public document and must be judicially noticed; this is identical to section 6 (1) of the 1937 Act. Section 14 permits acts to be cited in various forms: by the long title, short title, the consecutive number and year or the regnal year and chapter number (for pre-Independence statutes). This is an expansion of section 7 of the 1937 Act, which permitted citation of post-Independence statutes only by short title or consecutive number and year. It also provides that reference to an enactment is implicitly to the amended version. Finally, it provides that the short title of an act or the title of any other citation need not contain a comma before any reference to a year unless the comma is required for the purpose of punctuation. Section 15 provides that the date of the passing of an Act of the Oireachtas is the date on which the relevant Bill is signed by the President. This date is to be recorded on the act by the Clerk of Dáil Éireann. Section 16 provides that an act comes into operation on the date that it is signed unless it provides otherwise, and that enactments come into operation at the end of the day before that day. In other

¹⁷³ L.R.C. 61 – 2000, p.77.

words, they come into operation at one second past midnight on the day that they are signed. These two sections reproduce sections 8 and 9 of the 1937 Act. Section 17 enables the use of commencement orders or other mechanisms to bring acts into force and permits the exercise of certain powers (such as making statutory instruments) under an Act once it is passed, if this is “necessary or expedient”. It is similar to section 10 of the 1937 Act.

Part 4 deals with the meaning and constructions of words and expressions. Section 18 sets out a great deal of general rules of construction for, for example, singular and plural, gender and ‘person’. This re-states the similar rules in section 11 of the Interpretation Act 1937. Section 18 (b) continues and extends the gender-proofing¹⁷⁴ introduced in the Interpretation (Amendment) Act 1993. Section 18 (g) continues the prohibition in section 11 (g) of the 1937 Act on the use of marginal notes in statutory interpretation (subject to the exception in section 7).

Section 19, like section 19 of the 1937 Act, provides that words in statutory instruments have the same meaning as in the act under which the instrument is made. Section 20 provides that interpretation provisions apply to the act which contains them unless otherwise provided. Section 21 provides that the words listed in the schedule to the Act have the meanings given to them there. Part 1 of the schedule, which is broadly similar to the schedule to the 1937 Act, is both retrospective and prospective (applying to acts in force on 1 January 2006 and enactments coming in force after that date), while part 2 of the schedule is prospective only (applying only to enactments coming into operation after 1 January 2006).

Part 5 deals with powers and duties under legislation, allowing them to continue to have effect rather than being exercised once and then exhausted. Section 22 provides that powers conferred by enactments can be exercised “as occasion requires”; that when conferred upon office-holders, they are conferred upon the holder for the time being; and that a power to make a statutory instrument includes the power to repeal or

¹⁷⁴ See Byrne and McCutcheon, *The Irish Legal System* (4th ed., 2001), p. 475, fn. 41.

amend it. Section 23 makes similar provision with regard to duties. Section 24 provides that the extension or variation of the jurisdiction of a court brings with it a power for the relevant rule-making body to make rules regulating practice and procedure relating to that jurisdiction. Section 25 defines what constitutes service by post. These largely mirror section 15 to 18 of the 1937 Act.

Part 6 deals with amendment of legislation. Section 26 deals with the procedure for the coming into force of amendments, particularly for the continuation of existing arrangements under the former amendment, such as appointments, securities and legal proceedings. Section 27 similarly limits the ability of a repeal to affect existing arrangements and provides for the continuance of legal proceedings (either civil or criminal) in being at the time of repeal. These are similar to sections 19 to 22 of the 1937 Act; the principal difference is the new rules in section 26 for continuing existing arrangements.

B. The Law Reform Commission and Section 5 of the Act

1. The Commission's Recommendations

Discussing the Irish situation in the year after the introduction of the Interpretation Act 2000 and before *Crilly* was decided, the Law Reform Commission suggested the need for a uniform approach to statutory interpretation.¹⁷⁵ The Commission noted “a strong line of judicial opinion” hostile to parliamentary history. Its members also believed that legislative history is usually of little use in interpretation. The Commission nevertheless concluded that “it should be open to a court to refer to Oireachtas debates” in limited situations.¹⁷⁶ According to their report,

many judges admit to looking at these contextual materials in private, but omit[] to refer to them in

¹⁷⁵ “[I]n general, there has been no uniformity ... and an authoritative Supreme Court decision on the point is awaited with interest.” L.R.C. 61 – 2000, p. 58.

