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“HEIRLOOMS”:

THE EVOLUTION OF A LEGAL CONCEPT

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I. INTRODUCTION

In the eighteenth century, Sir Richard Hill made his daughter-in-law, Mrs Hill, an unconditional gift of some jewellery. Mrs Hill passed it on to her daughter-in-law, Ann, at her marriage to the second Viscount Hill in 1833, saying that the jewels were to be Ann’s for life, but it was Mrs Hill’s wish that Ann should leave them at her death “as heirlooms”: a fact which Ann acknowledged years later in a memorandum to her solicitor in 1890. Ann died in 1891 leaving a will by which she bequeathed the jewels to her son, the third Viscount Hill, until his death and after his death to those who should succeed to the title successively; her intention being “that the diamonds should descend as heirlooms so far as the rules of law and equity shall permit.” The third Viscount died in 1895 leaving his second wife alive, the dowager Viscountess, and a son, the fourth Viscount Hill. The fourth Viscount and his stepmother, the dowager Viscountess, asserted competing claims to the diamonds, and the former sought to recover possession of the jewels from the dowager Viscountess.

The outcome hinged on when, if at all, the jewels became “heirlooms” in any legal sense. Did that occur in 1833 when Mrs Hill asked Ann to leave the jewellery at her death “as heirlooms”? Or did it occur in 1891 when Ann’s will took effect in the more complicated terms outlined above? If they became heirlooms in a legal sense in 1833, then the dowager Viscountess had an absolute interest in them, but if 1891 was the relevant date, the fourth Viscount could claim them absolutely. This was because, as we shall see later, the effect of achieving heirloom status in a legal sense at this stage of our legal history was merely to secure the descent of the property within a family for two generations. Thus, the fourth Viscount and current holder of the family title had to argue that the mere use of the word “heirlooms” in the wedding gift of 1833 had no legal force, and that the jewels only became heirlooms – and vested in him – under the 1891 will. He argued that the words used in 1833 by Mrs Hill so far as Ann had recollected them and set them down in the 1890 memorandum were words of request and not words of obligation, and that a precatory trust had not been created at that date. It was held that Ann took the jewels in 1833 free of any trust, and that the jewels only became heirlooms in any legal sense in 1891 under Ann’s will. This had the effect of carrying the jewellery for two generations, through the third Viscount to the fourth Viscount whose claim was now paramount doubtless a satisfying result which preferred the claims of the heir to those of the stepmother.¹

¹ *Hill (Viscount) v Hill (Dowager Viscountess)* [1897] 1 QB 483.

In popular usage, “heirlooms” are items of moveable property handed down from generation to generation within a family,² often following the descent of land, at least during the seventeenth to nineteenth centuries although much less frequently so today. For the first purchaser or donor of the items within a family, who either buys them or hands them on “as heirlooms”, this use of the word indicates a strong desire that future generations will respect their status by preserving them as family heritage. The ascription can even provide a moral justification for extravagance given that the initial expense of objects which might become heirlooms is offset by the potential value of the item to future generations, a point sometimes exploited by the owners of luxury brands:

“Cecil Harvell, a 39-year old Morehead City, North Carolina, attorney is the proud owner of a \$17,000 Patek Philippe wristwatch . . . The company fearing its potential customers might think that an unreasonable sum to spend runs ads that encourage them to think of their purchase as creating a family heirloom: “. . . you never actually own a Patek Phillippe. You merely look after it for the next generation.” The pitch seems to work: “with a seven-year old son, Mr Harvell said he viewed the watch as a keepsake that could be passed down through the family.”³”

The *Viscount Hill* case raises questions about the legal nature of “heirlooms” and the circumstances in which the word signifies not only a human aspiration but also a legal process by which moveable objects become descendible through generations. We shall consider here the legal doctrine of “heirlooms”, the forces which have shaped it and the extent to which it can be said to have satisfied human aspirations through the generations.

According to *Viscount Hill*, the basic rule for purchasers of moveable objects seeking to preserve their integrity for future generations as chattels-with-land or as chattels within a family is that it is not sufficient merely to describe them as “heirlooms” in any disposition of the property. The request that Ann should at her death treat the jewellery as “heirlooms” and dispose of them as such was considered merely an expression of hope and insufficient to impose a precatory trust upon her. She was therefore not bound to ensure the continued descent of the jewellery to later generations (although she in fact did so). Chitty LJ commented:

“. . . a man cannot turn a chattel into freehold land [which can descend within a family by means of an entail]. Accordingly, if A gives a chattel to B and merely says that B is to have it as an heirloom, no force (*in the absence of any context or special circumstance*) can be attributed to the word ‘heirloom’.”⁴

Yet although merely to describe an object as an “heirloom” has, in the absence of context or special circumstance, no legal effect upon the status of

² “Heirloom” means “a chattel that, under a will, settlement or custom, follows the devolution of real estate. Hence, any piece of personal property that has been in a family for several generations”: *Shorter Oxford English Dictionary*.

³ Frank, *Luxury Fever* (1999), 16.

⁴ *Hill (Viscount)*, *op cit*, p 496, Chitty LJ, emphasis supplied.

the object itself, it has on occasion been considered relevant to the interpretation of gifts of *other property* in wills. The best example of this, perhaps, is the case of *Byng v Byng* where the House of Lords had to construe a gift of land under the will of Anne Cranmer, a descendent of Archbishop Cranmer.⁵ She left an estate comprising Quendon Hall in Essex to her niece “and her children”, with “furniture, plate, books, linen etc, Archbishop Cranmer’s portrait by Holbein, India cabinet, striking watch, and my diamond earrings as heirlooms with my estate”. Under a “name and arms” clause the niece could only take the benefit of the will if she accepted an obligation to assume the Cranmer name. The issue for the court was the meaning of the words “and her children” in the gift of land and the application of the rule in *Wild’s Case*⁶ familiar to land law students. Were these words sufficient to create an entail, given that the testatrix had failed to use the time-honoured formula “to my niece and the heirs of her body”? The normal application of the rule in *Wild’s Case* would have suggested otherwise, resulting in the niece and her children taking the land jointly in fee simple. The rule is, however, one of construction subject to any evidence of intention collected from other parts of the will. The House of Lords relied upon the name and arms clause, the reference in the gift of chattels to “heirlooms” and specifically the desire that Holbein’s portrait of Cranmer should remain at Quendon Hall, as evidence of a desire to create an entail of the land, “a wish to establish a family which shall enjoy the family estate”. Lord Cranworth said that:

“the very word ‘heirlooms’ seems to involve in it the principle of descent . . . [and] it must mean something which, though not by its own nature heritable, is to have a heritable character impressed upon it”.⁷

Thus, in *Byng*, the reference to “heirlooms” and, to a lesser degree, the name and arms clause created a context of lineal descent which enabled the House of Lords to discern the donor’s intention in relation to the land and find that an entail had been created.

The primary means by which moveable objects may achieve legal recognition as heirlooms and have a “heritable character impressed upon them” is through the creation of context by means of the conveyancer’s art. As Theobald explains:

“ . . . owners . . . often desire that chattels of special interest and importance should pass from generation to generation with their . . . estates. These chattels may be family pictures, jewels and trinkets, medals and decorations, . . . in fact, any chattel of interest or value. But land and chattels being fundamentally

⁵ (1863) 10 HLC 171. The testatrix, born Anne Webb, had inherited the estate from her cousin Martha Cranmer, subject to a name and arms clause. She changed her name to Cranmer, as did her husband at their marriage.

⁶ *Wild’s Case* (1599) 6 Co Rep 16a. *Prima facie*, if the primary donee had no children living at the date when the will was made, the court inferred that the testator intended to create an entail whereas if a child was already in existence at that date, the primary donee took the fee simple jointly with such children as were alive when the testator died.

⁷ *Byng, op cit*, p 181.

different, could only be welded together by the ingenuity of conveyancers, and they constantly tended to start asunder.”⁸

In part III, we shall consider the ingenuity of conveyancers in achieving the preservation of heirlooms within families and the role of the courts in facilitating their efforts, while in part IV, we shall examine the jurisdiction introduced in the 1880s to authorise sale of heirlooms despite the efforts of conveyancers to prevent this. We begin by looking back to a time when “heirloom” was first used as a term of art to describe certain moveable property which devolved automatically to the heir of land according to custom or common law. Although these rules have little contemporary practical relevance, with the significant exception of those which relate to our ecclesiastical heritage, they bear brief examination since they gave us the word “heirloom” and, to an extent, they conditioned our thinking on the subject.

II. “HEIRLOOM” AS A TERM OF ART

The common law gave effect to two quite different interpretations of the term “heirloom”, one established by ancient customary law but enforced by common law after the Norman Conquest and the other established by the common law itself.

(a) “Heirlooms, chiefs or principals”⁹ under ancient local custom: the beginning of metaphorical annexation of moveables to land

The common law approach to devolution of property on death rested entirely upon its own artifice, the distinction between real and personal property: real property descended to the heir-at-law determined according to the rules of primogeniture with a preference for male heirs, whilst personal property passed to the deceased’s personal representatives for distribution amongst the next-of-kin.¹⁰ For several centuries, however, the common law courts showed considerable tolerance of Saxon (but not Brehon¹¹) customs of inheritance which frequently challenged the principle of primogeniture and less frequently blurred the distinction between real and personal property. For example, the custom of borough-English favoured the youngest son who inherited his father’s land because he was least likely to be independent at his father’s death, whilst gavelkind achieved an equal distribution either amongst sons or amongst all of the deceased’s children on the social basis that parents generally wish all of their children, or at least all of their sons, to benefit from their estate.¹² Similar forms of customary descent could be

⁸ Theobald, *The Law of Land* (2nd ed, 1929), 227.

⁹ See Viner, *General Abridgment of Law and Equity* (2nd ed, 1793) vol 14, 291: “Note, that heirlooms, chiefs or principals are those things which have continually gone with the capital message by custom.”

¹⁰ For comment, see Pollock and Maitland, *The History of English Law before the time of Edward I* (2nd ed, 1923), vol ii, bk II, ch vi, 363.

¹¹ *Case of Gavelkind* (1605) Dav 134, *Case of Tanistry* (1607) Dav 28.

¹² See First Report of the Real Property Commissioners, Brit Parl Papers (1829) x 1, and the evidence taken by the Commissioners as to the prevalence of these customs in 1829.

found in part of continental Europe.¹³ In the English context, customs prevailed on particular manors or groups of manors and the variation in tenurial customs from manor to manor was marked: in London, for example, the land of freeholders of the manor of Islington passed to the youngest son, whilst south of the river at Richmond and on surrounding manors, it was divided equally among male and female children.

Most commentators place the customary right to heirlooms squarely within the context of primogeniture, describing it generally as a right of the heir to the land to have the best (“chief” or “principal”) of certain chattels of utilitarian value. Where the custom applied, on the death of a freeholder functional items such as the best bed, table, pot and other household utensils or agricultural implements would automatically pass to the heir by custom as “heir-looms”.¹⁴ Coke summarised the principle thus:

“And note, that in some places chattels as heirlooms (as the best bed, table, pot, pan, cart or other dead chattels moveable) may go to the heir, and the heir in that case may have an action for them at common law . . . but the heirloom is due by custom and not by the common law.”¹⁵

Such a custom went some way towards meeting an objection on economic grounds to the strict demarcation between real and personal property for purposes of devolution on death: at a time when a householder’s inventory of possessions would have been extremely basic, the descent to the heir of “heirlooms” of a utilitarian nature ensured that he had some means of enjoying and exploiting the land which he inherited.¹⁶

One example of heirlooms as hereditaments descending with realty to the heir has been traced in Stretford in Oxfordshire:

“The custom of the hundred of Stretford . . . is that the heirs of tenements, within the hundred aforesaid, existing after the death of their ancestors, shall have principal – i.e. an heirloom, viz., of every kind of cattle [chattel]; the best waggon, best plough, best cup, etc.”¹⁷

Elton describes a Welsh custom dating back to the 10th century at the latest, whereby on the death of a landowner, the dwelling-house, eight acres of land and the best implements of the household passed to the youngest son,

¹³ See Elton, *Origins of English History* (2nd ed, 1890) ch viii, *passim*. Blackstone describes similar customary rights in the duchy of Brabant: Christian (ed), *Blackstone’s Commentaries on the Laws of England* (15th ed, 1809), ii, 428 (hereafter *Bl Com*).

¹⁴ Halsbury’s *Laws of England*, vol 39, para 390, Megarry and Wade, *Law of Real Property* (3rd ed, 1966), 531-2; Williams, *Law of Personal Property* (1848), 12; Noy, *The Principal Grounds and Maxims; a Dialogue and Treatise of the Laws of England and on Tenures* (9th ed, 1821), 239; Goodeve, *The Modern Law of Real Property* (1897), 11; Goodeve, *The Modern Law of Personal Property* (1887), 3; Tyler and Palmer (eds), *Crossley Vaines on Property Law* (5th ed, 1973), 9.

¹⁵ *Co Litt* 18b; *Bl Com*, *op cit*, p 427; 1 *Cruise Dig*, ss 5, 6; Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* (16th ed, 1982), 481-2.

¹⁶ See Pollock and Maitland, *op cit*.

¹⁷ Quoted from Hazlitt (ed), *Blount’s Tenures of Land and Customs of Manors* (1874), 301. See also Myers, *England in the late Middle Ages* (8th ed, 1971), 63.

presumably the heir under borough-English custom.¹⁸ It is not clear if any similar practice developed in Ireland but in Scotland “heirship moveables” were the best of certain types of moveable property to which the heir was automatically entitled.¹⁹

The term “heirloom” is itself consistent with a custom which links articles of furniture and implements with the heir to the land, since “loom” was a Saxon word for goods or chattels.²⁰ An alternative but unconvincing interpretation that “loom” is a corruption of “limb”, a view apparently accepted by Blackstone,²¹ was rejected in *Byng v Byng*.²²

Objects were heirlooms when, and only when, customary law diverted the course of devolution from the mainstream created by common law: “a man by the common law cannot be heir to goods or chattels.”²³ Blackstone stated:

“Heirlooms are such goods and personal chattels, as contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance and not to the executor of the last proprietor.”²⁴

The owner for the time being of heirlooms could sell or destroy them during his or her lifetime (although so great was their utilitarian value in medieval times that such conduct was extremely unlikely), but could not defeat the customary course of descent by bequeathing them to someone else. The application of such customs may have survived as late as the seventeenth or eighteenth centuries but probably were obsolescent by the end of the eighteenth century. *Viner’s Abridgment* of 1793 described them in the present tense but in 1848, the eminent property lawyer Joshua Williams stated that “they are very seldom met.”²⁵ The Real Property Commissioners Report of 1829 made no reference to heirloom customs although it indicated the continued prevalence of customary tenures such as gavelkind. At all events, customary modes of descent were abolished in England and Wales in

¹⁸ Elton, *op cit*, pp 181-2.

¹⁹ See McLaren, *The Law of Wills and Succession as administered in Scotland* (3rd ed, 1894), vol 1, 198.

²⁰ *Byng, op cit*, n 5, p 183, Lord Cranworth.

²¹ Blackstone, *op cit*, “an heirloom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold.” Some support for this view can arguably be found in the decision of Holt CJ in *Lord Petre v Heneage* as reported by Lord Raymond: (1701) 1 Ld Raym 728. However according to another report, Holt CJ clearly viewed heirlooms as goods in gross: (1701) 12 Mod 520. In any case, Blackstone’s comments seem more relevant to the issue of fixtures, and his discussion of heirlooms later proceeds on the basis that they are *not* physically attached to the realty: see pp 428-9.

²² *Op cit*, n 5, p 183.

²³ Co Litt 8a.

²⁴ Bl Com, p 427.

²⁵ Williams, *op cit*.

1925,²⁶ in Northern Ireland in 1955,²⁷ and in the Republic of Ireland in 1965.²⁸

(b) Heirlooms at common law: the “savour of the inheritance”

The ancient Saxon customs of descent gave us the word “heirloom” and a hybrid category of chattels which on the death of an ancestor passed to the “heir”. The common law courts built upon this foundation and added a slender group of common law heirlooms,²⁹ a miscellany of items linked only by the fact that each had a close relationship with real property which on the death of a freeholder passed with the land to the heir-at-law. This occurred:

“ . . . where the chattels, to use the old phrase, savour of the inheritance; that is are directly connected with it. This class includes title-deeds and the chest or box where they are usually kept,³⁰ the patent creating a dignity,³¹ the garter and collar of a knight,³² an ancient horn where the tenure is by cornage as in the case of the Pusey horn,³³ and the ancient jewels of the Crown.³⁴”³⁵

A further group of chattels was added to the sequence: coat of armour, helmets, swords and other relics hung in a church to honour the memory of an ancestor,³⁶ a not uncommon feature in older English parish churches.

“Other personal chattels there are, which also descend to the heir in the nature of heirlooms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them but is liable to an action from the heir.”³⁷

²⁶ Administration of Estates Act 1925, s 45(1)(b).

²⁷ AEA (NI) 1955, s 1(3).

²⁸ Succession Act 1965, s11(1). In Scotland, “heirship moveables” were abolished in 1868.

²⁹ See generally the works cited at n 14.

³⁰ “Writings savouring of the realty”: see *Duke of Somerset v Cookson* (1735) 3 P Wms 390, Lord Talbot LC. Title deeds, or “the sinews of the land” as Coke described them (Co Litt 6a) and all land records and the box containing them passed at common law to the heir: *Atkinson v Baker* (1791) 4 TR 229 and Halsbury’s Laws, vol 39, *Real Property*, paras 388-9.

³¹ And see *Upton v Lord Ferrers* (1801) 5 Ves Jun 801 (Lords’ journals delivered to peers probably pass to their heirs).

³² In *Earl of Northumberland’s Case* (1584) Owen 124, these bejewelled items were considered “ensigns and honours of state” which did not pass under a bequest of “jewels” by the Earl to his wife.

³³ *Pusey v Pusey* (1684) Vern 272.

³⁴ Co Litt 18b; Bl Com, ii, 427. Blackstone explains that this is necessary to “maintain the state and support the dignity of the sovereign”.

³⁵ *Hill, op cit*, n 1, pp 494-5, Chitty LJ.

³⁶ Co Litt 18b.

³⁷ Bl Com, ii, 428-9, citing *Corven’s Case* (1612) 12 Co Rep 105. Such items are also listed as heirlooms in *Viner’s Abridgment, op cit*, n 9, with the observation that “this agrees with the law of other nations.”

A contemporary case, *Re St Andrews, Thornhaugh*,³⁸ establishes that such heirlooms continue to devolve to the heir-at-law of the ancestor in question. In 1976, the rector and churchwardens of a village church petitioned the Consistory Court for a faculty authorising the sale of a helmet which hung in the church as part of the accoutrements of the tomb of Sir William Russell, first Duke of Bedford. Russell had been a distinguished soldier in the reign of Elizabeth I and a comrade-in-arms of Sir Philip Sydney. His helmet had at his request been put in place in the church following his death in 1613. By 1976, it was a very valuable asset the sale of which would go a long way towards meeting the church's repair bills. The court rejected the petition on the basis of lack of jurisdiction.³⁹ The helmet belonged to Sir William's heir, but no evidence had been adduced as to that person's identity, although it was probably the present Duke of Bedford. In any event, the petitioners had not sought the Duke's consent. Further, Chancellor Fitzwalter Butler stated that jurisdiction to authorise sale of such "heirlooms" should be exercised with caution where the object is a national treasure and the sale is not absolutely necessary to raise funds to preserve the fabric of the Church.⁴⁰

In each of these largely unconnected cases, the common law seized upon the heirloom principle first established by customary law – personalty devolving automatically with the realty to the heir-at-law, defying the normal course of devolution for moveables – in order to achieve the desired outcome for the case. The property in question therefore became an "heirloom" because a court decreed that the heir should have it: when original jurisdiction was first assumed for each of the examples given, heirloom status was the effect rather than the cause of the court's decree.⁴¹

Two important features of common law heirlooms survive within the legal system today. The first of these relates to English ecclesiastical heritage, as illustrated by *Re St Andrews, Thornhaugh*. Much work remains to be done, in the context of cultural property law, on this aspect of heirloom status and its role in the preservation of ecclesiastical heritage under the jurisdiction of the Consistory Court. The second is of more general importance. To understand it, we return to the case of the Pusey horn reported in 1684. The manor of Pusey in Berkshire had been held by the Pusey family in cornage tenure, that is, by a horn given with the land by King Canute (died 1035). This form of tenure was by no means uncommon in the Welsh Marches or the borders between England and Scotland, the stipulated service of sounding a horn being required to herald the approach of the monarch or of invading forces. The Pusey horn was inscribed:

"Kyng Knowd (Canute) gave Wyllyam Pewse [Pusey]
Thys horne to holde by thy Lande."

³⁸ [1976] 1 All ER 154.

³⁹ The Court had no common law jurisdiction because the heirloom belonged to Russell's heir-at-law. Statutory jurisdiction under the Faculty Jurisdiction Act 1964 only arose where the owner could not be found or withheld his consent, which was not the case here.

⁴⁰ *Ibid.*, pp 160-1 and cases cited there.

⁴¹ The example of the Crown jewels is the only one based upon mere supposition, apparently that of Lord Coke. Other jewels could not be "heirlooms" at common law: *Lord Petre v Heneage*, *op cit*, n 21.

Some 700 years after it had been given to William Pusey, his descendant and heir to the land, Charles Pusey, brought a bill in Chancery to recover possession of the horn from another member of the family. Blount states that the horn was produced in court, “and with universal admiration received, admitted, and proved to be the identical horn by which . . . Canute had conveyed the manor of Pusey.”⁴² Lord Keeper Guildford decreed that the horn must be restored to the plaintiff,⁴³ a ruling which was to become the basis of equitable jurisdiction to order specific restitution of chattels of antiquity or unique value, an important development in Chancery given that before 1854, the common law courts had no power to award specific restitution in detinue or trover.⁴⁴ During the period between *Pusey* in 1684 and the enactment of the Common Law Procedure Act 1854, the equitable jurisdiction to order specific restitution of moveables flourished. Thus, in 1735 the Duke of Somerset, as lord of the manor of Corbridge in Northumberland, was able to recover possession of a patera (a dish used for sacrificial offerings in ancient times) inscribed in Greek with a dedication to Hercules. By some underhand means, it had been sold to a goldsmith in Newcastle and it was feared that he might deface it in order to conceal its identity and provenance.⁴⁵ Lord Talbot LC rejected the defendant’s argument that the jurisdiction to award specific restitution was limited to cases of “heirlooms” strictly so-called, by which he meant objects which savoured of the realty such as the Pusey horn. It would seem that by 1735, “heirloom” as a term of art was understood by reference to those objects which savoured of the inheritance and were categorised as heirlooms at common law rather than by reference to the earlier sense of the word under customary law. Further, the Pusey horn now appears to be retrospectively viewed as an object to be valued more for its antiquity and historic significance than for its tenurial connection with the manor of Pusey. A more general intention to protect cultural objects and not merely “heirlooms” in the narrow common law sense can be inferred in the decision in *Pusey*. Thus, the judgment on the bill in *Pusey* blossomed into a broader jurisdiction of general relevance in the field of cultural property law and explained by Lord Loughborough LC in 1796 in a case involving a unique tobacco-box belonging to a society:

“The value [of the box] I cannot measure. The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give two-pence beyond the weight.

⁴² Hazlitt (ed), *Blount’s Tenures*, *op cit*, n 17, p 250 and the references found there. See also Hewitt and Richardson, (eds) *White and Tudor’s Leading Cases in Equity* (9th ed, 1928), 404(b).

⁴³ *Pusey*, *op cit*, n 33.

⁴⁴ The Common Law Procedure Act 1854, s 78 conferred a discretionary power to do so. See generally, Heuston (ed), *Salmond on the Law of Torts* (15th ed, 1969), 117, 147; Keeton and Sheridan, *Equity* (1969), 67-8, 484; Megarry and Baker (eds), *Snell’s Principles of Equity* (27th ed, 1973) 575; Meagher, Gummow and Lehane, *Equity : Doctrines and Remedies* (3rd ed, 1992), chap 22.

⁴⁵ *Duke of Somerset v Cookson* (1735) 3 P Wms 390.

It was not to be cast to the estimation of people, who have not those feelings.”⁴⁶

III. THE CONVEYANCER'S ART

“Georgian society took pride in the increasing range of material objects which were now falling within the pockets of a wider cross-section of society Many such belongings went beyond the basic necessities . . . that had made up the furnishings of so many Stuart cottages.”⁴⁷

By the eighteenth century, as property ownership increasingly extended beyond the essentials of life, many more families possessed objects of value which they viewed as “heirlooms” and wanted to be treated as such in law. Inevitably, the greatest pressure for a fresh look at heirloom status would come from the wealthier families, but all property owners would benefit from the outcome. The public had grasped the essence of heirlooms – descendibility of moveables – but had no understanding of the precise legal term of art and its narrow scope. Saxon custom and common law had applied only to a limited range of objects, and, in the case of customary law, had embraced articles of utilitarian value, not valuable non-essential items which were now the subject of proposed retention for the material and cultural enrichment of later generations. For property owners, “heirloom” status for chattels was an increasingly common aspiration but the legal term was wholly incapable of satisfying popular expectations. The best that could be hoped for was that lawyers might succeed in devising a means of allowing valuable moveable objects to be treated *as if* they were heirlooms – “quasi-heirlooms”, as Challis described them.⁴⁸ In the context of the times, any mechanism which might be devised would require elements not only of succession to the objects in question but also of metaphorical annexation to the land on which they were to continue to be enjoyed, to ensure the unity of land and chattels.

The common law did not favour the settlement of moveable objects with or without land as estates could not be created in them and, in particular, no entails of chattels were permitted: the statute *De Donis Conditionalibus* 1285 applied only to tenements, freehold land. Thus, an attempt to give moveables to “A for life, remainder to B and the heirs of his body”, vested the whole interest in the property in A.⁴⁹ By the time of Henry VI, however, the common law had drawn a distinction between bequests of moveable property *per se* to persons in succession and gifts by will of *the use* of such property. This made it possible to grant to A the use of certain chattels during his life, with a gift over of the absolute interest to vest in B at A’s

⁴⁶ *Fells v Read* (1796) 3 Ves Jun 71. See also *Earl of Macclesfield v Davis* (1814) 3 V & B 16, where specific restitution was ordered in a case of chattels made “heirlooms” by the skill of conveyancers.

⁴⁷ Porter, *English Society in the Eighteenth Century* (1990), 225.

⁴⁸ Challis, *The Law of Real Property* (1887), para 285.

⁴⁹ Butler (ed), *Fearne’s Contingent Remainders and Executory Devises* (10th ed, 1844), vol I, 401, 567; *Halsbury’s Laws*, vol 42, para 611; *Foley v Burnell* (1783) 1 Bro CC 274 and (1785) 4 Bro PC 319, and *Re Hope* [1929] 2 Ch 136.

death.⁵⁰ By the 1660s, common law and equity were at one on this point⁵¹ and by the end of the seventeenth century, it was no longer necessary to specify, at least in wills, that the property was solely “for the use of” A for life with a gift over, as these words were implied by the courts.⁵² The principle was summarised by Lord Keeper Somers in the Court of Chancery, as follows:

“The devise or grant of a personal thing to one for life for an hour or minute [is] a gift for ever, and an absolute disposition of the entire property to the first person. But where the devise is only of the use of the goods to one for life, and after to another, here the first devisee has not the property of the goods but only a special interest in them; and still there remains a property which may be given over.”⁵³

Only a little more effort was necessary to secure the notional annexation of chattels to land so that succession to the chattels would follow succession to the land, at least initially. A good early example of a formula to which the Court of Chancery gave effect is found in the case of *Vachel v Vachel and Lemmon* in 1669, where after various limitations, the testator created the context for the gift of personal estate, paintings, books and rare objects:

“that they remain as an heir-loom and go and remain to such person and persons as shall inherit my said manors and lands, who I desire may prove lovers of learning, ingenuity and arts.”⁵⁴

In time, the mode of settling chattels as heirlooms with land was refined by conveyancers. They could either make them expressly subject to the same limitations as the real estate setting these out in full, or they could incorporate those limitations by reference either by declaring that the chattels were to go upon the same limitations as the realty or simply by saying that they were to be treated “as heirlooms”.⁵⁵ Often, testators adopted the latter

⁵⁰ *Hyde v Parrat* (1696) 2 Vern 331, 1 P Wms 1, where Lord Keeper Somers stated that equity followed the law on this point. He cited (1459) 37 Hen 6 (abridged in Bro Devise 13) where a testator devised a book called the Grail to A to use during his life and afterwards to B: held, the devise over was good. See also *Welcden v Elkington* (1578) Plowd 521. The cases were reviewed in *Smith v Clever* (1688) 2 Vern 59. Similar reasoning was applied to gifts of this sort relating to leaseholds: *Manning’s Case* (1609) 8 Co Rep 95 and *Lampet’s Case* (1612) 10 Co Rep 47. See also Fearn, *op cit*, p 401, *Lord Hastings v Douglas* (1633) Cro Car 343 (gift of jewellery (which was the wife’s paraphernalia) in husband’s will: to his widow for use during her life, then over to their daughter. Held, the bequest overrode the wife’s absolute right to paraphernalia at his death.).

⁵¹ *Hart v Hart* (1666) 1 Chan Rep 260, *Vachel v Vachel and Lemmon* (1669) 1 Chan Cas 727. These were both Chancery decisions in which the opinion of the common law judges was taken.

⁵² Fearn, *op cit*, p 406, *Clarges v Duchess of Albermarle* (1691) 2 Vern 245 and the cases cited there, *Hyde, op cit*, and *Shirley v Ferrars* (1690) 1 P Wms 6.

⁵³ *Hyde, op cit*, p 3 (Peere Williams report).

⁵⁴ *Vachel, op cit*. See also *Hart, op cit*, “as an heirloom according to the limitations of the lands”.

⁵⁵ See *Lord Scarsdale v Curzon* (1860) 1 J & H 39. If no reference was made to the limitations of the real estate or to the word “heirlooms”, the court would not imply

and simplest course, bequeathing chattels to “go as heirlooms” with the settled land.

But what did it mean to “go as heirlooms” with settled land? If the seventeenth century courts had confirmed that an element of succession to moveable objects could be achieved by limiting the rights granted to the first taker to the use of the personal property, they had done nothing to interfere with the fundamental principle that entails – descendible estates – could not be created in chattels. Where chattels were left to “go as heirlooms” and follow the succession to the entailed land, they were enjoyed by the tenant for life of the land as usufructuary and legally annexed to the settled land during the life interest(s). Thus, they could not be removed by the tenant for life.⁵⁶ Title to the chattels vested absolutely in the first tenant in tail as soon as he was born subject only to the life tenant’s rights as usufructuary.⁵⁷ At that moment, they reverted to their status as personal property and would not descend further with the land. In several cases decided by Lord Hardwicke LC between 1740 and 1750, attempts by tenants for life to secure an absolute interest in the chattels were defeated.⁵⁸ Lord Hardwicke asked rhetorically “what is there then of the nature of inheritance in these heirlooms if they stop there [*ie* with the tenant for life]?”⁵⁹ Yet while the courts were prepared to rule that title to the moveables vested not in the tenant for life but in the tenant in tail, that vesting had to be absolute: as personal property could not be made subject to an entail, it had to stop with and vest in the first tenant in tail. On his death, the personal property formed part of his estate and passed away from the land, unless he himself took steps to resettle the chattels with the land for the benefit of his heirs, as his father or grandfather had done for him. The basic rule was explained by Lord Thurlow LC in *Foley v Burnell* in 1785:

“... it was contended that the general intent of the testator was to annex the personal property in question to the real estate in the nature of heirlooms. The infant son of [the tenant for life] upon his birth acquired an estate in tail to the real property, to which these heirlooms were annexed: the extent of his interest in the heirlooms therefore was such as a tenant in tail of personal property has in consideration of law: that interest by the law is considered as absolute and of course this infant son became upon his birth the absolute owner of the property in question, subject only to the interest his father had in it for his life.”⁶⁰

The rule was first laid down in a series of seventeenth century Chancery cases where conveyancers’ attempts to weld leaseholds on to strict

it: *Wyth v Blackman* (1748) 1 Ves 196 (“household stuff”). See *Davidson’s Precedents and Forms in Conveyancing* (3rd ed, 1873), vol iii, Pt II, 1180, and Williams, *Law of Personal Property* (18th ed, 1926), 514-7.

⁵⁶ *Re Chesham* (1884) 31 Ch D 466.

⁵⁷ Subject to the terms of the gift, the tenant for life’s right of usufruct continued until his death.

⁵⁸ *Gower v Grosvenor* (1740) Barn C 54, *Trafford v Trafford* (1746) 3 Atk 348, and *Duke of Bridgwater v Egerton* (1750) 2 Ves 122.

⁵⁹ *Trafford*, *op cit*, p 349.

⁶⁰ *Foley*, *op cit*, n 49, p 326.

settlements of the real estate were given sympathetic treatment by successive Lord Chancellors.⁶¹ Leaseholds, like moveables, could not be entailed. It was logical and convenient to apply to moveables notionally annexed to land as heirlooms the same principle as had developed for leaseholds. In time, the courts even accepted that the same principle could operate where chattels were settled as heirlooms to pass with a title without specific reference to lands.⁶²

The desire that heirlooms in the popular sense should be absorbed by the system of dynastic land settlement so prevalent in the eighteenth century emerges clearly from these words of Lord Hardwicke LC:

“The expression in the present will is, that these personal chattels shall go as heirlooms; which expression is not to be understood in the strict sense of that word, but only signifies in general, that they are to go with the rest of the family estate; and where men have settled a considerable real estate, it is frequent to find some clause in the instrument of the same kind as the present one. And if a very strict construction was made on these sort of clauses. . . it would tend very much to defeat the intention of the party. Clauses of this nature are intended as monuments of great families, to support the honour and dignity of them . . .”⁶³.

But the willingness to give effect to the intentions of testators and settlors had to operate within the general framework of property law; accordingly, “since the law will not permit personalty to go as an estate tail, when you get to such a limitation, you have to stop and give an absolute interest.”⁶⁴ Where land was limited to A for life, remainder to A’s first and other sons successively “and the heirs male of their bodies”, and the heirlooms were to pass on similar terms, absolute vesting of the chattels in A’s eldest son satisfied not only the rule that entails may not be created in chattels but also the rule against perpetuities. Whether A’s son was alive at the date of the gift or was born later, vesting of the heirlooms in him occurred within the period allowed by law, a life in being (the tenant for life) and 21 years.

By the early eighteenth century, the parameters of a doctrine of heirlooms had been established: judicial willingness to assist in the preservation of “the monuments of great families” (and, by extension, the favoured property of less wealthy owners) by giving effect to donors’ intentions to constitute “heirlooms”, bounded only by the inability to create entails in chattels and the susceptibility of heirlooms clauses to the rule against perpetuities. Although personal property could not be subjected to the same conveyancing

⁶¹ Yale (ed), *Lord Nottingham’s Prolegomena of Chancery and Equity* (1965), 223 *et seq.* See the list of cases cited in *Gower, op cit*, especially *Higgins v Derby* (1708) 1 Salk 157.

⁶² *Clarke v Earl of Ormonde* (1821) Jacob 791, *Re Johnston* (1884) 26 ChD 538, *Holmesdale v West* (1866) LR 3 Eq 474, and *Re Exmouth* (1883) 23 Ch D 158.

⁶³ *Gower, op cit*, pp 56-7.

⁶⁴ *Lord Scarsdale, op cit*, n 55. Vesting of the chattels in the tenant in tail occurred even though his interest in the realty was liable to defeasance, *eg* by the birth of someone with a better claim: *Portman v Portman* [1922] 2 AC 473, *Re Cresswell* (1883) 24 Ch D 102, *Re Cornwallis* (1886) 32 Ch D 388.

dynamic (and social stasis) as land held in entail and heirlooms clauses merely propelled personal property as far as the first tenant in tail, it was nevertheless a repeatable process which could be employed each time the land was resettled, as usually occurred every generation or two. It was enough to meet popular expectations.

The problem for the conveyancer in the early eighteenth century was that, although he knew that he could now secure the transmission of chattels as heirlooms beyond the tenant for life of the land as usufructuary to the tenant in tail, it could not be known at the outset whether the tenant in tail would live long enough to take actual possession of the land and heirlooms or leave issue to succeed him under the entail. If he died in infancy or died without issue before the entail vested in possession, the land would pass on his death to another branch of the family while the personal property, having already vested in him at birth, formed part of his estate and was severed from the land. A series of refinements in conveyancing practice led to heirloom clauses preventing vesting of the chattels from occurring if the tenant in tail died under 21 without issue and without having taken actual possession of the settled land.⁶⁵ By 1740, postponement of the vesting age to 21 was “the common and known way of conveyancing” in relation to heirlooms according to Lord Hardwicke LC⁶⁶ and was the practice of even longer standing in relation to leaseholds limited to follow the descent of realty.⁶⁷ It was expedient to postpone vesting of heirlooms until the tenant in tail reached 21 because at that stage it was common for the tenant for life to prevail upon a tenant in tail in remainder to join with him to bar the entail and resettle the land and the heirlooms together, thus pushing back the ultimate vesting of the latter for one more generation.⁶⁸

A particular difficulty arose in relation to marriage articles, the means by which much land was brought under settlement. These commonly contained covenants to settle specific chattels as heirlooms to be annexed to the land “so far as the rules of law and equity permit”, so creating executory gifts the details of which remained to be settled in a later conveyance. Executory gifts might also occur under wills where the testator transferred chattels to his executors directing them to settle them as heirlooms with the land. Where the will or the marriage articles⁶⁹ conferred no express reference to postponement of the vesting of the chattels in the tenant in tail until the age

⁶⁵ Page-Wood V-C traces the phases in conveyancing practice in *Lord Scarsdale, op cit.* Where the vesting of the chattels was postponed until the tenant in tail reached 21, he could be given a right of usufruct over them until that age: *eg Trafford, op cit.*, n 58, where vesting of the entail in possession occurred before the tenant in tail reached 21, it was decided that the heirlooms vested in him liable to divesting if he failed to reach the age: *Re Chesham* [1909] 2 Ch 329.

⁶⁶ *Gower, op cit.*, n 58, p 63.

⁶⁷ *Stanley v Leigh* (1732) 2 P Wms 917, where Jekyll MR stated that this was well-established conveyancing practice.

⁶⁸ See *eg, Re Chesham, op cit.*

⁶⁹ In *Countess of Lincoln v Duke of Newcastle* (1806) 12 Ves Jun 218, Lord Eldon rejected any distinction between executory gifts by will and under covenants to settle, saying it would “shake to their foundation the rules of Equity”, see also *Carr v Lord Erroll* (1808) 14 Ves Jun 605. As to executory gifts of heirlooms, see generally Robbins (ed), *Bythewood and Jarman’s Precedents in Conveyancing* (4th ed, 1890), 514-7.

of 21 or until his entail vested in possession, a question of considerable practical significance arose whether the Court of Chancery, in directing how executory gifts should be executed, should adopt current conveyancing practice which was generally to postpone vesting of the heirlooms until the age of 21 and sometimes to postpone vesting until the obtaining of actual possession of the land. In the 1740s, Lord Hardwicke LC took the view that the Court had considerable power to direct the limitations affecting settled chattels so as to ensure the unity of realty and personalty for as long as possible in accordance with the donor’s wishes, as evidenced by the words “so far as the rules of law and equity permit.”⁷⁰ In the 1780s and 1790s, Lord Thurlow LC led a body of judicial opinion to the contrary and had the backing of the House of Lords for his views.⁷¹ His real objection to the Court’s control over the drafting of heirlooms clauses was not the use of an age condition but the possibility that the Court might insist on the tenant in tail becoming entitled in possession to the land before taking an absolute interest in the heirlooms. What if a tenant for life in possession and a tenant in tail in remainder (often, father and son) wished to bar the entail and sell the land? The tenant in tail in remainder could not yet deal with the heirlooms, since vesting of these had been postponed. Must the heirlooms continue to be tied up even after the land had been sold or the mansion house pulled down? Lord Thurlow LC failed to see how this could be in accordance with the settlor’s wishes and he persuaded his fellow judges not to adopt Lord Hardwicke’s approach. Nevertheless, in 1806 in *Countess of Lincoln v Duke of Newcastle*,⁷² the House of Lords confirmed a decree of the Court of Chancery directing that the terms of a settlement of personalty should include a postponement of vesting until the tenant in tail was 21 even though the marriage articles in question did not expressly require this. Lord Eldon disagreed with the Lords’ decision, and maintained his opposition for years to come. He agreed with Lord Hardwicke in principle but as “a great mass of property” (leases and heirlooms) had been settled on the basis of Lord Thurlow’s decisions in 1785 and 1790, a return to the Hardwicke view would “shake a very large property”.⁷³ Lord Eldon’s doubts, however, did not prevail.⁷⁴

At the heart of this debate over the power of the Court of Chancery to adopt common conveyancing practice in relation to heirlooms clauses in executory gifts was a keen awareness on the part of the judiciary that sophisticated conveyancing could never overcome the haphazard course of human existence. On many occasions, early death of a tenant in tail or complete failure of issue of the tenant for life had frustrated conveyancers’ efforts and caused a severance of heirlooms from land. Years after the debate was settled, in a case where the efforts of conveyancers to preserve the unity of land and heirlooms had proved fruitless, Lord Buckmaster would say:

⁷⁰ *Gower, op cit.*

⁷¹ *Foley, op cit*, n 49, *Vaughan v Burslem* (1790) 3 Bro CC 102.

⁷² *Countess of Lincoln, op cit.*

⁷³ *Ibid*, p 237. See also *Burrell v Crutchley* (1809) 5 Ves 544 and *Carr v Lord Erroll, op cit.*

⁷⁴ See eg *Sackville-West v Viscount Holmesdale* (1871) LR 4 HL 543, *Harrington v Harrington* (1872) LR 5 HL 100, and *Re Johnston* (1884) 26 Ch D 538.

“The result is a strange comment on the vanity of human wishes, for the absolute ownership of these heirlooms will now vest in a lady who can never become entitled to the estate which the testator desired to enrich. This is, however, due to the operation of the law which . . . is not open to dispute.”⁷⁵

Yet although the circumstances of individual cases would continue to perplex land owners, their conveyancers and the judges, by the end of the Georgian era all were engaged on a common purpose to preserve the integrity of land and heirlooms. When Lord Eldon LC said in 1821: “I may venture to say, that heirlooms are a kind of property that are rather favourites of the Court”,⁷⁶ he neatly summarised judicial attitudes towards the heritability of moveable objects of value to landed families.

The achievements of the Court of Chancery in supporting conveyancers’ efforts to draft effective heirlooms clauses were recognised and respected at common law. When the heavily indebted Lord Montfort, in consideration of marriage, settled his lands and certain valuable chattels on himself for life, remainder to his wife for life, remainder to his sons successively in tail, the trustees of the marriage settlement were able to sue in trover to recover heirlooms seized from Lord Montfort by a creditor in execution of a judgment for debt. Lord Mansfield LCJ referred to the frequency with which land and heirlooms were settled on marriage and the construction which the Court of Chancery imposed upon the gift of heirlooms making Lord Montfort merely a usufructuary of the personal property, and held that any interference at common law with the remainderman’s right to the settled chattels was not to be countenanced.⁷⁷ Many creditors must have been defeated on this basis.

One significant development which occurred in Chancery practice in the eighteenth century was to abandon the procedure adopted in the previous century of requiring the tenant for life, at the request of the immediate⁷⁸ remainderman, not only to make an inventory of the heirlooms and deliver it to the Master but also to provide security that they would be available at his or her death.⁷⁹ Security was only ordered in the more settled social conditions of the eighteenth century where there appeared to be a specific threat to the continued existence of the objects in the household.⁸⁰

Little has been said so far about the nature of the objects which might be settled to go as heirlooms with land. The conveyancer’s art could be applied to personal property in an indiscriminate manner; the law simply recognised “the propriety of annexing sufficient possessions to support the splendour of

⁷⁵ *Portman*, *op cit*, n 64.

⁷⁶ *Clarke*, *op cit*, n 62, p 115.

⁷⁷ *Cadogan v Kennet* (1776) Cowp 432. See also *Clarke*, *op cit*, and *Fearne*, *op cit*, n 49, p 414.

⁷⁸ But not more remote remaindermen: see *Hart*, *op cit*, n 51.

⁷⁹ *Vachel*, *op cit*, n 51, *Anon* (1695) 2 Freem 206, and for the later practice, see the decisions of Lord Hardwicke LC in *Bill v Kynaston* (1740) 2 Atk 82 and *Leeke v Bennett* (1737) 1 Atk 470.

⁸⁰ See *Fearne*, *op cit*, n 49, p 406.

great families.”⁸¹ In practice, plate, books, pictures, jewellery, statuary and similar objects were made the subject of heirlooms clauses. Items of furniture, unless of particular interest or value, were sometimes considered inappropriate to be settled as heirlooms.⁸² The testator or settlor might expressly refer to specific items and to the circumstances surrounding them: the disposition of “the Sèvres China flower stand given to the Rt. Hon. Robert Charles Banks, Earl of Liverpool by the Emperor Napoleon the First”, for example, provided useful information about the article’s provenance.⁸³ This might be provided as an inventory attached as a schedule to the gift; alternatively, the executors or trustees might be directed to draw up an inventory of those articles among the testator’s personal effects which at their discretion were to be retained as heirlooms.⁸⁴

In the Victorian era,⁸⁵ the issues which arose in “heirlooms” cases were mostly questions of construction of particular wills and the application of what was now regarded as settled doctrine. A degree of codification of the law was achieved in the summary of some of the earlier cases provided by Page-Wood V-C in 1860 in *Lord Scarsdale v Curzon*,⁸⁶ a case often taken by subsequent commentators and courts as a starting-point, giving the subject of heirlooms a more modern appearance than is justified.

In general, in addressing questions of construction, the courts demonstrated a degree of benevolence towards heirlooms clauses preferring the construction which, on the facts of the case, ensured unity of land and heirlooms. In all of the nineteenth century cases where the issue was whether the settlement required the tenant in tail’s estate in the land to vest in possession and not merely in remainder before the personalty vested in him, the courts reached decisions which kept land and heirlooms together.⁸⁷ While superficially the twentieth century cases appear to take a more restrictive approach, the

⁸¹ *Duke of Marlborough v Godolphin* (1754) 1 Eden 404, 416, Sir Robert Henley, Lord Keeper.

⁸² See *Re Johnston*, *op cit*, n 74, p 550.

⁸³ *Portman*, *op cit*, n 64, p 481.

⁸⁴ See *Key and Elphinstone’s Precedents in Conveyancing* (15th ed, 1953) vol 2, 808; *Re Johnston*, *op cit*, and *Re Montagu’s Settlement Trusts* [1992] 4 All ER 308. In *Montagu*, the trustees were directed to prepare an inventory of items suitable in their opinion for inclusion in the settlement as heirlooms and to hold the remaining personal property on trust for the tenth Duke of Manchester absolutely. They failed to prepare an inventory and allowed the Duke to have and sell several valuable items. They were found liable for breach of trust but Megarry V-C found that as the Duke had no knowledge that items had come into his power and control in breach of trust, he was not liable as constructive trustee.

⁸⁵ Fiscal privileges were introduced under the Finance Act 1896, s 20 (as amended by the Finance (1909-10) Act 1910, s 63) for objects of national, scientific or historic interest, settled to be enjoyed by persons in succession: see *Re Leconfield* (1904) 90 LT 399 and *Re Scott* [1916] 2 Ch 268.

⁸⁶ (1860) 1 J & H 40.

⁸⁷ *Potts v Potts* (1846) 9 Ir Eq R 577, confirmed by HL: (1848) 1 HLC 671; *Lord Scarsdale*, *op cit*, *Martelli v Holloway* (1872) LR 5 HL 532; *Re Angerstein* [1895] 2 Ch 883.

outcome in almost all of these was that the heirlooms remained in the family one way or the other.⁸⁸

Similar benevolence has been shown in relation to the application of the rule against perpetuities.⁸⁹ The frequent use of a vesting age of 21 in heirlooms clauses potentially raised problems if successive tenants in tail died under 21 but leaving issue. Lord Eldon warned of heirlooms travelling “through minorities for two centuries.”⁹⁰ Conveyancing practice was amended to address this and the House of Lords adopted a continued policy of relatively benign construction.⁹¹ Nevertheless, conveyancers had always to be mindful of the fact that an heirlooms clause annexed moveables to an estate which enjoyed privileged status under the rule against perpetuities, privilege which did not extend to personal property. For example, a shifting clause attached to an entail was not invalidated by the rule because the entail could be barred at any time, destroying the shifting clause. The same could not be said, however, for heirlooms with the result that a shifting clause which infringed the rule against perpetuities would invalidate the gift of heirlooms, while leaving the entail intact.⁹² Only by the exercise of considerable skill was a limited degree of annexation achieved for heirlooms and land.

