
LAW REFORM COMMISSION

REPORT

ACCESSIBILITY OF LEGISLATION IN THE DIGITAL AGE

(LRC 125-2020)



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRÍÚ AN DLÍ

Report

Accessibility of Legislation in the Digital Age

(LRC 125 – 2020)

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About the Law Reform Commission

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular, by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 220 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. The *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation work makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in three main outputs: the Legislation Directory, Revised Acts and the Classified List of In-Force Legislation. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. Revised Acts bring together all amendments and changes to an Act in a single text. The Commission provides online access to selected Revised Acts that were enacted before 2005 and Revised Acts are available for all Acts enacted from 2005 onwards (other than Finance Acts) that have been textually amended. The Classified List is a separate list of all Acts of the Oireachtas that remain in force organised under 36 major subject-matter headings.

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OVERVIEW AND EXECUTIVE SUMMARY

1. This Report forms part of the Commission's *Fourth Programme of Law Reform*¹ and it follows the Commission's Issues Paper on this project.² As the project evolved, the Commission concluded that the Report's title should be *Accessibility of Legislation in the Digital Age*.
2. The Report contains the Commission's final recommendations about making our legislation more accessible. The key elements involve planned programmes of consolidation of legislation and planned programmes of Revised legislation, which would also build on existing online and digital technologies that have developed in the first two decades of this century. The Commission also recommends that these would be coordinated by an Accessibility and Consolidation of Legislation Group, which would include members with particular knowledge and expertise in this area. The Commission considers that the Group should be established on a statutory basis, though initially this could be done on an administrative, non-statutory, basis.
3. In **Chapter 1 Guiding Principles**, the Commission notes that the recommendations in this Report should be seen within the wider context of Ireland's policies and practices on better regulation. Those national policies and practices have been informed by a number of international reviews of regulatory reform in Ireland. This began with the 2001 *Report on Regulatory Reform in Ireland* prepared for the Government by the Organization for Economic Co-operation and Development (OECD). This led to the publication of the Government's 2004 White Paper *Regulating Better*, which in turn resulted in a series of initiatives aimed at improving the accessibility of legislation. These are discussed in Chapter 2, and the Commission's recommendations in the subsequent chapters of the Report build on those important initiatives.
4. While regulatory reform and better regulation encompasses very wide legal and related policy issues, such as the design of regulatory systems,³ this Report concerns a specific aspect: how to ensure the accessibility of our legislation. In Ireland, this

¹ Law Reform Commission, *Fourth Programme of Law Reform* (LRC 110-2013), Project 11.

² Law Reform Commission, *Issues Paper on Accessibility, Consolidation and Online Publication of Legislation* (LRC IP 11-2016).

³ The Commission examined this in Chapter 2 of its 2018 *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018), in which it recommended that comparable financial and economic regulators should have a core set of regulatory powers. The Commission is also examining this matter in the adult safeguarding context as part of its *Fifth Programme of Law Reform*: see *Issues Paper on a Regulatory Framework for Adult Safeguarding* (LRC IP 18-2019).

comprises over 3,000 Acts and over 15,000 statutory instruments (such as ministerial Regulations) that remain in force at the time of writing (August 2020).

5. Against that background, it is important that legislation should be as accessible as possible. In the first place, democratic principles require the public at large to have access to the law, so that they know their rights as well as their obligations under the law. This is even more important when laws create criminal offences, especially where the penalty on conviction involves potential imprisonment. Accessible legislation is therefore important from the rule of law or constitutional perspective. One of the basic principles of a legal system is that ignorance of the law is no excuse (*ignorantia juris non excusat*). In a State such as Ireland where the rule of law is of central importance, it is essential that all citizens have access to the law as it currently stands.
6. The accessibility of legislation is also important from a regulatory and economic perspective and it is not surprising therefore that this forms a key part of any state's policy on better regulation, which includes regulatory reform and reducing the cost of doing business. It can be time-consuming and expensive for businesses to determine what the current law is on a particular area if the law is contained in a number of separate Acts and statutory instruments that have been amended many times and have not been brought together in a single accessible format. The costs associated with navigating the law can be especially high for individuals and small and medium enterprises (SMEs).
7. The Government recognised this in its 2004 White Paper *Regulating Better*,⁴ in which it set out guiding principles relating to the design, implementation, consolidation and review of legislation. These were influenced by guiding principles developed by the OECD. In 2019, the OECD published *Better Regulation Practices Across the European Union*,⁵ in which it analysed the use of regulatory management tools in EU Member States in respect of EU-derived laws, using the OECD's Indicators of Regulatory Policy and Governance. These tools included, for example, stakeholder participation in legislative design and post-enactment review processes. The OECD's 2019 paper proposed a standards-based approach as part of best practice regulatory management, which the Commission discusses in Chapter 7.
8. In response to the Commission's Issues Paper, consultees agreed that it would be helpful to set out guiding principles concerning the accessibility of legislation. The

⁴ *Regulating Better: A Government White Paper setting out six principles of Better Regulation* (June 2004); available at: <<https://www.gov.ie/en/publication/2083d0-better-regulation-archive/>> accessed on 26 August 2020.

⁵ OECD, *Better Regulation Practices Across the European Union* (2019); available at: <<http://www.oecd.org/publications/better-regulation-practices-across-the-european-union-9789264311732-en.htm>> accessed on 26 August 2020.

Commission has therefore used guiding principles in developing the specific recommendations in this Report. Those principles are that, to be accessible, legislation should be:

- a. comprehensive, meaning that all legislation that is in force is accessible;
- b. current, meaning that it is available in an up-to-date, as amended form;
- c. made available free online as soon as possible and in as accessible a format as possible; and
- d. based on defined legislative policy standards, at each stage of the policy cycle, including at pre-legislative and post-legislative stages.

9. **Chapter 2 Accessibility of Legislation in Ireland** traces the historical development of our collection of legislation, the Irish statute book, which currently comprises: (a) over 3,000 Acts that remain in force, including over 1,000 that predate the foundation of the State in 1922; and (b) over 15,000 statutory instruments, secondary legislation made under Acts (such as detailed Regulations), that remain in force.⁶ The Chapter also describes the various initiatives that have been devised and adopted in Ireland in an effort to improve the accessibility of the statute book. The Chapter proceeds to outline the variety of legislative sources that now comprise the statute book, as well as other relevant sources of law, including EU and international law. In this context, the current accessibility issues posed by the various legal sources are outlined. The Chapter also includes a number of case studies or examples of areas of the law that are particularly in need of reform. These examples include:
 - a. road traffic legislation;
 - b. employment legislation;
 - c. gambling control legislation; and
 - d. sale of alcohol legislation.
10. Chapter 2 concludes with an overview of the accessibility initiatives that are currently in practice in the State, including the Commission's Access to Legislation work, the electronic Irish Statute Book (eISB), and the Legislative Observatory of the Houses of the Oireachtas.
11. **Chapter 3 Comparative Approaches to Making Legislation Accessible** considers, from an historical perspective, legislative developments that have taken place in other

⁶ In 2019, the Commission, with the support of the Office of the Attorney General, began its pre-1922 Statute Law Revision Project (SLRP), which involves an examination of the extent to which pre-1922 secondary instruments from 1821 to 1922 remain in force. The Commission intends to complete the pre-1922 SLRP project in 2022.

jurisdictions, encompassing both common and civil law traditions, including France, Germany, the United Kingdom, the United States of America, Canada, Australia and New Zealand. The Chapter then progresses to discuss the various measures that have been adopted in these jurisdictions, from the 20th century to the present day, to make their respective laws more accessible.

12. **Chapter 4 Comprehensive Legislation** explores the first of the guiding principles: comprehensiveness. It considers the methods that could be employed to consolidate or codify in-force legislation in order to ensure a comprehensive collection of legislation. The Chapter includes a comparative analysis of various projects that have been undertaken in other jurisdictions to manage their respective collections of legislation. The Chapter discusses that, ideally, there should be one Act per subject matter but that, where this is not possible, related legislation could be presented together in an official online database of legislation, using the Commission's Classified List of In-Force Legislation as a guide.
13. The great majority of the submissions the Commission received were in favour of consolidating the State's collection of legislation through planned programmes of consolidation. The Commission therefore recommends that planned programmes of consolidation should be prepared and carried out over a defined period of five years.
14. In Chapter 4, the Commission also recommends the establishment of a multi-agency body to coordinate and oversee the work necessary to consolidate Irish legislation. The Commission proposes that this multi-agency body should be called the Accessibility and Consolidation of Legislation Group (ACLG). The Commission recommends that the ACLG should draft programmes of consolidation by carrying out public consultations to identify areas of the law that are particularly in need of being streamlined and simplified. The Commission also recommends that a number of criteria should guide the ACLG in identifying areas to prioritise for codification. These criteria are:
 1. Legislation that is frequently used;
 2. Law that covers a significantly wide and coherent area of law, comparable to a significant element of one of the 36 headings of the Commission's Classified List of In-Force Legislation;
 3. Law that is contained in numerous Acts and provisions (including in pre-1922 Acts);
 4. Law that has been amended many times, with the result that it is difficult to know what the applicable law is; and
 5. Significant preparatory work has already been completed (for example, the draft Scheme of a consolidation Bill has already been prepared).

15. Using these criteria, the Commission has recommended a number of areas of the law that could be considered by the ACLG for inclusion in a first programme of consolidation. These areas are:
 1. Road traffic legislation;
 2. Employment legislation;
 3. Gambling control legislation;
 4. Sale of alcohol legislation;
 5. Monuments and archaeological heritage legislation;
 6. Consumer protection legislation; and
 7. Landlord and tenant legislation.
16. To ensure that the end user's experience of accessing legislation continues to inform the work overseen by the ACLG, the Commission has recommended that the ACLG should be assisted by an advisory group to facilitate consultation with different stakeholders and users of legislation, including businesses and members of the public.
17. **Chapter 5 Maintaining Legislation in a Coherent Form** concerns the second guiding principle, currency. It considers how legislation, once consolidated, can continue to be maintained in an up-to-date coherent form. While projects to streamline the law can succeed in bringing the law together, the continuously evolving nature of the law means that any consolidated law will continue to be subject to regular, and in some cases frequent, amendment. Failure to implement effective systems to ensure that such consolidated law remains in a coherent state runs the risk that the initial effort to consolidate will degrade over time. This means that the law relating to a particular subject matter would no longer be contained within a single, consolidated Act, but rather in a series of separate Acts and statutory instruments that are subsequently enacted or made.
18. Chapter 5 discusses the measures that should be adopted to ensure that legislation continues to be made available to the public in an accessible and comprehensible form. In this regard, the Commission recommends that the Commission itself should continue to be under a duty to produce revised versions of legislation, and that this would include both primary legislation (Acts) and, where practicable, secondary legislation (such as ministerial Regulations).
19. The Chapter then discusses the desirability of prescribing editorial powers as part of producing revised versions of legislation. The Commission recommends that there should be a power to make editorial changes to legislation in certain limited instances, including, for example, to incorporate changes to the name or title of a body, office, or person; to omit any provisions that have expired or been repealed; to incorporate transitional provisions; to alter the style or presentation of text or graphics to be consistent with current drafting practices or to improve the electronic presentation of

legislation; or to include gender neutral references. The Commission recommends that any exercise of editorial powers to make changes to legislation should be subject to the supervision and approval of the Accessibility and Consolidation of Legislation Group.

20. In making its recommendations relating to editorial powers, the Commission is mindful of Article 15.2.1° of the Constitution, which confers on the Oireachtas the sole and exclusive power to legislate. For this reason, the Commission recommends that any legislation that authorises such editorial changes should expressly include the proviso that any editorial changes made must not alter the substance or effect of the legislation. Additionally, the Commission recommends that any editorial changes made to an Act or statutory instrument should be clearly identified within the revised text of that Act or statutory instrument. Furthermore, in the event of any conflict arising between the text of legislation as enacted or made and the text of revised legislation, the text as enacted or made must take precedence and prevail. Finally, the Commission recommends that, where an obvious error is discovered within legislation during the course of its being revised, this error should be communicated to the Accessibility and Consolidation of Legislation Group, which should in turn communicate the error to the Office of the Attorney General, the appropriate Government Department, and the Houses of the Oireachtas.
21. **Chapter 6 Using ICT to Make Legislation Immediately Available** concerns the third general principle, that legislation should be made immediately available to the public, including through making the best use of Information and Communications Technology (ICT).
22. The Commission recommends that provision be made to confer *prima facie* (presumptive) evidential status on the online versions of legislation, as has been achieved in the European Union and a number of other jurisdictions. The Commission recommends that the online versions of Revised Acts and statutory instruments should also be conferred with *prima facie* (presumptive) evidential status. The Commission recommends that this can be achieved by designating, in legislation, a single online database or website – the electronic Irish Statute Book (eISB) – as the official source of all legislation in the State.
23. The Commission also recommends that the official or authoritative versions of legislation published on that website would need to be accompanied by a suitable electronic signature that complies with the requirements of Regulation (EU) No. 910/2014 on the mutual recognition of electronic identification and signatures, the eIDAS Regulation. This is the form of electronic signature that is required under Regulation (EU) No. 216/2013 on the electronic publication of the Official Journal of

the European Union, as amended by Regulation (EU) No. 2018/2056 to take account of the eIDAS Regulation.

24. The Chapter also considers the importance of publication for the enforceability of legislation. The need to publish the full text of legislation is an important aspect of making legislation fully accessible to all. However, it becomes particularly important where the versions published online are to be given official or authoritative status. In this regard, the Commission recommends that a duty to publish all legislation be set out in legislation and that the full text of legislation should be published as soon as is practicable following its enactment or making. The Commission is conscious of the constitutional requirement to provide translated versions of legislation where it is enacted or made in one of the State's two official languages. In the majority of cases, this requires legislation to be translated from English into Irish. Consequently, the Commission recommends that sufficient resources should be allocated on an ongoing basis to the Translation Unit of the Houses of the Oireachtas to ensure that the full text of legislation is available online in both official languages of the State. The Commission recommends that translation efforts should prioritise the translation of Revised Acts and statutory instruments.
25. The Chapter also looks at how ICT may be used to improve the navigability and presentation of legislation. The Chapter considers the current ways in which ICT is used to enhance the accessibility of legislation, including the electronic Irish Statute Book, the Legislation Observatory of the Houses of the Oireachtas, the Legislation Directory, and the Commission's collection of Revised Acts, and acknowledges that significant progress has already been made in this regard.
26. The Commission recommends that these improvements should be built on by the development of an eLegislation Strategy, to be overseen by the Accessibility and Consolidation of Legislation Group, to ensure that, as technology advances, it continues to be used to improve the accessibility of legislation. This is consistent with the Government's general digital-by-design policy, including GovTech, which involves applying emerging technologies, such as artificial intelligence and advanced data processing to improve the delivery of public services through increasing efficiency and lowering costs.⁷ It is also consistent with the commitment in the Programme for

⁷ See *Cruinníú GovTech Report* (Department of Public Expenditure and Reform, November 2019), page 6, available at <<https://assets.gov.ie/42554/9f1238028b8f427facc97bf12a270410.pdf>> accessed 26 August 2020.

Government adopted in June 2020 to develop a National Digital Strategy, which includes integrating digital services within the provision of public services.⁸

27. The Commission recognises that making legislation more accessible can include presenting it alongside other relevant information that can help clarify and explain its purpose and development. Technology can also be used to present this information in a helpful and informative way through, for example, incorporating hyperlinks in legislation. Such information could include, for example, reports from bodies that have informed the legislation, Schemes of Bills published by Government Departments, pre-legislative scrutiny by Oireachtas Committees, texts of Bills as published and as amended during the legislative process, Explanatory Memoranda, relevant Oireachtas debates, explanatory information provided online by State bodies such as the Citizens Information Board, and case law of the courts interpreting and applying legislation.
28. Finally, the Commission recommends that standards for online publication of legislation should require legislation to be arranged by subject matter as well in chronological order. The subject matter classification of legislation would make it easier for end users of legislation to identify the applicable law on a given subject area. It would also allow for Acts and statutory instruments that concern related areas to be presented alongside each other where it is not possible to consolidate the law on a given area into one single Act. The Commission's Classified List of In-Force Legislation could be helpful to the Accessibility and Consolidation of Legislation Group in this regard.
29. **Chapter 7 Pre-Legislative and Post-Legislative Standards to Assist Accessibility of Legislation** considers how legislative policy standards can be improved and maintained at each stage of the policy cycle. In recent years, a number of jurisdictions have come to understand the importance of putting in place an effective regime for maintaining standards in the legislative process. While initiatives have varied from jurisdiction to jurisdiction, they can be seen to have a shared objective, namely, to improve the processes in the production and enactment of legislation with a view to ensuring that legislation that is ultimately enacted is accessible and is of the highest quality. Chapter 7 therefore begins by examining the extent to which current procedures for producing and amending legislation enable, or prevent, the development or maintenance of comprehensive legislation on a particular subject.
30. A comprehensive approach to legislative standards should, in order to be effective, include the provision of identifiable standards against which conformity can be

⁸ *Programme for Government: Our Shared Future* (2020), at page 121, available at <https://www.finegael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf> accessed on 26 August 2020.

measured at all relevant phases throughout the policy cycle, from policy formulation through to enactment. Furthermore, effective legislative standards should set out parameters against which legislation can be reviewed once it has been enacted. Given the recent increase in enacted legislation arising from Private Members' Bills,⁹ it is highly desirable that all legislative proposals, regardless of their source, be of the highest standard possible.

31. The Commission recommends that the Accessibility and Consolidation of Legislation Group should be designated with responsibility for coordinating the maintenance and development of published legislative standards throughout the policy cycle, including the pre-legislative scrutiny and post-legislative scrutiny stages. At the pre-legislative stage, this would include guidance on the form and content of explanatory memoranda for Bills; and, at the post-legislative stage, guidance on the form of post-legislative scrutiny reports.
32. Chapter 7 concludes with a consideration of the desirability of consolidating the existing law regarding legislation itself. In a number of jurisdictions, a Legislation Act has been enacted to consolidate the legislation concerning the production, publication, consolidation and interpretation of legislation. While the Commission supports the desirability of such a consolidated Legislation Act, having regard to the views of consultees, it has concluded that it should confine its recommendations to the accessibility issues that have formed the main focus of this Report. The Commission nonetheless considers that it is appropriate to examine developments in other jurisdictions and to describe what might suitably be included in such a Consolidated Legislation Act, which might form part of a future programme of consolidation.
33. **Appendix A** contains a summary of the recommendations in the Report.
34. **Appendix B** contains the *Draft Scheme of an Accessibility and Consolidation of Legislation Bill*, which refers to the recommendations made in this Report concerning accessibility of legislation, including the establishment of the proposed Accessibility and Consolidation of Legislation Group (ACLG). The Commission notes that if the ACLG were to be established, at least initially, on a non-statutory administrative basis, the relevant Heads of the Draft Scheme, notably Heads 3 to 7 and Head 13, could form the basis for its terms of reference.

⁹ See the *Final Report of the Sub-Committee on Dáil Reform* (May 2016) and the *Capacity Review of the Office of the Parliamentary Legal Advisor (OPLA) of the Houses of the Oireachtas* (December 2016) for discussions of the increased role anticipated for the enactment of Private Members Bills, with the assistance of the Office of Parliamentary Legal Adviser to the Houses of the Oireachtas.

CHAPTER 1 GUIDING PRINCIPLES OF ACCESSIBLE LEGISLATION AND THE BETTER REGULATION CONTEXT

1. Introduction: context of better regulation

- [1.1] This Report contains the Commission’s recommendations concerning how to make our legislation more accessible. The Report, and the recommendations, should be seen within the wider context of Ireland’s policies and practices relating to better regulation or smart regulation, which is sometimes discussed against the wider background of policy on regulatory reform. Those national policies and practices have been informed by a number of international reviews of regulatory reform in Ireland, as well as by the European Commission’s better regulation agenda.
- [1.2] In this century, this began with the 2001 *Report on Regulatory Reform in Ireland* prepared for the Government by the Organization for Economic Co-operation and Development (OECD). The 2001 OECD Report involved a wide-ranging review of regulatory policy and reform, some of which is outside the scope of this project, for example the importance of coordinated policy in the development of legislation concerning regulatory powers.¹ Related to the subject matter of this project, the 2001 Report recommended that there was a need to ensure that the complete “regulatory stock”, that is, the collection of legislation in the Irish statute book, should be kept under ongoing review and that steps should be put in place to rationalise it.
- [1.3] The 2001 Report led to the publication of the Government’s 2004 White Paper *Regulating Better*,² which set out six OECD-derived principles of good regulation that ought to inform both the production and review of Irish legislation. Those principles are: necessity, effectiveness, proportionality, transparency, accountability, and

¹ The Commission examined this in its 2018 *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018), in which the Commission recommended, in Chapter 2, that comparable financial and economic regulators should have a common core set of regulatory powers.

² *Regulating Better: A Government White Paper setting out six principles of Better Regulation* (June 2004); available at <<https://www.gov.ie/en/publication/2083d0-better-regulation-archive/>> accessed on 26 August 2020.

consistency. They were re-affirmed in the Government's 2013 policy statement *Regulating for a Better Future*.³

- [1.4] While regulatory reform, or better or smart regulation, encompasses very wide legal and related policy issues such as the design of regulatory systems, this Report concerns the element that concerns the accessibility of legislation. In Ireland, our statute book comprises over 3,000 Acts and over 15,000 statutory instruments (such as ministerial Regulations) that remain in force at the time of writing (August 2020).
- [1.5] The 2004 White Paper led to a number of initiatives that have made Irish legislation more accessible, notably the many enhancements to the electronic Irish Statute Book (eISB), the Statute Law Revision Project (SLRP), the Legislative Observatory of the Houses of the Oireachtas, the increased use of Regulatory Impact Assessments (RIAs), pre-legislative and post-legislative scrutiny within the Houses of the Oireachtas, and the existing work of the Commission on Access to Legislation. These developments are discussed in the succeeding chapters of this Report, with the emphasis being on those directly related to making legislation more accessible.
- [1.6] The OECD continues to engage with its member states on their respective regulatory policies, including as to how those policies relate specifically to the development of legislation. This engagement has included its 2019 review of *Better Regulation Practices Across the European Union*.⁴ For this review, the OECD analysed the use of regulatory management tools in EU Member States using the OECD's Indicators of Regulatory Policy and Governance. These tools included, for example, stakeholder participation in legislative design and post-enactment review processes. The 2019 OECD review recommended a standards-based approach as part of best practice regulatory management. The Commission discusses this issue in Chapter 7 of the Report.
- [1.7] The European Commission has also adopted a Better Regulation Agenda, which has involved incorporating the views of EU citizens and stakeholders throughout the policy cycle and law-making process of the EU. For example, views are sought on draft EU acts, legislative proposals, and impact assessments. In Ireland, this has included the

³ *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (Department of the Taoiseach, 2013), available at <<http://web.archive.org/web/20190208174434/https://www.taoiseach.gov.ie/eng/Publications/Publications%202013/Policy%20Statement%20on%20Economic%20Regulation%2020131.pdf>> accessed on 26 August 2020.

⁴ OECD, *Better Regulation Practices across the European Union* (2019); available at <<http://www.oecd.org/publications/better-regulation-practices-across-the-european-union-9789264311732-en.htm>> accessed on 26 August 2020.

role of Oireachtas Committees under the *European Union (Scrutiny) Act 2002*.⁵ This ensures that EU measures are evidence based, the transparency of EU decision-making, and reduces the regulatory burden on business and individuals as far as is practicable. The Commission also reviews existing EU laws through the Regulatory Fitness and Performance (REFIT) programme and has incorporated public and stakeholder consultation into this process.

- [1.8] Against that general background, the Commission now turns to the principles that have informed the specific recommendations concerning accessibility of legislation in the succeeding chapters of this Report.

2. Guiding Principles of Accessible Legislation

- [1.9] For legislation to be accessible, users should be able to access it freely and confidently, from a reliable and publicly available source. To ensure this, legislation should comply with certain essential principles, which are in turn derived from better regulation principles. In the Issues Paper, the Commission identified four guiding principles to which legislation should conform in order to be accessible and sought views from consultees as to the suitability of these guiding principles. The majority of submissions received supported these principles, which have consequently informed the analysis and recommendations in this Report. The four guiding principles identified by the Commission are that legislation should be:

1. Comprehensive;
2. Current;
3. Immediately available; and
4. Based on defined legislative standards.

- [1.10] This Chapter discusses each of these principles in turn, explaining what is meant by each and why each is important in respect of the accessibility of legislation.

(a) Comprehensive

- [1.11] This principle means that all legislation that remains in force must be accessible, not just some of it. In this digital era, this also means being available online. As discussed in detail in Chapter 2, a comprehensive collection of current Irish legislation, the legislation that remains in force, consists of approximately 3,000 Public Acts and over 15,000 statutory instruments, some of which pre-date the foundation of the State in 1922. The full text of all legislation enacted since 1922, together with the full text of

⁵ See the discussion of the 2002 Act in the Commission's *Discussion Paper on Domestic Implementation of International Obligations* (LRC 124-2020), at paras 4.37-4.38.

virtually all in-force pre-1922 Acts is available online via the electronic Irish Statute Book (eISB). In addition, the full text of all 2,000-plus in-force post-1922 Acts of the Oireachtas and 15,000 post-1922 statutory instruments, together with the full text of over 100 pre-1922 Acts, are available and arranged under 36 subject headings through the Commission's searchable Classified List of In-Force Legislation on its website.

- [1.12] While both of these online resources have greatly improved the accessibility of our legislation, difficulties remain for users. This is especially because, since legislation is regularly amended, it may be difficult to find the text of the current law, though again it is important to note that the eISB, through the Legislation Directory, provides a complete tracking of amendments to all in-force legislation. In addition, the growing number of Revised Acts being developed and maintained by the Commission, which at the time of writing (August 2020) contain the up-to-date text of over 380 Acts as amended, has improved accessibility to a wide range of legislation in its current form. Nonetheless, further work is required on this front and for this reason, comprehensiveness requires further streamlining of our legislation.
- [1.13] Chapter 4 of the Report therefore focuses on the comprehensive legislation principle by considering how the current volume of legislation can be effectively managed into the future. Chapter 4 builds on initiatives already adopted to date in Ireland, including the Statute Law Revision Programme (SLRP), which has resulted in the repeal of a huge volume of obsolete legislation, as well as the enactment of consolidating and codifying legislation. Chapter 4 considers how a more structured and programme-based approach to these methods could be used to build towards a simplified and streamlined collection of our legislation.

(b) Current

- [1.14] This principle means that legislation is available in its up-to-date, as amended, form. As already noted, even where legislation has been brought together in consolidated form, it will continue to be amended on a regular basis. Therefore, it is vital that such consolidated legislation is maintained in a coherent, up-to-date state. Chapter 5 therefore addresses this principle and considers how legislation, once consolidated, can continue to be made available in its up-to-date, as amended, form.

(c) Immediate

- [1.15] In this digital and online age, accessible legislation means that it should be available online as soon as possible and presented in a format that is accessible and useable. The importance of using Information and Communications Technology (ICT) effectively in this regard has been recognised for some time. As long ago as 2001, the Council of

Europe⁶ agreed a Recommendation which contained a number of general principles, including that legislation should:

1. be available free online from an official source;
2. be available in both as enacted form and in its as amended, revised form;
3. include point-in-time information; and
4. be authenticated.

[1.16] As noted above, significant progress has been made to make legislation more accessible through the use of ICT. For example, the full text of in-force legislation can be accessed free-of-charge on the eISB, amendments can be tracked through the Legislation Directory, and both the collection of Revised Acts and the Classified List of In-Force Legislation are published on the Commission's website. Despite this progress, the full potential of ICT to make legislation more accessible has not yet been harnessed. The online legislation databases in some other jurisdictions provide point-in-time information, which means that legislation can be viewed as it was in effect on a given date. Others, such as Queensland, provide revised versions of legislation in draft format as soon as an amending Bill is tabled in its Parliament, allowing members to immediately see what the effect of a Bill on existing legislation would be. Chapter 6 therefore discusses how ICT can be further used to make legislation more accessible.

(d) Legislative standards

[1.17] To ensure that legislation is produced in a manner that is consistent with the other guiding principles of accessibility, each stage of the legislative process should be underpinned by appropriate legislative standards. This includes in particular that those involved in the pre-legislative preparation phase are aware of what needs to be done to make the production of legislation as efficient as possible, and that similar standards apply to the post-enactment phase, including post-legislative scrutiny. The Commission emphasises that this is separate from the question of legislative drafting standards and techniques, which is outside the scope of this Report. The objective of improving and maintaining legislative standards is to improve the processes involved in the production and enactment of legislation with a view to ensuring that legislation that is ultimately enacted is accessible and is of the highest quality. Chapter 7 therefore discusses the extent to which current procedures for producing legislation enable the development or maintenance of comprehensive legislation in consolidated form, as well as how those procedures can be maintained and improved.

⁶ *Recommendation on the delivery of court and other legal services to the citizen through the use of new technologies Rec (2001) 3*, adopted by the Council of Europe Committee of Ministers on 28 February 2001 at the 743rd meeting of the Ministers' Deputies.

(e) Conclusions and recommendations

- [1.18] In submissions received in response to the Issues Paper, consultees agreed that the four guiding principles identified by the Commission are an appropriate set of principles to guide the production and maintenance of accessible legislation.
- [1.19] The *Legislation (Wales) Act 2019* provides a useful definition for accessibility as it relates to legislation, though the definition is intended, of course, to apply only to the law in Wales. Section 1(2) of the 2019 Act defines accessibility as the extent to which Welsh law is:
1. Readily available to the public;
 2. Published in an up-to-date form;
 3. Clearly and logically organised (both within and between enactments); and
 4. Easy to understand and certain as to its effect.
- [1.20] The attributes set out in section 1(2) of the Welsh 2019 Act are somewhat similar to the four guiding principles identified by the Commission. The first of the Welsh attributes aligns quite closely, for example, with the guiding principle of immediacy, while the second is similar to principle that legislation should be current. The third, which relates to the clear and logical organisation of legislation, relates both to the comprehensiveness and immediacy principles, in that it concerns both the organisation of legislation, as well as to its navigability and presentation. The final attribute is comparable to the legislative standards principle.
- [1.21] The Commission has taken account of the views of consultees that the four guiding principles that were identified in the Issues Paper are an appropriate set of principles to guide the production and maintenance of accessible legislation. The Commission also notes that similar principles have been adopted in the *Legislation (Wales) Act 2019*. For those reasons, the Commission concludes, and recommends, that those four principles should form the basis for the recommendations set out in the succeeding chapters of the Report.

R. 1.01 The Commission recommends that, to be accessible, legislation should be:

- (a) comprehensive, that is, that all legislation that is in force is accessible;
- (b) current, that is, that it is available in an up-to-date, as amended form;
- (c) immediately available in a free to access online format; and
- (d) based on defined legislative standards, at each stage of the policy cycle, including at pre-legislative and post-legislative stages.

CHAPTER 2 ACCESSIBILITY OF LEGISLATION IN IRELAND

1. Introduction

- [2.1] This Chapter describes the current level of accessibility of legislation in Ireland. At present (August 2020), the legislation that remains in force in Ireland includes nearly 1,200 public general Acts enacted prior to the State's establishment in 1922,¹ as well as approximately 1,800 of the 3,000 Acts enacted by the Oireachtas since 1922.²
- [2.2] During the 19th century, when the rate at which legislation was being enacted began to accelerate with the concurrent growth in the reach of State regulation, it was recognised that there was a pressing need to bring some order to the increased volume of law: a need to "tidy the statute book", that is, to render legislation more accessible.³
- [2.3] This Chapter, therefore, discusses the various strategies that have been devised and implemented to improve the accessibility of legislation in Ireland from the 19th century onwards. These strategies have included, for example, the publication by a Statute Law Committee of official volumes of Revised Acts, which were essentially administrative consolidations of all Acts in force at that time.⁴ Other approaches that were adopted have included the enactment of consolidation Acts, which brought together collections of legislation on specific topics, and "mini-code" Acts, which placed common law (judge-made) rules on a statutory footing. These were all intended to bring either narrow or broad subject areas together into a relatively coherent form. These approaches have continued, to a greater or lesser extent, into the 21st century.
- [2.4] This Chapter proceeds to explore how these various strategies have been adapted and enhanced through the use of online and digital technology. This exploration includes an assessment of the extent to which the key online resources currently utilised – the electronic Irish statute book (eISB), the Houses of the Oireachtas Legislative

¹ These Acts were carried over into the law of the new Irish State by virtue of Article 73 of the Irish Free State Constitution and, subsequently, by Article 50 of the Constitution of Ireland (*Bunreacht na hÉireann*). See para 2.5.