¹⁷⁶ L.R.C. 61 – 2000, p. 60 and pp. 64-5.

their judgments. It is our strong view that any material which influences the decision of a court should be available to litigants. Thus, our position is intended to place what is currently widespread judicial practice on a more solid and transparent footing.¹⁷⁷

They believed their proposal balanced the legal certainty of a “legislative framework”¹⁷⁸ cataloguing admissible interpretive aids with considerable judicial discretion in weighing those aids. As such, no “particular category of extrinsic aid should be singled out for different treatment.”¹⁷⁹

The Commission retained literal interpretation as the primary rule of interpretation. Section 1 of the draft legislation mirrors very closely the final text of the Act and seems to be rooted in the judgment in *Mulcahy*.¹⁸⁰ As noted, the judgment and the Commission’s comments suggest consideration of ‘plain language’ and ‘plain intention’ in *all* cases.¹⁸¹ Arguably this is true, too, of the Executive *obiter* in the Dáil.¹⁸²

In Section 2 of its draft legislation, the Commission suggested that where a literal interpretation was “ambiguous or obscure” or “would fail to reflect the plain intention of the Oireachtas”, extrinsic aids could be used. The meaning of ‘ambiguous’ (and presumably also of ‘obscure’) is straightforward: “a situation where the meaning of a statutory provision, in relation to the facts of the instant case, is unclear.”¹⁸³ As the Report notes, however, ‘absurd’ can have multiple meanings: self-contradiction, contradiction with other

¹⁷⁷ L.R.C. 61 – 2000, 66. The Report notes Lord Lester’s comments on ‘peeking’ by English judges in “Pepper v. Hart revisited” (1994) 15 *Statute Law Review* 10.

¹⁷⁸ L.R.C. 61 – 2000, p. 67.

¹⁷⁹ L.R.C. 61 – 2000, pp. 67-8.

¹⁸⁰ L.R.C. 61 – 2000, p. 88.

¹⁸¹ L.R.C. 61 – 2000, p. 20. See also recommendation 3 at p. 85.

¹⁸² 557 *Dáil Debates* 249 (Report and Final Stages, 1 July 2003, Minister Hanafin referring to the discussion of Denham J. in *Howard*).

¹⁸³ L.R.C. 61 – 2000, p. 10.

portions of the enactment or even an effect that could not have been intended by the legislature.¹⁸⁴

The Commission's draft legislation, unlike the final Act, explicitly provided for the use of extrinsic aids in these circumstances. The process consists of an additional step beyond the literal and purposive approaches articulated in *Mulcahy*.¹⁸⁵ Section 2 was thus necessary to authorise the use of the following extrinsic aids:

- (a) any document that is declared by the Act to be a relevant document for the purposes of this section;
- (b) any relevant report of an Oireachtas committee;
- (c) any treaty or other International Agreement referred to in the Act;
- (d) any official explanatory memorandum relating to the Bill containing the provision;¹⁸⁶
- (e) the speech made by a Minister on the second reading of a Bill;
- (f) any other material from the official record of debates on the Bill in the Dáil or Seanad;
- (g) any publication of the Law Reform Commission or other official body that was published before the time when the provision was enacted;
- (h) legislation dealing with the same subject area as the provision being construed;
- (i) such other document as the court, for a particular reason, considers essential.¹⁸⁷

¹⁸⁴ L.R.C. 61 – 2000, p. 10.

¹⁸⁵ L.R.C. 61 – 2000, p. 68.

¹⁸⁶ The failure to expressly deal with extrinsic aids in the Act creates at least one curious result. According to the Commission, explanatory memoranda are normally published at the introduction of legislation. While the Commission noted that the courts occasionally found them useful, they “enjoy[ed] no distinct status as a more authoritative type of extrinsic aid than the other categories already discussed.” L.R.C. 61 – 2000, p. 53. In the event, two separate memoranda were drafted in the course of enacting the Act, one at its introduction and another *after* the Act was passed by both Houses of the Oireachtas. The status of such memoranda remains unclear.

These extrinsic materials were not, however, conclusive. They were *admissible* but their *weight* remained to be determined by the courts. This is consistent with academic commentary and goes some distance to meeting the English concerns expressed in the aftermath of *Pepper*.¹⁸⁸ The Commission's draft legislation suggested factors that might be considered in this determination of weight.¹⁸⁹

The proposed sections were clearly an attempt to balance one another and reflect practice while ensuring that parliamentary history is used only in rare circumstances.

2. Section 5 of the 2005 Act

The Interpretation Act 2005 is the result of a long process of judicial development, scholarly commentary, and legislative activity. The most significant innovation is section 5 which is the first occasion on which legislation has explicitly addressed a general principle of statutory interpretation. The text of section 5 (1) closely resembles the first element of the Commission's proposals.¹⁹⁰ It provides:

In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

¹⁸⁷ L.R.C. 61 – 2000, p. 88.