In the twentieth century, momentum in the development of heirlooms doctrine all but ceased. Such case law as has been reported mainly concerned nineteenth century or pre-World War I settlements. A small amount of litigation in the Irish courts revealed that conveyancing practice in relation to heirlooms and the attendant legal rules prevailed in Ireland,⁹³ while an English court applied the general principles of heirlooms clauses to Scottish estates held under a deed of entail.⁹⁴ Major social, economic and fiscal changes after World War I undermined the value of the strict settlement system causing conveyancers increasingly to use more flexible trust provisions crafted to comply with the rule against perpetuities (itself put on a more flexible basis in the 1960s), in order to achieve property owners’ wishes. The modern trust can easily be drafted to confer rights of usufruct in

⁸⁸ *Chesham*, *op cit*, n 65; *Re Parker* [1910] 1 Ch 581; *Re Beresford-Hope* [1917] 1 Ch 287; *Re Lewis* [1918] 2 Ch 308; *Portman*, *op cit*, n 64; *Re Morrison’s Settlement* [1974] 1 Ch 326. Only in *Re Coote* [1940] 1 Ch 349 did a severance of land and chattels occur, and Morton J regretted the result: p 557. Bear in mind Lord Thurlow’s concern about requiring the entail to vest in possession before the heirloom could vest: p16 *ante*. The same concern was expressed in *Parker* where Parker J stated that such clauses were now considered undesirable by conveyancers.

⁸⁹ *Christie v Gosling* (1866) LR 1 HL 279; *Martelli*, *op cit*. See also *Harrington v Harrington* (1868) LR 3 Ch Ap 564, *Portman*, *op cit*, n 64, and *Re Gormanston* [1923] 1 IR 137.

⁹⁰ *Ware v Polhill* (1805) 11 Ves 257.

⁹¹ By avoidance of the requirement that the tenant in tail should vest in possession before taking his interest in heirlooms and by expressly confining entitlement to heirlooms to tenants in tail taking by purchase and not by descent. See *Christie and Martelli*, *op cit*, and compare *Re Morrison*, *op cit*, and *Re Duckett* [1918] 1 IR 110.

⁹² *Portman*, *op cit*, n 64. See Morris and Leach, *The Rule against Perpetuities* (2nd ed, 1962), 198-9.

⁹³ *Duckett*, *op cit*, *Beresford v Preston* (1920) 54 ILTR 48, *Gormanston*, *op cit*.

⁹⁴ *Re Fowler* [1917] 2 Ch 307.

heirlooms on successive beneficiaries but absolute vesting must ultimately occur by the end of the perpetuity period, subject only to a further moral obligation imposed by the settlor, for example, “I desire that if any person shall become absolutely entitled to the heirlooms ... he or she will retain or settle the same as heirlooms”.⁹⁵ Curiously, as conveyancers turned away from strict settlements, the Law of Property Act 1925 made it possible in England and Wales for personal property to be made the subject of an entail, thus removing the restriction on the scope of *De Donis Conditionalibus* 1285. Indeed, after 1925, the use of the established methods of settling chattels as heirlooms described above were deemed sufficient to create an entail in such heirlooms.⁹⁶ Thus, the ingenuity of conveyancers from the seventeenth century onwards lived on in the statutory provisions, albeit briefly. In the history of “heirlooms”, this statutory power has been short-lived: from January 1, 1997, it has not been possible to create entails of either land or chattels in England and Wales.⁹⁷

With the passage of time, “heirlooms” in the sense of specific chattels settled with land had almost completely supplanted the concept of heirlooms in the strict sense understood under customary and early common law. In the Court of Chancery in 1814, when specific restitution was sought of chattels settled as heirlooms with entailed estates, Lord Eldon LC referred to the order made in the case of the Pusey horn, (an “heirloom” in the strict sense⁹⁸) and held that so far as the chattels at issue were concerned, “*a fortiori* the restitution of heirlooms must be decreed”!⁹⁹ Similarly, in an Irish case reported in 1920¹⁰⁰ where the court had to consider the terms of a gift of chattels settled as heirlooms with farm land, it was held that it could not possibly apply to utilitarian articles such as farm implements, the very articles conceived as heirlooms in Saxon custom with the endorsement of the early common law. And when in the Settled Land Act 1882, Parliament made provision for the sale, with court sanction, of chattels settled as heirlooms with land, the marginal note on the statute-book stated simply: “Heirlooms”.

IV. “HEIRLOOMS” UNDER THE SETTLED LAND ACT 1882: A NEW APPROACH

Heirlooms clauses rarely granted power to sell the chattels in question and the Court of Chancery asserted no general inherent jurisdiction to authorise sale.¹⁰¹ The purpose of such clauses was to prevent sale, not permit it. In extreme cases, a private Act of Parliament might be obtained in order that heirlooms might be sold.¹⁰² In the 1870s, however, the English courts assumed an inherent jurisdiction to sanction a sale of heirlooms to raise money to reduce the burden of debt on the land and so improve the life

⁹⁵ See *eg Re Caldwell* [1971] 1 All ER 780, 783.

⁹⁶ LPA 1925, s 130(1) and (2).

⁹⁷ Trusts of Land and Appointment of Trustees Act 1996, Sched 1, para 5.

⁹⁸ See p 9.

⁹⁹ *Earl of Macclesfield*, *op cit*, n 46.

¹⁰⁰ *Beresford v Preston*, *op cit*.

¹⁰¹ *D'Eyncourt v Gregory* (1876) 3 Ch D 635.

¹⁰² It appears that this occurred in the *D'Eyncourt* case: see *Re Rivett-Carnac* (1885) 30 ChD 136, 140.

tenant's income.¹⁰³ The point was not lost on the legislature for when it enacted the Settled Land Act 1882, giving the tenant for life of settled land a range of powers to free the land from the settlement by selling an absolute title and transferring the interests under the settlement from land to money, a statutory power allowing heirlooms to be sold - "a startling and new idea to any conveyancer"¹⁰⁴ - was included in the statutory scheme.

Section 37 of the 1882 Act provides as follows:

" (1) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of 21 years . . . a tenant for life of the land may sell the chattels or any of them.

(3) A sale . . . of chattels under this section shall not be made without an order of the court."

Section 37 remains in force in both parts of Ireland but was replaced in England and Wales by section 67 of the Settled Land Act 1925, which is in similar terms.

The power of sale is given to the tenant for life, a mere usufructuary of the heirlooms, as we have seen. The requirement of a court order authorising sale was intended to safeguard the interests of the tenant in tail and other remaindermen. An application for an order under section 37(3) is not a routine matter: the tenant for life must make out some case for sale.¹⁰⁵ Although he must not act on capricious, selfish or dishonest grounds - his merely seeking to increase his income to finance an extravagant lifestyle would be considered an insufficient basis for the exercise of the jurisdiction¹⁰⁶ - an order can be granted for the purpose of improving the settled land,¹⁰⁷ repairing other heirlooms,¹⁰⁸ or to reduce the debt on the settled estate.¹⁰⁹

In addition to the tenant for life's motives, the court considers the interests of others such as owners of remainder interests and members of the family generally. This is particularly important where the heirlooms in question have a special family significance - portraits of ancestors, for example, or part of a collection of paintings built up by previous generations¹¹⁰ - or are objects of unique character and family pride, such as the Hope diamond

¹⁰³ *Fane v Fane* (1876) 2 Ch D 711, referring to an unreported case, *Vansittart v Vansittart*, February 1876.

¹⁰⁴ *Re Duke of Marlborough's Settlement* (1886) 32 ChD 1, 9, Lindley LJ.

¹⁰⁵ *Marlborough*, *op cit*.

¹⁰⁶ *Re Hope* (1893) 9 TLR 506, *Re Hope* [1899] 2 Ch 679, *Re Bateman*, *The Times*, June 11, 1926. Compare *Re Hope* (1910) 26 TLR 413 and *Earl of Radnor's Will Trusts* (1890) 45 Ch D 402.

¹⁰⁷ *Re Houghton Estate* (1885) 30 ChD 102, *Fontaine v Barclay's Bank*, unreported, April 22, 1996.

¹⁰⁸ *Re Waldegrave* (1899) 81 LT 632.

¹⁰⁹ *Marlborough*, *op cit*, *Radnor*, *op cit*, *Re Beaumont* (1888) 58 LT 916, *Re Townshend's Settlement* (1904) 89 LT 691.

¹¹⁰ See *eg Hope* (1893), order for sale refused in 1893 but granted in 1898: see *Hope* (1899).

named after the family which owned it.¹¹¹ The views of remote remaindermen may have counted for little in such cases,¹¹² but those of the owner of the fee simple absolute who has barred the entail carry considerable weight.¹¹³ Between these two extremes, careful consideration has been given to the interests of remaindermen according to their degree of entitlement, but no special deference has been shown to the person who would, under an heirlooms clause, take an absolute interest, namely, the first tenant in tail to meet the conditions of that clause.¹¹⁴ The justification for this appears from the following statement by Lopes LJ in *Re Duke of Marlborough's Settlement*:

“It is clear that the tenant in tail is materially prejudiced by the exercise of the power contained in section 37. . . Was the legislature alive to the effect that section 37 would have upon the tenant in tail? I think that the legislature was fully aware of what the effect would be. Section 37. . . recognises in distinct terms the difference between the tenure of chattels and that of land; and recognises . . . the fact that the law of perpetuities prevents chattels or personalty being bound to the same extent and in the same way as land.”¹¹⁵

And in a case where the tenant in tail was not yet born and his father was in need of additional income (with no suggestion of extravagance), so that he could take his place in society and find a spouse, Chitty LJ rebutted the arguments made on behalf of the unborn tenant in tail by saying “I am unable to see how it is in his interest to remain unborn”.¹¹⁶

Thus, under section 37, family interests and sentiment generally, rather than the particular interests of the person who would otherwise be absolutely entitled to the heirlooms, have formed the basis of the court’s discretion. And at the end of the day, the heirlooms may be sacrificed in order to preserve the land within the family, “instead of keeping heirlooms unnecessarily whilst the estate perished”.¹¹⁷

¹¹¹ *Hope* (1899), *op cit.*; order for sale refused in 1899, but granted in 1901, see *Hope* (1910), *op cit.*

¹¹² *Hope* (1910), *op cit.*, *Townshend, op cit.*

¹¹³ *Fontaine, op cit.*

¹¹⁴ *Re Fetherstonhaugh's Settlement* (1898) SJ 198, *Townshend, op cit.*, *Radnor, op cit.*, *Re Sebright* (1912) 28 TLR 191, (1914) 31 TLR 25. The interests of infant and unborn remaindermen are represented by the trustees of the settlement.

¹¹⁵ *Op cit.*, pp 11-12.

¹¹⁶ *Radnor, op cit.*, p 410.

¹¹⁷ *Marlborough, op cit.*, p 9, Lord Esher MR.

CONCLUSION

An American legal scholar has commented that “there are no ‘heirlooms’ properly so-called in America.”¹¹⁸ The same might with equal justification be said of every jurisdiction except England where “heirloom” has been a legal term of art since Saxon times used only to describe utilitarian articles which by custom passed to the heir. But “heirlooms” later derived a new legal meaning which lingers today. Greater economic prosperity and an increase in the circulation of luxury items which developed in the eighteenth century created a pressure for descendible chattels despite the fact that moveables could not be entailed. The legal response was the heirlooms clause welded on to the strict settlement of land, a conveyancing device supported and encouraged by the courts. Legal force was given to gifts of chattels “to go as heirlooms” with the land, meaning “*as if they were* heirlooms” in the old strict sense. An entail of land or succession to a title created the context in which heirlooms clauses became enforceable. (The effective use of such a clause annexed to a title explains the ultimate destination of the heirlooms in the *Viscount Hill* case, considered in the opening section of this paper.)

By the late nineteenth century, statutory usage of the word “heirlooms” in the Settled Land Act 1882 - like judicial usage since the early eighteenth century - referred to chattels settled with land or a title. The 1882 Act, however, shifted the balance of power under heirlooms clauses from tenant in tail to tenant for life, and more generally it signalled the end of the era of landed estates on which heirlooms had enjoyed a privileged status. While the modern cultural heritage industry feeds on the carcass of the dynastic settlement of land and heirlooms, “heirloom” status rarely arises as a legal issue today.¹¹⁹ The symbiotic combination of entails and heirlooms clauses may still be created in Ireland but this is a theoretical possibility only because of the unpopularity of entails. Yet the human desire to hand property down through the generations remains. A carefully drafted modern trust will achieve this end, with or without the use of the word “heirlooms”, provided that ultimate vesting does not occur beyond the perpetuity period. The use of a properly drawn heirlooms clause, at least in a gift of jewellery and perhaps more generally, will be regarded as evidence of intention to create a precatory trust, even though the gift is not annexed to an entail or to succession to a title.¹²⁰ Only the unguided use of “heirlooms” in gifts or wills may still cause problems. We saw at the beginning that the request in *Viscount Hill* that the donee would leave jewels at her death “as heirlooms” did not impose a precatory trust creating an heirloom effect, but in *Seale v Hayne*, a similar gift in a will did create a trust requiring the beneficiary under the will to pass jewels on to the next generation.¹²¹ Yet in both *Viscount Hill* and *Seale*, the practical effect of the court’s decision was that the jewels remained in the direct line of descent. “Heirloom” remains an

¹¹⁸ Gray, *The Rule against Perpetuities* (4th ed, 1942), para 363, n 1.

¹¹⁹ But see *Eddis v Chichester Constable* [1969] 2 All ER 912, *Re Montagu’s Settlement Trusts* [1992] 4 All ER 308, and *Fountaine v Barclay’s Bank*, unreported, April 22, 1996.

¹²⁰ *Re Steele’s Will Trust* [1948] 2 All ER 193, following *Shelley v Shelley* (1868) LR 6 Eq 540.

¹²¹ (1864) 9 LT 570.

expression of hope, and in the limited situations now open to them, the courts still appear to be willing to find a solution which satisfies those aspirations.

NEGLIGENCE IN THE PUBLIC SPHERE: IS CLARITY POSSIBLE?

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The law relating to the liability in negligence of those exercising statutory powers, and in particular of public authorities, is in a confused and uncertain state. In part this is a reflection of current debates surrounding the criteria for resolving negligence claims generally.² But it also reflects unresolved questions relating to the position of public authorities in tort litigation, and the extent to which their status may differ from that of other defendants.³ The confusion is heightened by the fact that these two sources of uncertainty have become intertwined. The continuing controversy is reflected in the June 1999 decision of the House of Lords in *Barrett v Enfield London BC*⁴ in which the House narrowly distinguished its own earlier decision in *X(minors) v Bedfordshire CC*,⁵ and refused to strike out a negligence claim involving the defendants' statutory responsibilities for the welfare of children. Other recent decisions on welfare provision, and on the liability of highway authorities and the emergency services, also reveal striking differences in approach. In this article the concepts deployed in these cases will be examined, and the restrictive approach of the majority of the House of Lords in *Stovin v Wise*, with its hostility towards liability for "omissions" and its emphasis upon statutory "intention", will be criticised. The relevance or otherwise in this context of such notions as "reliance" and "assumption of responsibility" will also be considered, and the recent revival of interest in the distinction between "policy" decisions and "operational" activities will be welcomed. The concluding argument will be that unstructured pragmatism, which is currently the dominating influence in this area, should be superseded by a more principled basis for liability. In particular, claims to immunity from negligence liability on grounds of public interest should be treated as such, and their merits or otherwise debated openly.

DIFFERING APPROACHES

At least three different judicial attitudes towards the liability of public authorities can be gleaned from the recent cases. At one extreme there is scepticism as to the very legitimacy of using a statutory power as the basis for liability in negligence. This view, and its associated call for a return to a much older orthodoxy, is reflected in the 1996 speech of Lord Hoffmann in

¹ I am indebted to my colleagues Chris Hilson, Paul Jackson and Chris Newdick for discussion of the issues, and for valuable comments on an earlier draft. The usual disclaimers apply.

² For discussion see Kit Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 LQR 461; Jenny Steele "Scepticism and the Law of Negligence" [1993] 52 CLJ 437.

³ See A.M.Dugdale "Civil Liability and Public Authorities" [1994] 45 NILQ 69 for stimulating consideration of possible approaches to the problems.

⁴ [1999] 3 All ER 193.

⁵ [1995] 2 AC 633.

Stovin v Wise.⁶ At the other extreme there is a reluctance to concede that proven carelessness should escape liability merely because it occurred in a statutory context: this approach is apt to emphasise instead the need for “wrongs to be remedied”.⁷ Perhaps the most favoured approach is one which seeks to steer a pragmatic course between the two extremes, taking full advantage of the flexibility accorded by such notions as “proximity” and “justice and reasonableness”. It is convenient to begin with *Stovin v Wise*.

STOVIN’S CASE AND THE RETREAT FROM ANNS

In *Stovin v Wise* Lord Hoffmann added his voice to the now familiar chorus of criticism which has surrounded the speech of Lord Wilberforce in *Anns v Merton London Borough Council*.⁸ It will be recalled that in the *Anns* case, which concerned the statutory powers of local authorities to supervise the construction of buildings, the House of Lords held that a statutory power could give rise to liability in negligence for damages if the negligence occurred in the “operational” rather than the “policy” area. The distinction between the two areas, which Lord Wilberforce conceded was “probably a distinction of degree”,⁹ was intended to facilitate the imposition of liability in damages for carelessness without simultaneously depriving the authority of freedom to decide, as a matter of policy, to inspect infrequently or even not to inspect at all. The distinction therefore represented an attempt to overcome the logical difficulty of superimposing a private law *duty* upon a public law *power* without subverting the discretion conferred by the latter. It marked a conscious departure from the earlier decision of the House in *East Suffolk Rivers Catchment Board v Kent*.¹⁰ In that case it had been held, in effect, that that difficulty was insurmountable. Accordingly, it was decided that an authority could not be liable for carelessly failing to prevent the occurrence of harm, which prompt use of its statutory powers could have averted, but only for making matters *worse* by adding to the harm which would have been inevitable if the authority had chosen not to exercise its powers at all. The subsequent fate of the decision in *Anns v Merton London Borough Council* is too well-known to need recounting at length here. It led to a substantial increase in claims against local authorities for economic loss, by those whose buildings were reduced in value due to defective construction which the authorities had failed to prevent. And as far as the recovery of economic loss was concerned, it was overruled in *Murphy v Brentwood District Council*.¹¹ The overruling did not, however, involve the distinction between “policy” and “operations” itself. But that distinction had already fallen into disfavour, and it has continued to be the subject of judicial criticism, not least by Lord Hoffmann in *Stovin v Wise*.

⁶ [1996] 2 AC 923.

⁷ See the dissenting judgment of Sir Thomas Bingham MR (as he then was) in the Court of Appeal in *X (minors) v Bedfordshire CC* [1995] AC 633 at 663.

⁸ [1978] AC 728.

⁹ See [1978] AC at 754.

¹⁰ [1941] AC 74.

¹¹ [1991] 1 AC 398.

The “Intention” Of The Statute

In *Stovin v Wise*¹² the plaintiff motor-cyclist suffered serious personal injuries in a collision with a car, the driver of which had had her view obscured by a large bank of earth on land adjoining the highway. An attempt to hold the local highway authority jointly liable for the plaintiff’s injuries, on the ground that the accident might have been prevented if it had exercised its statutory powers to compel removal of the bank of earth, was unsuccessful. A bare majority of the House of Lords, reversing the Court of Appeal, held that the claim against the authority would fail. Lord Hoffmann, speaking for the majority, described the distinction drawn in *Anns* between “policy” and “operational” areas as “inadequate”,¹³ and appeared to indicate a preference for the general principle of non-liability embodied in *East Suffolk Catchment Board v Kent*.¹⁴ On the assumption, however, that the *Anns* doctrine was applicable, Lord Hoffmann held that the claim would still fail for two reasons. First, contrary to the interpretation of the facts which had been favoured by the Court of Appeal, he considered that the failure to bring about removal of the bank¹⁵ should be regarded as having fallen within the “policy” rather than the “operational” area. Secondly, even if there had been operational negligence this would not be sufficient in itself to generate liability since there was, in his view, a *further* requirement to satisfy. It was necessary to show, in any given case, not only that the statute in question was designed to facilitate the prevention of harm to the plaintiff, but also “that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised”. He said:

“In terms of public finance, this is a perfectly reasonable attitude. It is one thing to provide a service at the public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss. . . . To require payment of compensation increases the burden on public funds. Before imposing such an additional burden, the courts should be satisfied that this is what Parliament *intended*”.¹⁶

Lord Hoffmann referred by analogy to the law relating to liability in tort for damages for breach of actual statutory *duties*. He observed that “whether a statutory duty gives rise to a private cause of action is a question of construction” requiring “an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach”.¹⁷ He indicated that since a finding in favour of liability in damages for breach of

¹² [1996] 2 AC 923.

¹³ See [1996] 2 AC at 951.

¹⁴ “I...do not say that a statutory ‘may’ can *never* give rise to a common law duty of care. I prefer to leave open the question of whether *Anns*’ case was wrong to create *any* exception to Lord Romer’s statement of principle in the *East Suffolk* case”, *ibid* at 953 (italics supplied).

¹⁵ See below for discussion of the importance which Lord Hoffmann attached to the distinction between “acts” and “omissions”.

¹⁶ *Ibid* at 952 (italics supplied).

¹⁷ See [1996] 2 AC at 952.

statutory duty is exceptional, such a finding should, *a fortiori*, be even rarer in cases in which a mere power had been conferred by the statute. While this particular implication is logical enough, Lord Hoffmann's invocation of the notion of legislative intention, as it is conventionally used in the context of breach of statutory duty, is more questionable. His Lordship did accept that, unlike the statutory duty situation, whether a provision "can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself".¹⁸ Nevertheless, the overall thrust of his remarks, including the use of the word "intention" in the passage quoted above, is that the "policy" of the statute is relevant not only to determine the particular mischief at which it was directed but also to determine whether "Parliament intended" that there should be "payment of compensation [out of] public funds". This approach is essentially the same as that which, in theory, applies in the statutory duty context¹⁹ and, as such, is open to challenge. For many decades commentators in England and in other common law jurisdictions have contended that use of the notion of legislative intention in the context of the action for breach of statutory duty is a patent fiction, which serves only to conceal the policies or intuitions which lie behind the decision to impose or deny liability.²⁰

THE DOMINANCE OF PRAGMATISM

There is a paradoxical sense in which Lord Hoffmann's speech in *Stovin v Wise* has more in common with that of Lord Wilberforce in *Anns v Merton London Borough Council*, than either has with the approach which currently dominates both this area and the law of negligence generally. Both consider that the difficulties surrounding the development of private law *duties*, against a background of statutorily conferred *powers* to be used for public benefit, require a distinctive conceptual basis for their resolution.²¹ Notwithstanding Dicey's long shadow, both therefore regard it as inevitable that there will sometimes be an open inequality in the treatment of public authorities, as compared with private defendants, when common law negligence claims are being resisted. By contrast, prevailing orthodoxy as

¹⁸ *Ibid*, at the same page.

¹⁹ For a recent example see *Maye (a minor) v Craigavon Borough Council* [1998] NI 103.

²⁰ See, especially, Thayer "Public Wrong and Private Action" (1914) 27 Harv LR at 320. See also Morris, "The Role of Criminal Statutes in Negligence Actions" (1949) 49 Col L Rev 21; Fricke, "The Juridical Nature of the Action upon the Statute" (1960) 76 LQR 240; Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 MLR 233; Alexander, "Legislation and the Standard of Care in Negligence" (1964) 2 Can.B Rev 243; Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 LQR 204. See, generally, Stanton, *Breach of Statutory Duty in Tort*, (1986).

²¹ For a different view see Bailey and Bowman, "The Policy/Operational Dichotomy - A Cuckoo in the Nest" (1986) 45 CLJ 430, and the same writers' "Negligence in the Realms of Public Law - A Positive Obligation to Rescue?" [1984] PL 277. Bailey and Bowman deny that the treatment of public authorities requires "the creation of any special legal principle - it is all part and parcel of the traditional private law principles of negligence" [1986] 45 CLJ at p.455). But it is difficult to see how those principles can take the full weight of the special factors which are relevant in this sphere without considerable modification or over-simplification. *Cf* Craig, *Administrative Law*, 4th edn, (1999) pp. 860-864.

enunciated by the House of Lords in the “private law” case of *Caparo Industries plc v Dickman*,²² holds that the result in any given negligence case should depend upon whether the situation was “one in which the court considers it fair, just and reasonable that the law should impose a duty”. This highly ad hoc approach also makes full use of the opaque concept of “proximity”.

Before *Caparo* the Privy Council invoked the notion of proximity in *Yuen Kun Yeu v Attorney-General of Hong Kong*²³ when declining to impose liability upon a financial services regulatory authority. Overt consideration of the special problems which the imposition of liability would entail is confined to a few lines at the end of the judgment in that case, and is accompanied by a disclaimer that these formed the basis of the decision.²⁴ In somewhat similar vein the Privy Council in *Rowling v Takaro Properties*²⁵ described the question whether a government minister should be liable in negligence for damages, for an admitted *ultra vires* decision which had caused loss to the plaintiff company, as “intensely pragmatic”. The Board concluded that, on the facts of the case, even if a duty *had* existed the minister would not have been in breach of it. In so far as the judgment referred, in passing, to substantive reasons the main emphasis was upon the danger of liability making officials over-cautious.²⁶ But since this danger will frequently be present in cases involving public authorities, the observation does not help to distinguish those situations in which imposition of liability will be legitimate from those in which it will not.

“Just and Reasonable”

In *X(minors) v Bedfordshire County Council*²⁷ various claimants sought to impose negligence liability upon several local authorities for the manner of their exercise, or failure to exercise, their statutory powers relating to the welfare of children. In one of the cases a child had been wrongly removed from her mother when a psychiatrist confused the name of the latter’s innocent boyfriend with that of someone suspected of abusing the child. In another case an authority had failed to take action to protect a child despite clear evidence of abuse, and in yet another failure had allegedly occurred in the making of provision for children with special educational needs. The House of Lords struck out all the claims directed against the authorities.²⁸

²² See [1990] 2 AC 605 at 618 per Lord Bridge.

²³ [1988] AC 175.

²⁴ See [1988] AC at 198 (Lord Keith delivering the judgment of the Board).

²⁵ See [1988] AC 473 at 501 (Lord Keith delivering the judgment of the Board).

²⁶ See [1988] AC at 502 (Lord Keith).

²⁷ [1995] 2 AC 633. See Hilson and Rogers (1995) 3 TLJ 221.

²⁸ Claims alleging vicarious liability were also struck out, with one exception, on the ground that to allow them to proceed would allow indirect circumvention of the decision to strike out the direct claims against the authorities: see [1995] 2 AC at 754, per Lord Browne-Wilkinson. See also *Phelps v Hillingdon BC* [1999] 1 All ER 421 in which the Court of Appeal struck out a vicarious liability claim for the same reason (the House of Lords has given leave to appeal). For criticism of the perception of the relationship between direct and vicarious liability in the *Bedfordshire* and *Hillingdon* cases, see respectively, Cane “Suing public authorities in tort” (1996) 112 LQR 13 at 19-21 and Hedley “Negligence -

Lord Browne-Wilkinson, who delivered the leading speech, acknowledged that the statutory context necessitates greater sophistication, when dealing with negligence claims against public authorities, to ensure that appropriate limits on the scope of justiciability are not over-stepped. Nevertheless he was concerned to emphasise that, once justiciability is established, whether there is “a common law duty of care” falls “to be decided by applying the usual principles, ie those laid down in *Caparo Industries plc v Dickman*”, including the requirement for a “proximate” relationship and the need for it to be “just and reasonable to impose a duty of care”.²⁹

Lord Browne-Wilkinson’s reasons for concluding that it would not be “just and reasonable” to impose liability on the local authorities in the instant case included the fact that the situations in question were “extraordinarily delicate”, and a “fertile ground in which to breed ill feeling and litigation” which would be a waste both “of money and human resources”. Moreover, “if a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties”.³⁰ Potential litigants should be encouraged to use instead the administrative complaints procedures which existed. With respect, this collection of reasons illustrates the dangers inherent in the subjectivity of the “just and reasonableness” approach. There are few situations in which litigation takes place *without* ill-feeling, and without the expenditure of resources which in happier circumstances could have been spent more constructively. And one person’s “cautious and defensive approach” is another person’s salutary improvement in practice to prevent misfortune re-occurring in the future. Moreover, while the impact of *liability* upon the public finances is of crucial importance, to introduce the cost of litigation *itself* as a reason for denying liability, under the umbrella of “justice and reasonableness”, would soon result in conferring total immunity upon public authorities and placing them outside the law. The point is one which should be directed towards the excessive cost of the legal process generally rather than towards the protection of public bodies. On any view, if Lord Browne-Wilkinson’s reasons were to be widely applied the scope of tortious liability would be drastically curtailed.

BARRETT v ENFIELD LONDON BC

A rather more structured and less pragmatic approach to the issues in this area can perhaps be discerned in the recent decision of the House of Lords in *Barrett v Enfield London BC*.³¹ The plaintiff was in the care of the defendant authority from the age of ten months until he was 17. He alleged that the authority had negligently failed to provide him with proper social workers, had made placements for him with inappropriate foster parents, and had moved him too frequently between different residential homes. He claimed that, as a result, he had reached adulthood with profound difficulties of a psychological and psychiatric nature which constituted actionable personal

Vicarious Liability of Health Authorities - Diagnosis of Dyslexia” [1999] 58 CLJ 270.

²⁹ See [1995] 2 AC 633 at 739.

³⁰ See *ibid* at 750.

³¹ [1999] 3 All ER 193.

injury.³² The Court of Appeal struck out the claim,³³ relying on *X v Bedfordshire CC*. But the House of Lords reversed the Court of Appeal and, distinguishing its own decision in *Bedfordshire*, reinstated the claim. Two of the three Law Lords who delivered speeches, Lord Slynn and Lord Hutton, quoted the aphorism that “wrongs should be remedied”.³⁴

The reasoning in *Barrett’s* case is also significant for an apparent revival of judicial interest in the distinction between policy and operational activities. The defendant authority had argued that the decisions taken in attempting to discharge its responsibilities for the plaintiff’s welfare had been discretionary, and hence that they could not be actionable in negligence unless, possibly, *ultra vires* for *Wednesbury* unreasonableness. But as Lord Slynn observed, “if an element of discretion is involved in an act being done subject to the exercise of the overriding statutory power” common law negligence is not necessarily ruled out. In determining whether or not what had occurred was non-justiciable³⁵ for the purposes of the law of negligence the “distinction which is sometimes drawn between decisions as to ‘policy’ and as to ‘operational’ acts” was relevant.³⁶ While the decision considered in *Bedfordshire* actually to take, or not to take, a person into care was non-justiciable, it did not follow that “having taken a child into care, an authority cannot be liable for what it or its employees do in relation to the child without it being shown that they have acted in excess of power”.³⁷

Once justiciability had been established the House did go on to consider, in accordance with orthodox doctrine, whether the possible imposition of liability would be “just and reasonable”. Nevertheless, it is striking how the various factors grouped under this umbrella in the *Bedfordshire* case were considered *not* to “have the same force separately or cumulatively”³⁸ in *Barrett* so as to outweigh the plaintiff’s right to have his case substantively determined. In particular, both Lord Slynn and Lord Hutton expressly rejected the argument that a decision against the local authority would be objectionable on the ground that it might lead such authorities to “adopt a more cautious and defensive approach to their duties”.³⁹ On the contrary, observed Lord Slynn, quoting from the dissenting judgment of Sir Thomas Bingham MR (as he then was) in the Court of Appeal in *X v Bedfordshire*

³² The contention by defendants that claimants in cases of this type have not suffered any recognisable head of damage has not, on the whole, been favourably received: see *e.g. per* Bingham MR in *E(a minor) v Dorset CC* [1995] 2 AC 633 at 703; *per* Lord Slynn in *Barrett v Enfield London BC* [1999] 3 All ER 193 at 214. *Cf per* Stuart-Smith LJ in *Phelps v Hillingdon BC* [1999] 1 All ER 421 at 432-433.

³³ See [1997] 3 All ER 171.

³⁴ See [1999] 3 All ER 193 at 207 and 227.

³⁵ The notion of “non-justiciability” is regularly used, in preference to the distinction between policy and operations, to express the conclusion that what occurred was beyond the reach of the law of negligence. This terminology is appropriate to express a *result* (see below, note 100). But as Craig writes, “even if we do abandon the terms policy and operational, they are likely to guide indirectly the application of the criterion of justiciability” (*Administrative Law*, 4th edn, (1999) p.863).

³⁶ See [1999] 3 All ER 193 at 211.

³⁷ *Ibid* at the same page.

³⁸ See [1999] 3 All ER 193 at 208 *per* Lord Slynn.

³⁹ See [1999] 3 All ER 193 at 228 (Lord Hutton) and 208 (Lord Slynn).

CC, “the imposition of a duty of care” could contribute “to the maintenance of high standards”.⁴⁰

RELIANCE AS A BASIS FOR LIABILITY

The decision in *Barrett* clearly demonstrates that, notwithstanding a background which involved the exercise of discretionary power, a common law duty of care may be imposed in respect of negligence by social workers. In effect the House held, albeit without using that phraseology, that the defendants had “assumed responsibility” towards the plaintiff by taking him into care, and that he had “relied” upon them to act with appropriate skill when taking decisions relating to his welfare. A year or so before the decision of the House of Lords in *Barrett*, the Court of Appeal openly deployed the concept of “assumption of responsibility” to reach a decision favourable to the plaintiff in another case involving social workers. In *W v Essex CC*⁴¹ the court was again confronted with the tension between conferring a broad immunity upon public authorities under the “just and reasonableness” umbrella, and the intuitive demand that victims of negligence should be compensated. Foster parents who were anxious for the safety of their own children asked for, and were given, specific assurances that no child suspected of sexual abuse would be fostered with them. Contrary to those assurances a boy known to the authority to have been cautioned for sexual abuse was fostered with the family and proceeded to abuse the other children, who accordingly sought to sue the defendants for negligence. In the Court of Appeal Stuart-Smith LJ would have applied *X v Bedfordshire CC* so as to strike out the claims. But his was a dissenting judgment. Judge and Mantell LJ allowed the case to proceed. Judge LJ placed emphasis upon the “assumption of responsibility”, represented by the assurances which the plaintiffs’ parents had received, which he considered was “integral” to their case.⁴² He saw the claim as analogous to cases in which specific assurances given by the police had had the effect of displacing an immunity⁴³ which that service, in effect, otherwise enjoyed.⁴⁴

A POSSIBLE DOCTRINE OF GENERAL RELIANCE?

A much broader notion than that of assumption of responsibility towards a specific individual is the concept of “general reliance”. The idea is that the routine exercise of statutory powers may lead members of the public to assume that such exercise will continue and, subconsciously or otherwise, to take that assumption into account when planning their lives or activities. In one Australian case “the control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building” were suggested as possible examples.⁴⁵ Although Lord Hoffmann was highly critical of the doctrine in

⁴⁰ See [1999] 3 All ER 193 at 208.

⁴¹ [1998] 3 All ER 111.

⁴² See [1998] 3 All ER 111 at 136. *Cf* Kit Barker, “Unreliable Assumptions in the Modern Law of Negligence” (1993) 109 LQR 461, for criticism of the concept of “assumption of responsibility”.

⁴³ See below.

⁴⁴ *Cf Swinney v Chief Constable of Northumbria* [1997] QB 466, discussed below.

⁴⁵ See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 *per* Mason J.

his speech in *Stovin v Wise*,⁴⁶ it is a decision of the High Court of Australia which provides the fullest discussion of the concept to date and also reveals a significant difference of judicial opinion as to its viability. In *Pyrenees Shire Council v Day*⁴⁷ the defendant local authority was held liable in damages for failing to exercise its statutory power to insist upon the taking of precautions, after an inspection had revealed the presence of a fire-risk on certain premises. The decision was, however, based upon the perception of the court that the statute in question “intended” to facilitate the award of compensation: that is the test favoured by Lord Hoffmann in *Stovin v Wise*. But the majority also took the opportunity to condemn the doctrine of general reliance. Gummow J could see “no sound doctrinal footing”⁴⁸ for such a doctrine and Brennan CJ expressed himself as follows:⁴⁹

“If community expectation that a statutory power will be exercised were to be adopted as a criterion of a duty to exercise that power, it would displace the criterion of legislative intention. In my respectful opinion, if the public law duty of a public authority is relevant to its liability in damages for a failure to exercise that power, the appropriate criterion is legislative intention. I am respectfully unable to accept ‘general reliance’ as the basis of such liability”.

A very different note was, however, struck by McHugh J who said:⁵⁰

“I do not think that it is correct to say that the doctrine of general reliance is a fiction or that it gives rise to common law duties that are inconsistent with the conferment of discretionary powers and functions”.

Any scope for the application of a doctrine of general reliance would be very limited, for a reason which will emerge below. Nevertheless, it is submitted that the view of McHugh J is in principle to be preferred to that of his brethren and of Lord Hoffmann in *Stovin v Wise*. To prefer the notion of legislative “intention” in this context, to that of general reliance, on the ground that the latter, as distinct from the former, “is a fiction” is to reverse reality. The concept of general reliance involves an overt appeal to experience and to intuitive notions of responsibility. Whatever the difficulties associated with it, it is therefore more in accordance with the nature of the law of tort than a search for an unexpressed legislative intention. Moreover, despite Lord Hoffmann’s hostility to the doctrine of general reliance in *Stovin v Wise*, the actual decision of the majority in that case can be perceived as being consistent with it. Motorists and others do not expect roads to be uniformly configured to a consistently high level of safety⁵¹ in the same way that they assume, for example, that competent NHS

⁴⁶ See [1996] 2 AC 923 at 954-955.

⁴⁷ (1997-1998) 151 ALR 147. See Doyle and Redwood, “The Common Law Liability of Public Authorities: The Interface between Public and Private Law”(1999) 7 Tort L Rev 30.

⁴⁸ See (1997-1998) 151 ALR 147 at 190.

⁴⁹ See (1997-1998) 151 ALR 147 at 155.

⁵⁰ See (1997-1998) 151 ALR 147 at 177.

⁵¹ But they do expect consistency in the display of road-signs warning of hazards ahead: see *eg Bird v Pearce* [1979] RTR 369 CA; *affmg* [1978] RTR 290.

medical treatment will be available to them should they have the misfortune to suffer an accident. The analogy of NHS medical treatment also demonstrates why wholesale adoption of the principle in *East Suffolk Rivers Catchment Board v Kent* is no longer tenable. It would obviously be impossible successfully to defend an action for admitted medical negligence on the ground that an easily curable condition had merely been left unremedied rather than actually exacerbated and that, in any event, the legislature had intended that only treatment and not compensation should be funded.⁵² It is therefore difficult to regard blanket dismissal of any notion of general reliance, in favour of searching silent statutes for an “intention” to facilitate the payment of actual compensation, as anything other than a retreat into fiction.

Aircraft Inspection

The suggestion by the High Court of Australia that “the safety inspection of aircraft”⁵³ might provide an example of the doctrine of general reliance foreshadowed the recent decision of the English Court of Appeal in *Perrett v Collins*,⁵⁴ even though the concept was not actually referred to in the case. The decision is significant for a particularly robust assertion of the primacy of principle when determining a negligence claim against a body exercising a statutory power, albeit not a public authority as such. The plaintiff had been injured when flying as a passenger in a light aircraft which had been statutorily certified by an inspector as fit to fly. The inspector, and the Popular Flying Association on whose behalf he operated, denied that they owed the plaintiff a duty of care. They contended that it would not be “just and reasonable”, to impose liability upon a statutory regulatory authority in such circumstances.⁵⁵ The Court of Appeal had no hesitation in holding that a duty of care existed. The Court placed particular emphasis upon the fact that the claim in the case before them concerned personal injury, and all three members of the Court were critical of attempts to use the “just and reasonable” formula to evade a liability which they considered to be consistent with long-established authority. Hobhouse LJ (as he then was), in particular, said of the defendants’ contention that:

“. . . it represents a fundamental attack upon the principle of tortious liability for negligent conduct which had caused foreseeable personal injury to others. That such a point should be considered shows how far some of the fundamental principles of the law of negligence have come to be eroded. The arguments advanced in the present case. . . illustrate the dangers of substituting for clear criteria, criteria which are incapable of precise definition and involve what can only be

⁵² “There is no doubt that once the relationship of doctor and patient or hospital authority and admitted patient exists, the doctor or the hospital owe a duty to take reasonable care to effect a cure, not merely to prevent further harm”: *per* Stuart-Smith LJ in *Capital and Counties plc v Hampshire CC* [1997] QB 1004 at 1035.

⁵³ See note 45, above.

⁵⁴ [1998] 2 Lloyd’s Rep 255. See also *Swanson et al v The Queen* (1991) 80 DLR (4th) 741.

⁵⁵ *Cf Rich (Marc) & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, upon which the defendants relied.

described as an element of subjective assessment by the Court: such ultimately subjective assessments tend inevitably to lead to uncertainty and anomaly which can be avoided by a more principled approach”.⁵⁶

Even if the welcome decision in *Perrett v Collins* can be treated as an example of general reliance, it is nevertheless clear from recent cases involving the emergency services that the courts remain markedly sceptical of the doctrine.

EMERGENCY SERVICES

Fire

In *Capital and Counties plc v Hampshire CC*⁵⁷ a number of claims against the fire service were heard together by the Court of Appeal. In one case the fire brigade had allegedly been negligent in failing to ensure that a fire which they had been fighting had been fully extinguished before they left the scene. In another case the senior fire officer present at the scene ordered sprinkler systems in the affected building to be switched *off*. This was a very unusual order and had the unfortunate effect of causing the fire to spread more rapidly than it otherwise would have done. In the first case the Court was pressed with the argument that the doctrine of general reliance applied to the fire service but Stuart-Smith LJ, who delivered the judgment of the court, rejected the argument referring to Lord Hoffmann’s criticisms of that doctrine in *Stovin v Wise*. Stuart-Smith LJ also rejected the submission that, by accepting the summons to attend a particular fire, a fire-brigade “assumes responsibility” to the specific individuals whose property is under threat. As a result the Court held that the fire brigade could not be liable in the first case, even if carelessness were to be proved, because “a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire”.⁵⁸ In the case in which the sprinklers had been turned off, on the other hand, the Court reached a different result and held that liability could be imposed on the principle derived from *East Suffolk Rivers Catchment Board v Kent*, that is, that the order to turn off the sprinklers had actually made matters *worse*. The general approach of the Court to the issues in the cases before it was accordingly encapsulated as follows by Stuart-Smith LJ:⁵⁹

“In our judgment the fire brigade are not under a common law duty to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up in time because they have carelessly misunderstood the message, got lost or run into a tree, they are not liable. . . . But where the rescue/protective service itself by negligence creates the danger there is no doubt in our judgment that the plaintiff can recover”.

⁵⁶ See [1998] 2 Lloyd’s Rep 255 at 257-258.

⁵⁷ [1997] QB 1004.

⁵⁸ See [1997] QB 1004 at 1038.

⁵⁹ *Ibid* at 1030-1031.

Although the Court of Appeal therefore declined, on the ground of absence of “proximity”, to impose liability for a negligent failure to extinguish a fire, it nevertheless *rejected* a defence argument that imposition of liability would not be “just and reasonable”. Stuart-Smith LJ responded to this submission as follows:⁶⁰

“. . . the courts should not grant immunity from suit to fire brigades simply because the judge may have . . . a visceral dislike for allowing possibly worthless claims to be made against public authorities, whose activities involve the laudable operation of rescuing the person or property of others in conditions often of great danger. Such claims may indeed be motivated by what is sometimes perceived to be the current attitude to litigation – ‘if you have suffered loss and can see a solvent target – sue it’. None the less, if a defendant is to be immune from suit such immunity must be based upon principle. . . . If we had found a sufficient relationship of proximity. . . . we do not think we would have found the arguments for excluding a duty of care on the grounds that it would not be just, fair and reasonable convincing”.

In itself this emphasis upon principle is to be welcomed. But it is not easy, in the circumstances, to see a fundamental difference between denying liability on the basis of lack of “proximity” and doing so under the umbrella of “justice and reasonableness”. The result is the same: failure of a claim for damage which would have been prevented in the absence of carelessness.

Coastguard and Ambulance services

Capital and Counties plc v Hampshire CC was applied in *OLL v Secretary of State for Transport*,⁶¹ in which May J held that it necessarily followed from it that the coastguard service would not be liable for an allegedly negligent failure to prevent the deaths of several young canoeists who had got into difficulties at sea. Nevertheless, in the later case of *Kent v Griffiths*,⁶² which involved another emergency service, the *Capital and Counties* decision was distinguished by the Court of Appeal which declined to strike out the claimant’s action. In this case a 999 call was made to summon an ambulance for the claimant who was suffering from an asthma attack. Unfortunately there was a long delay in responding to the call. The claimant alleged that this delay, and the treatment which she received once in the ambulance on the way to hospital, was negligent and responsible for the tragic outcome of the situation, including personality changes consequent upon a respiratory arrest, and a miscarriage. Kennedy LJ observed⁶³ that since “if in an emergency an ambulance is sent for and does not attend or takes a long time to attend there is a foreseeable risk of *physical* harm” the case was “in a different category from those where the risk is one of financial loss against which it may be possible to insure”. Moreover, whatever the position might have been if the 999 call had been rejected, it was at least arguable that “a

⁶⁰ See [1997] QB 1004 at 1040 and 1044.

⁶¹ [1997] 3 All ER 897.

⁶² *The Times* 23 December, 1998.

⁶³ LEXIS transcript.

sufficiently proximate relationship” is created “once a call for an ambulance is accepted”. The claimant could, after all, have made alternative arrangements to get to hospital if she had known that a delay was likely to occur. The emphasis in this case on the fact that the claim was one for personal injury is notable, as is the implicit proposition that, assuming a degree of policy-based immunity to exist, a specific undertaking to a particular individual may displace it.

Difficult Distinctions

It is submitted that *Kent v Griffiths* was correctly decided, although it is not easy to see a clear distinction in principle between the ambulance service on the one hand, and the fire and rescue services on the other, once a distress call has been accepted. Nevertheless there *may* be grounds for conferring what amounts to an immunity on the one and not on the other. In *Capital and Counties plc v Hampshire CC* Stuart-Smith LJ said:⁶⁴

“ . . .the fire brigade’s duty is owed to the public at large to prevent the spread of fire and this may involve a conflict between the interests of various owners of premises. It may be necessary to enter and cause damage to A’s premises in order to tackle a fire which has started in B’s. During the Great Fire of London the Duke of York had to blow up a number of houses not yet affected by fire, in order to make a fire break.”

In reply, it might be contended that situations of that kind would justify a finding of no negligence rather than a claim to a blanket immunity. But other distinguishing factors might be prayed in aid. For example, a “floodgates” type of argument might contrast the potential effect of major fire-claims upon the public finances with the isolated claims for personal injury which the ambulance service will typically face.⁶⁵ But whatever the validity of these contentions, the debate surrounding them is likely to more satisfactory if conducted openly than if the issues are left partially veiled behind the language of “proximity” or “justice and reasonableness”.

A MORE STRUCTURED APPROACH?

How then should the law deal with the problems surrounding the negligence liability of public authorities, both in the context of the emergency services and more generally? It is submitted that clarity would be promoted if the various issues were examined under *three* distinct headings. The first two headings will be familiar, even if the second has recently been regarded with undue scepticism. But the third is, in this particular context, a new phrase to highlight ideas which are in themselves familiar but which are rarely articulated with the degree of openness which their sensitivity requires. The first heading is the *statutory framework*, the second is the distinction between *policy and operations*, and the third is the concept of *official immunity*.

⁶⁴ See [1997] QB 1004 at 1036.

⁶⁵ Similiar considerations of public policy might warrant restricting the subrogation rights of indemnity insurers to prevent them from recouping their losses by bringing negligence actions against the emergency services. *Cf per* Lord Hoffman in *Stovin v Wise* [1996] AC 923 at 955. See also Reuben Hasson, “Subrogation in Insurance Law - A Critical Evaluation” (1985) 5 OJLS 416.

Relevance Of The Statute

In *X(minors) v Bedfordshire County Council* Lord Browne-Wilkinson emphasised a point which is undeniably of fundamental importance. He said:⁶⁶

“ . . . the question whether there is . . . a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. . . a common law duty of care cannot be imposed. . . if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties”.

The inevitability of using the statute in this way as a starting point must not be confused with implausibly ascribing the outcome entirely to the statute itself. Lord Browne-Wilkinson’s insistence that the duty is a *common law* one is important. The court should seek to ascertain, in general terms, the broad purpose of the legislation as a preliminary to itself determining whether the imposition of a tortious duty of care in negligence would be appropriate. But the need to have regard to the statute *does* mean that distinctions which the common law draws elsewhere might be disregarded and, conversely, that other constraints may be imposed which would normally be irrelevant.

If the claimant has suffered personal injury, and if the statute was concerned, albeit not necessarily exclusively, with risks to health and safety, the courts appear more ready to impose liability than if the claim was for financial loss or damage to property.⁶⁷ Thus in both *Perrett v Collins* and *Kent v Griffiths*, the Court of Appeal placed special emphasis upon the fact that the claimants had suffered personal injury.⁶⁸ The unquestioned assumption that the National Health Service is rightly held liable routinely in medical negligence cases is also in point here. Conversely, in *Reeman v Department of Transport*⁶⁹ the Court of Appeal rejected a negligent misstatement claim for substantial financial losses which resulted from the allegedly negligent certification as safe of a dangerous, and hence unsellable, fishing vessel. “The purpose of the certificate”, observed Lord Bingham CJ, “was to safeguard the physical safety of the vessel and her crew; it was not directed in any way to the market value of the vessel”.⁷⁰ A similar approach could also hold the key to the enigma represented by the decision in *Anns v London Borough of Merton*. The real flaw in that case may have been to use the Public Health Act 1936 as a device for compensating victims of insolvent builders for their financial losses in owning buildings which were worth less than they should have been. On the other hand, if the statutory power is expressly concerned with financial matters that may, in theory at least,

⁶⁶ See [1995] 2 AC 633 at 739.