² The remaining 1,200 Acts of the 3,000 enacted by the Oireachtas since 1922 have subsequently been repealed, either by another Act or statutory instrument.

³ See Chapter 3, which outlines similar realisations that took place, during and leading up to that period, in other jurisdictions.

⁴ For a more detailed consideration of these Revised Acts, see paras 2.18 to 2.21.

Observatory, and this Commission’s work on Access to Legislation – have improved online accessibility to legislation in Ireland.

2. Sources of legislation in Ireland

(a) Primary legislation

- [2.5] The body of Irish legislation, or the “Irish statute book”,⁵ comprises all Acts (primary legislation) and statutory instruments (secondary legislation) applicable to Ireland.⁶ Acts usually contain generally applicable legal principles and rules, for example, provisions that make certain matters criminal offences, or provisions concerning the principal rules on taxation, or the key provisions regulating an economic activity such as banking. Article 15.2.1° of the Constitution of Ireland (*Bunreacht na hÉireann*) 1937 confers upon the Oireachtas sole and exclusive responsibility for enacting Acts.⁷ In addition, pre-1922 Acts applicable to Ireland were also carried over into Irish law by Article 73 of the 1922 Irish Free State Constitution 1922,⁸ and, subsequently, by Article 50 of the Constitution of Ireland.⁹ Of approximately 3,000 Acts that currently remain in force, 1,800 of these have been enacted since 1922, while approximately 1,200 were enacted prior to 1922.¹⁰

⁵ The term “statute book” is slightly misleading in that it connotes the existence of a single book or volume that contains all applicable laws. In reality, the statute book is comprised of Acts of the Oireachtas, as well as “a disparate set of Acts from very different times”. For a more detailed discussion of the development of the Irish statute book, see Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007), Chapter 3.

⁶ It should be noted that a number of non-statutory instruments (such as instruments made under a prerogative, executive, or administrative power) as well as general charters and letters patent from before independence (pre-1922) also remain in force. At the time of writing (August 2020), the Commission, with the support of the Office of the Attorney General, has assumed responsibility for the remaining aspect of the Statute Law Revision Programme (SLRP), which involves determining the number of statutory instruments from 1821 to 1922 that remain in force. This work is scheduled to be completed in 2022.

⁷ See Chapter 4 for a more detailed discussion of Article 15.2.1°.

⁸ Article 73 of the 1922 Constitution provided that “the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.” In *The State (Kennedy) v Little* [1931] IR 39, the High Court (O’Byrne J) remarked that the intention of Article 73 was to establish the new State “with the least possible change in previously existing law.”

⁹ Article 50 of the Constitution provides that “the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.”

¹⁰ See the discussion of the Commission’s Classified List of In-Force Legislation, at paras 2.52-2.54, below.

(b) Secondary legislation

- [2.6] Statutory instruments are statutory provisions made by a person, often a Government Minister, or body under a power delegated to that person or body by an Act.¹¹ They usually contain detailed rules or regulations that supplement the general principles or rules in the Act under which they are made: for this reason, they are often referred to as secondary legislation. Statutory instruments are usually limited to expanding upon the "principles and policies" of the "parent" Act.¹² They cannot usually amend or repeal an Act or create a criminal offence.¹³ Of over 35,000 statutory instruments made since 1922, approximately 15,000 remain in force (or appear to remain in force).¹⁴
- [2.7] Article 29.4.6° of the Constitution,¹⁵ in tandem with the *European Communities Act 1972*, as amended, permits a significant derogation from the rule that secondary legislation may only expand upon the principles and policies contained in a parent Act.¹⁶ Article 29.4.6° sets out the constitutional basis on which EU law is transposed into the Irish legal system.¹⁷ The *European Communities Act 1972* was enacted to

¹¹ The Act authorising the making of statutory instruments is sometimes referred to as the "parent" or "principal" Act.

¹² The leading case on the "principles and policies" test is *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381. See the review of this area in the Commission's *Discussion Paper on Domestic Implementation of International Obligations* (LRC 124-2020), at paras 3.144-3.152.

¹³ This is subject to the important exception that ministerial Regulations made under section 3 of the *European Communities Act 1972*, as amended, that give effect to an EU-derived legal instrument (such as an EU Directive) may amend an Act of the Oireachtas and create indictable offences: see para 2.7 below. Other, limited, examples of a power to amend primary legislation by statutory instrument include section 12 of the *Adaptation of Enactments Act 1922*, section 2 of the *Adaptation of Enactments Act 1931*, section 5 of the *Constitution (Consequential Provisions) Act 1937*, and section 4(10) of the *Ombudsman Act 1980*.

¹⁴ See the discussion of the Commission's Classified List of In-Force Legislation, at para 2.52-2.54, below. In addition to the 15,000 post-1922 instruments in force, 43 instruments made prior to 1820 were retained in force by the *Statute Law Revision Act 2015*, which also formally revoked all other instruments made up to 1820. At the time of writing (August 2020), it is not known how many statutory instruments made between 1821 and 1922 remain in force. In 2019, the Commission began work on this part of the Statute Law Revision Programme and intends to complete in 2022 the work to identify which instruments made between 1821 and 1922 should be retained in force and which should be revoked.

¹⁵ Article 29.4.6° was inserted into the Constitution in 2009 by the *Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009*. Similar provisions have been in place since the 1972 referendum to approve the State's membership of the European Communities, now the European Union: see *Third Amendment of the Constitution Act 1972*.

¹⁶ For a discussion of this Article of the Constitution, see Cahill, "Constitutional Exclusion Clauses, Article 29.4.6°, and the Constitutional Reception of European Law" (2011) 34 *Dublin University Law Journal* 74-100; and Fahey, *EU Law in Ireland* (Clarus Press 2010) Chapters 5 and 8.

¹⁷ One interpretation of the effect of this Article is that it enables EU law to take precedence over constitutional provisions in the event of a conflict between the two, where this is necessitated by Ireland's membership of the EU.

incorporate, on foot of this constitutional provision,¹⁸ the law of the European Communities, now the European Union, into Irish domestic law. Section 3 of the 1972 Act provides that Regulations made by a Minister under that section may have the same legal effect as an Act where this is necessitated by membership of the European Union.¹⁹ Regulations made under section 3 of the 1972 Act may also amend an Act, where such amendment is necessitated to give full effect to a requirement under EU law, and may create both summary and indictable offences where the Minister making the Regulations considers it necessary to give full effect to the relevant provision under EU law.²⁰ The growing number of obligations that arise under EU law means that the number of Regulations made under section 3 of the 1972 Act has increased significantly.²¹ For example, 199 statutory instruments were made under section 3 of the 1972 Act in 2019, which comprised about 28.43% of statutory instruments made in 2019.²² Currently, just under 2,000 Regulations made under section 3 of the 1972 Act remain in force.²³

(c) European Union law

- [2.8] Aside from its incorporation into the collection of Irish legislation through the regulations made under section 3 of the 1972 Act, however, EU law is itself another distinct source of law that is applicable within the State.²⁴ As referred to above, Article 29.4.6° of the Constitution is key in this regard. However, views have changed regarding the exact effect of Article 29.4.6° on the demarcation of the boundaries between Irish and EU law.

¹⁸ At that time, this provision was contained within Article 29.4 of the Constitution.

¹⁹ For a consideration of the constitutional limitations on the exercise of legislative power under section 3 of the 1972 Act, see *Meagher v Minister for Agriculture* [1994] 1 IR 329 and *Maher v Minister for Agriculture* [2001] 2 IR 139.

²⁰ Section 3(3) of the 1972 Act, as amended by the *European Communities Act 2007* (which effectively reversed the Supreme Court decisions of *Browne v Ireland* [2003] 3 IR 205 and *Kennedy v Attorney General* [2007] 2 IR 45), and the *European Union Act 2009*, permits the Ministerial creation of indictable offences.

²¹ However, as discussed in paras 2.38-2.39, increasingly, EU law is being made by way of Regulation rather than by Directive. This is relevant because EU Regulations do not require legislative implementation by Member States to be integrated into national law.

²² In 2019, 700 statutory instruments were made. See <www.irishstatutebook.ie> accessed 26 August 2020.

²³ See the discussion of the Commission's Classified List of In-Force Legislation, at paras 2.52-2.54, below.

²⁴ This poses accessibility issues, particularly in relation to EU Regulations, which are discussed in more detail at paras 2.38 to 2.39.

- [2.9] According to one interpretation of the Article, it accords primacy to EU law over Irish law, affording it "a large measure of constitutional immunity".²⁵ This appears to be the approach originally adopted by the Irish courts,²⁶ particularly in the *Meagher* case,²⁷ in which the Supreme Court stated unequivocally that "[i]t is well established that Community law takes precedence over our domestic law."²⁸ This reflects the monist interpretation of the supremacy of EU law set out by the European Court of Justice in *Internationale Handelsgesellschaft* and *Simmenthal*.²⁹
- [2.10] However, in the more recent *Maher* case,³⁰ the Supreme Court appeared to apply another interpretation, namely, that it merely impedes constitutional provisions from preventing EU law having "force of law" in Ireland, and that it does not actually clarify the position EU law enjoys in the hierarchy of laws within the State.³¹ Instead, it has been suggested that the supremacy of EU law over Irish law is provided for on a legislative, rather than a constitutional basis,³² through section 2 of the *European Communities Act 1972*, as amended by section 3 of the *European Communities Act 2009*.³³
- [2.11] This discussion is becoming more relevant given the emerging pattern of EU law being increasingly enacted through EU Regulations (not to be confused with ministerial

²⁵ Hogan, Whyte, Kenny and Walsh, *JM Kelly The Irish Constitution* 5th ed (2018), 5.3.49.

²⁶ In *Lawlor v Minister for Agriculture* [1990] 1 IR 356 and *Greene v Minister for Agriculture* [1990] 2 IR 17.

²⁷ *Meagher v Minister for Agriculture and Food* [1994] 1 IR 329.

²⁸ *Meagher v Minister for Agriculture and Food* [1994] 1 IR 329, at 360.

²⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, at para 21.

³⁰ *Maher v Minister for Agriculture and Rural Development* [2001] 2 IR 139.

³¹ Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Communities* (1997) 350-351. The constitutional provision has also been criticised as being "a questionable manner" in which to regulate the relationship between Irish and EU law. See Cahill, "Constitutional Exclusion Clauses, Article 29.4.6, and the Constitutional Reception of European Law" (2011) 34 *Dublin University Law Journal* 74, at 100.

³² Fahey, *EU Law in Ireland* (Clarus Press 2010) at 7.

³³ Section 2 of the 1972 Act as amended provides: "The following shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the treaties governing the European Union: (a) the treaties governing the European Union; (b) acts adopted by the institutions of the European Union (other than acts to which the first para of Article 275 of the Treaty on the Functioning of the European Union applies); (c) acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty; and (d) acts adopted by bodies competent under those treaties (other than acts to which the first para of the said Article 275 applies)."

Regulations made in Ireland) rather than through EU Directives. EU Directives required implementation through domestic legislation, while EU Regulations do not necessarily require the enactment of domestic legislation. These developments are discussed in greater detail, below.³⁴

3. The position when the State was founded in 1922: consolidated Acts and Revised Acts from the 19th century

(a) Consolidation projects in the 19th century

- [2.12] When the State was founded in 1922, it inherited a significant amount of pre-1922 legislation, which had, to some extent, undergone a process of rationalisation and reform in the century prior to independence. In the early 19th century, the state of English law and legislation, which had developed in a piecemeal and unstructured fashion from the 11th century onwards,³⁵ was subjected to widespread criticism by political philosophers, writers, and campaigners. Jeremy Bentham, for instance, (considered one of the "fathers" of 19th century British political reform and of common law statutory codification)³⁶ scathingly described the law of England as "a fathomless and boundless chaos made up of fictions, tautology and inconsistency".³⁷ Similarly, Charles Dickens pilloried the chaotic and unjust nature of court procedures in his novel *Bleak House*, levying his criticism against the Court of Chancery in particular and castigating it for lengthy delays in litigation.³⁸

³⁴ See para 2.38 to 2.39.

³⁵ While the "notional canon of statutes" commenced with the confirmation of the Magna Carta in 1225, the United Kingdom's collection of legislation can be traced back to charters and letters patent issued in 1066. For an overview of the development of the English collection of legislation, see Baker, *An Introduction to Legal History* (Butterworths 2002) at 204-212.

³⁶ Indeed, Bentham is regarded as having coined the verb "to codify". See Morris, "Codification and Right Answers" (2004) 74(2) *Chicago-Kent Law Review* 355.

³⁷ Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England* (Clarendon Press 1928) at 153. See also Bentham, *General View of a Complete Code of Laws* (William Tate 1843). For a consideration of the work of Bentham in relation to law reform, see Judson, "A Modern View of the Law Reforms of Jeremy Bentham" (1910) 10 *Columbia Law Review* 41, and Hemming, "Why Bentham's Vision of a Comprehensive Criminal Code Remains Viable and Desirable as the Model Design for a Code" (2012) 14 *University of Notre Dame Australia Law Review* 125.

³⁸ "Equity sends questions to Law, Law sends questions back to Equity; Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything without this solicitor instructing and that counsel appearing for A, and this solicitor and that counsel appearing for B, and so on through the whole alphabet, like the history of the Apple Pie... And we can't get out of the suit on any terms, for we are made parties to it, and must be parties to it, whether we like

- [2.13] These political and literary critiques were further bolstered by the publication in 1846 of the *Report from the Select Committee on Legal Education*,³⁹ which damningly concluded that there was a complete dearth of legal education in England and in Ireland at that time.⁴⁰ As a consequence of this lack of legal education, legal knowledge remained the sole purview of judges and legal practitioners.⁴¹
- [2.14] In direct response to the 1846 report, universities and Inns of Court began to develop curricula for legal education.⁴² Interestingly, these curricula were significantly influenced by civil law jurisdictions, in which a legal scientific tradition had already developed and from which they could draw inspiration and guidance.⁴³ This mantle was taken up by legal educators such as Sir Henry Maine and John Austin,⁴⁴ thanks to whom civil law began to take a footing in legal theory in the United Kingdom.⁴⁵
- [2.15] As a result of public attention being directed towards the shortcomings of the law and the legal system within the United Kingdom, and of academic attention being focused on the development of legal science, political reforms began to take place, in legislative form, from the 1830s onwards. In 1833, for example, the English Lord Chancellor Lord Brougham established the Statute Law Commission for the purposes of improving the collection of legislation. However, although the Commission

it or not." Dickens, *Bleak House*, Chapter 10. *Bleak House* was originally published between 1852 and 1853 in serial format.

³⁹ UK Parliament, House of Commons, *Report from the Select Committee on Legal Education* (1846) Vol. X.

⁴⁰ See Samuel, "Civil Codes and the Restructuring of the Common Law" in Fairgrieve (ed), *The Influence of the French Civil Code on the Common Law and Beyond* (British Institute of International and Comparative Law 2007) at 96; and Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press 1980) at 78-79.

⁴¹ Samuel, "Civil Codes and the Restructuring of the Common Law" in Fairgrieve (ed), *The Influence of the French Civil Code on the Common Law and Beyond* (British Institute of International and Comparative Law 2007) at 95.

⁴² Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press 1980) at 79.

⁴³ *Ibid.*

⁴⁴ Sir Henry Maine (1822-1888) was Chair of Historical and Comparative Jurisprudence and later Master of Trinity Hall at Oxford University. He was then appointed as Whewell Professor of International Law at Cambridge University. John Austin (1790-1859) was Professor of Jurisprudence at University of London.

⁴⁵ Samuel, "Civil Codes and the Restructuring of the Common Law" in Fairgrieve (ed), *The Influence of the French Civil Code on the Common Law and Beyond* (British Institute of International and Comparative Law 2007) at 96.

produced eight reports until its dissolution in 1845, its recommendations were never adopted.⁴⁶

- [2.16] Despite the newly illuminated need to bring coherence and organisation to the United Kingdom's collection of legislation, it was not until 1853 that law reform began to be taken seriously, when a renewed programme of reform was proposed by the UK Lord Chancellor Lord Cranworth. The reform programme culminated in the enactment in 1861 of the "Criminal Law Consolidation Acts," which comprised: the *Accessories and Abettors Act 1861*, the *Criminal Statutes Repeal Act 1861*, the *Larceny Act 1861*, the *Malicious Damage Act 1861*, the *Forgery Act 1861*, the *Coinage Offences Act 1861*, and the *Offences against the Person Act 1861*. Some of these Acts can also be described as "mini-codes", as they placed some common law offences on a statutory footing. Following this, a number of Statute Law Revision Acts were subsequently enacted to repeal obsolete Acts.⁴⁷
- [2.17] Prior to the 1850s, the reticence for any real change to be effected in respect of law reform can be partly attributed to the propensity during this period for radical political transformation to be critiqued through a conservative framework of "prudence, restraint, and moderation"⁴⁸ as originally advocated by Edmund Burke in response to the events of the French Revolution.⁴⁹ Following the successes of the 1853 programme, however, momentum for law reform began to build and, throughout the second half of the 19th century, a significant number of Acts were enacted that consolidated the law. Additionally, "mini-codes" were enacted in areas as diverse as commercial law, the courts system, criminal law, prison law, and taxation.⁵⁰ These consolidating and codifying Acts were carried over and remained in force in Ireland under Article 73 of the Constitution of the Irish Free State 1922 and, subsequently, under Article 50 of the Constitution of Ireland 1937. Many of these Acts remain in force, either in whole or in part, at the time of writing (August 2020), while some have been replaced by post-1922 successor consolidations and mini-codes.⁵¹

⁴⁶ Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 39-40.

⁴⁷ Acts aimed at making the collection of legislation more accessible enacted during this period included the *Statute Law Revision Act 1856*, the *Statute Law Revision Act 1861* and the *Statute Law Revision Act 1863*.

⁴⁸ Turner, *Edmund Burke: Reflections on the Revolution in France* (Yale University Press 2003) xiv.

⁴⁹ Edmund Burke (1730-1797) was an Irish political theorist, philosopher and, for many years MP for Bristol, who is regarded as the father of British conservatism.

⁵⁰ For example, the *Supreme Court of Judicature (Ireland) Act 1877*, the *Bills of Exchange Act 1882*, the *Arbitration Act 1889*, the *Partnership Act 1890*, and the *Sale of Goods Act 1893*.

⁵¹ For a list of some of the mini-codes that remain in force today, see para 2.33, below.

(b) Statutes Revised

- [2.18] In addition to the formally enacted reforming, consolidating and mini-codifying Acts, a separate programme of administrative consolidation was undertaken during the 19th century to publish a semi-official collection of all Acts that remained in force and in their amended forms, rather than in their as enacted forms. This involved the publication of the multi-volume *Statutes Revised*, under the supervision of the Statute Law Committee, which was established in 1868 by the UK Lord Chancellor Lord Cairns. The first edition of the *Statutes Revised* was published between 1870 and 1885, and it comprised a comprehensive collection of all public general Acts enacted in Westminster that remained in force up to 1878, including all amendments.
- [2.19] The second edition of the *Statutes Revised* comprised 24 volumes covering all Acts in force up to 1920 and incorporating all amendments up to the year immediately preceding each volume's year of publication. The first 20 volumes of this second edition, taking the law up to the year 1900, were published between 1888 and 1909, and as such, can be relied upon, to a certain extent, as accurately restating the law applicable to Ireland at their time of publication, to the extent that they contained Westminster Acts that expressly applied to Ireland. A parallel exercise was carried out in respect of Acts enacted by the pre-1800 Irish Parliament, which culminated in the publication in 1885 of *The Irish Statutes Revised, 1310-1800*.⁵² Thus, when the State was established in 1922, it inherited a relatively clear collection of some of the legislation that remained in force at that time.⁵³
- [2.20] A similar exercise was carried out in respect of secondary legislation under the direction of the Statute Law Committee, which resulted in the publication in 1896 of the *Statutory Rules and Orders Revised*. The first edition comprised 9 volumes and contained all in-force Statutory Rules and Orders of a general and public character that were issued prior to 1890. Any Orders issued after 1890 were included in the annual volumes of the *Statutory Rules and Orders*. The fourth and final edition of the *Statutory Rules and Orders Revised* was published in 1903.

⁵² See *The Irish Statutes Revised, 1310-1800* (Round Hall, 1995). This was a reprint of the original 1885 publication prepared by WF Cullinan, with a new Introduction by Professor Nial Osborough, which noted that the collection of the pre-Union Acts it contained was not comprehensive.

⁵³ The collection in the *Statutes Revised* and, more particularly, the collection in *Irish Statutes Revised*, were not comprehensive. See Osborough, Introduction, *The Irish Statutes Revised, 1310-1800* (Round Hall, 1995); and Mooney, "The Statute Law Revision Project and Statute Law Revision in Ireland 2003 to 2015" (2017) 38(1) *Statute Law Review* 79-97, at 82. It was not until the enactment of the *Statute Law Revision Act 2007* that a comprehensive list of pre-1922 Public Acts, including pre-1800 Acts of the Irish Parliament, was compiled, including a definitive list of 1,364 pre-1922 Public Acts that were retained in Schedule 1 of the 2007 Act. This is discussed in greater detail at para 2.61.

- [2.21] As a result of the work that was carried out under the direction of the Statute Law Committee, when the State was established in 1922, it inherited a relatively clear collection of some of the legislation that remained in force at that time, particularly in respect of primary legislation.

(c) Chronological Tables of and Index to the Statutes

- [2.22] In addition to the Statutes Revised and the Statutory Rules and Orders Revised, the Statute Law Committee also published and updated, on a regular basis, the *Chronological Table of the Statutes and the Index to the Statutes*. An official Index to the Statutes and a Chronological Table to the Statutes was first proposed in 1867 by Lord Cairns. In October 1867, the UK Lord Chancellor Lord Chelmsford informed the Home Secretary that an Index to the Statutes and a Chronological Table of the Statutes would be prepared as a result of Lord Cairns' proposal and following the introduction of the Statute Law Revision Bill of that year.⁵⁴ The first edition was published, as a single volume, in 1870. It continued to be published as a single volume until the 12th edition, from which point onwards the Chronological Table and the Index were published as two separate volumes.⁵⁵
- [2.23] The last edition of the Chronological Table and Index that was published prior to the establishment of the State in 1922 was the 37th edition published in 1922. Volume 1 of this edition, the Chronological Tables, tracked all amendments to Acts passed in Westminster up to 1921, including Acts that applied to Ireland. This later enabled the Law Reform Commission to populate the Legislation Directory, discussed below,⁵⁶ with pre-1922 legislative amendments retained in force by the *Statute Law Revision Act 2007*.
- [2.24] Volume 2 of the 37th edition comprised the Index of the Statutes, which also indexed all Acts passed in Westminster up to 1921.⁵⁷

⁵⁴ See the Commission's *Consultation Paper on the Legislation Directory: Towards A Best Practice Model* (LRC CP 49-2008), at paras 1.15-1.18.

⁵⁵ Prior to this, in 1836, Andrew Newton Oulton, a barrister, prepared a statutory Index to and Chronological Table of the Statutes affecting Ireland. These were not, however, official publications. See Oulton, *Chronological Table of the Statutes in force or, or affecting Ireland from the earliest period to the present time, with references to the index to these statutes* (Hodges and Smith Dublin 1837).

⁵⁶ Paras 12.51 to 12.52.

⁵⁷ See para 1.49. For a discussion of the work carried out by the Commission in transcribing the hardcopy Chronological Table into an electronic format, see the Commission's *Report on the Legislation Directory* (LRC 102-2010), at paras 2.87-2.97.

4. Developments since 1922

(a) Consolidations

- [2.25] On the establishment of the State in 1922, it inherited the collection of legislation that had been consolidated and revised by the 19th century projects considered above. In the years following the establishment of the State, however, resources for legislative drafting were limited. Additionally, the State's first Parliamentary Draftsman, Arthur Matheson, was predominantly engaged during his time in the position in "the mammoth task of establishing a sufficient administrative structure following independence".⁵⁸ Due to these resourcing constraints, the State initially failed to maintain Revised Acts in their up-to-date form. However, a number of consolidations and mini-codes of the law were enacted in the period during which the State sought to put in place a legislative framework for the new State, including the *Ministers and Secretaries Act 1924* and the *Courts of Justice Act 1924*.
- [2.26] In 1951, the Statute Law Reform and Consolidation Office (SLRCO) was established within the Office of the Attorney General. While the SLRCO drafted a number of law reform Bills during the 1950s, such as the *Mortmain (Repeal of Enactments) Act 1954*, the *Fisheries (Statute Law Revision) Act 1956*, the *Statute of Limitations 1957*, and the *Fisheries (Consolidation) Act 1959*, it was not until the early 1960s that the drive to consolidate and streamline the collection of legislation was accelerated,⁵⁹ with the State, and in particular the Department of Justice, seeking to modernise its collection of legislation.
- [2.27] In 1962, the Department of Justice published a White Paper, entitled *Programme of Law Reform*,⁶⁰ which set out for the first time a specific list of proposals for statutory reform. The ultimate intention of the Programme was to put in place a collection of legislation comprised exclusively of Acts of the Oireachtas. Under this Programme, a number of significant consolidations occurred, such as the *Guardianship of Infants Act 1964* and the *Succession Act 1965*. The SLRCO also drafted the *Companies Act 1963* and the *Income Tax Act 1967*. The work carried out by the SLCRO in drafting these pieces of legislation was quite innovative. The *Succession Act 1965*, for example, was at least in part influenced by civil law traditions. The Commission has previously noted

⁵⁸ For an overview of the early workload of the Office of Parliamentary Draftsman, see Hunt, "The Origins of the Parliamentary Draftsman in Ireland" (2005) 26(3) *Statute Law Review* 171.

⁵⁹ The early legislative reforms drafted by the SLRCO, coupled with the appointment of Charles Haughey as Minister for Justice in 1961, an enthusiastic proponent of law reform, paved the way for the more substantive and systematic reforms that took place from the 1960s onwards.

⁶⁰ *Programme of Law Reform* (Pr 6379, Department of Justice, 1962).

this influence in its *Report on Prevention of Benefit from Homicide*⁶¹ and its *Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children*.⁶²

- [2.28] However, some reform proposals suggested in the 1962 Programme took many decades to implement,⁶³ such as the reform of the law on criminal insanity, which was ultimately enacted in the *Criminal Law (Insanity) Act 2006*. Shifting legislative priorities caused implementation of the Programme to decelerate, which negatively impacted on the work of the SLRCo, because it could only act on Government Departments' instructions and could not initiate its own projects. The SLRCo also remained without a Director for a number of years, which ultimately led to its abolition in 1988.⁶⁴ A number of reforms proposed for consideration in the 1962 *Programme of Law Reform*, such as on the civil liability of occupiers,⁶⁵ consolidation of the courts legislation,⁶⁶ and reform of trustee law,⁶⁷ would later form the basis of projects included in this Commission's Programmes of Law Reform.⁶⁸
- [2.29] Separately, a number of Government Departments have prepared consolidations or mini-codes which have continued to be enacted since the 1960s.⁶⁹ Some of these have been enacted on foot of recommendations from advisory groups such as this Commission or from specially-convened bodies such as the Company Law Review Group, and sometimes also on the responsible Department's own initiative. As a

⁶¹ *Report on Prevention of Benefit from Homicide* (LRC 114-2015), at para 1.13.

⁶² *Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children* (LRC 118-2017), at paras 1.24 and 2.124.

⁶³ It has been suggested that, despite the commitment to law reform, "the exigencies of more immediate legislative priorities within the Department of Justice" meant that some of the 1962 proposals were not implemented for some time. See *Byrne and McCutcheon on the Irish Legal System* 6th ed (Bloomsbury 2014) at para 11.10.

⁶⁴ The functions of the SLRCo were re-established by the creation of the Statute Law Revision Unit in 1999. See Donelan, "Recent Developments in Statute Law Revision in Ireland" (2001) 22(1) *Statute Law Review* 1, at 2; and Donelan, "Statute Law Revision, Codification and Related Policies in Ireland" (2001) 29(2) *International Journal of Legal Information* 323, at 326.

⁶⁵ *Report on Occupiers' Liability* (LRC 46-1994), implemented by the *Occupiers' Liability Act 1995* Act.

⁶⁶ *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010).

⁶⁷ *Report on Trust Law: General Proposals* (LRC 92-2008).

⁶⁸ The Commission was established by the *Law Reform Commission Act 1975*. For a detailed discussion of the background to its establishment, see O'Connor, "The Law Reform Commission and the Codification of Irish Law" (1974) 9 *Irish Jurist* 14.

⁶⁹ For example, the *Land and Conveyancing Reform Act 2009* and the *Companies Act 2014*.

consequence of such consolidations, a number of areas of the law have been enacted within relatively self-contained mini-codes.⁷⁰

(b) Revised Acts

- [2.30] The Statute Law Revision Unit (SLRU) was established within the Office of the Attorney General in February 1999, on foot of recommendations made in the 1997 *Report of the Review Group on the Law Offices of the State*. The SLRU conducted a review of the viability of consolidation and revision projects in respect of Irish legislation and concluded, with agreement from the Attorney General, that a “new approach” would be required.⁷¹ As a short-term approach, a restatement policy was formulated, based on the Australian approach of administrative consolidation.⁷² This entailed the publication of an administrative consolidation that would be laid before the Houses of the Oireachtas and would constitute presumptive evidence of the law where certified by the Attorney General under section 2(1) of the *Statute Law (Restatement) Act 2002*.
- [2.31] In 2006, the Government reassigned functional responsibility for restatements from the SLRU to the Commission.⁷³ In 2008, the Commission published a *Report on Statute Law Restatement*,⁷⁴ in which, using specified selection criteria, it selected approximately 60 Acts to be included in the First Programme of Restatement.⁷⁵ When related legislation to be reviewed in tandem with the candidate Acts was considered, the actual number of Acts that came within this first programme numbered more than 100. Coupled with the ongoing number of amendments being made to those Acts, the Commission recognised that certificates by the Attorney General would quickly become obsolete as soon as any of the Acts were subsequently amended. As a result, the Commission concluded that it was not practicable to seek such certifications for restatements every time an amendment was made and that it was therefore preferable to prepare Revised Acts, that is, administrative consolidations outside the parameters of the 2002 Act.

⁷⁰ For a list of some of the mini-codes that remain in force today, see para 2.33, below.

⁷¹ Donelan, “Statute Law Revision, Codification and Related Policies in Ireland” (2001) 29(2) *International Journal of Legal Information* 323, at 333.

⁷² *Ibid.*

⁷³ See the discussion in the Commission’s *Report on Statute Law Restatement* (LRC 91-2008).

⁷⁴ *Report on Statute Law Restatement* (LRC 91-2008).

⁷⁵ The First Programme of Restatement covered the period from July 2008 to December 2009. For a full list of these Acts, see Appendix B of the Commission’s *Report on Statute Law Restatement* (LRC 91-2008).

- [2.32] The Commission maintains on its website Revised versions of all textually amended Acts enacted since 2005 (other than Finance Acts)⁷⁶ and over 160 pre-2005 Acts; representing a total of over 380 Revised Acts at the time of writing (August 2020). This work has, to some extent, bridged the gap back to the work of the pre-1922 Statute Law Committee on the Statutes Revised.

(c) Current mini-codes

- [2.33] As a consequence of the projects undertaken to date, significant progress has already been made in making legislation accessible in a relatively comprehensive and current form. By virtue of consolidation projects undertaken prior to 1922 and those that have been carried out since the State was established in 1922 (although not under a structured programme), a number of pre-1922 and post-1922 mini-codes provide relatively comprehensive statements of the law in a number of areas. In addition, Revised Act versions of some of these mini-codes are also available on the Commission's website, which ensures that they are maintained in an up-to-date form. The following is a list of some of these pre-1922 and post-1922 mini-codes that remain in force (using examples from the 36 headings in the Commission's Classified List of In-Force Legislation and also indicating where revised versions of such mini-codes are available on the Commission's website).⁷⁷

Heading 1: Agriculture and Food	Heading 3: Business Occupations and Professions
<ul style="list-style-type: none"> • <i>Animal Health and Welfare Act 2013</i>⁷⁸ (available as revised) 	<ul style="list-style-type: none"> • <i>Pharmacy Act 2007</i> (available as revised) • <i>Medical Practitioners Act 2007</i> (available as revised) • <i>Nurses and Midwives Act 2011</i> (available as revised)
Heading 4: Business Regulation, Including Business Names, Company Law and Partnerships	Heading 5: Citizenship, Equality and Individual Status
<ul style="list-style-type: none"> • <i>Industrial and Provident Societies Act 1893</i> 	<ul style="list-style-type: none"> • <i>Data Protection Act 2018</i> (available as revised) • <i>Equal Status Act 2000</i> (available as revised)

⁷⁶ In 2019, the Commission began a collaborative project with the Department of Employment Affairs and Social Protection to prepare and publish a revised version of the *Social Welfare Consolidation Act 2005*, which is scheduled to be completed by end 2020 or early 2021.