¹⁸⁸ See the factors discussed in Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998) 43 *McGill Law Journal* 287, 323. See also Vogenauer, "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn" (2005) 25 *Oxford Journal of Legal Studies* 629, 658-665.

¹⁸⁹ L.R.C. 61 – 2000, p. 90. These were "the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act; and the need to avoid prolonging any legal or other proceedings without compensating advantage", "in addition to any other relevant matters".

¹⁹⁰ L.R.C. 61 – 2000, p. 24.

- (i) in the case of an Act [of the Oireachtas], the Oireachtas, or
- (ii) in the case of an Act [continued in force by Article 50 of the Constitution], the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

Section 5 (2) makes similar provision for statutory instruments.¹⁹¹ Both resemble the Commission's draft provisions. These seem to modify the two-step process outlined in section IV.A above slightly. Where the provision is obscure, ambiguous or literally absurd, the procedure is the same and a purposive interpretation is sought. If these tests are not met, a court previously could choose to consider what in *Mulcahy* was called the 'true legislative intention' and is here called the 'plain intention of the Oireachtas' (if it is ascertainable from the Act as a whole). Now, however, to determine whether a construction, even following a literal approach, "would fail to reflect the plain intention" of the Oireachtas requires a purposive interpretation. The second step has become mandatory rather than optional, although the end result will likely be the same in most cases.

The text does not, however, permit or prohibit an enquiry beyond statutory text. The draft provisions relating to the admissibility and weight of extrinsic aids were not introduced, discussed, or enacted in the Oireachtas.

C. The Intention of the Houses of the Oireachtas?

The intention of the Houses of the Oireachtas, the *ratio legis*, appears to have been to codify current judicial practice and retain the exclusionary rule. But both executive and legislative

¹⁹¹ Their construction is to reflect "the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment".

assumptions about judicial policy and practice seemed to vary considerably from those of the judiciary. Indeed, comments made in the Dáil and Seanad seem to suggest an intention to allow the courts to examine Oireachtas debates, at least in some very limited circumstances, based on the widespread belief that this was common practice.¹⁹²

At the Second Stage in the Dáil, Deputy Hanafin, Minister of State at the Department of the Taoiseach, laid out the purpose of the Act as she saw it: to update statutory interpretation in response to general constitutional, statutory, and judicial developments.¹⁹³ Deputy Jan O’Sullivan asked “whether the placing of this principle of interpretation on a statutory footing is intended to give rise to the presumption that other canons of statutory construction, some of more respectable vintage but which have not been so elevated, are being effectively abolished.”¹⁹⁴ Arguably, since the Commission’s recommendations were intended to reflect practice the failure to enact all of its recommendations is a change in the law. While we suggest that legislative silence here was an attempt to permit judicial development to continue, the extent to which the Oireachtas understood judicial practice is unclear.

Discussion of both the Commission’s Report and judicial practice was slight and anecdotal and many legislators were clearly exasperated by the complexities of the Bill. Commenting on the “highly technical Bill” in the Committee Stage, Deputy Bruton noted the omission of “the debates of the Houses of the Oireachtas which would make quite plain the intention of the Oireachtas in deciding and voting on amendments or sections.”¹⁹⁵ In her response, the Minister of State stated that the Bill “is intended to provide a statutory basis for what the courts are already doing”.¹⁹⁶ She suggested that room was being left for

¹⁹² See, e.g., 180 *Seanad Debates* 2308 (Report and Final Stages, 29 June 2005). An Opposition amendment to explicitly permit reference to the Oireachtas debates was opposed in the Seanad. See 180 *Seanad Debates* 2308 (Report and Final Stages, 29 June 2005).

¹⁹³ 557 *Dáil Debates* 670 (Second Stage, 14 November 2002).

¹⁹⁴ 557 *Dáil Debates* 674-75 (Second Stage, 14 November 2002).

¹⁹⁵ 29FPS1, No. 4 *Dáil Debates* 149-150 (Committee Stage, 22 January 2003).