⁶⁷ This parallels the situation in the context of the action for breach of statutory duty where safety legislation, particularly in the employment field, is pre-eminent as a source of actionability: see Stanton, *Breach of Statutory Duty in Tort*, (1986), chapter 4.

⁶⁸ See above.

⁶⁹ [1997] 2 Lloyd’s Rep 648.

⁷⁰ See [1997] 2 Lloyd’s Rep 648 at 685.

facilitate a finding in favour of liability for pure economic loss which the ordinary law of negligence would not countenance.⁷¹

The majority of negligence claims involving statutory powers are based upon the argument that the defendant authority failed to act to protect the claimant from harm, often inflicted by a third party, when it could have done so. In ordinary negligence such claims would face the difficulty that liability can only very exceptionally be based upon a mere *omission* to act. But by providing an opportunity to come effectively to the claimant's aid, which a private individual would not have enjoyed, the statute itself can give rise to an exception to the general rule of non-liability for omissions.⁷² In *Stovin v Wise* Lord Hoffmann nevertheless suggested that the fact that the claim concerned an omission represented a fundamental difficulty in that case.⁷³ Although he observed that "some of the arguments against liability for omissions do not apply to public bodies like a highway authority", he added that that did "not mean that the distinction between acts and omissions is irrelevant to the duties of a public body".⁷⁴ His Lordship even appeared to suggest that causal arguments could be invoked.⁷⁵ In the particular context of negligence liability based upon statutory powers Lord Hoffmann's view is consistent with his apparent preference for a return to the "additional damage" principle in the *East Suffolk* case. But in so far as negligence liability in the public sphere is a feature of the current law, it follows that cases involving statutory powers *can* constitute an exception to the general principle of non-liability for omissions provided that the imposition of liability in the particular circumstances is not inconsistent with the relevant statutory framework.⁷⁶ Lord Hoffmann's observations on this point must no doubt be seen in the context of concern for the potential resource implications of liability in this field. While this is a crucially relevant factor, it is submitted that the essentially conceptual debate surrounding the distinction between acts and omissions is not an appropriate context in which to reflect it. It should be considered instead when "policy" decisions, which may relate to the discretionary allocation of resources, are being

⁷¹ See *e.g. per* Browne-Wilkinson V-C in *Lonrho plc v Tebbit* [1991] 4 All ER 973 at 985-986.

⁷² See Craig, *Administrative Law*, 4th edn (1999), at p. 868; Arrowsmith, *Civil Liability and Public Authorities*, (1992), at p 179 *et seq.*

⁷³ See [1996] AC 923 at 943 *et seq.*

⁷⁴ *Ibid* at 946. In particular the libertarian, or "why pick on me" argument is inapplicable.

⁷⁵ "Mr Stovin's injuries were not *caused* by the negotiations between the council and British Rail or anything else which the council *did*": see [1996] 2 AC 923 at 945 (*italics supplied*).

⁷⁶ *Cf per* Lord Nicholls (dissenting) in *Stovin v Wise* [1996] AC 923 at 933-934: "The authority did not create the loss, but it failed to discharge its statutory responsibilities with proper care. Had it behaved properly, the loss would not have occurred. Expressed in traditional tort terms, the loss in this type of case arises from a pure omission. Any analysis must recognise this. But the omission may also constitute a breach of the authority's public law obligations. . . *Anns* showed that a remedy in the form of an award of damages is possible without confusing the uneasy divide between public and private law. The common law is still sufficiently adaptable. The common law has long recognised that in some situations there may be a duty to act. So a concurrent common law duty can carry the strain, without distortion of principle".

distinguished from “operational” activities, and it may also arise when the desirability of conferring a general “immunity” from liability for operational carelessness is under consideration in the particular area in question. Accordingly, overcoming the omissions difficulty, and establishing that the harm and its occurrence were within the mischief at which the statute was aimed, is not enough in itself to guarantee a claimant’s success. There remain the formidable hurdles represented by the other two headings, which have yet to be considered.

Policy And Operations

The revival of interest, by the House of Lords in *Barrett v Enfield London BC*, in the distinction between policy questions and operational activities is to be welcomed. Despite the criticism which has been directed at it on grounds of uncertainty, no better formulation has yet emerged of a limitation of fundamental importance upon the negligence liability of public authorities.⁷⁷ If a discretion is conferred, especially if it involves the allocation of substantial resources, attempts by the courts to use the machinery of the law of negligence to second-guess the decisions arrived at would constitute, at best, an inappropriate use of that machinery for a purpose to which it is ill-suited and, at worst, an undue interference with the democratic process. But those objections do not have the same force if a specific act of carelessness is committed in the actual carrying out of an agreed course of action, when all the relevant policy and resource allocation decisions have been taken. Nor is it an objection in itself to a legal principle that certainty cannot be guaranteed, and that difficult borderline cases will arise.⁷⁸ *Stovin v Wise* appears to have been just such a case. The allocation of resources for road improvements is certainly a matter of discretion. But the argument that, since a decision had apparently been taken to act with respect to the junction in question, the context was operational has considerable force.⁷⁹ Nevertheless, the works had not actually been commenced and, in those circumstances, the proposition apparently favoured by the majority in the House of Lords, that the matter remained in the administrative sphere, while not free from difficulty,⁸⁰ is at least tenable.

In so far as the doctrine of “general reliance” has a place within the conceptual structure of the negligence liability of public authorities, it will operate to constrain the discretionary freedom of an authority at the policy level. This makes it easier to understand why that doctrine is to be regarded

⁷⁷ See, generally, Craig “Negligence in the Exercise of a Statutory Power” (1978) 94 LQR 428.

⁷⁸ Since the distinction is essentially one of degree (see above, note 9), an activity does not cease to qualify as “operational” merely because there is *some* element of discretion, even if it involves a degree of choice in relation to expenditure. Cf Cane, *An Introduction to Administrative Law*, (3rd ed, 1996), pp. 252-253.

⁷⁹ See the reversed decision of the Court of Appeal: [1994] 3 All ER 467.

⁸⁰ It would be too simplistic to confine the “operational” sphere merely to physical work on site. Presumably clerical errors (*eg* mis-filing), as a result of which instructions to commence work in the field are never sent out, may be operational? In *Stovin*’s case itself the reason why the work was not carried out was because a letter offering to do it, having been left unanswered, was not followed up: see [1996] AC 923 at 942.

with caution. Its capacity to convert a power directly into a duty, and thereby subvert the distinction between policy and operations, means inevitably that the opportunities for its successful invocation will be few in number. It is likely to have its greatest utility in situations in which the statutory power has been in existence for many years and has been so regularly exercised that, although in form a power, it has come to be regarded by authorities, as well as by the public at large, as being in substance a duty.

If a decision is established as falling on the “policy” side of the line it will normally be free from attack in a negligence action regardless of whether it was *intra vires* or *ultra vires* although, if it was the latter, it will be susceptible to judicial review. It is axiomatic that, merely because a decision was *ultra vires*, it will not give rise to liability in damages for negligence.⁸¹ Nevertheless it is conceivable that it might do so in extreme cases if recklessness or bad faith was involved. Such a claim has succeeded in the Canadian Supreme Court.⁸² It may therefore be going too far to assert, as did Lord Browne-Wilkinson in *X(minors) v Bedfordshire CC*, that “a common law duty of care in relation to the taking of decisions involving policy matters cannot exist”.⁸³ But an activity which falls on the “operational” side of the line should, in principle, always be susceptible to investigation in a negligence action.⁸⁴ Despite some uncertainty in the early cases,⁸⁵ the distinction between *ultra vires* and *intra vires* should, it is submitted, now be regarded as irrelevant in such cases.⁸⁶ It is in this sense that it is correct to say, in the words of Lord Browne-Wilkinson in *X(minors) v Bedfordshire CC*, that it is not “helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence”.⁸⁷

If a claimant succeeds in establishing that the harm suffered fell within the framework of the statute, and also that it occurred as the result of an operational activity rather than a policy decision, he or she will have satisfied two of the conditions normally insisted upon for the imposition of negligence liability in the public sphere. But it does not follow that liability will necessarily be imposed. The Privy Council emphasised over a decade ago, in *Rowling v Takaro Properties Limited*, that while “classification of the relevant decision as a policy or planning decision. . . may exclude liability. . . a conclusion that it does not fall within that category does not. . . mean that a duty of care will necessarily exist”.⁸⁸ Unfortunately, despite the validity of

⁸¹ See *eg Dunlop v Woollahra Municipal Council* [1982] AC 158 (PC); *Rowling v Takaro Properties* [1988] AC 473 (PC).

⁸² See *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641. *Cf* the tort of “misfeasance in public office”.

⁸³ See [1995] 2 AC 633 at 738.

⁸⁴ *Cf* Brodie “Public authorities-negligence actions-control devices” (1998) 18 LS 1.

⁸⁵ See, especially, *Home Office v Dorset Yacht* [1970] AC 1004, per Lord Diplock at 1067-1068.

⁸⁶ *Cf* Cane, *An Introduction to Administrative Law*, (3rd ed, 1996) at p 250. See also *per* Lord Slynn in *Barrett v Enfield London BC* [1999] 3 All ER 207 at 211 (see above: fn 37). *Cf.* Craig, *Administrative Law*, 4th edn, (1999), at pp 872-875.

⁸⁷ See [1995] 2 AC 633 at 736.

⁸⁸ See [1988] AC 473 at 501.

this insight, the *Rowling* case has contributed to much of the confusion in this area because it fuelled the perception that the distinction between policy and operations had become discredited. But this perception seems to have been based, at least in part, on the fallacious assumption that that distinction purported to be a *comprehensive* statement of the conditions required for the imposition of negligence liability upon public authorities. In reality the distinction remains crucial, since a claimant who is unable to show that his loss occurred as a result of an operational activity will normally fail at the outset: he will have failed to prove that the defendant authority had been “negligent” in any meaningful private law sense. Conversely, a claimant who *does* succeed in proving operational carelessness will have surmounted a major obstacle, and it will be up to the *authority* to put forward cogent reasons why it should nevertheless escape liability.

“Official Immunity”

The full significance of declining to impose liability on the defendant, when operational carelessness has caused harm of a kind which the statute was enacted to prevent, is obscured by the use of bland and opaque expressions such as “proximity” or “justice and reasonableness”. It is submitted that a much more focused approach would develop if an explicit category, which could be called “official immunity”, were to be recognised. Indeed it is significant that, despite the reticence about invoking it formally in the context of other public authorities,⁸⁹ the immunity approach appears to have been substantially adopted in a line of cases involving claims against the police.

The police cases, while far from being completely satisfactory,⁹⁰ do provide some indication of the kind of approach which can emerge when the legitimacy of barring claims on policy grounds is confronted openly. In the well-known case of *Hill v Chief Constable of West Yorkshire*⁹¹ the House of Lords declined to impose liability upon the police for culpable failure to catch a serial murderer of women. The primary reason given was that there had been no “proximity” between the defendant and the deceased, who had been the killer’s last victim, since she had been at no greater risk than any other female member of the public. “Public policy” as such was, however, also invoked, Lord Keith observing that “the imposition of liability” could lead to police activity “being carried out in a detrimentally defensive frame of mind”.⁹² Subsequent decisions have begun to clarify the extent of this policy immunity and have established, *inter alia*, that it is not confined to the main policing function of detecting and suppressing crime, but can extend even to activities such as traffic⁹³ and riot⁹⁴ control. More significant for

⁸⁹ The word “immunity” was used in the speech of Lord Browne-Wilkinson in *X(minors) v Bedfordshire CC*, but only in the special context of “witness immunity”: see [1995] 2 AC at 754-755.

⁹⁰ See, generally, Clayton and Tomlinson, *Civil Actions Against the Police*, (2nd ed, 1992).

⁹¹ [1989] AC 53.

⁹² See *ibid.* at 63.

⁹³ See *Clough v Bussan* [1990] 1 All ER 431; *Ancell v McDermott* [1993] 4 All ER 355.

⁹⁴ See *Hughes v National Union of Mineworkers* [1991] 4 All ER 278.

present purposes, however, is that it would now seem that the two reasons for the decision in the *Hill* case were inter-related rather than separate, and that the supposedly subsidiary justification is in reality the more fundamental of the two. That is to say, the absence of “proximity” is better perceived as a condition for the existence of immunity rather than as a free-standing justification for the denial of liability. To deny liability on the basis of “proximity” alone is always apt to appear questionable once foreseeability and carelessness are conceded, as they appear to have been in *Hill*.⁹⁵ But against the background of an overt immunity from liability in negligence, the *absence* of a high degree of “proximity” may be a legitimate requirement for successful invocation of the immunity in as much as the court might be disposed to override it in situations where close “proximity” between the police and the claimant was in fact *present*.⁹⁶ Thus in *Swinney v Chief Constable of the Northumbria Police*⁹⁷ the defendant was unsuccessful when attempting to rely upon the *Hill* case to invoke public policy immunity to strike out a claim by an informer, whom the police had put at risk by negligently disclosing her identity. Ward LJ observed that “proximity” was “shown by the police assuming responsibility” towards the plaintiff, and that this made it arguable that there was “no overwhelming dictate of public policy” to prevent further consideration of her claim.⁹⁸ Peter Gibson LJ emphasised that “when one is considering whether the police have an immunity from liability in negligence. . . the court must evaluate *all* the public policy considerations that may apply”.⁹⁹

The specific use of the word “immunity” does, therefore, serve to concentrate minds since it makes it obvious that the point at issue is whether an operationally negligent tortfeasor should be discharged from liability for overriding reasons of public policy unconnected with the *merits* of the case against it.¹⁰⁰ If the immunity approach were to be adopted, instead of the rather haphazard collection of pragmatic considerations reflected in the reasoning in cases such as *X(minors) v Bedfordshire CC* and *Rowling v Takaro Properties*, a much sharper jurisprudence should therefore emerge.¹⁰¹

⁹⁵ If pre-identification of a particular claimant were always necessary the establishing of negligence liability would frequently be logically impossible!

⁹⁶ *Cf Doe v Board of Commissioners of Police for Metropolitan Toronto* (1989) 58 DLR (4th) 396 in which the High Court of Ontario distinguished *Hill's* case, notwithstanding similar facts, on the ground that the police had had reason to suppose that the plaintiff was particularly at risk from a serial rapist who was active in her vicinity.

⁹⁷ [1997] QB 464.

⁹⁸ *Ibid* at 486.

⁹⁹ [1997] QB 464 at 486 (italics supplied).

¹⁰⁰ A possible source of ambiguity here is that the term “immunity” is sometimes used to denote an authority’s freedom from negligence liability for discretionary decisions: see *eg* Arrowsmith, *Civil Liability and Public Authorities*, (1992), at p 169 *et seq*. The notion of (non-) “justiciability” would, however, seem to be more appropriate in that context; with that of “immunity” being reserved for situations in which it *alone* prevents the imposition of a liability which would otherwise exist.

¹⁰¹ *Cf* per Lord Browne-Wilkinson in *Barrett v Enfield London BC* [1999] 3 All ER 193 at 199: “. . . the word ‘immunity’ is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants

Appropriate comparisons could more readily be made with similar controversial areas such as advocate's immunity¹⁰² and the law relating to Public Interest Immunity certificates.¹⁰³ The relevance of the Human Rights Act 1998 would also become obvious.¹⁰⁴

Some of the arguments currently deployed to avoid the imposition of liability *might* survive the thorough testing required to substantiate an overt claim to immunity, while others might *not* do so. Thus "floodgates" type fears of enormous numbers of claims, with devastating consequences for the public finances, could turn out to be justified in certain circumstances. Conceivably, the need to avoid undue pressure upon those making finely balanced judgments in tense and emotive situations might also be accepted. But more general concerns that the mere possibility of the harassment and cost of litigation would itself be too unsettling, for the minds of those discharging public responsibilities, could prove less easy to support.

Accurate mapping of the conceptual geography of the law of negligence in this area also makes it easier to understand those cases in which claimants who have relied upon specific assurances or undertakings given by public bodies have successfully resisted the striking out of their claims. In such cases the court is, in effect, weighing the affront to justice to the individual caused by denying the claim, against the policy considerations underlying a possible immunity. It is interesting to note that such claims will indeed normally only be possible in situations in which operational negligence is established, but to which an immunity would otherwise apply. They could not be advanced, except in very exceptional circumstances, at the prior level of a policy decision. This is because to permit an authority to assume specific responsibility towards an individual in those circumstances could constitute an inappropriate fetter or estoppel upon the authority's freedom of action in public law.¹⁰⁵ Conversely, the policy side of the policy and operations distinction will normally be the appropriate point at which to make any submission based on the notion of "general reliance". If it failed to convert a power into a duty *at that* stage it is hardly likely to do so if the case becomes one of operational negligence attracting official immunity, since that would simply contradict the immunity.

CONCLUSIONS

There is an urgent need for a more principled approach to the negligence liability of public authorities, and for a clear structure which exhibits the substantive issues. The decision in *Barrett v Enfield London BC* is therefore to be welcomed. It has breathed new life into the vital distinction between policy decisions and operational activities. But that distinction alone cannot

whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject". *Sed quaere*.

¹⁰² For a recent example see *Kelly v Corston* [1998] QB 686.

¹⁰³ See *eg* Sir Richard Scott, "The Acceptable and Unacceptable Use of Public Interest Immunity" [1996] PL 427.

¹⁰⁴ *Cf Osman v United Kingdom* [1999] 1 FLR 193 in which the European Court of Human Rights held that a general immunity from negligence liability for the police could constitute a violation of art. 6.1 of the European Convention on Human Rights (right of access to a court).

¹⁰⁵ See, generally, Craig, *Administrative Law*, (4th ed, 1999), Ch 19.

determine whether or not liability should be imposed. The statutory framework within which the power is contained will provide the starting point, and enable successful claimants to contend that what occurred was not a mere “omission”. The suggestion that those exercising statutory powers should only be liable for “additional” damage is no longer viable as a general proposition. Consideration of the statutory framework must not, however, be confused with a fictional search for a non-existent statutory intention to “compensate”. Very occasionally the doctrine of “general reliance” may assist a claimant to overcome the defence that what occurred was a matter of discretion rather than one of operational negligence. But in the more typical type of case, it will be necessary for the claimant to show *both* that the harm which he or she suffered was within the general mischief at which the Act was aimed, *and* that operational negligence in fact occurred. The imposition of liability *should then follow*, unless the authority can establish a specific immunity on grounds of public interest.

Even if such an immunity would normally apply, a claimant who was given undertakings or assurances, upon which he or she relied, may be able to overcome it. In any event, however, the need overtly to *justify* the claim to immunity should ensure that only the most powerful of countervailing considerations are permitted to override the principle that “wrongs should be remedied”.

DEFERRAL OF SENTENCE: PRINCIPLES, PRACTICE AND PROPOSALS.

His Honour Judge David Smyth QC

INTRODUCTION

Some years ago, when those concerned with the sentencing of offenders in Northern Ireland were first attempting to get to grips with what exactly was involved in the concept of “restorative justice”, it occurred to some of us that the principles of “restorative justice”¹ were not limited to diverting offenders from the courts. Properly understood and applied these principles could, at the later stage of sentencing, be used either to divert offenders from custody or to give some bite to court orders that otherwise would have little direct impact on the offender, for example binding over and the various forms of discharge.

The extent to which existing formal sentencing powers recognise restorative aspects of justice are very limited. Compensation and community service orders have reparative elements which might be regarded as “restorative” but the manner of their imposition and the way in which these powers are enforced minimise the extent to which the offender is made responsible for “putting things right.”²

All sentencers in the United Kingdom have however possessed a discretionary power that has on occasions been used to effect a restorative resolution in sentencing: the power to defer passing sentence for the purpose of having regard to the offender’s conduct after conviction.³ This is one of the few areas of sentencing that has remained unaltered by successive criminal justice measures. The suggestions made in this article result from a

¹ “The term ‘restorative justice’ is a convenient shorthand expression that is commonly applied to a variety of practices which seek to respond to crime in a more constructive way than is conventionally achieved through the use of punishment. At the risk of over-simplification, the philosophy on which it is based can most helpfully be summarised in terms of the “three Rs” of Responsibility, Restoration and Reintegration. One of the primary aims of most restorative justice approaches is to engage with offenders to try to bring home the consequences of their actions and an appreciation of the impact they have had on the victims of their offences. A second aim is to encourage and facilitate the provision of appropriate forms of reparation by offenders towards either their direct victims (provided they are agreeable) or the wider community. A third aim is to seek reconciliation between victim and offender where this can be achieved and, even in cases where this is not possible, to strive to reintegrate both victims and offenders within the community as a whole following the commission of an offence.” For this definition see J. Dignan [1999] Crim.LR 48.

² See, eg J. Dignan, “*Repairing the Damage. Can Reparation be made to work in the service of Diversion?*” (1992) 32 BJ Criminol 453.

³ Examples include not only financial compensation but work undertaken directly on behalf of victims and, in at least one instance, work done under supervision by an affected party in a case of arson (see later). Figures (discussed later in this article) suggest about 3% of all court disposals excluding fines are deferral orders.

study undertaken in 1997 and 1998 to assess the extent to which Northern Irish courts used deferral and for what purposes.

What impressed most was the frequency with which our courts did defer passing sentence. Almost equally impressive was the extent to which the practice and approach of individual sentencers to deferral varied. Since the power is discretionary and since it has received relatively little attention in authoritative texts or in Superior Courts this is perhaps not that surprising. However the virtues of discretion would not be unduly fettered by suggestions as to what could be regarded as good practice.

What follows divides into three parts. In the first I attempt to outline the existing statutory framework and relevant case law in the three jurisdictions of the United Kingdom (Scotland, as will be seen, is very different). The second part gives some indication of the present use of deferral in Northern Ireland. In the final part some specific suggestions are made for widening the present powers in a way that would permit greater application of the principles of restorative justice⁴ and allow greater flexibility in relation to the treatment and rehabilitation of offenders suffering from drug addiction.⁵

DEFERMENT OF SENTENCE: THE LEGISLATIVE FRAMEWORK IN NORTHERN IRELAND

Article 3⁶ of the Criminal Justice (NI) Order 1996 provides:

“Subject to the provisions of this Article, the Crown Court or a magistrates court may defer passing sentence on an offender for the purpose of having regard, in determining his sentence, to his conduct after conviction (including where appropriate, the making by him of reparation for his offence) or to any change in his circumstances”.

The Order places specific limitations on the exercise of the power. Only one period of deferral is permitted and that for a maximum of up to six months.⁷

⁴ The Review of Criminal Justice in Northern Ireland, which is due to be published in the course of this year, is likely to attach considerable attention to some forms of restorative justice. *Review of Criminal Justice in Northern Ireland, a Consultation Paper NIO 1999*. “In certain circumstances, restorative justice can offer a more inclusive approach to dealing with the effects of crime. It concentrates on restoring and repairing the relationship between the offender, the victim and the community at large. It can operate in a number of contexts, both within the formal prosecution process and outside it. It depends crucially on the offender admitting the wrong and showing some sign of wanting to put it right. In restorative schemes, where all parties consent, some form of victim-offender mediation may take place. This can be done directly, in a conference, or indirectly, through intermediaries. In recognition that the effect of crime goes beyond those initially involved, there is also scope to include family members and representatives of the wider community.”

⁵ See developments in relation to the setting up of Drugs Courts, particularly in the United States, *eg* Hora, Schma and Rosenthal, (1999) 74 *Notre Dame LR* 439.

⁶ Formerly Article 11 of The Treatment of Offenders (NI) Order 1989.

⁷ In *R v Ingle* [1974] 3 All ER 811, it was accepted that there was an inherent power to postpone sentence at the end of deferment but this inherent power should only be exercised where there were *strong* reasons for doing so.

The offender must consent. The court must be satisfied that deferral is in the interests of justice. It may not, at the same time as deferring sentence, remand the offender. The court may, however, deal with the offender before the end of deferment if, during that time, he is convicted in Northern Ireland of any offence. This might appear to suggest that, with this exception, the court does not have power to sentence an offender before the deferral period has expired.

Deferment of sentence developed from the report of the Advisory Council on the Penal System (1970).⁸ Two types of appropriate cases were identified by Wootton: first, those where the court wished to confirm an offender's promise of good behaviour or await the outcome of a specific event such as a new job, and secondly, those where the offender had promised to make reparation. Despite Wootton recommending that in deferring sentence a court be given power to impose formal conditions, as was the case in Scotland, this proposal was not adopted in the legislation. This appears to have been due to an apprehension that there would be a risk of "double jeopardy", a person being sentenced twice for the same offence or, rather, receiving a greater sentence than he would have for the original offence. It also reflected concerns that difficulties might arise in determining whether specific conditions had been breached and the extent to which these breaches should be taken into account at final sentence.⁹ A Home Office memorandum which accompanied the Criminal Justice Act 1972 indicated that, notwithstanding the absence of a power to prescribe formal conditions, the court should record the specific object of the deferment and make this clear to the offender. The deferring court should also specify how it expected the sentencing court to be informed of progress.¹⁰

Since the introduction of the power to defer sentence in England and Wales there have been a number of case-law-based developments resulting from appeals from justices and Crown Court Recorders¹¹. An obvious difficulty that was inevitably going to arise was what approach the court should take where there remained unresolved matters arising out of allegations in relation to behaviour during the period of deferment. These cannot be taken into account by the court considering whether the offender has conformed to the spirit of deferral¹². To what extent can and should a court use the power to

⁸ Cmnd 4953.

⁹ It must be borne in mind that the power to defer sentence in England and Wales was going to be exercised by both stipendiary magistrates and lay justices assisted by legally qualified clerks and by Crown Court Recorders, many of whom are part-time, a much more disparate body than in Scotland, where the power is exercised principally by Sheriffs, and in Northern Ireland, where the power is exercised by Resident Magistrates, of whom there are now 17 and County Court judges sitting in the Crown Court of whom there are now 14.

¹⁰ *R v Gurney* [1974] Crim LR 472.

¹¹ The same court which deferred sentence should determine final sentence: *R v Ryan* [1976] Crim LR 508. Similarly, the same counsel should appear at final sentence as at the deferral.

¹² *R v Aquilina* [1990] Crim LR 134, where the court held that unresolved matters should not affect the outcome in any way. *Quaere* whether there could be a short adjournment to permit such outstanding issues to be resolved; *R v Ingle* [1974] 3 All ER 811, where the court accepted that adjournment was possible but the practice was discouraged. Clearly the court is concerned to prevent judicial

adjourn in order to permit such matters to be resolved? This remains one of the difficulties encountered in deferring sentence. Proceedings for breach of the probation order can, by contrast, be brought after the period of the order has run its course. On the other hand there can be both excessive delay in bringing breach proceedings and erratic and inconsistent approaches to such proceedings. These of course have their own “double jeopardy” aspect.

The Courts have also given guidance as to what the approach of the sentencing court should be where there is clearly an expectation that a custodial sentence will not be imposed.¹³ The English Court of Appeal has also considered the extent to which conditions could be attached to deferral orders. In an unreported case the trial judge had imposed a number of conditions designed constructively to control the way the accused, a woman, behaved. Since he appeared to be assuming powers to impose conditions, the matter was brought back before him. He removed the conditions but indicated that if the accused did not behave in a way that reflected those conditions this factor would be taken into account at sentencing. Whilst the Court noted the complaint about conditions there was no criticism of the deferment and the implied conditions on the basis that the judge was deferring sentence to see how the defendant would settle down to new responsibilities, in this case as mother of a child. The Court shortened the probation order imposed at the end of the deferral.¹⁴

The most detailed Court of Appeal guidance on the use of deferment was set out in *R v George*.¹⁵ The sentencing court should make it clear to the defendant what the purpose of the deferment is and what is expected of him:

prevarication, a matter of additional concern under the Human Rights Act; *R v Anderson* [1984] 78 Crim App Rep 251 where a case was mistakenly listed seven months after deferral. It was held that jurisdiction was not lost for delay caused by the mistake. The trial judge was on other duties and the court clerk relisted the case for his return in the mistaken belief that the original judge had reserved the case to himself. If, during the extra month, the offender had committed an offence it obviously could not be taken into account

¹³ In *R v Gilby* [1975] 2 All ER 745, where magistrates committed to the Crown Court for sentence after deferral, the court disapproved, expressing a general caution: “Exercise of the power for purposes other than the prescribed purposes in the Act is an invalid exercise of the power and can lead to great difficulty.” Where an offender’s report and/or his change in circumstances are not unfavourable a substantial custodial sentence is not appropriate. See also *R v Head* [1976] 63 Crim App Rep 157 where it was made clear that whilst this may not amount to a rule of law, the principle was clear. *R v George* [1984] 79 Cr App Rep 26 and *R v Dray* [1991] 92 Cr App Rep 305. If an offender has substantially conformed, or attempted to conform with the expectations of the court he is entitled to expect that an immediate custodial sentence will not be imposed. Also *R v Fairhead* [1973] 2 All ER 737. The court should always ask the defendant if he consents to deferral. Where the court decides to use its common law powers to delay passing sentence it should avoid the use of the words “deferred sentence” (see page 741 e, f and 742 d). There can only be an appeal against sentence when that is finally passed but the Attorney General can refer a deferral order on the basis that it is unduly lenient at the time of deferral. *Attorney General’s Reference No. 22 of 1992*.

¹⁴ See *R v Mumford*, Court of Appeal, Criminal Division, 26 July 1991. Transcript on Lexis.

¹⁵ *R v George* [1984] 3 All ER 13.

“what he is expected to do or refrain from doing”. Before selecting deferral the court should carefully consider whether it would be more appropriate to use one of the other means available of dealing with the offender. A note should be made of the purpose, and ideally the defendant should be given notice in writing. When finally passing sentence the court must determine if the defendant “has substantially conformed or attempted to conform with the proper expectations of the deferring court.” If he has, he may legitimately expect not to be sentenced to immediate custody at the end of the deferred period. If he has not, the court should state in what respects he has failed.

The Court touched on reparation: “It will, one imagines, seldom be in the interests of justice to stipulate that the conduct required is reparation by the defendant”¹⁶, but the Lord Chief Justice went on to consider those situations where deferment will be more appropriate than, for instance, a probation order:

“where the defendant is to make a real effort to find work, or where the sentencer wishes to see whether a change in the defendant’s attitude and circumstances, which appears to be a possibility at the time of deferment, does in fact come about. Again, deferment may be the appropriate course where the steps to be taken by the defendant could not of their nature be the subject of a condition, for example where he is to make reparation, or at least demonstrate a real intention and capacity to do so.”¹⁷

There appears to be some ambiguity in the courts’ interpretation of the use of deferment to facilitate reparation. Whilst it is specifically mentioned in the legislation the courts are reluctant to be seen giving an opportunity to an offender to “buy his way out” of a certain sentence. The Court of Appeal recognised that reparation may be appropriate but thought it would seldom be appropriate to stipulate its requirement. Obviously while a condition of reparation cannot be attached to a probation order, specific compensation and restitution orders can now be made in addition to other court orders.

The Wootton Report had considered this situation: “Deferment of sentence with a condition of reparation would, we think, be more appropriate where the offender undertook to make reparation but the court was uncertain about his determination to do so either then or in the immediate future.” The Department of Social Policy and Social Work at the University of York, who conducted research into the use of deferment (see below), suggested that deferment could be used more often for the purpose of reparation, even suggesting a pilot scheme which would permit deferment to be used more systematically.

In a recent Scottish case¹⁸ the Sheriff deferred sentence for a year in a case of theft for the offender to be of good behaviour and to bring £300 to the court. After a year, he had saved £180. The case was further deferred and by the time it was called again, the offender had spent the £180 and was sentenced to imprisonment. On appeal the High Court held that the Sheriff was not to

¹⁶ *Ibid* p15 a.

¹⁷ *Ibid* p15 h.

¹⁸ *R v Cameron and Webster* [1997] SCCR 228.

be commended. If he had considered a compensation order to be appropriate he should have made it at the time.

Leaving aside this apparent ambiguity over reparation as a specific stipulation by the Court on deferring sentence (perhaps remarkable given that this was an important consideration of the Advisory Council which recommended the introduction of deferral and is also incorporated into the legislation), the direct imposition of formal conditions upon an offender as part of a deferral order is without statutory basis. It does however seem that the courts are prepared to contemplate that expectations as to conduct and behaviour can be agreed. This seems clear from both *R v Mumford* and *R v George*.

If the offender by way of mitigation and with the encouragement of the court “sets up his stall” by committing himself to a course of action (whether that be to undergo voluntary restrictions, submit to supervision, make restitution or some form of reparation, undertake some form of community work or take a therapeutic course of treatment for alcohol or drug addiction, not reside in a certain area, take up employment, stay away from drug dealing locations or known criminals) and if the court indicates to the offender that successful performance of these undertakings will result in significant mitigation of the commensurate sentence (with that stated in court) then presumably neither the letter nor the spirit of Article 3 has been offended?

It certainly seems from our brief research into the use of deferral in Northern Ireland that many judges and most magistrates are deferring sentence on this basis, that is, that expectations can be agreed between court and offender and the offender has a clear expectation that, if he meets these expectations, a custodial sentence will be avoided or a lesser penalty imposed. The risk of “double jeopardy” is avoided by the sentencing court stating what the commensurate sentence is at the time it defers.

THE POSITION IN SCOTLAND

In Scotland, where deferred sentences are used more frequently¹⁹ and where the suspended sentence is unknown, there are no such uncertainties. The statutory basis is as follows:

“For the avoidance of doubt it is hereby declared that it is competent for any Scottish court to defer sentence after conviction for a period of such conditions as the court may determine”.²⁰

¹⁹ Deferred sentences constitute 6.4% of disposals of charges proved. This compares with probation orders, 1.8%, and community service, 1.9%. The suspended sentence is unknown to Scots Law, see: Nicolson, *Deferment of Sentences in Scotland* [1993] Scots Law Times.

²⁰ S. 47 of the Criminal Justice (Scotland) Act 1963. Further statutory provisions are contained in the Criminal Justice (Scotland) Act 1979 ss 219 and 432 and the Criminal Justice (Scotland) Act 1980 where sections 53 and 58 permit the imposition of probation and compensation orders following a deferred sentence. They have the same provision which permits sentence to be brought forward in the event of the commission of another criminal offence.

Scotland therefore has a much more flexible scheme which gives sentencers very wide discretion and which enables them to sentence in accordance with the facts as they appear to be at the end of the deferral period but with all the rights of sentencing at first instance. There is no “once and for all” limitation and no six months limit. The power to impose conditions is expressly conferred and in terms that give wide discretion.

Periods of deferral imposed vary from up to 25 weeks (well over 50%) to 35 weeks and one year (used less frequently but favoured by Scottish High Court Judges). Extensions are frequently imposed. These have the effect of increasing the average length of deferral to 30 weeks from 25.

While the Scottish system gives greater flexibility it is also subject to considerable differences in the way it is applied by individual Sheriffs. Practice varies considerably from court to court as to what is said by the Sheriff when sentence is deferred and as to what standard is applied by the court when assessing compliance with conditions. This is so even with the most basic condition “to be of good behaviour”. Deferral is used for a wide variety of cases including (though less frequently) some of the more serious. Most typically the power to defer is used in respect of infrequent offenders to permit them to show they have acted out of character in specific cases to achieve a direct object, for example, to see if employment is taken up and kept and also in cases of last resort to permit persistent offenders the opportunity to prove they can alter their lifestyle or break a pattern of offending.

The Scots have encountered similar problems to those experienced in England and Wales. How does one fit the deferral of a sentence and the ultimate sentence of the court into a tariff system? This in practice may not be such a problem since deferral is unlikely to be used for the more typical tariff offence unless there is a very cogent reason for doing so.

The difficulty of ensuring that there is continuity of the sentencing court (both sentencer and counsel) has arisen. There are both administrative and practical problems. These in a busy court can easily be imagined. An effective and accurate record must be made and retained. The volume of cases for a busy Sheriff and the number of times when, for unavoidable reasons, another judge has to pass the ultimate sentence make this essential. This is not always achieved.

The requirement to give a full explanation at the time of deferral as to what is expected and as to what is likely to happen requires both care and consistency. In Northern Ireland this is of even greater importance since the offender is required to consent. Extensions occur frequently in Scotland (in 43% of cases). This contrasts with the rigidity of our once and for all six month’s limit. In Scotland there is more scope for prolixity and for greater frequency of court appearances with consequent cost in time and court resources. Of the reasons for extensions being granted 27% were because the court wished to extend the period of deferral for specific reasons, 20% were because of the availability of reports, 14% were to enable the same Sheriff to appear and 30% were because the offender failed to appear!

There can be difficulty in determining whether an offender is in breach of a condition especially if the condition is not specific. The following are examples of specific positive conditions, which have been imposed by courts

in Scotland: restitution or some form of reparation; completing therapeutic courses; saving towards compensation or financial penalty; the completion of a course of education or training course; and the taking up and keeping of employment. Negative conditions imposed by Scottish courts have included such matters as: restrictions on driving and exclusion from certain areas. The Nicholson research was conducted prior to 1992 and the picture may have altered since that date but no further research has been done on the use of deferred sentence in the United Kingdom since that date.²¹

DEFERRAL OF SENTENCE IN NORTHERN IRELAND

To what extent do sentencers in Northern Ireland use deferral, in what circumstances and what do they seek to achieve by its use? There are few statistics available which is not perhaps a matter of surprise since an order for deferral of sentence is not a final disposal. There are some however.

In 1996 the Northern Ireland Court Service did publish a figure for the number of deferral orders in adult business in Northern Ireland's magistrates courts. Of a total of 31,387 disposals (excluding fines), 1353 were deferrals (or 4% of the total). By contrast 1492 probation orders were made (5%). In itself this demonstrates not just frequency of use but, given the fundamental position of probation in sentencing, the significance of deferral as a sentencing measure for magistrates.²² There are no comparable figures for either juvenile court disposals or for the use of deferral in Crown Courts. The last published figure for juvenile disposals which include a total for deferrals was for 1994 when resident magistrates deferred on 94 orders (out of a total of 3086, about 3%. This compared with 470 probation orders, 15%).²³

The genesis for this article was concern about the extent of use of deferral and, in an attempt to find out more, in 1997 with the assistance of the Criminal Justice section of the Northern Ireland Office questionnaires were distributed to all county court judges and resident magistrates in Northern Ireland as well as a number of probation officers. Twenty three of a total of thirty, the complement at the time, replied. (11 judges and 12 magistrates). The purpose was to determine how sentencers regarded existing powers to defer sentence and whether there was any scope for change.

Over half (60%) of the judges who replied to the survey estimated that they had deferred sentences on fewer than five occasions in the preceding 12

²¹ The following suggestions were made to improve the efficiency of deferment of sentence in Scotland after research commissioned by the Scottish Office in 1992 (*The Deferred Sentence in Scotland*, Nicholson, 1992): the introduction of a standard reminder letter for issue to offenders shortly before the date of their final hearing; where possible, the desirability of achieving continuity of sentencer from initial to final hearing should be achieved; a standard procedure should be introduced for recording the views of the initial sentencing court for the benefit of the court or final sentence and for any substantial appeal court; a study should be made to identify the cause of and reduce the frequency of unplanned extensions to deferments; consideration should be given to the introduction of a consistent and effective method of alerting the offender to precisely what is expected during deferment; central government should establish a system of routine collection and publication of statistics on the use and practice of deferring sentence.

²² Judicial statistics 1996: N.I. Court Service, Belfast.

²³ Judicial statistics 1994: A Commentary, N.I. Court Service, Belfast.

months compared with only 8% of magistrates. Since most offences that come before the Magistrates' Court are less serious than those tried before a judge, it is understandable that the practice of deferral is much more prevalent amongst the magistracy, with three-quarters having used it more than ten times in the past year compared with 30% of judges.

As regards eventual outcome three-quarters of those who deferred sentence reported that in very few cases (fewer than 15%) did a custodial sentence follow a period of deferment. In total three-quarters of judges and two-thirds of magistrates stated that in very few cases did they take the course of imposing a custodial sentence. Mirroring this, most respondents (83%) also reported that in the majority of their cases, defendants substantially fulfilled the expectations of the Court.

The reason cited most often for deferring a sentence (referred to by two-thirds of respondents) was to permit the offender an opportunity to take part in a rehabilitative or therapeutic programme (Table 1). The next most popular conditions attached to a deferred sentence involved the payment of compensation or maintaining voluntary contact with the probation service.

Table 1

Case Deferred to Permit	Number Citing
Compensation	19
Voluntary contact with Probation	19
Rehabilitation/therapeutic programme	20
Reparation in other form	5*
Residence requirement	6
Voluntary work in community	10

* This figure includes examples not only of financial reparation but other forms of "restorative action" by offenders including work done for victims who had suffered from arson attack (sectarian). Deferral has also been used with the consent of victim and offender to facilitate meeting and apology and payment of compensation in criminal damage cases. My own view is that there are some cases where this approach is merited but they have to be carefully selected.

Without exception, respondents felt that the power to defer sentence was useful, with 62% believing it to be very useful. Judges and magistrates were slightly less enthusiastic but over half of each (55%) also believed it was very useful to defer sentences.

The most common advantage of deferring sentence, identified by 80% of respondents, was that this practice allowed offenders an opportunity to change. Just over a third (36%) also believed that it was advantageous as it allowed the offender an opportunity to make some kind of reparation. In some cases the reparation was seen as necessarily involving the victim.

The judges' responses tended to concentrate on the *type* of offender best suited to a deferred sentence. Most felt that the power to defer was best

employed where the crime did not correspond with their impression of the offender and that therefore they required more time to assess the case. Particular reference was made to offenders ‘on the fringes of criminality’ and those who would benefit from being removed from ‘the adverse influence of others’. The circumstances in which deferral was considered to be useful ranged from serious crimes committed by young offenders to cases where disputes had arisen within the family or other similar situations.

The magistrates put more emphasis on their *expectations* of the offender. A number said that they made it clear to the defendant that this was their last chance before custody – one voicing the possibility that six months out of trouble may foreshadow a lifetime out of trouble. As one put it, “your future is now put to the test and in your hands”. One considered deferral to be a more effective course of action than a suspended sentence as it did not have the same sense of finality. Another reflected the views of many in stating that a sentencer can use “initiative and judgement towards reform and rehabilitation rather than punishment *per se*”. Only one mentioned that the period of deferral allowed time for ‘victim awareness.’

The comments of probation officers referred largely to the effect of the deferral on the offender and the role of probation in his disposal. The knowledge that the offender must return to court ‘concentrates the mind’ and provides reinforcement of probation’s efforts with a defendant. Goals can be easily defined, which encourages responsibility and motivation in the defendant.

The range of advantages and disadvantages referred to by respondents are set out in Tables 2 and 3 below.

Table 2

Advantage	Number Citing
Opportunity to change	22
Opportunity to make reparation	9
Public perception	1
Alternative disposal	7
Time to reflect	5
Keep people away from others	1
Time to get help for drink/drugs	2
Facilitates a better understanding of victim	1

Table 3

Disadvantage	Number Citing
Perception of lightness	8
Opportunity to re-offend	14
No formal constraint	13

Timescale short	4
Administrative	5
Increased time between offence and sentence	8
Probation reluctance	1
No use for addicts: drugs/drink	2

The most commonly cited disadvantage with deferring a sentence (Table 3) was the opportunity it afforded an offender to re-offend, with half of all respondents referring to this. A similar proportion were also concerned that no formal constraint could be imposed. While offenders could be given a deferred sentence and asked to attend specific therapies, avoid 'bad' company or make some kind of restitution, these 'requests' had no formal status. Offenders were not required to follow courses identified by the courts at the time of their deferment of sentence.

Many respondents felt that the administration of deferred sentences was poorly defined. Problems were identified where an offender was accused of, but denied, other offences during this period of deferral. A lack of monitoring and inadequate systems for dealing with breach complicated the process. Some felt that deferral actually limited their sentencing options, stating that it was not easy to impose a custodial sentence once the six months was up. In certain cases, the final imposition of a custodial sentence may be open to challenge if the sentencer has previously indicated that good behaviour may be grounds for leniency.

A number of magistrates expressed concern about the degree of subjectivity that deferrals required of them. One described having to infer "declared intention to reform without any concrete evidence of real intention to reform". Others suggested that the system risked compromising fairness. One warned of losing control over the process, citing a "risk of a loss of uniformity in ultimate disposal" and referring to "the growth of a complicated body of law on the subject which will negate the original intention." Another saw complications arising where the ultimate sentence was based on both the original offence on a tariff and the defendant's conduct in the interim, particularly where he has not complied with conditions. One probation officer expressed concern that very minor offences may constitute a breach and result in custody. There was also some concern that ancillary orders such as disqualifications or seizure orders could not be made pending the determination of the entire sentence.

Again, one mention was made of the victim, who suggested that "victims might feel more vulnerable and in a sense betrayed" if the offender is not sentenced immediately.

Despite identifying these disadvantages most respondents (56%) did not feel restricted by the lack of a statutory power to impose positive conditions on those receiving deferred sentences, not least because, according to one magistrate, "implied conditions" are already being imposed.

More than two-thirds (70%) of all respondents thought that there was scope for greater use of deferred sentencing, as this would lead to greater

sentencing power. However, there was some resistance to this: one-third of judges and one-third of magistrates agreed that there was no scope for widening use of deferred sentencing.

One judge foresaw the same “problems of articulation and effect” as exist now, while some magistrates and probation officers were concerned about the issue of compliance. One magistrate stated that greater powers to defer would necessitate an “objective test of compliance” because requirements were not uniformly verifiable – “How does one determine that an offender hasn’t breached negative conditions?” A probation officer saw further problems where a defendant had not re-offended but had failed to meet the express conditions or where particularly difficult conditions had been imposed, such as remaining drug-free.

Probation officers pointed out that imposing conditions created problems, particularly where more than one condition was being imposed. There was also a need to consider how conditions could be made “commensurate with civil rights.”

The power to defer sentences was seen as potentially useful in those instances where the offender lacked awareness of the full nature of his crime, or where the crime was alcohol induced. This latter circumstance, the role of alcohol in the crime, was the one most referred to (by 70% of those answering this section).²⁴

ENSURING GOOD PRACTICE?

In the light of the above what improvements could be made to ensure that deferral of sentence is used in the most effective manner that is consistent with principle? Recognition and application of what constitutes good practice would ensure that many of the concerns outlined above are met. I venture to list some of these here. I however feel that there is a reasonably good case to be made for changes in the enabling legislation. I therefore suggest some modest changes which would have the effect of clarifying areas where there are existing ambiguities and which would also give judges wider scope in using deferral.

Sentence should only be deferred where the court has good reason to suppose that deferment will influence the offender’s future conduct. This is to state the obvious but it bears restating. Once the court has determined this the question of consent has to be addressed. In this context the precise expectations upon which passing of sentence may be deferred must be clearly stated and agreed with the offender before he is asked to give his formal consent. The offender should be asked to acknowledge these in court when he gives his consent. All expectations agreed with the court should be reduced to writing and a copy provided for the offender. At all stages it should be made clear that the offender’s consent is required. Care should be taken by the court to ensure that the purpose of deferral is clearly expressed including the provision to the offender of the opportunity to avoid custody or to mitigate his punishment. It should be made clear, in the event of re-

²⁴ I would like to acknowledge the assistance given to me in the collation of these questionnaires by Tom Haire of the Northern Ireland Office and also the assistance of David McKeown also of the NIO, Criminal Justice Division.

offending or failure to meet conditions or expectations agreed with the court, that no greater penalty will be imposed than that stated by the court to be commensurate with the offence committed. The same judge should pass final sentence as first ordered deferment (with obvious savings).

These proposals would ensure better uniformity of practice and permit closer monitoring. They would meet most of the concerns raised by the Court of Appeal in *R v George* and would make it clear that a person who has had the passing of sentence upon him deferred will not be at risk of a greater penalty as a result of his failing to meet conditions or expectations. A written set of conditions would assist the court in assessing compliance with the spirit of deferral and with the difficult task of deciding what to do in the event of default.

Where precise decisions have been breached the offender can perhaps be returned to the court and dealt with early. Overall this would assist the offender to know what is expected of him. The court's discretion would still remain wide particularly in relation to more subjective conditions or exhortatory expectations. Not only would this more formal approach substantially widen the opportunity given to the court to influence the offender's behaviour by giving it a framework within which the offender has an incentive but it also clearly places the responsibility for achieving this on the offender. However in my view much more could be achieved by the following amendments to the existing law.

LEGISLATIVE CHANGE

Proposed Amendments To Article 3 Of The Criminal Justice (NI) Order 1996

The text of the relevant parts of the current law are reproduced here with the proposed amendments in italics:

“Deferment of sentence

3 (i) Subject to the provisions of this Article, the Crown Court or a magistrates' court may defer passing sentence on an offender after conviction *for a period and on such conditions as the court may determine* for the purpose of enabling the court to have regard in determining his sentence to his conduct after conviction (including, where appropriate, the making by him of reparation for his offence) or to any changes in his circumstances *or lifestyle*.

