

# *Natura non facit saltum*: Drafting issues in gradual codification and the use of indicative headings

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*Abstract: This paper examines a number of drafting issues which arise from the development of the proposed Irish Criminal Code. One distinctive feature of the design of the Irish Criminal Code is that it will be enacted not with a single Bill setting out a “grand design” covering the entire criminal law, but rather on a gradual basis commencing with an “inaugural code instrument”, based on four areas of statute law which have been the subject of legislation in the past two decades. The intention is to propose the codification of further additional areas following the enactment of the inaugural instrument. This gradual method of codification gives rise to particular drafting issues, which are examined in the paper. The paper will consider relevant drafting desiderata, including the proposition that Parts and chapters of the code should be organised in a systematic and logical order, under suitable Part and chapter headings, and how such principles can be reconciled with the gradual codification model that is proposed for Ireland. The paper concludes that while radical departures from established nostrums relating to statutory form do not appear to be necessary or appropriate, the use of indicative headings in the inaugural code instrument deserves consideration as a mechanism to reconcile the various drafting desiderata involved without doing undue violence to established principles.*

In this talk I want to discuss the Irish model of gradual criminal law codification and the question of general desiderata in terms of putting a code together, and to pose the question as to whether the two are compatible - in other words can you go the Irish route of gradual codification while complying with all the rules of drafting and if not how to reconcile the two.

Bearing in mind the adage that the history of codification is the history of failure, the Irish model is designed to avoid some of the pitfalls of the grand design. It is first of all driven by a standing advisory committee which operates under the umbrella of the Department of Justice, Equality and Law Reform. The committee is designed to have dedicated resources so that while it works very closely with the Department, it is not readily liable to have its energies diverted by other priorities. Furthermore, the committee's existence is underpinned by statute.

The Irish process of codification is designed to be gradual. There is to be no “big bang” or single implementation of a complete code. The proposal is to commence with an “inaugural code instrument” which would be a piece of legislation bringing together for what have been referred to as “mini-codes” - recently enacted Acts effecting consolidation of the criminal law in four discrete areas. The intention is that once the four mini-codes had been put together in an inaugural code instrument, one would then have a legislative text that would be capable of being added to when further areas are examined by the committee as time goes on.

Let us now consider what might be thought of as drafting desiderata. If one were to sit down and draft the ideal code what sort of drafting desiderata would one have in mind? One might summarise some of these as follows:

- First of all, the sections of the code, and material generally, should be organised in a logical sequence - that would seem to be a fairly basic requirement of any code.
- Related material should be grouped together under relevant headings, whether Part headings or chapter headings.
- In general, sections should be numbered in consecutive integers. However in Ireland the requirement that sections be numbered consecutively, which had existed since our first Interpretation Act in 1923,<sup>1</sup> was repealed three years ago by our legislature,<sup>2</sup> thus giving permission to codifiers to think more creatively.
- A further desideratum is the concept that substantive provisions should not be placed in schedules. When Ireland achieved independence on becoming a dominion in 1922, our Constitution was placed in a schedule to an Act,<sup>3</sup> which might have been the high point in Irish legal history for placing substantive provisions in a schedule. One might see that as somewhat of a downgrading of a constitution. It should be a substantive matter rather than just something

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<sup>1</sup> See s. 10(2) of the Interpretation Act 1923: “Every Act passed after the commencement of this Act shall be divided into sections numbered consecutively”. See also section 6(2) of the Interpretation Act 1937. This provision is not reproduced in Section 13 of the Interpretation Act 2005.

<sup>2</sup> Interpretation Act 2005 s. 3(1).

<sup>3</sup> See the Constitution of the Irish Free State (Saorstát Éireann) Act 1922.

located in a schedule. In any event, since then there has been a drafting tendency not to put substantive material in schedules.

It follows from these desiderata that drafting problems can arise in their absence – for example:

- If there is no logical flow to the material.
- If there are headings for Parts or chapters but no substantive content – the term I am using for such headings is “indicative headings”, in that they are in effect an indication that something is coming at some future point under that heading.
- If there is non-consecutive or non-integer numbering, for example unwieldy section numbers consisting of a mix of numbers and letters, where new sections are added by amendment. The New Zealand Crimes Act 1961<sup>4</sup> which is one example where for example between ss. 7 and 8 there has been added ss. 7A and 7B, and in some places one gets quite a long stretch of these numbers and letters mixed together – for example ss. 312A to 312Q including quite exotic section numbers such as 312CA to 312CD. This looks a little bit unwieldy but if one were to apply such a method to the Irish inaugural code instrument there would be a huge number of these additional letters, because the inaugural instrument is dealing only with four discrete areas and all other areas would have to be superimposed on that numbering scheme.
- If there is substantive material in schedules. In our legislature sections are debated section by section whereas a schedule is debated *en bloc*<sup>5</sup> so there is also a democratic argument for not having too much substantive material in schedules because it does not get properly debated and sometimes things that are not properly debated turn into problems later on.

If codification is effected in a “big bang” by a single Act, there is no serious drafting problem because the code can be drafted as a whole in the manner of the draftsman’s choosing. The problem is when one wishes to engage in an exercise of

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<sup>4</sup> No. 43 of 1961.

<sup>5</sup> See Standing Orders of Dáil Éireann relative to Public Business, SOO. 124 and 125.

gradual codification along the lines proposed in Ireland, where one has an initial code which then has to be added to. There would seem to be a number of options to deal with this.