⁷⁷ As noted below, some of these mini-codes, such as the *Firearms Act 1925*, have experienced some degree of degradation since their enactment due to the enactment of subsequent standalone amending Acts. See *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62- 2010) and the discussion at paras 2.52-2.54, below.

⁷⁸ The 2013 Act provides for a significant rationalisation of the law on animal welfare, repealing 28 Acts in whole and 7 Acts in part and replacing them with one consolidated Act.

- *Companies Act 2014*⁷⁹ (**available as revised**)

Heading 6: Civil Liability (Contract and Tort) and Dispute Resolution

- *Statute of Limitations 1957* (**available as revised**)
- *Civil Liability Act 1961* (**available as revised**)

Heading 7: Commercial Law

- *Bills of Exchange Act 1882*
- *Sale of Goods Act 1893* (**available as revised**)
- *Competition Act 2002* (**available as revised**)
- *Consumer Protection Act 2007* (**available as revised**)
- *Consumer Insurance Contracts Act 2019*

Heading 8: Communications and Energy

- *Communications Regulation Act 2002* (**available as revised**)

Heading 9: Courts and Courts Service

- *Supreme Court of Judicature (Ireland) Act 1877*
- *Courts of Justice Act 1924*
- *Courts (Supplemental Provisions) Act 1961*

Heading 10: Criminal Law

- *Offences against the Person Act 1861*
- *Criminal Damage Act 1991* (**available as revised**)
- *Criminal Justice (Public Order) Act 1994*
- *Non-Fatal Offences Against the Person Act 1997*
- *Criminal Justice (Theft and Fraud Offences) Act 2001* (**available as revised**)

Heading 12: Education and Skills

- *Education Act 1998*
- *Education and Training Boards Act 2013* (**available as revised**)

Heading 14: Employment Law

- *Unfair Dismissals Act 1977* (**available as revised**)
- *Employment Equality Act 1998* (**available as revised**)
- *Safety, Health and Welfare at Work Act 2005* (**available as revised**)

Heading 17: Family Law

- *Family Law (Divorce) Act 1996* (**available as revised**)
- *Domestic Violence Act 1996* (**available as revised**)
- *Adoption Act 2010* (**available as revised**)

Heading 18: Financial Services and Credit Institutions

- *Central Bank Act 1942* (**available as revised**)

Heading 20: Garda Síochána (Police)

- *Garda Síochána Act 2005* (**available as revised**)

⁷⁹ The 2014 Act builds on the progress of three previous consolidation projects in 1862, 1908 and 1963. In the years after the enactment of the *Companies Act 1963*, it experienced significant degradation as reform was effected by means of new standalone Acts and statutory instruments made under section 3 of the *European Communities Act 1972*. On foot of this growing inaccessibility, the Company Law Review Group published in 2007 a draft General Scheme of the *Companies Consolidation and Reform Bill*, which formed the basis for the 2014 Act. The 2014 Act comprises a consolidated and reformed framework for company law in Ireland, repealing and replacing 23 Acts in whole and 9 Acts in part. The 2014 Act also revoked and replaced 15 statutory instruments and two other instruments or charters.

Heading 21: Health and Health Services	Heading 23: Land Law, Succession and Trusts
<ul style="list-style-type: none"> • <i>Mental Health Act 2001 (available as revised)</i> 	<ul style="list-style-type: none"> • <i>Trustee Act 1893</i> • <i>Succession Act 1965⁸⁰ (available as revised)</i> • <i>Land and Conveyancing Law Reform Act 2009⁸¹ (available as revised)</i>
Heading 24: Licensed Sale of Alcohol	Heading 27: Natural Resources
<ul style="list-style-type: none"> • <i>Intoxicating Liquor (General) Act 1924</i> 	<ul style="list-style-type: none"> • <i>Fisheries (Consolidation) Act 1959</i>
Heading 28: Oireachtas (National Parliament) and Legislation	Heading 30: Prisons and Places of Detention
<ul style="list-style-type: none"> • <i>Interpretation Act 2005</i> 	<ul style="list-style-type: none"> • <i>General Prisons (Ireland) Act 1877</i> • <i>Prisons Act 2007 (available as revised)</i>
Heading 32: Social Welfare, Pensions, Charities and Religious Bodies	Heading 33: State Finance and Procurement
<ul style="list-style-type: none"> • <i>Social Welfare Consolidation Act 2005</i> • <i>Pensions Act 1990</i> 	<ul style="list-style-type: none"> • <i>Public Accounts and Charges Act 1891</i> • <i>Customs Act 2015⁸²</i>
Heading 34: State Personnel and Superannuation/Pensions	Heading 35: Taxation
<ul style="list-style-type: none"> • <i>Superannuation Act 1876</i> 	<ul style="list-style-type: none"> • <i>Taxes Consolidation Act 1997⁸³</i> • <i>Stamp Duties Consolidation Act 1999</i> • <i>Capital Acquisitions Tax Consolidation Act 2003</i> • <i>Value-Added Tax Consolidation Act 2010 (available as revised)</i>
Heading 36: Transport	

⁸⁰ The 1965 Act was enacted on foot of the Department of Justice's *Programme of Law Reform* (1962), discussed above at para 2.28. Since 1965 it has remained, as amended, the unitary statement of law on succession. The Act repealed and replaced 37 Acts in whole and 36 Acts in part, spanning legislation dating back to the 13th century (the *Courtesy Act 1226*).

⁸¹ The 2009 Act was enacted on foot of recommendations in the Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005). The 2005 Report sought to replace an extensive patchwork of legislation in the area, almost all of which dated from before the foundation of the State and which set out the law in an extremely complicated and archaic manner. The 2009 Act consolidated all existing legislation in the area, dating back to the 13th century (*Statute De Donis Conditionalibus 1285*) and repealed 149 Acts in whole and 22 Acts in part.

⁸² The 2015 Act involved a significant rationalisation of the law relating to customs. It repealed and replaced 16 Acts in whole, and 36 Acts in part, and revoked 24 instruments completely and 2 instruments in part.

⁸³ The 1997 Act provided for a significant consolidation of the law relating to income tax, corporation tax and capital gains tax. It consolidated 40 different Acts and reduced the number of provisions to 1,104 sections and 32 Schedules, by contrast with the pre-1997 position of more than 2,000 sections and 50 Schedules. Since 1997, the Act has been amended at least annually through successive Finance Acts.

- *Road Traffic Act 1961 (available as revised)*
- *Merchant Shipping Act 1894*

(d) Consolidation projects awaiting implementation

- [2.34] In addition to those mini-codes already enacted, a number of Consolidation Bills are currently being undertaken or are awaiting implementation. These include published Bills, Bills planned under the Programme for Government 2020,⁸⁴ and draft Bills published as part of Commission Reports. These include (also using examples from the 36 headings in the Commission's Classified List of In-Force Legislation):

Heading 4: Business Regulation, Including Business Names, Company Law and Partnerships	Heading 9: Courts and Courts Service
<ul style="list-style-type: none"> • <i>Gambling Control Bill</i>⁸⁵ 	<ul style="list-style-type: none"> • <i>Courts (Consolidation and Reform) Bill</i>⁸⁶ • <i>Evidence (Consolidation and Reform) Bill</i>⁸⁷
Heading 10: Criminal Law	Heading 14: Employment Law

⁸⁴ At the time of writing (August 2020), the Government Legislation Programme for Autumn Session 2020 is awaited. In June 2020, the *Programme for Government: Our Shared Future* was published. See:

<https://www.finegael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf> accessed on 26 August 2020.

⁸⁵ The *Government Legislation Programme*, Autumn Session 2019 states that work is ongoing on the Bill. See <https://merrionstreet.ie/MerrionStreet/en/News-Room/News/20190917_LegislationProgramme.pdf> accessed on 26 August 2020.

⁸⁶ This refers to the draft *Courts (Consolidation and Reform) Bill* in the Commission's 2010 *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010). If implemented, it would provide for a significant consolidation of a considerable body of legislation currently scattered across numerous statutes over the centuries. In total, the Bill proposed by the Commission would repeal 192 Acts in full, of which 135 pre-date the foundation of the State in 1922. At the time of writing (August 2020), the Working Group on Review of the Administration of Civil Justice, established in 2017, was completing a review to improve the administration of justice with a view to reforming the law in this area.

⁸⁷ This refers to the draft *Evidence (Consolidation and Reform) Bill* in the Commission's 2016 *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016). If implemented, it would provide a comprehensive consolidation of the body of legislation relating to the law of evidence, much of which pre-dates the foundation of the Irish State in 1922. In total, the Bill would repeal in full 18 Acts, 15 of which are pre-1922 Acts. The elements of the 2016 Report concerning business records in civil cases were enacted in Part 3 of the *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020*.

- *Criminal Code Bill*⁸⁸
- *Bail (Amendment) Bill 2017*

Heading 18: Financial Services and Credit Institutions

- *Central Bank (Amendment) Bill*

- *Employment Permits (Consolidation and Amendment) Bill*⁸⁹

Heading 23: Land Law, Succession and Trusts

- *Landlord and Tenant Law Reform Bill*⁹⁰

Heading 24: Licensed Sale of Alcohol

- *Sale of Alcohol Bill*⁹¹

Heading 27: Natural Resources

- *Inland Fisheries (Consolidation) Bill*⁹²

(e) The electronic Irish Statute Book (eISB) publishes Acts in as enacted form

- [2.35] The principal online source for accessing the State's legislation is the electronic Irish Statute Book database (eISB),⁹³ maintained by the Office of the Attorney General (AGO). The AGO first made the eISB available in 1998,⁹⁴ initially on CD-ROM, and then online. The eISB is a free online database and contains:

⁸⁸ This refers to the draft *Criminal Code Bill* published in 2010 by the Criminal Law Codification Advisory Committee, available at <http://criminalcode.ie>. The draft Criminal Code Bill is discussed as part of the examples of accessibility problems with Irish legislation in Chapter 2, above.

⁸⁹ A draft Heads of Bill of an *Employment Permits (Consolidation and Amendment) Bill* was published by the Department of Business, Enterprise and Innovation in November 2019. The Department conducted a Regulatory Impact Assessment in April 2019. Both the draft Heads of Bill and RIA are available at <<https://dbei.gov.ie/en/Legislation/General-Scheme-of-an-Employment-Permits-Consolidation-and-Amendment-Bill.html>> accessed on 26 August 2020.

⁹⁰ A General Scheme of a *Landlord and Tenant (Law Reform) Bill* was published by the Department of Justice and Equality in April 2011 on foot of the Commission's *Report on General Law of Landlord and Tenant* (LRC 85-2007). The General Scheme, if enacted, would repeal up to 35 Acts, many of which are pre-1922 Acts. The *Government Legislation Programme*, Autumn Session 2019 states that work is ongoing on the Bill. See <https://merrionstreet.ie/MerrionStreet/en/News-Room/News/20190917_LegislationProgramme.pdf> accessed on 26 August 2020.

⁹¹ A General Scheme of a *Sale of Alcohol Bill* was published by the Department of Justice and Equality in 2008. This proposes to repeal the *Licensing Acts 1833 to 2011*, as well as the *Registration of Clubs Acts 1904 to 2008*. The *Government Legislation Programme*, Autumn Session 2019 states that Heads of the Bill is approved and that work is ongoing. See <https://merrionstreet.ie/MerrionStreet/en/News-Room/News/20190917_LegislationProgramme.pdf> accessed on 26 August 2020.

⁹² The *Government Legislation Programme*, Autumn Session 2019 states that work is ongoing on the Bill. See <https://merrionstreet.ie/MerrionStreet/en/News-Room/News/20190917_LegislationProgramme.pdf> accessed on 26 August 2020.

⁹³ Available at <www.irishstatutebook.ie> accessed on 26 August 2020. This database also acts as the source database for the European Union's N-Lex system, which offers a single gateway to all EU Member States' national databases: <http://eur-lex.europa.eu/n-lex/index_en> accessed on 26 August 2020.

⁹⁴ For the background to the development of the eISB see Gleeson, "Information Technology and Access to the Law" (1997) 7 *Bar Review* 293-294.

1. Up-to-date versions, in both Irish and English, of the Irish Constitution; these are available in both PDF and HTML formats.
 2. The full text of all Acts of the Oireachtas and of most statutory instruments, as they were enacted or made since 1922;⁹⁵ these are available in HTML format and, in respect of Acts enacted since 1996 and statutory instruments made since 2007,⁹⁶ PDF format also.
 3. Since 2014, the full text of over 1,100 of the 1,364 pre-1922 public Acts retained in force by the *Statute Law Revision Act 2007*.⁹⁷ The text of many of these pre-1922 Acts was taken from the as amended version in the Statutes Revised published under the supervision of the pre-1922 Statute Law Committee.⁹⁸
- [2.36] The eISB also contains an integrated link from each Act and statutory instrument to a database, the Legislation Directory, which provides users with information on amendments to legislation as well as (in respect of Acts enacted since 1946 at the time of writing (August 2020)) other legislative information such as Commencement Orders and Regulations made under those Acts. Thus, while all legislation on the eISB is published in its original form, it is at least possible for users to track subsequent amendments directly from each Act to the relevant Legislation Directory entry for that Act.⁹⁹ In addition, since January 2017, where a revised version of a piece of legislation is prepared by the Commission, the eISB now contains a direct link from the as enacted version to that revised version, as published on the Commission's website.

⁹⁵ Certain categories of statutory instrument have previously been exempted from publication requirements in accordance with section 2(3) and (4) of the *Statutory Instruments Act 1947*. This exemption was repealed by section 6 of the *Statute Law Revision Act 2015*, although under section 2A of the 1947 Act, inserted by the 2015 Act, certain classes of instruments made under the *Defence Act 1954* and the *Defence (Amendment) Act 1990* continue to be exempt from publication.

⁹⁶ Some statutory instruments made in 2007 are not available in PDF format, for example, SIs Nos. 1-4 of 2007 are available in HTML format only. All SIs from SI No 629 of 2007 onwards are available in PDF format.

⁹⁷ The 2007 Act repealed all public statutes enacted prior to independence that were not expressly retained by Schedule 1 of the Act. In the case of a small number of those statutes, including all 24 Statutes of England retained by Part 2 of that Schedule, the full text is not available in electronic format. Not all of the 1,364 pre-1922 public Acts retained by the 2007 Act remain in force. More than 200 of these have subsequently been repealed, including over 100 repealed by the *Land and Conveyancing Law Reform Act 2009*.

⁹⁸ On the role of the Statute Law Committee see the discussion at paras 2.18-2.24, above.

⁹⁹ The Commission recognises that this is not the most adequate solution, as a certain level of familiarity with the eISB is expected of users in order to successfully track amendments. See Chapter 6, below, for a discussion of different approaches that have been adopted in other jurisdictions to enable readers to track legislative amendments.

- [2.37] An accompanying benefit of publishing legislation in HTML format is that it enables cross-references from one piece of legislation to other pieces of legislation (or sections thereof) to be integrated as hyperlinks. This allows users to directly access the referenced legislation, which facilitates quicker access to related texts and a fuller comprehension of how the various pieces of legislation relate to each other. The accessibility of the legislation contained on the database is also augmented by a full text search function within the database, which enables users to conduct searches for terms across all HTML versions of legislation available on the database.
- [2.38] A particular challenge to the provision of comprehensive legislative information via a single, open-access source is European Union law, which, as discussed,¹⁰⁰ forms part of Irish domestic law.¹⁰¹ EU Directives are a form of EU legislation that set out detailed rules that must be implemented by Member States, but which leave to each Member State the form and methods through which they are to be achieved.¹⁰² Consequently, they are sometimes implemented through the enactment of an Act and sometimes through the making of a statutory instrument,¹⁰³ as provided for by section 3 of the *European Communities Act 1972*.¹⁰⁴ As a result, they are included in the body of legislation published on the eISB. Currently (August 2020), the eISB contains a specific segment in which all Regulations made under section 3 of the *European Communities Act 1972* can be accessed.¹⁰⁵ This provides an element of accessibility to EU Directives, but it does not do so completely because Regulations made under section 3 of the 1972 Act are not the only mechanism through which EU Directives are implemented.¹⁰⁶ As discussed in Chapter 6, below, more accessibility would be achieved by arranging

¹⁰⁰ See paras 2.8-2.11, above.

¹⁰¹ As noted above, section 2(1) of the *European Communities Act 1972* provides that a number of sources of European Union law are binding on the State and form part of domestic law, including the treaties governing the European Union and acts adopted by the institutions of the European Union. This is permitted by virtue of Article 29.4.6° of the Constitution which provides: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union."

¹⁰² Article 288 of the Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty).

¹⁰³ For example, in 1997, 59 statutory instruments, of a total of 530 made that year, were made pursuant to section 3 of the 1972 Act (11.13%). Contrast this with 2017, during which 646 statutory instruments were made in total, 185 of which were made under section 3 (28.64%). See also Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 347-350.

¹⁰⁴ See paras 2.7-2.11, above.

¹⁰⁵ <<http://www.irishstatutebook.ie/eli/isbc/s3eutoc.html>> accessed on 26 August 2020.

¹⁰⁶ For example, Directive 2014/45/EU was implemented by the *Commercial Vehicle Roadworthiness (Vehicle Testing) (Amendment) Regulations 2018* (SI No. 117 of 2018), which was made under the *Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012*.

legislation implementing EU legislation under a suitable subject heading in an online legislation database, such as the Commission's Classified List of In-Force Legislation, an objective to which the Commission is committed.

- [2.39] Another challenge is presented by the increasing volume of EU law that is enacted through an EU Regulation,¹⁰⁷ such as Regulation (EU) 2016/680, the 2016 EU General Data Protection Regulation (GDPR). In contrast to a Directive, an EU Regulation is "directly applicable" under EU law,¹⁰⁸ which means it becomes law without the need for an implementing Act or statutory instrument and is therefore not immediately visible or accessible to users of the eISB, despite its immediate applicability. While the *Data Protection Act 2018* enacted the necessary administrative arrangements to ensure the effective implementation of the GDPR, many key matters, such as the definition of "data", are not found in the 2018 Act but rather in the GDPR itself.
- [2.40] In order to mitigate these accessibility issues to a certain extent, the eISB provides an external link to the official EU law database, EUR-lex. A number of other EU Member States have developed additional ways to overcome this particular challenge. In Malta, for example, the Laws of Malta website includes a separate access portal for EU law.¹⁰⁹ The portal can be searched using a CELEX number, title, or general text, or by setting a particular date range. It provides access to the Official Journal of the European Union as well as to the treaties, legislation, case-law, and legislation. In Croatia, its central legal database contains the full text of EU Regulations, which are published alongside the relevant implementing national legislation.¹¹⁰ In Slovakia, EU law and corresponding implementing regulations are published alongside each other on the Slov-Lex portal.¹¹¹ Norway, although not an EU Member State, is also working on generating automatic links to EU and European Economic Area (EEA) legislation from a central database.¹¹² In 2007, the Europalov website was established to bridge the information gap on EU law in Norway;¹¹³ and it is now the main source of EU law in

¹⁰⁷ According to the Directory of European Union Legislation (as of August 2020), approximately 3,104 Regulations are currently in force, compared to approximately 667 Directives.

¹⁰⁸ Article 288 of the Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty) provides that regulations "shall be binding in [their] entirety and directly applicable in all Member States".

¹⁰⁹ The portal can be accessed via <<https://legislation.mt/EULaw>> accessed on 26 August 2020.

¹¹⁰ <<http://www.digured.hr/>> accessed on 26 August 2020.

¹¹¹ <<https://www.slov-lex.sk/domov>> accessed on 26 August 2020.

¹¹² Norway is subject to approximately 21% of EU laws because it accesses the Single Market. Approximately 12,000 EU acts have been incorporated into Norwegian national law, with approximately 3,000 to 4,000 being incorporated on an annual basis.

¹¹³ <<https://www.europalov.no/>> accessed on 26 August 2020.

Norway. Through Europalov it is possible to follow the entire progress of EU law from the original proposal and decision in the EU institutions through to implementation into Norwegian law. This means that there is a clear delineation between "ordinary" national legislation and EU-derived national legislation.

5. Current accessibility issues with legislation in Ireland

- [2.41] Notwithstanding the online availability of legislation and the projects currently being pursued to improve public access to legislation,¹¹⁴ the accessibility of legislation continues to be hindered by a number of features of Irish law, which undermine the public's ability to ascertain the law with confidence. The key features that hinder accessibility are:
1. The fact that Irish legislation is organised chronologically, not by subject matter: the Irish collection of legislation is currently ordered in chronological order of enactment, from the early 13th century (the *Fairs Act 1204*) to the present day. Each piece of legislation is numbered in order of its enactment within a particular year. This chronological order is the only order in which print versions of legislation are made available, although the eISB allows access by alphabetical order within years. Access by means of subject matter is not currently available, although the Commission's Classified List of In-Force Legislation remedies this to some extent, especially since the Commission made the Classified List available in database format on its website in January 2020. However, as discussed in Chapter 6, below, information and communication technology (ICT) can be utilised to a much greater extent to make legislation more navigable and accessible to users.
 2. The absence of an up-to-date, comprehensive statement of law on a given topic in a single legislative source: legislation is published as enacted and does not take account of subsequent amendment or original free-standing provisions in other Acts. For example, in order to obtain a comprehensive picture of the law relating to sexual offences, a reader would have to consult a number of different pieces of legislation and would also need to track the amendment history of each Act (through the Legislation Directory entry for each Act) in order to discover the current position.¹¹⁵

¹¹⁴ See paras 2.43 to 2.71, below.

¹¹⁵ See Example 1, below. The Classified List of In-Force Legislation lists 12 different Acts in force addressing sexual offences.

3. The volume of legislation on the statute book: since 1922, over 3,000 Acts have been enacted, of which approximately 1,800 remain in force, and over 35,000 statutory instruments have been made, of which approximately 15,000 remain in force (or appear to remain in force although they may be obsolete, spent or superseded).¹¹⁶ This is in addition to nearly 1,200 pre-1922 Public Acts that remain in force. Legislation is currently arranged on the eISB chronologically and gives no direct indication as to whether it is in force or has been amended (although this information is available through the integrated link to the Legislation Directory entry for each Act), rendering it a difficult and somewhat cumbersome task to identify the current law. The issues presented by the volume of the statute book exacerbate the accessibility issues caused by the chronological presentation of legislation and make it much more difficult for users to confidently determine the relevant applicable law that is in force. As discussed in Chapter 4, introducing phased programmes of consolidation could address this.
4. Substantially amended legislation: legislation is amended on an ongoing basis and in many cases very regularly. For example, the list of amendments to the *Social Welfare Consolidation Act 2005* on the eISB runs to over 2,500 effects (primarily textual amendments). In the absence of a revised version of the 2005 Act, it is extremely difficult and time consuming to track these amendments.¹¹⁷ The Commission's work in generating Revised Act versions of legislation alleviates this accessibility issue to a large extent. However, as recommended in Chapter 5, a statutory duty to produce Revised versions of legislation, supported by the appropriate resources, would be required to fully address this accessibility issue.

¹¹⁶ The qualifying term "appear" is used in relation to secondary legislation because the eISB, through the Legislation Directory, does not currently provide complete data pertaining to all amendments to and revocations of statutory instruments. However, this work is ongoing and, at the time of writing (August 2020), the Legislation Directory had been updated by the Commission to include all changes to secondary legislation from 1972 onwards. Additionally, the *Statute Law Revision Act 2015* reviewed all statutory instruments up to 1820 (see para 2.63, below).

¹¹⁷ In 2019, the Commission began a collaborative project with the Department of Employment Affairs and Social Protection to prepare and publish a Revised Act of the *Social Welfare Consolidation Act 2005*. The resulting Revised Act will incorporate all amendments and other effects that have been made to the 2005 Act through 40 Acts of the Oireachtas and many more statutory instruments. This will be available by end 2020 or early 2021.

5. Not all bye-laws are available on the electronic Irish Statute Book (eISB): although all bye-laws are statutory instruments, not all bye-laws are published on the eISB. The rationale for their omission from the eISB is that too many bye-laws are made by, for example, local authorities to allow them to be published on the eISB. Prior to making a bye-law, the local authority must publish a notice that is circulated in the relevant local area. It is possible for a member of the public to inspect a particular bye-law by visiting the relevant local authority office. Their omission from the eISB remains problematic, however, given that some bye-laws create offences. One such example is the *Dublin City Council (Prohibition of Consumption of Intoxicating Liquor on Roads and in Public Places) Bye-Laws 2008*, which were made under section 199(1) of the *Local Government Act 2001*. These bye-laws created a number of offences related to the consumption of alcohol in public places within the city of Dublin, which are punishable by a fine on summary conviction not exceeding €1,900.

[2.42] In addition to these main legislative features, a number of technical issues further impede the accessibility of legislation. These more technical issues include:

1. Indirect or non-textual amendment of legislation: although a more technical issue, the use of non-textual amendments serves to obscure the law and can lead to errors on the part of users as to the application of legislation.¹¹⁸ In contrast to other jurisdictions, there is no provision to incorporate any non-textual amendments textually into revised legislation, even if this were textually feasible.

¹¹⁸ A non-textual amendment does not directly alter the text of the any other legislation but rather consists of a discursive statement with regard to the effect of the amendment on the existing law. An example of this can be seen in the *Fines Act 2010* which provides that the fines contained in all pre-2010 legislation were index-linked to correspond with the fine indexation system set out in the 2010 Act. Although this affected a huge number of pre-2010 Acts, none of these Acts are referred to in the *Fines Act 2010* itself. While this use of non-textual amendment may be understandable in order to achieve the desired objective, it is less than desirable from the perspective of accessibility.

2. Commencement information: a common feature of an Act is a provision that it (either in whole or in part) will come into force on a date other than the date of its enactment, to be subsequently fixed by ministerial Commencement Order.¹¹⁹ A consequence of this is that a reader has no means of knowing by reference to the text of the legislation whether it is in force or when a particular provision came into force.¹²⁰ The use of such a commencement provision is defensible because it allows Departments and policy makers to make the necessary administrative arrangements prior to commencement of a provision. However, a negative consequence of this practice is that many non-commenced provisions of Acts remain on the statute book with varying degrees of likelihood of ever being commenced.¹²¹

¹¹⁹ The use of commencement orders has increased in recent years. For an analysis of commencement orders, including their impact on the exclusive legislative power of the Oireachtas. See Sheehy Skeffington, "Commencement Orders: A Creeping Incursion into the Legislature's Law-Making Domain?" (2018) 59 *Irish Jurist* 93.

¹²⁰ It should be noted that the legislative histories on the eISB for all Acts enacted from 1972 onwards contain Commencement Tables which provide this information. Each Revised Act published by the Commission also contains the substance of commencement orders in a note to the Act's commencement section. An approach that has been adopted in other jurisdictions incorporates Commencement Tables into revised texts of legislation: see, for example, the Office of Parliamentary Counsel of the Commonwealth of Australia's Drafting Direction No. 1.3, paras 103-108.

¹²¹ For example, the *Health (Mental Services) Act 1981* was never commenced but was not repealed for a further 25 years until the coming into force of the relevant provisions of the *Mental Health Act 2001*. Section 60 of the *Civil Liability Act 1961*, which would impose civil liability on local authorities for failure to maintain roads (sometimes referred to as "non-feasance", for example not filling a pothole) as opposed to malfeasance (negligent filling of a pothole, for which it may already be found liable), has not been brought into force at the time of writing (August 2020). No provision of the *Adventure Activities Standards Authority Act 2001* has been brought into force at the time of writing. The provisions on licensing of indoor events (sections 1 to 23) in the *Licensing of Indoor Events Act 2003* have not been brought into force at the time of writing (August 2020).

3. Superseding legislation and statutory instruments: a particular problem that affects statutory instruments is the failure of an Act that repeals a previous Act to also expressly revoke any statutory instruments that were made under the repealed Act.¹²² Similarly, some statutory instruments that, in effect, supersede a previous statutory instrument may not explicitly revoke the previous statutory instrument.¹²³ This means that a user of the statute book may have to engage in considerable research and interpretation in order to assess the currency of legislation, resulting in uncertainty and restrictions on access to justice for those who lack the means or expertise to do so.

¹²² See the Commission's Classified List of In-Force Legislation, which highlights statutory instruments that appear to be obsolete on this basis, available at:
<http://revisedacts.lawreform.ie/classlist/intro> accessed on 26 August 2020.

¹²³ An example of this can be seen with statutory instruments brought into force under sections 21 and 26 of the *Courts of Justice Act 1953*. These provisions allow for the establishment, variation, and abolition by Order of District Court areas, as well as the variation of sitting days and times. Over 300 Orders have been made under these provisions, many of which supersede previous Orders. Even though previous Orders are superseded, these Orders have not been revoked.

(a) Examples of accessibility problems with Irish legislation

Example 1: Finding the law on road traffic offences

The *Road Traffic Act 1961* was an important consolidating Act, the purpose of which was to bring together in one piece of legislation the main provisions relating to road traffic law within the State. However, since the enactment of the 1961 Act, more than 20 Road Traffic Acts have been enacted. Furthermore, separate, standalone provisions relating to road traffic offences in other Acts have subsequently come into force.

Combined, these Acts and provisions now form what might be loosely termed the Irish "road traffic code." The collective citation *Road Traffic Acts 1961 to 2018* comprises 25 separate Acts in whole or in part, of which 20 remain in force.¹²⁴ Many of these separate Acts are themselves subject to regular amendment. This makes it extremely difficult for a reader to ascertain what the law on road traffic is at any given time. In addition, some Acts and provisions need to be read in conjunction with related Acts, such as the *Road Traffic Act 1933* and the *Local Authorities (Traffic Wardens) Acts 1975 and 1987*. Users are also required to examine over 900 statutory instruments made under these Acts in order to obtain a complete picture of this "road traffic code".

The difficulty in this area of the law is particularly exemplified by the current state of offences related to drink-driving. These offences are among those on the statute book that are subject to the greatest number of legal challenges and appeals. One of the reasons for this is the fact that a conviction for a drink driving offence carries automatic disqualification from driving for a minimum period of 3 months).¹²⁵ These offences have, at various times, been governed by sections 49 and 50 of the 1961 Act, Part 5 of the *Road Traffic Act 1968*, Part 3 of the *Road Traffic (Amendment) Act 1978*, and Part 3 of the *Road Traffic Act 1994*. Each of these provisions was substantially amended on a regular basis and both the 1978 and 1994 Acts entirely substituted new sections 49 and 50 into the 1961 Act, dealing with the offence of driving under the influence of an intoxicant. The 1978 Act also substantially repealed the 1968 Act and set out new provisions for taking specimens. This was itself repealed and replaced by the 1994 Act.

¹²⁴ For the full list of these Acts, including those which have been repealed, see the *Road Traffic Act 1961 Revised*, as prepared by the Commission, which is available on the Commission's website at the following link <<http://revisedacts.lawreform.ie/eli/1961/act/24/revised/en/html>> accessed on 26 August 2020.

¹²⁵ Prior to the enactment of the *Road Traffic (Amendment) Act 2018*, which amended section 29 of the *Road Traffic Act 2010*, some drivers received 3 penalty points in lieu of automatic disqualification. The 2018 Act introduced a minimum period of 3-months' disqualification in instances where a person was eligible under section 29(1) of the 2010 Act to be served with a fixed penalty notice and paid this charge in full and in accordance with section 29(8).

Separately, a standalone provision in section 4 of the *Road Traffic Act 2006* provided for the establishment of checkpoints and mandatory testing of all motorists stopped at a checkpoint. The relevant provisions of the 1961 Act, the 1994 Act, and the 2006 Act were subsequently repealed by Part 2 of the *Road Traffic Act 2010*, which contained new provisions for offences of driving under the influence of an intoxicant, and set out new procedures concerning the taking of specimens. The provision of the 2010 Act that repealed the previous provisions came into force in part in 2011, and, at the same time, significant amendments to Part 2 of the 2010 Act made by the *Road Traffic (No. 2) Act 2011* also came into force. Part 2 of the 2010 Act has since been further amended by the *Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012*, the *Taxi Regulation Act 2013*, the *Road Traffic Act 2014*, the *Road Traffic Act 2016* and the *Road Traffic (Amendment) Act 2018*.