(ii) Any deferment under this Article shall be until such date as may be specified by the court, not being more than 6 months after the date on which the deferment is announced by the court and where the passing of sentence has been deferred under this Article it shall not be further deferred thereunder *unless the court is satisfied that special circumstances exist and it would be in the interests of justice to further exercise the power in accordance with the provisions of paragraph (3) and, in any event, such date shall not be more than 12 months after the date on which deferment was first announced by the court*.

(iii) The power conferred by this Article shall be exercised only if the offender consents and the court is satisfied having regard to the nature of the

offence and the character and circumstances of the offender that it would be in the interests of justice to exercise the power.

(iv) A court which under this Article has deferred passing sentence on an offender may pass sentence on him before the expiration of the period of deferment if during that period he is convicted in Northern Ireland of any offence or *if the court is satisfied that the offender has breached a condition imposed by the court.*

Amendment No 1

“for a period and on such conditions as the court may determine”

This would provide a statutory basis permitting the enforcement of agreed conditions; a Consent remains essential but the court order can record conditions and ultimately a sanction can be imposed if these agreed conditions are not met. This would be in line with the original recommendation of the Advisory Council on the Penal System (Wootton Report 1970). It would not be as far reaching as the Scottish provisions whereby the court is simply empowered to “defer sentence after conviction for a period and on such conditions as the court may determine”. (Section 47 of the Criminal Justice (Scotland) Act 1963). The restrictions currently imposed by our Article 3 would remain unchanged. However no limit is imposed on the conditions which may be attached to the Order deferring sentence.

Amendment No 2

“and lifestyle”

This would further define “any change in his circumstances” as to make it clear that the ambit of deferral is not simply confined to such matters as the obtaining of a job and so forth but would also include the successful completion of medical treatment and detoxification of an offender dependent on drugs or alcohol.

Amendment No 3

“unless the court is satisfied that special circumstances exist and that it would be in the interests of justice to further exercise the power in accordance with the provisions of paragraph (3) and in any event such date shall not be more than 12 months after the date on which deferment was first announced by the court”.

This would permit the court to extend a deferral where special circumstances are found to exist. It is designed to meet those cases where, unusually, a further period of deferral is appropriate, for example where there is an unresolved allegation of the committal of an offence within the first deferral or where a course of medical treatment has still to be completed and reported upon or where an academic year is uncompleted at the end of the first deferral period.

Amendment No 4

“or if the court is satisfied that the offender has breached a condition imposed by the court”.

This would permit earlier resolution of a case where an offender has clearly demonstrated no intention to observe the terms of the deferral and its purpose. This would meet a concern expressed by some probation officers and would increase the discretion available to the court. It may be criticised on the basis that it emphasises the compulsory and non-voluntary aspect of deferment but the incentive an offender has to avoid custody does provide motivation and this option might not be available without the offender’s agreement to submit to conditions, (for example there would be little point in a court having to wait six months before sentencing an offender who has not observed a condition of contact with a probation officer or of residence or of undertaking treatment or of engaging in agreed restorative actions).

These amendments in themselves do not involve too radical an alteration to the existing scheme of the Article. To an extent they recognise what sentencers have been attempting to achieve with the existing power. They remove some uncertainties and clarify some ambiguities but they also significantly widen the discretion available to judges and would give clear statutory authority to what is already being achieved by individual sentencers on the basis of expectations agreed between the offender and the court.

The benefits of giving these further powers to sentencers go beyond the matters discussed above. The Scots and the French use their powers to encourage restitution or some form of reparation in kind. As the concept of restorative justice develops the principles involved in restoring the relationships between offender, victim and community can be accommodated within this statutory framework.

These wider powers could be used to encourage the completion of therapeutic and detoxification courses. They could facilitate the completion of training and education; the taking up and keeping of employment; the monitoring of behaviour. Such matters as saving towards making financial compensation to victims, direct contact with victims through mediation or group conferencing schemes could well fit within this framework. Deferment could permit voluntary work to be undertaken by offenders whose needs are not met by community service schemes and also would permit less formal contact with probation officers, other trained facilitators and, in appropriate cases, the police.

Perhaps more ambitiously these enhanced powers could be particularly useful in cases where offenders are subject to opiate addiction, (a problem in parts of Northern Ireland that has recently shown signs of becoming as acute as it has elsewhere in the world). Whilst in the recent Criminal Justice (NI) Order 1998²⁵ provision is made for drug testing and treatment orders it is

²⁵ These are “stand alone Orders” introduced by the Criminal Justice (NI) Order 1998 Articles 8-11. These provisions, which have not yet come into force, provide for: a new order to be made by a criminal court with the consent of the offender; requiring the offender to undergo drug rehabilitation treatment; the court would be expected to review the offender’s progress regularly; the offender would be

very unlikely that these provisions will be brought into force in the medium term.. No funding has been planned by the Department of Health and Social Services and no facilities or protocols exist within the local health service that would meet the demands of compulsory treatment and testing orders made by the courts. Failing such compulsory measures being introduced (and all the bureaucracy associated with these) the power to defer sentence to permit treatment and detoxification could meet some of the concerns intended to be met by formal treatment and testing orders. Deferral of sentence for the purpose of monitoring a course of treatment for opiate addiction or alcohol addiction and its outcome-result would be within the general scope of the power. It would involve the court in a much more direct way with the health service than has been the case up to the present. There are however many indications already as to the benefits of such a closer relationship.²⁶

required to submit to weekly drug screening tests; offenders could be brought before the court for failure to comply. Comment: This seems to be an over elaborate and resource intensive form of order particularly as, from January 1998, the Northern Ireland courts have had powers to make orders requiring offenders to submit to treatment to reduce drug and alcohol dependency on foot of probation orders.

²⁶ In Dublin a “drugs court” is in the course of being established. Its jurisdiction will be exercised by District Judges utilising existing powers. Other schemes are in existence in Australia (Sydney), Canada and in the United States, *eg* The Miami Drug Court discussed by Hora, Schma and Rosenthal, *Notre Dame Law Review*, *op cit* n 5.

MODERNISING THE REGULATION OF WATER POLLUTION IN NORTHERN IRELAND

PART ONE: THE STIMULUS FOR REFORM & THE PRINCIPLE OF POLLUTION PREVENTION

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INTRODUCTION

For almost thirty years, the Water Act (Northern Ireland) 1972¹ has controlled the system of regulation governing the pollution of inland, coastal and ground waters in Northern Ireland. Although innovative in its time, the system of pollution control laid down in the Act became increasingly outdated as successive waves of reform during the 1980s and 1990s considerably upgraded the entire regulatory system governing the prevention and control of water pollution in Great Britain. Eclipsed by the security concerns that engulfed the Province in the early 1970s, water law and policy in Northern Ireland, as with the rest of its environmental laws, effectively petrified until the early years of this decade. During this period, the Government made no effort to prepare legislation designed to ensure parity between water pollution laws applying in Great Britain and Northern Ireland and a blind eye was turned to the Department of the Environment (Northern Ireland)'s² endemic failure to implement EC water pollution Directives. In addition, direct rule effectively immunised the Government from public pressure to improve water pollution controls in Northern Ireland. Even the highly critical findings of the Halcrow Report³ submitted to the Department in 1988 concerning the management of water quality issues in Northern

* The author would like to thank Professor Colin Reid (University of Dundee), Professor Richard Macrory (University College London), Professor Brigid Hadfield (Queen's University Belfast), and Clive Mellon (Senior Conservation Officer, RSPB(NI)) for their comments on earlier drafts of this work. Thanks are also due to my research assistant Sharon Thompson and to the Law School, Queen's University Belfast for funding the research of this paper. Part Two will be published in the Summer issue.

¹ c 5

² Hereinafter referred to as the DoE(NI).

³ In 1988 the DoE(NI) commissioned an efficiency study of its Environmental Protection Division (the predecessor of the Environment and Heritage Service). The study was carried out by William Halcrow, then Director of the Forth River Purification Board in Scotland. The Halcrow Report has not been published and therefore remains as an internal DoE(NI) document. Although the present author requested a copy of the report during the writing of this paper, the EHS made a decision (over 3 months later) to refuse access on the grounds that the report is a confidential, internal document within the meaning of Regulation 5(2)(c) of the Environmental Information Regulations (NI) 1993. However, reference to Halcrow's core findings can be found in the Report of the Comptroller and Auditor General for Northern Ireland, *Control of River Pollution in Northern Ireland*; HC 693, Session 1997-98, p 26 *et seq.*

Ireland were largely ignored. An effective stimulus for reform finally emerged in 1990. Led by Sir Hugh Rossi, the House of Commons Environment Select Committee conducted the first external study of the legal framework and regulatory structures governing the environment in Northern Ireland. Their final report, published in 1990,⁴ highlighted in no uncertain terms their profoundly neglected state. Fortunately, the Committee's recommendations were not ignored. As a result, the Government pledged to undertake an extensive programme of reform designed to bring environmental law and policy in Northern Ireland into line with national and EC law in this field.

The mammoth task of modernising water law and policy in Northern Ireland began almost immediately. The first phase of reform, spanning from 1990-1996, was dominated by the urgent need to implement the enormous backlog of EC Directives on the aquatic environment.⁵ The purpose of the present article is to examine the results of the more halting second phase of change which has focused on bringing Northern Ireland's water pollution legislation into line with that applying in England and Wales. Although it began auspiciously in December 1993 with the publication of the *Review of the Water Act (Northern Ireland) 1972: A Consultation Paper*,⁶ the second phase of reform did not bear fruit until the adoption of the Water (Northern Ireland) Order in March 1999.⁷ The making of this new legislation represents an important milestone in the protracted process of modernising the legal framework that exists to protect and manage the freshwater environment in this jurisdiction. When it comes into force,⁸ the Order will repeal and replace the Water Act (NI) 1972 as the central pivot in the system of regulation governing the pollution of inland, coastal and groundwater in Northern Ireland. The new Order will effectively bring Northern Ireland broadly, but not completely, into line with the more sophisticated and environmentally progressive controls imposed on water pollution in England and Wales⁹ under the Water Resources Act 1991,¹⁰ the Environmental Protection Act 1990¹¹ and the Environment Act 1995.¹² In doing so, it will considerably strengthen the powers available to the DoE(NI) to deliver effective

⁴ *Environmental Issues in Northern Ireland*; HC 39, Session 1990-91.

⁵ In this regard, see: S. Turner and K. Morrow, *Northern Ireland Environmental Law*, Gill and Macmillan (1997), Chapters 3 and 5; S. Turner and K. Morrow, "The Impact of EU Law on the Environmental Law of Northern Ireland", in Holder, (ed.) *The Impact of EU Environmental Law in the United Kingdom*, Wiley (1997), pp 69-84.

⁶ Published jointly by the DoE(NI) and the Department of Agriculture (NI).

⁷ SI 1999/662 (N.I. 6).

⁸ At the time of writing, no date has been set for bringing the Water (NI) Order 1999 into force. However, it is anticipated that the Order will not come into force for at least another twelve months.

⁹ Water pollution in Scotland is governed by the heavily amended Control of Pollution Act 1974 (c 40), which essentially approximates to the terms of the provisions applying in England and Wales. In the interests of clarity, this article will use England and Wales as the principal point of comparison – however, significant differences in Scotland will be highlighted where relevant.

¹⁰ c 57.

¹¹ c 43.

¹² c 25.

freshwater pollution control in Northern Ireland. The purpose of this article is to examine the nature and scope of the reform introduced by the Water (NI) Order 1999 and to propose an agenda for future reform in this field. Due to the scale of change wrought by the Order, the analysis will be published in two separate parts.¹³ The present article (Part One) will address two issues. First, it will examine reasons for reform; namely, the changes in the wider policy and legislative framework governing water pollution control in England and Wales that provided the stimulus for eventual reform in Northern Ireland. It will then move on to discuss the first principal feature of reform introduced by the Water Order, namely, the implementation of the principle of pollution prevention. Part Two of this analysis will address two further issues. First, it will examine the significance of the changes wrought to the core regulatory mechanism; namely, the discharge consent system. Secondly, it will identify three core weaknesses that exist within the regulatory system governing water pollution all of which should be resolved as a matter of urgency by the Northern Ireland Assembly.

THE NEED FOR REFORM

Clean water has been recognised as being sufficiently important in the United Kingdom to be protected by legislation for the past 150 years.¹⁴ Concern over public health and the prevention of water borne disease was the principal concern underlying most of the early legislation in this field. However by the early 1970s increasing public concern about the state of the environment led to the adoption of legislation which focused on the protection and enhancement of the aquatic environment in its own right. The Water Act (NI) 1972 introduced the first coherent system for freshwater pollution control in Northern Ireland. One of the last measures adopted by the old Northern Ireland Parliament, the Act consolidated and extended the fragmented system of water pollution control that had previously been governed by a range of legislative provisions and administered between various bodies.¹⁵ Although the new Act was heralded as introducing 'one of the most modern codes of law protecting water anywhere in the world',¹⁶ in national terms its pollution control provisions were lax¹⁷ compared to the

¹³ Part two of this article will be published in a forthcoming edition of this journal: (2000) 51 NILQ.

¹⁴ Report of the Comptroller and Auditor General for Northern Ireland, *Control of River Pollution in Northern Ireland*; HC 693, Session 1997-98, p 24, para 5.

¹⁵ In particular a series of Fisheries Acts since 1842, the Rivers Pollution and Prevention Act 1876 and 1891, the Water Supplies and Sewerage Act (NI) 1945 and the Public Health Acts 1878-1907. Responsibility for the administration of these Acts was also fragmented between various bodies including Local Authorities, the Fisheries Conservancy bodies and the Department of Agriculture.

¹⁶ Parliament of Northern Ireland Commons Debates 1971-72, Vol. 82, July 8 1971, at pp 740-792, *per* Northern Ireland Minister for Development (Mr Bradford MP), at p 744.

¹⁷ Confines of space do not permit a detailed comparison between the two measures. Suffice it to say, however, that it was widely accepted during the Parliamentary debates on the Water Act (NI) 1972 that the protection of the aquatic environment in Northern Ireland did not require the introduction of legislation containing the same degree of legal control as that applying in England and Wales under the Water Act 1945 and Water Resources Act 1963 – the predecessors of COPA 1974.

more environmentally progressive powers introduced in Great Britain under the Control of Pollution Act 1974¹⁸ (COPA). Despite this, both provisions shared certain common features. As was the case under COPA, the discharge consent system was the principal regulatory instrument contained in the Water Act (NI) 1972, and for the first time in Northern Ireland, regulation was extended to discharges from industrial, commercial and domestic sources.¹⁹ Both consent systems were reinforced by criminal offences and a range of administrative powers designed to facilitate the prevention and remediation of water pollution. In addition, both COPA and the 1972 Act contained provisions enabling public participation in the regulatory system through the establishment of public registers of information and the advertisement of applications for discharge consents. However, only limited provision was made for public participation in Northern Ireland.²⁰ The bodies responsible for administering and enforcing the regulatory system operated both as poacher and gamekeeper in the context of water pollution control. In England and Wales, Parliament enacted the Water Act 1973²¹ which established ten public sector bodies, known as Regional Water Authorities, who were made responsible for both water pollution control and operational activities, such as the supply of water and the treatment and disposal of sewage. Similarly, in Northern Ireland, the DoE(NI) was made responsible (under the Water Act (NI) 1972) for the regulation of water pollution²² and (under the Water and Sewerage Services (NI) Order 1973²³) the operational aspects of the aquatic environment.²⁴ Finally, although COPA and the 1972 Act were considered radical in their time, their potential impact was blunted by the considerable delays in bringing many of their most innovative provisions into force; in fact some of their provisions were never implemented. However, there the similarities ended. Whereas the next thirty years witnessed a period of profound legislative stagnation in Northern Ireland in relation to all aspects of the environment, by contrast, the same

See for example, Parliament of Northern Ireland Commons Debates 1971-1972, Vol. 82, June 22 1971, pp 759-760.

¹⁸ c 40.

¹⁹ Prior to the 1972 Act, the only system of control imposed on pollution came under fisheries legislation, which made it a criminal offence to pollute water – see note 15 *supra*.

²⁰ The extent of this difference is discussed in detail in Part Two of this article.

²¹ c 37.

²² The DoE(NI)'s pollution control function was originally exercised by the Department's Environmental Protection Division. In 1990 the EPD was subsumed into the Environment Service, which in turn was subsumed into the Environment and Heritage Service (established as a Next Steps Agency of the DoE(NI)) in 1996. For a fuller discussion of the historical evolution and current function of the DoE(NI), see S. Turner and K. Morrow, Gill and Macmillan (1997), note 5 *supra* at pp 18-31.

²³ SI 1973/70 (N.I. 2).

²⁴ Specifically, the treatment, supply and distribution of drinking water and the collection, treatment and disposal of sewage and waste water. Today the DoE(NI) exercises its operational functions in relation to the aquatic environment via the Water Service (established as a Next Steps Agency of the DoE(NI) in 1996). For a fuller discussion of the historical evolution and current function of the DoE(NI), see S. Turner and K. Morrow, Gill and Macmillan (1997), note 5 *supra* at pp 18-31.

period in England and Wales was characterised by fundamental reform in almost every area of environmental law and policy.

The process of modernisation in Great Britain began in the field of water pollution law with Europe providing the initial stimulus for reform. Despite lacking a Treaty basis for Community action on the environment, the EEC (as it was then known) adopted its First Action Programme on the Environment in 1973 and immediately identified water pollution as a priority issue. A veritable outpouring of Directives on water pollution followed, the cumulative effect of which has considerably strengthened the legal protection afforded to the aquatic environment. Although the Government's initial reluctance to ensure full implementation of these Directives in Great Britain was well documented,²⁵ no action whatever was taken to prepare equivalent implementing legislation for Northern Ireland. The implementation of EC Directives on the environment was simply not a priority for the DoE(NI) during the 1970s and 1980s.²⁶ Not surprisingly, Northern Ireland gradually became synonymous with worst practice in the implementation Directives on the environment. As a result, its aquatic environment did not benefit from the more stringent standards laid down by the Community for almost two decades – many years after the deadlines for implementation had expired. Further stimulus for reform during the mid-1980s came from the Conservative Government's political commitment to privatisation. The Government's decision to privatise the water industry in England and Wales, and mounting public pressure concerning environmental issues generally, ultimately led to a fundamental restructuring of the approach to water pollution control in Great Britain. After several years of political debate, the Government introduced the Water Act 1989,²⁷ which overhauled the regulatory and administrative structures governing the water environment in England and Wales and considerably strengthened the control of water pollution in Great Britain.²⁸

²⁵ See for example: Haigh, *Manual of Environmental Policy: The EC and Britain*, Longman (1992), Chapter 4.2; Somsey, "EC Water Directives" (1990) *Water Law* 93; Weale, "Environmental Regulation and Administrative Reform in Britain", in Majone (ed.), *Regulating Europe*, Routledge (1996), pp 106-130; Maloney and Richardson, *Managing Policy Change in Britain: The Politics of Water*, Edinburgh University Press (1995); Bell, *Ball and Bell on Environmental Law*, (4th ed, 1997), pp 439-447.

²⁶ In this regard it should be noted that non-implementation of EC environmental Directives in Northern Ireland had been addressed in the context of a number of enforcement actions taken by the European Commission against the United Kingdom, all of which are discussed by S. Turner and K. Morrow, Wiley (1997), note 5 *supra*. Although the European Court declared that the United Kingdom had failed in its obligations in relation to Northern Ireland, the breaches persisted, and at that point the Treaty did not empower the Court to impose a penalty for failure to comply with its judgments. For a fuller discussion of the strengths and weaknesses of the Commission's enforcement powers in the context of environmental law, see: Macrory, "The Enforcement of Community Environmental Laws: Some Critical Issues" (1992) 29 *CML Rev.* 347.

²⁷ c 15.

²⁸ It should be noted however, that the 1989 Act did not privatise the water industry in Scotland. Separation of the poacher-gamekeeper problem only occurred in Scotland under the Local Government (Scotland) Act 1994. COPA continues to

The most obvious change introduced by the 1989 Act was the privatisation of the water industry in England and Wales and the separation of the conflicting poacher-gamekeeper roles that had weakened the credibility of the previous system of pollution control. Prior to this point, ten Regional Water Authorities – established under the Water Act 1973²⁹ as multi-purpose public sector bodies – were responsible for both pollution control and operational activities such as the management of water provision, water treatment and supply, sewerage, sewage works and sewage disposal. By the 1980s this system was widely regarded as ineffective in principle and practice.³⁰ The Water Act 1989 brought an end to this conflict of interest by separating regulatory and operational functions.³¹ The structure of the ten water authorities in England and Wales in 1973 was based on a fully integrated approach to water management, and initially the Government intended to preserve this approach by privatising the authorities in their existing form, combining both operational and regulatory functions. But in order to minimise the potential for compromise, they would operate against a much more explicit statutory framework of legally binding water quality standards and objectives. European Community water legislation, however, required Member States to appoint ‘competent authorities’ in order to implement many Community obligations. There was considerable legal doubt whether a fully privatised body could be a competent authority in this context, and threat of legal action by the Council for the Protection of Rural England, amongst others, forced the Government into a major rethink. The result was that the responsibility for regulatory functions was transferred to the National Rivers Authority – an independent, non-departmental public agency established under the Water Act 1989 – while the remaining operational side of the water industry (encompassing water supply and waste

apply in Scotland, albeit amended by the Water Act 1989 and by numerous successive provisions.

²⁹ c 37.

³⁰ Increasing financial restrictions imposed on water authorities led to a decline in water quality and under-performance in the sewage works operated by Regional Water Authorities (RWAs). Discharges from sewage works meant that RWAs were both significant polluters and regulators. See also: Bowman, “*Improving the Quality of Our Water: The Role of Regulation by the NRA*” (1992) 70 Public Administration 565; Richardson, Maloney et al, “*The Dynamics of Policy Change: Lobbying and Water Privatisation*” (1992) 70 Public Administration 157; Byatt, “The Impact of EC Directives on Water Customers in England and Wales” (1996) 3 Journal of European Public Policy 665; McLoughlin, *The Law and Practice Relating to Pollution Control in the United Kingdom*, Graham and Trotman (1982); Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and America*, Cornell University Press (1986); Howarth, *Water Pollution Law* (1988); Richardson, Ogus & Burrows, *Policing Pollution*, Oxford University Press (1982).

³¹ In this regard see generally: the original White Paper *Privatisation of the Water Authorities in England and Wales* (1986) Cmnd 9734; *The Water Environment: The Next Steps* (DoE/W.O. Consultation Paper, April 1986); *The National Rivers Authority: The Government’s Proposals for a Public Regulatory Body in a Privatised Water Industry* (DoE, Ministry of Agriculture, Fisheries and Food, and Welsh Office, July 1987); and *The Public Utility Transfers and Water Charges Act 1988*.

water treatment) was privatised in the form of statutory sewerage and water undertakers.³²

More important, for present purposes, were the improvements made by the Water Act 1989 to the legal framework governing the prevention and control of water pollution in Great Britain.³³ The Act retained the traditional system of discharge consents, but introduced the first system of statutory water quality control. Although regional authorities had operated water quality controls prior to this point, these standards had been applied on an informal basis and they varied from area to area. The negotiation of the 1976 Dangerous Substances Directive³⁴ revealed deep philosophical disputes between the United Kingdom and other Member States, with the United Kingdom resisting the majority preference for minimum emissions standards for discharges of the most dangerous substances because this failed to take account of the physical capacity of differing receiving waters to absorb and dilute pollution. This was at a time when environmental Directives required unanimous voting, and eventually a compromise was reached which gave Member States the option of applying either an emissions approach or a quality objective approach in relation to the most dangerous black list substances. However, the introduction of a statutory system of quality control, based on explicit and consistent quality classifications and objectives, was necessary to ensure compliance with the quality objective approach permitted under EC law. Three further changes were introduced by the Water Act 1989: namely, the strengthening of the system of charges for trade and sewage discharges;³⁵ the improvement of pollution prevention and remediation powers; and increased transparency and accountability in the regulation of water pollution. The decision to strengthen the system of discharge fees reflected not only the Conservative Government's commitment to the development of market-based regulatory strategies, but also the wider 'polluter pays' principle which had by then come to the fore in European and global policy on environmental management. The introduction of stronger powers to prevent and remedy pollution implemented the principles of prevention and precaution – championed by the European Commission – that replaced the essentially reactive approach adopted by earlier systems of pollution control. Pressure for enhanced transparency and public accountability in the regulation of water pollution also owed its origins to changes in EU environmental policy. Mounting public concern about the deteriorating state of the environment led to an

³² Three core regulators were created to replace the old Regional Water Authorities. Environmental regulation became the responsibility of the National Rivers Authority. The Office of Water Services (OFWAT) took charge of economic regulation of the water industry, while the Drinking Water Inspectorate (DWI) had responsibility for drinking water quality.

³³ The Water Act 1989 replaced Part II of COPA 1974 concerning water pollution in England and Wales. However, COPA (although much amended) continues to apply in Scotland. A consolidated version of COPA appears in Tromans, *The Environment Acts 1990-95*, Appendix 4.

³⁴ Directive 76/464/EEC, OJ L129, 18 May 1976.

³⁵ Section 7 of the Public Health (Drainage of Trade Premises) Act 1937 (c 40) introduced the first discharge fees by allowing local authorities in England and Wales to impose charges on the owners and occupiers of trade premises, by agreement, for the reception and disposal of any trade effluent produced.

acceptance, enthusiastically at European level, of the need for greater public access to environmental information and public participation in decision-making on the environment. The Water Act 1989 reflected this policy development in a number of ways. In particular, through the introduction of a statutory system of water quality controls based on public consultation; increasing the regulator's obligations to ensure public consultation concerning the operation of the discharge consent system; and widening the range of information held on the public register. The legal framework governing water pollution law in England and Wales was consolidated two years later by the Water Resources Act 1991, which also replaced the Water Act 1989.

Another milestone in the modernisation of the United Kingdom's approach to the protection of the environment was laid down in 1990. In September 1990 the Government published *This Common Inheritance*³⁶ – Britain's first comprehensive White Paper on the environment. Later that year Parliament enacted the Environmental Protection Act 1990, which overhauled the regulation of Great Britain's most polluting industrial processes and provided the basis for further reform in 1995. *This Common Inheritance* was intended to provide not only a baseline survey of action taken thus far, but also a statement of intention for future action throughout the United Kingdom. The Government identified the 'ethical imperative of stewardship', embracing the interrelated concepts of sustainable development and intergeneration equity, as the fundamental objective for all environmental policies. In order to realise this objective, *This Common Inheritance* stated that Britain's³⁷ environmental policies would be based on four key principles, namely: reliance on the best evidence and analysis available; adoption of the precautionary principle; the enhancement of public participation in decision-making on the environment; and use of the best instruments (including market mechanisms) to achieve environmental objectives.³⁸ The Government emphasised its commitment to the introduction of integrated pollution control and the application of advanced technical solutions. Separating the roles of regulator and producer were deemed to be integral to Britain's pollution control strategy, as were the establishment of strong pollution inspectorates with clear remits to impose high standards.³⁹ In the specific context of water pollution control, *This Common Inheritance* identified four key strategies for ensuring effective protection of Britain's inland and coastal water resources. First, the establishment of 'the right organisations' to manage the water resource and the supply of water to the public and to monitor and control quality; secondly, the introduction of statutory water quality standards; thirdly, the adoption of regulations to prevent pollution and providing advice on how to avoid pollution; and finally, setting guidelines for recreation and wildlife conservation. The changes wrought by the Water Act 1989 and those, then forthcoming, in the Environmental Protection Act 1990 (EPA) were identified as having established a regulatory system capable of delivering effective pollution control in line with Government policy. The EPA 1990 introduced not only a more sophisticated

³⁶ Cm 1200.

³⁷ Stated to include all parts of the United Kingdom, p 32, para 2.1.

³⁸ p 10, paras 1.14 - 1.32.

³⁹ pp 136-140 and pp 162-169.

and more stringent system of integrated pollution control for Great Britain's most polluting industrial processes, it also strengthened the application of the polluter pays principle by increasing the maximum fine for water pollution offences from £2,000 to £20,000. The main structure of water pollution law remained unchanged by the EPA 1990 however; the regulation of water pollution in England and Wales was split once again, this time between the National Rivers Authority (NRA) and Her Majesty's Inspectorate of Pollution (HMIP), the regulator responsible for administering Integrated Pollution Control. This controversial departure from the trend towards integrated pollution control was eventually resolved by the merging of the NRA and HMIP into a unified Environment Agency under the Environment Act 1995.

While emphasising the need for a coherent national policy on the environment, *This Common Inheritance* also acknowledged that Northern Ireland (like Scotland) faced environmental challenges particular to this region. A separate chapter was therefore devoted to a discussion of the state of the environment in Northern Ireland and the objectives that should be attained to ensure effective protection of its environment. The unspoilt nature of its local environment provided the central focus for the Northern Ireland chapter. In the context of water pollution control, emphasis was placed on the high quality of Northern Ireland's aquatic environment with particular reference made to the high quality of river water reported by the DoE(NI) in 1989 and the high level of practical compliance with the EC Bathing Water Directive.

To say that the chapter glossed over the problems facing the environment in Northern Ireland is an understatement. By 1990, environmental law and policy in Northern Ireland and the regulatory bodies designed to deliver environmental protection in the Province, failed to comply with virtually all of the principles, policies and strategies identified as being central to the United Kingdom's approach to environmental protection in *This Common Inheritance*. Because environmental issues in Northern Ireland had been so completely neglected during the previous two decades, by 1990 the United Kingdom was a long way from achieving a coherent national policy on the environment. Despite this, the Northern Ireland chapter made no mention whatever of the gap that had opened up in the legal framework governing water pollution in Great Britain and that applying in Northern Ireland. Draft legislation had still not been prepared to introduce the terms of the Water Act 1989 into Northern Ireland. The EPA 1990, which contained the centrepiece of the Government's policy on pollution control, did not apply to the Province and draft legislation to ensure its enactment in Northern Ireland was in preparation. Similarly, the enormous delays in the legal implementation of all EC water Directives (including the Bathing Water Directive⁴⁰) went

⁴⁰ Formal implementation of Directive 76/160/EEC OJ L31, 5 February 1976, was by then thirteen years late – a fact that had been highlighted by the European Commission in a reasoned opinion issued to the United Kingdom in 1980. In this regard, see S. Turner and K. Morrow, *Northern Ireland Environmental Law*, Gill and Macmillan (1997), p 213.

unmentioned.⁴¹ The DoE(NI) lacked not only the statutory powers to introduce a system of discharge consent fees, but had also failed to introduce any written policies or procedures or guidance for the staff of its Environment Service (as it then was⁴²) or for its agents on recovery of costs arising from pollution incidents.⁴³ In addition, the Northern Ireland chapter ignored the fact that the DoE(NI) could not comply with the Government's vision of the 'right organisation' to manage the water resource and control water quality. By 1990 the Department was still acting as both the regulator and a polluter of water resources. In addition, no provision had been made for the introduction of a statutory system of water quality control; hence the Department could comply neither with national policy on water quality control nor the requirements of the EC water quality Directives in Northern Ireland. It also lacked the statutory powers to adopt pollution prevention regulations and therefore the capacity to implement an effective strategy for preventing water pollution. In 1988 the organisational structures and management of water quality in Northern Ireland were the subject of vigorous criticism – none of which was alluded to in *This Common Inheritance*. William Halcrow, then the Director of the Forth River Purification Board in Scotland, was commissioned by the DoE(NI) to conduct an efficiency study of the Department's Environmental Protection Division (the predecessor of the Environment and Heritage Service).⁴⁴ The Halcrow Report, submitted in 1988, was the first external professional review of water quality management in Northern Ireland for twenty years. Although the report commended the work of the fisheries bodies that assisted the Environmental Protection Division in the enforcement of water law in Northern Ireland, several major shortcomings were identified in the organisation and management of water pollution control. In particular, the Halcrow Report observed that water quality management functions were dispersed in 'penny packets', an approach described as not only inherently inefficient and ineffective in key areas, but which also failed to provide a reasonable level of service or value for money. The management and control of agents employed to assist the EPD in the control of water pollution was also regarded as poor. In addition, the systems in place for measuring water quality were described as 'wholly insufficient to measure the performance of the regulatory authority or to give an indication of overall water quality in the Province.' The Department did not fully accept the report and despite the

⁴¹ 'Legal' implementation meaning the introduction of formal legislation designed to transpose the requirements of EC Directives on water into the legal system of Northern Ireland.

⁴² note 22 *supra*.

⁴³ Report of the Comptroller and Auditor General for Northern Ireland, *Control of River Pollution in Northern Ireland*; HC 693, Session 1997-98, p 79, para 8.8.

⁴⁴ In this regard, see note 3 *supra*. It should also be noted that in 1990 the Environment Protection Division was amalgamated with the DoE(NI)'s Conservation Service to form the Environment Service, which in turn was replaced by the Environment and Heritage Service (A Next Steps Agency of the DoE(NI)) in 1996. For further discussion of the structures responsible for environmental protection within the DoE(NI), see S. Turner and K. Morrow, Gill and Macmillan (1997), note 5 *supra* at pp 25-31.

serious nature of the criticisms made, it did not produce a formal response to the Halcrow Report.⁴⁵

The publication of the House of Commons Environment Select Committee report on *Environmental Issues in Northern Ireland* followed close on the heels of *This Common Inheritance*. Published in November 1990,⁴⁶ the Rossi Report⁴⁷ squarely expressed what had remained unsaid in *This Common Inheritance*. The House of Commons Committee Report was seminal for Northern Ireland in three respects. First, it was the first detailed review of environmental law and practice in Northern Ireland that had been published for twenty years. Secondly it was highly critical of almost every aspect of the regulatory structures and legislative framework designed to manage the environment in Northern Ireland. Thirdly, and most importantly, the Government did not ignore its findings.

Like *This Common Inheritance*, the Rossi Report identified the quality of its natural environment as one of Northern Ireland's greatest cultural and economic assets. However, the Committee went on to point out that Northern Ireland faced environmental problems that were as great as, and in some respects greater than, those facing the rest of the United Kingdom. The system of environmental protection operating in Northern Ireland was described as being "much less highly developed than in Great Britain".⁴⁸ In addition, the Rossi Committee stated that since its establishment in 1973 the DoE(NI) has paid rather ' cursory' attention to environmental matters. Although it acknowledged the impact of the legislative and administrative system imposed due to the 'troubles', the Report stated that direct rule did not remove the need for dealing effectively with environmental problems facing the Province. The Committee emphasised that although it was less industrialised than the rest of the United Kingdom, Northern Ireland does not escape pollution problems and could not afford to be complacent about its environment. The development of a clear, coherent policy on the environment was deemed essential as economic recovery in Northern Ireland gradually took hold, a process that would depend heavily upon the Government's ability to maintain a high level of environmental quality. The Rossi Committee made a total of twenty-nine recommendations for reform spanning the entire framework of environmental law and regulation in Northern Ireland. However, those most relevant to the reform of water law were as follows.

The outdated nature of the legislative framework governing environmental protection was identified as a core problem affecting every sector of environmental law. This legislative lag took two forms. First, there were lengthy delays in the implementation of EC Directives on the environment that marred every sector of environmental law in Northern Ireland. Secondly, there were considerable delays in enacting domestic legislation on

⁴⁵ A decade later the Department was asked by the Comptroller and Auditor General for Northern Ireland to explain this decision. The Department responded that the Halcrow Report was "always regarded as semi-official and that there was never any question of a formal response", note 43 *supra* at p 28, para 1.9.

⁴⁶ HC 39, Session 1990-91.

⁴⁷ As it became known after its chairman, Sir Hugh Rossi.

⁴⁸ Preface, para 2.

the environment that was not covered by EC law. The Committee stated that the delays in transposing EC Directives exposed the United Kingdom to an unacceptable threat of infringement proceedings under the EC Treaty and reminded the Government that it was obliged under EC law to ensure the timely implementation of Directives for the country as a whole.⁴⁹ Two recommendations were made in this regard. First, the Government was strongly urged to transpose the backlog of EC Directives as soon as possible, and secondly to review implementation practices to ensure simultaneous implementation for the United Kingdom as a whole in the future.⁵⁰ The Committee was equally critical of the legislative lag that had also occurred in relation to environmental legislation not covered by EC law. Particular reference was made to the fact that the sweeping changes introduced in Great Britain under the Water Act 1989 and the Environmental Protection Act 1990 had not been matched in Northern Ireland.⁵¹ The Northern Ireland Minister for the Environment and Agriculture (then Mr Peter Bottomley MP) explained this state of affairs to the Rossi Committee in the following terms:

“Some parts of [the legislation] are delayed because draft Directives are changing. In other parts it is because either it has been thought that other priorities in terms of work were more important, until we had extra staffing, or it was that we did not think it was directly relevant or the work was going on and one cannot always get things done immediately.”⁵²

No specific explanation was provided as to the nature of the competing work priorities, nor was any attempt made to explain how past failures to ensure legislative parity could be justified by forthcoming changes to EC legislation. In any event, the Rossi Report emphasised that Northern Ireland should not lose out on the improvements and upgrading of pollution laws contained in the 1989 and 1990 Acts and recommended, as a matter of general principle, that the Government should ensure that environmental legislation is consistent throughout the United Kingdom.⁵³

A second core problem identified by the Rossi Report concerned weaknesses in the regulatory structures responsible for the delivery of environmental protection in Northern Ireland. In this regard, it is worth noting that the DoE(NI), when giving evidence to the House of Commons Environment Select Committee, failed to refer the Committee to William Halcrow’s findings concerning the organisational structures and management of water quality in the Province despite being clearly relevant to their deliberations. This omission was specifically highlighted by the Comptroller and Auditor General for Northern Ireland in his 1998 report on the *Control of River Pollution in Northern Ireland*.⁵⁴ The House of Commons Committee was particularly critical of the conflict of interest inherent in the DoE(NI)’s

⁴⁹ Paras 25, 26 and 28-31, pp xiv-xv.

⁵⁰ Para 32, p xvi.

⁵¹ Para 27, p xiv.

⁵² Para 30, p xvi.

⁵³ Para 33, p xvi.

⁵⁴ HC 693, Session 1997-98, at p 29. It should however be noted that the Fisheries Conservancy Board for Northern Ireland did refer the Rossi Committee to the Halcrow Report, at p 144, para 4.4 and provided a summary of the report to the Committee in Annex I to its evidence.

regulation of water pollution. One of the most frequent complaints submitted to the Committee about water services in the Province was that the DoE(NI) was both a regulator (through the Environment Service, as it then was) and a polluter (as a result of discharges from sewage treatment operated by the Water Service). Although the Report recorded the difference of opinion between local interest groups and the two fisheries boards concerning the scale of the pollution caused by the Department's sewage works,⁵⁵ the Committee declared that it was unsatisfactory to have polluters regulating pollution.⁵⁶ The Committee was of the opinion that the Department's role as regulator would always be treated with suspicion and resentment while it remained unaccountable through its Crown immunity for pollution incidents caused by the Water Service.⁵⁷ It strongly urged the Government to increase the weight given to environmental issues in Northern Ireland, and saw resolution of the poacher-gamekeeper conflict as being a central element in this process. The Rossi Committee left the Government in no doubt that it regarded the establishment of an independent environment agency as the best means of increasing the profile of environmental issues and ensuring delivery of effective environmental protection. However, the Committee concluded that if the Government still found itself unable to accept these recommendations, then it was at least necessary to considerably enhance the status and resourcing of the Environment Protection Division.

The final recommendations made by the Rossi Report in relation to water pollution related to the enforcement of water pollution offences. Although the Committee commended the DoE(NI)'s prosecution record,⁵⁸ it regarded the fines imposed as being too low to act as a deterrent or to stimulate investment in pollution abatement facilities.⁵⁹ The Report emphasised that water pollution offences must be treated very seriously and that Resident Magistrates⁶⁰ should give very careful consideration to the level of fines imposed for breaches of water pollution laws.⁶¹ In addition, the Department was urged to publicise data on the full environmental costs of selected pollution incidents to engender a broader public understanding of the costs of water pollution.⁶²

⁵⁵ Para 78, p xxiv-xxv. The British Field Sports Society expressed the view that the Department was probably the biggest single polluter in NI (evidence not printed in the report), a view echoed by a member of Kells and Connor Angling Club (evidence not printed). The Report noted that the DoE(NI)'s figures for pollution incidents did not support this contention and the Foyle Fisheries Commission and Fisheries Conservancy Board both stated that sewage plants were generally well maintained and only caused a small amount of incidents (Appendices 20 and 21).

⁵⁶ Para 78.

⁵⁷ Para 78.

⁵⁸ Para 74.

⁵⁹ Para 75. The average fine for a conviction for a water pollution offence was reported to be £250; however, fines of £25-50 were normally imposed for first offences.

⁶⁰ In Northern Ireland responsibility for trying less serious criminal offences lies with full-time, legally qualified magistrates called Resident Magistrates. For further details as to the jurisdiction of the RM, see: B. Dickson, *The Legal System of Northern Ireland*, 3rd ed SLS, (1993) (new edition forthcoming).

⁶¹ Para 76.

⁶² Para 77.

The Rossi Report was not ignored. Not only did the Government formally respond to the recommendations contained therein,⁶³ it also reported three years later on progress made in the implementation of these recommendations.⁶⁴ The Government fully accepted the Committee's recommendations concerning the urgent need to bring environmental legislation in Northern Ireland into line with EC law.⁶⁵ In addition, the Government accepted the need to remove the disparities between domestic environmental law applying in Northern Ireland and the rest of the United Kingdom.⁶⁶ The Government made a commitment to achieving broad parity with Great Britain and to doing so more quickly than hitherto. In addition, the Government stated that additional resources had been deployed to ensure that the overall legislative backlog would be eliminated.

The process of modernising water law and policy began almost immediately. In March 1991 the Government announced that priority would be given to the implementation of EC Directives on the environment; however work also progressed on reforms designed to implement domestic legislation on water pollution. In December 1993 the Government introduced the Water and Sewerage Services (Amendment) (Northern Ireland) Order 1993⁶⁷ which conferred powers on the DoE(NI) to establish a system of statutory water quality objectives, thereby providing the basis for bringing Northern Ireland into line with various EC Directives on water quality and the terms of the Water Resources Act 1993 (which had by then replaced the Water Act 1989). In addition, the Order increased fines for water pollution offences from £2,000 to £20,000 in line with those imposed in the rest of the United Kingdom under the Environmental Protection Act 1990. December 1993 also witnessed the publication of the *Review of the Water Act (Northern Ireland) 1972: A Consultation Paper* in which the Government proposed the repeal of the Water Act (NI) 1972 and the introduction of a new Water Order which would, in effect, achieve some level of parity between the DoE(NI)'s pollution control powers and those exercised by the regulator in England and Wales. Progress on making the new Order was, however, brought to an almost immediate halt by the more urgent need to ensure formal implementation of EC Directives on the environment. In 1992 the Maastricht Treaty amended the EC Treaty to confer powers on the European Commission to recommend to the European Court of Justice the imposition of financial penalties on Member States who fail to comply with a Court judgment declaring that they are in breach of their Community obligations. This strengthening of the European Commission's enforcement powers meant that the Government was faced for the first time with the very real threat of significant penalty for its endemic failure to implement EC environmental Directives in Northern Ireland. Not surprisingly the need to

⁶³ *The Government's Response to the First Report from the House of Commons Select Committee on the Environment: Environmental Issues in Northern Ireland*, (1991) Cm 1484.

⁶⁴ House of Commons Environment Select Committee, *Environmental Issues in Northern Ireland, Minutes of Evidence*; HC 861-i, Session 1992-93.

⁶⁵ Note 63 *supra.*, at Chapter 1, para 1.1; Chapter 2, paras 2.1-2.2 and Chapter 3, paras 3.1-3.5.

⁶⁶ *Ibid.*

⁶⁷ Article 16; SI 1993/165 (N.I. 16).

ensure at least formal compliance with the very considerable backlog of unimplemented Directives across all sectors of environment law in Northern Ireland eclipsed reform initiatives that involved the enactment of purely domestic legislation.

Over four years were devoted to the task of implementing the backlog of EC Directives on the environment.⁶⁸ Finally, in May 1998 the DoE(NI) published the proposal for a draft Water (Northern Ireland) Order thus launching (or in this case re-launching) the second phase in the reform of water law. The making of the draft Order was delayed a further year due to pressures on the Parliamentary timetable caused by the devolution legislation;⁶⁹ however, the draft Order was finally laid before Parliament in February 1999 and was made on 10 March. Despite its lengthy gestation, the Environment and Heritage Service anticipate that the Water (NI) Order 1999 will not come into force for at least another year.

When it comes into force, the Order will achieve four principal objectives. First, although it was not mentioned in the Consultation Paper or explanatory documents, the Order will belatedly implement one of the principal recommendations made by the Rossi Committee, namely, that the aquatic environment in this jurisdiction should benefit from the more sophisticated legal protection afforded to freshwater in Great Britain. It is important to emphasise, however, that the Order will achieve a much greater degree of legislative parity than was initially envisaged by the Government in the *Review of the Water Act (NI) 1972*. Even though the review document was published four years after the enactment of the Water Act 1989 and two years after the enactment of the Water Resources Act 1991, the Government's modest proposals for reform represented only a limited implementation of the pollution controls operating in England and Wales. The Water (NI) Order 1999, as finally adopted, represents a much more enthusiastic attempt to embrace the stringent legal protection afforded to the aquatic environment in England and Wales. Although significant disparities remain, the Order makes considerable strides in the process of bringing water pollution law in Northern Ireland into line with the terms of the Water Resources Act 1991, the Environmental Protection Act 1990 and even the recent amendments introduced by the Environment Act 1995. As a result, the new legislation considerably strengthens the DoE(NI)'s powers to prevent and control water pollution in Northern Ireland. Indeed, it is interesting to note that, although no concerted attempt was made to improve on, or develop national provisions on water pollution, there are instances where the Water Order confers slightly wider pollution control powers than are given to the Environment Agency in England and Wales. In effect, if properly administered and enforced, the Order will play an important role in bringing the United Kingdom closer to realising the objective laid down in *This Common Inheritance* for a coherent national strategy on the environment. Needless to say, as we enter an age of devolution, the Northern Ireland

⁶⁸ For a detailed discussion of the numerous measures introduced in response to EC Directives on the environment during the early 1990s, see: S. Turner and K. Morrow, Wiley (1997), note 5 *supra*.

⁶⁹ See the comments made by Mr John McFall (Parliamentary Under-Secretary of State for Northern Ireland) during the meeting of the Third Standing Committee on Delegated Legislation; House Commons, 2 March, 1999, p 14.

Assembly may decide to exercise its devolved powers concerning pollution control⁷⁰ to deviate from national policy on the aquatic environment (although not in a manner that is incompatible with EC law⁷¹). In the immediate future, pressure is likely to mount to weaken controls on emission to freshwater in the interests of economic regeneration. It can only be hoped that the new Assembly will resist such pressure as failure to fully resource and support the administration and enforcement of the new Order is likely to ensure that Northern Ireland rapidly emerges as the United Kingdom's pollution haven.

The second major objective underlying the Water Order is the implementation of a range of horizontal⁷² principles and policies, which since the early 1990s, have been regarded as fundamental to contemporary systems of environmental management at both national and European level. They are: the principle of pollution prevention;⁷³ the polluter pays principle;⁷⁴ the need to enhance public participation in environmental decision-making and public access to environmental information;⁷⁵ and the need to base pollution control

⁷⁰ Pollution control powers have been transferred to the Northern Ireland Assembly. However, the creation of offences and penalties and enforcement policy are currently reserved matters under Schedule 3, para 9 of the Northern Ireland Act 1998, c 47.

⁷¹ Section 6(2)(d) of the Northern Ireland Act 1988, c 47.

⁷² These principles are referred to as 'horizontal' principles because they cut across all sectors of environmental law.

⁷³ See generally: *This Common Inheritance: Britain's Environmental Strategy*, (1999) Cm 1200, at p 11 (para 1.18 and p 136, para 10.3); *Sustainable Development: The United Kingdom Strategy*, (1994) Cm 2426, Chapter 3; *A Better Quality of Life: A Strategy for Sustainable Development for the United Kingdom*, (1999) Cm 4345, at p 23; EC's Third Action Programme on the Environment 1982-86, OJ C46, 17 Feb. 1983; EC's Fourth Action Programme on the Environment 1987-92, OJ C328, 7 Dec 1987; and *Towards Sustainability*, the EC's Fifth Action Programme 1993-2000, OJ C138, 17 May 1993; Hughes, *Environmental Law*, 3rd ed. Butterworths (1996), at pp 20-21; Kramer, *E.C. Treaty and Environmental Law*, (2nd ed., 1995), at pp 54; Jans, "Objectives and Principles of EC Environmental Law", in Winter, (ed.), *European Environmental Law: A Comparative Perspective*, Dartmouth (1996), at pp 277, 282-284; Kiss and Shelton, *Manual of European Environmental Law*, (2nd ed, 1997), Chapter 2; Alder and Wilkenson, *Environmental Law and Ethics*, Macmillan (1999), Chapter 6; Sands, *Principles of International Environmental Law: Volume I*, Manchester University Press (1995), at pp 194-197 and pp 208-213.