¹⁹⁶ 29FPS1, No. 4 *Dáil Debates* 150 (Committee Stage, 22 January 2003).

judicial development and noted that the Government did not want to depend on Executive interpretations inserted in the Oireachtas debates.¹⁹⁷ Deputy Bruton replied, “I do not accept that the Act as a whole includes the Dáil debate on it.”¹⁹⁸ Minister Hanafin insisted that

Anything that would help in the interpretation of legislation is important. In many circumstances Oireachtas debates have helped in that interpretation and the courts have used this. My understanding of the section, however, is that it does not preclude them from doing this. They may still continue to look at the Oireachtas debates to see the intention behind legislation.¹⁹⁹

While she also cited the Commission’s comments about the difficulties of using legislative history, the Minister failed to mention their recommendation to permit the use of such history. Neither does she clarify her statements on practice,²⁰⁰ nor is it clear whether ‘use’ refers to ‘peeking’ or opening by counsel. While we could not undertake the empirical investigation necessary to confirm current practice, the number of cases where the courts have referred to the debates are small and it does not seem to be an accepted practice.

The representatives of the Executive made similar remarks in the Seanad. In a discussion initially about Section 7 of the Bill, the Government spokesman, Minister Kitt, insisted that “[t]he courts examine Oireachtas debates but the danger of stipulating that they should do so is that it would make the law more imprecise.”²⁰¹ This is consistent, of course, with arguments for

¹⁹⁷ 29FPS1, No. 4 *Dáil Debates* 151 (Committee Stage, 22 January 2003).

¹⁹⁸ 29FPS1, No. 4 *Dáil Debates* 151 (Committee Stage, 22 January 2003).

¹⁹⁹ 29FPS1, No. 4 *Dáil Debates* 151 (Committee Stage, 22 January 2003).

²⁰⁰ She does briefly mention *Mulcahy* at 570 *Dáil Debates* 251 (Report and Final Stages, 1 July 2003). Interestingly, there was even a hint of Lord Steyn’s estoppel argument in the Report and Final stages of the Interpretation Bill. See Deputy Burton’s comments in reference to proposed amendment (No. 10) to the Bill at 557 *Dáil Debates* 250 (Report and Final Stages, 1 July 2003).

²⁰¹ 180 *Seanad Debates* 2287 (Committee Stage, 29 June 2005).

the exclusionary rule while simultaneously denying that it is applied. The objections were also similar to those made in the Dáil. Senator Ryan, for example, argued that “[i]t should be made clear that judges may examine them. All of us accept they examine the debates.”²⁰² After Minister Kitt again insisted the courts may look to the Oireachtas debates, Senator Ryan added:

I am concerned that by outlining what the court may do, the Minister of State is also stating what it may not do. If it does not mean the courts are prevented from doing other things, the section is unnecessary but if it means they are prevented from doing other things, then the section is outlining only what they may do. The courts do not have to do everything outlined but it is clear they may not do any more.²⁰³

While this exchange petered out, the issue came up again in the Report and Final Stages.²⁰⁴ There, Senator Ryan moved an amendment to allow the courts to explicitly use the debates. Senators Hayes and Quinn agreed. Minister Kitt rejected the amendment, referring to the decision in *Wavin Pipes* as well as the debates on *Pepper*. Once again, at no time in this exchange was mention made of the Commission’s recommendations on extrinsic aids. Judicial practice was never clarified.

The Law Reform Commission’s Report was mentioned, and indeed cited, by Minister Kitt when the Dáil went into Committee to consider Seanad amendments. There he offered an eloquent defence of the judicial development of the use of extrinsic aids. “It is felt”, he said, “that the Irish judiciary should be allowed to develop further the principles it applies to the use of extrinsic aids in respect to purely domestic legislation.”²⁰⁵ When pressed on the Seanad amendments, however, to expressly permit reference to such aids in the Bill, he concluded that “[t]he current position is

²⁰² 180 *Seanad Debates* 2287 (Committee Stage, 29 June 2005).

²⁰³ 180 *Seanad Debates* 2288 (Committee Stage, 29 June 2005).

²⁰⁴ 180 *Seanad Debates* 2307-2308 (Report and Final Stages, 29 June 2005).

²⁰⁵ 606 *Dáil Debates* 1690 (Considering Seanad Amendments, 5 October 2005)

that it does not prevent the courts from using debates of the Dáil and Seanad. That was the advice I was given, which I am glad to share with the House.”²⁰⁶

D. The Separation of Powers

Finally, the Law Reform Commission was not troubled by any separation of powers issues in preparing its report. The new Interpretation Act was simply the latest in a string of such legislation. The Commission emphasised “that under Ireland’s constitutional arrangements, it is the function of the legislature to make the law, and of an independent judiciary to interpret it. None of the proposals which we make can, or should, undermine this vital demarcation line.”²⁰⁷ Separation of powers questions cannot be considered in greater detail here due to lack of space, but the Oireachtas debates suggest a divergence of understanding amongst the branches of government.