The complex, arguably chaotic, nature of the law in this area has been the subject of ongoing criticism,¹²⁶ with commentators arguing for the consolidation of road traffic legislation as a matter of priority.¹²⁷ In the Supreme Court decision *Oates v Browne*,¹²⁸ for example, Hardiman J was very critical of the law on drink driving and the way it had been repeatedly amended in a piecemeal manner to the point that this area of the statute book had become "positively misleading".¹²⁹ The position has been alleviated to some extent by the Commission's publication of Revised Act version of all the Road Traffic Acts that remain in force.¹³⁰

¹²⁶ For criticism of the state of road traffic legislation see for example the comments of the Director General of the Law Society of Ireland on RTÉ's Claire Byrne Live on 11 December 2017, reproduced in part in a statement issued by the Law Society of Ireland, "Urgent reform and investment needed for road traffic law enforcement," available at <<https://www.lawsociety.ie/News/Media/Press-Releases/law-society-calls-on-government-to-tear-up-and-start-again-on-road-traffic-laws-urgently-invest-in-district-court/>> accessed on 26 August 2020.

¹²⁷ See for example Pierse, "Spaghetti Junction" (2011) *Gazette Law Society of Ireland* Issue 8, page 22.

¹²⁸ [2016] IESC 7. This case concerned an appeal of a conviction under sections 49(4) and 6(a) of the *Road Traffic Act 1961*. The Court allowed the appeal and quashed the conviction.

¹²⁹ [2016] IESC 7, at para 4.

¹³⁰ These include the *Road Traffic Act 1961*, *Road Traffic Act 1968*, *Road Traffic (Amendment) Act 1984*, *Road Traffic Act 1994*, *Road Traffic Act 2002*, *Road Traffic Act 2004*, *Road Traffic Act 2006*, *Road Traffic and Transport Act 2006*, *Road Traffic Act 2010*, *Road Traffic Act 2014*, *Road Traffic Act 2016* and the *Road Traffic (Amendment) Act 2018*.

Example 2: legislation on licensing and sale of alcohol

Another area that would benefit considerably from consolidation is the legislation on licensing and sale of alcohol. The law in this area is governed by the *Licensing Acts 1833 to 2018*, which comprises 39 individual Acts,¹³¹ and by the *Registration of Clubs Acts 1904 to 2008*, which comprises 14 individual Acts. Additionally, various Finance and Customs and Excise Acts,¹³² as well as a myriad of statutory instruments apply to the area.¹³³ This now includes the public health aspects, notably through the *Public Health (Alcohol) Act 2018*. A number of other standalone Acts are also applicable, including several that were enacted prior to 1922.¹³⁴ The need to streamline this area of the law was acknowledged as long ago as 1899, when the Royal Commission on Liquor Licensing Laws recommended the codification of Irish licensing laws. By that time, both the English and Scottish liquor licensing laws had already been codified. Following the foundation of the State, the Executive Council established the Intoxicating Liquor Commission in 1925, which recommended that the laws governing liquor licensing be codified and consolidated "without delay" as they had become a "veritable legal jungle".¹³⁵ In 1957, the Commission of Enquiry into the operation of the Laws relating to the Sale and Supply of Intoxicating Liquor recommended that the consolidation of this area of the law be undertaken "as soon as is conveniently possible".¹³⁶ In 2003, the Commission on Liquor Licensing expressed optimism at the fact that the Government had committed to codifying the licensing code and recommended that work on this code commence immediately.¹³⁷

¹³¹ The collective citation also includes three Acts that are no longer in force; these are the *Intoxicating Liquor (Amendment) Act 1929*, the *Licensing (Ireland) Act 1905*, and *An Act for the Protection of Children against the Sale to them of Intoxicating Liquors 1886*.

¹³² For example, the *Excise Licences Act 1825*, the *Excise Management Act 1827*, the *Excise Act 1835*, and the *Excise Management Act 1841*.

¹³³ Commission on Liquor Licensing, *Second Interim Report* (July 2002), at 9.

¹³⁴ For example, the *Spirits (Ireland) Act 1845*, the *Still Licences Act 1846*, the *Spirits (Ireland) Act 1854*, the *Spirits (Ireland) Act 1855*, and the *Refreshment Houses (Ireland) Act 1860*.

¹³⁵ So described by the Intoxicating Liquor Commission in its August 1925 report. Comments reproduced in Commission on Liquor Licensing, *Second Interim Report* (July 2002), at 9.

¹³⁶ Quoted in the *Second Interim Report* of the Commission on Liquor Licensing (July 2002), at 9.

¹³⁷ The terms of reference of the Commission was to make recommendations for a liquor licensing code. Commission on Liquor Licensing, *Final Report* (April 2003), at 5. Commission on Liquor Licensing, *Second Interim Report* (July 2002), at 45.

Acting on this, in 2005 the Department of Justice proposed a codification of the liquor licensing laws in the form of the *Intoxicating Liquor Bill 2005* and published a General Scheme on its website. At that time, the Department of Justice noted that the repeated failure in the past to implement the numerous recommendations that had called for the simplification of this area of the law appeared to have been due to the "sheer magnitude of the task".¹³⁸ The *Intoxicating Liquor Bill 2005* was ambitious in its scope, aiming to replace approximately 650 provisions across 100 different Acts with a single Act containing approximately 200 provisions. Unfortunately, the Bill never progressed to being introduced to the Houses of the Oireachtas. In the intervening period, amendments and enactments have continued to accrue. The 1833 Act not only continues to apply but continues to be amended, having most recently been amended by the *Intoxicating Liquor (Breweries and Distilleries) Act 2018*.¹³⁹ 149 amendments are recorded against the 1927 Act in the Legislation Directory, 100 of which are textual amendments and 49 of which are non-textual amendments. Under its proposed legislation for criminal and civil law, the Department of Justice includes a Sale of Alcohol Bill, the stated purpose of which is to "modernise and streamline licensing law".¹⁴⁰ Thus, the need for reform in this area remains within the Department's policy agenda.

¹³⁸ Department of Justice, *Information Note on the Intoxicating Liquor Bill 2005*, at 6; available at <<http://www.inis.gov.ie/en/JELR/Pages/Intoxicating-Liquor-Bill-scheme>> accessed on 26 August 2020.

¹³⁹ Section 3 of the *Intoxicating Liquor (Breweries and Distilleries) Act 2018*, which was commenced on 3 September 2018 by the *Intoxicating Liquor (Breweries and Distilleries) Act 2018 (Commencement) Order 2018* (SI No 344 of 2018), amended section 13 of the *Licensing (Ireland) Act 1833*.

¹⁴⁰ <<http://www.justice.ie/en/JELR/Pages/ProposedLegislation>> accessed on 26 August 2020.

Example 3: Finding the law relating to consumer protection

The need to consolidate legislation regulating consumer protection has been recognised previously. In 2011, for example, the Sales Law Review Group's 2011 *Report on the Legislation Governing the Sale of Goods and Supply of Services* made wide-ranging proposals to consolidate and reform much of the existing consumer protection legislation into a single Act.¹⁴¹ Similarly, in 2014, the Department of Business, Enterprise and Innovation published a *Consultation Paper on Reform of the Law on Consumer Contract Rights*.¹⁴² The Commission too recognised the need for simplification of the law in the area of consumer protection in its 2015 *Report on Consumer Insurance Contracts*.¹⁴³ The Sales Law Review Group's 2011 Report agreed that the existing law governing consumer protection is confusing, at least in part because it is located in a number of separate Acts dating from the late 19th century, including the *Sale of Goods Act 1893*, the *Sale of Goods and Supply of Services Act 1980*, the *Consumer Protection Act 2007* and the *Consumer Protection (Gift Vouchers) Act 2019*. These Acts overlap with a number of statutory instruments that implement EU Directives, which include the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*, which implemented Directive 93/13/EEC, the 1993 EU Directive on Unfair Terms in Consumer Contracts, and the *European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013*, which implemented Directive 2011/83/EU, the 2011 EU Directive on Consumer Rights.

On foot of its 2014 Consultation Paper, in May 2015, the Department of Business, Enterprise and Innovation published the *Scheme of a Consumer Rights Bill*.¹⁴⁴ The Bill, if enacted, would implement the key recommendations made by the Sales Law Review Group in its 2011 Report. Progress on the Draft 2015 Bill was postponed pending consideration of further proposals at EU level on consumer contracts for the supply of digital content and the sale of goods, notably, Directive (EU) 2019/770 and Directive (EU) 2019/771.¹⁴⁵ Directive (EU) 2019/771 amended Regulation (EU) 2017/2394 and Directive 2009/22/EC, both of which also form part of the legislative framework on consumer protection in Ireland. Directive 2009/22/EC was implemented by the *European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010*, which have themselves been amended by statutory instruments made in 2013, 2015, 2018, and 2019.¹⁴⁶

¹⁴¹ Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (2011); available at <www.dbei.ie> accessed on 26 August 2020.

¹⁴² Department of Business, Enterprise and Innovation, *Consultation Paper on Reform of the Law on Consumer Contract Rights* (2014); available at <<https://dbei.gov.ie/en/Consultations/Consultation-Paper-on-Reform-of-the-Law-on-Consumer-Contract-Rights.html>> accessed on 26 August 2020.

The Department's Sales Law Review Group's proposal to consolidate this area of the law meets the criteria identified by the Commission for inclusion in an initial programme of consolidation (see Chapter 4, below). Simplifying the law concerning consumer protection would not only benefit the average consumer, enabling him or her to easily understand his or her rights and obligations under the law, which is itself sufficient justification, but it would also reduce the cost of doing business in the State for Small and Medium Enterprises (SMEs), which are less likely than large commercial enterprises to be in a position to afford costly legal advice to assist with navigating the current legislative framework.

¹⁴³ Law Reform Commission, *Report on Consumer Insurance Contracts* (LRC 113-2015), at para. 9.03, footnote 3. The recommendations and draft Bill in the 2015 Report were implemented (with further amendments) in the *Consumer Insurance Contracts Act 2019*.

¹⁴⁴ Available at <<https://dbei.gov.ie/en/Consultations/Consultations-files/Scheme-of-a-proposed-Consumer-Rights-Bill-May-2015.pdf>> accessed on 26 August 2020.

¹⁴⁵ See the comments of the Minister for Business, Enterprise and Innovation at the Dáil Éireann Debate of 23 July 2019; available at <<https://www.oireachtas.ie/en/debates/debate/dail/2019-07-23/>> accessed on 26 August 2020.

¹⁴⁶ The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015, the European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015, the European Union (Unjustified Geo-blocking of Consumers) Regulations 2018, and the European Union (Package Travel and Linked Travel Arrangements) Regulations 2019.

Example 4: The general principles of criminal law

The need to consolidate and codify the general principles of criminal law has been recognised on numerous occasions.¹⁴⁷ Indeed, significant efforts have already been made to bring this about. The Criminal Law Codification Advisory Committee was established¹⁴⁸ under Part 14 of the *Criminal Justice Act 2006*, and published a draft *Criminal Code Bill* in 2010.¹⁴⁹ Part 1 of this draft Bill, the General Part, set out general principles of criminal law, such as the fault element (*mens rea*) and the conduct element (*actus reus*) of crimes, general defences (legitimate defence, provocation, necessity, and duress), and inchoate liability (attempt, conspiracy, and incitement).¹⁵⁰ Part 2 of the Bill was intended to include a codification of homicide offences.¹⁵¹ Parts 3 to 6 sought to codify those offences that had already been consolidated into 4 "mini-codes," namely criminal damage,¹⁵² public order offences,¹⁵³ non-fatal offences against the person,¹⁵⁴ and theft and fraud offences.¹⁵⁵ Although the draft Bill has not yet been enacted, the question remains as to whether it is a suitable model to consider in the context of improving accessibility of criminal law. The Commission considers that the completion of this work would be of significant benefit to the public. Benefits would include codifying areas of the criminal law that are still regulated by common law and providing the public with a single reference point from which to ascertain those principles, as well as key areas of specific criminal offences. Accordingly, the Commission considers that there is merit in completing the initial phase of the work of the Criminal Law Codification Advisory Committee. Great care would need to be taken in this respect, in particular to ensure that the level of expertise reflected in the membership of the Criminal Law Codification Advisory Committee was available in preparing an updated draft of the *Criminal Code Bill* published in 2010.

¹⁴⁷ See, for example, McCutcheon and Quinn, "Codifying Criminal Law in Ireland" (1998) 19(3) *Statute Law Review* 131; Department of Justice, *Tackling Crime* (Dublin 1997), Chapter 8; and Donelan, "Statute Law Revision, Codification and Related Policies in Ireland" (2001) 29 *International Journal of Legal Information* 323, at 354.

¹⁴⁸ The Criminal Codification Advisory Committee comprised representatives of the judiciary, legal practitioners, legal academics, representatives from the Department of Justice, and representatives of the Director of Public Prosecutions.

¹⁴⁹ Criminal Law Codification Advisory Committee, *Draft Criminal Code Bill and Commentary*, available at <<http://criminalcode.ie/>> accessed on 26 August 2020.

¹⁵⁰ The Committee indicated that, to complete these elements of Part 1, it was likely to draw on the Commission's *Draft Criminal Law (Defences) Bill* in its 2009 *Report on Defences in Criminal Law* (LRC 95-2009) and the *Draft Criminal Law (Inchoate Offences) Bill* in its 2010 *Report on Inchoate Offences* (LRC 99-2010).

Example 5: Finding the law on sexual offences

The legislation on sexual offences is spread across numerous Acts, dating from 1885, and, as a result, lacks any coherent structure.¹⁵⁶ Many of these Acts have been significantly amended, making it extremely difficult for any person to know with certainty the current state of the law in this area. While some specific sexual offences are set out in one Act, many others are spread across different Acts, requiring the reader to be able to identify the correct provision depending on the specific facts of a given case. For instance, statutory provisions defining rape, which also remains an offence at common law, are provided separately in both section 2 of the *Criminal Law (Rape) Act 1981* (as amended by the *Criminal Law (Rape) (Amendment) Act 1990*) and section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*.

Similarly, sexual offences involving children are currently spread across a number of Acts, including the *Child Trafficking and Pornography Act 1998*, the *Criminal Law (Sexual Offences) Act 2006*, and the *Criminal Law (Sexual Offences) Act 2017*. Sections 248 and 249 of the *Children Act 2001* (as been amended by section 49 of the *Criminal Law (Sexual Offences) Act 2017*) also contain offences relating to the protection of children from sexual exploitation. Although the *Criminal Law (Sexual Offences) Act 2017* significantly reformed the law on sexual offences, providing for a number of new offences and amending others, it does not consolidate the law in this area. Project 5 in the Commission's Fifth Programme of Law Reform includes the objective of reforming and consolidating the law of sexual offences.

¹⁵¹ Part 2 was not developed to draft form, but the Committee indicated that it was likely to draw on the Commission's *Draft Homicide Bill* in its 2008 Report on *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008).

¹⁵² *Criminal Damage Act 1991*.

¹⁵³ *Criminal Justice (Public Order) Act 1994*.

¹⁵⁴ *Non-Fatal Offences Against the Person Act 1997*.

¹⁵⁵ *Criminal Justice (Theft and Fraud Offences) Act 2001*.

¹⁵⁶ See Robinson and Molloy, "Piece by Piece" (2015) *Gazette, Law Society of Ireland* Issue 6, page 38.

Example 6: Finding the law on firearms

An example of the accessibility issues that can arise as a result of poor legislative planning is provided by the *Firearms Acts 1925 to 2009*, which comprises 8 separate Acts.¹⁵⁷ The principal Act is the *Firearms Act 1925*, which originally comprised 30 sections and has subsequently been amended many times.

At the time of writing (August 2020), the legislative history of the 1925 Act on the eISB lists 172 effects, of which 132 are textual amendments and 40 are non-textual effects. In addition, a number of subsequent Acts contain free-standing provisions regulating firearms, rather than inserting them as amendments into the 1925 Act. Five of these Acts remain in force and must be consulted in conjunction with the principal 1925 Act to ascertain a comprehensive statement of the law in this area.¹⁵⁸ However, these Acts have themselves been subsequently amended on a number of occasions. In addition, the *European Communities (Acquisition and Possession of Weapons and Ammunition) Regulations 1993* also make provision for EU law requirements regarding the regulation of firearms.¹⁵⁹ The 1993 Regulations have, in turn, been substantially amended by the *European Communities (Acquisition and Possession of Weapons and Ammunition) (Amendment) Regulations 2010*.¹⁶⁰ The consequence of this for anyone trying to gain an accurate picture of the law relating to firearms is that they must sift through an extensive patchwork of interrelated legislation, tracking substantial amendments. Although firearms legislation has been substantially amended three times in the past decade,¹⁶¹ it has not been consolidated. The fact that the relevant provisions have been amended numerous times across multiple pieces of legislation causes practical problems. For instance, it can make it difficult for members of An Garda Síochána to accurately record and track firearms offences in the Police Using Leading Systems Effectively (PULSE) database. The law on firearms was further complicated in May 2019, following a declaration of unconstitutionality by the Supreme Court of section 27A(8) of the *Firearms Act 1964*, as inserted by section 59 of the *Criminal Justice Act 2006* and amended by section 38 of the *Criminal Justice Act 2007*.¹⁶² Revised versions of the Firearms Acts that remain in force are maintained by the Commission.¹⁶³

¹⁵⁷ The Acts in the group are: *Firearms Act 1925*; *Firearms Act 1964*; *Firearms Act 1971*; *Firearms and Offensive Weapons Act 1990*, Part II; *Firearms (Firearms Certificates for Non-Residents) Act 2000*, other than s. 4; *Criminal Justice Act 2006*, Part 5 and sch. 1; *Criminal Justice Act 2007*, Part 6; and *Criminal Justice (Miscellaneous Provisions) Act 2009*, Part 4.

¹⁵⁸ *Firearms Act 1964*; *Firearms (Proofing) Act 1968*; *Firearms Act 1971*; *Firearms and Offensive Weapons Act 1990*; and *Firearms (Firearm Certificates for Non-Residents) Act 2000*.

Example 7: Finding the law relating to drugs offences

The law governing drugs offences is contained in the *Misuse of Drugs Act 1977*, which has been subject to considerable amendment. For example, the amendment history on the eISB for the 1977 Act at the time of writing (August 2020) lists 111 textual amendments and 76 non-textual effects. In addition, readers also need to be familiar with separate standalone provisions in the *Misuse of Drugs Act 1984*, the *Criminal Justice Act 1994*, the *Criminal Justice (Drug Trafficking) Act 1996*, the *Licensing (Combating Drug Abuse) Act 1997*, the *Criminal Justice (Illicit Traffic by Sea) Act 2003*, and the *Criminal Justice (Psychoactive Substances) Act 2010*. The majority of these Acts have, in turn, been subsequently amended on a number of occasions, and those seeking to access the law on this topic are required to be familiar with the up-to-date law contained in these Acts. The Commission has published a Revised Act version of the *Misuse of Drugs Act 1977*.¹⁶⁴

¹⁵⁹ SI No 362 of 1993.

¹⁶⁰ SI No 493 of 2010.

¹⁶¹ Part 5 and Schedule 1 of the *Criminal Justice Act 2006*, Part 6 of the *Criminal Justice Act 2007*, and Part 4 of the *Criminal Justice (Miscellaneous Provisions) Act 2009*.

¹⁶² *Ellis v Minister for Justice and Equality* [2019] IESC 30.

¹⁶³ Acts that remain in force which contain substantive provisions include the *Firearms Act 1925*, *Firearms Act 1964*, *Firearms (Proofing) Act 1968*, *Firearms Act 1971*, *Firearms and Offensive Weapons Act 1990* and the *Firearms (Firearm Certificates for Non-Residents) Act 2000*.

¹⁶⁴ The text of the Commission's Revised Act of the version of the *Misuse of Drugs Act 1977* is available at <<http://revisedacts.lawreform.ie/eli/1977/act/12/revised/en/html>> accessed on 26 August 2020.

Example 8: The cost of not knowing a defence to a charge of criminal damage

In *The People (DPP) v Kelly*,¹⁶⁵ the defendant had been tried on a charge of criminal damage to a US plane in Shannon Airport, contrary to section 2 of the *Criminal Damage Act 1991*. Section 6 of the 1991 Act provides various “lawful excuse” defences to a charge under section 2. Section 6(2)(c) of the 1991 Act had been amended by section 21 of the *Non-Fatal Offences Against the Person Act 1997* seven years prior to the first of the defendant’s two trials and had added a new “lawful excuse” defence on which the defendant could have relied at her trials. However, this defence was not put to the jury. This defence does not appear to have been known by those involved in either of these two trials and was only discussed in detail when the defendant, who had represented herself at trial, successfully appealed against her conviction. The amendment made to the 1991 Act by the 1997 Act was contained in the Legislation Directory entry on the eISB and was therefore publicly available knowledge. It is, however, at least arguable that it would have been more likely that the error in the defendant’s trials would not have occurred if, in addition, there had been an up-to-date text of the 1991 Act as amended by the 1997 Act publicly available at the time of the trial. The substantial cost of the two trials and appeal might, therefore, have either been greatly reduced or completely avoided. The 1991 Act, as amended, is now one of over 380 Revised Acts currently (August 2020) available on the Commission’s website.

¹⁶⁵ [2011] IECCA 25.

Example 9: Error by the courts as to the force of the law of provisions of the Prevention of Electoral Abuses Act 1923

A specific case can expose the danger posed by the absence of up-to-date information on the current status of legislation. In *Quinlivan v O'Dea*,¹⁶⁶ the plaintiff, an elected member of a local authority, brought proceedings against the then Minister for Defence in relation to statements which the plaintiff contended were untrue and defamatory. The plaintiff sought an injunction on two grounds, namely, to restrain any repetition of the alleged defamation pending the trial of the action and pursuant to section 11(5) of the *Prevention of Electoral Abuses Act 1923*, restraining a repetition of the statements in relation to the character or personal conduct of the plaintiff or any other such false statements as to his character and personal conduct.

The *Prevention of Electoral Abuses Act 1923* was repealed on 11 December 1992 upon the coming into force of the *Electoral Act 1992*. This does not, however, appear to have been known to those involved in the case and the application for an injunction under the 1923 Act was allowed to proceed, even though the 1923 Act had not been in force for more than a decade.

¹⁶⁶ [2009] IEHC 187.

Example 10: legislation on interception of telecommunications

Section 98 of the *Postal and Telecommunications Services Act 1983* prohibits the unlawful interception of telecommunications. Interception was defined for the purposes of this section by section 98(5), as enacted, which defined it as:

"listening to, or recording by any means, or acquiring the substance or purport of, any telecommunications message without the agreement of the person on whose behalf that message is transmitted by the company and of the person intended by him to receive that message".

This definition was subsequently replaced by section 98(6), as substituted 10 years later by section 13 of the *Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993*, which defines interception as follows:

(6) In this section 'intercept' means listen to, or record by any means, in the course of its transmission, a telecommunications message but does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording, and cognate words shall be construed accordingly.

This new definition had the effect of removing the requirement that the person on whose behalf the message is transmitted, and the intended recipient, agree to the interception.

In *The People (DPP) v Dillon*,¹⁶⁷ the Court of Criminal Appeal considered the application of section 98. In this case, the prosecution sought to rely on evidence of a telephone conversation between a Garda Inspector, communicating under an assumed identity, and the accused. In deciding whether this communication was an interception for the purposes of the 1993 Act, the Court considered, relying on the definition as enacted, that the crucial question was whether the Inspector had the accused's consent that he could listen to his communications. The Court considered that the accused would not have spoken to the Garda had he known his true identity and, as such, he could not be considered to have agreed to the conversation. Accordingly, the Court concluded that the definition of interception for the purposes of section 98 extended to communications where one party misrepresents his or her identity. Accordingly, evidence gathered from this communication was considered to be unlawfully obtained.

¹⁶⁷ [2002] 4 IR 501.

The decision in *Dillon* was subsequently relied upon by the accused in *The People (DPP) v Geasley*,¹⁶⁸ who argued that a judge of the Circuit Court was bound by the principle of *stare decisis* to apply the law as interpreted by the Court of Criminal Appeal. The Court of Criminal Appeal held that the ruling in *Dillon* had been decided *per incuriam*, meaning that it was based on an error of law. Accordingly, the judge of the Circuit Court had been correct to depart from the precedent established in *Dillon* and to apply the law as amended.

The costs of both of these appeals could have been avoided had a version of the 1993 Act as amended been available at the time of the first trial. The amendment made to the *Postal and Telecommunications Services Act 1983* would have been available in the Legislation Directory (then called the Chronological Tables) at the time of the decision in *Dillon* and was therefore publicly available knowledge at that time. It is, however, at least arguable that it would have been more likely that the error in *Dillon* would not have occurred if there had also been an up-to-date text of the 1983 Act as amended by the 1993 Act publicly available at that time. The substantial costs of the *Geasley* appeal might, therefore, have either been greatly reduced or completely avoided.

¹⁶⁸ [2009] IECCA 22.

Example 11: Amendments to the governance of the Health Service Executive

The law governing the management of the State's national health service, the Health Service Executive (HSE), is difficult to follow. A person should be able to find with relative ease the provisions concerning the general governance structure of the HSE, and whether it has a board or not. The *Health Act 2004*, which established the HSE, originally provided that there was a HSE board with its own budget and a HSE chief executive. However, in 2013 the *Health Service Executive (Governance) Act 2013* made numerous amendments to the 2004 Act, including the replacement of the HSE board with the HSE Directorate, headed by the HSE Director General. In 2014, the *Health Service Executive (Financial Matters) Act 2014* made further amendments to the 2004 Act, by removing the HSE's separate budget and making further amendments to the functions of the HSE Director General. In 2019, the *Health Service Executive (Governance) Act 2019* reinstated a Board to the HSE and provided that the HSE was no longer to be governed by a directorate. None of these hugely significant changes made in 2013, 2014 or 2019 is set out in the official,¹⁶⁹ paper, version of the *Health Act 2004* as published under the authority of the Stationery Office. This is because that version contains the text of the 2004 Act as originally enacted.¹⁷⁰

¹⁶⁹ The *Documentary Evidence Act 1925* provides that the text of an Act published under the authority of the Stationery Office is *prima facie* evidence of the content of the Act in question. Article 25.4.5° of the Constitution of Ireland provides that the text of each Act as signed by the President must be enrolled for record in the office of the Registrar of the Supreme Court and this enrolled text is "conclusive evidence" of the provisions of the Act. This is discussed in Chapter 6, below.

¹⁷⁰ It should be noted that the eISB contains a direct link from the text of every Act, including the 2004 Act, to the Legislation Directory entry, where all amendments to the 2004 Act are listed.

Example 12: Repeated amendments to the *Insurance Act 1964*

The *Insurance Act 1964* provides a useful example of an Act that has become inaccessible due to repeated amendments, despite those amendments taking the form of direct textual amendments to the Act. At the time of writing (August 2020), the Legislation Directory entry for the 1964 Act contained 95 separate direct textual amendments and six indirect amendments.

These accessibility issues could be alleviated to some extent by consolidating the legislation that regulates insurance undertakings. However, this consolidation would be a particularly complex task due to the complexities of the legislative framework of this area of the law.

Financial services legislation, of which the law regulating insurance undertakings is a part, consists of a combination of:

- (a) domestic-inspired legislation, Acts, Regulations and Codes; and
- (b) increasingly, EU-derived legislation, much of which is implemented by Regulations made under section 3 of the *European Communities Act 1972*, and some of which amend both primary legislation (Acts) and secondary legislation (Regulations).

A good example of this complexity is the effect of the *European Union (Capital Requirements) Regulations 2014* (SI No 158 of 2014), which implemented Directive 2013/36/EU, the 2013 Fourth Capital Requirements Directive (CRD IV). The 2014 Regulations, the Stationery Office (PDF) version of which comprises 165 pages, introduced not only new standalone rules for financial institutions on capital requirements and liquidity, but also amended a number of existing Acts, including the *Central Bank Act 1942*, the *Central Bank Act 1971*, the *Central Bank Act 1989*, the *Building Societies Act 1989*, the *Trustee Savings Banks Act 1989* and the *Central Bank Act 1997*.

In addition, the *European Union (Capital Requirements) (No 2) Regulations 2014* (SI No 159 of 2014) implemented the necessary administrative arrangements to give effect to the directly applicable companion Regulation (EU) No. 575/2013 on Capital Requirements (CRR). The combined effect of the CRD IV and the CRR was to implement in EU law “Basel III”, a voluntary framework on bank capital adequacy, stress testing, and market liquidity risk agreed by the members of the Basel Committee on Banking Supervision in 2010-2011 in the aftermath of the global collapse of the financial services sector in 2008.

(b) Current approaches to improving the accessibility of legislation

(i) Information on amendments and related matters for Acts and statutory instruments on the eISB

- [2.44] The eISB contains information on most amendments, and related matters, for all Acts and statutory instruments.¹⁷¹ This allows users of legislation to track the current state of an Act. It has been described as "the one identifiable publication upon which the coherence and accessibility of our statute book rests."¹⁷² This legislative information was previously made available on the eISB as a separate database called the Legislation Directory (previously called, as noted above, the Chronological Tables to the Statutes). Since 2016, the eISB contains a direct link to this information from the online text of each Act and statutory instrument. In 2006, at the request of the Office of the Attorney General, the Commission was given functional responsibility for producing and maintaining this information. As noted above, this had followed a request by the Government in 2005 for the Commission to take responsibility for the preparation of Revised Acts.
- [2.45] The information provided by the Legislation Directory has been progressively expanded since the Commission took over functional responsibility. At the time of writing (August 2020), for each Act enacted from 1946 onwards, a separate page in the Legislation Directory has been generated that can be accessed directly linked to the Act affected, providing additional information concerning the amendment history of the Act. This includes: (a) a commencement table setting out the commencement information in relation to each section in the Act, (b) a table listing all amendments and other effects to the legislation, and (c) a table listing statutory instruments made under the Act.¹⁷³ In 2011, the Legislation Directory was expanded to include comparable amendment histories for statutory instruments and, at the time of writing (August 2020), all legislative effects made by statutory instruments from 1 January 1972 onward are tracked.
- [2.46] Nonetheless, the information provided by the Legislation Directory has its limitations. These include:

¹⁷¹ At the time of writing (August 2020), changes made by statutory instruments made prior to 1 January 1972 are not tracked on the eISB.

¹⁷² Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 60.

¹⁷³ A comparison of legislative histories on the eISB database, as presented in the old and the new formats is set out in Figures 1 and 2 below.

1. The absence of commencement and associated secondary legislation information for legislation enacted prior to 1946;¹⁷⁴
2. Complex and unnavigable legislative histories caused by the frequent and extensive amendment of some legislation, such as the Taxes Acts and Social Welfare Acts;¹⁷⁵ and
3. The fact that information for secondary legislation is incomplete. As mentioned above, only legislative changes effected by secondary legislation made since 1 January 1972 are at present (August 2020) included in this database. Users cannot, therefore, rely on the information contained within the eISB as representing a complete statement of effects made by all secondary legislation.

¹⁷⁴ Commencement information for legislation enacted before 1946 is available in a separate page within the eISB entitled "Commencement Orders". The only way to ascertain whether secondary legislation has been made under an Act enacted before 1946 is to carry out a search of the statutory instruments on the eISB database using the title of the Act in question. This is a time-consuming exercise and invariably entails a user having to trawl through numerous references to the Act in non-associated legislation in order to identify associated secondary legislation. The Commission's work in this area is ongoing and it intends to continue to populate commencement information on all Acts back to 1922.

¹⁷⁵ For example, see the discussion of the Legislation Directory entry for the *Social Welfare Consolidation Act 2005*, discussed above.

<u>Local Government (Dublin) Act 1930</u>	Appl. (in pt.).	<u>25/1931, s.5</u>
	Power to make regs. under.	<u>11/1991, ss. 1 (10), 24 (3) (d)</u>
	References construed	<u>1/2014, ss. 1(22), 9(2),(3)</u>
	Restrictions on performance of reserved function under	<u>S.I. No. 231 of 2014</u>, regs. 2, 6-10
	Reserved functns. ext.	<u>50/1931, ss. 5 (3), 12 (3)</u> <u>18/1937, s.33 (3)</u> <u>32/1937, s.9 (9)</u> <u>18/1941, s.3</u> <u>34/1979, ss. 3 (7), 9 (4),</u> <u>43/1980, ss. 7 (4), 9 (7), 21 (2)</u> <u>37/2001, sch. 14A pt. 3 (see also 1/2014, ss. 1(22), 21(4), sch. 3)</u>
	Spent in so far as it relates to Dun Laoghaire Corporation.	<u>31/1993, ss. 1 (5), 4</u>
	Status of members of City Col.	<u>10/1935, s.2 (b)</u>
	S. <u>1</u> (in pt.) rep.	<u>31/1993, ss. 1 (5), 4, sch. 1</u>
	Ss. <u>2-6</u> rep.	<u>31/1993, ss. 1 (5), 4, sch. 1</u>
	Ss. <u>4-8</u> incorp. as mod.	<u>21/1940, s.5</u>
	S. <u>7</u> , rep. with saver.	<u>37/2001, ss. 5 (1), 6, 7, sch. 3, pt. 1</u>
	S. <u>8</u> rep.	<u>31/1993, ss. 1 (5), 4, sch. 1</u>
	Ss. <u>9-11</u> rep.	<u>26/1950, s.1, sch.</u>
	S. <u>12</u> incorp. as mod.	<u>21/1940, s.5</u>
	S. <u>13</u> rep.	<u>26/1950, s.1, sch.</u>
	Ss. <u>14-16</u> rep.	<u>31/1993, ss. 1 (5), 4, sch. 1</u>
	Ss. <u>17-19</u> , rep. with saver.	<u>37/2001, ss. 5 (1), 6, 7, sch. 3, pt. 1.</u>
	S. <u>19</u> (in pt.) rep.	<u>26/1950, s.1, sch.</u>
	Ss. <u>20-24</u> rep.	<u>31/1993, ss. 1 (5), 4, sch. 1</u>
	Ss. <u>24</u> , 25, incorp. as mod.	<u>21/1940, s.5</u>
	Ss. <u>25-27</u> rep.	<u>31/1993, ss. 1 (5), 4, sch. 1</u>

Figure 1: Legislative history in its original format for part of the *Local Government (Dublin) Act 1930* (incorporating amendments up to 16 January 2020).