⁷⁴ See generally: *This Common Inheritance*, *ibid.*, at p 13 (para 1.28), p 136 (para 10.3) and p 168 (paras 12.23-25); *Sustainable Development: The United Kingdom Strategy*, *ibid.*, chapter 3; *A Better Quality of Life*, *ibid.*, at p 23; Hughes, *ibid.*, at pp 21-23; Kramer, *ibid.*, at pp 56-57; Kramer, *Focus on European Environmental Law*, Sweet & Maxwell (1992), Chapter 11; Jans, *ibid.*, at pp 285-287; Kiss & Shelton, *ibid.*, at p 43; Alder & Wilkenson, *ibid.*, at pp 171-184; O'Riordan, *Ecotaxation*, Earthscan (1997); and *Towards Sustainability*, *ibid.*, Chapter 7, section 7.4; Sands, *ibid.*, at pp 213-217.

⁷⁵ See generally: *This Common Inheritance*, note 73 *supra*, at p 10 (paras 1.14-15, 1.20 and 1.38); *A Better Quality of Life*, note 73 *supra*, at p 23; Royal Commission on Environmental Pollution, *Setting Environmental Standards*, (1998) Cm 4053, Chapters 7 and 8; Bell, *Ball and Bell on Environmental Law*, (4th ed, 1997), Chapter 7; Kramer, *Focus on European Environmental Law*, Sweet & Maxwell (1992), Chapters 5 and 14; Alder and Wilkenson, note 73 *supra.*, chapter 12;

systems on the best available scientific evidence.⁷⁶ A third purpose of the Water Order is to clarify the legislative framework governing water pollution control by consolidating the amendments made to the Water Act (NI) 1972 in recent years. For the first time, the provisions governing the discharge consent system and the system of water quality control – the two major systems of pollution control – are brought together in a single piece of legislation. In addition, the Order consolidates the increase in fines for water pollution offences introduced into Northern Ireland under the Water and Sewerage Services (Amendment) (NI) Order 1993.⁷⁷ The final objective of the Water Order is to implement Government policy on ‘better regulation’ – that is, regulation which delivers objectives without imposing unnecessary burdens.⁷⁸

In terms of structure, the Order is divided into four parts and eight schedules. Part II and its attendant schedules govern the DoE(NI)’s powers to prevent and control freshwater pollution and comprise the principal body of the legislation. The remaining provisions of the Order make changes to the Department of Agriculture (NI)’s powers in relation to water recreation and navigation; however, unless relevant to pollution control, these will not be addressed in the present analysis. As with much of the contemporary pollution control legislation recently introduced in Northern Ireland, Part II of the Water Order anticipates the adoption of a considerable amount of further legislation by the DoE(NI); hence the Order provides the framework, but not the total system, of freshwater pollution control. The remaining Parts of this analysis provide a detailed examination of the principal features of the new pollution control regime introduced by Part II of the Water (NI) Order 1999 and their success in bringing Northern Ireland into line with contemporary national and EC law on water pollution control.

IMPLEMENTING THE PRINCIPLE OF POLLUTION PREVENTION

One of the most important features of contemporary environmental law and policy is its emphasis on the prevention of environmental harm. Whereas the first generation of environmental laws adopted a largely reactive approach to

Towards Sustainability, note 73 *supra*, Chapter 3; Somsen, (ed.) *Protecting the European Environment: Enforcing EU Environmental Law*, Blackstone Press (1996); Principle 10 of The Rio Declaration on Environment and Development, adopted June 14, 1992 at Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1, (1992) 31 ILM 874.

⁷⁶ See generally: *This Common Inheritance*, note 73 *supra*, at p 10 (para 1.15-16); *Sustainable Development: The United Kingdom Strategy*, note 73 *supra*, chapter 3, para 3.17; *A Better Quality of Life*, note 73 *supra*, at p 23; *Towards Sustainability*, note 73 *supra*, chapter 7, section 7.1.

⁷⁷ SI 1993/3165 (N.I. 16), article 17.

⁷⁸ *Sustainable Development: Opportunities for Change – A Consultation Paper on a Revised United Kingdom Strategy*, DETR February 1998, www.environment.detr.gov.UnitedKingdom/sustainable/consult1/inde.htm at para 85. See also: *A Better Quality of Life: A Strategy for Sustainable Development for the United Kingdom*, (1999) Cm 4345, at p 27, para 5.10; *The Better Regulation Guide*, Cabinet Office, Regulatory Impact Unit, August 1998; *Modernising Government*, (1999) Cm 4310.

pollution control, the past thirty years have witnessed a growing global, European and national consensus that in the environmental arena, prevention is better and cheaper than cure. It is not intended in the present context to retrace the extensive discussion surrounding the development and scope of this concept. Suffice it to say that, since the 1990s, the prevention of pollution at source has been acknowledged as a fundamental principle of national, EC and international environmental law and policy.⁷⁹ At the United Nations conference on Environment and Development at Rio de Janeiro in 1992, the international community (including the United Kingdom) acknowledged the fundamental importance of precautionary and preventative action to contemporary environmental law and policy.⁸⁰ The EC's Fourth⁸¹ and Fifth⁸² Action Programmes on the Environment and the EC Treaty⁸³ specifically identify the principle of prevention as one of the core bases of EU policy on the environment. Similarly, in 1990 *This Common Inheritance: Britain's Environmental Strategy* identified preventative action as one of the key principles underlying the Government's policy on the environment.⁸⁴ Consistent with this shift in policy, the Water Act 1989, and later the Environment Act 1995, strengthened the regulator's powers to prevent water pollution in England and Wales. Linked to this change was a corresponding increase in the fines imposed for pollution offences and in the Environment Agency's powers to ensure that polluters rather than taxpayers undertook and bore the cost of appropriate clean-up action. When it comes into force, the Water (NI) Order 1999 will bring the DoE(NI)'s pollution prevention powers into line with those conferred on the Environment Agency under the Water Resources Act 1991 (WRA) 1991 as amended by the Environment Act 1995, although it is regrettable that Northern Ireland has had to wait so long for the conferral of equivalent powers. The Water (NI) Order 1999 contains five principal mechanisms for ensuring pollution prevention and control; namely, pollution prevention notices, pollution prevention regulations, powers to conduct anti-pollution works, enforcement notices and pollution emergency notices. With the exception of its emergency powers, which remain unchanged from the Water Act (NI) 1972,⁸⁵ the Water Order significantly strengthens and extends the DoE(NI)'s powers to prevent and remedy water pollution. One unusual feature of the Order is the decision to retain the formula used in the Water Act (NI) 1972 to define liability for pollution offences. Whereas liability in England and Wales is based on a person who "causes or knowingly permits"⁸⁶ poisonous, noxious or polluting matter to enter freshwater, the Northern Ireland Order bases liability on the person who "knowingly or otherwise"⁸⁷ discharges or

⁷⁹ For a more detailed discussion of the scope and role of this principle in contemporary environmental law, see note 73 *supra*.

⁸⁰ Principle 15 of The Rio Declaration on Environment and Development, adopted June 14, 1992 at Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1, (1992) 31 ILM 874.

⁸¹ 1987-92, OJ C328, 7 December 1987.

⁸² 1993-2000, OJ C138, 17 May 1993.

⁸³ Article 130R(2) (now article 174 EC as amended by the Treaty of Amsterdam).

⁸⁴ (1990) Cm 1200, p 11, para 1.18 and p 136, para 10.3.

⁸⁵ c 5.

⁸⁶ Section 85(1) WRA 1991.

⁸⁷ Article 7(1) – retained from section 5(1) of the Water Act (NI) 1972.

deposits such matter so that it enters freshwater. Although the courts in this jurisdiction have not yet addressed the meaning of this phrase, the present author has previously argued that the Northern Ireland formula appears to create an even more strict liability than that applied in England and Wales.⁸⁸ In law, at least, this provision strengthens the DoE(NI)'s power to prevent and control water pollution. Finally, it should be noted that the Water Order also represents a clear shift in emphasis towards the polluter pays principle. The Order not only consolidates the increase in fines for water pollution offences introduced in 1993, but considerably increases the powers available to the DoE(NI) to require potential and actual polluters to pay for the cost of pollution prevention and remediation. Although there are concerns that the courts in Northern Ireland have not yet made use of the increased ceilings for pollution fines,⁸⁹ if enforced to their maximum effect these reforms would have a powerful deterrent effect. The Department's new pollution prevention powers will each be addressed in turn.

New Powers to Serve Pollution Prevention Notices

Under section 6 of the Water Act (NI) 1972 the DoE(NI) was empowered to issue a pollution prevention notice where it appeared to the Department that a water pollution offence was likely to occur: (i) as a result of a proposed or actual use of a waterway or land for the purposes of disposing or storing any potentially polluting matter, or (ii) by reason of the use or proposed use of a vessel or vehicle from which poisonous, noxious or polluting matter could enter inland or ground waters. A notice could prohibit the proposed use of the waterway, land, vehicle or vessels or permit it subject to certain conditions. Although, *prima facie*, the Act provided the DoE(NI) with a potent means of preventing pollution, section 6 was fundamentally weakened by the fact that the Department could not prosecute for failure to comply with the terms of the notice. Prosecution could only be launched in the event that the anticipated pollution actually occurred, thus weakening the preventative effect of this power to say the least. Inadequate storage and management of farm effluent has long been a major cause of water pollution in Northern Ireland.⁹⁰ Similarly, spillage and leakage of fuel oil and chemicals from both agricultural and industrial sources cause serious water pollution throughout the Province.⁹¹ Neither form of pollution is susceptible to control under the discharge consent system, nor was the DoE(NI) given sufficiently wide powers under the Water Act (NI) 1972 to adopt regulations for the purposes of preventing pollution of this nature. Although a pollution prevention notice could be served, if it was ignored the Department was powerless to act until pollution actually occurred. While the DoE(NI) had the power under section 6 to remove and dispose of potentially polluting material, and could recover expenses incurred in doing so from the recipient of the notice, it was impossible to undertake the removal of all potentially

⁸⁸ S. Turner and K. Morrow, *Northern Ireland Environmental Law*, Gill and Macmillan (1997), pp 168-169.

⁸⁹ Discussed *infra*.

⁹⁰ *Review of the Water Act (NI) 1972: A Consultation Paper*, December 1993 (DoE(NI) and DANI), at p 12, para 6.2.

⁹¹ *Ibid.*

polluting substances throughout the Province. Not surprisingly, such action was only taken in exceptional circumstances.

The Department's ability to ensure pollution prevention by serving a pollution prevention notice has been considerably strengthened under the Water Order. Failure to comply with the terms of a prevention notice is now a criminal offence irrespective of whether a pollution incident actually occurs.⁹² In addition, conviction for such an offence may attract the considerably increased penalties for water pollution offences introduced into Northern Ireland in 1993 – even though a pollution incident may not have occurred. If the Environment and Heritage Service pursues a rigorous enforcement policy in relation to pollution prevention notices and is supported by the imposition of penalties that reflect the environmental importance of pollution prevention, then recipients of prevention notices should be provided with a sufficient incentive to comply.⁹³

When compared to the equivalent provisions operating in England and Wales, it would appear that the Water (NI) Order 1999 has conferred greater powers on the DoE(NI) in relation to pollution prevention notices than are available to the Environment Agency. Under section 86 of the Water Resources Act 1991, the Environment Agency may issue a notice prohibiting the making or continuation of a discharge likely to result in the commission of a general water offence under section 85. Alternatively the Agency may issue a notice subjecting the discharge to certain conditions. The DoE(NI)'s equivalent powers under the Northern Ireland Order are more extensive in two regards. First, the DoE(NI) has the power to issue prevention notices in relation to a wider range of potentially polluting activities, specifically the actual or proposed use of land or waterways for the purposes of storing matter, and the proposed or actual use of a vessel or vehicle from which

⁹² Article 8. As was the case under the 1972 Act, the notice will not come into force until 28 days from the date on which it is served, during which time the recipient of the notice may appeal to the Water Appeals Commission (an independent non-departmental body established under article 7 of the Water and Sewerage Services (NI) Order 1973 (SI 1973/70 (N.I. 2))). If no appeal is brought, the notice will be final and conclusive as to any matters which could have been raised on appeal. Although there is a time-lag of 28 days before a notice comes into force, any person who knowingly or otherwise discharges or deposits polluting matter into water, or discharges or deposits polluting matter so that it enters water, will be guilty of the general pollution offence under article 7.

⁹³ The DoE(NI) is obliged to furnish information concerning the notice to any person who appears to the Dept to be "interested in any land" if they request the information. The information is provided at the expense of the person requesting the information. Although the Order does not place the DoE(NI) under an obligation to provide this information to parties such as NGOs or residents groups who may be affected by the action of the potential polluter (but do not have an interest in the land), the Department would be under an obligation to provide such information under the Environmental Information Regulations (NI) 1993 (SR 1993 No.45) if requested. It should also be noted that an 'interested' party has the power to include anyone's name in the request for information concerning the notice and thereby invoke the DoE(NI)'s obligation under the Water Order. Finally, it should be noted that all prevention notices issued under article 8 and any convictions for offences under article 8 must be recorded in the public register maintained under the Order.

polluting matter may enter freshwater. Although the Environment Agency has wide powers under section 161A of the WRA 1991 to serve notices requiring persons to carry out anti-pollution works, identical powers are also conferred on the DoE(NI) under the new Order (discussed below). Secondly, as stated above, failure to comply with a prevention notice served under the Northern Ireland Order is a separate offence, distinct from the violation of article 7 (general pollution offence) which would also be committed were pollution also caused. However, an offence is only committed under section 86 of the WRA 1991 if the discharge is actually made.

Pollution Prevention Regulations

Although the greatly invigorated power to issue pollution prevention notices under article 8 represents an important articulation of the principles of prevention and precaution, it would be impossible for the DoE(NI) to serve an individual prevention notice for every site in Northern Ireland at which potentially polluting matter is located. Consequently, in order to implement an effective strategy for preventing water pollution in Northern Ireland, it was vital that the DoE(NI) be conferred with sufficient powers to set standards for particular categories of activity carried on throughout the Province. Under section 12 of the Water Act (NI) 1972 the Department was empowered to adopt regulations for the specific purpose of preventing water pollution; however, as already noted, these powers were very limited indeed. Regulations could only be adopted to prohibit or restrict washing or cleaning of things in controlled water, or putting litter or other 'objectionable' matter into water and keeping or use of vessels with sanitary appliances that may pass polluting matter into water. The *Review of the Water Act (NI) 1972: A Consultation Paper* proposed that this power be considerably extended.⁹⁴ In particular, the DoE(NI) proposed that it be empowered to adopt regulations that provided clear standards for industry and agriculture as to the preventative measures that should be taken to avoid water pollution. The Consultation Paper pointed to regulations adopted in England and Wales setting standards for silos, slurry tanks and oil storage in agriculture and plans to adopt corresponding measures for industry. Power to adopt these regulations was conferred on the Secretary of State for England and Wales under section 92 of the Water Resources Act 1991⁹⁵ and were used in the same year to introduce precautionary controls for a range of potentially very polluting agricultural activities, in particular, silage making and slurry and agricultural fuel oil storage.⁹⁶ Three years later the National Audit Office reported that these regulations had been of considerable value in improving standards and that the threat by the then National Rivers Authority to serve an improvement notice was "usually sufficient to secure upgrading of facilities".⁹⁷ More importantly, the National Audit Office Report noted that the existence of enforceable standards may have contributed to the decrease

⁹⁴ DoE(NI) and DANI, December 1993, p 13, para 6.7.1

⁹⁵ Section 92 essentially re-enacted the power to make regulations given under section 31(4) of COPA 1974, but which was never exercised.

⁹⁶ The Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) Regulations 1991, SI 1991/324.

⁹⁷ National Rivers Authority: *River Pollution from Farms in England*; HC 235, Session 1994-95, at p 22, para 3.7.

in farm pollution incidents in England and Wales. This is an experience echoed by the former Clyde River Protection Board (now part of SEPA) which noted in its 1994-95 annual report that warnings of forthcoming improvement notices were 'very effective' in ensuring that farmers took remedial action.⁹⁸

Given that industry and agriculture have long since been identified as the two principal sources of water pollution in Northern Ireland, it seems extraordinary that we have had to wait so long to remedy this gap in the Department's powers. Although the Department of Agriculture (NI) has required all new waste stores built with grant aid to comply with the standards contained in the British Regulations,⁹⁹ there were no powers to control stores built without grant aid or to compel farmers to repair defective stores. Article 14 of the Water (NI) Order 1999 retains the terms of section 12 of the Water Act and includes provisions identical to those contained in section 92 of the Water Resources Act 1991. Regulations can be adopted that prohibit a person from having custody or control of any poisonous, noxious or polluting matter unless prescribed works and precautions have been taken to ensure the prevention or control of pollution of inland, coastal and ground waters. Similar regulations may be adopted which require a person who already has custody of such matter to carry out specific works or take certain precautions to ensure the same end. Wide-ranging new powers are also conferred on the Department to specify the circumstances in which persons affected by these regulations must carry out pollution prevention works or take precautions or other steps and may also specify the nature of the action or works to be taken. It is also interesting to note that the maximum penalty laid down in the 1999 Order (£20,000) may be imposed for contravention of regulations adopted under article 14. Once again, the Order does not tie the imposition of the maximum penalty to offences involving actual pollution incidents. Instead, the penalty is being used as a means of reinforcing the Department's ability to prevent pollution. Given the effectiveness of the regulations introduced for Great Britain in reducing and preventing pollution from agricultural sources, the Comptroller and Auditor General for Northern Ireland strongly recommended in 1998 that the DoE(NI) should produce finalised draft regulations which can be laid without delay following the introduction of the Water (NI) Order 1999.¹⁰⁰ However, given that the Department only once used its powers under section 12 of the Water Act, and given the further delays anticipated in bringing the Water Order into force, the introduction of regulations for industrial fuel oil and chemical storage for Northern Ireland may not be imminent.

Anti-Pollution Works

The changes made to the DoE(NI)'s anti-pollution powers represent the most potent expression in the Water Order of the principles of prevention and precaution and the Government's commitment to implementing the polluters

⁹⁸ Equivalent Scottish powers for the adoption of pollution prevention regulations exist under section 31A of the Control of Pollution Act 1974; these powers were exercised to adopt equivalent regulations, SI 1991/346.

⁹⁹ *Control of River Pollution in Northern Ireland*: Report by the Comptroller and Auditor General for Northern Ireland; HC 693, Session 1997-98, at p 57.

¹⁰⁰ *Ibid.*, at p 57, para 5.7.

pays principle. Under their original powers conferred by section 13(6) of the Water Act (NI) 1972, the DoE(NI) had the power to carry out anti-pollution works where it appeared to the Department that any poisonous, noxious or polluting matter was present in, or was likely to enter inland, coastal or ground waters as a result of an accident or other unforeseen act or event. The Department's powers were, however, limited to removing and disposing of the polluting matter and remedying or mitigating any pollution caused. The Department did not have the power to ensure restoration of the water, or the aquatic life of affected waters. In addition, because it did not have the power to require those responsible for a pollution threat or actual pollution incident to carry out anti-pollution work, the responsibility for undertaking such work lay entirely with the DoE(NI). Even though it could recoup its costs from the person in default, the DoE(NI) was required to undertake the work before attempting to recover its costs which undoubtedly inhibited the Department's willingness to utilise its powers in this regard. Articles 16 to 19 of the Water (NI) Order 1999 set down the Department's considerably expanded new powers to carry out anti-pollution works, to investigate the cause and source of pollution, and its new powers to require potential or actual polluters to carry out anti-pollution works. In this regard, it should be noted that the Water Order brings the DoE(NI)'s powers into line with those powers conferred on the Environment Agency under section 161 of the Water Resources Act 1991 as amended by the Environment Act 1995.

Under article 16, the DoE(NI) retains its discretion to carry out anti-pollution works where it considers that polluting matter is likely to enter or to be present in inland, coastal or ground waters. In addition, the Department may exercise its powers to conduct anti-pollution works where polluting matter "has been present" in such waters. The range of work that may be carried out by the Department is not only more explicit under article 16, it is also expanded in several important respects. The preventative and remedial aspects of the Department's powers are set out separately in articles 16(1)(a) and (b), which clarifies the Department's power to undertake works to prevent polluting matter from entering water. Although the Department's anti-pollution powers under the Water Act (NI) 1972 did encompass a preventative dimension in that the DoE(NI) could take action where polluting matter was 'likely' to enter water, the specific anti-polluting works that could be undertaken were principally remedial in nature. The only preventative works identified by section 13(6) were the removal and disposal of polluting matter from land. Article 16(1)(a) of the new Order provides that the Department may undertake "such works and operations as it considers appropriate" to prevent polluting matter from entering the relevant waters. Hence, not only is the preventative dimension of the Department's powers emphasised through article 16(1)(a), there are now no limitations imposed on the nature of the works that may be carried out to prevent a pollution incident. The Department's remedial powers in the event of a pollution incident are also considerably expanded. Whereas the DoE(NI)'s powers to respond to a pollution incident were previously limited to the removal and disposal of polluting matter and to remedying and mitigating the effects of pollution, the Department now has the additional power to carry out "such works and operations as it considers appropriate" to restore the affected waters, in so far as is reasonably practicable, to their state immediately prior to the pollution incident, including the restoration of the flora and fauna present in the polluted water. This power is of considerable

significance as it will enable the DoE(NI) to respond much more fully to the environmental impact of water pollution. Regrettably, however, the DoE(NI)'s powers in this regard appear to be diminished in one important respect compared with the equivalent powers conferred on the Environment Agency under section 161(1) of the WRA 1991. Whereas the Northern Ireland provision refers to the restoration of flora and fauna 'in' waters, section 161(1)(b)(iii) of the WRA 1991 refers to flora and fauna '*dependant on the aquatic environment of the waters.*' Consequently, bird life, for example, which may be 'dependent on', but not 'in' the polluted water body, would not be protected under article 16.

One of the major problems in taking prosecutions for water pollution is identifying the polluter – without adequate investigative powers the Department's ability to control or prevent pollution is considerably blunted. Two new powers of investigation are conferred on the DoE(NI) under article 16 both of which are also conferred on the Environment Agency(EA). Under article 16(1) the Department may "carry out investigations"¹⁰¹ to establish both the source of the pollution and the identity of the person responsible for its entry into relevant waters. This new power can be used either to prevent likely pollution incidents or when pollution has actually occurred. It is also identical to the equivalent power conferred on the EA under the WRA 1991.¹⁰² Article 16 of the Northern Ireland Order also confers an additional power of investigation on the DoE(NI) to carry out works to assess the actual or likely effect of the existing or potential pollution levels on inland, coastal or ground waters,¹⁰³ which will undoubtedly enhance the Department's capacity to act preventatively. This power is equivalent to the Environment Agency's incidental powers conferred under section 37(a) and (b) of the Environment Act 1995.

Another important change in the Department's anti-pollution powers concerns its improved powers to recover costs reasonably incurred in carrying out this work from the person responsible for the threatened or actual pollution. Under section 13 of the Water Act (NI) 1972 the Department could recover any reasonable costs incurred in carrying out works from the person in default.¹⁰⁴ Article 16(4) of the Water Order also enables the Department to recover any reasonable costs incurred in exercising its powers under article 16(1). One important weakness in the cost recovery power conferred on both the Environment Agency and the DoE(NI) in this context was that the regulator was required to undertake the anti-pollution work before it could recover its costs. Not surprisingly, this situation generated a degree of uncertainty as to the prospects of actual cost

¹⁰¹ The term 'investigation' is not defined by the Order. It is unclear whether this power is wider than, or circumscribed by the DoE(NI)'s powers of entry and inspection laid down in articles 25 and 26 discussed *infra*.

¹⁰² Article 161(1) of the WRA 1991 as amended by the Environment Act 1995.

¹⁰³ Article 16(1)(b)(iv).

¹⁰⁴ Under section 161(4) of the WRA 1991 the Environment Agency is unable to recover costs incurred in carrying out anti-pollution works or investigations from any person in relation to pollution caused by a discharge from an abandoned mine. The Water (NI) Order 1999 does not impose a similar exclusion in relation to abandoned mines in Northern Ireland. The exclusion contained under the WRA 1991 will expire on 31 December, 1999.

recovery, which inhibited the regulator's willingness to exercise its anti-pollution powers under section 13.¹⁰⁵ This weakness was addressed in England and Wales by section 60 of the Environment Act 1995 and is dealt with in Northern Ireland by article 16(2) of the 1999 Order. Article 16(2) provides that the Department may only exercise its powers to conduct anti-pollution works (excluding investigations) if it is either necessary to carry out those works 'forthwith' or the Department has been unable to identify a person on whom a works notice (discussed below) could be served. By implication, if such a person can be identified, then a works notice must be served thereby shifting the costs of anti-pollution work to the recipient of the notice. Although the Department's power under article 16(4) to recover the costs of investigative work is not restricted by the need to identify a person responsible for the threatened or actual pollution, the Order clearly seeks to encourage implementation of the polluter pays principle in the conduct of anti-pollution works. Article 17(9) provides that the DoE(NI) will be able to recover the costs incurred in conducting investigations under article 16(1) even where the Department has served a works notice on the person connected to the matters to which the investigations relate.

Although the Department's anti-pollution powers are no longer linked specifically to accidental pollution or pollution caused by unforeseen events as was the case under the Water Act (NI) 1972, in practice, the Environment Agency (EA) has tended to use its equivalent anti-pollution powers to deal with accidental acts of pollution. These powers may also be used where a discharge consent has been breached; however the EA is more likely to issue an enforcement notice under the Water Resources Act 1991 where a consent is breached.¹⁰⁶ The DoE(NI) is also conferred with equivalent powers to issue enforcement notices in relation to discharge consents (discussed below), so it is likely that the Department will utilise its anti-pollution powers in a manner similar to the EA. It should be noted, however, that the Department may not use its anti-pollution powers or issue a works notice which impedes a discharge that is being made in accordance with a discharge consent.¹⁰⁷

One of the most important implementations of the principle of pollution prevention is the conferral of new powers on the Department to serve 'anti-pollution works notices'. Indeed, the Department's powers in this regard are arguably stronger those conferred on the Environment Agency under sections 161A to D of the WRA 1991 (as inserted by the Environment Act 1995). Article 17 provides that the Department may serve a works notice on any person who has "caused or permitted, whether knowingly or otherwise", poisonous, noxious or polluting matter to enter relevant waters, or to be present at a place from which the matter is likely to enter such water. As already stated, this formula is potentially more stringent than that used in section 161A(1) of the WRA 1991 which only allows the EA to serve a works notice on a person who has "caused or knowingly permitted" such matter to enter controlled waters.¹⁰⁸ The circumstances in which a works

¹⁰⁵ See Bell, *Ball and Bell on Environmental Law*, (4th ed, 1997), at p 472.

¹⁰⁶ *Ibid.*, at p 473.

¹⁰⁷ Article 16(3) and 17(8).

¹⁰⁸ Discussed at notes 86-88 *supra*.

notice can be served mirror those in which the Department may exercise its own powers under article 16, namely where the Department considers that pollution is likely to occur, or where polluting matter is present in or has been present in relevant waters. A works notice can be used to require a person to carry out identical anti-pollution works to those available to the Department under article 16(1). Not surprisingly, only the DoE(NI) may carry out investigations into pollution incidents, or assess the effect of potential or actual pollution. It should also be noted that even where a works notice is served, the Department retains its powers to conduct anti-pollution works and investigations.

The Department's ability to ensure that effective anti-pollution work is carried out is consolidated by article 18. Under article 18 the DoE(NI) has the power to request that preventative or remedial works must be carried out on any land or in any waters, regardless of whether the recipient of the notice has a right of access or a right to conduct such works on that land or in those waters.¹⁰⁹ The definition of 'land' and 'waters' in this situation also includes adjacent and adjoining land and waters. In such situations, the owners, occupiers or other rights holders must grant or join in granting permission to allow the specified works to be carried out. Consequently, effective pollution control does not depend on the Department ensuring voluntary co-operation from other holders of land and water rights. Although the DoE(NI) is required to reasonably endeavour to consult with such persons prior to the works being conducted, failure to do so will not invalidate the works notice. Owners, occupiers and other rights holders of such land are entitled to compensation; however, consistent with the polluter pays principle, compensation is payable by the recipient of the works notice, not the taxpayer.¹¹⁰

Before serving a works notice, the Department is required to make a reasonable effort to consult with the intended recipient of the notice concerning the works that might be required under the notice. Since failure to consult will not invalidate the notice, potential recipients are not given an incentive to evade consultation. A works notice must specify the period within which the works must be carried out. Hence, although a works notice may be appealed¹¹¹ within 21 days of being served, beyond this point its recipient will not be able to ignore the notice while the effects of the pollution become more extensive or entrenched. As is the case in relation to pollution prevention notices under article 8, failure to comply with the terms of a notice is an offence, regardless of whether pollution actually occurs or not. Once again, courts may impose a maximum penalty of £20,000 for such an offence, thus reinforcing the message that pollution prevention is taken as

¹⁰⁹ Article 18 is identical to section 161B of the WRA 1991.

¹¹⁰ Conditions governing payment will be prescribed by regulations to be made by the DoE(NI).

¹¹¹ The appeal will be taken to the Water Appeals Commission (an independent non-departmental body). It should be noted that the Water Order does not indicate whether a works notice is to be suspended pending the outcome of an appeal. However, the Anti-Pollution Works Regulations 1996 (SI 1999/1006) recently brought into force in England and Wales, make clear that lodgement of an appeal under the WRA 1991 will not suspend a works notice. It is likely that equivalent regulations will be adopted for Northern Ireland. Discussed *infra*.

seriously as pollution itself. The Department may take proceedings for such an offence before the High Court where it is of the opinion that it is necessary to do so to obtain an effective remedy. In the event that a notice is ignored, the DoE(NI) may carry out the works specified in the notice, and may recoup any expenses reasonably incurred from that person.

Articles 16 to 19 will not only bring the DoE(NI)'s anti-pollution powers into line with those available to the Environment Agency in England and Wales, but also these new powers should act as a powerful deterrent to potential polluters in Northern Ireland. Because the costs of clean-up may far exceed the maximum penalty that may be imposed as a result of a successful prosecution for a pollution incident, potential polluters are given a clear incentive to conduct their business or activities in a manner that is environmentally responsible. The deterrent effect of articles 16 and 17 is further underlined by the fact that a polluter's liability for clean-up costs now encompasses a liability to restore the water, including its flora and fauna, to its state prior to the pollution incident. Although this does not oblige the polluter to return normally polluted water to a pristine state, the cost of restoring fish stocks and aquatic life could be far greater than the maximum fines imposed for the water pollution offence itself.¹¹² The case law surrounding the application of section 161 of the WRA 1991 has also established that the Environment Agency can utilise its powers under section 161 even in the absence of a successful prosecution for water pollution.¹¹³

Important indicators of the likely application of the power to issue anti-pollution works notices are contained in policy statements and regulatory impact assessments surrounding the coming into force of the Environment Agency's powers in this respect in April 1999. The Anti-Pollution Works Regulations 1996¹¹⁴ were adopted to implement the Environment Agency's powers to serve an anti-pollution works notice in England and Wales. The Regulations did not, however, come into effect until April 1999 – hence the Agency's powers in this regard have only recently come into use.¹¹⁵ It is likely that the adoption of regulations implementing the Department's powers in Northern Ireland will be similarly delayed. Commenting on its new powers, the Environment Agency identified the construction industry as the “prime candidate” to receive works notices.¹¹⁶ The 1996 Regulations are essentially procedural in that they prescribe the content of works notices and require such notices to be recorded on the public register maintained under the WRA 1991. It is interesting to note, however, that although provision is

¹¹² In this regard, one often quoted example of the relationship, or lack thereof, between pollution penalties and clean-up liabilities occurred in *National Rivers Authority v Shell (United Kingdom)* [1990] Water Law 40. In this case Shell was fined £1m for leaking oil into the River Mersey; however, its clean-up liability was reportedly in excess of £6m.

¹¹³ Bell, note 105 *supra* at p 473. See in particular, *Bruton v Clarke* [1994] Water Law 145.

¹¹⁴ SI 1999/1006.

¹¹⁵ 29 April, 1999. In this regard, see also ENDS Report 291, April 1999, p 42. It should also be noted that the arrangements laid down in these Regulations are very similar to those introduced in relation to waste management licences in March 1999 – see ENDS Report 291, p 44.

¹¹⁶ ENDS Report 291, April 1999, p 42.

made for appeals against the service of works notices, the 1996 Regulations provide that such notices will not be suspended pending the outcome of an appeal. It is likely that the Northern Ireland regulations will adopt the same approach in this regard.¹¹⁷

Another important issue addressed with the coming into force of the 1996 Regulations was the overlap between the Environment Agency's powers to issue anti-pollution works notices and other water pollution control powers. One area of overlap concerns the requirement under section 161A(7) of the WRA 1991 that an anti-pollution works notice cannot require works which would impede or prevent the making of a consented discharge. The regulatory impact assessment of the Agency's powers produced by the Department of the Environment, Transport and the Regions (DETR) states that this provision means that a works notice "cannot be served where a discharge is made under and in accordance with a discharge consent". It is possible, however, that an anti-pollution works notice could be served on the holder of a discharge consent without impeding or preventing him from continuing the discharge. The ENDS Reports suggest, for example, that the Environment Agency "could order a discharger to restore waters to aquatic organisms damaged by a consented discharge."¹¹⁸ A policy statement¹¹⁹ issued by the Environment Agency (in agreement with the DETR) concerning the Agency's use of its powers to serve an anti-pollution works notice addresses additional overlaps with the contaminated land clean-up provisions introduced by the Environment Act 1995 and the regimes laid down in regulations concerning groundwater pollution and pollution from agricultural sources. The Agency has taken the view that it will, "in the first instance", use its specific powers to serve pollution prevention or control notices under the ground water or agricultural pollution regulations rather than resort to the service of an anti-pollution works notice. It is likely that the DoE(NI) will use its powers under regulation 18 of the Groundwater Regulations (NI) 1998¹²⁰ in a similar manner. As already discussed, Regulations have not yet been adopted for Northern Ireland to control water pollution from agricultural sources. The policy statement also makes clear that an anti-pollution works notice will only be served to deal with water pollution from contaminated land until such time as the new regime laid down in the Environment Act 1995 is brought into force. Even then, works notices will only be served to tackle pollution which will be addressed under the new regime: for example, to prevent serious pollution or where there is an imminent danger of such pollution. The equivalent regime concerning contaminated land is not yet in force in Northern Ireland; hence it is likely that the DoE(NI) will follow the Agency's practice concerning the use of its power to serve an anti-pollution works notice. The Environment Agency statement does, however, point out that the contaminated land clean-up regime may not be able to address cases of historic pollution from contaminated sites – for example, where pollutants have entered ground water from a contaminated site in the past, but the seepage has ceased. In

¹¹⁷ In this regard, it should be noted that provision is made for an accelerated appeals procedure.

¹¹⁸ ENDS Report 291, April 1999, at p 42.

¹¹⁹ ENDS Report 291, April 1999, p 42.

¹²⁰ SR 1998 No. 401.

such a situation, an anti-pollution works notice may be served. Finally, the policy statement makes clear that the Environment Agency will carry out risk assessment in deciding whether to issue a works notice and will have regard to the costs and benefits under the powers conferred by section 5 of the Environment Act 1995 – both are also anticipated for Northern Ireland.

Enforcement Notices

The enforcement notice is another new addition to the DoE(NI)'s pollution prevention armoury – however, this power is limited to the control of actual or threatened pollution from holders of discharge consents. Under article 12 the Department has the power to serve an enforcement notice on the holder of a discharge consent where the consent has been, or is likely to be, breached.¹²¹ The notice must state the opinion of the Department, specify the nature of the contravention or threatened contravention, the steps that must be taken to ensure compliance with the consent and the period within which these steps must be taken. Service of an enforcement notice has a strong preventative effect. In the first place, although it is possible to appeal service of an enforcement notice, the legal effect of the notice will not be suspended pending the outcome of the appeal.¹²² In this regard enforcement notices are unique in the context of the Water Order. Under article 13(5), an appeal against a decision to revoke or modify a consent will normally suspend the legal effect of the Department's decision pending the outcome of the appeal.¹²³ Although the Water Order allows the DoE(NI) to require that in the interests of preventing or minimising pollution or harm to human health, its decision to revoke or modify the consent will continue to have effect pending the outcome of an appeal,¹²⁴ the consent holder is entitled to compensation for any loss suffered as a result of the Department's decision if the Water Appeals Commission decides that in doing so, the Department acted unreasonably.¹²⁵ There is no equivalent right to compensation for loss sustained as a result of service of an enforcement notice. The preventative effect of the enforcement notice is further underlined by the fact that failure to comply with an enforcement notice is a criminal offence, conviction for which may attract the more substantial penalties imposed for water pollution offences (£20,000). Once again this penalty may be imposed regardless of whether the threatened breach of the consent actually occurs.¹²⁶

The importance of this new power cannot be underestimated. Not only does it give the Department a means of enforcing the terms of the 1999 Order without launching a prosecution, the enforcement notice also provides an important mechanism for suspending the operation of a discharge consent without risking liability for compensation. The Department cannot use its powers to serve an anti-pollution works notice that impedes or prevents the making of a consented discharge. Although the Department has the power to

¹²¹ The terms of article 12 are identical to those contained in section 90B of the WRA 1991.

¹²² Article 13(8). The appeal will be brought before the Water Appeals Commission.

¹²³ Article 13(5).

¹²⁴ Article 13(6).

¹²⁵ Article 13(7).

¹²⁶ The DoE(NI) also has power to take proceedings in the High Court where normal proceedings would not secure an effective remedy.

modify or revoke a consent as a result of a review, a review cannot be conducted without the consent holder's consent, except in specific limited circumstances, for at least four years after the consent has been granted. The only alternative mechanism available to the Department for suspending a discharge consent without having to wait for a minimum of four years is its emergency power conferred under article 15. Article 15 retains the powers conferred on the Department under the 1972 Act to serve a notice prohibiting the discharge or deposit of any matter onto land or into any inland, coastal or ground water where it is necessary in the public interest. Such a notice will take effect even if the Department has previously granted a consent for the discharge and will continue to have effect until it is revoked by the Department or a further consent is granted in response to an application made by the discharger. Although failure to comply with the notice is an offence, punishable by the maximum penalty under the Order, the Department's capacity to exercise these powers is limited in two important respects. First, although the term 'public interest' is not defined by the Order, the heading 'pollution emergencies' clearly indicates that this power will only be used in exceptional circumstances. Secondly, if the notice has been complied with and is successfully appealed, the Department will be obliged to compensate the person on whom it was served for loss sustained as a result – thus further inhibiting the exercise of this power.

CONCLUSION

It is clear from the foregoing discussion that the Water (NI) Order 1999 marks an important milestone in the modernisation of water pollution law and policy in Northern Ireland and certainly represents an enthusiastic response to the recommendations of the House of Commons Environment Committee. When it comes into force, the Order will transform the statutory powers available to the DoE(NI) to prevent pollution at source and also to mitigate and remedy its effects. In doing so, the Order not only gives powerful expression to one of the most fundamental principles of contemporary environmental law, but also provides potential and actual polluters in Northern Ireland with a potent incentive to ensure that pollution is avoided or minimised. In particular, these powers will provide the DoE(NI) with a vital means of controlling pollution from agricultural sources and accidental spillage which normally cannot be controlled through the discharge consent system. Regrettably, however, there are worrying indications that a considerable gap may exist between the formal legal position under the Water Order and reality on the ground.

For the first indication, one need go no further than the Order itself. Unlike the Environment Agency in England and Wales, the DoE(NI) is not placed under a general duty to exercise its pollution control powers in a preventative manner. Section 5(1) of the Environment Act 1995 explicitly requires the Agency to exercise its pollution control powers for the purpose of "preventing or minimising, or remedying or mitigating the effects of pollution of the environment." Although the implementation of the principle of pollution prevention is one of the major innovations made by the Water Order, the DoE(NI)'s general duties in relation to the aquatic environment do not even require the Department "to have regard" to this fundamental dimension of the new regulatory framework. This would also appear to be a deliberate rather than accidental omission as the Order does require the

Department “to have regard to the prevention of pollution” in exercising its powers to carry out engineering or building works.¹²⁷ In addition, the Department of Agriculture (NI)¹²⁸ is explicitly required to pay similar regard to pollution prevention in exercising its new powers under the Order concerning inland water navigation and recreation.¹²⁹ Hence, although the Environment and Heritage Service Annual Report 1998-1999 states that “we regulate to prevent and control pollution of our water. . .”¹³⁰ this role is not reinforced by statutory obligation.

Further important signals concerning the Department’s capacity to exercise its new pollution prevention powers are found in the report published in 1998 by the Comptroller and Auditor General on the *Control of River Pollution in Northern Ireland*.¹³¹ Although the Auditor General’s report addresses all aspects of the DoE(NI)’s functioning in this context, the central theme running throughout this lengthy report is one of deficient regulation. The findings made by this report concerning the regulation of the discharge consent system and the monitoring of water quality will be discussed in Part Two of this analysis of the Water Order – all of which reflect negatively on the DoE(NI)’s likely capacity to exercise its pollution prevention powers adequately in the short term. However, as against this, two recent improvements introduced by the DoE(NI) give some cause for optimism. During the course of the Auditor General’s examination the Department acquired a new information system (PILOTS) that will enable it to record not only the number of reported pollution incidents but also – for the first time – their severity and whether the report has been substantiated.¹³² This new system will undoubtedly make considerable improvements in the Department’s ability to make informed decisions on pollution prevention expenditure in both the public and private sectors, but also provide meaningful indicators as to how well the DoE(NI) is fulfilling its statutory duties to promote the cleanliness of water. The introduction of a reliable information system for measuring the extent of pollution will also enable the Department to make strides towards complying with Government policy stated in *This Common Inheritance* that decisions on environmental protection must be based on the “best information and scientific evidence available”. The second improvement relates to the introduction of a new ‘pollution hotline’ in 1997 which has been used effectively by the regulator in England and Wales to identify sectors where anti-pollution initiatives are necessary.¹³³

The final significant barrier to the effective implementation of the principle of pollution prevention in Northern Ireland concerns the low level of fines

¹²⁷ Article 23(3)(b).

¹²⁸ It should also be noted that the pollution control powers allocated to the DoE(NI) under the Water Order will not be reallocated as a result of devolution. However, the powers conferred on the DANI concerning recreational uses of water will be transferred to the Department of Arts, Culture and Leisure.

¹²⁹ Article 40(1).

¹³⁰ p 19.

¹³¹ HC 693, Session 1997-98.

¹³² *Ibid.*, pp 32-35. See also the *Environment and Heritage Service Annual Report 1998-1999*, at pp 21-22 for a report on the recent use of the PILOTS system.

¹³³ *Ibid.*, pp 66-67.

imposed by the courts in Northern Ireland for water pollution offences. One of the most important recommendations made by the Auditor General concerned the need to encourage the courts in Northern Ireland to consider the full range of fines for pollution offences. Although the Environment and Heritage Service prosecution rate is high, the levels of fines imposed are low.¹³⁴ Despite raising the ceiling for fines in relation to water pollution from £2,000 to £20,000 in February 1994, the Auditor General reported that this change made “very little difference to the general level of fines.”¹³⁵ Remarkably, despite a resolution of the Northern Ireland Water Council in 1991 expressing concern that the level of fines was too low to act as a deterrent, the Auditor General reported that the level of fines actually dropped the year after legislation was enacted which considerably increased the maximum fine.¹³⁶ It goes without saying that unless potential and actual polluters face the full range of fines for offences under the Water Order – particularly those offences which do not require proof of actual pollution – the practical implementation principles of pollution prevention and polluter pays will be considerably thwarted. Consequently, as recommended by the Auditor General, it is important that the Environment and Heritage Service makes every effort to provide courts in Northern Ireland with information on the full costs of dealing with pollution incidents as a means of encouraging the judiciary to consider the full range of penalties available for offences.¹³⁷

Part Two of this extended analysis of the Water (NI) Order 1999 will focus on two further issues. First, it will assess the significance of the changes wrought to the discharge consent system. Although the United Kingdom and the EC are committed to the development of economic instruments as alternative strategies for delivering environmental protection, administrative regulation will remain at the heart of national and European policy on the environment for the foreseeable future. Consequently, the discharge consent will remain as the core regulatory mechanism used to prevent and control freshwater pollution throughout the United Kingdom. The Water (NI) Order 1999 considerably upgrades the discharge consent system operating in Northern Ireland and thereby brings this pivotal mechanism into line with the more sophisticated and environmentally sound systems operating in Scotland, England and Wales. Part Two will conclude by setting out an agenda for further reform in this field. As already stated at the outset of this article, three fundamental weaknesses remain at the heart of the regulatory framework governing water pollution in Northern Ireland. First, the DoE(NI) still operates as both poacher and gamekeeper in the field of water pollution control. Secondly, despite the reforms introduced by the Water (NI) Order 1999, freshwater in Northern Ireland is still not afforded the degree of legal protection extended to the aquatic environment in England and Wales. Thirdly, serious concerns have been raised by the Comptroller and Auditor General as to the DoE(NI)’s ability to administer and enforce the new Order in an effective manner. Consequently, despite the changes wrought by the Water (NI) Order 1999, the process of modernisation is far from complete. Although we are now entering an age of devolution in which

¹³⁴ p 83, para 8.22.

¹³⁵ p 81, para 8.15.

¹³⁶ p 81, para 8.15.

¹³⁷ p 83, para 8.19.

parity with Great Britain will become less important, it is submitted that the Assembly must take action to ensure that Northern Ireland comes into line with modern standards of control operating in England and Wales. Failure to do so will not only inhibit, to a considerable degree, the potential effect of the new Order; continued tolerance of comparatively lax regulation will also ensure that Northern Ireland rapidly emerges as a pollution haven within the United Kingdom.

NATIONALISM, THE IRISH CONSTITUTION, AND MULTICULTURAL CITIZENSHIP

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“One thing that can be said about the Constitution is that it is a nationalist constitution.”¹

This comment, which occurs in Barrington J’s judgment in *McGimpsey v Ireland*, was made as if it were a completely uncontentious and agreed description of the Irish Constitution, in a context where widely divergent interpretations of the text were being reviewed as a prelude to giving a judgment. The very obviousness with which it was asserted suggests a need to analyse what is meant by describing a constitution as “nationalist,” and to clarify its implications, if any, for our understanding of Irish citizenship.

Such an analysis is greatly facilitated by recent work on nationalism. These studies were motivated, to some extent, by the emergence of nationalist claims in many countries worldwide, including the former Yugoslavia and former Soviet republics. For critics, such as Michael Ignatieff, there is much in contemporary manifestations of Romantic nationalism to be regretted or condemned.² But condemnation or regret is not enough; one also needs to understand a phenomenon which has even a fraction of the political influence that is attributed to nationalism. Hence the renewed interest among political scientists and philosophers in analysing what we mean by “nations” or “national identity,” and in re-assessing the meaning and validity of the claim that nations or national groups have distinctive political rights.

In Part I, I borrow on the results of this recent work and identify some of the defining features of a nationalist ideology. In Part II, I apply this analysis to the Irish Constitution, and make explicit some of its nationalist assumptions. Finally, in Part III, I examine whether nationalism precludes the emergence of other equally important issues in the discussion of constitutional arrangements at the beginning of a new millennium. In particular, is the apparent dominance of nationalist identities a hindrance to recognising the reality of multicultural citizenship, and the need to create political structures which could more adequately reflect that reality?³ I argue that one widely accepted concept of nationalism, which seems to be endorsed by the Irish Constitution, over-simplifies the conceptual framework in which we currently discuss constitutional arrangements in Ireland, and thereby obstructs other equally important realities from being adequately acknowledged or considered.

¹ *McGimpsey v Ireland* [1988] IR 567, at p 583.

² Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (1994).

³ Yael Tamir has articulated this issue, about seeing some realities so clearly that others are obscured or ignored, in “The Age of Atonement,” Clarke and Jones, eds. *The Rights of Nations* (1999), pp 88-99.

PART I - MODERN NATIONALISM

One of the key features of nationalist thinking is the idea that many different individuals, in different historical periods and perhaps even in different geographical regions, form a single people. The unique identity of the people is explained partly by reference to a common culture, shared traditions, linguistic uniformity, perhaps even the same religious beliefs. A model for this trans-temporal unity was provided by the Biblical account of the Jews as a chosen people who, despite their lengthy diaspora, preserved a belief in their distinctive identity and in their divinely ordained destiny to return to a chosen land.⁴ In fact, the Biblical paradigm provides a model for a number of features that are found in modern, secular versions of nationalism. Smith identifies four such features: (i) the ideal of ethnic election, of being a chosen or special people in some sense; (ii) the idea of a sacred or distinctive history, usually associated with a particular geographical territory; (iii) the memory of a golden age, a return to which or a recovery of which helps motivate many modern nationalists; and (iv) the importance of acts of commemoration, especially of the glorious dead who gave their lives for the sake of the people.⁵

Implicit in the features just mentioned is the role played by the beliefs of a given community about itself, the shared beliefs of a large number of individuals in virtue of which they think of themselves as having a common identity and, therefore, as having certain moral and political rights and responsibilities towards each other. This implies that the mere fact that people speak the same language, worship the same God, inhabit a given geographical territory, and so forth would not be sufficient to constitute them as a single people or nation. In the phrase used by Benedict Anderson, a nation is an “imagined community.” Anderson does not mean that nations are imaginary or unreal; rather, he claims that “the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”⁶ In other words, the unity of the nation is an imaginative construction on the part of its members, even if the possibility of maintaining such a construction presupposes at least some of the common cultural features that nations typically exhibit. A similar point is made by David Miller: “national communities are constituted by belief; nations exist when their members recognize one another as compatriots, and believe that they share characteristics of the relevant kind.”⁷ This suggests that certain commonly held ‘beliefs’ are a necessary condition for national identity.