The first option would seem to be to add new material at the end of the code. In the Irish example which begins with codification of 4 areas (public order, non-fatal offences against the person, criminal damage and theft and fraud offences), one might have a Part 1, Part 2, Part 3 and Part 4. The General Part might for the sake of argument be Part 5. Table 1 sets out how this first Bill might look. The next Act might deal hypothetically with sexual offences - that becomes Part 6 and so on. The problem with that is the material does not get organised in a logical sequence - it gets organised in the sequence that the Irish system produces the material, which does not make a lot of sense from the point of view of the internal logic of the code.

**Table 1 - The inaugural Bill drafted in conventional manner**

Part 1 (Sections 1 to 16)	Criminal Damage (Sections corresponding to Sections 1 to 16 of the Criminal Damage Act 1991)
Part 2 (Sections 17 to 43)	Public Order (corresponding to Sections 1 to 26 of the Criminal Justice (Public Order) Act 1994)
Part 3 (Sections 44 to 76)	Non-Fatal Offences (corresponding to Sections 1 to 32 of the Non-Fatal Offences Against the Person Act 1997)
Part 4 (Sections 77 to 142)	Theft and Fraud (corresponding to Sections 1 to 65 of the Criminal Justice (Theft and Fraud Offences) Act 2001)
Part 5 and subsequent Parts (Sections 143 to (say) 200)	General part.

A second option would be to put the code in a schedule to an Act, which might give a little more freedom in terms of changing it later, but as I have mentioned that would be a fairly major breach of a drafting principle and I think on reflection the advantages are probably not such as to outweigh the disadvantages.

A third option would be to insert new material in between existing sections as with the New Zealand Crimes Act. We have already seen the disadvantages of this, particularly in the Irish context.

A fourth option is to renumber the sections as new sections are added, so that 7A becomes 8 and so on. However, particularly in the criminal context, that would be, I think, a recipe for administrative chaos because the police and prosecutors and everyone else concerned would have to renumber forms and documents and would have to learn the new number each time; and no doubt mistakes would be made which would give rise to unmeritorious points being advanced by the defence and so on.

A fifth option, and the one I want to suggest for consideration, would be to design legislation to allow for future chapters to be slotted into a pre-designed order. That could require the use of indicative headings or possibly non integer numbering or both. The main advantage of indicative headings in the context of the gradual codification of the law is that they preserve the sense of an overall code. Even though one is only tackling certain areas initially, an approach of indicative headings will preserve the shape of the code; it will indicate that even though we are approaching it gradually we have an overall concept of the code in mind. It facilitates amendment; and it gives a political signal as well because the legislature is enacting the code and indicating that they are going to come back to these indicative headings and flesh them out. Luckily enough and just on time for the criminal law codification exercise, the Irish legislature has just started using indicative headings. One of the first if not the first one occurs in the Finance Act 2007,<sup>6</sup> so again the door has been opened to some extent.

It would also facilitate putting the special part before the general part which is something I have a mild personal preference for. On the one hand that would be somewhat contrary to the general international practice. Indeed, one reason for putting the general part first is that it is less liable to be radically amended and, therefore, one is less liable to have numbering problems following amendment. However, if a solution such as indicative headings is adopted, together with non-

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<sup>6</sup> S. 35 of the Finance Act 2007, inserting schedule 24A in the Taxes Consolidation Act 1997, indicative heading for Part 3.

consecutive numbering, that problem does not arise. My preference for putting the special part first is that the ordinary user of the code doesn't really expect or want to have to wade through technical aspects first. The ordinary user wants to get straight into the substance of the code. In short putting the special part first is more user-friendly at any rate for the end user of the document, for example the member of the police who is seeking to apply the law at its cutting edge.

Table 2 sets out how the inaugural Bill might look, dealing substantively with the four mini-code areas and using indicative headings for other areas.

**Table 2 – Inaugural Bill using Indicative Headings**

Part 1	Fatal Offences against the Person ( <i>Indicative Heading</i> )
Part 2	Non-Fatal Offences against the Person (corresponding to Sections 1 to 32 of the Non-Fatal Offences against the Person Act 1997)
Part 3	Sexual Offences ( <i>Indicative Heading</i> )
Part 4	Offences against the International Community ( <i>Indicative Heading</i> )
Part 5	Treason and Related Offences ( <i>Indicative Heading</i> )
Part 6	Offences against the State ( <i>Indicative Heading</i> )
Part 7	Official Secrets ( <i>Indicative Heading</i> )
Part 8	Explosives ( <i>Indicative Heading</i> )
Part 9	Firearms ( <i>Indicative Heading</i> )
Part 10	Criminal Damage (corresponding to Sections 1 to 16 of the Criminal Damage Act 1991)
Part 11	Theft and Fraud Offences (corresponding to Sections 1 to 65 of the Criminal Justice (Theft and Fraud Offences) Act 2001)
Part 12	Other Property Offences ( <i>Indicative Heading</i> )
Part 13	Public Order (corresponding to Sections 1 to 26 of the Criminal Justice (Public Order) Act 1994)
Part 14	Corruption ( <i>Indicative Heading</i> )
Part 15	Drugs ( <i>Indicative Heading</i> )
Part 16	Administration of Justice Offences ( <i>Indicative Heading</i> )
Part 17	Video Recording Offences ( <i>Indicative Heading</i> )
Part 18	Summary Offences ( <i>Indicative Heading</i> )
Part 19	General Part ( <i>Indicative Heading</i> )

Within each part on this scheme one would need a non-integer section numbering system to facilitate the indicative headings. For example within Part 2, non fatal offences, one might have section numbers 2001 to 2032 corresponding to the law being codified under that heading, and so on.

In summary, it is suggested that the use of indicative headings and non-integer numbering systems may facilitate the process of gradual codification such as that being carried out in Ireland.