Updated to 16 January 2020 (Act No. 53 of 2019 and S.I. No. 14 of 2020)

Passports Act 2008

No. 4 of 2008

Contents

- [Commencement](#)
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Commencement

Section	Commencement Date	Commencement Information
Ss. 1-13	1 November 2008	Passports Act 2008 (Commencement) Order 2008 (S.I. No. 412 of 2008), art. 2
Ss. 14(1)-14(7)	1 November 2008	Passports Act 2008 (Commencement) Order 2008 (S.I. No. 412 of 2008), art. 2
Ss. 14(8), 14(9)		Not yet commenced. Commencement order required under s.1(2)
Ss. 15-28	1 November 2008	Passports Act 2008 (Commencement) Order 2008 (S.I. No. 412 of 2008), art. 2

Amendments and other effects

How Affected	Affecting Provision
S. 2 amended	Data Protection Act 2018 (7/2018), ss. 1(3) , 207(a)
S. 8 transfer of functions under	Finance (Transfer of Departmental Administration and Ministerial Functions) Order 2011 (S.I. No. 418 of 2011), arts. 1(2), 3, schedule 1
S. 8(1) amended	Data Protection Act 2018 (7/2018), ss. 1(3) , 207(b)
S. 11(1) deleted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2) , 38(1)(a) , 38(2)
S. 11(2) deleted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2) , 38(1)(b) , 38(2)
S. 11(2A)-(2C) inserted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2) , 38(1)(c)
S. 11(4) substituted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2) , 38(1)(d)
S. 14(1) substituted	Children and Family Relationships Act 2015 (No. 9 of 2015), ss. 1(8) , 100(a)

Figure 2: Legislative history in the new format for *Passport Act 2008* (incorporating amendments up to 16 January 2020).

(ii) Revised Acts

[2.47] As already noted, the Commission also maintains a body of Revised Acts. These are administrative consolidations that bring together in a single text all amendments and changes to a particular Act. Such consolidations render the law more accessible for all users, enabling them to have an up-to-date statement of the law in the relevant areas.¹⁷⁶ These Revised Acts also provide significant assistance to Government Departments, serving as useful starting points from which to work, in cases where they wish to carry out consolidations or plan amending legislation.

¹⁷⁶ See the comparison of section 5 of the Succession Act 1965 published as revised by the Law Reform Commission and published as enacted on the eISB in Figures 3 and 4, below.

- [2.48] The Commission's work on Revised Acts involved, ultimately, a departure from the scheme in the *Statute Law (Restatement) Act 2002*,¹⁷⁷ which provided that the Attorney General could certify the text of a restatement (the text of an Act as amended), which would then have *prima facie* (or presumptive) legal status as to the content of the Act. Initially, this work was undertaken by the Statute Law Revision Unit (SLRU), which was established within the Office of the Attorney General in 1999.¹⁷⁸
- [2.49] As discussed above,¹⁷⁹ the Commission concluded that it would not be practicable to seek the certification of a restatement every time an amendment was made, owing to the number of Acts included in the First Programme of Restatement and the number of ongoing amendments being made to those Acts. Instead, the Commission concluded that it was more practicable to prepare Revised Acts, which had the benefit of mirroring the name given to the pre-1922 publications of Acts-as amended prepared under the supervision of the Statute Law Committee, discussed earlier in this Chapter.¹⁸⁰
- [2.50] At the time of writing (August 2020), the Commission maintains revised versions of over 160 pre-2005 Acts and all post-2005 Acts (other than Finance Acts)¹⁸¹ that have been textually amended, currently (August 2020) amounting to over 380 Revised Acts in total.
- [2.51] Revised Acts are made freely available on the Commission's website.¹⁸² In addition, since January 2017, where a Revised Act is prepared by the Commission, the eISB contains a direct link from the relevant Act-as enacted on the eISB to the Revised Act published on the Commission's website.
- [2.52] A limitation to the accessibility of Revised Acts is that they can only provide a comprehensive statement of the law where subsequent legislative reform is made by

¹⁷⁷ The 2002 Act was enacted on foot of the Government's 1999 policy document *Reducing Red Tape – An Action Programme for Regulatory Reform in Ireland*, which was based on the *Report of the Strategic Management Initiative Working Group on Regulatory Reform*.

¹⁷⁸ For a more detailed discussion of the work of the Statute Law Revision Unit, see para 2.30, above.

¹⁷⁹ See para 2.31, above.

¹⁸⁰ See paras 2.18-2.21, above.

¹⁸¹ In 2019, the Law Reform Commission began a collaborative project with the Department of Employment Affairs and Social Protection to prepare and publish a revised version of the *Social Welfare Consolidation Act 2005*. This is expected to be completed by end 2020 or early 2021.

¹⁸² <<http://revisedacts.lawreform.ie/revacts/intro>> accessed on 26 August 2020.

means of direct, textual, amendment to that Act.¹⁸³ Where subsequent amendments are made by new standalone provisions in separate enactments,¹⁸⁴ the accessibility of the Revised Act is degraded because of the need to consult the Revised Act as well as the separate standalone provisions from another, later, Act.¹⁸⁵

Presumption of simultaneous death in cases of uncertainty.

5.—Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously.

[New]

Figure 3: section 5 of the Succession Act 1965, as published as originally enacted on the eISB.

Presumption of simultaneous death in cases of uncertainty.

[New]

5.—F10 [(1)] Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for the purposes of the distribution of the estate of any of them, they shall all be deemed to have died simultaneously.

F10 [(2)] Where immediately prior to the death of two or more persons they held any property as joint tenants and they died, or under subsection (1) were deemed to have died, simultaneously, they shall be deemed to have held the property immediately prior to their deaths as tenants in common in equal shares.

(3) Property deemed under subsection (2) to have been held by persons as tenants in common shall form part of their respective estates.]

Annotations:

Amendments:

F10 Inserted (20.07.2008) by Civil Law (Miscellaneous Provisions) Act 2008 (14/2008), s. 68(a) and (b), S.I. No. 274 of 2008.

Figure 4: section 5 of the Succession Act 1965, as published in revised form by the Law Reform Commission.

(iii) Classified List of In-Force Legislation in Ireland

- [2.53] The Classified List of In-Force Acts in Ireland was first developed by the Commission in 2010 in consultation with all Government Departments.¹⁸⁶ It comprises a list of all post-1922 Acts that remain in force (and over 100 pre-1922 Acts) organised under 36 subject headings. The Commission developed the 36 headings taking account of:

¹⁸³ Direct textual amendments operate as a direct amendment to the text of the principal Act by inserting, deleting, or substituting text for the legislation's original text.

¹⁸⁴ For example, the *Industrial Relations Acts 1946 to 2015*, the *Central Bank Acts 1942 to 2015*, the *Road Traffic Acts 1961 to 2016*, the *Firearms Acts 1925 to 2009* and the *Criminal Law (Rape) Acts 1981 and 1990*.

¹⁸⁵ For example, the *Misuse of Drugs Act 1977*, which is discussed in Example 7, above.

¹⁸⁶ See <<http://www.lawreform.ie/classification-list-of-legislation-in-ireland.361.html>> accessed on 26 August 2020.

1. Some near universal and conventional headings, such as Civil Liability, Commercial Law, Criminal Law, and Taxation;
 2. Areas of responsibility of Government Departments in Ireland;
 3. Headings unique to Ireland, such as Heading 21, Irish Language, and Gaeltacht; and
 4. Headings used in comparable classified compilations of Acts in other Common Law countries, notably the United States of America (both at federal and state level).
- [2.54] The Classified List was originally developed at the request of the eLegislation Group,¹⁸⁷ convened under the auspices of the Department of the Taoiseach, with a view to identifying all post-1922 legislation still in force and to identifying related groups of Acts. In its 2010 *Consultation Paper on a Classified List of Legislation in Ireland*,¹⁸⁸ the Commission proposed to publish and maintain a Classified List of In-Force Legislation, and, between 2010 and 2016, the Commission published, and updated twice yearly, a Classified List of In-Force Acts, taking account of newly-enacted legislation and the repeal of legislation. In addition to the benefits of its subject-based approach, which groups related legislation together, the Classified List also identifies the relevant Government Department with line responsibility for each Act.
- [2.55] Building on this work, in May 2016 the Commission published on its website the first draft Classified List of In-Force Acts and Statutory Instruments, comprising not only Acts that were in force but also all secondary legislation made under these Acts. In January 2020, the Commission further developed the Classified List by reorganising it into a searchable electronic database (see Figure 5, below). The Classified List database is discussed further in Chapter 6. At the time of writing (August 2020), the Classified List is maintained fully up to date on a monthly basis.¹⁸⁹ The Classified List comprises an index of more than 2,000 Acts and more than 15,000 statutory instruments, and provides a list of all in-force Acts enacted since 1922, as well as over 100 pre-1922 Acts; as well as in-force statutory instruments made since 1922.¹⁹⁰ The Classified List also identifies over 3,000 statutory instruments which the Commission considers may

¹⁸⁷ The eLegislation Group is a non-statutory group, of which the Commission is a member, that began its work in December 2007. It was convened by Department of the Taoiseach as part of the Government's Information Society Action Plan, *New Connections*, which outlined an eLegislation strategy. See *New Connections* 2nd Progress Report (2004), para 3.6, available at <www.taoiseach.ie> accessed on 26 August 2020.

¹⁸⁸ See the Commission's *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62-2010).

¹⁸⁹ <<http://revisedacts.lawreform.ie/classlist/intro>> accessed on 26 August 2020.

¹⁹⁰ In 2019, the Commission began work on that remaining aspect of the Statute Law Revision Project (SLRP) which will identify what secondary statutory instruments made between 1821 and 1922 should be retained in force. This is intended to be completed in 2022.

be spent or obsolete and which could therefore be revoked. This should significantly assist Departments in their efforts to streamline the collection of secondary legislation under their remit, in line with Recommendation R. 4.12, in Chapter 4.

17. FAMILY LAW

Updated to 15 June 2020 (Act No. 2 of 2020 and S.I. No. 210 of 2020)
 Click on triangular bullet points to see more detail.
[show subtitles](#) • [hide subtitles](#) • [show all acts](#) • [hide all acts](#)

PDF

▼ 17.1. Marriage

Justice	► Family Law Act 1995	26/1995
Justice	► Marriage Act 2015	35/2015
Justice	► Deceased Wife's Sister's Marriage Act 1907	7 Edw. 7, c. 47
Justice	► Deceased Brother's Widow's Marriage Act 1921	11 & 12 Geo. 5, c. 24
Justice	► Married Women's Status Act 1957	5/1957
Justice	► Family Law Act 1981	22/1981
Justice	► Family Law Act 1988	31/1988

▼ 17.2. Civil Partnership and Cohabitants

Justice	► Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010	24/2010
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▼ 17.3. Children and Parental Duties

▼ 17.3.1. General

Justice	► Children and Family Relationships Act 2015	9/2015
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Figure 5: Extract from the Family Law Heading of the database version of the Classified List of In-Force Legislation. The purple shading indicates that a Revised Act version of an Act is available.

(iv) *The Legislative Observatory of the Houses of the Oireachtas*

- [2.56] The Legislative Observatory of the Houses of the Oireachtas contains the following resources:¹⁹¹

1. The full text of all Bills as initiated since 1922, including their Explanatory Memoranda;
2. The full text of all Bills as amended, and as passed by both Houses of the Oireachtas since 1922;
3. Hyperlinks to the Official Debates in both Houses of the Oireachtas on all such Bills;

¹⁹¹ Available at <<http://www.oireachtas.ie/ViewDoc.asp?fn=/documents/nav/legislation.htm>> accessed on 26 August 2020.

4. The full text of all Acts of the Oireachtas enacted since 1922; and
 5. The full text of the official translations into the Irish language of all Acts enacted since 1922.
- [2.57] One of the significant benefits of the Legislative Observatory is, as noted above, that it provides hyperlinks to the Official Debates on Bills initiated since 1922, making them directly accessible from the relevant Bill's entry in the Observatory. This is a particularly advantageous feature, because the debates can often, though not always,¹⁹² provide considerable insight into the background and political context of the resultant Acts. A second major benefit of the Observatory is that the text of the Acts on the website is provided in PDF format, with each PDF document reflecting almost exactly the printed version of the relevant Act as published under the authority of the Stationery Office.¹⁹³ As noted in Chapter 6,¹⁹⁴ the *Documentary Evidence Act 1925* provides that the Stationery Office printed version is *prima facie* (or presumptive) evidence of the content of the law prescribed by an Act.
- [2.58] In 2019, a new "Bill History" tab was added to every Act published on the eISB. The new tab provides a direct link from a particular Act on the eISB to the Bill history for that Act on the Legislative Observatory of the Houses of the Oireachtas. This integration between the Legislative Observatory and the eISB enables a user, for the first time, to trace the legislative progress of an Act from its introduction as a Bill in either Dáil Éireann or Seanad Éireann through to its enactment and publication on the eISB, where commencement and amendment information can then be accessed and, where available, a link to the Revised Act version published on the Commission's website. It is important to note, however, that while the relevant Bill history on the Legislative Observatory can be accessed from an Act published on the eISB, it is not yet possible to access an Act on the eISB via the Legislative Observatory. This is because a link to the Act on the eISB for each Bill has not yet been integrated into the legislative history on the Legislative Observatory.

¹⁹² For a consideration of the absence of parliamentary procedure to facilitate adequate explanatory parliamentary material and the resulting difficulties for the courts when interpreting legislation, see the comments of the High Court (Humphreys J) in *KRA v Minister for Justice and Equality* [2016] IEHC 289 at para 35.

¹⁹³ The PDF versions of Acts on the Oireachtas website do not, however, carry the standard Stationery Office label that is included in the printed versions. In contrast, statutory instruments made since 2007 and published on the eISB carry the Stationery Office label. The Stationery Office label is available to download from the website of the Government Publications Office (which is part of the Office of Public Works), at <<http://www.opw.ie/en/governmentpublications/services/togovtdeptsbodies/#d.en.23168>> accessed on 26 August 2020.

¹⁹⁴ See paras 6.5-6.11, below.

(v) *Statute Law Revision Programme*

- [2.59] The Statute Law Revision Programme (SLRP) identifies spent or obsolete legislation for repeal or revocation,¹⁹⁵ which is a continuation of the pre-1922 work to consolidate, codify, and modernise legislation, discussed above.¹⁹⁶ Between 2004 and 2012, the SLRP was carried out by the Statute Law Revision Unit in the Office of the Attorney General,¹⁹⁷ and from 2012 to 2016 was carried out from the Department of Public and Expenditure and Reform. As noted below, in 2019, with the support of the Office of the Attorney General, the remaining phase of the SLRP concerning pre-1922 statutory instruments made from 1821 to 1922 was taken up by the Commission.
- [2.60] Between 1856 and 2005, a large number of Statute Law Revision Acts was enacted. Approximately 25 Acts were enacted prior to independence in 1922, including Acts in 1878 and 1879 which each focused on revising Acts of the old Irish Parliament.¹⁹⁸ Following the foundation of the State in 1922, the first Statute Law Revision Acts were enacted in 1962 and 1983.¹⁹⁹ The drafts of the preceding Bill for each of these Acts had been drafted by the Statute Law Reform and Consolidation Office (SLRCO), which is discussed above.²⁰⁰
- [2.61] In 2003, the Attorney General and the Government approved a new Statute Law Revision Project.²⁰¹ The first review under this new programme was conducted by the

¹⁹⁵ For a detailed history of the SLP, see Humphreys, "Clearing the statute book" (2016) 21(6) *Bar Review* 177; and Mooney, "The Statute Law Revision Project and Statute Law Revision in Ireland 2003 to 2015" (2017) 38(1) *Statute Law Review* 79.

¹⁹⁶ See paras 2.30-2.31, above.

¹⁹⁷ While under the remit of the Attorney General's Office, the programme was known as the Statute Law Revision Project.

¹⁹⁸ The *Statute Law Revision (Ireland) Act 1878* and the *Statute Law Revision (Ireland) Act 1879*.

¹⁹⁹ The *Statute Law Revision (Pre-Union Irish Statutes) Act 1962* and the *Statute Law Revision Act 1983*. Additionally, two Fisheries (Statute Law Revision) Acts were enacted in 1949 and 1956, but these have been more accurately described as "reform Acts" that significantly revised the law. See Mooney, "The Statute Law Revision Project and Statute Law Revision in Ireland 2003 to 2015" (2017) 38(1) *Statute Law Review* 79, at 83.

²⁰⁰ See para 2.27, above. For an overview of the establishment and the work carried out by the Statute Law Reform and Consolidation Office, see Hunt, "The Origins of the Office of the Parliamentary Draftsman in Ireland" (2005) 26(3) *Statute Law Review* 171, at 185-188.

²⁰¹ The Programme was formulated, as part of a process to modernise the law in the State, by the then Taoiseach and Attorney General, following the publication of the 2001 Report of the Organization for Economic Cooperation and Development (OECD), *Regulatory Reform: Regulatory Reform in Ireland* (2001). This was followed by the publication, in 2004, of the Government's White Paper, *Regulating Better*, which set out six OECD-derived principles of good regulation (necessity, effectiveness, proportionality, transparency, accountability and consistency) that ought to inform both the production and revision of legislation.

Statute Law Revision Unit and resulted in the enactment of the *Statute Law Revision (Pre-1922) Act 2005*.²⁰² This review adopted a similar approach to that adopted in previous Statute Law Revision projects, in that it reviewed and identified 207 Acts as being suitable for repeal, which were then expressly repealed in the 2005 Act.²⁰³

- [2.62] A significant departure in approach came with the enactment of the *Statute Law Revision Act 2007*, which, for the first time, sought to identify a definitive "White List" of retained Acts. Whereas earlier projects provided for express repeals of Acts only, the 2007 Act also sought to expressly retain Acts. This new model was adopted to clarify what Acts enacted prior to 1922 remained in force. Where Acts were not retained by the 2007 Act, and not expressly repealed, they were impliedly repealed. The 2007 Act examined 26,191 public Acts and identified a definitive list of 1,364 retained Acts.²⁰⁴ The 2007 Act also expressly repealed 3,224 Acts and impliedly repealed 12,562 Acts. The total number of 15,786 repeals effected by the 2007 Act made it the largest single repealing measure anywhere in the world at that time.²⁰⁵ The 2007 Act formed part of the Government's Better Regulation agenda and followed a regulatory impact analysis that had been introduced across Government Departments in June 2005.
- [2.63] The SLRP then progressed to look at local, personal, and private Acts. These were addressed by two Acts, the *Statute Law Revision Act 2009* and the *Statute Law Revision Act 2012*. The Attorney General's Office undertook a review of the SLRP in 2010, to determine the viability of completing the pre-independence phase of the Project in circumstances where the SLRP had been allocated a considerably reduced budget. It was agreed in 2011 that the work would be completed "on a greatly reduced cost basis",²⁰⁶ and the *Statute Law Revision Act 2012* was the last to be drafted by the SLRU. Notwithstanding the reduced funding, between the 2005 and 2012 Acts, more than 33,000 Acts were reviewed, over 4,300 Acts were expressly repealed, and more than

²⁰² For a general summary of the methodology employed by the Statute Law Revision Unit in preparing the *Statute Law Revision (Pre-1922) Bill 2004*, see the comments of the then Minister of State at the Department of the Taoiseach during the Seanad Éireann debate of 13 April 2005, available at <<https://www.oireachtas.ie/en/debates/debate/seanad/2005-04-13/7/>> accessed on 26 August 2020.

²⁰³ Initially, 90 Acts were identified for repeal by the *Statute Law Revision (Pre-1922) Bill 2004*; the Bill was subsequently amended and the number of Acts repealed grew to 207 by the time it was enacted in 2005.

²⁰⁴ Since 2007, over 200 of the 1,364 pre-1922 Acts retained in force by the *Statute Law Revision Act 2007* have also been repealed. For example, the *Land and Conveyancing Law Reform Act 2009*, which followed from the Commission's 2005 *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), repealed (and replaced with reforms) over 150 of the pre-1922 Acts that had been retained in force by the 2007 Act.

²⁰⁵ Humphreys, "Clearing the statute book" (2016) 21(6) *Bar Review* 177.

²⁰⁶ Office of the Attorney General, *Annual Report 2012* at 66.

27,000 Acts were impliedly repealed by these two Acts. Over 900 local, personal, and private Acts were retained.

- [2.64] In early 2012, responsibility for the Statute Law Revision Project (renamed as the Statute Law Revision Programme) was transferred to the Department of Public Expenditure and Reform. The first Revision Act drafted under the auspices of that Department was the *Statute Law Revision Act 2015*, which engaged in a similar exercise in respect of a portion of the pre-1922 secondary legislation, which reviewed all instruments up to 1820, amounting to 12,841 instruments. The 2015 Act expressly revoked 5,782 instruments, impliedly repealed 6,604 instruments and retained 43 instruments.
- [2.65] The *Statute Law Revision Act 2016* extended, for the first time, the work of the Programme into the post-independence era. For the purposes of the 2016 Act, a total of 1,124 Acts, enacted between 1922 and 1950, were reviewed. On foot of this review, 301 Acts were identified as obsolete and therefore suitable for express repeal.
- [2.66] The contribution made by the Statute Law Revision Acts to streamlining the picture of in-force legislation has, clearly, been immense. The SLP has successfully identified tens of thousands of redundant and obsolete Acts and secondary instruments legislation as suitable for repeal and revocation, thus contributing enormously to the reduction in the number of Acts and instruments that remain in force. The SLP has also been instrumental in producing a definitive list of pre-1922 Acts that remain in force. As a consequence, for the first time in the history of the State, the public can establish, with certainty, what pre-1922 Acts remain in force. In total, approximately 74,000 pieces of legislation have been reviewed since 2005. Over 60,000 pieces of legislation have been repealed or revoked, either expressly or impliedly, while another 10,000 were identified as already repealed or revoked. Of the legislation examined, 2,748 pieces of legislation have been retained.
- [2.67] In 2019, the Commission, with the support of the Office of the Attorney General, assumed responsibility for completing the element of the SLP related to pre-1922 secondary instruments. As noted above, the *Statute Law Revision Act 2015* had reviewed all instruments up to 1820. The Commission will complete this work by examining all secondary instruments made between 1821 and 1922 that applied to Ireland, with a view to retaining those that remain in force and remain relevant, and formally revoking all others that are obsolete. The Commission intends to complete this work in 2022.

(vi) Irish Treaty Series and Draft Inventory of Ireland's International Agreements

- [2.68] International law does not automatically form part of the domestic legal order in Ireland, in accordance with Article 29.6 of the Constitution,²⁰⁷ which encapsulates the dualist approach to international law. Consequently, in order to have the force of law in the State, international treaty obligations to which the State has bound itself must be incorporated into the domestic legal order through the enactment of relevant legislation by the Oireachtas. As previously discussed in this Chapter,²⁰⁸ the electronic Irish Statute Book database (eISB) contains the full text of all Acts enacted and of most statutory instruments made since 1922. This means that all Acts and statutory instruments that have given statutory force to international agreements in Irish law can be readily accessed via the eISB.
- [2.69] However, further research is required to identify the applicable international agreements to which Ireland is party. As is the case with EU law, the eISB does not, for example, categorise this implementing legislation separately so that it may be easily accessed in one particular section of the database. Nor does it provide information regarding international obligations which have been signed but not yet ratified.
- [2.70] These issues have been mitigated by the maintenance of the Irish Treaty Series (ITS) by the Department of Foreign Affairs and Trade.²⁰⁹ The ITS is an online database that publishes the international agreements to which the State becomes a party. It has been published since 1930 and now includes the full text of all international treaties that have been ratified by Ireland since 1998.²¹⁰ The Department of Foreign Affairs and Trade also maintains, on the ITS home page, a separate list of international agreements that have been signed by the State subject to ratification. The Department's ITS and separate list of signed international agreements mirrors the format of the eISB in that they are published in chronological order.
- [2.71] In 2018, the Commission, as part of its *Fourth Programme of Law Reform* and in collaboration with the Department of Foreign Affairs and Trade, published a Draft Inventory of Ireland's International Agreements.²¹¹ The Draft Inventory builds on the

²⁰⁷ Article 29.6 provides: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

²⁰⁸ See para 2.35.

²⁰⁹ <<https://www.dfa.ie/our-role-policies/international-priorities/international-law/find-a-treaty/>> accessed on 26 August 2020.

²¹⁰ Additionally, the ITS includes the full text of a selection of treaties that the State ratified prior to 1998.

²¹¹ The Draft Inventory of Ireland's International Agreements formed the first of the two published outputs of Project 10 in the Commission's *Fourth Programme of Law Reform*. The

work of the Department of Foreign Affairs and Trade in maintaining the ITS as well as the separate list of signed but not ratified by the State. It also includes a full list of Conventions of the International Labour Organization (ILO), for which the Department of Business, Enterprise and Innovation has direct responsibility within Government.²¹²

- [2.72] The Draft Inventory contains approximately 1,400 entries, which are organised under more than 30 subject headings. These headings have been derived, in part, from the 36 headings in the Commission's Classified List of In-Force Legislation, and the entries are linked to corresponding domestic legislation. As with the Commission's subject-based approach to the Classified List, the intention in producing the Draft Inventory under subject headings is to promote accessibility of the international agreements. Thus, the reader is able to see all relevant international agreements under, for example, the heading of Environment or International Taxation, as the case may be.

second and final element was the Commission's *Discussion Paper on the Domestic Implementation of International Agreements* (LRC 124-2020).

²¹² *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

CHAPTER 3 COMPARATIVE APPROACHES TO MAKING LEGISLATION ACCESSIBLE

1. Introduction

- [3.1] This Chapter describes how a number of other jurisdictions have approached the task of making their legislation accessible. A common theme that emerges from this is that significant efforts began to be made during the 19th century to provide access to comprehensive and up-to-date statements of the law. Over the course of the 19th century, European jurisdictions with civil law traditions, such as France, Germany, and Italy, enacted relatively extensive statutory codes of law. In the second half of the 19th century, common law jurisdictions (that is, those that share a British legal heritage), such as the United States, Australia, and New Zealand, produced comprehensive collections of Revised Acts, which mirrored the approach taken at that time in the United Kingdom (and this State, then part of the United Kingdom). In the 20th century, the United States, Australia, and New Zealand surpassed the United Kingdom in this context by enacting significant codifying Acts in a wide range of legal areas, including in commercial and criminal law. These developments challenge the commonly held notion that codification is found in civil law states only.
- [3.2] In the late 20th century and early 21st century, many jurisdictions, civil law and common law alike, have used digital and online technology to improve the accessibility of their respective laws. This Chapter discusses the extent to which these developments mirror those that have taken place in Ireland, including whether the full text of all legislation within a particular jurisdiction is available online, free of charge.
- [3.3] As noted below, a number of jurisdictions have also harnessed technology to provide the revised, as amended, text of Acts in online format within a short period of the enactment of amending legislation. Moreover, an increasing number of states have decided to enact legislation that confers official status on the online version of legislation, rather than the traditional approach whereby only the printed hardcopy has this official status. In some cases, the online and paper hard copy has official status.
- [3.4] As noted, since 2013, the online edition of the Official Journal of the European Union (e-OJ), in which European Union laws must be published in order to be enforceable,¹ is the official version of all post-2013 EU laws.² This means that a printed copy of a post-

¹ Case C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* [2007] ECR I-10841, at paras 17-51, discussed below.

² See Regulation (EU) No. 216/2013 (OJ No. L 69, 13.3.2013, page 1).

2013 EU law, such as the 2016 General Data Protection Regulation (GDPR), has no official legal status if presented to an Irish court; only the online version of the GDPR on the e-OJ has official legal status. The “authenticity, integrity and inalterability”³ of the e-OJ is guaranteed by the advanced electronic signature attached to each entry on it. The European Union recognises 24 official languages,⁴ each of which has equal status.⁵ Consequently, EU legislation is drafted in each of the official languages, with all versions being published on the e-OJ.

2. Early initiatives to make the law accessible: common law and civil law states

- [3.5] As previously noted by the Commission,⁶ many states belong to one of two major “families” of legal systems,⁷ the common law family and the civil law family.⁸ The common law family, to which Ireland belongs, comprises legal systems whose development has been influenced by the United Kingdom and is characterised by the initial development of the law by judge-made case law or precedent.⁹ It must be acknowledged that, since the 19th century, the content of the law in common law

³ <<https://eur-lex.europa.eu/content/oj/e-oj.html>> accessed on 26 August 2020.

⁴ In accordance with the most recent amendment to *Regulation No 1 determining the languages to be used by the European Economic Community* of 1958, these 24 languages are Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish.

⁵ Irish has, however, been temporally derogated to a working language until 2021; this is due to a lack of sufficiently qualified translators.

⁶ Law Reform Commission, *Consultation Paper on the Classified List of Legislation in Ireland* (LRC CP 62-2010), at para 1.03.

⁷ The concept of “families” of law was introduced into comparative legal studies in 1900, as a means to compare legal systems. See De Cruz, *Comparative Law in a Changing World* (Cavendish Publishing 2007), Chapter 2.

⁸ It should be noted, however, that these legal systems have experienced significant convergence in the second half of the 20th century, due to a number of factors such as the international harmonisation of laws, the process of decodification and recodification in civil law states, and codification projects that have taken place in common law states. As such, the differences between these systems can no longer be considered as significant as they once were. It should also be noted that, in addition to these “western families”, a number of non-western legal systems also exist. While there is no consensus regarding the appropriate categorisation of these legal systems, significant non-western legal traditions include socialist legal systems as well as Eastern legal systems influenced by Islamic, Hindu, or Confucian law. For a consideration of these different legal systems and their categorisation, see de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing 2007), Chapter 6; and Zweigert and Kötz, *Introduction to Comparative Law* (Oxford UP 1998).

⁹ For further information regarding the development of the common law, see Langbein, Lerner and Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 2nd ed (Aspen Publishers 2009).

jurisdictions has consisted overwhelmingly of legislation. Thus, by the second half of the 20th century it was estimated that, even in the United Kingdom, the home of the common law, about 90 percent of all cases heard by the Judicial Committee of the UK House of Lords (then the highest court in the UK system) involved the interpretation of legislation.¹⁰ Civil law countries comprise most of continental Europe and their former colonies, and the civil law tradition is characterised by the development, in the late 18th and early 19th centuries, of comprehensive written codes as the main sources of law.¹¹ Both the common law and civil law states can be considered to have their roots in ancient Roman law, the influence of which spread throughout Europe in the centuries before and after the collapse of the Roman Empire.¹²

- [3.6] From the emergence of organised society in ancient times, the importance of organising and arranging the law in a predictable and accessible manner had been recognised. Even in ancient Babylon, the pre-democratic rulers wanted to make clear to their subjects what the basic rules were. Indeed, the earliest surviving civil code is the Babylonian *Code of Hammurabi*,¹³ which was produced in approximately 1760 BC by the sixth Babylonian king, Hammurabi.¹⁴ The most famous code from ancient times, however, is the Roman *Corpus Juris Civilis*, a codification of Roman law, consisting of four compilations, produced between 529 and 534 AD at the instigation of the

¹⁰ See the opening sentence of the Opinion of Lord Hailsham in the UK House of Lords decision in *Johnson v Moreton* [1980] AC 37, [1978] 3 All ER 37: "Approximately nine out of ten appeals which come before you Lordships' House are concerned with disputes about the correct construction of Acts of Parliament." See also Hailsham, *Hamlyn Revisited: the British Legal System Today* (Sweet & Maxwell, 1984), page 65, cited in Bennion, *Statutory Interpretation: A Code* 3rd ed (Butterworths, 1997), page 1, and subsequently in the Commission's 2000 *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61–2000), Introduction, para 5.