⁴ See especially the writings of Anthony D. Smith, *The Ethnic Origins of Nations* (1986); *Nations and Nationalism in a Global Era* (1995); *Nationalism and Modernism* (1998).

⁵ These are summarised in Smith, ‘Social and Religious Origins of Nations,’ in D Clarke and C Jones, eds, p 26.

⁶ Anderson, *Imagined Communities* (1983), p 6.

⁷ Miller, *On Nationality* (1995), p 22.

Without them, we merely have a population of individuals who happen to have various objective features in common.⁸

If national identity cannot be established simply by the colour of one's skin, the place of one's birth, one's maternal language[s], or other similarly objective features, it suggests that there is more flexibility than might otherwise be expected in the imaginative construction involved in developing a national consciousness. I return to this issue later. The role of beliefs in nation-building also raises a question about the motivation or rationale for making distinctions between nations, for treating some people as being co-nationals and others as not – assuming that everyone in the world is not equally a member of a single nation. There are a number of different comments worth making here, depending on what kind of nationalism is at issue. One reason for cultivating the concept of a nation, in the eighteenth century, was a rejection of the divine right of kings and the relocation of political authority in “the people”. Evidently, the identity of “the people” in question varied with the context in which the political change took place. In the political theory inspired by John Locke, the argument proposed was that the authority of any legislature originates in the consent of individuals who conditionally surrender some of their natural rights to the legislature. These rights do not derive from the commonwealth; on the contrary, the limited powers and jurisdiction of the commonwealth derive from “the people”. Similarly, in the first constitution which followed the French Revolution, one finds a republican expression of the role of the nation or people as the exclusive source of all political authority: “The principle of all sovereignty resides essentially in the Nation. No body, no individual can exercise any authority that does not issue explicitly from the Nation.”⁹ In these cases, nationality emerges as one dimension in the development of popular democracy, even if it remains unclear who “the people” are and how one is expected to demarcate its membership.¹⁰

One of the most well-known insights into the dynamics of modern nationalism, first articulated by Ernest Gellner, is that nations typically aspire to statehood. “Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent. . . . Nationalism is a theory of political legitimacy, which requires that ethnic [does he mean national?] boundaries should not cut across political ones, and, in particular, that ethnic boundaries within a given state . . . should not separate the power-holders from the rest”.¹¹ One could gloss for the moment over Gellner's conflation of ethnic and national identity. In the language of nations, his suggestion is that modern nationalism is motivated by the belief that each

⁸ Cf Lord Fraser's interpretation of an ethnic group, in the context of anti-discrimination legislation (the Race Relations Acts 1972), in *Mandla v Dowell Lee* [1983] 2 AC 548, at 562.

⁹ French Constitution of 1791, Article 3.

¹⁰ Recent discussions of Scottish nationalism and of the type of autonomy in self-government which would adequately express its democratic inspirations are relevant here. Cf the Scotland Act 1998; R. Brazier, “The Constitution of the United Kingdom,” [1999] CLJ 96; G. Clark, “Scottish Devolution and the European Union” Public Law [1999] 504.

¹¹ Gellner, *Nations and Nationalism* (1983), p 1.

distinctive national group is entitled to govern itself in a separate state or a comparable political unit.

This might suggest that nations normally pre-exist the alleged dynamic to become a separate state. But Gellner has also argued that nationalism often comes first and creates both nations and states. Linda Colley has documented this argument for Britain in the eighteenth and nineteenth centuries, when British nationalism was explicitly cultivated as a means to state-building.¹² The kind of nationalism that was espoused by Thomas Davis in *The Nation*, in nineteenth-century Ireland, can likewise be compared with contemporaneous proposals in Germany, Italy or elsewhere in Europe. Thus while already existing nations may aspire to become autonomous states, it seems equally clear in some cases that governments or political leaders cultivate a national consciousness as a means to consolidating the unity of disparate regions and cultural communities in a single state, or of generating political support for the creation of a new state.

Whether nations evolve into states or states cultivate nationalism to provide political unity in times of crisis or transition, it is widely assumed that nations have a right to self-determination. This is reflected, for example, in the fact that Article 1 of two United Nations Covenants, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both begin with exactly the same provision:

“1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

Many commentators have struggled to provide a theoretical account of what is meant by “peoples” and “self-determination” here.¹³ In this context, Yael Tamir has drawn attention to a basic distinction between: (a) the democratic government of a given community of people; and (b) the government of a given community by [some of] its own members. The former implies that the members of the community have a genuine input into the way in which they are governed, even if those who govern them are not members of the same community but are, for example, elected representatives in a federal parliament (such as the European Parliament). In contrast, (b) merely stipulates that those who govern a community must be members of the same community, and this may be realised even by a dictatorship within the same community or nation.¹⁴

Evidently, nationalism may be presented today as an expression of these two radically different projects. In the former, we claim that political power derives from the people who choose to be governed in a certain way; in the latter, we claim that a group of people, as such, is identifiable as a distinct nation which has a legitimate claim to autonomous government. There are

¹² See Colley, *Britons: Forging the Nation 1707-1837* (1996).

¹³ See for example, Freeman, ‘The Right to National Self-Determination,’ in Clarke and Jones, eds, 45 ff and Raz and Margalit, “National Self-Determination,” in Raz, *Ethics and the Public Domain* (1994), 125.

¹⁴ Tamir, *Liberal Nationalism* (1993), p 71.

also degrees of autonomy; at the limit, this form of nationalism demands a separate, sovereign state for each distinct national group.

Given the historical connection between cultivating nationalism as a means of state-building, and claiming sovereign statehood for a people and region that claims to be a nation, it is important in contemporary discussions not to collapse the terms “nation” and “state” into synonyms.¹⁵ Such a semantic conflation precludes making distinctions that are necessary and asking questions, especially about the warrant for various political claims, that need to be asked.

Finally, one of the most contentious assumptions of nationalism is the apparent homogeneity that is often implicit in speaking about a single people or a nation. One may be tempted to lay the blame here on German Romanticism, or on similar philosophies which attributed a quasi-spiritual unity to a large population of people despite the reality of their obvious differences. This is not merely a philosophical or academic dispute between hard-nosed realists and romantic idealists. Failure to address this issue explicitly has the effect either of excluding some people from membership of a given nation – because they fail to satisfy some criterion that is often implicit and unnecessary – or of including individuals of very different cultural traditions within the same nation, without their consent, and then demanding that they adopt the culture of those who see themselves as paradigm representatives of “the nation”.

In this context, nationalism can exhibit a form of cultural blindness which fails to recognise the reality of multiculturalism.¹⁶

It is clear from the literature that there is no single phenomenon called nationalism that can be neatly defined by necessary and sufficient conditions. However, one might still anticipate that some or all of the following features are typical of modern forms of nationalism:

- a) a belief in the unity and distinctness of a people across generations and geographical boundaries;
- b) the assumption that political authority derives ultimately from the people, who have a right to choose their own style of government;
- c) a tendency to assume that each nation should enjoy autonomy in self-government; at the limit, each nation should have a separate state and, in general, the boundaries of states should coincide with the geographical distribution of peoples or nations;

¹⁵ Cf Lord Simon in *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 363-4, where the same distinction was required to implement race relations law. “‘Nation’ and ‘national,’ in their popular in contrast to their legal sense, are also vague terms. They do not necessarily imply statehood. Scotland is not a nation in the eye of international law, but Scotsmen constitute a nation by reason of those most powerful elements in the creation of national spirit – tradition, folk memory, a sentiment of community.”

¹⁶ The most well-known exponent of this issue in recent political philosophy is Kymlicka. See for example *Multicultural Citizenship* (1995).

d) a belief in the cultural homogeneity of members of each nation, or of the relative insignificance of multiculturalism as a challenge to assumptions about the shared features of members of the same nation.

PART II - NATIONALISM IN THE IRISH CONSTITUTION

It is not a novel thesis to suggest that the Irish Constitution was drafted in an historical context which was significantly influenced by a somewhat uncritical and exclusive form of nationalism, and that the key personality in the drafting process was attempting to combine legal practicalities with symbolic expressions of a distinctive reading of Irish history.¹⁷ The question being raised here is not an historical one about the way in which the Constitution was drafted, or about the political forces that affected its nationalist character. The issue here is to draw out the implications to which we are committed today by the nationalism of the Constitution. As long as it remains, unamended, as the basic law of the state called "Ireland", we need to make explicit the view of ourselves that it projects to the international community and, in particular, to those who live in Northern Ireland and who are willing to review relations between the neighbouring jurisdictions.

To what extent, therefore, is the Constitution inspired by, or expressive of, a form of nationalism that may no longer represent the views of the majority of citizens of Ireland, and that may exacerbate rather than help resolve recent political problems on the island of Ireland?

The Preamble of the Constitution introduces the nationalist inspiration of the whole document. It refers to both the "nation" and the "people of Ireland", and also includes a prototypical commemoration of the glorious dead whose efforts contributed to the political freedoms that are claimed in the Constitution itself.

"We, the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, who sustained our fathers through centuries of trial, gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation [*Náisiún*], and seeking to promote the common good, . . . so that . . . the unity of our country [*tír*] [may be] restored, and concord established with other nations [*náisiúin eile*], Do hereby adopt, enact, and give to ourselves this Constitution."¹⁸

If one studies the rhetoric and style of nationalist manifestos, one could hardly improve on the clarity with which these opening lines enunciate a belief in a unique people that has reached a turning point in its history at which, due to the heroic deeds of earlier generations, it can adopt a constitution that expresses its distinctive and independent political character. The Irish nation comes of age and asserts its claim to independent statehood.

¹⁷ See O'Halloran, *Partition and the Limits of Irish Nationalism* (1987). For the nationalist dimension of the pre-partition period, see Bew, *Ideology and the Irish Question* (1994).

¹⁸ Given the implications of Article 25,5,4^o, to the effect that the Irish text is definitive, I have quoted in parentheses the Irish equivalent of some significant terms.

However, despite the apparent clarity of the text, there are ambiguities even here in the Preamble. For present purposes, one might simply note the identity of those who claim to enact the Constitution. “We, the people of Éire [*muintir na hÉireann*] . . . Do hereby adopt, enact, and give to ourselves this Constitution.” Who are *muintir na hÉireann*? Article 4 specifies that ‘Éire’ [even in the English-language text] is the name of the state which came into being with the enactment of the Constitution and which was formerly called *Saorstát Éireann*.¹⁹ Since the vote to enact the Constitution was a majority decision by those who were registered in what was then called the Irish Free State, it is consistent both with the reality of that particular referendum and with the legal implications of Article 4 to suggest that the “people of Éire” mentioned in the Preamble are not identical with the Irish nation, but with the citizens of the Irish Free State who claimed to speak on its behalf.

Nation and State: The term ‘nation’ is used ten times in the Constitution, and the extent to which it is often confused, in the text, with the term ‘state’ has already been documented.²⁰ This ambiguity in the Constitution has been repeated by the courts, even in cases in which the legal status of the nation or state was at issue. The semantic ambiguity is symptomatic of the nationalist theory which is so pervasive in the text of the Constitution that it slips almost imperceptibly from “nation” to “state” and back again. One of the clearest cases of this terminological variation is in Article 29, which is preceded by the heading: “International Relations”.²¹ In section 1, “Ireland [that is, the state called Ireland/Éire] affirms its devotion to the ideal of peace and friendly co-operation amongst *nations*. . .”. In principle, this might be understood as a willingness to recognise other nations, such as the Kurdish nation, which were not legally established as states. But section 3 clarifies that Article 29 is concerned with other states: “Ireland accepts . . . international law as its rule of conduct in its relations with other *States*.” And while the executive power of the State is to be exercised by the Government in external relations (Article 29, 4, 1°), the Government is authorised by the subsequent sub-section (sec. 4, 2°) to use a variety of organs, instruments or methods which are adopted by “any group or league of *nations* with which the State is or becomes associated.” Admittedly, the confusion here is no more blatant than in the title of the United Nations, of which only states or their legal equivalent (rather than nations) are eligible for membership. However, in a constitution which recognises a distinct identity for the Irish nation – and in which the Irish term “*náisiún*” is usually capitalised when denoting the Irish nation²² – it requires some explanation as to why the text should oscillate between “nation” and “state” even within the same article.

¹⁹ “The name of the State is Éire, or in the English language, *Ireland*.”

²⁰ Clarke, “Nation, State and Nationality in the Irish Constitution” (1998) 16 *ILT* 252.

²¹ This is also the article which was amended by the Nineteenth Amendment of the Constitution Act 1998, following the Good Friday Agreement. See below, note 33.

²² For example, in Articles 13.7.2° or 41.1.2°.

The Nation in Articles 1– 3

The first three articles of the Constitution are the only ones included under the heading “The Nation”. It has often been pointed out that they are not exclusively legal provisions in the narrow sense, but expressions of a political philosophy or of political aspirations which were widely accepted in 1937. This view was expressed by O’Higgins, CJ in *In re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975*:

“One of the theories held in 1937 by a substantial number of citizens was that a nation, as distinct from a State, had rights; that the Irish people living in what is now called the Republic of Ireland and in Northern Ireland together formed the Irish Nation; that a nation has a right to unity of territory in some form, be it as a unitary or federal state; and that the Government of Ireland Act 1920, though legally binding, was a violation of that national right to unity which was superior to positive law. This national claim to unity exists not in the legal but in the political order and is one of the rights which was envisaged in Article 2”.²³

O’Higgins CJ raises a number of issues in this paragraph. For present purposes it is enough to acknowledge that, in this judgment, the Supreme Court accepted that the Constitution not only established the fundamental law of the State, but that it also expressed political theories that were widely accepted at the time of its enactment. One of those theories was a form of nationalism. This is evident in Article 1:

“The Irish Nation [*náisiún na hÉireann*] hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations [*náisiúin*], and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.”

The classification of this right as “inalienable” suggests that it belongs to the same genre as the “inalienable and imprescriptible rights, antecedent and superior to positive law” that are attributed to the family in Article 41, 1, 1°, or the “inalienable right . . . of parents to provide . . . for the religious and moral . . . education of their children,” (Article 42, 1). In other words, it derives from a natural law philosophy which accepts that individuals or groups of individuals have certain natural rights which are prior to their legal acknowledgement in a given jurisdiction. Thus the natural right of the Irish Nation is affirmed or assumed rather than established by Article 1; the justification for the underlying philosophy lies elsewhere.

Articles 2 and 3 are, by now, perhaps the best known in the whole text. Together, they make three references to the “national territory”.²⁴ This raises a query about what is meant by “national” in this context. The adjective “national” is used sixteen times in the Constitution, and on many occasions it simply means “of or pertaining to the State [rather than the nation]”. For

²³ [1977] IR 129, at p 147.

²⁴ There are two references in the English text, and three in the Irish version (as *na críocha náisiúnta*).

example, Article 6 refers to “national policy” where it means the policy of the state, and Article 15 (1) mentions the “National Parliament” when the reference is unambiguously to the parliament of the State. However, the Constitution also refers to “the national language” [*an teanga náisiúnta*] and, while recognising both English and Irish as “official” languages of the state (Article 25, 4, 6°), it classifies Irish as “the national language” and the “first official language”.²⁵ Thus there is a distinction between being a language recognised in the state as an official language, and the special status of one official language which is legally established as the traditional language of the nation. This has obvious implications for those members of the nation who do not speak Irish, including many of those who were acknowledged in the Preamble as having engaged in an “heroic and unremitting struggle”. This is an issue to which I return later. On the evidence available, the term “national” is probably used in Article 25 to mean “of or pertaining to the nation”.

Although the use of the term “national” is arguably unclear in some places in the Constitution, there is no ambiguity in Articles 2 and 3, where “national” certainly does not denote the State called Éire/Ireland. Article 2 says that “the national territory consists of the whole island of Ireland”, while Article 3 limits the jurisdiction of the state for which the Constitution is the basic law to the same geographical area as the former *Saorstát Éireann*, that is, the twenty-six counties:

“Pending the re-integration of the national territory [*na críocha náisiúnta*], and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect”.

This is a paradigm expression of a nationalist philosophy, or of what Gellner prefers to call an ideology; it claims that there is a national territory over which the Oireachtas has a “right. . . to exercise jurisdiction”, although the geography of the island alone could not possibly decide the disputed issue of the rightful jurisdiction of the “Parliament and Government established by this Constitution.”

Having expressed these nationalist claims or aspirations in the first three articles of the Constitution, it remained for the courts to interpret their legal effect. On this, the courts have been neither clear nor consistent. In *Boland v An Taoiseach*, the court rejected a challenge to the constitutionality of the Sunningdale Agreement.²⁶ In the course of explaining their decisions, O’Keeffe J argued that it would have been *ultra vires* for an Irish Government to have agreed that “the State does. . . not claim to be entitled *as of right* to jurisdiction over Northern Ireland,” and Budd J interpreted

²⁵ Article 8, sec.1; see also Article 25, 4, 6°; 25, 5, 4°. In the last two cases, the term corresponding to “national language” in the Irish text is simply *Gaeilge*. The limited jurisprudence on this topic is summarized in Nic Shuibhne, “The Constitution, the Courts, and the Irish Language,” in Murphy and Twomey, eds, *Ireland’s Evolving Constitution 1937-1997* (1998), pp 253-63.

²⁶ [1974] IR 338.

Sunningdale as merely an expression of “policy” on the part of the State rather than an “agreement as to the future of Northern Ireland”.²⁷ In a subsequent case, *Russell v Fanning*, the Supreme Court considered the extradition of an accused person to Northern Ireland, and rejected an appeal based on the alleged political nature of the offence with which he was charged. In the course of its judgment the Court introduced the term “constitutional imperative” into its understanding of Article 3. Hederman J argued that the “unification of the national territory. . . is. . . a constitutional imperative and not one the pursuit or non-pursuit of which is within the discretion of the government or any other organ of State”.²⁸ McCarthy J, in his minority opinion in the same case, preferred to interpret the Preamble and Articles 2 and 3 as expressing “a national aspiration”.²⁹ However, he linked this aspiration with the provisions of Article 6, 1:

“All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy [*beartas an Náisiúin*], according to the requirements of the common good.”

While conceding that national policy could not be decided by the courts, McCarthy J concluded that “the people, in final appeal, must decide all questions of national policy. . . . The Constitution provides but one means of ascertaining the will of the people on such a question.”³⁰ It seems questionable to argue that the Constitution provides only one way of finding out the will of the people; the implication of his remarks seems to be that even an aspiration, once expressed in the Constitution, cannot be changed except by means of a constitutional referendum.

These earlier decisions were summarised in the High Court by Barrington J in *McGimpsey v Ireland*, in which the constitutionality of the Anglo-Irish Agreement 1985 was challenged. The High Court decided that the claim about “the national territory” in Article 2 “exists in the political and not in the legal order”.³¹ However, the Supreme Court on appeal decided not to follow the interpretation of the High Court and decided instead that Article 2 represented a “claim of legal right” about the extent of the national territory, and that Article 3 expressed a constitutional imperative for its eventual re-integration.

“. . . I am satisfied that the true interpretation of these constitutional provisions is as follows:

1. The reintegration of the national territory is a constitutional imperative (*cf.* Hederman J in *Russell v Fanning* [1989] ILRM 333).

²⁷ *Ibid*, 363, and 366-7. Walsh J repeated this interpretation, that the government had expressed “nothing more than a declaration of policy” in Sunningdale, in *Crotty v An Taoiseach* [1987] IR 713, at p 779.

²⁸ *Russell v Fanning* [1988] IR 505, at 537.

²⁹ *Ibid*, p 553.

³⁰ *Ibid*, p 554.

³¹ [1988] IR 567, at p 584.

2. Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right.

There can be no doubt but that the only reasonable interpretation of Article 1, taken in conjunction with the denial of derogation from sovereignty contained in Article 2(b) of the Anglo-Irish Agreement, is that it constitutes a recognition of the *de facto* situation in Northern Ireland but does so expressly without abandoning the claim to the reintegration of the national territory".³²

It is not clear what "a claim of legal right" means here. The use of the term "claim" suggests that Article 2 involves a claim in international law which has not been decided by any relevant legal authority, and it is not clear what such an authority might be. Perhaps a "claim of legal right" is a claim made by a given jurisdiction that it has a right to legislate for a specific region, even though the claim is not accepted by other claimants. In that case, it seems as if the claim itself is a political or moral claim, rather than a legal claim, and hence that the Supreme Court decision differs rhetorically, rather than legally, from the earlier decisions in *Boland*, *Crotty*, and *Russell v Fanning*.

The Good Friday Agreement, 1998

The limited jurisprudence of Articles 2 and 3 will be radically revised since the provisions of the Good Friday Agreement were implemented and the Constitution was amended accordingly.³³ However, the amended Articles continue to appeal to the reality of "the Irish nation" [*náisiún na hÉireann*] as a basis for the new provisions and, to that extent, continue to reflect a nationalist philosophy, even if it is amended in significant ways.

The amendment to Article 2 explicitly extends membership of the nation to everyone born in the island of Ireland and to naturalised citizens.

"It is the entitlement and birthright of every person born in the island of Ireland, . . . to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland."

³² *McGimpsey v Ireland* [1990] IR 110, at 119.

³³ Following the Nineteenth Amendment to the Constitution Act 1998 [signed into law on June 3, 1998] the amended Articles 2 and 3 were incorporated, provisionally, into Article 29. The latter specifies that the amended Articles 2 and 3 will replace the 1937 version of the same Articles, if a declaration is made by the Irish government within twelve months, or such longer period as may be determined by law, that the State has become obliged to implement the Agreement. Thus the amendments to Articles 2 and 3 were included in the amended Article 29, awaiting a final decision either to delete them from the Constitution or to relocate them as replacements for Articles 2 and 3. The relevant declaration was made by the Irish Government on December 2, 1999. The Constitution was thereby amended. The unique mechanism adopted for the proposed amendments is described in O'Donnell, "Constitutional Background to and Aspects of the Good Friday Agreement," 1999 (50) NILQ, 76.

This has the merit of recognising that membership of the Irish nation is open to all those born on the island of Ireland, irrespective of their cultural, religious or political traditions.

Nonetheless it is important, at this stage, to emphasise a distinction between what was adopted as amendments to the Irish Constitution, and what is otherwise included in the Belfast Agreement. The Agreement acknowledges that “the present wish of a majority of the people of Northern Ireland. . . is to maintain the Union,” and that it is “the birthright of all the people of Northern Ireland to identify themselves. . . as Irish or British, or both, as they may so choose, and accordingly. . . to hold both British and Irish citizenship.”³⁴ In this sense, the extension of membership of the Irish nation cannot deprive those who so choose of their British nationality. By conceding the right of people in Northern Ireland to hold both British and Irish citizenship, and by recognising that the relevant people have a choice, the Agreement implies that membership of one nation may overlap with that of another. Whether or not this concession about dual membership in the Agreement modifies the concept of Irish nationality in the Constitution remains an open question.

The question of consent to membership of the Irish nation is explicitly raised in the amended version of Article 3:

“It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws. . . etc. [of the Irish Free State].”

This amendment, once implemented,³⁵ resolves the remaining ambiguity about the “claim of legal right” introduced by the *McGimpsey* decision and removes the claim from the Constitution that the Oireachtas may legislate for Northern Ireland. It also has the merit of acknowledging that the people on the island of Ireland have distinct cultural identities, and that the unification of the island is a political objective that may be pursued only within limits set by the democratically expressed consent of the people in each jurisdiction. All this must be welcomed as removing the constitutional ambiguity of the 1937 text and as recognising the role of democratic consent in political changes.

But underlying the amendments to Articles 2 and 3, there remains a commitment to at least a modified version of the nationalism which inspired the original text. This is apparent insofar as the amended Constitution continues to assume the basic principle identified by Gellner, namely the

³⁴ *Agreement Reached in the Multi-Party Negotiations*, pp 33, 34. Cf Annex 2, Declaration on the Provisions of Paragraph (vi) of Article 1 in relationship to Citizenship, p 35, in which the phrase “the people of Northern Ireland” is defined.

³⁵ See note 33 above.

ideal of congruence between nation and state. The logic of nationalism implies that the Irish nation has a right to a separate state that coincides with “the national territory”; since there are many people living in Northern Ireland who prefer to remain British citizens, and since one can assume that they will not agree to emigrate elsewhere, the only way of realising a non-coercive congruence between nation and state, in a united Ireland, is by extending membership of the Irish nation to all those born in Northern Ireland. In other words the underlying philosophy is: firstly, to claim the whole island as the appropriate geographical region for the Irish nation and then to accept, as the unavoidable price of making the nation and state coincide, that all current residents of the island must be admitted to membership of the Irish nation. The argument here is not that the Good Friday Agreement compromises the British nationality of those born in Northern Ireland and who choose to remain British citizens. It does not. However, only some provisions of the Agreement have been included in the Irish Constitution,³⁶ and those sections are consistent with the nationalist political aspirations of the original text. This amounts to reading the Agreement as a compromise document in which both the British and Irish governments set out their political objectives and each recognises the legitimacy of the other’s aspirations. Apart from the principle of consent, which precludes coercive methods for realising political objectives, the aspirations expressed by the amended Irish Constitution remain fundamentally nationalist.

Thus, consistent with its underlying principles, Irish nationalism copes with radical cultural diversity either by excluding those who do not fit neatly within its parameters (the 1937 solution), or by including them without adequately recognising their distinctness (the Belfast Agreement solution). In either solution, the question left unasked is about the rationale for continuing to divide people living on the island of Ireland, in the late twentieth century, into distinct nations.

PART III - NATIONALITY AND MULTICULTURALISM

One of the implications of recent work on nationalism and multiculturalism is that our nationality is not something given, fixed or inherited in the way that other features of our reality are to a greater or less extent unmodifiable. Nationality is a cultural construct of a very complex kind and is open to use or exploitation for a variety of disparate political, economic or social ends. These two points – the malleability of nationality and its availability for exploitation – are inextricably linked. Many of those who appeal to their nationality to justify political ends do so as if the former were both given and fixed, and as if it implied the political conclusion to which they themselves are favourably disposed. But the logic of the argument may run as easily in the opposite direction. A group of people may first decide on a given political end, and then intentionally fashion the kind of national consciousness that is most conducive to realising that end. For example, as already indicated above, state-building is usually facilitated by a simultaneous fostering of a shared national consciousness. Hence the

³⁶ Article 29 has also been amended so that the State may become bound to honour the whole Agreement as an international treaty.

cultivation of a particular national consciousness may be either a means or an end. Once it is acknowledged that both political objectives and nationality are equally subject to modification, and that neither one provides a secure, unchangeable basis for the other, we can move logically within their circular interconnection by questioning either one of the mutually dependent pair.

It is beyond dispute that the framing of the Constitution in 1937 was motivated by a very specific nationalist agenda, and that the resulting document bears the hallmarks of its historical conception. However, from the perspective of current political philosophy, the nationalist philosophy which inspired many of its provisions is open to question. This questioning cannot be avoided simply by appealing to current constitutional arrangements in the Republic of Ireland. One cannot establish a nation by means of a referendum, even if it is approved by a much larger majority than those who voted for *Bunreacht na hÉireann* (in 1937) or in support of the Good Friday Agreement amendments (in 1998). Instead, the Constitution presupposes the existence of the reality called the “Irish nation” and appeals to it as a justification for the basic laws it brings into force. The circularity mentioned above between nationalism and political objectives is not logically “vicious”, as long as we realise that there are no fixed foundations, historical or legal, which preclude raising certain kinds of question at this point in time. But it would be circular in an illogical sense if one hoped to justify the existence of a particular type of nation by pointing to a constitution which evidently presupposes its prior existence. Thus, whether or not there exists a reality called “the Irish nation” cannot be decided by reference to the text of the Constitution.

It follows from what has been said so far – or, more accurately, from contributions over the past two decades to our understanding of nationalism – that the fundamental question facing any community of people, when they address questions about their nationality, is: what kind of nationalism [if any] do they want, and how are they most likely to succeed in cultivating it? This is not a question that applies only to those who are called “nationalists”. Many other residents of the island of Ireland, who might shudder at the thought, are more committed to a form of nationalism than they are likely to admit. In particular, those who call themselves “Unionists” in Northern Ireland may be as dependent on nationalism [in their case, on their conception of British nationality] as their so-called Nationalist neighbours. Thus the question about what kind of nationalism is desirable is one that can usefully be entertained by anyone living on the island of Ireland or, further afield, by anyone living in the United Kingdom or elsewhere.³⁷

Inclusive or Exclusive Nationality?

It goes without saying that nationality, by its nature, divides people into distinct groups. For any particular nation, some people are classified as members and others are not. The motivation for raising national consciousness and making such divisions may be benign, and it may be

³⁷ Recent expressions of Scottish nationalism are relevant here. For one way in which Scottish nationalism, as a cultural phenomenon, can be expressed within the constitutional structures of the United Kingdom, see MacCormick, “Liberal Nationalism and Self-Determination,” Clarke and Jones, eds, 65.

supported initially as a means of uniting people into a viable political community. But there is no known nationality that includes all the people of the world. To describe oneself as having a given nationality, or as belonging to a particular nation, is automatically to exclude other people from membership of the same group. This is not to say that one may not be a member of more than one nation; that is certainly still possible, and in that case there is an overlap between national groups and their respective memberships. But if there were no distinction between members and non-members of a given nation, then there would be no point in having such a national identity in the first place. National identity or affiliation divides the people of the world into distinct groups, which may or may not overlap to some extent.

This system of division does not assume that the criteria for membership of a given nation must be clear, explicit or sharp. It is much more likely that the line of demarcation between members and non-members will be unclear, unarticulated or fuzzy.³⁸ It is also likely, as indicated above, that members will satisfy the criteria for membership of a nation to a greater or lesser extent, and that some members will be marginal both in satisfying the conditions and in their consciousness of belonging to a particular national group.

Thus national identity is a cultural construct with vague and possibly overlapping boundaries, and the relative sharpness of the boundaries is likely to depend on the political objectives for which the national identity in question is cultivated.

Nation-building exercises typically involve attempts to impose a linguistic and cultural uniformity on all the disparate groups who are to be included in a nation-state. In some cases, evidently, such a programme is doomed to failure from the outset – as in Switzerland or Belgium – and those who hope to unify distinct linguistic and cultural groups into a single political entity must be willing to tolerate more inclusive criteria for membership. If one reviews the nationalist philosophy which inspired the separatist political movements in Ireland in the nineteenth and twentieth centuries, it is evident that anti-colonialism was one of its principal motivating factors. Consequently those who were associated with British colonial policy in Ireland were least likely to be included as members of the newly defined Irish nation. Their distinctive cultural characteristics were Protestantism (as Linda Colley has shown in her historical analysis of British nationalism), speaking English rather than Irish, and, in general, sharing the cultural traditions which were distinctive of Britain. In the political confrontations that resulted from this anti-colonial movement, it seems almost inevitable in retrospect that Irish identity was defined in opposition to British identity and

³⁸ Cf Lord Simon in *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362, in relation to sec 1 (1) of the 1968 Act: “This is rubbery and elusive language – understandably when the draftsman is dealing with so imprecise a concept as ‘race’ in its popular sense and endeavouring to leave no loophole for evasion.” Despite the difficulties involved, the courts have found sufficient precision in the phrase “on the ground of colour, race or ethnic or national origins” to identify unlawful discrimination.

that the Irish nation was defined, even if only implicitly, by reference to features which were most likely to distinguish it from British nationality.

Recent studies of nationalism also point to the extent to which an emerging national identity is likely to be projected back into the past, and to how this projection is assisted by what Renan famously described as “a shared amnesia, a collective forgetfulness” on the part of the relevant community. Thus the narrowness or exclusiveness of a particular nationality at a given historical period, initially promoted for immediate political objectives, is projected back into history and forward into the future. There is no natural or historical inevitability about this. The whole cultural construct is, as already indicated, partly a function of the current beliefs of the participants. We persuade ourselves about our distinctiveness or our national identity, and we construct a history (that is, another coherent set of beliefs) that supports our convictions about our national identity. But the coherence of both our nationalist and historical beliefs, and the political advantages that result from their adoption and dissemination, must eventually be evaluated in terms of the divisiveness they entail and the disadvantages they cause in the community.

When these general remarks are applied to Irish nationality, the conclusion they point to is that the concept of nationality which is pervasive in the Constitution is a cultural construct which emerged from the anti-colonial political struggles of the last three centuries; that there is nothing given, fixed or unchangeable in the relatively recent historical construction of “the Irish nation”; that the understanding of “the national language” and “the national territory” in 1937 was a function of a nationalist political philosophy that was prevalent at that time, rather than an uncontroversial historical fact; and that the way in which Irish people (however they are to be identified) specify their nationality in the late twentieth century is not determined uniquely by our past, but is open to redefinition in virtue of our current beliefs about what we have in common. In particular, we can reinforce an exclusive and divisive concept of our national identity which marginalises or excludes many people in contemporary Irish society. Alternatively, we can recon-ceptualise our nationality in a less exclusive way, so that it leaves open membership of the “nation” to those who are less enamoured of the myths which supported the development of one form of Irish national consciousness in the early decades of the twentieth century.

Why Change?

Why should the people of a given geographical region re-think their national identity? Why should they re-write their history – that is, the account of their past to which they have become accustomed – and perhaps, in doing so, re-evaluate the honorific status of those who engaged in the “heroic and unremitting struggle” for the international recognition of Ireland as a distinct nation? Is it not an extreme and implausible form of revisionism not only to re-evaluate the past but also to attempt to change our identity by modifying our current beliefs about who we are?

The answer to the first question, in summary form, is easy: because justice demands it. Justice demands, in a region that includes individuals with diverse cultural identities, that their cultural diversity should be acknowledged and that no group should be allowed to impose its culture, by

exclusion or enforced inclusion, on others. This is an insight that has emerged relatively recently in discussions of multiculturalism and in what Charles Taylor has called the “politics of recognition”.³⁹ Evidently, major questions may be raised about what counts as a legitimate part of one’s culture, and about the extent to which cultural practices that compromise the rights of individuals should be legally recognised in a modern democracy. None of these issues is addressed here.⁴⁰ But one could at least begin by recognising that linguistic diversity is a characteristic feature of many modern democracies, and that it is unnecessarily coercive of individuals to require all co-nationals to speak the same language[s]. Thus the Irish Constitution might begin by recognising both Irish and English as equally official and national languages, so that citizens are free to carry out their public duties by using either one.

Once the question is raised about linguistic prerequisites for national membership, the apparent necessity of other criteria may also be queried. It may not be necessary, in order to be genuinely Irish, to share the enthusiasm of many citizens for the games sponsored by the Gaelic Athletic Association, to share the religious beliefs of a majority of citizens in the Republic, or to enjoy the music and dance that are typically classified as “Irish”. As the list gets longer, it might seem as if we have embarked on an extremely slippery slope [in the logical sense], and that there remain no criteria at all by which to distinguish those who properly belong to the Irish nation. However, the danger threatened by a slippery slope is a sufficient reason not to ask questions only for those whose insecurity outweighs the logic of the argument. The guiding principle remains, despite the danger of slippage: justice demands that our concept of the nation be catholic enough to include those who were born in Ireland, but whose religious and cultural affiliations alienate them from the hegemonic and exclusive nationalism of one dominant, politically active group.

Should we also re-write history? This question may sometimes be asked in a rhetorical style, as if merely asking the question suggests an obvious negative answer. However, it is an extremely simplistic view of history, as a story about our past, either to think that it has already been written perfectly by others, or that there is no selection made in the events discussed or the interpretation of them that is generally endorsed. Any history is a theory about the past. Recent work in philosophy of science has shown the extent to which, even in the sciences, our descriptions of what are usually called “facts” are theory-laden because of the conceptual framework used to describe them.⁴¹ If physics is theory-laden, then *a fortiori* so is history. There is no question, then, about whether or not we should re-write history. We can either repeat what earlier historians have written – in which case we are not doing history at all – or we can put our minds to the interpretation of the past in the light of the best and most recent scholarship available. Doing history is, of necessity, re-writing the story of the past.

Of course, neither reconceptualising our national identity nor re-writing our history is remotely as easy as the arguments that support their necessity,

³⁹ Gutmann, ed. *Multiculturalism and the ‘Politics of Recognition’* (Press, 1992).

⁴⁰ See Barry, ‘The Limits of Cultural Politics,’ in Clarke and Jones, ed, p 127.

⁴¹ See Rorty, *Philosophy and Social Hope* (1999), p 175.

because the effort involved in either case is not exclusively intellectual. Both are inhibited by interests that are more deep-seated and less explicitly acknowledged than the logic of any argument. However, we can begin the task by questioning the justification offered by proponents of exclusive nationalism, because their justification is articulated in the world of ideas and of speech, rather than in the murky, intractable underworld of competing political and economic interests.

What, then, for the future? The Irish Constitution, even when amended as a result of the Good Friday Agreement,⁴² is fundamentally inspired by a nationalist ideology. It assumes the existence of a people, *náisiún na hÉireann*, which is distinct from other European peoples with whom we share much of our history and our culture. It attributes to this people a national language which is not widely spoken among its members. It claims for this people a right to self-government, and assumes that its political jurisdiction should coincide with the island of Ireland as its rightful “national territory.” Following the Good Friday Agreement, the Constitution has been amended to acknowledge that membership of the Irish nation is open to many people whose religious, cultural and political traditions differ significantly from those whose philosophy inspired the text of 1937. By accepting the principle of consent, the amended Constitution also modifies the measures that may legitimately be used to realise the nationalist goal. However, it changes little in the goal itself. More fundamentally, it changes little in the way in which we conceptualise the competing claims of members of a multicultural population.

As already mentioned above, this is not a comment about the Good Friday Agreement, but about the kind of nationalism which survives even in an amended version of *Bunreacht na hÉireann*. The Belfast Agreement represents an evidently welcome compromise between competing political objectives. The focus here is on analysing the political philosophy that is presupposed in one [or both?] of those objectives, namely, in nationalism. Thus, despite the parallel statements of the rights and duties of the contending traditions, and of the common ground agreed by both, there remains a question about the ways in which the disputing parties conceptualise the realities about which they disagree.

The political landscape could be changed almost beyond recognition by revisions in that underlying political philosophy. This would imply that we begin from the reality of individuals who currently live on the island of Ireland; that we acknowledge the extent of their religious, cultural and political diversity; that we accept the principle of democratic consent; and that, once these realities have been acknowledged, we consider the feasibility of different political structures that would respect the diversity of the people who live on the island. In particular, it would involve deferring assumptions about the nationality of different groups until their equality as citizens is first established, and surrendering the fundamental principle of nationalism identified by Gellner, namely, that political units or structures must be congruent with the distribution of national groups. Hence the emphasis on parity of esteem. Evidently, such an inversion of the logic of nationalism is feasible – even in an ideal political community – only if the cultural and civil

⁴² See above, note 33.

rights of different groups are respected equally. An oppressed group in any society is likely to develop a distinct national consciousness as a means of developing the kind of solidarity that is needed, among the oppressed, to assert their rights.

In a less than ideal community, the new millennium beckons us to question the nationalist assumptions by which we have classified and divided from each other the people who live on the island of Ireland. We could try thinking first about citizens, about their rights and interests, and only later consider the various “imagined communities” to which they belong. In summary, to conceptualise the history and political realities of the island of Ireland in terms of national affiliations is to assume a framework which classifies citizens in terms of incompatible nationalities.⁴³ If this classification includes the Gellner thesis, implicitly or otherwise, to the effect that a nation has a right to exclusive sovereignty over its national territory, the apparent insolubility of the constitutional issues that beset the island is logically implied by the very terms in which they are conceived, that is, in incompatible claims by different communities to different national identities, and in claims to exclusive jurisdiction over the same geographical region which result from competing nationalities. Any hope of progress presupposes an alternative conceptualisation. Minimally, it requires a surrender of the claim that a distinct national group must have exclusive political control over a geographical region identified as “the national territory”, even when it includes a significant population which, by its own choice, claims a different nationality to that of the majority. Cultural nationalism in this sense, that is, nationalism without exclusive territorial claims, is compatible with a wide range of political structures which respect and accommodate multicultural citizens.

⁴³ If all residents of Northern Ireland were willing to think of themselves as both British and Irish, then their nationalities would not be incompatible. But as long as some such residents see the implications of Irish nationality as accepting the territorial aspiration of Irish Nationalists (which is made explicit by the Gellner thesis), then these two nationalities are, for them, incompatible.

QUESTIONING THE LEGAL STATUS OF UNINCORPORATED ASSOCIATIONS

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INTRODUCTION

Unincorporated associations do not possess a separate legal identity independent of their members. The resulting effect is a considerable amount of operational complexity when determining, *inter alia*, who makes contracts on behalf of the association, who employs the association's staff and by the association not possessing the capacity to hold its own property which will usually be held on trust by the members.¹ An ancillary problem resulting from the association's lack of legal status is that members who are injured on the association's premises have no legal redress against the association, action being precluded because the member would, in effect, be suing himself.² One option for resolving this particular problem, outlined in a previous article,³ is to extend the liability of the committee in such associations. It was submitted that if the committee undertakes and accepts managerial responsibility this embodies, by implication, a responsibility for the safe condition of the association's premises thus giving rise to a duty of care to both ordinary members and visitors. However, this would depend on the judicial interpretation of the rules of the association and would not solve the related problems arising from the association's general lack of legal capacity. In addition, in practical terms it may reduce the number of volunteers willing to undertake this role. The purpose of this article, therefore, is to suggest an alternative solution. It is submitted that the introduction of legislation automatically giving non-profit making associations a separate legal identity would have many benefits including achieving a level of consistency in the legal treatment of such associations; giving members legal redress when injured on the association's premises and

* This is the second part of two conjoined articles, the first part appearing in (1999) 50 *Northern Ireland Legal Quarterly* pp 515-527. I would like to thank David Capper and an anonymous referee for commenting on an earlier draft.

¹ See Warburton, "The Holding of Property by Unincorporated Associations" [1985] *Conv* 318.

² See *McKinley v Montgomery* [1993] NI 93. In this case the Northern Ireland Court of Appeal held that a lady member of Eglinton Cricket Club could not maintain an action, based on section 2(1) of the Occupiers' Liability Act (Northern Ireland) 1957 and common law negligence, against the club for injuries resulting from a fall on the club's premises. Her membership of the club meant that she could not be classed as a visitor to whom a duty of care would have been owed. Furthermore, the fact of her membership precluded her from successfully suing the respondents as the nominated representatives of her fellow members as there was no real distinction between them and, as such, she was owed no duty of care. See also *Prole v Allen* [1950] 1 All ER 476; *Shore v Ministry of Works* [1950] 2 All ER 228; *Robertson v Ridley* [1989] 2 All ER 474.

³ Glennon, "Extending the Role of the Committee in an Unincorporated Association – A Separate Duty of Care to Members and Visitors?" (1999) 50 *NILQ* pp 515-527.

enabling the association to make contracts in its own right and hold property unfettered by the present complexities.

THE ASSOCIATION AS A SEPARATE LEGAL PERSONALITY

The question of whether a club or association should have a separate legal personality raises a broad range of questions, such a development involving a complete re-assessment of the fundamental nature of clubs and societies. At present, unincorporated associations have no legal identity independent of their members.⁴ It is interesting to note, however, that unincorporated associations cannot avoid some sort of formal legal regulation. Indeed, it is ironic that for some purposes unincorporated associations are recognised as a body, an ‘entity of assessment’.⁵ Section 6 of the Income and Corporation Taxes Act 1988 includes an unincorporated association within the definition of ‘company’ for the payment of corporation tax.⁶ A noteworthy point is that

⁴ An interesting debate, however, is whether unincorporated associations have, by implication, a legal identity. This theory is based on the idea that the collective body of members has a separate identity from the individual members. In the words of Dicey: “It is a fact which has received too little notice from English lawyers, that whenever men act in concert for a common purpose, they tend to create a body which from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted”. Dicey, *Law and Opinion in England* p 153. In the present context, the hypothesis is that any body bearing the characteristics of a corporation should, by implication, have a separate legal personality. Lloyd responds with the observation that having a personality in fact is different from having a personality in the eyes of the law. Lloyd, *Law of Unincorporated Associations*, (1938) p 6. Millett J was of a similar opinion in the case of *Maclaine Watson & Co. v Department of Trade and Industry* [1987] BCLC 707 saying that the existence of a natural person is completely distinct from his legal capacity: “He has life, and the physical capacities with which he is endowed by nature. But an artificial legal person is entirely the creation of law. It has no physical existence. It exists only in contemplation of law as the subject of legal rights and duties”. An interesting argument was raised in the Irish case of *Murphy v Roche* [1987] IR 656, where it was asserted that the unincorporated association was a legal entity distinct from the individual members who collectively made up the club analogous to the legal distinction between the State and individual citizens. On this analysis, it was argued that the totality of the members owed enforceable duties to individual members. It was argued in response that the legal identity of the club was only co-extensive with the collective body of its members. Furthermore the analogy with the State was false on the basis that the State can be regarded as an entity which has been created to protect individuals’ pre-existing rights. By contrast, no such rights exist in relation to club members outside the rules of the association, the club’s existence being wholly dependent on them. Gannon J, in the High Court, upheld the long-established principle that the club has no separate legal character distinct from its members.

⁵ *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners* [1987] 1 WLR 1057 at 1063 *per* Sir Nicolas Browne-Wilkinson V-C.

⁶ Section 6 states that a company is defined as “any body corporate or unincorporated association . . .”. Sellwood summarises the position in this respect: “most members’ clubs, societies and associations are. . . likely to be within the charge to corporation tax although they will not necessarily have income that is chargeable.” Sellwood, *Bogey at the Nineteenth*, Tax. 1991 (127) 3308, 335. This is because corporation tax is payable on profits and not gross income. An unincorporated

it is the association itself that bears the liability and not the individual members⁷. This point arose in the case of *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners*⁸ where the question was whether assessments to development land tax should be made on the club⁹ or on the individual members of the club. It was held by the Court of Appeal that the club as an unincorporated association was a 'person' within the context of the legislation;¹⁰ the assessments, therefore, were properly made on the club. This treatment of unincorporated associations, however, is the exception as opposed to the rule and in the context of liability to individual members there is no such recognition of the association as a separate entity. The conferment of a separate legal personality on an association or club would remedy this defect. It would also attenuate the distinction between the legal treatment of unincorporated associations and corporations. Indeed, Ford thinks that the two have a lot in common. The difference, he argues, is not one of personality as opposed to lack of it, but rather connotes legal attributes in one package by reference to those of a human individual as opposed to the piecemeal legal recognition accorded to unincorporated associations.¹¹

The benefits of associations having a separate legal personality

In general, the conferment of a separate legal personality on associations is meritorious as regards their dealings with members and non-members alike. Indeed, Fletcher states that:

“Lack of status, the refusal of the courts to recognise that an unincorporated association possesses an identity or existence separate from its constituent members, is the cause of most legal problems which arise in dealings between an unincorporated association, acting collectively, and its members or outsiders.”¹²

Conferring a separate legal personality on associations would have significant benefits. In practical terms there would be a great deal more clarity as to who the proper defendant is in negligence actions. At present,

association also comes under the ambit of 'company' by section 288(1) of the Taxation of Chargeable Gains Act 1992.

⁷ See *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners* [1987] 1 WLR 1057; *Carlisle and Silloth Golf Club v Smith* [1913] 3 KB 75 (where it was established that an unincorporated members' club could be assessed to income tax on its profits as an entity separate from its members) and *American Foreign Insurance Association v Davies (Inspector of Taxes)* [1950] 32 TC 1. In *Carlisle* Buckley LJ said that the question was not whether the members of the club were making a profit, but whether the society was making a profit by the concern in question.

⁸ *Ibid.*

⁹ The club was an unincorporated members' association.

¹⁰ Section 28(1) of the Development Land Tax Act 1976 and by virtue of section 19 of the Interpretation Act 1889 which defined a 'person' as any body corporate or unincorporate.

¹¹ Ford, *Unincorporated Non-Profit Associations*, (1959) at p 145.