The issue was explicitly, if curiously, referred to in the Dáil. Deputy O’Sullivan expressed a deep suspicion of the courts’ view of the role of legislature. She suggested that the Act might represent “a shift of power from the Oireachtas to the courts”, perhaps providing “a licence for judicial legislation.”²⁰⁸ In the context of her remarks, this is likely simply confusion over the long-standing judicial application of—and legislative acquiescence to—the ‘golden rule’ in those instances, however rare, where statutory text is ambiguous or unclear. But such comments are especially interesting in light of the recent more restrained view of the courts’ role in the separation of powers.²⁰⁹

²⁰⁶ 606 *Dáil Debates* 1690 (Considering Seanad Amendments, 5 October 2005)

²⁰⁷ L.R.C. 61 – 2000, p. 7. *Cf.* “Separation of powers’ principles would suggest that if a judge knows, or can reasonably be expected to know, what the Oireachtas intended the effect of the Act to be, then he or she is bound to give effect to that intention.” *Ibid.*, 18. See also *Ibid.*, 43.

²⁰⁸ 557 *Dáil Debates* 674 (Second Stage, 14 November 2002). See 557 *Dáil Debates* 675. In the Committee Stage, Deputy Burton ended her remarks by stating that “[t]he Bill gives additional powers of interpretation.” 29FPS1, No. 4 *Dáil Debates* 175 (Committee Stage, 22 January 2003).

²⁰⁹ See, e.g., *Sinnott v. Minister for Education* [2001] 2 I.R. 505 and *T.D. v. Minister for Education* [2001] 4 I.R. 259. See also Morgan, *A Judgment Too Far?: Judicial Activism and the Constitution* (2001).

This view is consistent with adherence to the exclusionary rule and was a development contemporaneous with *Crilly*.

Deputy O’Sullivan suggested it was “more realistic” to state:

...that the detail and complexity of much modern legislation is such that the average legislator does not even attempt to get to grips with it, especially if it outside his or her own brief or area of interest. In this view, Deputies and Senators are not so much the authors of legislation as bystanders, with only limited capacity to intervene and listen to a conversation taking place between the Executive, via its draftsman, and the law courts. There is something slightly bogus about grandiloquent references to “the intention of the Oireachtas” in passing a specific statute. There is also something unattractive about a system of justice which places a premium on the ability of legal advocates to spot defects in legislation that can be exploited to their clients' advantage.²¹⁰

On the one hand, such a statement (if true) suggests significant difficulties in the use of parliamentary history and seems to confirm the importance of the exclusionary rule. On the other hand, it does so only by a far more critical, perhaps realistic, perspective on the idea of legislative intent. Both the courts and the legislature speak of ‘plain intention’, but it may be that neither have a clear understanding of the realities of the process of legislating.

²¹⁰ 557 *Dáil Debates* 674 (Second Stage, 14 November 2002). Cf. the comments on the American system in Breyer, “On the Uses of Legislative History in Interpreting Statutes” (1992) 65 *Southern California Law Review* 845, 858.

VI. CONCLUSION

The Commission's proposals were modest. It appears that their intention was to ensure that statutory context is consulted only to supplement rather than supplant the ordinary meaning of statutory text. In their Report, they also made strong arguments in favour of the occasional use of parliamentary history. However, the Commission's suggestions on extrinsic aids were not enacted. In *Crilly*, decided as the Commission was completing its work and the Bill was in its early stages, the Supreme Court expressed in strong terms its reluctance (albeit in *obiter*) to use parliamentary materials.

Senator Ryan overstated the point when he noted that he was "intrigued that the Interpretation Bill 2000 is going to be one of the most difficult pieces of legislation to interpret",²¹¹ but it is easy to be sympathetic.²¹² One possible interpretation of the Oireachtas not implementing the Commission's recommendations is that it intended to continue the exclusionary rule. However, peeking at the debates in search of the subjective intent of the Oireachtas provides only dim guidance rather than a 'flood of light', leaving the issue in an unclear state. Case law and the comments of the Oireachtas suggest contrasting views of what current judicial practice is and ought to be, indicating that this is a question which is unlikely to have a clear answer for some time.

The Oireachtas has, however, explicitly required a limited purposive approach to statutory interpretation. The impact of the Act on current practice is likely to be minimal but its development could be quite interesting. The legislation is of considerable importance to all concerned—judges, practitioners and legislators—and merits careful study and consideration.

²¹¹ 180 *Seanad Debates* 2284 (Committee Stage, 29 June 2005).

²¹² In addition to its unclear effect on the exclusionary rule, the Act may have some unintended consequences. See Dodd, "The Interpretation Act 2005" (2006) 11(3) *Bar Review* 100, 104.