¹¹ For a discussion of the development of the civil law tradition, see Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (1985).

¹² From the Middle Ages, these systems began to take their own distinct form. In England, from the mid-12th century, King Henry II centralised the many legal systems across the English Kingdom, creating a common law system for the whole country. Within this common law system, the law was developed centrally through judicial decisions on a case-by-case basis. In this way, the diverse Anglo-Saxon customs came to be supplanted by this new legal order. By contrast, during this time, the resurgence of Roman law teaching in universities and schools across Europe, particularly Italy, was influencing legal thought across much of the European continent. From this point, Roman Law, as interpreted and developed by these universities, became common across much of what are now Europe's civil law states, where they coexisted with existing customary laws.

¹³ The *Code of Ur-Nammu*, produced around 2100BC is considered to be the oldest known Code in existence, although no complete record of this Code remains. See Finkelstein, "The Laws of Ur-Nammu" (1968–1969) 22(3/4) *Journal of Cuneiform Studies* 66.

¹⁴ See Bartholomew, "The Ancient Codes and Modern Science" (1960) 1(3) *Tasmanian University Law Review* 429; and Pearn, "Hammurabi's Code: A primary datum in the conjoined professions of medicine and law" (2016) 84(3) *Medico-Legal Journal* 125.

Emperor Justinian I, and so it is often referred to as Justinian's Code. The *Corpus Juris Civilis* is the historical basis for the concept of codification in most European civil law legal systems. Justinian's Code was based on earlier codes, consolidating them into one integral code. However, those earlier versions have not survived, leaving Justinian's Code as the only complete source of Roman law from this period.¹⁵

3. Codification in the 18th and 19th centuries: an introduction

- [3.7] The next significant wave of statutory reform coincided with the period of Enlightenment in the late 18th century in Europe.¹⁶ As a result, a number of European states sought to rationalise their laws and make them available in authoritative codes.¹⁷ For example, the Russian Empress Catherine the Great drafted her *Instruction for the Commission Charged with Preparing a Project of a New Code of Laws (Nakaz)* over a 2-year period during, which she then presented to the Legislative Commission of 1767-1768. The Nakaz called for a new code of law to replace the 1649 Russian Legal Code that would incorporate Enlightenment principles. The 1649 Code had become obsolete because thousands of legislative acts had been enacted in the intervening 100 years, many of which overlapped with the 1649 Code but had failed to identify inconsistencies with that code. The Nakaz did not, however, lead to an enacted Code.
- [3.8] Modern codification began in a number of states within what is present-day Germany during the late 18th century.¹⁸ This process was followed in the early 19th century by the adoption of the Napoleonic Codes in France,¹⁹ and, after that, the process of codification accelerated across Europe and much of the colonies of the continental European states. This acceleration was often associated with the French colonisation of

¹⁵ Although, it should be noted that those tasked with compiling the *Corpus Juris Civilis* were directed, by Justinian, to edit enactments and juristic writings, so that the Justinian Code has been described as representing a "modified pastiche of [the] legal rules and opinions" of the Roman Empire, rather than reflecting Roman law completely accurately. See de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing 2007) at 56.

¹⁶ During the Enlightenment period, philosophers such as Bacon, Grotius, Locke, and Hobbes developed the doctrine of natural law, based on the belief that the law is a system of universal principles. See for example, Powell and Menendian, "Remaking Law: Moving beyond Enlightenment Jurisprudence" (2009-2010) 54 *Saint Louis University Law Journal* 1035.

¹⁷ See, for example, Rudolph, *Common Law and Enlightenment in England, 1689-1750* (2013); and Labuschagne and Sonnenschmidt, *Religion, Politics, and Law: Philosophical Reflections on the Sources of Normative Order in Society* (2009).

¹⁸ In 1756, Bavaria published the first of these codes, the Codex Maximillianeus Bavaricus Civilis. This was closely followed by the Allegemeines Landrecht für die Preußischen Staaten (General State Laws for the Prussian States), which was promulgated in 1794. See du Plessis, *Borkowski's Textbook on Roman Law* (2010) and Merryman, *The Civil Law Tradition* (1985).

¹⁹ See paras 3.14-3.21, below.

Europe during that period, as well as the quite different influences of nation-building, such as the unification of Germany and Italy during the 19th century.²⁰

- [3.9] The two most influential codifications from this period, namely those carried out across the Germanic States of the 18th century and the 19th century Napoleonic Codes, are considered in greater detail below.

4. Codification in the Germanic States

- [3.10] Although the Napoleonic Codes, adopted in France in the early 19th century, would ultimately become the most influential codification projects of this era,²¹ they were predated by codification initiatives taken in a number of states forming parts of modern-day Germany and Austria. The first attempts at modern codification in Europe began during the second half of the 18th century in Germany and Austria, when the states of Austria, Prussia, Bavaria, and Saxony began to codify their laws. From the mid-18th century onwards, a number of states sought to put in place comprehensive codes of law. These regional codes would in turn influence various efforts across the 19th century to produce a common code for all of Germany, culminating in the promulgation in 1896 of the *Bürgerliches Gesetzbuch* (BGB) (Civil Code), which entered into force on 1 January 1900.²²

(a) Pre-codification developments

- [3.11] Prior to codification, Germanic laws consisted of a mixture of local customary laws and Roman law.²³ In the centuries preceding codification, Roman law emerged as the most influential source of law, which German society had become increasingly exposed to from the re-establishment of the Holy Roman Empire in 962 AD and, in particular, from the revival of Roman law teaching across Italy from the 11th century onwards. In 1495, during the reign of Emperor Maximilian I, the Court of the Imperial Chamber

²⁰ Both Germany and Italy were unified in 1871. The unification of Germany into an administratively integrated nation state took place in January 1871, while the consolidation of different Italian states into the Kingdom of Italy was finalised in June 1871.

²¹ See Gergen, "The Reception of the Code Civil (Napoléonic Code) of 1804: An Example of 'Juridical Migration'?" (2014) 5(1) *Journal on European History of Law* 26.

²² The BGB has served as the foundation for civil codes in a number of other countries, including in China, Greece, Japan, and Thailand. See for example, Chen, "Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution" (2011) 6 *National Taiwan University Law Review* 389.

²³ See Sumner Lobingier, "Reception of the Roman Law in Germany" (1915-1916) 14(7) *Michigan Law Review* 562.

(*Reichskammergericht*) was established.²⁴ The Court was required to judge in accordance with the “common law of the Empire”,²⁵ namely Roman law as developed and taught in Italian universities and schools and embodied in Justinian’s Code. Roman law was thus binding on the Court unless local statutes and customs were proved to the contrary. These local customs were often difficult to prove however, and, consequently, Roman law can be considered to have been received into German law from the foundation of the Imperial Chamber Court in 1495, with customary law having been progressively supplanted from that point onwards. This common reception of Roman law can be considered as an early example of the harmonisation of legal principles across the Roman Empire.

(b) Regional codifications: late 18th century and early 19th century

- [3.12] From the 18th century onwards, a number of states began to move towards formulating their own codes of law,²⁶ influenced by existing Roman law, with the states of Austria, Prussia, Bavaria, and Saxony beginning to codify their laws. One of the first was the Bavarian *Codex Maximilianeus Bavaricus Civilis* of 1756. The use of the Latin title in the Code indicates the influence of Justinian’s *Corpus Juris Civilis*. In 1792, the *Allgemeines Landrecht für die Preussischen Staaten* (General National Law for the Prussian States) was enacted by King Frederick II (Frederick the Great). It contained codified laws on civil law, penal (criminal) law, and constitutional law. However, the Prussian Code replaced existing Roman law only, and existing local laws were not affected by its enactment. In 1809, the *Badisches Landrecht* code, which was a modified form of the Napoleonic Code, was adopted in the Grand Duchy of Baden. Similarly, in Austria, the first steps towards fully-fledged codification began in the mid-18th century, culminating in the enactment of the *Allgemeines bürgerliches Gesetzbuch* (ABGB) (Austrian Civil Code) in 1811. This work owed its inception to a number of projects over the previous century to streamline the law, initially undertaken by Archduchess Maria Theresa.²⁷ Unlike the Prussian Code, the Austrian Code replaced customary law entirely, becoming the principal source of law in the State.

²⁴ This was a judicial body with original jurisdiction for princes and appellate jurisdiction for others. Its jurisdiction spanned the entire Holy Roman Empire.

²⁵ Smithers, “The German Civil Code (Das Bürgerliche Gesetzbuch): Sources, Preparation, Adoption” (1902) 50(12) *American Law Register* 685, at 702.

²⁶ For a consideration of these codification projects and their background, see Pearce Higgins, “The making of the German Civil Code” (1905) 6(1) *Journal of the Society of Comparative Legislation* 95.

²⁷ These include the preparation of the *Codex Theresianus* in 1766 (not enacted) and the adoption of the *Josephine Code* in 1787 (concerning personal law only).

(c) National codification

- [3.13] From the formation of the Germanic Confederation in 1814, following the collapse of the Holy Roman Empire eight years earlier, there was discussion as to the prospect of a code that would apply to the whole of the Confederation. Whereas some leading jurists, such as Anton Friedrich Justus Thibaut, called for the adoption of national codes to unify the German legal system, others, such as Friedrich Carl von Savigny, argued that Germany was not ready for a code.²⁸ In the early years of the Confederation, the position adopted by Savigny would prevail. There was no general desire for such a national codification in the early years of the Confederation. More importantly, the Treaty of Vienna 1815 did not create any central legislative assembly and individual states remained protective of their own separate laws. As such, the Germanic states were not ready for a general codification project to apply to all of the Confederation. Nonetheless, codification projects continued at state level. Prussia and Bavaria both undertook, ultimately unsuccessful, projects, while Saxony successfully completed its Civil Code in 1863.
- [3.14] In the aftermath of the 1848 Revolutions, which included a number of revolts across German States, a new National Assembly was established, comprising directly elected members from across the German states.²⁹ This body would, for the first time, prepare codes to apply to all parts of Germany. A code relating to bills of exchange came into force across Germany in 1859. Similarly, in the same year, a commercial code was adopted by all of the members of the Confederation.³⁰ A codification of the law of obligations was prepared but never completed.
- [3.15] Following the establishment of the German Empire in 1871 and the coming into force of its constitution in 1872, the first real opportunity for a meaningful common code of law emerged. A Codification Commission was established in 1874,³¹ with the remit to undertake a general codification of the civil law. An initial draft code was completed in 1887 and published 1888, although this draft was subsequently rejected. On foot of revisions from a new Commission, established in 1890, the completed code was

²⁸ See Higgins, "The making of the German Civil Code" (1905) 6(1) *Journal of the Society of Comparative Legislation* 95, at 98-100 and Murillo, "The evolution of codification in the civil law legal systems: towards decodification and recodification" (2001-2002) 11 *Journal of Transnational Law & Policy* 163, at 167-168.

²⁹ The "Frankfurt Parliament" gathered at *Paulskirche* (Saint Paul's Church) between 1848 and 1849.

³⁰ These were both subsequently re-enacted as Imperial laws following unification.

³¹ See Hamza, "The Development of Private Law and the Codification of Private Law in Germany" (2004) 44 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica* 61.

forwarded to the Reichstag in October 1895. The code was ultimately adopted on 18 August 1896 and came into force on 1 January 1900.

5. Codification in France

- [3.16] While the first attempts at modern codification in Europe began in the second half of the 18th century across a number of German states, there can be no doubt that the most influential codification project undertaken in this period was that carried out in France in the aftermath of the 1789 Revolution. These codes would ultimately be "exported" across the French empire, thus ensuring their enduring influence. The origins of the drive to codify French law lay in the haphazard nature of French law under the *Ancien Régime*, illustrated by the (possibly misleading) phrase "*L'État, c'est moi*".³² In fact, prior to the French Revolution, more than 400 codes of laws were in place in various parts of France,³³ with customary law predominant in the north, and Roman law in the south.³⁴ The French Revolution sought to overturn these separate and diverse systems of law and to establish a single framework of laws for the emerging French nation state.

(a) Developments prior to codification in France: pre-revolutionary developments

- [3.17] Although the general codification of French law was ultimately realised during the Napoleonic period, the process that occurred during the late 18th and early 19th centuries can be considered to be the culmination of various initiatives undertaken to rationalise and streamline the law in France, dating back to the 15th century.³⁵ The drive to improve the arrangement of laws gathered pace in the 16th century. During this period, a well-known lawyer, Charles Dumoulin, sought to unify French law by

³² "*L'État, c'est moi*" translates as "the state, it is I" or "I myself am the nation".

³³ This multiplicity of legal systems caused Voltaire to comment "Is it not an absurd and terrible thing that what is true in one village is false in another? When you travel in this kingdom, you change legal system as often as you change horses."

³⁴ The survival of Roman law in the south of France after the collapse of the Roman Empire owed much to the enactment of the *Lex Romana Visigothorum* by the Visigoth king, Alaric II, in 506 AD. This Code was based on an early Roman codification, the *Code of Theodosius*, and provided both a summary and a commentary of the law. As the Franks allowed the conquered Gauls to live by their own laws after conquering the south of France, Roman law, as articulated in the *Lex Romana Visigothorum*, survived as a legal system. For an analysis of this code see de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing 2007) at 61.

³⁵ In 1454, the first tentative steps were taken to rationalise the law when a royal statute decreed that all local customs, which at that point only existed orally, be written down. This process was subsequently carried out over the following decades. For a fuller analysis of the historical developments leading up to codification, see Maillet, "The historical significance of French codifications" (1969-1970) 44 *Tulane Law Review* 681.

creating a general body of private law for the entire country.³⁶ Similarly, the *États Généraux* suggested, on three separate occasions,³⁷ that all of the laws in force should be assembled in one document and that all others be annulled.³⁸ On foot of these suggestions, two codes were prepared, the *Code Henri III* in 1586 and the *Code Marillac* in 1629. Although these codes were eventually rejected by the *Parlements*,³⁹ they represent the first significant steps taken in the movement towards the general codification of the law in France.

- [3.18] In addition to the initiatives referred to above, during the 17th century, a body of "general statutes" was adopted to bring about a partial unification of areas of law generally applicable across all of France, although not in the systematic manner with which one would associate codification.⁴⁰ These "general statutes" were in turn succeeded by the "great statutes".⁴¹ Each great statute was devoted to a specific subject matter, with a view to bringing together all of the law in that area into one single statute. As such, they constituted partial codifications. This process began when, encouraged by King Louis XIV, the First President of the *Parlement de Paris*, Lamoignon, prepared a draft compilation of all private law regulations in force in the territory under the jurisdiction of the *Parlement de Paris*.⁴² Following on from this, the statesman Colbert drafted several general statutes.⁴³ These were partial codes intended to reform, order, and unify particular legal areas.⁴⁴ This task was once again resumed by Louis XV's Chancellor Daguesseau between 1731 and 1747, with three

³⁶ Maillet, "The historical significance of French codifications" (1969-1970) 44 *Tulane Law Review* 681, at 682.

³⁷ In 1560, 1576, and 1614.

³⁸ The *États Généraux* was the consultative assembly, which sat intermittently during the *Ancien Régime*.

³⁹ These were provincial appellate courts in the *Ancien Régime*. Laws and edicts issued by the Crown were not officially recognised in their respective jurisdictions unless the *Parlements* had given their assent by publishing them.

⁴⁰ Maillet, "The historical significance of French codifications" (1969-1970) 44 *Tulane Law Review* 681, at 682.

⁴¹ *Ibid.*

⁴² Lamoignon, *Recueils des arrêtés de Monsieur le premier Président de Lamoignon* (1702).

⁴³ Jean-Baptiste Colbert, who served as Minister for Finances in France from 1665 to 1683, had urged Louis XIV to "reduce into one body all the existing ordinances". See de Colyar, "Jean-Baptiste Colbert and the Codifying Ordinances of Louis XIV" (1914) 13(1) *Journal of the Society of Comparative Legislation* 56.

⁴⁴ Included in these statutes were a statute concerning civil procedure (1667), a statute concerning criminal procedure (1670), a statute on trade (1673), and a statute on the merchant marine and marine trade (1681).

further statutes being passed during this time.⁴⁵ As a consequence of this work, France had already achieved significant reforms of its presentation of the law as it entered its revolutionary period towards the end of the 18th century.

(b) French Revolution and Napoleonic codification

- [3.19] Thus, in the pre-revolutionary period a number of initiatives had been adopted with the intention of improving the arrangement of the law in France. Nonetheless, the very nature of traditional society ensured resistance to any general codification, which would necessarily threaten existing social hierarchies under the *Ancien Régime*'s feudal system, as well as the status of provinces and local communities and their individual legal systems.⁴⁶ As such, pre-revolutionary initiatives only ever focused on a limited number of fields of law, and never on the most important areas regulating people's lives.
- [3.20] From the beginning of the French Revolution, those aspects of French society that had provided obstacles to general codification were progressively removed. The Revolution abolished the feudal system, limited the power of the church, suppressed local status and rule, and assigned full responsibility for the creation of laws to the State.⁴⁷ With the abolition of these societal factors, it became possible for a more general codification of the law to be undertaken.
- [3.21] From the outset of the French Revolution, moves were made to produce a comprehensive code of civil law. A decree of 1790 stated that "a general Code of statutes which will be simple, clear, and appropriate to the Constitution will be formed."⁴⁸ Following this, the French Constitution of 1791 provided that "[a] Code of civil statutes common to the whole kingdom will be made." A number of draft civil codes were prepared during this period, but none was successfully enacted. This can, to some extent, be explained by the turmoil and instability that prevailed at that time. Nonetheless, a number of codes were adopted, including three "mini-codes" on criminal law, criminal procedure, and sentencing, namely, a Penal Code (1791), a Code of Statutes on Criminal Procedure (1795), and a Code of Offences and Punishments (*Code des délits et des peines*) (1795). These three codes were later replaced by the Napoleonic Code of Criminal Procedure (1808) and the Penal Code (1810).⁴⁹ While

⁴⁵ These were statutes on gifts (1731), testaments (1735), and substitution (1747).

⁴⁶ Maillet, "The historical significance of French codifications" (1969-1970) 44 *Tulane Law Review* 681, at 684-691.

⁴⁷ *Ibid.*, at page 691.

⁴⁸ See Maillet, "The historical significance of French codifications" (1969-1970) 44 *Tulane Law Review* 681, at 683.

⁴⁹ The 1810 Penal Code remained in force until 1994 when it was replaced by the Code Pénal.

there were key differences between the 1791 Penal Code and the 1810 Penal Code (for example, the 1797 Code abolished the death penalty and life imprisonment as penal sanctions while the 1810 Code reinstated these), the 1791 Code did influence its 1810 counterpart. This influence is evident through the use of clear definitions in both, which were included in both Codes to ensure citizens knew what punishments would follow and to leave little room for judicial interpretation. The French Revolution also ultimately succeeded in adopting a number of mini-codes in the civil law area, including a Code on Inheritance (1794) and a Code on Land Law (1795).

- [3.22] With Napoleon's rise to power, work on the codification project was revived, as Napoleon sought to provide a single framework of laws for the emerging French nation state and to make sense of the 14,000 pieces of legislation that had been enacted during the French Revolution. The codification process involved the formation, in 1800, of a four-person commission of experts, which notably included Jean-Etienne-Marie Portalis.⁵⁰ Under Napoleon's direction, the work of the commission gathered momentum and he is reported to have attended 36 of the commission's 87 meetings in person.
- [3.23] The first code to emerge from the commission's work was the *Code Civil*, completed at the end of 1801, although not published until 1804.⁵¹ The Civil Code consolidated some basic revolutionary objectives. For example, in respect of land law, the Civil Code abolished feudal tenure and replaced it with virtually absolute rights. The Civil Code was followed by five subsequent codes, four of which were enacted into law (*Les Cinq Codes* or *The Five Codes*).⁵² These Napoleonic Codes were later "exported", with modifications, to the French Empire of the 19th and early 20th century, thus ensuring their enduring influence internationally. As already noted in Chapter 2,⁵³ code provisions that originated in the Napoleonic Codes have been influential in Irish law, including for example, the *Succession Act 1965*; and, indeed, the concept of codification has been an accepted part of legislative activity in many common law jurisdictions such as Australia, New Zealand and the United States. It remains the case

⁵⁰The committee comprised Tronchet, Bigot-Préameneu, Portalis, and Malleville. See Fairgrieve, *The Influence of the French Civil Code on the Common Law and Beyond* (British Institute of International and Comparative Law 2007) at 15; and Wheeler, "Code Napoleon and Its Framers" (1924) 10 *American Bar Association Journal* 202, at 203.

⁵¹ Crabites, "Napoleon Bonaparte and the Code Napoleon" (1927) 13(8) *American Bar Association Journal* 439, at 439.

⁵² These original Codes were the Civil Code (*Code Civil des Français*) 1804, the Code of Civil Procedure (*Code de Procédure Civile*) 1806, the Code of Commercial Law (*Code de Commerce*) 1807, the Code of Criminal Procedure (*Code d'Instruction Criminelle*) 1808, and the Criminal Code (*Code Pénal*) 1810. Additionally, the Rural Code (*Code Forestier*) was debated at that time but not subsequently enacted into law.

⁵³ See para 2.27, above.

that the United Kingdom has been somewhat impervious to codification as such, though its three Law Commissions, as with this Commission, have a statutory mandate to propose law reform that includes codification of the law.⁵⁴ The Commission now turns to examine codification-style initiatives in common law jurisdictions, beginning with the United Kingdom.

6. Initiatives across common law jurisdictions

(a) Early initiatives in the United Kingdom

- [3.24] In contrast to the developing wave of codification that took place across civil law jurisdictions in the 18th and 19th centuries, reform of the presentation and arrangement of law in common law jurisdictions developed at a slow pace. It is important to recall that, at this time, common law jurisdictions were, in fact, colonies of Great Britain, and were largely subject to prevailing political and legal thinking in London. It was not until the last decade of the 18th Century that one of its largest colonies, the emerging United States of America, gained its independence, and it would be well into the 19th century before that independence resulted in the kind of separate legal identity that influenced the development of US codification projects, discussed below. For the rest of the common law jurisdictions that formed the British Empire, the London-based aversion to codification cast a long shadow. It was not until the beginning of the 20th century that colonies such as Australia and New Zealand began to develop a code-based approach to legislating, discussed below.
- [3.25] By the 19th century, the United Kingdom's law comprised a combination of a substantial body of judge-made case law and a vast array of legislation that had been enacted in a piecemeal manner from the 11th century onwards. This had begun with the Norman Conquest of 1066, which marked the beginning of the common law system that comprised a mixture of judge-made case law and legislation, in effect, a French import from Normandy that replaced the existing Anglo-Saxon system. Although some dissatisfaction with this situation, and the resulting confusion as to what the law was, had been expressed throughout the following centuries,⁵⁵ no

⁵⁴ See section 3(1) of the British *Law Commissions Act 1965*, which established the Law Commission of England and Wales and the Scottish Law Commission. The Northern Ireland Law Commission, established under the *Justice (Northern Ireland) Act 2002*, has a similar statutory remit. At the time of writing (August 2020), the Northern Ireland Law Commission has been non-operational since April 2015, due to budgetary pressures within the Northern Ireland Department of Justice.

⁵⁵ As early as the 16th century King Edward VI commented to Parliament that "I would wish... that the superfluous and tedious statutes were brought into one sum together, and made more plain and short."

significant projects were undertaken to improve the presentation and arrangement of the law until well into the 19th century.⁵⁶

- [3.26] Compared with its European neighbours, no significant projects were successfully undertaken in the United Kingdom to reform the presentation of its laws in the early decades of the 19th century. The antipathy towards Napoleon and his legacy of the codification of French law cast a long shadow in the United Kingdom during much of the 19th century.⁵⁷
- [3.27] Nonetheless, towards the end of the 19th century, a renewed interest was taken in improving access to the law. As noted in Chapter 2,⁵⁸ ongoing criticism of the state of English law throughout the early 19th century would provide the impetus to undertake projects to improve access to the law. Throughout the second half of the 19th century, a significant number of Acts were enacted that consolidated the law and enacted mini-codes in a wide range of areas, such as commercial law, the court system, criminal law, prison law, and taxation. Some of these, as noted in Chapter 2,⁵⁹ remain in force in Ireland at the time of writing (August 2020).
- [3.28] In addition to these formally enacted reforming and codifying Acts, a separate programme was undertaken during the 19th century to publish a semi-official collection of all in-force Acts in their amended form, known as Revised Statutes.⁶⁰ This involved the publication of the multi-volume Statutes Revised under the supervision of the Statute Law Committee, which was appointed in 1868 by the UK Lord Chancellor, Lord Cairns. The first edition of the Statutes Revised was published between 1870 and 1885, and it comprised a comprehensive collection of all public general Acts enacted in Westminster that remained in force up to 1878, including all amendments.⁶¹ Three further editions of the Statutes Revised were published by the Statute Law Committee in the United Kingdom, with the final edition being completed in 1981 and published

⁵⁶ This deceleration has been attributed to a failure on the part of successive UK Parliaments to accept the "ulterior object of consolidation." See Elliott, "Access to Statute Law in New Zealand" (1990) 20(3) *Victoria University of Wellington Law Review* 131.

⁵⁷ Indeed, this antipathy still lingers to a certain extent. See Steiner, "Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far?" (2004) 25(3) *Statute Law Review* 209, at 212-214.

⁵⁸ See paras 2.12-2.17, above.

⁵⁹ See para 2.33, above.

⁶⁰ The current provisions addressing the status of such revisions in the UK are s. 19(1)(a) of the *Interpretation Act 1978* (England and Wales), s. 47(3) of the *Interpretation Act (Northern Ireland) 1954* and ss. 10(2) and 11(2) of the *Interpretation and Legislative Reform (Scotland) Act 2010*.

⁶¹ For a more detailed discussion of the Statutes Revised project, see paras 2.18-2.21, above.

under the title *Statutes in Force*.⁶² Amendments up to 1991 continued to be incorporated into this loose-leaf publication.⁶³

- [3.29] As noted in Chapter 2, a similar exercise was undertaken to publish the text of in-force secondary legislation (now called statutory instruments), that is, statutory rules and orders made under Acts, the *Statutory Rules and Orders Revised*.⁶⁴
- [3.30] As the impetus to improve access to the law took hold in the United Kingdom, this influenced legislative policy across the common law world. A number of the United Kingdom's colonies and former colonies would seek to implement similar projects and expand upon them further. The Commission discusses these below.

(b) Initiatives to consolidate law in other common law jurisdictions

- [3.31] Early interest in improving access to legislation can be seen in projects undertaken in various common law jurisdictions to consolidate the statute book comprehensively. As the legislative stock of these new legal systems began to grow, the importance of keeping the law in consolidated form was recognised. A number of these initial projects appear to have been inspired by the work of Lord Cairns and the Statute Law Committee, and often explicitly used the term Revised Statutes.

(i) United States of America

- [3.32] The most notable of these early consolidation projects in the 19th century took place in the United States, by then almost 100 years into its independence from Britain. There, a thematic consolidation of all federal statute law was undertaken.⁶⁵ In 1874, the *Revised Statutes of the United States*, which was published as a single volume, was approved by the United States President and enacted as an Act of Congress. This was intended to provide a complete consolidation of the federal laws of the United States. It included all statutes of a general and permanent nature that were in effect as of 1

⁶² See para 2.51, above, for a discussion of the Statutes Revised.

⁶³ In 1991, following a decision by the UK Lord Chancellor Lord Mackay of Clashfern, the Statute Law Committee was replaced with the Advisory Committee on Statute Law. It advises the Lord Chancellor, on a periodic basis, on issues relating to the publication of the statute book. See Arden, "Improving the Statute Book: A Law Reformer's Viewpoint" (1997) 18(3) *Statute Law Review* 169.

⁶⁴ For a more detailed discussion of the *Statutory Rules and Orders Revised* project, see para 2.20 above.

⁶⁵ The impetus for the project was provided by the enactment, in 1866, of *An Act to provide for the Revision and Consolidation of the Statute Laws of the United States* by Congress. Momentum had been building prior to this enactment, with Charles Sumner recommending the revision and consolidation of national statutes to Congress in 1851. This was followed by a similar recommendation in 1861 by President Abraham Lincoln.

December 1873, repealing all of those enacted prior to that date and thus sometimes referred to as the *Revised Statutes of 1873*. These make up Part 1 of volume 18 of the Statutes at Large of the US Congress. Similar codification projects to that at a federal level were also carried out across a number of individual States.⁶⁶

(ii) *Canada*

- [3.33] Similar projects were undertaken across Canada to consolidate all its in-force laws. Canada had, at different times in its history, been a colony first of France (which left lasting civil law influences) and then of Britain. The first such comprehensive consolidation at federal level in Canada occurred in 1886, with the appointment of a statutory Statute Revision Commission with a statutory mandate to provide a complete set of Revised Acts.⁶⁷ This led to the publication of a series of volumes entitled *Revised Statutes of Canada* (1886). This consolidation project was in turn repeated across a number of Canadian provinces including Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, and Saskatchewan.⁶⁸
- [3.34] Over the course of the 20th century, progress was maintained across Canadian jurisdictions by continuing to carry out regular periodic systematic consolidations. The systematic consolidation of Canadian law undertaken in 1886 was repeated 5 more times up until 1985. Similarly, in Ontario a total of 11 general consolidations of the statute book were undertaken between 1877 and 1990. More recently, jurisdictions have moved away from systematic consolidations performed by ad hoc commissions in favour of undertaking ongoing phased consolidation. At a federal level, for instance, a permanent Commission has been established to provide for consolidations on an ongoing basis.

(iii) *New Zealand*

- [3.35] New Zealand also undertook a systematic consolidation of its legislation around the same time, although less extensive consolidation had taken place earlier, in 1850 and in 1892.⁶⁹ Under the New Zealand *Revision of Statutes Act 1879*, between 1879 and 1884, 50 consolidation Acts were enacted, consolidating nearly 280 Acts and Ordinances.⁷⁰ The 1879 Act was repealed and replaced by the New Zealand *Reprint of*

⁶⁶ See for example the consideration of codification in Maryland in the Commission's *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62- 2010), at para 2.10.

⁶⁷ This revision was authorised by *An Act respecting the Revised Statutes of Canada*.

⁶⁸ See Berry, "Keeping the statute book up to date: a personal view" (2010) 36(1) *Commonwealth Law Bulletin* 79, at 84.

⁶⁹ New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (NZLC R104, Wellington 2008), 90-91.

⁷⁰ *Ibid*, at 103.

Statutes Act 1895, which led to a compete statement of in-force New Zealand legislation by the Commissioners appointed under the 1895 Act in the *Consolidated Statutes Enactment Act 1908*.⁷¹ The 1908 Act repealed almost all pre-existing legislation in New Zealand. It replaced the pre-existing Acts with 208 consolidated Acts and was described as “the greatest of all reforms” of the New Zealand statute book.⁷² Since then, New Zealand has used the term Reprints for Revision Acts. Section 4 of the *Legislation Act 2012*, which was repealed by the *Legislation (Repeals and Amendments) Act 2019*, defined a reprint as a version of an Act or Legislative Instrument (New Zealand’s version of statutory instruments) that incorporates all relevant amendments made to that Act or Instrument as at the date of the reprint. They are therefore comparable to the Revised Acts prepared and updated by this Commission. The 2012 Act was replaced by the *Legislation Act 2019*, which does not contain a definition for a reprint. Section 60 of the 2019 Act provides, on the other hand, that Revision Bills re-enact the law previously contained in disparate Acts and are the New Zealand equivalent of our Consolidation Acts.

- [3.36] In New Zealand, the *Statutes Drafting and Compilation Act 1920* also provided for general reprints of revised legislation. New Zealand’s first comprehensive legislative reprint took place in 1931, although this project was not carried out under the 1920 Act but was, rather, a joint undertaking between the government of New Zealand and Butterworths, a legal publisher.⁷³ The 1931 reprint was followed by a second reprint in 1957.⁷⁴ The 1920 Act was repealed and replaced by the New Zealand *Legislation Act 2012*, which as noted was itself replaced by the *Legislation 2019*.
- [3.37] New Zealand has also made provision for ongoing phased consolidation. Following the 2008 Law Commission *Report on the Presentation of New Zealand Statute Law*,⁷⁵

⁷¹ The 1908 consolidation enacted 208 consolidated public general statutes and repealed The New Zealand Acts as consolidated in 1908 are available as a historical collection on the website of the New Zealand Legal Information Institute<http://www.nzlii.org/nz/legis/hist_act_1908/> accessed on 26 August 2020. Elliott, “Access to Statute Law in New Zealand” (1990) 20(3) *Victoria University of Wellington Law Review* 131, at 143.