¹² Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) 207.

there are a few possible courses open to a non-member. Such a person could bring an action against the officers or committee of the club, invoke a representative action,¹³ or sue all those who were members at the time the injury occurred. As regards liability to a member, the fact that the association would have its own identity signifies that it has a means of identification outside the collective body of members. The result is that it could be sued by a member as the two would no longer be synonymous.¹⁴

Similarly, the question of who is the employer of the association's staff would no longer pose difficulties. Warburton says that at present the employer will most likely be the person who engages the employee, most likely the committee. However, this is not necessarily the position. In *Kinner v Trustees of West Belfast Pigeon Club*¹⁵ the employer was held to be all the members, except the plaintiff himself who had been injured on the club's premises. Once again the conferment of a separate legal identity on the association would clarify this issue and the duties and responsibilities of the employer would no longer be held by the committee or members collectively, but by the association itself. In more general terms, such a status would give the organisation permanence and a more structured basis for internal decision-making. Furthermore, an important aspect of the proposed legislation would be the exclusion of the ordinary member's liability for any liability, act or default of the association, thus protecting the individual members from the association's debts and obligations.¹⁶

¹³ Under RSC (NI) 1980, Ord 15, r 12.

¹⁴ The effect of an association having a separate legal personality can be seen in the case of *Gesner v Wallingford & District Labour Party Supporters' Association Club Ltd*, *The Times*, 2 June 1994. A members' club was registered under the Industrial and Provident Societies Acts 1965 to 1978 and was, therefore, a body corporate. When a member was injured on the club's premises the question was raised as to whether a duty of care was owed either under the Occupiers Liability Act 1957 or at common law. It was asserted that although the buildings and land occupied by the club was vested in the club as a corporate body, this was held for the benefit of the members thus making this indistinguishable from those cases involving unincorporated associations. Glidewell LJ, in the Court of Appeal, refuted this assertion, holding that there is a "world of difference" between the two cases. His Lordship emphasised that the club was not merely a body which can be sued but a body which owed duties. In response to the second argument that a member was not a visitor within the context of the Occupiers Liability Act Glidewell LJ held that members of an incorporated society enter the premises under a contractual licence between them and the society. This means that a duty of care is owed by the club or society to the individual members. The basis of this position is the fact that in the case of an incorporated society the rules form a contract not only between the members but also between the club, as a body, and the members.

¹⁵ [1998] 7 *BNIL* 91.

¹⁶ It could be argued that this will not necessarily result in a radical difference as members already enjoy a form of limited liability. The mere fact of a person's membership of an association will not render them liable for the association's debts and obligations. A member will be liable for any damage or injury caused by his own acts or the acts of his agent. It should also be noted that agency will not be implied from the fact of membership alone but can be found expressly or by implication in the contract of membership.

If it is accepted that associations should have separate legal personality the next question is whether this could be adequately facilitated under existing legislation or whether the introduction of specially designed legislation is warranted? The unincorporated association, at present, has the option of incorporating under the Companies (Northern Ireland) Order 1986 either as an unlimited company, a company limited by shares or a company limited by guarantee. One of the main considerations is to ensure that the members enjoy limited liability thus precluding the unlimited company as a suitable framework. It seems that the company limited by guarantee is the most feasible option for associations wishing to incorporate as the emphasis is not on raising the necessary capital facilitated by the company limited by shares. Indeed, Bailey says that this is the most suitable form of limited company for the voluntary association as “. . . [the] incentive to participate is not profit but commitment to the goals of the association”.¹⁷

The company limited by guarantee can be, and is, used by non-profit and charitable associations and the Companies (Northern Ireland) Order 1986 is wide enough to facilitate such bodies. However, incorporation under this legislation is a matter of the association's own choice and may not be an attractive option as loss of immunity in tort to members would follow. For this reason specially designed legislation automatically conferring a separate legal identity on associations, comparable to the status of trade unions, is a more desirable option. It is proposed that compulsory registration with a newly appointed regulatory body as a non-profit association would invoke the tailor-made legislation which would automatically confer a separate legal personality on the association.¹⁸ One question, however, concerns the definition of association qualifying for inclusion under the proposed format. It is submitted that those associations which have for their purpose objects of a social, recreational or other non-profit generating objective where the members do not enjoy any type of financial gain from their membership should come under the ambit of the legislation. One of the main benefits of such a legislative scheme would be to achieve a level of consistency regarding the legal treatment of associations and their members and would result in a unified structure for associations with a non-profit generating objective.

The Association as a Separate Legal Entity

Initially it has to be decided what type of legal personality should be conferred? A distinction may be drawn here between corporate status and legal capacity. Is it necessary for an association to have full corporate status

¹⁷ Bailey, “A Question of Status”, (1989) *Accountancy*, 104(1152), 84. Article 13(3) of the Companies (Northern Ireland) Order 1986 states that the members of a company limited by guarantee have to contribute, on the winding up of the company, an amount not exceeding the sum specified in the memorandum. The company limited by guarantee is only suitable for non-commercial purposes as it does not have any capital contributed by the members while the company is a going concern.

¹⁸ Warburton has proposed similar tailor-made legislation for charities. This would involve a legislative provision that a "charity corporation" registered with the Charity Commissioners be a body corporate with limited liability. Warburton, “Charity Corporations: The Framework for the Future?”, [1990] *Conv* 95.

to enjoy the benefit of having a separate legal personality, or is the endowment of various legal capacities sufficient to give it an identity independent of its members? The relationship between legal capacity and legal status was raised in the case of *Maclaine Watson & Co. v Department of Trade and Industry*.¹⁹ The International Tin Council was granted by the International Tin Council (Immunity and Privileges) Order 1972 the “legal capacities of a body corporate”, although it was not made a body corporate. The question was whether this gave the ITC a separate legal existence. In the House of Lords Lord Oliver referred to the judgment of the trial judge, Millett J, who held that as the legal capacities bestowed were the most extensive powers conferable on an artificial entity the ITC had a separate legal existence from its members and could acquire its own rights and duties independent of its members. On the specific point referred to Millett J held that:

“the separate legal existence of an artificial person is simply the sum or consequence of its characteristics or attributes, and is seen in terms of its capacity to acquire legal rights and duties of its own. In my judgment, the dichotomy between status and capacity is false”.²⁰

This is not to say, however, that all associations or bodies with varying degrees of legal capacity will be accorded a separate legal identity. In *Bosnor v Musicians’ Union*²¹ the House of Lords held that the registered trade union was not granted a separate legal entity distinct from its members as some, but not all, of the characteristics of a separate legal personality had been granted by the Trade Union Act 1871.²² It seems, therefore, to depend on the wording of the legislation. A salient point in the *Maclaine* case was that the capacities were conferred directly on the ITC itself, not on its members or officials. Similarly, in the Australian case of *Chaff and Hay Acquisition Committee v J A Hempill & Sons Pty Ltd*²³ a committee was established by statute, it was not incorporated but was given various legal capacities.²⁴ The legislation importantly contained an express provision excluding the liability of the members. The High Court of Australia held that although the committee was not a corporation it was a legal entity. Millett J. in *Maclaine* thus commented that the creation of a separate legal entity is the consequent characteristics and attributes of a legal person conveyed by statute and “. . . that the capacity to acquire its own legal rights and duties, distinct from those of its members, is sufficient”.²⁵

It seems, therefore, that a comparable stance could be taken with unincorporated associations. Legislation could be enacted giving such associations sufficient legal personality enabling them to incur liabilities on their own account which are not the liabilities of their members. Latham CJ

¹⁹ [1989] 3 All ER 523.

²⁰ [1987] BCLC 707 at 712.

²¹ [1956] AC 104.

²² The union could, however, be sued in its registered name and any judgment obtained could only be enforced against the property of the union.

²³ (1947) 74 CLR 375.

²⁴ It could acquire property and hold it in its collective name, dispose of that property and sue and be sued in its collective name.

²⁵ [1987] BCLC 707 at 712.

opined in *Chaff and Hay Acquisition Committee v J A Hempill & Sons Pty Ltd*²⁶ that:

“A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation”.²⁷

A similar structure has been introduced for trade unions. While the trade union is precluded from being a body corporate under the Companies Act 1985 it has been given a quasi-corporate status by the Trade Union and Labour Relations (Consolidation) Act 1992. In the case of *National Union of General and Municipal Workers v Gillian*²⁸ Uthwatt J in the Court of Appeal thought that trade unions had been given some sort of legal entity which had an existence separate from their members. His Lordship defined it as a ‘near-corporation’. In some circumstances, therefore, an unincorporated entity may have sufficient legal capacity to sue and be sued in its own name. As statute has conferred on trade unions many of the benefits of incorporation, a similar result could be reached with other unincorporated associations.²⁹

INCORPORATED ASSOCIATIONS

Purpose of the association

There are various considerations to be addressed when deciding the detail of the legislation.³⁰ It has been mentioned that the objectives of any association

²⁶ *Supra*, n 23.

²⁷ *Ibid*, at 385.

²⁸ [1946] KB 81.

²⁹ Section 10 of the Trade Union and Labour Relations (Consolidation) Act 1992 bestows on trade unions the capacity, among other things, to make contracts on their own behalf and to sue and be sued in their own names. This means that a judgment is enforceable against the union and its property and not against the property of its members. A trade union, however, is fully liable in tort except where it acts in contemplation or furtherance of a trade dispute. Section 22 of the Trade Union and Labour Relations (Consolidation) Act 1992, however, sets out a maximum level of damages which can be awarded commensurate with the size of union membership, for example, £10,000 where the union has fewer than 5,000 members; £50,000 where it has between 5,000 and 25,000; and £125,000 where it has between 25,000 and 100,000 members.

³⁰ Warburton’s proposals for the ‘charity corporation’ are interesting. It was suggested that the main powers, duties and liabilities of the corporation be laid out in statute while the bulk of the administrative rules be determined by subordinate legislation and documents issued by the Charity Commissioners. Warburton proposes that those responsible for the operation of the new legal structure be called stewards and that their duties and liabilities be laid down in statute. Similarly, the rights and duties of the members should be laid down, including the power to elect and remove stewards, and to avoid any dispute it should be clearly stated that a member of the ‘charity corporation’ is not liable for the debts of the corporation or to contribute to its assets. Warburton suggests that it would be beneficial to set out in a Schedule to the legislation a list of matters which must be included in the constitution of a charity corporation including the conduct and procedure of general meetings, the election, authority and proceedings of the stewards’ committee, the keeping of financial records and indemnities for

qualifying for inclusion under the legislation must be non-profit. One reason for this is to preclude businesses from coming under the ambit of the legislation to avail of any legislative relaxations. The proposed format differs from the general premise of the Companies (Northern Ireland) Order 1986 which has to balance the needs of creditors, shareholders and managers in a commercial context. One of the main considerations is that the economic interests of the members are less significant in a non-profit association. Their expectation of the club or association should not involve either a return on their capital investment, or any other type of financial gain. Perhaps, therefore, the test to be used in deciding what qualifies an association as non-profit, is whether any profits made are to be distributed to the members? The distribution of profits during the lifetime of the association should be expressly prohibited in the legislation and on the association's dissolution provision should be made allowing any accumulated profits to be distributed to existing members, subject to any agreement the members may make to the contrary.

Useful guidance can be obtained from Australia where every State has an Associations Incorporation Act providing for the incorporation of non-profit making organisations.³¹ The Associations Incorporation Act 1984 (New South Wales), for example, provides that an association eligible for incorporation under the Act includes a society, club, institution or other body provided that it has not less than five members. Section 7 of this Act makes it clear, however, that an association is not eligible for incorporation if it is carried on, *inter alia*, for the object of trading or securing pecuniary gain for its members or has a capital divided into shares or stock held by its members.³²

stewards. This is regarded as an advantage as “. . . no organisation would be capable of becoming a charity corporation unless it possessed a constitution with sufficient rules to run the charity effectively”. See Warburton, “Charity Corporations: The Framework for the Future?”, [1990] *Conv* 95.

³¹ Associations Incorporation Act 1984 (New South Wales); Associations Incorporation Act 1991 (Australian Capital Territory) as amended by the Associations Incorporation (Amendment) Act 1994; Associations Incorporation Act 1996 (Northern Territory of Australia); Associations Incorporation Act 1981 (Queensland); Associations Incorporation Act 1985 (South Australia); Associations Incorporation Act 1981 (Victoria) as amended by the Associations Incorporation (Amendment) Act 1997; Associations Incorporation Act 1987 (Western Australia); Associations Incorporation Act 1964 (Tasmania). Fletcher states that the purpose of the legislation is to provide for an incorporated alternative to the unincorporated association as an escape from “the dilemma of the unincorporated association”. Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) at p 354.

³² Section 7 also provides that an association which is a company within the meaning of Corporations Law, other than a company limited by guarantee, is not eligible for incorporation. This is in line with the earlier point that it is necessary to preclude profit-making businesses who would ordinarily opt for incorporation as a company limited by shares from coming under the ambit of this new legislative scheme. Indeed, all the Australian models have a prerequisite of a non-profit generating objective. Fletcher states that this is to ensure that “. . . the benefits of the legislation are not conferred on associations formed with a primary purpose of carrying on trading functions and all [statutes] prohibit the incorporation of associations formed for making pecuniary profits or gains for their members.” See

Size of the association

The automatic conferment of separate legal personality means that the legislation would have to be designed to encompass a diverse grouping of associations, both large and small. It has to be decided, therefore, whether legal treatment should be dependent on the size and resources of the association? However, what does size mean in this context? It could be interpreted to mean, *inter alia*, the number of members, the capital resources of the association or the value of the association's premises. Ideally, however, the present informality should be maintained as far as possible to ease the day to day operation of the association and flexibility in relation to internal matters. Indeed, Fletcher states that in Australia the law on incorporated associations has been

“ . . . drafted with a view to providing [incorporation] at the least possible cost, in time and effort, and with minimal interference in association affairs consistent with regard for the public interest in an officially registered organisation”.³³

The proposed legislation should, therefore, balance the need for regulation with the desire to maintain the associations' autonomy as far as possible. Indeed, the purpose is not to impose onerous administrative and financial burdens on such associations to make it impractical for smaller organisations. From this perspective the size of the association need not be a relevant factor when deciding the detail of the legislation.

Interests of creditors and the position of managers of the association

The fact that the legislation would deal with non-profit bodies does not mean that the interests of creditors be overlooked. Comparable with the Companies (Northern Ireland) Order 1986 an element of transparency is necessary as the interests of the creditor still has to be safeguarded bearing in mind that the liability of the members would be limited. For this reason the filing of documents, articles of association and financial accounts with a public registrar would still be a good idea.³⁴ It seems that a balance has to be struck between safeguarding the interests of creditors and keeping the administrative burden and cost to a minimum.

Another point worth considering is the position of the managers of the incorporated association. Although the association would have a separate legal identity it would be necessary to have a human element within the body to make decisions and carry out the day-to-day management. This function is currently carried out by the committee of an association and it is submitted

Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 223.

³³ *Ibid*, at 354.

³⁴ In New South Wales, for example, the committee of the association must prepare an annual financial statement which gives a true and fair view of, *inter alia*, the income and expenditure, assets and liabilities and mortgages and charges of the association during its last financial year. The statement must be approved by the general meeting of the members before being filed with the Registrar: Associations Incorporation Act 1984 (New South Wales) ss 26(6) and 27(1).

that the new structure should not differ radically from this, whether the management body be called directors, officials or something different.³⁵ There is the potential, at the minute, for a committeeman to abuse his position and this would be no different in the new structure. However, counter measures could be built in to the new legislation to try to prevent this bearing in mind that any duties and obligations imposed on the managers should not be so onerous as to discourage members from undertaking this role. The position of directors in a limited company and managers in this context are not really comparable. Neither is the relationship between directors and shareholders on the one hand and managers and the general body of members on the other. Directors in a profit-making enterprise are concerned with making a profit for the shareholders, but are in the position for their own financial gain as well. For this reason, it could be argued that there is a greater potential for a conflict of interest to arise. Members of non-profit associations, however, do not have comparable economic objectives and do not need the same level of protection.

Any formal regulation, however, must, to a certain extent, protect creditors and ensure that the managers/directors do not abuse the power which is bestowed on them. As regards the latter consideration, the rights and duties of the members should be clearly laid out in the legislation³⁶ and should include the power to elect and remove the managers/directors.³⁷ Furthermore, it should be remembered that in such associations it is likely that there will be a greater turnover of managers anyway. One way of keeping the managers in check would be to state in the association's constitution the objective(s) of the association and a requirement that the managers act only in fulfilment of this.³⁸ However, to ensure continued

³⁵ Section 29(1) of the Associations Incorporation Act 1985 (South Australia) provides that “. . . the persons who have under the rules of an incorporated association power to administer the affairs of the association constitute, for the purposes of this Act, the committee of the association”. Fletcher emphasis in this context that the main purpose of the Australian legislation governing incorporated associations is to “. . . resolve problems arising from lack of legal status not to regulate association affairs. Thus. . . the legislation, in most jurisdictions, does little to impose a management structure, set standards for managers or dictate managerial duties to associations”. Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 288.

³⁶ At present the rights of members depend on the rules of the association and as the rules vary from association to association so the rights of members vary. A legislative scheme which provides for the rights and duties of the members would, therefore, ensure a measure of consistency.

³⁷ Warburton makes the point that at present in relation to unincorporated associations there is no statutory source of rules to fall back on thus rendering it difficult to control any abuse by the committee. For example, members have no automatic power of removal unless it is conferred by the rules of the association. See Warburton, “Charity Corporations: The Framework for the Future?”, [1990] *Conv*, 95 at 99. Tailor-made legislation, however, could remedy this by giving the members the power to remove any committeeman or officer of the club by a simple majority.

³⁸ Indeed, the legislation should require incorporated associations to state their objects either in their rules or a separate statement of objects. For example, section 19 of the Associations Incorporation Act 1984 (New South Wales) provides that an application for incorporation under the Act must include a copy of

protection to creditors, acting outside the stated purpose would not render transactions invalid, but would initiate internal procedures against the manager in question.³⁹ In this way it is hoped that managers would observe the limitations on their powers.⁴⁰ Another useful option which could be included in the legislation is a provision requiring those responsible for the association's accounts to lay them before the general body of members.⁴¹ However, in keeping with the desired autonomy of the association, this requirement could be dispensed with by a majority of members.

As regards the powers of the association the legislation should specify that the powers of the incorporated association, subject to the legislation and the association's rules, should include the power to acquire, hold, deal with and dispose of any real or personal property; open and operate bank accounts; invest its money upon such terms and conditions as the association thinks fit; borrow money upon such terms and conditions as the association thinks fit; give such security for the discharge of liabilities incurred by the association

the statement of objects which has been approved by the association. Section 23A of the Associations Incorporation Act 1985 (South Australia) provides that the objects of the association must be stated in the association's rules.

³⁹ This involves a comparable limitation on the *ultra vires* rule as applied to corporations under section 35 of the Companies Act 1985. See, for example, section 18 of the Associations Incorporation Act 1984 (New South Wales); section 17 of the Associations Incorporation Act 1981 (Victoria) as amended by the Associations Incorporation (Amendment) Act 1997; section 26 Associations Incorporation Act 1981 (Queensland) and section 15 of the Associations Incorporation Act 1987 (Western Australia). The latter provides that "a contract made with an incorporated association is not invalid by reason of any deficiency in the legal capacity of the association to enter into, or carry out, the contract unless the person contracting with the association has actual notice of the deficiency". Section 15(3) provides the qualification that this does not "... prejudice an action by a member of an incorporated association to restrain the association from entering into a transaction that lies beyond the powers conferred on the association by this Act or its rules".

⁴⁰ An interesting precedent is set out in the report by the Alberta Institute of Law Research and Reform, *Proposals for a new Alberta Incorporated Associations Act*, Report No 49, March 1987. The report outlined the proposed duties on directors of an incorporated non-profit making association as the duty to act honestly and in good faith with a view to the best interests of the corporation and the duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The report concluded that it was reasonable to impose these duties on volunteer directors as, without this, the common law may impose an unduly high standard of care on directors with specific qualifications. Also, the inclusion of the term 'comparable circumstances' dictates the standard of care to be applied, allowing the court to focus on the voluntary nature of the association. This report resulted in Bill 54 (Volunteer Incorporations Act) introduced into the Alberta legislature on 15 June, 1987. However, the legislation was not passed and the provincial Alberta Societies Act 1980 still applies to non-profit associations wishing to incorporate. Alternatively, a non-profit organisation can choose to incorporate federally under the Canada Corporations Act 1970, part II of which embraces organisations "without share capital, for the purpose of carrying on, without pecuniary gain to its members" and with "a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting" purpose.

⁴¹ *Supra*, n 34.

as the association thinks fit; appoint agents to transact any business of the association on its behalf; enter into any contracts it thinks necessary or desirable and to do all such other things as are incidental or conducive to the attainment of the purposes and the exercise of the powers of the incorporated association.⁴²

Financial cost

The financial cost involved in the new legislative scheme should be minimal. It would be advisable for the association to obtain insurance for the managers covering them against personal liability and insurance for the association to cover claims by members, who would now be able to sue the association itself. When assessing whether the insurance costs are too onerous for such associations it should be remembered that addressing the problem at hand, in whatever way, will invariably involve some sort of financial cost. If, without incorporation, the liability of the committee is extended, liability insurance would also be advisable. Furthermore, although the insurance purchased for the incorporated association may involve an increase in membership subscriptions, this will be spread between all the members. It could be argued that associations with a smaller number of members could not afford such an increase. However, if one considers the insurance purchased to cover the cost of potential liability to members this may not involve a huge increase for associations with a smaller membership base as the increased cost may be commensurate with the size of the membership.⁴³

If the association is given a separate legal personality and can be sued by members and visitors alike the obvious question is whether the incorporated body can either limit or exclude liability under the Unfair Contract Terms Act 1977. This raises important contractual issues which will be discussed in the following section.

CAN LIABILITY BE LIMITED OR EXCLUDED?

The question of whether the proposed incorporated association could limit or exclude liability depends on the application of the Unfair Contract Terms Act 1977 which prohibits businesses from excluding liability for death or personal injury,⁴⁴ and from excluding liability for other damage beyond a point which is reasonable. Non-business entities, however, are not bound by the restraints of the 1977 Act. The question, therefore, depends on the interpretation of 'business'. There is little guidance as to what constitutes a 'business' under the Unfair Contract Terms Act, section 14 of which defines

⁴² See, for example, section 25 of the Associations Incorporation Act 1985 (South Australia); section 16 of the Associations Incorporation Act 1981 (Victoria); section 17 of the Associations Incorporation Act 1984 (New South Wales); section 25 of the Associations Incorporation Act 1981 (Queensland) and section 13 of the Associations Incorporation Act 1987 (Western Australia).

⁴³ Fletcher makes the point that an incorporated association is liable in the same way as any other property owner, operator of vehicles or employer in tort but "because . . . the association and not the changing body of committee or ordinary members is the liability bearer, it should be in a better position than an unincorporated association to insure against such risks." Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 297.

⁴⁴ Section 2(1).

a business as including “a profession and the activities of any Government department or local or public authority”. Neither does case law give any guidance regarding associations, clubs and societies in this context.

Section 1(3) of the Unfair Contract Terms Act 1977⁴⁵ excludes from “business liability” a duty regarding the dangerous state of premises towards a person gaining access for recreational or educational purposes, unless the granting of access falls within the business purposes of the occupier. This is an unhelpful and poorly drafted provision as it excludes certain activities from the definition of business unless they are carried out for business purposes, while no further guidance or clarification is given regarding the concept of business. *Prima facie*, therefore, recreational or educational use of property will be outside the ambit of the Unfair Contract Terms Act, but not necessarily so. It seems therefore, that when dealing with non-commercial access the question of the ‘business’ of the occupier still has to be addressed.

Non-profit incorporated associations, on first view, would appear to be able to exclude liability as the requirement of a non-profit objective, by implication, renders the association a non-business operation. However, this is not necessarily the case as it is impossible to say that every non-profit operation will be non-commercial. An interesting case is *Inland Revenue Commissioners v Eccentric Club*⁴⁶ where the question was whether a company, which was incorporated to carry on a social club, was carrying on any trade or business. The club argued that, although it was a company, it did not operate on commercial principles as its objects were to promote social intercourse and not the acquisition of financial gain. It was held that the company was not carrying on a trade, business or anything of a similar nature and, therefore, was not liable to corporation profits tax. Pollock MR recognised that the dilemma arose as to whether:

“... the form of the Eccentric club alone is to be looked at, or whether one may test the question whether the company is carrying on business, by looking at the nature and purpose and substance of the transaction by which the members of the club are aggregated in the company”.⁴⁷

His Lordship concluded that the company was only a structure for carrying on a purely non-commercial social club.

The question, therefore, to be addressed is whether an association, which is regarded as non-profit for the purposes of certain legislation, can be classed as “business” under the ambit of the Unfair Contract Terms Act 1977?⁴⁸

⁴⁵ Amended by article 4 of the Occupiers’ Liability (Northern Ireland) Order 1987.

⁴⁶ [1924] 1 KB 390

⁴⁷ *Ibid.*, at 415.

⁴⁸ A preliminary consideration is the fact that if an association is found to be running a business for the acquisition of a gain and has more than twenty members, incorporation under the Companies Act 1985 will be necessitated. Section 716 of the Companies Act 1985 states that: “No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by a company, association or partnership, or by its individual members, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of

While the association would need a non-profit generating objective, for the purposes of the proposed legislation, this could be satisfied by ensuring that the profits are not distributed to the members. Nonetheless, incidental transactions could be interpreted as business transactions.⁴⁹ This can be seen in a different context in the case of *The Religious Tract and Book Society of Scotland v Forbes*⁵⁰ where a society which was founded for the diffusion of religious literature sold Bibles at depositories in Edinburgh and Belfast and sent out colporteurs to sell Bibles and act as cottage missionaries. While the shops resulted in a profit, the colportage was carried on at a loss. The net result of the society's operation was a loss and the society argued that the operation should be construed as a whole, any loss made in one department being deducted from any profit made in another before an income tax assessment was made. The Lord President conceded that the overall object of the society was the diffusion of religious literature and not that of making profit. However, he added that:

“Incidental to that large and beneficial purpose they engage in trade, and this assessment proceeds upon the very intelligible theory that the business of bookselling cannot be taxable or not taxable according to the motive of the bookseller”.⁵¹

It was held, therefore, that the society was carrying on the trade of bookselling by operating two shops. The decision of whether the loss of the colportage could legitimately be deducted from the profit of the society's other operations depended on whether the former was part of this business. It was held that while the shops were commercial operations conducted on strictly commercial principles, the colportage was not. The colportage was not carried on for commercial purposes, it could not have made a profit and was preserved to appeal to the religious public to obtain subscriptions. Neither was it conducted on commercial principles as the sale of the society's goods was not the main objective of what was essentially a charitable mission administering religious advice. The Lord President went on to say that:

Parliament, or of letters patent”. However, this question arose in *Smith v Anderson* (1880) 15 Ch D 247. Brett LJ laid particular emphasis on the words “carrying on any business”, and held that if the acquisition of gain is a subsidiary aspect of an association or partnership, it will be outside the ambit of the legislation. A related question arose *In re St. James's Club* (1852) 2 De GM & G 383 where Lord St. Leonards LC held that a members' social club was not an association for the purposes of the Joint Stock Companies Winding Up Act 1848 as amended by the Joint Stock Companies Winding Up Act 1849. His Lordship continued: “. . . I cannot hold it to apply to every association or company. If I were to do so, I might be called upon to carry the application much lower. . . . A cricket club, an archery society, or a charitable society, would come under the operation of the Act. . . . If such had been the intention of the legislature, why should not the word ‘club’ have been expressly mentioned?”

⁴⁹ In a similar vein the report by the Alberta Institute of Law Research and Reform, *Proposals for a new Alberta Incorporated Associations Act*, Report No 49, March 1987 recommended that an incorporated association should not be prohibited from running a business for profit as long as the profits were not distributed to the members.

⁵⁰ (1896) 3 Tax Cases 415.

⁵¹ *Ibid.*, at 418.

“ . . . while I completely assent to the view that the establishment and conduct of the shops and the establishment and conduct of the colportage all rest upon the same ultimate motive, yet at the same time the two operations seem to be essentially distinguished”.⁵²

Using a similar principle, it could be argued that business transactions may be incidental to the non-commercial objective of the association. On the rationale of the *Forbes* case it may not matter that any profits derived from ancillary commercial operations would ultimately be used for the furtherance of the non-profit purpose of the association. Lord Adam said in *Forbes* that:

“ if a party takes to selling books it does not matter. . . what his object is in doing so, whether it is to put profit into his own pocket, or, having made profit, to expend that in charity or donation”.⁵³

Two relevant points arise from this case. Firstly, an association’s activities can be severed for some purposes and part of the operation can be construed as business or commercial, while the other is not. Secondly, the fact that any profits derived from the commercial aspect of the enterprise are ultimately bound for a non-commercial purpose does not alter this fact. It seems, therefore, that when deciding whether an association is carrying on a “business”, the substance of each separate operation undertaken must be considered and the ultimate destination of any profits made is not a conclusive factor. This makes it possible to distinguish between a club’s various different activities. In this respect a distinction may be made between the club’s inward and outward looking activities to render transactions between the members *inter se* non-business activities and those with the public as business. Such demarcation between an association’s activities can be seen in the case of *Carlisle and Silloth Golf Club v Smith*.⁵⁴ In this case the members of the club paid an annual subscription to use the facilities of the club and its premises. On top of this visitors were allowed to enjoy the same facilities on the payment of green fees. The question was whether the club was carrying on “an adventure or concern in the nature of trade”, the annual profits or gains of which would be taxable. It was held that the separation of the club’s activities rendered the acquisition of green fees from non-members liable to tax. An argument against assessing the club for income tax was the fact that the club’s expenses each year exceeded the amount received from green fees from visitors. This was held to be irrelevant, however, as the fact that the club obtained external revenue rendered it liable to tax.⁵⁵ The relevance of this is that the activities of the club were severable, Cozens-Hardy M R putting it as follows:

⁵² *Ibid*, at 419. See also *Grove v Young Men’s Christian Association* (1903) 4 Tax Cases 613.

⁵³ *Ibid*, at 419.

⁵⁴ [1913] 3 KB 75.

⁵⁵ Buckley LJ quoted from Lord Macnaghten in *Tennant v Smith* [1892] A C 164, “a person is chargeable to income tax not on what he saves his pocket but on what goes into his pocket”.

“It seems to me that there is a real difference between moneys received from members and applied for the benefit of members and moneys received by the club from strangers”.⁵⁶

In the context of whether a club or association is operating a “business” for the purposes of the Unfair Contract Terms Act 1977, Josling is of the opinion that “business” has a commercial connotation and, therefore, transactions with members are outside the ambit of the Act.⁵⁷ Indeed, a similar principle is applied to the assessment of corporation tax. The principle of mutual trading means that an association will be exempt from tax on any surplus made on the provision of services for the exclusive benefit of the members.⁵⁸

In conclusion, therefore, whether an incorporated association will be able to exclude or limit liability will depend on the facts of each case, the actual substance of the transactions involved and the regularity of those transactions.⁵⁹ As there is no direct judicial guidance in this context one can speculate about the possible approaches which may be taken. If one applies the severance argument in *Carlisle* the finding of a business operation may be likely as regards non-members if the services and amenities of the club are routinely utilised by such persons for payment.⁶⁰ This approach may also correlate the finding of a business operation with the size of the association as larger associations may be more likely to open their facilities to non-members. However, it may be possible for the association to avoid this, and the restrictions of the Unfair Contract Terms Act, by making non-members temporary members for a limited period.⁶¹ This was suggested by Kennedy

⁵⁶ *Supra*, n 54 at p 80.

⁵⁷ Josling, *Law of Clubs* (6th edition, 1987) at p 98.

⁵⁸ The definition of business for VAT purposes, however, does not include the exemption for mutual trading. Section 47(2)(a) of the VAT Act 1987 defines ‘business’ as the provision by a club, association or organisation, for a subscription or other consideration, of the facilities or advantages available to its members. There are, however, other examples of a club’s transactions with its members being outside the scope of a business. For example, it is a long established principle that the provision of alcohol to club members for payment is not a sale, *Graff v Evans* (1882) 8 QBD 373. (Such a club will still have to comply with licensing laws). See also *IR C v Eccentric Club* [1924] 1 K B 390.

⁵⁹ The Court of Appeal in the case of *R and B Customs Brokers Ltd v United Dominions Trust Ltd*. [1988] 1 All ER 847 held that a transaction would be “in the course of a business” under section 12 of the Unfair Contract Terms Act 1977 if it was integral to the nature of the business or there was sufficient regularity of transactions.

⁶⁰ The relevance of non-member use is backed up if one considers that the company in *IR C v Eccentric Club* was found not to be running a business. Interestingly on the facts of the case there were no receipts from persons who were not club members. Warrington LJ made reference to this acknowledging that “no payments for provisions supplied in the club are taken from any person not a member”. *IR C v Eccentric Club* [1924] 1 K B 390 at 421.

⁶¹ Josling says that “it may sometimes be convenient to make the casual user of the club facilities a temporary or associate member. In such a case, the Act will not apply. But membership must be genuine and not a cloak”. Josling, *Law of Clubs* (6th edition, 1987) p 99. Warburton also makes the point that it may be possible “to avoid tax by creating temporary members but all the members should have the same rights and benefits and temporary membership should not be instantaneous”. Warburton, *Unincorporated Associations* (2nd edition, 1992) p 60.

LJ in *Carlisle and Silloth Golf Club v Smith*.⁶² A distinction was made between the case where the club's facilities were open to the paying public and the case where a club gives access to people who are introduced by a member or are approved by the club committee who, upon payment, are entitled to use the club's facilities for a specified period. His Lordship opined that

“. . . I am inclined to think that the person to whom such privileges are accorded might fairly be regarded as becoming, for the time being, members of the club, subscribing to its funds”.⁶³

As regards liability to members the upshot is that a member will be able to sue the association unless the club has taken steps to limit or exclude liability unrestrained by the Unfair Contract Terms Act 1977. In such a case the only way in which an injured member could obtain legal redress would be to attempt to sue the committee or individual officers of the club.⁶⁴

An alternative approach may be to consider whether the association “*as a separate body*” operates on commercial principles and for commercial purposes? In essence, this raises the issue of whether the association, as a separate body, constitutes a proprietary club⁶⁵ operating the particular organisation? On the authority of *Inland Revenue Commissioners v*

⁶² *Supra*, n 54 p 82.

⁶³ *Ibid*.

⁶⁴ On the principle of *New Zealand Shipping Co. Ltd. v A M Satterthwaite & Co. Ltd. (The Eurymedon)* [1975] 1 All ER 1015, however, it may be possible for the club's exclusion of liability to apply to the committee and individual officers of the club. In this case the consignor loaded goods on a ship for carriage to the plaintiff consignee in New Zealand. The carrier's agent issued a bill of lading containing an exemption clause which purported to promise the defendant stevedores, who were employed by the carriers to unload the cargo in New Zealand, the benefit of various exemptions and limitations of liability. After the plaintiff became the holder of the bill of lading the cargo was damaged as a result of the negligence of the stevedores. The question was whether the stevedores could rely on the exemption clause to avoid liability. The plaintiff claimed that this was not possible as the defendant was not a party to the contract. It was held by the Privy Council that the exemption clause in the contract could be relied on by the defendant. Lord Wilberforce held that the terms of the bill of lading constituted a unilateral offer by the consignor to the stevedores, made through the carriers as agent, that if the stevedores unloaded the goods they should have the benefit of the exemption clause.

⁶⁵ Josling defines a proprietary club as a business in which an individual, individuals, partnership or company provides the amenities and facilities of a club for use by the members who, in reality, are customers. See Josling, *Law of Clubs* (6th edition, 1987) p 11. The essential characteristic of this type of club is that it is owned by the proprietor who carries on the business as a profit-making concern. The main difference, therefore, between a members' club and a proprietary club, according to Field, is the ownership of assets: “. . . if assets are held in private hands other than the hands of the members themselves the club is a proprietary one in the eyes of the law.” Field, *Practical Club Law*, (1979) p 4. In *I R C v Eccentric Club* [1924] 1 K B 390 at 421 Warrington LJ said that “The club proprietor, whether an individual or a company, carries on a business with a view to profit as an ordinary commercial concern”.

*Eccentric Club*⁶⁶, however, it seems that the substance of the association remains the determining factor. In this case it was held that the company framework was nothing more than a convenient means for the members to conduct a social club, “*the objects of which are immune from every taint of commerciality*”.⁶⁷ However, once again in this determination the fact that the club’s transactions were between members and not outsiders was significant. Sargent LJ supported the contention that the

“ . . . limitation of activities to a system of self-supply altogether differentiates their enterprise from that of an individual or company carrying on an ordinary proprietary club with the object of making a profit out of the supply of club amenities . . . ”.⁶⁸

CONCLUSION

In conclusion, the present position that an unincorporated association does not possess a legal status independent of its members causes obvious operational complexity when it comes to making contracts, employing staff and holding property. Warburton, for example, draws attention to the fact that in unincorporated associations:

“The employment of staff and activities requiring contracts with non-members are . . . hampered by the lack of legal status and can carry unexpected personal risk for members of the committee”.⁶⁹

One further problem arising from such associations’ lack of legal status is that a member injured on the association’s premises, in the absence of special circumstances, is unable to obtain legal redress from the association. This position is arbitrary and unjustifiable rendering it impossible to state clearly to whom a duty of care will be owed, and by whom. The possible irony was evident to MacDermott LJ who in *Kinner v Trustees of West Belfast Pigeon Club*⁷⁰ said that it would be totally unreal to suggest that an injured barman who was not a member could recover against the club but a barman-member cannot. It is equally ironic that an injured trespasser is in a better position than an injured member.⁷¹ Legal intervention in this area is necessary to

⁶⁶ *Supra*, n 46.

⁶⁷ *Ibid*, at 421 *per* Warrington LJ

⁶⁸ *Ibid*, at 430.

⁶⁹ Warburton, “Charity Corporations: The Framework for the Future?”, [1990] *Conv* 95 at 99.

⁷⁰ [1998] 7 *BNIL* 91. In this case the plaintiff who was injured on club premises was both a member and an employee of the club. He alleged that he was injured while carrying out his duties as a barman. The defendant denied liability and alleged that the plaintiff’s action could not be maintained due to his membership of the club. The Court of Appeal, however, disagreed holding that his membership was not an immunity against actions. See Glennon, “Extending the Role of the Committee in an Unincorporated Association – A Separate Duty of Care to Members and Visitors?” (1999) 50(4) *NILQ* pp 515-527 for a discussion of this case.

⁷¹ The position of an occupier in relation to trespassers is found in the Occupiers’ Liability (Northern Ireland) Order 1987. This provides that an occupier owes a duty of care to any person in respect of a risk against which he may reasonably be

avoid straining “. . . *reality for the sake of inadequate theory*”.⁷² The most feasible solution would be to introduce legislation giving unincorporated associations a separate legal identity. The practical benefits of this include, *inter alia*, recognition of the association as a separate legal entity with perpetual succession, the association being able to hold its own property and to sue and be sued in its own name. In this vein Fletcher states that:

“the existence of a corporate liability bearer should resolve procedural difficulties and enable substantive issues to be litigated directly”.⁷³

In relation to the association’s liability the application of the Unfair Contract Terms Act would be dependent on the nature of the association in question and the substance of the transactions undertaken by that body. In this way, it could be argued that the application of the ‘business’ test may be a useful regulating tool in deciding which associations should bear the full brunt of liability. The practical result may be that members can only sue the association if it has not taken positive steps to limit or exclude liability. Despite this, a legislative enactment giving associations a separate legal identity would reduce the present complexity involved with such bodies and solve the problem outlined by Lloyd namely that:

“. . . no system of law recognises the corporate character of every group, so that large numbers of associations remain without specific legal personality. Nevertheless grounds of expediency and even necessity may oblige the law to concede some degree of legal capacity to these bodies”.⁷⁴

expected to offer that person some protection. The standard required is to take such care as is reasonable in all the circumstances.

⁷² Laski, “*The Personality of Associations*”, (1915-16) 29 Harv L Rev 404 at 420.

⁷³ Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 297.

⁷⁴ Lloyd, *Law of Unincorporated Associations*, (1938) p 3.

PERSONAL PENSIONS AND THE FINANCIAL SERVICES AUTHORITY: NEW CHAPTER OR SAME OLD STORY?

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INTRODUCTION

Despite origins embedded within Thatcherite anti-welfarist policies and ideologies of individual choice, the personal pension (PP) scheme appears to have become a permanent feature of the United Kingdom's pensions landscape.¹ However, the revelation that large numbers of such schemes were 'mis-sold' to persons for whom they were not the most suitable option has prompted demands for "better regulation to restore confidence in the system".² Against such a backdrop, the Labour Government has embarked upon a radical overhaul of the entire structure of financial services regulation, including that of PPs. This article seeks to assess the suitability of the new regulatory regime in the PP context, in view of the particular qualities that serve to distinguish this product sharply from others in the financial services marketplace.

PENSIONS MIS-SELLING: A BRIEF BACKGROUND

PPs are regulated as emanations of the financial services industry. As such, under the Financial Services Act 1986, they were subject to the powers of the Securities and Investments Board (SIB) and the relevant self-regulatory organisations (SROs). It is noteworthy that at no time was any single SRO responsible for the regulation of PPs *per se*; instead, tasks were divided along functional lines. When evidence of mis-selling began to emerge, the key SROs were Fimbra, which regulated Independent Financial Advisers (IFAs), and Lautro, responsible for regulating life offices. Between 1990 and 1992, Lautro and Fimbra began to receive information that suggested low levels of compliance with regulatory standards. In July 1992, the SROs therefore issued more particular guidance as to what was required,³ and the following year SIB commissioned a report by KPMG Peat Marwick to investigate compliance with these new guidelines.

The report revealed that those who had been in occupational pension (OP) schemes were being advised to transfer to PPs, even though these were less suitable because (for example) they did not receive employer contributions and did not guarantee a salary-related level of income on retirement. Similarly, those who could have joined an occupational scheme did not do

¹ Current proposals for pensions reform envisage a growing role for private provision, including PPs: see DSS, *A new contract for welfare: partnership in pensions* (1998; Cm 4179): *passim*.

² *Ibid.*, Summary, para 34.

³ See now SIB, *Pension Transfers and Opt-Outs – Further Safeguards for Future Business Trends* (March 1994); *Pension Transfers and Opt-Outs: Model Guidance* (May 1994) *etc.*

so, on advice, and instead bought PPs. The report referred to “widespread regulatory compliance failure”⁴; the cost to providers and financial advisers of making good the mistakes made has since been estimated variously at £4 billion to £11 billion.⁵

The reasons for such large-scale breach have been analysed fully elsewhere.⁶ It is submitted here that pension provision is a unique activity and that the PP is unlike any other form of financial service. Regulation must identify and manage the particular risks that continue to arise: the failure of the previous regime to do so may have contributed to its failure. The prospects for success of the new regulator and our proposals for the future will be considered below. First, however, the uniqueness of pension provision and PPs as manifestations of such provision will be explored.

THE DISTINCTIVE QUALITIES OF PERSONAL PENSIONS

1. Social risk and pension provision

In many senses, pension schemes are merely savings schemes – a type of financial service. Contributing to them or providing them is therefore an unremarkable economic activity. As an analysis of pension provision, however, this approach is unsatisfactory because it does not take account of the distinctive factors at issue. Pension provision caters for the risk of reaching old age without income. Unlike other forms of social risk, where the degree of risk is more uncertain, most people are more likely than not to grow old. In addition, the social convention of retirement from the job market, which is now so well-established as to be a norm, means that most will have to deal with the issue of how to support themselves during retirement. Although some will be well placed to do this, the risk of a “penurious old age”⁷ is much more widespread than other similar social risks. Because it is so universal, the costs of dealing with it are huge: in 1990, the combined expenditure on public and private pension schemes in the United Kingdom was approximately 11% of GDP.⁸ Government literally cannot afford not to deal with this form of risk, but its current income is not sufficient to underwrite it.

There is also another factor. It is well documented that the population is ageing, so that dependency ratios are falling: in 1953, there were 4.6 people of working age for every pensioner, which compares with 3.4 today and an

⁴ KPMG Report (1993), p 16.

⁵ See *Occupational Pensions* (March 1998), p 3 and Treasury Select Committee, Ninth Report, *The Mis-Selling of Personal Pensions* HC 712-I (1997-8), p x. There are no figures available enabling an estimate to be made of the numbers of PPs mis-sold in Northern Ireland: see 299 HC Deb 160 (written answer, 29 July 1997). However, the FSA has indicated its awareness that a problem exists (communication with authors).

⁶ See generally KPMG Report, *op cit* n 4; Black and Nobles, “Personal Pensions Mis-selling: The Causes and Lessons of Regulatory Failure” (1998) 61 *MLR* 789 at 793; and for matters following the pensions review see Treasury Select Committee, *ibid*.

⁷ Baldwin, *The Politics of Social Security* (1980), p 12.

⁸ Barr and Whynes, *Current Issues in the Economics of Welfare* (1993), p 45.

estimated 2.4 by 2040.⁹ It will therefore become increasingly unrealistic to rely on current earners to support all non-earners.¹⁰ Nevertheless, assuming that the current philosophy of welfare survives, those who grow old will still need support. Plans are needed to stave off what could be a major economic problem.

The breadth of the risk faced and its financial consequences are not, however, the only factors that make this a unique issue for social policy. When ideas about social justice gained enough weight to be translated into government policy at the turn of the century, two elements on which the claim of the elderly to state support rested emerged, which made their demands very difficult to resist. Previously, the elderly had been treated as a subset of the poor and therefore subject to the same rules with regard to poor relief as others. However, there was a growing recognition of the destitution suffered by many of the elderly through poverty. Coupled with this was the fact that, unlike many other forms of social need, old age was often accompanied by undoubted desert.¹¹ Although some individuals may have wasted away their lives in ‘feckless poverty’ (as proponents of the Poor Laws may have put it), many more seemed to be suffering poverty despite having worked all their lives. Thus, those claiming relief in old age could point to two justifications: need *and* desert – which otherwise have often been set in opposition to each other.¹² In this respect they were perhaps unique amongst those claiming social support.

Partly because the risks faced are so great and expensive, therefore, and partly because, politically, the twin elements of need and desert are still apparent and powerful¹³, old age, retirement generally is now a distinct

⁹ DSS, *op cit* n 1, ch.1, para 27. Approximately 10 million people currently receive state pensions; by 2030, the number will rise to about 14 million: see Pension Provision Group, *We all need pensions – the prospects for pension provision* (1998), Part 2.

¹⁰ See further Miles and Timmermann, “Risk sharing and transition costs in the reform of pension systems in Europe” (1999) 29 *Economic Policy* 253 at 257. Note, however, that several commentators have cast doubt on the negative impact of the so-called ‘demographic timebomb’: see Vincent, “Who’s Afraid of an Ageing Population?” (1993) 16 *Critical Social Policy* 3 at 23; Hills, *The Future of Welfare: A Guide to the Debate* (1993), pp 12-13; Barr and Whynes *op cit* n 8, p 50 *et seq.*

¹¹ For contemporaneous accounts and acknowledgement of need, as well as attitudes towards ‘desert’, see *eg* Spender, *The State and Pensions in Old Age* (1892), ch.1; and generally Committee on Old-Age Pensions, *Old Age Pensions: A Collection of Short Papers* (1903).

¹² See *eg* Baldwin, *op cit* n 7, p 31 *et seq.*; and generally Miller, *Social Justice* (1976). For the history of the development of old age relief, see *eg* Brown, *Social Security for Retirement* (1990), pp 3-47; and for insurance as a model for welfare provision, see Ogus *et al.*, *The Law of Social Security* (1995), p 25 *et seq.*

¹³ See *eg* Pinker, *Social Work in an Enterprise Society* (1990), p 131, drawing on data from public opinion surveys. He notes the wide support for state health, education and pensions provision as compared with the unemployed; and comments on the implication that the former are ‘deserving’ groups. It is also interesting that the keynote of the Government’s reform for welfare as a whole is that “work is the surest route out of poverty”: see DSS, *New ambitions for our country: a new contract for welfare* (1998; Cm 3805), Summary, para 10, and generally.

socio-political issue, and it has become necessary for government to make some provision for pensions. The cost element involved has meant that the choice of funding method has been an issue since state provision began.¹⁴ One solution is to adopt the 'savings model' of provision, where an individual saves income generated whilst economically active, so as to provide assets on which he can live in retirement. In this way, income can be drawn to support the current retired population "without any impact on the [current] working population"¹⁵. Politically, one of the crucial implications of this is the focus it places on the individual and current earnings, and the consequent non-involvement of the state and society either in provision itself or, in principle, in any failure of the individual's arrangements. Although it may be accepted that a certain level of state welfare provision is unavoidable (most western industrialised states now provide it at some level), if the current workforce is not involved in the support of its predecessors, then responsibility falls on the individual in each workforce to be self-reliant in retirement. This approach assumes that the individual can earn enough during a working life to amass adequate savings for retirement and implies that self-reliance and the effectiveness of the individual to provide for himself are paramount.