⁷² Sir Thomas Sidney, former Attorney General of New Zealand (1928-1931), quoted in Carter and Green, “The enactment is self-explanatory...or is it? – Explanatory Provisions in New Zealand Legislation” (2007) 28(1) *Statute Law Review* 1, at 10.

⁷³ See New Zealand Law Commission, *Presentation of New Zealand Statute Law* (NZLC R104, 2008), 90-91. Prior to 1931, less extensive reprints were prepared in 1850, covering the period between 1841 and 1849, and again in 1892.

⁷⁴ The 1957 reprint appears to have been less comprehensive than its predecessor. It was not published until 1961 by which time it was already outdated. See New Zealand Law Commission, *Presentation of New Zealand Statute Law* (NZLC R104, 2008), 91.

⁷⁵ A useful history of consolidation initiatives is provided in the New Zealand Law Commission’s *Report on Presentation of New Zealand Statute Law* (NZLC R104, 2008), 102-104.

section 30 of the New Zealand *Legislation Act 2012* provided for ongoing phased programmes of consolidation. The 2012 Act was repealed and replaced by the *Legislation Act 2019*. Under the 2019 Act, the New Zealand Parliamentary Counsel Office is required to undertake three-yearly consolidation programmes with a view to consolidating and updating the statute book. The first consolidation programme under the 2012 Act was presented to the House of Representatives in 2014 and covered the period 2015 to 2017.⁷⁶

(iv) Australia

- [3.38] Similar projects were also undertaken across a number of Australian states and territories from the 19th century onwards. Victoria completed a full revision of its Public Acts in 1865 and again in 1890.⁷⁷ This was followed by a third consolidation in 1915, which included consolidations of local and personal Acts for the first time. This was followed in 1928 by the *Acts Enumeration and Revision Act 1928*. In 1958, the state enacted the *Acts Enumeration and Revision Act 1958*, which consolidated all public Acts in force in Victoria as at 1 September 1958, enacting 233 consolidating Acts.⁷⁸
- [3.39] Revision (or consolidation) did not take place at the federal level in Australia until the early 20th century, as the Commonwealth of Australia did not come into being until 1901. In 1905, the *Amendments Incorporation Act 1905* (which was repealed in 2016 by the *Acts and Instruments (Framework Reform) Act 2015*) was enacted, which required legislative amendments to be incorporated into any future Reprints of Acts. The first general Reprint of all Commonwealth Acts under the 1905 Act was carried out in 1913. The initial general reprint was followed by further reprints in 1936, 1952, 1974, and 1987. These were in turn followed by a similar reprint of all regulations in force in 1956.
- [3.40] South Australia undertook its first general reprint in 1936, which contained all Acts enacted between 1837 and 1936.⁷⁹ South Australia undertook a further general reprint in 1976. New South Wales carried out its first official reprint in 1937, which contained

⁷⁶ See <<http://www.pco.parliament.govt.nz/revision-programme-2015-to-2017/>> accessed on 26 August 2020.

⁷⁷ Mackinnon, "The Consolidation of the Law in Victoria" (1924) 6(1) *Journal of Comparative Legislation and International Law* 255, at 256.

⁷⁸ Parliament enacted the *Sessional Acts Revision Act 1958* alongside the *Acts Enumeration and Revision Act 1958* to ensure that amendments made to the as-enacted laws prior to the consolidated Acts coming into operation would be construed as amending the consolidated Acts

⁷⁹ The official title of the first South Australian reprint is South Australian Statutes 1837-1936. See Marshall, "Statute Law Revision in the Commonwealth" (1964) 13(4) *International and Comparative Law Quarterly* 1407.

all Acts enacted between 1824 and 1937.⁸⁰ This was followed by a further general reprint in 1957. The Northern Territory also produced its first full revision of all ordinances enacted since its separation from South Australia in 1911. Queensland, Tasmania, and Western Australia all carried out revisions on a periodic basis during the 1930s.

- [3.41] Towards the end of the 20th century, the policy of general reprints of legislation in the Australian states as revised was abandoned in favour of a process of "rolling reprint". Rolling reprint entailed the periodic revision of legislation as it was amended on an ongoing basis and its publication in pamphlet form. This enabled revisers to focus their work on the most amended legislation, more regularly providing revised versions.⁸¹ As a consequence of the efforts of such states to maintain Revised Acts, they had available to them a relatively up to date body of law when they began publishing their legislation online in the late 20th century. Because of this, these states were able to produce complete current law databases that could then be maintained when they moved online.
- [3.42] At the federal level, revised versions of Acts and of legislative instruments (the Australian equivalent of statutory instruments) are referred to as compilations. Section 4 of the *Acts and Instruments (Framework Reform) Act 2015* and section 4 of the *Legislation Act 2003* define a compilation as a version of the relevant Act or instrument that shows the text of the Act or instrument as amended and in force on the relevant compilation date.
- [3.43] Section 15T(1)-(3) of the 2003 Act requires the First Parliamentary Counsel to register a compilation Act or instrument in the Federal Register of Legislation when a required compilation event occurs,⁸² which section 15Q defines to include express amendment and repeal. The First Parliamentary Counsel may also register a compilation of an Act or instrument in the Federal Register when a discretionary compilation event occurs, which section 15T(4)-(6) define as including the commencement of provisions and implied amendments. Section 15ZB of the 2003 Act provides that registration in the Federal Register gives compilation Acts the force of law and allows judicial notice to be taken of them.

⁸⁰ The New South Wales revision was entitled The Public Acts of New South Wales 1824-1937. See Marshall, "Statute Law Revision in the Commonwealth" (1964) 13(4) *International and Comparative Law Quarterly* 1407.

⁸¹ Berry, "Keeping the statute book up to date: a personal view" (2010) 36(1) *Commonwealth Law Bulletin* 79, at 84, noted that, as of 2010, 21 such revisions had been carried out in Victoria in respect of the *Crimes Act 1958*.

⁸² The Federal Register of Legislation is the official website of the Australian Government and is the authorised website on which all federal Australian legislation is hosted.

- [3.44] In some limited circumstances, future law compilations are prepared which show the text of an Act as it will be amended if proposed amendments are enacted.

7. The development of legislative codes in the United States of America in the 20th century

- [3.45] Throughout the 20th century, the progress made by common law jurisdictions towards rationalising their stocks of legislation continued and intensified. This is particularly evident in the United States of America. Using the 1874 *Revised Statutes of the United States* as a starting point, from the early 20th century onwards, the United States Congress approved the gradual development of the United States Code (USC). The USC is a compilation and codification of all the federal laws of the United States of America, having initially been adopted as a Code by Congress in June 1926.⁸³ It currently contains 54 major headings, which are referred to as Titles, and is published by the Office of the Law Revision Counsel (OLRC). It keeps the law up-to-date through incorporating any amendments and new provisions into the text.⁸⁴
- [3.46] In order to ensure a permanent revision and codification process was put in place, the OLRC was established within the United States House of Representatives in 1974. The provisions detailing the powers and functions of the OLRC are set down in Title 2, Part 9A (Office of Law Revision Counsel) of the USC itself. The OLRC was established as an independent body under the authority of the Speaker of the House of Representatives. Its function is to prepare complete compilations of the general and permanent laws of the United States to be submitted to the Committee on the Judiciary, the ultimate goal being to enact each Title as a positive law Title.⁸⁵ It is also responsible for classifying newly proposed and enacted provisions to their proper place within the Code, identifying obsolete legislation for repeal, carrying out revisions of positive law Titles, and publishing new editions of the Code. The OLRC publishes an entirely new print version of the USC every 6 years, with supplements being published every year in accordance with section 202 Title 1 (General Provisions) of the USC.
- [3.47] The USC is currently (August 2020) composed partly of positive law Titles and partly of non-positive law Titles. A positive law Title is a complete codification of the subject in

⁸³ Sess. I Ch. 712 1926 and Sess. I Ch. 713 1926.

⁸⁴ LeFevre, "The United States Code: Its Accuracy, Accessibility, and Currency" (2013) 38(2) *Administrative and Regulatory Law News* 10, at 10.

⁸⁵ The authority for the material in the USC comes from its enactment through the legislative process into positive law, rather than from its mere presentation in the Code. Prior to its enactment into positive law, the relevant section of the Code is *prima facie* evidence of the law. See Whisner, "The United States Code, Prima Facie Evidence, and Positive Law" (2009) 101 *Law Library Journal* 545.

the Title concerned. It is enacted by preparing and enacting a full Codification Title Bill which, when enacted, replaces the pre-codification law. Some examples of the positive law Titles contained in the USC are Title 11 Bankruptcy, Title 18 Crimes and Criminal Procedure, and Title 35 Patents. The OLRC is obliged to engage in an ongoing programme of positive law codification under 2 USC §285b(1) (in Title 2, The Congress). At the time of writing (August 2020), there are 27 positive law Titles, full codifications, of the 58 Titles in total. This process is similar to the process involved in enacting a Consolidation Bill and Act in Irish law; and it worth noting that, for example, a *Social Welfare Consolidation Bill*, when enacted as a *Social Welfare Consolidation Act*, is often referred to as involving the enactment of a "social welfare code." In the Supreme Court decision *Laurentiu v Minister for Justice*, Keane J referred to the "social welfare code",⁸⁶ as did Hamilton CJ in *Lowth v Minister for Social Welfare*⁸⁷ and Simons J in the High Court in *MG v Director of Oberstown Children Detention Centre*.⁸⁸

- [3.48] In contrast, non-positive law Titles involve an administrative consolidation by the OLRC which do not replace the existing law. Some of the non-positive law Titles include Title 20 Education, Title 27 Intoxicating Liquors, and Title 29 Labor. While they do not therefore constitute a definitive statement of the law, they are often prepared as a precursor to the preparation of a formal positive law Title. In addition, they can be cited in court as *prima facie* (or presumptive) evidence of the law. In this respect, non-positive Titles resemble Revised Acts prepared by this Commission. As discussed in Chapter 6,⁸⁹ although the Revised Acts cannot be relied on as evidence of the law, in practice they have been cited in judgments.⁹⁰
- [3.49] Under section 204 of Title 1 of the USC (General Provisions),⁹¹ the official version of the USC is the hard copy print version of the USC, together with any supplements. In other words, as is the position in Irish law under the *Documentary Evidence Act 1925*, the hard copy print version is, in the absence of evidence to the contrary, evidence of the law stated in it. Once a positive law Title is enacted by Congress, the hard copy print version of that Title constitutes evidence of the content of the law in it. As to a non-positive Title, in the event of any conflict between its provisions and the

⁸⁶ [1999] IESC 47, [1999] 4 IR 26.

⁸⁷ [1998] IESC 1, [1998] 4 IR 321.

⁸⁸ [2019] IEHC 275, at para 97.

⁸⁹ See para 6.8, below.

⁹⁰ For example in *Kerry County Council v An Bord Pleanála* [2014] IEHC 238, at para 19; and *The People (DPP) v FE* [2020] IESC 5.

⁹¹ Title 1 General Provisions is a positive law Title of the USC.

legislation which it has consolidated on an administrative basis, the provisions in the legislation it has consolidated constitute the official text.

8. 20th century developments in civil law jurisdictions: decodification and recodification

[3.50] As with common law countries, civil law jurisdictions have, in recent years, had to confront the growing influence of statutory regulation across various subject headings and the resulting problems posed to the integrity of their respective codes. Increased statutory regulation and the extension of the law into areas not previously foreseen by "classic" 19th century codes have resulted in significant challenges to the integrity of those codes. This accelerated statutory activity exposed a fundamental limitation to codification as originally envisaged in the 19th century. While the classic codes were very detailed in the areas to which they applied, they did not envisage the level of detailed regulation that is necessary in modern society. Consequently, they became outdated as they came to be supplemented by substantial new regulation and judicial doctrine, which developed to meet these new societal needs. Most significantly for civil law jurisdictions, this change has, since the second half of the 20th century, precipitated a process of "decodification" and "recodification", which has significantly altered the form and content of their original codes.

(a) Decodification

[3.51] Decodification has been particularly characterised by a rise in the number of standalone pieces of legislation being enacted, which have addressed particular areas of the law that had become more complex as a consequence of social and political changes. These standalone pieces of legislation have had the effect of separating significant parts of these areas of law from the original codes in which they were formerly situated. As a result, the law, which had previously been set out in broad unitary codes, underwent a process of fragmentation, with numerous standalone statutes providing more detailed regulation alongside the general principles contained in the codes, creating a series of "microsystems".⁹² One commentator writing in 2000 noted that there were more than 8,000 statutes and 90,000 regulations in French law, some of which had been codified and some of which had not.⁹³ Despite this fragmentation, it is important to note that the overall architecture of, for example,

⁹² Merryman, Clark and Haley, *The Civil Law Tradition: Europe, Latin America and East Asia* 3rd ed (Michie Company 1994) at 1241.

⁹³ Fauvarque-Cosson, "Modern Developments in French Codification", (2000) 4(3) *Edinburgh Law Review* 350, at 353.

France's 19th century criminal codes remains in place, that is, consisting of two basic parts, the general principles of criminal liability and specific criminal offences.

- [3.52] Decodification has also been influenced by the growth in judicial doctrine, the rise of constitutionalism, and the increasing influence of supranational legislation, such as EU law, and international law.⁹⁴ Codification, as originally envisaged, generally sought to limit the ability of the judiciary to develop the law.⁹⁵ However, as social circumstances changed, and as the original 19th century codes became outdated, it became necessary for courts in civil law jurisdictions to develop interpretive principles that allowed them to apply the codes to new conditions, to fill in gaps in the codes and to clarify ambiguities.⁹⁶ As a consequence, the determination of legal questions increasingly required reference to judicial case law rather than to codified principles alone.⁹⁷ In addition, the growth of constitutionalism has served to supplant provisions of a constitutional nature previously contained within a state's Civil Code. Finally, supranational legislation such as EU law, and international law more generally, has also had a significant influence on the need to reform national law. All of these factors have led to the decodification of the codes as originally drafted.

(b) Recodification

- [3.53] The proliferation of standalone legislation gave rise to significant confusion and ambiguity as to the effect of the law.⁹⁸ This in turn led to a revival of interest in codification, as civil law states sought to put order on the growing legislative sprawl. Accordingly, throughout the second half of the 20th century, the process of decodification was followed, in some jurisdictions, by a process of recodification.
- [3.54] Recodification generally involves a form of continuous codification. A recurring practice has been the establishment of a specialised commission tasked with

⁹⁴ The Commission has reviewed the increasing influence of international law, including the direct effect of EU law, in its *Discussion Paper on Domestic Implementation of International Obligations* (LRC 124-2020). See also Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification" (2001) 11(1) *Journal of Transnational Law and Policy* 163.

⁹⁵ Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification" (2001) 11(1) *Journal of Transnational Law and Policy* 163, at 167 and 174; Merryman, Clark, and Haley, *The Civil Law Tradition; Europe, Latin America and East Asia* 3rd ed (Michie Company 1994) at 1241.

⁹⁶ This development has served to erode the distinction between civil law and common law systems.

⁹⁷ Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification" (2001) 11(1) *Journal of Transnational Law and Policy* 163, at 175.

⁹⁸ *Ibid*, at 173.

undertaking recodification projects and with ensuring the ongoing revision of codes.⁹⁹ As part of the work of such commissions, codes were substantially modified or replaced entirely.

- [3.55] In contrast to the 19th century codifications that sought to create comprehensive codes that regulated vast areas of the law, recodification has replaced these extensive codes with codes that address discrete areas of the law. The original codes have either been substantially amended to remove those elements now covered under the new "modern" codes, or replaced entirely with new, compressed codes. However, all civil law jurisdictions continue to have both a civil code and a criminal code.

(c) Recodification in France

- [3.56] A specific example of a jurisdiction that has undergone extensive review and recodification of its 19th century codes is France.¹⁰⁰ The original Napoleonic Codes of the early 19th century have not remained in their original form, although their essential content largely survived until well into the 20th century. Increased statutory activity in the 20th century resulted in significant degradation of the classic 19th century codes.¹⁰¹ From the mid-20th century, French codification experienced a revival as the State sought to recodify its laws in light of increased statutory regulation.
- [3.57] Recodification has, in effect, involved either removing certain elements from the six original Codes, or replacing them entirely,¹⁰² and developing and enacting modern codes. In 1948, a decree established a Commission conferred with responsibility for assembling all statutory law, with a view to the complete codification of French law.¹⁰³ Under this Commission, a number of modern codes were produced, including the *Code de la santé publique* (Public Health Code) (1953), the *Code du travail* (Employment Law Code) (1973), and the *Code de l'organisation judiciaire* (Judicial Code) (1978). The 1948 Commission was replaced in 1989 by the *Commission*

⁹⁹ This has been the case, for example, in France (discussed below), as well as in Central and South American countries. See Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification" (2001) 11(1) *Journal of Transnational Law and Policy* 163, at 177.

¹⁰⁰ For an analysis of recodification in France, see Fauvarque-Cosson, "Modern developments in French codification" (2000) 4(3) *Edinburgh Law Review* 350.

¹⁰¹ Murillo, "The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification" (2001) 11(1) *Transnational Law and Policy* 163, at 173.

¹⁰² For example, the *Code de Procédure Civile* of 1806 was replaced entirely by the *Nouveau Code de Procédure Civile* in 1976. This Code was renamed the *Code de Procédure Civile by Loi n° 2007-1787 du 20 décembre 2007 relative à la simplification du droit*, which repealed the final provisions of the 1806 Code that had remained in force.

¹⁰³ Decree No. 48-800 of 10 May 1948.

Supérieure de Codification.¹⁰⁴ Arising from the work of this second Commission, 20 new codes had been adopted while nine codes had been entirely rewritten by 2015.¹⁰⁵ On foot of this work, approximately 60% of statutes and 30% of regulations in force are now codified.

- [3.58] The modern codes focus on specific areas of the law, allowing for the more detailed regulation necessary in a modern state. In total, over 60 modern codes have been published and enacted.¹⁰⁶ The effect of this has been that all of the original Napoleonic Codes have been either extensively amended or redrafted.
- [3.59] It is worth noting that, in its 2010 Annual Report, France's principal codification body, the *Commission Supérieure de Codification*, suggested that "the age of drawing up new codes is probably reaching its end."¹⁰⁷ This does not mean, however, that the French Commission has completely moved away from the concept of codification. In the same report, the French Commission also stated that it would continue to maintain the existing French codes, which are much greater in number than the original six Napoleonic Codes.¹⁰⁸
- [3.60] Commenting on this from a common law (Australian) perspective, Stewart notes that the significance of the French Commission's statement is that it points to the reality that, in a complex modern world, it is simply not practicable to include all the law in a set of six codes or "books." Rather, the author suggests that, in the modern setting codification should be seen as a process of developing a database of legislation in which the contents are suitably cross-referenced to related material, including case law and other relevant material such as background reports, impact assessment, pre-legislative scrutiny, and post-legislative scrutiny.¹⁰⁹
- [3.61] Stewart concludes that, for a common law jurisdiction such as Australia, this may have the advantage in the digital era that "codification" involves moving from the 19th

¹⁰⁴ Decree No. 89-647 of 12 September 1989.

¹⁰⁵ Sauvé, "25 ans de la relance de la codification", delivered to the *Institut Français des Sciences Administratives* (IFSA) on the 13 October 2015, available at <<https://www.conseil-etat.fr/actualites/discours-et-interventions/25-ans-de-la-relance-de-la-codification>> accessed 26 August 2020.

¹⁰⁶ A list of French Codes is set out in the Commission's *Consultation Paper on Classified List of Legislation in Ireland* (LRC CP 62-2010), at 27. These Codes can be accessed at <<http://www.legifrance.gouv.fr/>> accessed 26 August 2020. An English translation of many of these Codes, prepared by the French Government, is also available on this website.

¹⁰⁷ Stewart, "Mors Codicis: End of the Age of Codification?" (2012) 27 *Tulane European and Civil Law Forum* 17.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

century concept of “legislative codes as books” to “legislative codes as inter-connected databases.” The Commission sees great merit in this analysis. As discussed later in this Report, this approach reflects the development and maintenance of the US federal United States Code (USC) and comparable state legislative codes, which are online compilations of US federal and, as the case may be, state legislation. As also noted later in this Report, the US federal and state legislative Codes greatly influenced the development of the Commission’s Classified List of In-Force Legislation, which is organised under 36 subject headings and which, since 2020, is available as a searchable online database.

9. Late 20th century and early 21st century developments

(a) Codification in the United Kingdom

- [3.62] Although a complete draft Criminal Code was prepared by an expert UK Commission between 1835 and 1837, it was never enacted into law by the UK Parliament. One of its supporters, the leading jurist Sir Fitzjames Stephens, successfully persuaded the colonial Indian Parliament to make one of the first ventures into codification by enacting the great bulk of that draft Code into the Indian Penal Code (1860). That Code, as amended, remains the basis of Indian criminal law in the 21st century.¹¹⁰
- [3.63] There are recent indications that, at least in some areas of UK law, a more positive approach to codification has gained approval, largely on the basis of the work of the Law Commission of England and Wales. In June 2020, the UK Parliament enacted the *Sentencing (Pre-consolidation Amendments) Act 2020*. The 2020 Act is required in advance of the introduction and enactment of a *Sentencing Code Act* which will involve a codification of the entire law on sentencing in England and Wales. These developments follow from an extensive body of work by the Law Commission of England Wales, culminating in its 2018 Report *The Sentencing Code*.¹¹¹ The 2020 Act effects pre-consolidation amendments and repeals that are necessary to allow for the law in this area to be codified.
- [3.64] The Law Commission’s 2018 Report completed its Sentencing Procedure Project, launched in 2015 as part of its 12th Programme of Law Reform, which had noted that

¹¹⁰ See Cross, “The Making of English Criminal Law: (5) Macaulay” (1978) *Criminal Law Review* 519. In the late 20th century, comprehensive criminal codes were prepared by the English and Scottish Law Commissions, but these have also not been enacted into law by the UK Parliament. In 2009, the Law Commission announced that it would revisit Part 1 of its draft Criminal Code, which had been published in 1989. See <http://webarchive.nationalarchives.gov.uk/20090416025930/http%3A//www.lawcom.gov.uk/docs/newsletter_spring_2009.pdf> accessed 26 August 2020.

¹¹¹ Law Commission of England and Wales, *The Sentencing Code* (Law Com No 382, 2018).

English sentencing law had become "increasingly complex and incoherent".¹¹² The purpose of the new Sentencing Code is to achieve a "clean sweep" of the law on sentencing,¹¹³ removing the need for the courts to refer to historical versions of legislation. Instead, the Code will apply to all offenders where they are convicted prior to the coming into force of the Code, regardless of when their offences occurred. This will mean that the courts need only consult the Sentencing Code for deliberations at sentencing hearing and it will ensure that at least one stage of the criminal process, sentencing, is much clearer and accessible to the general public.

(b) The impact of technology

- [3.65] Towards the end of the 20th century, the capacity of states to make the law accessible was transformed by advances made in technology. Information and Communications Technology (ICT) has enabled states to make legislation available online, in its amended form, more efficiently and in a cost-effective manner. Typically, these initiatives include:
1. Provision of legislation online – towards the end of the 20th century, states began publishing their legislation online. This has facilitated free access to legislation from an immediately available source.
 2. Automatic revision – a number of states have developed systems that enable them to incorporate amendments into legislation automatically, or semi-automatically, on an ongoing basis. This has facilitated the production of revised legislation, almost immediately upon the coming into force of an amendment.
 3. Point-in-time information – a number of states also retain historical versions of legislation. This means that point-in-time information can be readily accessed to ascertain the contemporaneous law at any previous point in time.
 4. Officialisation – increasingly, states are recognising online versions of legislation as the official or semi-official versions of the law.
- [3.66] These developments are discussed in Chapter 6 of this Report, which focuses on how technology can be used to build on advances already made in improving the accessibility of legislation.

¹¹² O'Sullivan and Ormerod, "Time for a Code: Reform of Sentencing Law in England and Wales" (2017) 19 *European Journal of Law Reform* 285, at 286.

¹¹³ Law Commission of England and Wales, *The Sentencing Code* (Law Com No 382, 2018).

CHAPTER 4 COMPREHENSIVE LEGISLATION

1. Introduction

- [4.1] This Chapter discusses how to implement the first principle of accessibility identified in Chapter 1, comprehensiveness. Comprehensiveness means that all legislation that remains in force should be accessible online. The Chapter first considers whether it is practicable and desirable to achieve comprehensive legislation by consolidating each subject matter of the law into a single Principal Act. The Chapter then considers the best methods that could, in practice, be used to consolidate or codify legislation, including which areas of the law ought to be prioritised. The Chapter then considers where the responsibility for implementing consolidation programmes ought to lie. The Chapter concludes with a discussion of automatic repeal provisions and post-enactment review.

2. Consolidation, Codification, Revised Acts and this Report

- [4.2] It is important at the outset to distinguish as clearly as possible between the various techniques used to achieve comprehensiveness discussed in this Chapter, and subsequently in this Report. In this Chapter, the Commission discusses Consolidation Bills and Acts, which have a clear and distinct meaning under the Standing Orders of the Houses of the Oireachtas. The Commission also discusses codification Bills and Acts, in respect of which in the common law world there is a certain amount of agreement as to their scope but no single, agreed, definition. In later Chapters, in particular Chapter 5, the Commission discusses Revised Acts, and it is useful to describe here how they compare and contrast with consolidation and codification.

(a) Consolidation Bills and Acts

- [4.3] A Consolidation Act is an Act of the Oireachtas that consolidates existing statute law on a particular topic into a single legislative text. A Consolidation Act also provides for the repeal of the legislation consolidated by the Act; it does not change the law in any way. As with any other Bill, a Consolidation Bill requires the sponsoring Department to prepare Heads of Bill and obtain Government approval for the Office of the Parliamentary Counsel to the Government (OPC) to draft the Bill. When preparing the Heads, the sponsoring Department will consider in detail each statutory provision and where a provision is spent or no longer required such provision will not be included in the Consolidation Bill. Such provisions together with provisions that have been superseded by other statutory provisions, have otherwise become redundant, have not been commenced and are no longer intended to be commenced, or need to be amended due to practical or legal difficulties, are all examined in detail and, where appropriate, amended or repealed in a separate pre-Consolidation Bill that is drafted

in the OPC and enacted prior to the enactment of the Consolidation Bill. This pre-Consolidation Bill ensures that the Consolidation Bill, when enacted, does not contain unnecessary or spent provisions. Such detailed consideration by the sponsoring Department (and at the drafting stage by the OPC) often requires legal advice and is crucial in ensuring that the Consolidation Bill when enacted does not contain extraneous provisions or provisions that, since the enactment of legislation being consolidated, have become legally unsound due to changes in the law. Once a Government decision to draft the Consolidation Bill is granted, the Heads are again examined in detail in the OPC and any necessary legal advice is sought before the Bill (including any necessary transitional and saving provisions) is drafted before going back to Government for approval to publish.

- [4.4] The current Standing Orders of both Dáil Éireann and Seanad Éireann provide a clear definition of Consolidation Bills, namely Bills that "consolidate existing Statute Law on a particular subject matter" without making any substantive legal changes to the law.¹ They also provide that every Consolidation Bill must have prefixed to it a memorandum prepared by the Attorney General in which shall be specified the enactments repealed by the Bill, the sections of the Bill in which the repealed enactments are reproduced, together with the remarks of the Attorney General on any textual amendments made.
- [4.5] Once a Consolidation Bill has been certified by the Attorney General, special procedures apply to its passage through the Houses of the Oireachtas. The Bill proceeds to a special Consolidation Bill Committee, and no amendments to the Bill are permitted, other than ones challenging the certificate of the Attorney General. This fast track procedure ensures that Consolidation Bills can be enacted swiftly without amendment. Once a Consolidation Bill has been enacted and commenced, the statutory provisions that have been consolidated are repealed. This was the process used for enacting the *Taxes Consolidation Act 1997*, the *Social Welfare Consolidation Act 2005* and the *Value-Added Tax Consolidation Act 2010*.
- [4.6] The Commission appreciates from its engagement with consultees that Consolidation Bills are resource intensive from a Departmental and OPC perspective. Currently, individual Departments of State are responsible for identifying which Acts should be consolidated and for prioritising Government approval for their drafting and enactment within a Government Legislation Programme, which are usually published twice yearly by the Legislation Committee, chaired by the Government Chief Whip. As Consolidation Acts do not materially alter the existing law, they are often considered less important and urgent than other Bills that are required to implement new

¹ Standing Order 167(1) of the consolidated Dáil Éireann Standing Orders (2016), and Standing Order 140(1) of the consolidated Seanad Éireann Standing Orders (2016).

Government policy. Consequently, Consolidation Acts sometimes do not gain, or maintain, priority within a Government Legislation Programme when they must compete for scarce Oireachtas time against more urgent Government Bills, and the increasing number of Private Member's Bills. Thus, some proposed Consolidation Bills may be carried over from one Government Legislation Programme to another.

- [4.7] The Consolidation Bills that compete successfully for Oireachtas time, and are then enacted, also generally relate to areas of the law that are frequently used, and they are also therefore likely to be subject to ongoing amendment after enactment. It is also the case that amendments to Consolidation Acts are likely to adhere to the practice of amendment by textual amendment only, and that these amendments will seek to retain the essential legislative integrity and architecture of the parent Consolidation Act. For the reasons discussed later in this Report in connection with the nature of Revised Acts, this also makes Consolidation Acts very good candidates for maintenance in their as amended form as Revised Acts.
- [4.8] As noted already, on foot of a 2006 Government decision the Commission was conferred with functional responsibility for Revised Acts. Following this, the Commission decided that all textually amended Acts enacted from 2006 onwards would be maintained in their as amended form as Revised Acts, as well as ensuring that as many pre-2006 Acts as practicable, in particular those in frequent use, would be maintained in Revised Act form. Thus, the *Value-Added Tax Consolidation Act 2010* is maintained in revised Act format by the Commission. In 2019, the Commission began a collaborative project with the Department of Employment Affairs and Social Protection to prepare and publish a revised version of the *Social Welfare Consolidation Act 2005*, which is scheduled to be completed by end 2020 or early 2021. The Commission would be willing to engage in a comparable collaborative project with the Department of Finance and the Revenue Commissioners in connection with the *Taxes Consolidation Act 1997*.

(b) Codification Bills and Acts

- [4.9] As noted above, current Standing Orders of both Dáil Éireann and Seanad Éireann provide a clear definition of Consolidation Bills, namely that they involve consolidating into a single Bill the existing legislation on a particular subject matter, and they must not involve any substantive legal changes to the law.
- [4.10] In a common law jurisdiction such as Ireland, while there is a certain amount of agreement as to the scope of what is comprised in codifying Bills and Acts, there is no single, agreed, definition. It is, however, generally agreed that an important feature that distinguishes a codifying Bill from a consolidation Bill is that, whereas a consolidation Bill involves setting out in a single Bill all existing statute law on the subject in question only, a codification Bill will include all existing statute law on the

subject and will also place on a statutory footing any associated common law rules, from case law. This combination of existing statute law with common law may, though need not necessarily, involve substantive reform of the existing law.

- [4.11] Thus, the *Draft Criminal Law Code Bill* completed in 2010 by the Criminal Law Codification Advisory Committee incorporated both existing statute law and common law, and was therefore a codification Bill, but the Committee also stated that it did not propose any change to the law.² Other legislative projects that have not used the term codification in their titles as enacted have, in fact, involved a combination of both. For example, the complex project carried out under the auspices of the Company Law Review Group that resulted in the enactment of the *Companies 2014* involved, in part, consolidation (bringing together into a single Act the pre-2014 Companies Acts), in part, common law codification (placing some common law rules on a statutory footing) as well as, in part, reform (substantive legal changes).
- [4.12] This was also the approach taken in the *Land and Conveyancing Law Reform Act 2009*, which was enacted as a result of a joint project between the Commission and the Department of Justice.³ The 2009 Act consolidated much of Irish land law into a single Act, repealing and replacing more than 150 pre-1922 statutes, either in whole or in part,⁴ and also placing on a statutory footing, with reforms, many common law principles and rules on land law and conveyancing law, as well as abolishing some common law rules that were seen as inappropriate in a modern setting. Bearing in mind that the Commission's statutory mandate under the *Law Reform Commission Act 1975* to engage in law reform is expressly defined to includes the codification of the law, it is inevitable that the Commission would have engaged in such an extensive codification process.
- [4.13] The Commission continues to engage, where possible, in codifying-like projects, such as the project that led to the *Draft Consumer Insurance Contracts Bill* in the *Report on Consumer Insurance Contracts*,⁵ which was adopted as a Private Member's Bill and, with important amendments, was enacted as the *Consumer Insurance Contracts Act*

² The approach ultimately used in the *Criminal Law Code Bill* was described in the 2004 Report of the Expert Group on Codification of the Substantive Criminal Law, *Codifying the Criminal Law*, available at <<http://www.justice.ie/en/JELR/CodifyingCrimLaw.pdf/Files/CodifyingCrimLaw.pdf>> accessed 26 August 2020.