This can be contrasted with the so-called 'solidarity model'.¹⁶ As its name suggests, this involves a measure of collective action and responsibility for the welfare of all, born out of a sense of community within society¹⁷, it may be described as the acquisition by the 'retiree' of a claim to output by the next generation of workers.¹⁸ Thus, if individuals fall foul of risk, society has a responsibility to help bear the cost consequences. Typically, social risk has been met through some form of re-distributive insurance¹⁹. This functions by recognising that there are certain risk pools into which more than one person might fall. Given this, the adverse consequences of those risks manifesting themselves can be minimised if all those at risk contribute money to a common fund, from which a cash sum can be paid to those for whom the risk does materialise. Within the private sector, this means "reapportioning the costs of risk and mischance"²⁰ amongst those in the risk pool (rather than, for example, re-distributing wealth *per se*). When social insurance is in question, two extra steps are taken. First, those who are not so clearly within the risk pool may contribute to the costs of insuring all who do fall within it; second,

¹⁴ In 1908. See *eg* Brown, *op cit* n 12, p 3 *et seq.*

¹⁵ Davies, *Better Pensions for All* (1993), p 7; and see further Barr and Whynes, *op cit* n 8, p 48 *et seq.*

¹⁶ Davies, *ibid.*

¹⁷ An example of the adoption of this approach in state policy is contained in *Social Insurance and Allied Services* ('the Beveridge Report', 1942; Cmd. 6404), para 26. In dealing with the eradication of 'Want' which affected *inter alios* the elderly, Beveridge aimed neither to raise living standards, nor to reduce inequality, but to "enhance a sense of collective belonging within society": Langan, *Welfare, Needs, Rights and Risks* (1998), p 8.

¹⁸ Barr and Whynes, *op cit* n 8, p 48.

¹⁹ This satisfies the 'desert' element of the claim to social support. See generally de Vries, "From Insurance State to Welfare State, and Back Again?" (1995) 20 *Geneva Papers on Risk and Insurance* 439.

²⁰ Baldwin, *op cit* n 7, p 1.

the cost of contributing to the fund may be re-apportioned a second time, this time according to ability to pay.

What is at issue here is not the justice or otherwise of the wealth redistribution aspects of social insurance as opposed to its risk re-apportionment. It is simply to identify the characteristics of the vehicle chosen to meet, and defray the consequences of, the particular social risk. The PP appears to be a manifestation of the 'savings model' alone²¹: it is tied specifically to the individual and its effectiveness for retirement provision depends on how much that individual sets aside during a working life. Although the basic state pension would currently provide some back-up cover if the model fails (resulting in inadequate pension provision), this is not linked *per se* to the creation and development of the PP. Hence, within the product itself there is no element of 'solidarity': there is no element of risk-spreading. Additional factors relating to the PP itself are that even if the most appropriate product is sold, investments may still fail, or return otherwise undermined because, say, of unfavourable annuity rates at the point of retirement.²² Since there is no security of return, it is possible for a buyer to draw out less than was paid in, no matter how much that might be.

Once again, the point is not to make a value judgement about the choice of funding method, but rather to analyse the effectiveness of the 'savings model' as a means of achieving the given end: the provision of income upon retirement. The equation of pension provision with finance through the PP has placed it in an environment (financial services) where the social and individual goals of provision may not be met because the means of funding exposes the buyer to unrecognised or unregulated risks. As we have seen, there is no guarantee that the financial mechanism for providing the pension will do so (as there is, for example, in both occupational and state pension schemes)²³. Focusing solely on the capital markets means also that there is

²¹ John Denham MP described these second pensions as "solely dependent on each individual's ability to work and save": speech to Northern Pensions Conference, "A Third Way for Pensions Reform" (10 July 1998). See also Miles and Timmermann, *op cit* n 10 at 254, who observe that the PP is a "pure defined contribution scheme. . . with no redistribution between or within cohorts".

²² Annuities provide income for life in return for the investment of a lump sum. Legally, those retiring with PPs or OPs must buy an annuity by age 75. But annuity yields have dropped dramatically in recent years, with the loss of approximately £5000pa income for every £100,000 invested. Some insurance companies guaranteed annuity rates in the 1970s and 1980s, when it was difficult to imagine that yields would drop so much; the cost to them of meeting these obligations has been estimated at £14 billion (see *The Independent* 3 March 1999, *The Financial Times* 14 August 1999). Although some companies appear to be honouring these promises (see *The Independent* 9 April 1999), the Equitable Life mutual insurance company has recently resisted a legal challenge to its policy to honour its guaranteed rates over only a small proportion (or none) of the fund values it invested on behalf of its members (so disappointing the expectations of some of its members, though in order, it argued, to achieve parity between all classes of member). See *Equitable Life Assurance Society v Hyman*, *The Times* 12 October 1999; and press reports generally.

²³ Davies argues that "half the time people [buying PPs] will end up with a pension that is less than they were led to expect", *op cit* n 15, p 28.

no cover for failure of individual provision, and no recognition of either desert or need.

The nature of the risks accompanying the PP is examined in further detail below. For the present, however, the problem and its repercussions might be expressed as follows. Whilst the origins of the discourse about pension provision may have been in welfare, the admitted practical difficulties of resourcing this specific aspect of welfare have meant that the focus of the debate has long since shifted to means of funding. Given the mechanism chosen, the dominant discourse surrounding the PP has become that of finance/investment.²⁴ The financial services market may generally be an effective means of raising funds: that is not in issue. But within that particular discursive community, certain matters are taken for granted that demand more cautious treatment when pension provision is the only aim of the venture in question. Risk is the prime example. Those 'investing' inevitably face risk; indeed, the argument can be made that finance is *about* risk. The finance/investment discourse therefore allows us to dismiss concerns about the PP and the risks it presents to buyers simply by pointing to the nature of the 'game' involved:

"It is not reasonable to be protected against all possibility of losing money, or of making mistakes. . . finance is necessarily about risk, and therefore to attempt to regulate to remove all risk from the consumer would be a policy of regulating away the very function of finance and financial contracts".²⁵

On this analysis, the most that regulation can achieve is to prevent people being 'made fools of' in financial terms²⁶.

This surely misses a step. Pension provision *per se* is not about risk (except in the sense of managing social risk) and certainly not in the same way that finance/investment is. Salary-related OP schemes are examples of how the risks *of investment* are managed so that they do not fall on the intended 'retiree'; hence such schemes have a maximum chance of achieving their goal.²⁷ Indeed, trustees who invest funds for OP schemes are subject to strict trust law rules regarding attitude to and levels of risk that are acceptable.²⁸ We assume here that the overriding objective is to achieve the distinct social policy aim of providing adequate income on retirement. Given this, the risks inherent in the PP and the financial markets should at least be overtly

²⁴ The most notable example being the definition of the PP as an 'investment' in the Financial Services Act 1986, Sched. 1, para 10.

²⁵ Llewellyn, "Regulation of Retail Investment Services" [1995:Spring] *Economic Affairs* 12 at 16; also FSA, *Meeting our Responsibilities* (1998), para 47: "no system of regulation can insulate even retail customers from the responsibility of taking their own decisions on their savings and investments".

²⁶ Gower, *Review of Investor Protection*, Part I (1984; Cm 9125), para 1.16.

²⁷ Other types of risk may, of course, arise *eg* from fraudulent employers as in the Maxwell case.

²⁸ See *Re Whiteley* (1886) 33 Ch D 347 (CA): "the duty of a trustee is. . . to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people whom he felt morally bound to provide", *per* Lindley LJ at 355.

recognised and managed, through regulation. The nature of these risks will next be examined.

2. An environment of risk

The PP involves numerous forms of risk. The first encountered are those inherent in making any form of pension choice. The mis-selling saga highlights some of these: an individual considering pension provision may, if employed, have to consider whether to join an OP scheme rather than taking out a PP, or to opt out of one in favour of a PP. Many find this a confusing choice,²⁹ while others may make it on non-financial grounds;³⁰ but those in secure employment with access to a good OP scheme may be exposed to a higher risk of receiving less on retirement if they buy a PP because PPs generally do not attract employer contributions and do attract fees and commission. Even given a financially knowledgeable decision – and even if an employer makes contributions to a PP – factors such as investment performance, the structure of commission and fees charged, and annuity rates at the point of retirement may all combine to make the PP less successful than the OP.³¹

Quite apart from the risks inherent in choosing between OPs and PPs, as illustrated by mis-selling, there are investment risks inherent in any type of funded scheme. The conclusions of Miles and Timmermann illustrate this. They have examined the relative efficiency of funded and unfunded provision by governments across Europe and note that accepted wisdom appears to understate “significantly. . . the true volatility of the terminal value of portfolios”. They find that the number of recessions that are experienced during the “active work and savings period” of a particular age cohort of the population cannot be evened out over time, despite the commonly held belief that the contrary is true, and conclude that “even in the long run, the risk of funded pensions in the stock market can be considerable”.³² In the light of the findings that all funded schemes involve risk, those inherent in PPs may be viewed as particularly significant, given the absence of any possibility of risk-sharing in such vehicles.³³ These are important points when considering the suitability of the PP for the social goal of pension provision.

Some types of risk have already been recognised and addressed by regulatory authorities in response to the mis-selling episode.³⁴ However, other forms of risk remain as inevitable consequences of the PP’s location within the markets and within the discourse of financial speculation. Here the risk is that investments can fail as well as succeed. Varying degrees of such risk exist: at one level, there is a situation approaching chaos, or maximum risk of financial loss. No distinction is made between the individual and the

²⁹ See *eg* Pensions Law Reform Committee Report (‘the Goode Report’, 1993; Cm 2342), vol. II, Research Report 2 (generally).

³⁰ Because, for example, of distrust of the employer: see Goode Report, *ibid*, at 135.

³¹ *I.e.* because the return from the PP may be less than the pre-defined income guaranteed by formula under a salary-related OP

³² Miles and Timmermann, *op cit* n 10 at 266, 254, 270, respectively.

³³ See above, n 21 and accompanying text.

³⁴ Above n 3.

corporate investor: each is responsible for fact-finding and choice of investment or provider, and the investor who chooses well can make large profits.³⁵ The opposite condition is one of complete security for the individual: he is guaranteed not to lose money and in some situations will be guaranteed a certain return. This will be important if he is relying on that return to live on, having no other means of support; however, profits are likely to be relatively small and investment return relatively slow.

These risks are confronted by a 'spectrum' of investors/consumers.³⁶ The characteristics of each individual will include rational capacity, wealth (disposable cash or otherwise) and attitude to risk. The PP purchaser might, as part of any of these characteristics or in addition, also be affected by the level of need for income on retirement. These attributes can combine in several ways to produce a consumer who is 'vulnerable' to varying degrees, ranging from the investor with plenty of disposable cash and who is happy to take any kind of risk, however great, to an individual (such as our PP consumer) purchasing with the specific purpose of living on the funds raised because no other income will be available at that time.

Various factors will determine where any individual will sit within the 'risk environment', not all of which will necessarily foster the desired outcome: that is, to ensure that the retirement provision vehicle chosen is in fact likely to provide adequate income in retirement. One such factor relates to the nature of the market involved: wholesale, that is, investments commonly dealt in by professional investors; or retail, where consumers are involved. Focusing solely on the retail market, the nature and level of sophistication of the individual next becomes relevant. Black describes retail market consumers as, at one and the same time, "usually unsophisticated with a low level of understanding of the financial products they are buying", uninterested and unwilling to shop around or find out more; yet feeling capable of handling their own finances.³⁷ As she says, "[t]his dissonant combination of confidence and lack of sophistication suggests that

³⁵ See Pagnano, "Discussion" in Miles and Timmermann, *op cit* n 10 at 281: "as any student of capital markets knows – higher expected rates of return come at the cost of greater risk".

³⁶ The new regulator has argued for a three-way classification of consumers, distinguishing between professional traders, "expert end-users" and the man in the street: see Joint Committee on Financial Services and Markets, First Report, *Draft Financial Services and Markets Bill* HC 328-I (1998-9), para 28. The Government, however prefers to view the range of consumers/investors as a spectrum, so allowing for more subtle gradations between the categories: see below, n 79.

³⁷ Black, *Rules and Regulators* (1997), p 143, citing OFT study (1992). Other research shows that those with PPs (and members of OP schemes) were more likely than those receiving the State Earnings Related Pension to have thought "a lot" or "some" about pension provision in general and that a high proportion (about one half of the sample) felt that they had "very" or "fairly good" understanding of their schemes. The same survey reveals low levels of understanding about pension choices in general and the specifics of PP design: see Williams and Field, *Pension Choices, A Survey on personal pensions in comparison with other options*, DSS Research Report 22 (1993), paras 1.4 and 1.7 respectively. On the latter see also the Goode Report, Research Reports 1 and 2, *op cit* n 29.

consumers are especially vulnerable on savings and investment issues”.³⁸ She also points out the dangers of combining this type of consumer with a complex and opaque product such as the PP and the risk inherent in the competitive market.³⁹ Such difficulties are particularly acute for the poor, largely because of inequalities of status between users and providers, especially when one party has a “monopoly, or near monopoly, of expert knowledge”.⁴⁰ Nor is the provision of additional information necessarily helpful in redressing the balance, as consumers can simply be confused by it.⁴¹

Thus the PP market faces general difficulties in terms of competition, which increase the risk factors faced by our consumer. In addition, there are issues that specifically relate to the PP product. As Pinker states, the “ultimate sanction of the buyer [of such services/products]. . . is his ability to withdraw his custom altogether”.⁴² It is, however, difficult for the buyer of a PP to do so. For some, the PP replaces state provision for a socially recognised need (and it was promoted for this purpose).⁴³ In this situation, withdrawal is very difficult. Also, because of the nature of the PP mechanism, it is difficult for a consumer to know when it might be advantageous to withdraw. As Simpson argues, the future investment performance on which the buyer depends is something that can be estimated, but not known. In any event, withdrawing too early from the PP can be disastrous for an ends-oriented consumer: the commission due on some products is paid out of the early contributions made – say, over a period of two years. This means that no return will be made on the investment during that time. The ideal, therefore, may be for a PP contract to last for a long period, but this in turn means that the consumer does not gain experience of the product by frequent purchase. Nevertheless, the PP involves an ongoing financial commitment that may absorb a large

³⁸ Black *ibid*, citing research commissioned by SIB and Lautro (1991).

³⁹ Ogus *et al* make a similar, general comment, that the market model of welfare “assumes that individuals have the information available *and the capacity* to make rational, wise decisions concerning current and future welfare; unhappily, this is not always a realistic assumption” (emphasis added): *op cit* n 12, pp 9-10.

⁴⁰ Pinker, *Social Theory and Social Policy* (1979), p 143. He argues that the poor “lack the money to claim parity. . . Normatively and relationally they learn to define themselves as inferior persons, subordinate in terms of both money and knowledge”. The Pension Provision Group has observed that lower income groups are more vulnerable to the risk element that is inherent in PPs, *op cit* n 9, p 83. Davies has also commented on the impracticality and ineffectiveness of the PP as a means of pension provision for those on a low income, *op cit* n 15, pp 24-29. See further below, n 118.

⁴¹ The Consumers’ Association has commented that existing disclosure of information on charges “had not. . . resulted in a fall or increased competition, as consumers were ‘confused by this plethora of information’”: see Treasury Select Committee, *op cit* n 5, p ix.

⁴² Pinker, *op cit* n 40, p 144.

⁴³ This phenomenon has been described as ‘coerced exchange’. This is the idea that “people may effectively be ‘coerced’ into buying goods or services for which they previously depended upon state provision”, hence preventing a reduction in welfare rather than increasing it *per se*: see Dunleavy, “The Growth of Sectoral Cleavages and the Stabilization of State Expenditures” (1986) 4 *Society and Space* 129 at 143.

proportion of the consumer's wealth, which has corresponding implications for any mistakes made.⁴⁴

Whilst PPs therefore rely on the free market to provide an adequate source of pension provision, this ideal scenario is inherently skewed because the consumers will frequently not act appropriately for the market mechanism to work effectively. In terms of placing consumers within the 'risk environment', the factors identified in this section mean that the decisions they take are high-risk, because they will be less able to deal with the greater knowledge, power and sophistication of those selling a product which may often appear complex. Hence, they face a greater risk of losing money, and therefore of failing to secure adequate retirement income.

3. Regulatory consequences: the management of risk

Each of the risks identified above contributes to the danger that the PP product will 'fail' in its objective: the provision of retirement income. It is this objective, and the accompanying social and political consequences, that makes the PP distinct from other types of 'investment' in the financial markets.

We argue, therefore, that attention should concentrate on the central purpose of the PP, rather than the mechanism (financial services) by which it is funded. The goal is pension provision rather than investment, the point being "not to build up an assignable asset but rather to provide a means of fiscal security for the pensioner and his family".⁴⁵ The technical design of the PP supports this objective: in order to obtain tax exemptions, providers must incorporate a contractual prohibition on assignment.⁴⁶ It is designed for the sole purpose of security in retirement, and since the funds are not available until an agreed retirement age, individuals are unlikely to see it in any other light. Even if those who are better off buy PPs, their purpose will still be retirement income: a PP consumer who can 'afford to lose' the money contributed because he has other sources of income will still focus on the *ultimate outcome* of the investment, not on the investment activity itself. Its loss therefore signals the profound failure of the venture. This is especially so, the needier the individual concerned. The fact that, for example, NHS workers and miners were among the victims of mis-selling – a function of previous government policy that all levels of worker could purchase them – demonstrates the special dangers arising when those who genuinely need the income from PPs buy them.

⁴⁴ Simpson, *Regulating Pensions: Too Many Rules, Too Little Competition?* (1996), p 20. Again, the Treasury Select Committee comes to similar conclusions: *op cit* n 5, p ix.

⁴⁵ Thomas, "Bankruptcy in Occupational Pension Schemes and Personal Pension Schemes: A Dichotomy of Approach" [1998] *Conveyancer* 317 at 325. The National Consumer Council also appears to recognise this approach: "our view is that. . . the people who are buying [are doing so] really not as an expert purchase but as a means to an end, to greater security in old age or whatever... those people need a different level of protection from the people who [invest etc] as a business": evidence to the Joint Committee, *op cit* n 36 (vol. II), para 141.

⁴⁶ See Income and Corporation Taxes Act 1988, s 634(6).

These singular factors carry particular ramifications both for the objectives of regulation and the design of regulatory institutions. It has been argued that “the most powerful economic justification for public intervention is the correction of market failure”.⁴⁷ The goal of regulation here should be to reduce the prospect of such failure, by focusing closely upon controlling the risks to which consumers remain exposed as a result of the location of the product in the financial marketplace. This will maximise the chance that the PP will achieve its social policy aims. It is not enough simply to prevent the consumer from “being made a fool of”.⁴⁸ The latter objective may be appropriate for other financial products, but the individual, social and political consequences of failure of the PP are such that only very low levels of risk are acceptable. The regulator must accordingly attempt to position the PP purchaser in a low-risk environment, which will entail assuming a relatively unsophisticated customer with a low tolerance of risk and a risk-averse investment portfolio.⁴⁹

The need for this form of regulation distinguishes the PP from other financial service products.⁵⁰ Indeed, it can be argued that the use of PPs as an instrument of government policy, to meet a particular and pervasive social risk, gives rise to ‘public interest’ considerations more closely analogous to those that exist in utility products:

“if people are to have a reasonably good quality of life, gas and water services must be provided. I simply contend that some financial service products – such as those producing a decent retirement income – are also necessary in ensuring that people have a good quality of life”.⁵¹

This is especially so given their continued role in supplementing state provision in future government plans for the welfare system.⁵² All of these factors point to the need for a regulator to adopt an approach which *differentiates* between the PP and other financial service products, recognising its unique characteristics and purpose and managing risks accordingly.

It has been argued that the regulatory institutions governed by the Financial Services Act 1986 “did not have a detailed awareness of the particular nature of PPs” and hence did not conceive the PP product as problematic.⁵³ The necessary level of differentiation between products was not achieved, with the regulators monitoring “the whole of a firm’s business across the spectrum of its regulated activities”⁵⁴, rather than recognising the distinctive qualities and

⁴⁷ Bishop *et al*, *The Regulatory Challenge* (1995), p 3.

⁴⁸ See Gower, above n 26.

⁴⁹ See further Miles and Timmermann, *op cit* n 10 at 277, who argue for “some role for government to play in setting up guidelines for diversification and risk management service”.

⁵⁰ It is acknowledged that there are other financial products that aim at retirement provision; it is submitted that these should be subjected to the same risk analysis and regulatory regime suggested here for pensions.

⁵¹ Love, 334 HC Deb 97 (28 June 1999).

⁵² See below, n 118. Also note that it is difficult for IFAs to advise moving out of PPs, for example because of the controls on ‘churning’: see SIB core rule 26(1) – hence advice is likely to be to retain the product once it is purchased.

⁵³ Black and Nobles, *op cit* n 6 at 813.

⁵⁴ *Ibid*.

difficulties associated with PPs. This can be seen as a consequence of the institutional structure of regulation, which entailed the PP product being overseen by two SROs, both responsible for a variety of other financial service products in which higher levels of risk were acceptable.⁵⁵ A further difficulty was the absence of a statutory principle of consumer protection in the 1986 Act⁵⁶, which might have shifted the regulatory focus away from the *investor* towards the more vulnerable *consumer*, prepared to tolerate only low levels of risk.

It may be over simplistic to ascribe the mis-selling of personal pensions solely to the inappropriate nature of the regulatory style and structure emerging from the 1986 Act⁵⁷; nor do we take issue with government regulation *per se*. It is our contention, however, that the previous regime was seriously flawed in its failure to account for and react to the distinctive characteristics and specific risks inherent in the PP product. The question which must now be addressed is: will the new regulator, the Financial Services Authority (FSA), be any better placed to do so?

THE FSA: THE RIGHT REGULATORY TOOL FOR THE JOB?

1. Creating the FSA

The radical overhaul of the structure of financial services regulation which was announced by the new Chancellor in May 1997 took commentators by surprise.⁵⁸ Arguing that “the regulatory structure introduced by the Financial Services Act 1986 is not delivering the standard of supervision and investor protection that the industry and the public have a right to expect” and criticising the “inefficient” division of responsibility between SIB and the other regulatory bodies, he announced that work was to begin on legislation to simplify the regulatory system.⁵⁹ The new regulator was to take the form of a statutory ‘super-SIB’, with responsibility for all aspects of banking and financial services regulation, although the Bank of England would retain responsibility for overall systemic regulation.

The single regulator, christened the Financial Services Authority, came into being on 28 October 1997. The regulatory functions and powers previously exercised by the institutions governed by the 1986 Act will be vested in the FSA by means of a Financial Services and Markets Bill, likely to receive

⁵⁵ Although the replacement of Fimbra and Lautro by one regulator, the Personal Investment Authority (PIA), in 1994 may have reduced duplication of tasks, the responsibilities of this agency continued to extend well beyond the PP context.

⁵⁶ An omission particularly criticised by the National Consumer Council: see *Financial Services and Markets Bill: Response to the Treasury’s consultation on the draft Bill* (1999), p 3.

⁵⁷ See Davies, in evidence to Treasury Select Committee, Third Report, *Financial Services Regulation* HC 73-II (1998-9), para 216; and for a discussion of other contributory factors, see Black and Nobles, *op cit* n 6. It is important to note, however, the use of the mis-selling episode as a key argument for regulatory reform: see below, n 66 and accompanying text.

⁵⁸ See *eg* “Labour turns to the City”, *The Economist* (24 May 1997), p 15.

⁵⁹ Brown, 294 HC Deb 509 (20 May 1997).

Royal Assent in spring 2000.⁶⁰ The legislation, and hence the regulatory regime, extends to Northern Ireland.⁶¹ The Authority operates in effect as a statutory arm's-length government agency with a governing Board appointed by the Treasury and accountable to Parliament; but in legal form it is a private company limited by guarantee, funded by levies on the financial services industry.

2. The FSA and PPs: grounds for optimism

An evaluation of the likely effectiveness of the new regulator in addressing the particular challenges presented by the PP product necessitates discussion of the reasons for its creation, its statutory objectives and the approach that it proposes to adopt in the exercise of its powers.

The Government identified two broad rationales for overhauling the regulatory regime, and for the model adopted. Treasury ministers argued that a single regulator would reduce duplication of effort (and hence compliance costs) and better reflect the structure of a modern, global and integrated financial services industry, in which distinctions between types of institution are increasingly blurred.⁶² Regulatory reform was therefore linked to prosperity and international competitiveness, as well as Labour's broader 'modernising' agenda.⁶³ This justification, which might be described as emanating from *structural change*, thus related to wider developments in financial markets, rather than the PP 'problem' in particular.⁶⁴

The second – and here more instructive – rationale was *systemic confidence*, based on a critique of the previous 'self-regulatory' regime. In support of the argument that self-regulation, while attempting to protect the interests of the financial services industry as well as those of the public, ultimately did neither,⁶⁵ the Government marshalled as evidence incidents in which past regulatory performance appeared defective, chief among which was mis-selling:

⁶⁰ HC Bill 121 (1998-9). It received its First Reading on 17 June 1999, by which time it had already been subject to extensive consultation and pre-legislative scrutiny: see Joint Committee, *op cit* n 36, para 2. This process may in part have been designed to answer criticism that the effective creation of the FSA before the passage of its enabling legislation precluded adequate debate on the reforms: see Taylor, "Unanswered questions for the UK's new leviathan" (1997) 2(4) *The Financial Regulator* 42.

⁶¹ Clause 364. Excluded are provisions regarding open-ended investment companies, which are not relevant here.

⁶² See Brown, above n 59 at 510; Milburn, 334 HC Deb 37 (28 June 1999).

⁶³ See especially Byers, speech to Corporation of London Finance Committee, Treasury Press Release 201/98 (26 November 1998).

⁶⁴ Although implications exist for the speed and effectiveness of the regulatory response to issues such as mis-selling: see below, n 86 and accompanying text. For further discussion, see Goodhart *et al*, *Financial Regulation: why, how and where now?* (1998), ch.8.

⁶⁵ See O'Brien, "Regulatory change – revolution or reform?" (1996) 1(3) *The Financial Regulator* 17 at 18; Darling, speech to FSA European Conference, Treasury Press Release 201/98 (26 November 1998), para 30.

“the scale of personal pensions mis-selling has made it absolutely critical that, for consumer confidence, there now has to be a more transparent, a much simpler system of regulation that is not self-regulation. Personal pensions mis-selling brought the whole ethos of self-regulation into disrepute”.⁶⁶

Accordingly, the professed goal of reform was to “increase public confidence in the regulatory regime”⁶⁷ and in the markets, by restructuring regulation so that it was perceived as more independent, transparent, accessible and robust in its responses to market failure.⁶⁸ These qualities provided a link with the structural objective of simplification and pointed towards the creation of a statutory single regulator which could react more efficiently and effectively to crises such as pensions mis-selling.

The issue of public and consumer confidence lies, therefore, at the very heart of the FSA’s *raison d’être*, and the mis-selling episode offers both a specific justification for dismantling the previous regulatory regime and an illustration of the sort of incident that must be avoided in future. Consequently, it might be expected that the FSA will focus on measures to enhance public confidence and to protect the consumer, with those arising in the pension context particularly highlighted.

There is strong support for the view that that “the FSA’s primary remit will be to protect the consumer”.⁶⁹ The Financial Services and Markets Bill specifies the promotion of “public understanding of the financial system”⁷⁰ and the “appropriate degree of protection of consumers”⁷¹ as key objectives of the new regulator,⁷² while the FSA has described consumer protection as “at the heart of the work of the Authority”⁷³ and as the “red meat of our task”⁷⁴. This might lead one to predict that the FSA will pay close attention to the effective management and reduction of the risks faced by consumers within the financial marketplace – for example, by redressing asymmetries of information.

⁶⁶ Liddell, in evidence to Treasury Select Committee, *op cit* n 5 (vol. II), para 21; see also Brown, letter to Chairman of SIB, Treasury Press Release 49/97 (20 May 1997): “The government is committed to reform... to reduce the chance of events such as the mis-selling of personal pensions happening again”; also Milburn, above n 62 at 38; and for comment, Taylor, *op cit* n 60 at 43, 45.

⁶⁷ Brown, above n 59.

⁶⁸ See Foreword (Brown), *Financial Services and Markets Bill: A Consultation Document (Part 1)* (1998).

⁶⁹ Taylor, *op cit* n 60 at 43. Such a focus is perhaps unsurprising, given the shift in regulatory attention towards consumer and public interest issues in recent years, reflected elsewhere by the priority given to consumer interests in proposals for the reform of utilities regulation: see DTI, *A Fair Deal for Consumers* (1998; Cm 3898).

⁷⁰ Clause 4.

⁷¹ Clause 5(1).

⁷² Additionally, clause 9 of the Bill requires the establishment and maintenance of a panel “to represent the interests of consumers”.

⁷³ FSA, *op cit* n 25, para 43

⁷⁴ Davies, speech at FSA Launch Conference (28 October 1997).

But by itself, a commitment to ‘protecting the consumer’ – although preferable on our analysis to an approach that simply seeks to ‘prevent him from being made a fool of’ – may not be sufficient. We have argued above that the nature and purpose of the PP product and the consequent need for the reduction of risk, distinguish it from other transactions within the financial services market. It is important, therefore, that the FSA should take a *differentiated* approach to consumer protection, allowing it to intervene to a degree which would be inappropriate with other products in order to minimise the risks that might prevent the PP from fulfilling its objective. To what extent can the Authority be expected to adopt the necessary varied and flexible approach to its regulatory tasks?

A definitive response cannot be given at this stage, but a number of early indications exist. The Bill requires the FSA to have regard to the principle of *caveat emptor*⁷⁵, seen as necessary to avoid the risk of “moral hazard”⁷⁶; but in considering the degree of consumer protection which is appropriate, it will attempt “to ensure that they [consumers] are not exposed to risks that they should not reasonably be expected to assume”.⁷⁷ This is reflected in provisions requiring the Authority to have regard to differing degrees of “risk involved in different kinds of investment or other transaction” and of “experience and expertise which different consumers may have in relation to different kinds of regulated activity”, together with consumer needs for advice and accurate information.⁷⁸ Here, therefore, is a statutory manifestation of the view that the variety of products and consumers demands “an appropriate level of consumer protection that will be greater in some cases than others”⁷⁹, leaving it open to the FSA to apply differing levels of regulatory protection when undertaking its statutory functions. Thus, for example, the marketing and sale of life assurance could be regulated in a different fashion to that of PPs.

The FSA has already indicated that it is “committed to a flexible and differentiated approach”,⁸⁰ and has shown apparent awareness of the particular importance of such an approach in the PP context:

⁷⁵ Clause 5 (2) (d).

⁷⁶ *Ie* not requiring consumers to accept responsibility for actions would “give them no incentive to take appropriate decisions”: Treasury, *Financial Services and Markets Bill – Progress Report* (1999), para 4.11.

⁷⁷ FSA, *Financial Services Authority: an outline* (1997), para 2.

⁷⁸ Clauses 5 (2) (a), (b) and (c).

⁷⁹ Treasury, *op cit* n 76. Indeed, it is significant that the Government rejected calls from bodies such as the National Consumer Council (*op cit* n 56, p 3) to distinguish between ‘retail’ and ‘wholesale’ sectors, viewing this as “too blunt an instrument” (Treasury, *ibid*, para 4.8), which failed to take account of “a spectrum of types of customer within these broad categories”: *Financial Services and Markets Bill – Government Response to the Joint Committee’s First Report* (1999), para 2. See above, n 36 and accompanying text.

⁸⁰ FSA, *Designing the FSA Handbook of Rules and Guidance* (1998), p 6; also *Differentiated Regulatory Approaches – Future Regulation of Inter-professional Business* (1998), pp 5.7. Note also its proposals to utilise ‘risk-based’ supervision, focusing on the nature of the activity, the extent of risk within firms and markets, the quality of management controls and the sophistication of the consumers involved: *op cit* n 77, para 3.

“the personal pension is at one extreme of the spectrum of financial products. There are other savings and investments, such as simple deposit accounts which are much easier to understand. . . . So it is clear that the nature of any regulation of the retail market should vary considerably across products, and in some cases very little regulation is needed”.⁸¹

This would suggest, therefore, that we can expect the new regulator to exercise its statutory powers and duties in an adaptable manner, varying its style and level of regulation to respond adequately to the differing levels of risk existing within the financial services sector, and providing a greater level of protection in cases where – as with PPs – only very low levels of risk are acceptable. For the reasons previously advanced, such an outcome would be welcome.

3. The FSA and PPs: potential pitfalls

This outcome is, however, far from guaranteed. Despite the statutory provisions and early regulatory assurances, concerns have been voiced that the “FSA will fail to differentiate adequately. . . in the way that it approaches supervision and regulation”, especially given the broad definition of ‘consumer’ contained in the Bill.⁸² If this proves to be so, there is a danger that the particular characteristics and problems associated with the PP product and consumer may once again be left unrecognised. We turn, therefore, to examine the factors lending credence to this gloomier prognosis.

The ‘structural change’ rationale presented the new regulatory regime as more efficient and a better reflection of developments in the financial services industry.⁸³ Here, in arguing that “creating a single regulator with a single authorisation process, a single compensation scheme, a single ombudsman, and a single appeals tribunal, [will] reduce the amount of regulation while at the same time providing for greater accountability”,⁸⁴ the Government offered an *integrative* justification for regulatory reform. This was further evident in the emphasis placed upon the need to avoid the regulatory “turf wars”⁸⁵ that supposedly characterised the previous regime. A single regulator was regarded as being in a position to respond more effectively and speedily to incidents such as mis-selling:

“There can be little doubt that the regulatory response to previous mis-selling would have been more coherent, and more rapid, had it been managed in a single centre rather than being the responsibility of a number of separate organisations. Individuals in the regulatory network tried very hard to achieve coherence and co-operate with each other; the framework within which they were operating did not reward those efforts. The establishment of

⁸¹ Davies, Henry Thornton Lecture, FSA Press Release 87/98 (4 November 1998).

⁸² Joint Committee, *op cit* n 36, para 29. See further below, n 94.

⁸³ Above, n 62 and accompanying text.

⁸⁴ Byers, above n 63.

⁸⁵ See Alexander, “A view from the market” (1997) 2(3) *The Financial Regulator* 28 at 28-9.

the FSA as the single statutory regulator is putting an end to this regulatory fragmentation".⁸⁶

Pressure for an integrated form of regulation, reflected in the rhetoric of the "one-stop shop",⁸⁷ has therefore been imprinted strongly within the FSA's collective genes from birth, and represents a strong countervailing trend to the differentiated approach discussed above.

Moreover, it is likely that as it grows into maturity, the Authority will demonstrate ever more powerful integrative tendencies. Organisational theory teaches that, in order to contain fragmentation, successful large organisations need to adopt integrative managerial devices to co-ordinate the range of tasks.⁸⁸ When this factor is viewed alongside the Authority's deployment of a 'lead supervisor' approach to the regulation of financial conglomerates,⁸⁹ and the impetus provided by regulated firms preferring a 'level playing field' to a differentiated style which might confer a regulatory advantage on their rivals,⁹⁰ it would appear that there is a strong possibility of the development of a monolithic organisational 'culture' or 'ethos' within the FSA:

"Large organisations tend to develop a corporate approach; indeed they usually take pride in doing so. A real danger is that the FSA may try to deal in much the same way with very different market sectors, and with different customers with different requirements".⁹¹

There are reasons to believe, therefore, that FSA regulation may not differentiate to the extent presently asserted, and that a more homogeneous approach may steadily evolve. The issue here is the nature of any 'culture' that emerges and its likely effect upon the regulator's handling of the PP product. On one level, it might be argued that an undifferentiated regulatory approach need not in itself be unduly troubling, provided it is one that remains oriented towards protecting consumers from risks faced in the financial markets.⁹² Given the prominence accorded to consumer protection

⁸⁶ FSA, memorandum of evidence to Treasury Select Committee, *op cit* n 66, para 25; see also Davies, *op cit* n 57, para 219. The FSA has taken steps towards such a co-ordinated response by establishing, with PIA, a single integrated pensions review division: see FSA Press Release 07/97 (9 December 1997).

⁸⁷ See Davies, in evidence to Treasury Select Committee, *ibid*, para 195; Milburn, above n 62 at 35.

⁸⁸ See Handy, *Understanding Organizations* (4th ed., 1993), pp 203-9.

⁸⁹ This entails an individual or team co-ordinating the activities of other FSA employees working within the agency's different divisions, and taking responsibility for the consolidation of the supervisory relationship between such a firm and the Authority: see FSA, *op cit* n 25, para 35.

⁹⁰ See Alexander, *op cit* n 85 at 29: "we [NatWest Group] obviously want the FSA to develop a common culture and style so as to be consistent in its approach".

⁹¹ Lloyd, 334 HC Deb 80 (28 June 1999). The FSA has also emphasised the "benefits of a single regulatory culture": see *The Financial Services Authority: Information Guide* (1999), p 7.

⁹² The discourse of 'consumer' – as distinct from investor – which underpins the Bill would seem to focus regulatory attention on market risks faced by individuals: see Davies, above n 74.

issues in the creation of the FSA, this would indeed seem the most likely short-term outcome.

However, as argued above, a 'consumer orientation' is not enough in itself: if the particular risks inherent in the PP are to be effectively managed so that its social policy objective is realised, it is important that the regulator continues to differentiate between the PP purchaser and other types of consumer: in short, that it recognises the existence of a 'spectrum'.⁹³ The integrative pressures previously outlined, coupled with the absence of a statutory distinction between types of 'consumer', create anxiety that the FSA may move towards a uniform approach to its consumer protection responsibilities across markets and products.⁹⁴ In view of the retention of the *caveat emptor* principle, any such approach is most likely to be slanted towards an individual who is prepared to accept moderate levels of risk and responsibility, rather than the PP purchaser located in a 'low-risk environment': in other words, that "we will finish up with a regime fixed in the middle".⁹⁵

Furthermore, concern has been expressed that, over a longer period, there is a danger of 'regulatory capture' by the financial services industry.⁹⁶ This is especially so given the difficulty of organising effective representation of consumers due to the disparate nature of their interests (and the benefits gained) and the lack of resources comparable to those of producers.⁹⁷ The Authority may consequently develop an industry-oriented ethos, shifting its activity away from areas – such as PPs – where consumer protection issues are paramount, as well as exhibiting greater tolerance toward practices that create risks for consumers. Such an outcome may be all the more likely once the mis-selling episode has faded from media and political memories.

4. The FSA and PPs: conclusion

It is apparent from this discussion that it is, at present, impossible to be certain of the manner in which the FSA will approach its tasks. Initial indications point toward a differentiated style,⁹⁸ allowing room for cautious optimism that there will be proper regulatory recognition of the distinctive

⁹³ See above, n 79.

⁹⁴ See Treasury, *op cit* n 76, para 4.8; National Consumer Council, *op cit*, n 56, Hall (National Consumer Council) in evidence to Joint Committee, *op cit* n 45, para 141.

⁹⁵ Cable, HC Standing Committee A (15 July 1999).

⁹⁶ See Consumers' Association, memorandum of evidence to Treasury Select Committee, *op cit* n 66, para 4: "It is by no means certain that the FSA will deliver an effective regulatory regime according to consumer principles. There is a real fear that the consumer interest will be marginalised by the industry lobby in such a huge organisation"; National Consumer Council, *op cit* n 56, pp 10-11: "over time, the financial services industry. . . may gain excessive influence over the Authority". Producer dominance has been viewed as a key feature of 'self-regulation': see Alcock, "The New Financial Services Authority and Consumer Protection" (1998) 2 *Company Financial and Insolvency Law Review* 88 at 91-2.

⁹⁷ See especially Olson, *The Logic of Collective Action* (1965), pp 165-6, endorsed in the context of the Bill by McKechnie (Consumers' Association), in evidence to Treasury Select Committee, *op cit* n 57, para 11.

⁹⁸ See above, n 80 and accompanying text.

problems and characteristics of the PP. However, a powerful counter-trend towards integration is also evident from the FSA's origins, which may well grow stronger as the Authority evolves. If this tendency proves dominant, regulation of the PP product may once again become subsumed within wider financial service matters, with the likely consequence that the specialised risk management needed to achieve its distinctive policy goal is neglected.

That the FSA is conscious of these issues is apparent from its identification of the importance of "be[ing] alert to the need to strike a balance between the drive for integration and the maintenance of flexibility and appropriate differentiation".⁹⁹ Nonetheless, given the concerns expressed here, it seems appropriate to put forward possible alternatives to the new regulatory regime, which might be better suited to the particular challenges offered by the PP.

TOWARDS A NEW REGULATORY STRUCTURE?

There are clear arguments for the retention of an arm's-length, statutory agency, whose perceived distance from industry interests is likely to be a key factor in reinstating public confidence in the personal pensions market.¹⁰⁰ However, as previously discussed, "there are greater pressures towards undue uniformity within a single regulator – where every difference needs justification – than in specialist regulators which are clearly freer to develop their own distinctive approaches".¹⁰¹ Given the importance of differentiating PPs from other financial products, we therefore believe that the model should be such as to allow for greater regulatory specialisation.

Comparison may be drawn with the utilities sector, where bodies such as OFTEL and OFWAT regulate within a statutory framework set up for each individual industry. The objectives of a 'watchdog' in the competitive market for PPs might appear to be somewhat different from those of the utility regulators, whose major goals have been to stimulate competition and prevent abuse of monopoly power by the former nationalised companies; but there are indications that the 'utility watchdog' analogy has gained some ground.¹⁰² However, an even closer parallel exists within the pensions sector itself where the Occupational Pensions Regulatory Authority (OPRA) focuses solely on employer-run schemes, under the provisions of the Pensions Act 1995. An argument might be made for extending OPRA's regulatory responsibilities to PPs: this would detach the regulation of the "very particular business"¹⁰³ of pension selling from that of other financial products, while simultaneously emphasising the comparable social policy goals of the differing pension vehicles. However, care would need to be exercised as the industrial relations and trust-based form of the OP raises quite distinct legal and other problems from the PP, which centres on arms-

⁹⁹ FSA, *op cit* n 25, para 67.

¹⁰⁰ See Hedges, *Pensions and Retirement Planning*, DSS Research Report 83 (1998).

¹⁰¹ Lomnicka, "Reforming UK Financial Services Regulation: The creation of a Single Regulator" [1999] *JBL* 480 at 489.

¹⁰² See Love, above n 51 and accompanying text; also the Treasury Select Committee's suggestion that promotion of competition might become a statutory objective of the FSA: *op cit* n 57 (vol. 1), para 23, subsequently rejected by the Government: Treasury, *op cit* n 76, para 4.16.

¹⁰³ Black and Nobles, *op cit* n 6 at 791.

length contract – hence different skills and regulatory approaches may well be needed.¹⁰⁴

The application of some form of sector-specific regulatory model to the PP situation would have a number of advantages. Most significantly, it would facilitate the development of a level of specialised agency expertise. This is perceived as being a key strength of the utility regulators,¹⁰⁵ whose importance in the PP context has been emphasised by Black and Nobles. They claim that a feature of mis-selling was “regulatory blindness. . . No-one looked at pensions as posing particular problems because no-one knew or thought to look”, and conclude that “the regulator needs to have specialist knowledge of individual product and business areas”.¹⁰⁶ The ‘technical’ complexity of the PP product, especially as regards issues such as the tax regime, buying out, obtaining transfer values, the fee and commission structures combined with perhaps unfamiliar investment media and the inevitably long-term and retirement-focused nature of the PP – in addition to the distinctive social policy issues discussed above – presents a particularly strong case for specialisation here.

Such expertise may, of course, be attainable within the much larger structure of the FSA, but it is submitted that a smaller, focused agency would be better placed to identify the particular risks associated with PPs, to devise an appropriate response to instances of market failure and to offer an environment in which the special knowledge and skills needed to regulate this product can be developed. As argued in parliamentary debate, “the problem with one-stop shopping is that the shop assistants may not know well the needs of their different types of customer or the characteristics of their different suppliers”.¹⁰⁷

Furthermore (and contrary to the argument for regulatory simplification advanced above),¹⁰⁸ it may also be that a specialist agency can achieve a swifter and more flexible response to problems in the pensions arena than a larger, more bureaucratic organisation.¹⁰⁹ And, while regulatory capture remains a theoretical possibility for such a body, just as with the FSA, the experiences of the utility regulators and OPRA to date suggest that such an outcome is unlikely.¹¹⁰

Two objections to such a reform of the structure of regulation may be raised, and met. Firstly, it would represent a return to a more complex regime, with

¹⁰⁴ Black and Nobles, *ibid* at 793, identify the failure to compare the benefits of OPs with those of PPs as an illustration of mis-selling, but also stress the extent of the differences and the consequent need to develop specialised knowledge: at 790, 794-5, 817-8. It is notable that the Government has decided against absorbing OPRA within the FSA and thus subjecting the two pension vehicles to the same regulatory regime: see Joint Committee, *op cit* n 36, Appendix 1.

¹⁰⁵ See Harlow and Rawlings, *Law and Administration* (2nd ed., 1997), p 310.

¹⁰⁶ Black and Nobles, *op cit* n 6 at 789-90.

¹⁰⁷ Lloyd, above n 91 at 79-80.

¹⁰⁸ See above, n 86 and accompanying text.

¹⁰⁹ For discussion of the view that the FSA’s size is likely to result in unresponsiveness, see Davies, above n 74.

¹¹⁰ On the utility regulators, see Corry *et al*, *Regulating Our Utilities* (1994), pp 74-5.

firms regulated by different agencies according to whether they are conducting pension or other types of financial business. This apparently offends against one of the Government's main rationales for structural change, reflected in the "one-stop shop" rhetoric. There are already, however, some significant exclusions from the FSA's regulatory scope.¹¹¹ Moreover, it is interesting that recent proposals for the creation of 'stakeholder' pension schemes envisage regulation by two bodies: the FSA will regulate the marketing of schemes and provision of advice, while OPRA will oversee the operation of schemes.¹¹² These factors suggest that the Government does not regard the 'single regulator' solution as an article of faith, and that it is prepared to contemplate variations on this structure where appropriate.¹¹³ Our view is that PPs *are* sufficiently distinctive to require just such a departure from the regulatory norm.

Secondly, one might query the practicability of setting up such a specialised agency, given that the FSA is already discharging its regulatory functions within the PP market. Adjusting the regulatory structure once more would delay the legislative process and cause considerable disruption for firms, consumers and regulatory staff alike.¹¹⁴ However, acceptance of this argument may result in "the organisational tail. . . wagging the legislative dog":¹¹⁵ it is surely preferable to address possible deficiencies at a relatively early stage rather than to revisit them in subsequent legislation. In any event, it would be possible to allow for creation of a specialised regulator without significantly delaying the passage of the Financial Services and Markets Bill by the simple expedient of inserting an amendment allowing the FSA to delegate its powers and duties to another body which met prescribed statutory standards.¹¹⁶ This would allow for dispassionate, carefully-considered theorising focusing upon the type of regulator which best suits pension provision in general and the PP market and the regulatory difficulties it presents in particular.¹¹⁷

¹¹¹ Notably mortgages, which have not previously been subject to the statutory financial services regime: see Joint Committee, *op cit* n 36, paras 63-89. This exclusion is presently under review: see Treasury, *Regulation of Mortgages: A Discussion Document* (1999).

¹¹² See DSS, *Stakeholder Pensions: Regulation, Advice and Information – The Government's Proposals* (1999); Welfare Reform and Pensions Bill, HC Bill 44 (1998-9), clause 2.

¹¹³ See DSS, *ibid*, paras 10-11, where arguments for a single regulator are explicitly rejected.

¹¹⁴ See Treasury Select Committee, *op cit* n 102, para 53.

¹¹⁵ Taylor, in evidence to Treasury Select Committee, *op cit* n 57, para 184.

¹¹⁶ Taylor, memorandum of evidence to Treasury Select Committee, *ibid*, para 7.

¹¹⁷ The absence of such theorising in the approach to regulatory design is not unusual in the UK. It has been observed that "it is characteristic of our administrative law that machinery should evolve in piecemeal fashion and with no single set of clearly defined objectives. Utilities regulation has been peculiarly susceptible, given the scale and complexity of the privatisation process, as also a steep learning curve for government and agencies alike. Diversity in powers and performance is one trait which the regulation shares": Harlow and Rawlings, *op cit* n 105, p 318.

CONCLUSION

The argument advanced in this article is that the *social* goal of pension provision – to ensure that as many as possible attain an adequate level of income on retirement – gives rise to distinctive challenges for regulation of the PP and creates a particular need for effective risk management to ensure that the objective is fulfilled. In spite of its initial assurances, there are reasons to question whether, especially in the long term, FSA regulation will prove to be sufficiently sensitive to these issues. Such anxiety points us toward the creation of a focused regulatory agency in which the skills necessary to manage this distinctive and complex product can be evolved and which avoids the hazards of an undifferentiated approach.

Of course, institutional reform will not in itself provide a panacea to the problems that have beset the personal pension market. It is important that the creation of an appropriate regulatory structure is combined with the promulgation of rules which properly address the potential abuses which may occur, coupled with a preparedness to enforce these rules rigorously, imposing sanctions where necessary. The Labour Government, mindful of the continued role for the PP in its welfare policy,¹¹⁸ has adopted a number of additional measures in an attempt to “put right the wrongs of pensions mis-selling”.¹¹⁹ An equally robust approach will be required of the FSA, or any alternative regulator, if similar incidents are to be avoided in the future.

¹¹⁸ See DSS, *op cit* n 1, ch.3, para 9: “appropriately regulated, personal pensions will be the right option for some, mainly higher paid people”. Note also the Government projection that the present 60:40 ratio of state to private provision will be reversed over the next fifty years: *ibid*, ch.12, para 4.

¹¹⁹ See Liddell, 301 HC Deb 155-7 (18 November 1997). Note also various FSA advertising campaigns: see FSA Press Release 18/98 (14 April 1998), 001/99 (5 January 1999).