³ The Joint Project for Reform and Modernisation of Land Law and Conveyancing Law was established in 2003 by the Department of Justice, Equality and Law Reform, and the Law Reform Commission: see *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

⁴ Wylie, *Irish Land Law* 5th ed (Bloomsbury Professional 2013), at para 1.80.

⁵ *Report on Consumer Insurance Contracts* (LRC 113-2015).

2019. The 2019 Act involved consolidation, in part, of existing legislation on insurance contract law but also included abolition of and, in effect, reversal of a number of common law principles and rules in this area.

- [4.14] While the codifying exercises in these examples have in common with the consolidation Bill exercise that it is resource intensive, and that considerable care and expertise are required to achieve a successful outcome in both, the resulting outcome of an enacted Consolidation Act or enacted codifying Act can justify the effort required.

(c) Revised Acts

- [4.15] As already noted, on foot of a 2006 Government decision the Commission was conferred with functional responsibility for preparing Revised Acts. They are discussed in more detail in Chapter 5 below, but for present purposes it is sufficient to note that they involve what can be described as an unofficial administrative consolidation of an Act. They are unofficial in that they do not currently have any formal legislative status, unlike a Consolidation Act enacted on foot of the special Oireachtas procedure described above and which thus constitutes an Act of the Oireachtas. Another distinguishing feature of a Consolidation Act is that, as noted above, it will have had the benefit of analysis by Departmental officials and the OPC, which will include ensuring that spent and obsolete provisions are removed from the Consolidation Act. A Revised Act must retain all non-repealed provisions, even those that are clearly obsolete to the experienced research team in the Commission who prepare them.
- [4.16] Nonetheless, with the benefit of many years' experience in preparing Revised Acts, the Commission has developed significant contacts with officials in the relevant line Department to ensure that, to the greatest extent possible, the text of Revised Acts are accurate and that, if clearly obsolete provisions are identified, they can be noted as such. In that respect, the text of Revised Acts have the advantage that, since the Commission based their format on comparable online as amended Acts in other jurisdictions, such as the UK Legislation Database, they include editorial and other notes alerting users to, amongst other matters, whether or not individual statutory provisions and amendments to those provisions have been commenced and, if so, when.
- [4.17] In that respect, Revised Acts are a valuable aid to users in identifying the current state of the law, particularly in cases where legislative provisions have been heavily amended. The addition, in January 2017, of a link from each Act on the electronic Irish Statute Book (eISB) to a Revised Act, where available (at the time of writing, August 2020, now running to 380 Revised Acts in total), has undoubtedly led to a significant increase in the profile of Revised Acts. The Commission is aware that Revised Acts are frequently relied on by the public, by public officials, by legal practitioners and the

judiciary, and have been cited in High Court and Supreme Court judgments.⁶ In addition, as noted above, Revised Acts have the benefit that, in appropriate cases, they can maintain up to date a consolidation Act, such as the *Value-Added Tax Consolidation Act 2010*, or indeed a codifying Act, such as the *Companies Act 2014*, without the need to take up scarce Oireachtas legislative time, although this is subject to the important caveat that this is dependent on amendments to such Act conforming to the discipline of being textual amendments.

(d) Discussion and conclusion: a flexible concept of consolidation for this Report

- [4.18] As is clear from the above discussion, the concept of a consolidation Bill as defined in Oireachtas Standing Orders has a very clear meaning and can therefore be distinguished from the various meanings given to codification Bills. For the purposes of this Report, however, and in particular for the purpose of achieving in practice the first guiding principle set out in Chapter 1, comprehensiveness, it is important that a term should be used that encompasses that goal.
- [4.19] In this respect, the Commission notes that, notwithstanding the clear definition in Oireachtas Standing Orders of a consolidation Bill, and of the clear distinction therefore between consolidation and codification, this distinction is not always observed, even by senior members of the judiciary. Thus, Social Welfare Consolidation Acts have often been described as "social welfare codes."⁷ In the current context, the Commission considers that, to ensure that the goal of comprehensiveness is achieved in practice, those engaged in that process should be allowed the flexibility to choose whether to engage in consolidation as defined in Oireachtas Standing Orders, or to engage in more wide-ranging consolidation with reform, which could involve coming within the definition of codification as discussed above.
- [4.20] For ease of discussion in the remainder of this Report, it is necessary to adopt a single word that describes the objective of comprehensiveness. The Commission considers that it would not be appropriate to use the word codification in this context, as this might be misunderstood as indicating an intention to achieve in the short term complete codification of Irish law along the lines of early 29th century civil law jurisdictions. While the Commission fully appreciates the specific meaning given to consolidation Bills in Oireachtas Standing Orders, as discussed above, it has concluded that, solely for the purposes of this Report only, the term consolidation should be

⁶ See *Kerry County Council v An Bord Pleanála* [2014] IEHC 238, *Narconon Trust v An Bord Pleanála* [2020] IEHC 25 and *The People (DPP) v FE* [2020] IESC 5, discussed at para 6.10, below.

⁷ See *Laurentiu v Minister for Justice* [1999] IESC 47, [1999] 4 IR 26, *Lowth v Minister for Social Welfare* [1998] IESC 1, [1998] 4 IR 321, and *MG v Director of Oberstown Children Detention Centre* [2019] IEHC 275, discussed at para 3.47, above.

given a flexible meaning that allows more freedom of action for those engaged in the programmes of consolidation envisaged in the Report.

- [4.21] This is especially important bearing in mind that, although certain important areas of law have been brought under a single legislative roof – such as the *Taxes Consolidation Act 1997*, the *Social Welfare Consolidation Act 2005*, the *Land and Conveyancing Law Reform Act 2009*, or the *Companies Act 2014* – much of Irish legislation has not been subject to this kind of valuable discipline and therefore does not meet the first principle of accessibility, comprehensiveness.
- [4.22] For this reason, there are good reasons to allow flexibility as to the precise means used to achieve the goal of comprehensiveness. For the purposes of the Report, therefore, the Commission has concluded that the term consolidation is used to mean a Bill that can involve, but not necessarily in all instances, the following: bringing together into a single piece of legislation the law on a particular area, including, where relevant, principles and rules that are set out in existing legislation and case law, together with elements of reform where required. It is clear that if a particular Bill that aims to achieve comprehensiveness in a specific subject area employs all elements of that definition, it will not come within the definition of a Consolidation Bill for the purposes of Oireachtas Standing Orders and will therefore have to compete for more Oireachtas time. However, the Commission considers that it is appropriate to allow this element of flexibility to those engaged in such projects. It is clear from some examples given above, such as the *Land and Conveyancing Law Reform Act 2009* and the *Companies Act 2014*, that such flexibility is required to achieve the desired goal.

R. 4.01 The Commission recommends that, for the purposes of the Report, the term Consolidation Bill is used to mean a Bill that can involve, but not necessarily in all instances, the following: bringing together into a single piece of legislation the law on a particular area, including, where relevant, principles and rules that are set out in existing legislation and case law, together with elements of reform where required.

3. A Principal Act for each subject matter where possible

- [4.23] One way of achieving a comprehensive collection of legislation is to require the enactment of one Act for each major subject area, eventually resulting in a collection of legislation that comprises a series of subject-matter consolidations, as defined above. For certain areas of the law, it may be feasible to consolidate all of the relevant law into a single Principal Act in this way. Indeed, as noted in Chapter 2 and briefly above, this has already been achieved in a number of areas.

(a) Existing subject-matter Principal Acts

- [4.24] As noted above, the *Social Welfare Consolidation Act 2005* is a comprehensive statement in legislative form of all the principal rules concerning social welfare law, supplemented by a significant body of secondary legislation, Social Welfare Regulations made under the 2005 Act. Similarly, the *Taxes Consolidation Act 1997* consolidated 40 different Acts.⁸ It also reduced the number of tax law provisions to 1,104 sections and 32 Schedules from the pre-1997 position of more than 2,000 separate sections and 50 related schedules.
- [4.25] The *Land and Conveyancing Law Reform Act 2009* also provides an example of a successful subject-matter consolidation, together with, as already noted, significant features of codification.⁹ The 2009 Act consolidated much of Irish land law into a single Act, bringing together a multiplicity of existing provisions, many of which dated back centuries, as well as legal principles contained within relevant case law. The 2009 Act, which was enacted as a result of a Joint Project for Reform and Modernisation of Land Law and Conveyancing Law,¹⁰ replaced more than 150 pre-1922 statutes, either in whole or in part.¹¹ Additionally, the 2009 Act enacted significant reforms of Irish land law.
- [4.26] Similarly, the *Companies Act 2014* involved a comprehensive consolidation of the legislation on company law. At the time of writing (August 2020), it is the largest substantive enactment in the history of the State, with more than 1,500 sections. Not only did the 2014 Act succeed in consolidating and simplifying company law in Ireland, it also introduced significant reforms, creating a new "state-of-the-art" legislative framework for companies operating within the State.¹² Furthermore, the 2014 Act

⁸ The 1997 Act was the first consolidation of Irish tax law since the *Income Tax Act 1967*.

⁹ The Commission notes that a legislative code such as the 2009 Act may not necessarily involve a complete statement of the entire law. For example, the 2009 Act does not contain rules concerning the law on adverse possession. While it had been intended to include this issue in the draft Bill in the Commission's 2005 *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), it was omitted because of the need to consider this matter further in light of the decision of the European Court of Human Rights in *Pye (Oxford) v United Kingdom* (2007) 46 EHRR 1083. The issue is now included in Project 15 of the Commission's *Fifth Programme of Law Reform* (LRC 129-2019).

¹⁰ The Joint Project for Reform and Modernisation of Land Law and Conveyancing Law was established in 2003 by the Department of Justice, Equality and Law Reform, and the Law Reform Commission: see *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

¹¹ Wylie, *Irish Land Law* 5th ed (Bloomsbury Professional 2013), at para 1.80.

¹² The Minister for Jobs, Enterprise and Innovation began his speech at the Second Stage Dáil debate on the *Companies Bill* by stating that it provided a "state-of-the-art" framework for

codified some relevant common law principles, incorporating for the first time a legislative statement of the duties of directors, which prior to 2014 had been set out in case law.

(b) Not feasible to enact one Act for every subject-matter

- [4.27] Even with the important examples of more-or-less comprehensive statutory consolidations or codes discussed above, the Commission recognises that some areas of the law do not readily lend themselves to consolidation within a single Act. Indeed, a number of areas of the law overlap with each other and cannot easily be delineated from one another. An example of this is provided by the Documentary Evidence Acts, which the Commission recommended, in its 2016 *Report on the Consolidation and Reform of Aspects of the Law of Evidence*,¹³ should be consolidated into a single *Evidence (Consolidation and Reform) Bill*. This approach is consistent with textbooks on the law of evidence, which include discussion of the Documentary Evidence Acts in their analysis. Nonetheless, it could also plausibly be argued that the Documentary Evidence Acts should be included in a consolidated Legislation Act that could also incorporate the *Interpretation Acts*, the *Statute Law Revision Act 2007*, and relevant provisions of the *Official Languages Act 2003*, among others. This was the approach taken in the Australian *Legislation Act 2003* and the New Zealand *Legislation Act 2019* (replacing its *Legislation Act 2012*).
- [4.28] These differing approaches indicate that the allocation of areas of law into general subject-matter headings is not a precise art or science. This is the case with many exercises in categorisation and classification, and is not confined to law. Thus, while many would agree that a general definition of sport could be an activity bound by a defined set of rules, there might be disagreement as to the list of rule-based activities that constitute sports. In the legal context, the correct classification of the Documentary Evidence Acts within a consolidation project is one of many for which there may not be a single “right” answer.
- [4.29] Similarly, even in an area of law such as Criminal Law, which appears at first sight to have clear boundaries, it is likely that any consolidation exercise would throw up anomalies. Thus, a consolidation of criminal law legislation is highly likely to include the offence of assault, which carries a maximum penalty on conviction of one year. However, it is not likely to include competition offences, some of which carry on conviction a maximum penalty of ten years imprisonment. Competition legislation is

businesses: see Vol.800 *Dáil Debates* page 291 (23 April 2013), at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2013-04-23/debate/mul@/main.pdf>> accessed 26 August 2020.

¹³ *Report on the Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

likely to be featured in a collection of commercial law legislation. Thus, classification exercises are likely to be influenced by history, in this case recognising that all offences against the person fall within the traditional scope of criminal law, including in textbooks on criminal law, while competition offences, which are relative newcomers as crimes, may not be similarly regarded (or may be categorised as "regulatory offences", at least for the present).

- [4.30] The inevitable debates about the "correct" heading in which to include a specific area of law, whether the Documentary Evidence Acts or Competition Acts, has, in the past, been addressed by developing a comprehensive Index to Legislation, containing suitable cross-references. Thus, the part of an Index that lists "Legislation" entries could also include a sub-entry such as "Proof of Legislation: see Evidence, Documentary Evidence." The Commission discusses the role of an Index to Legislation in Chapter 6, below. It is sufficient to note here that, in the context of the increasing reliance on the online publication of legislation, as opposed to traditional paper-based sources, it may be that a well-organised search function would lead to the relevant material being sought, regardless of what subject heading a specific piece of legislation has been classified under.
- [4.31] Thus, in the Commission's online Classified List of In-Force Legislation, the Documentary Evidence Acts are grouped with other legislation on evidence, rather than with legislation concerning legislation, such as the *Statutory Instruments Act 1947* and the *Interpretation Act 2005*. The Commission's development of the Classified List database, which is discussed in greater detail in Chapter 6, can be said to have begun the process of bringing in-force legislation into an organised subject-matter format along the lines that has been in place in the United States of America for over 100 years (and in Civil Law and other code-based jurisdictions before that). While the current (August 2020) search function of the Commission's Classified List has not yet been fully developed (and has been in place since January 2020 only), the Commission is committed to ongoing development of the Classified List. A comprehensive search facility would lead a person to all relevant entries concerning legislation, regardless of the high-level subject heading into which the legislation has been classified.

(c) Conclusions and recommendations

- [4.32] The Commission considers that it would be unrealistic to recommend the enactment of a single Act for each major subject matter. Apart from practical problems with such an approach, some areas of the law simply do not lend themselves to easy self-containment. For other areas of the law that can be less clearly delineated, separate but related mini-codes can simply be organised under a broader heading using something similar to the Classified List database.

- [4.33] The Commission considers that where it is feasible and practicable to consolidate a subject area into a single Act, the proposed Accessibility and Consolidation of Legislation Group, discussed below, should include such consolidations in its planned consolidation programmes. Once an area of law has been consolidated in this way into a Principal Act, all later amending Acts should ensure that they retain the core integrity or architecture of the Principal Act by making textual amendments only to the Principal Act (this is discussed in more detail in Chapter 7). This is, indeed, already general drafting policy, and is well illustrated by the fact that all Acts that have amended the *Social Welfare Consolidation Act 2005* and the *Companies Act 2014* have involved textual amendments only to those Acts. This approach also facilitates the Commission's ability to maintain internally logical Revised Acts of the 2005 and 2014 Acts.
- [4.34] The Commission also considers that the proposed Accessibility and Consolidation of Legislation Group should consider, in preparing its consolidation programmes, whether particular areas of the law may require separate, but related, Principal Acts. Such programmes may include "pure" consolidations such as the *Social Welfare Consolidation Act 2005*. However, in light of the Commission's broader definition of consolidation for the purposes of this Report, the planned programmes will not be limited in this way. Both the *Land and Conveyancing Law Reform Act 2009* and the *Companies Act 2014*, discussed above, demonstrate the benefits of enacting legislative consolidations in areas of law that have been developed over many centuries, and which incorporate a combination of legislative consolidation, reform of existing common law rules, and entirely new legislative provisions.

- R. 4.02** The Commission recommends that, so far as is practicable, subject areas of the law should be consolidated into single Principal Acts, so that there are as few Acts for each subject area as possible.
- R. 4.03** The Commission also recommends that, where it is not possible to consolidate a subject area into a single Principal Act, related Acts should be presented together under a general heading or sub-heading in an online classified legislation database, as discussed in Chapter 6.

4. Planned programmes of consolidation

- [4.35] As discussed in Chapter 3, a number of states (such as the United States of America in the 20th century and the European Civil Law states in the 19th century) have successfully undertaken long-term comprehensive programmes to consolidate and, in some instances, to completely codify their legislation. Other states, such as New Zealand and Wales in the 21st century, have put in place medium-term programmes

of consolidation, in which they identify certain priority areas for consolidation that are to be achieved over relatively short time frames for each programme of 3 to 5 years. Both approaches have in common the ultimate goal of complete consolidation of all legislation. The difference between them is that the first approach involves a commitment from the beginning to achieve comprehensive consolidation, with associated long-term resourcing, whereas the second approach involves a phased approach with medium-term priority goals.

- [4.36] The great majority of consultees to the Issues Paper favoured the second approach over the first one. Consultees considered that it was unlikely that recommending a long-term comprehensive programme to consolidate all our legislation would be appropriate. This was primarily because the scale of such a long-term programme, involving the need to consolidate over 2,300 Acts (and over 15,000 statutory instruments if secondary legislation were to be included), would require a significant commitment of resources that would be difficult to justify. By contrast, consultees saw considerable merit in the medium-term approach, involving phased programmes of priority areas to consolidate. Consultees considered that this approach had the benefit of achieving clear benefits in the relatively short term, by contrast with the ideal of comprehensive consolidation. Consultees agreed that the comprehensive consolidation should remain as an ultimate goal.
- [4.37] The Commission has considered the views of consultees on this issue, and has concluded that the short-to-medium-term approach, involving phased programmes of priority areas to consolidate, is the preferable approach to take. As already noted in Chapter 3, at the time the Issues Paper was published, this approach was based primarily on the model recommended by the New Zealand Law Commission in its 2008 Report on *Presentation of New Zealand Statute Law*,¹⁴ and enacted in the New Zealand *Legislation Act 2012*, since repealed and replaced by the New Zealand *Legislation Act 2019*. The same approach had also been recommended by the Law Commission of England and Wales in its 2016 Report on *Form and Accessibility of the Law Applicable in Wales*. It is worth noting that, since the Issues Paper was published, the *Legislation (Wales) Act 2019* has implemented that 2016 Report and has therefore begun the first planned programme of consolidation of Welsh legislation.
- [4.38] The Commission has concluded that there are considerable benefits to the approach involving phased programmes of consolidation similar to those being developed in New Zealand and Wales. In particular, it has the benefit of yielding important and beneficial outputs over relatively short timeframes, which can then be assessed in terms of the ongoing benefits of the next programme. It also has the benefit of

¹⁴ New Zealand Law Commission, *Presentation of New Zealand Statute Law* (Report 104, 2008).

building on existing examples in Ireland of specific consolidation and codification projects that have been enacted since the foundation of the State, which have been discussed in Chapter 3. Adopting the New Zealand and Welsh models would bring an important new component, a consistent and planned approach to consolidation of legislation. In the Commission's view, this approach is also consistent with the ultimate goal of comprehensive consolidation but would not involve imposing such an objective in statutory form.

- [4.39] The Commission has therefore concluded that, under this incremental approach to consolidation, the proposed Accessibility and Consolidation of Legislation Group discussed below should prepare draft programmes of areas for consolidation, to be carried out over a defined period of five years. The Group should carry out a public consultation exercise with interested parties on each draft programme, including those with policy-making responsibility. Having taken account of this consultation process, it would publish the final content of the programme, which should be implemented as far as practicable (bearing in mind this will be a matter of securing scarce Oireachtas time) in accordance with the time frame set out in each programme.
- [4.40] The Commission considers that, as to the areas for consolidation to be included in any programme, it is important to have in place a set of selection criteria. This would greatly assist the consultative process that would be involved in finalising any draft programme of consolidation. The Commission notes that it uses a set of selection criteria in its consultation on the development of a Programme of Law Reform;¹⁵ and that it applied the same approach when selecting candidates for administrative consolidation in the form of Revised Acts.¹⁶ The main criteria for the programme of Revised Acts were:
1. Whether the candidate Act was frequently used;
 2. Whether the Act was currently easily accessible, and free, to the public in consolidated form; and

¹⁵ See for example the selection criteria used in the development of the Commission's *Fifth Programme of Law Reform: Report on Fifth Programme of Law Reform* (LRC 120-2019), at para 2.10.

¹⁶ At the time the Commission was developing these criteria, it was intended that the candidate Acts would be administratively consolidated as statutory Restatement in accordance with the *Statute Law (Restatement) Act 2002*. The 2002 Act requires that each Restated Act must be certified by the Attorney General in order to be recognised as the *prima facie* evidence of the law contained in the Restatement. As already noted in Chapter 3, given that Acts are frequently amended, a certified Restatement would often become out-of-date quickly. For this reason, the Commission does not publish Restatements under the 2002 Act, but instead publishes Revised Acts. While such Revised Acts do not have the benefit of the 2002 Act they are nonetheless relied on in practice, including being cited with approval by the courts.

3. Whether the resulting Revised Act would ease the regulatory burden on business.¹⁷

[4.41] Each of these criteria was allocated 2 points. The Commission also used 3 secondary selection criteria:

1. the level of work involved;
2. whether there was an existing informal administrative consolidation of the candidate Act; and
3. whether there were proposals to make significant amendments to the candidate Act.

[4.42] These secondary criteria carried 1 point each. Based on the total number of points a particular candidate Act achieved, it was rated as being either of high priority (6-9 points), medium priority (3-5 points) or low priority (1-2 points).¹⁸

[4.43] With these criteria in mind, the Commission considers, and recommends, that the following non-exhaustive criteria be used to prioritise areas of the law for inclusion in a programme of consolidation:

1. The legislation is frequently used;
2. The law covers a significantly wide and coherent area of law, comparable to a significant element of one of the 36 headings in the Classified List of In-Force Legislation;
3. The law is spread across numerous Acts and provisions (including in pre-1922 Acts);
4. The law has been amended many times, with the result that it is difficult to know the applicable law; and
5. Significant preparatory work has already been completed (for example, the draft Scheme of a consolidation Bill has already been prepared).¹⁹

[4.44] Having regard to these criteria, while also bearing in mind some of the specific examples of legislative inaccessibility outlined in detail in Chapter 2, the Commission considers that an initial programme of consolidation for public consultation could include the following areas:

¹⁷ See *Report on Statute Law Restatement* (LRC 91-2008), at para 4.03.

¹⁸ *Ibid.*

¹⁹ As noted in Chapter 3, above, a number of Draft Schemes or Heads of Bills have already been prepared in diverse areas such as consumer protection, the sale of alcohol, courts legislation and the general principles of criminal law.

1. **Road traffic legislation:** as discussed in Chapter 2, the law in this area is contained in a number of separate Acts and standalone provisions. Convictions for drink-driving related offences are among the most challenged due to the complexity of the current legislative framework. The need to simplify the legislation in this area was acknowledged in the Programme for Government adopted in June 2020.²⁰ This area of the law is also one that is in frequent use.
2. **Employment legislation:** the Department of Business, Enterprise and Innovation has prepared the Heads of Bill of an *Employment Permits (Consolidation and Amendment) Bill*, which were approved by Government in July 2019. This Bill, if enacted, would consolidate the *Employment Permits Acts* while also modernising the employment permits system. This area of the law is also one that is in frequent use.
3. **Gambling control legislation:** gambling control legislation dates back to the early 20th century, the *Betting Act 1931*. In 2013, the Government published the *General Scheme of a Gambling Control Bill*, which proposed the consolidation and reform of this area, and this was reproduced as a Private Member's Bill, the *Gambling Control Bill 2018*, which was debated at Second Stage in the Dáil in 2018.²¹ The 2018 Bill lapsed with the dissolution of the Oireachtas in January 2020. However, the Programme for Government 2020 includes a commitment to reforming gambling control legislation, including to establish a gambling regulator.²²
4. **Sale of alcohol legislation:** as discussed in Chapter 2, this area of the law is in need of consolidation as it is contained in legislation dating back to 1833. The *Scheme of a Sale of Alcohol Bill* to codify sale of alcohol law has been approved by Government. Additionally, the Programme for Government 2020 also contains a commitment to simplify the law concerning this area.²³

²⁰ *Programme for Government: Our Shared Future* (2020), at page 16; available at <https://www.finegael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf> accessed 26 August 2020.

²¹ Vol.968 *Dáil Debates* page 889 (9 May 2018), available at <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2018-05-09/debate/mul@/main.pdf>.

²² *Programme for Government: Our Shared Future* (2020), at page 86; available at <https://www.finegael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf> accessed 26 August 2020.

²³ *Programme for Government: Our Shared Future* (2020), at page 89; available at: <https://www.finegael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf> accessed 26 August 2020.

5. **Monuments and archaeological heritage legislation:** at the time of writing (August 2020), the Department of Culture, Heritage and the Gaeltacht had prepared the Heads of Bill for a *Monuments and Archaeological Heritage Bill*. The purpose of this Bill is to replace the *National Monuments Acts 1930 to 2014* with a modernised mini-code and to provide for Ireland's ratification of relevant international conventions in this area.²⁴
6. **Consumer protection legislation:** as discussed in Chapter 2, consumer protection legislation dates back to 1893 and is contained in several Acts, statutory instruments, and EU Directives. Additionally, the *Scheme of a Consumer Rights Bill* was prepared by the Department of Jobs, Enterprise and Innovation in 2015. This area of the law is also one that is in frequent use.
7. **Landlord and tenant legislation:** legislation in this area of the law dates back to the 19th century, commencing with the *Landlord and Tenant Law Amendment (Ireland) Act 1860* (Deasy's Act) and is contained in a multitude of separate Acts and statutory instruments. This area of the law is also one that is in frequent use.

R. 4.04 The Commission recommends that the Accessibility and Consolidation of Legislation Group (see Recommendation R.4.07, below):

- (a) shall prepare draft programmes of consolidation, to be carried out over a defined period of five years;
- (b) that the Group shall carry out a public consultation exercise on each draft programme with interested parties, including those with policy-making responsibility, and
- (c) that, having taken account of this consultation process, the Group shall publish the final content of the programme and implement the programme in accordance with the time frame set out in each programme.

R. 4.05 The Commission recommends that, in preparing a draft consolidation programme the Group should apply the following non-exhaustive criteria to determine the content of a programme of consolidation:

- (a) the legislation is frequently used;

²⁴ The *Government Legislation Programme*, Autumn Session 2019 states that work is ongoing on the Bill. See https://merrionstreet.ie/MerrionStreet/en/News-Room/News/20190917_LegislationProgramme.pdf

- (b) the law covers a significantly wide and coherent area of law, comparable to a significant element of one of the 36 headings in the Classified List of In-Force Legislation;
- (c) the law is spread across numerous Acts and provisions (including in pre-1922 Acts);
- (d) the law has been amended many times, with the result that it is difficult to know the applicable law; and
- (e) significant preparatory work has already been completed (for example, the draft Scheme of a consolidation Bill has already been prepared).

- R. 4.06** The Commission recommends that an initial draft programme of consolidation could propose the following areas for public consultation:
- (a) road traffic legislation;
 - (b) employment legislation;
 - (c) gambling control legislation;
 - (d) sale of alcohol legislation;
 - (e) monuments and archaeological heritage legislation;
 - (f) consumer protection legislation; and
 - (g) landlord and tenant legislation.

5. Accessibility and Consolidation of Legislation Group

- [4.45] The Commission now considers where responsibility for overseeing and coordinating the planned programmes should lie. The Issues Paper asked consultees to consider two options. The first would be to continue with present arrangements, where responsibility for consolidations would continue to be overseen within the context of each Government Department's general legislative programme. The second option would be to coordinate this work under the auspices of a specific body or bodies.
- [4.46] This second option is the one favoured in many other jurisdictions.
- [4.47] As noted in the Issues Paper,²⁵ the reason for coordinating programmes of consolidation within a body that is separate from the relevant line Department is clear: it avoids the inevitable conflict that arises because any consolidation programme will almost always have to compete for priority with the pressing day-to-day legislative

²⁵ *Issues Paper on Accessibility, Consolidation and Online Publication of Legislation* (LRC IP 11-2016), at para 3.14.

priorities of that Department. While it is clear from the examples given in Chapter 3, above, that some consolidation projects have been successfully enacted through the initiative of the relevant line Department, they do not, as a general rule, have a great deal of priority. This is indicated by the number of planned consolidations referred to in Chapter 3 that have been proposed for a number of years but have not been enacted.

- [4.48] Because of this, a number of jurisdictions confer responsibility for preparing and overseeing planned consolidation programmes on separate bodies. Thus, in New Zealand, the Office of Parliamentary Counsel in the Office of the Attorney General has responsibility under the *Legislation Act 2019* (which replaced the *Legislation Act 2012*) for the preparation of the three yearly Programmes of Revisions, in effect, "pure" consolidations that contain no change in the law. A similar approach was taken in the *Legislation (Wales) Act 2019*, which as noted above was modelled on the New Zealand approach. In England and Wales, the Law Commission has statutory responsibility under the *Law Commissions Act 1965* for preparing "pure" Consolidation Bills, and it has developed programmes of consolidation that complement its programmes of law reform.
- [4.49] The *Law Reform Commission Act 1975* similarly provides that the Commission's law reform functions include the revision and consolidation of legislation. As noted above, the Commission has been involved in preparing draft Bills that involve both consolidation and reform elements, and it also prepares Revised Acts, administrative consolidations. In addition, as noted in Chapter 6 below, the Commission has also for many years been a member of the eLegislation Group, chaired by the Department of the Taoiseach, which also includes representatives from the Office of the Parliamentary Counsel to the Government in the Office of the Attorney General, and representatives of the Bills Office in the Houses of the Oireachtas. The eLegislation Group has engaged in a number of joint initiatives to enhance the contents of the electronic Irish Statute Book (eISB), the key portal for online legislation in the State. This has included the ongoing development of the Legislation Directory, the inclusion of comprehensive Bill History information for each Act of the Oireachtas, as well as links to Revised Acts where available. The membership of the eLegislation Group thus includes representatives from key stakeholders in the end-to-end legislative process, including publication, and whose initiatives have enhanced accessibility to legislation through the eISB.
- [4.50] As noted above, the preparation of any programme for ongoing, phased consolidation should not have to compete for priority with a line Department's pressing day-to-day legislative priorities. Such a conflict would, in the Commission's opinion, inevitably result in the de-prioritisation of any consolidation programme. Accordingly, the Commission considers that it would not be appropriate to allocate sole responsibility

for the delivery of the phased programmes to Government Departments alone. The Commission emphasises, of course, that there must be close coordination with the appropriate Department, which will retain responsibility for bringing forward a Consolidation Bill within its remit.

- [4.51] A number of consultees, responding to the Issues Paper, expressed a clear preference for some form of co-ordinated approach that brings together existing key stakeholders in the legislative process. In particular, a number of consultees underlined the need for the involvement of the Commission, the Office of Parliamentary Counsel to the Government (OPC), and the Houses of the Oireachtas. The Commission considers that this is an appropriate and practical approach to take, to which it would add the need to involve Government Departments that have high ongoing legislative responsibilities. Such a model would enable consolidation programmes to build on expertise already gathered in the existing key stakeholders, thus facilitating successful completion of programmes.
- [4.52] Moreover, the Commission is conscious of the importance that a specific body should be designated with overall responsibility for coordinating this work. Such designation is essential to ensuring that the planned work has a greater chance of being actually carried out. Of the options available, the Commission considers that a multi-agency approach that includes the key existing bodies involved in the legislative process would be most appropriate. The membership of this multi-agency body should be comprised of representatives of the Office of the Parliamentary Counsel to the Government and the Office of the Attorney General, the Houses of the Oireachtas, notably, the Office of Parliamentary Legal Advisers and the Bills Office, the Law Reform Commission, representatives from Government Departments with high legislative experience, and legislative policy experts. The Commission notes that the eLegislation Group, discussed in Chapter 6,²⁶ also comprises this multi-agency approach and could therefore serve as a foundation.
- [4.53] Given that the eLegislation Group is chaired by the Department of the Taoiseach and that the Government Chief Whip chairs the Legislation Committee, the Commission considers that the Department of the Taoiseach should be designated as the convenor of the multi-agency group.
- [4.54] The Commission considers that such a multi-agency body, established specifically for the purpose of overseeing programmes of consolidation, would ensure that key stakeholders in the legislative process have an appropriate input into the programmes.

²⁶ See paras 6.102, below.

- [4.55] The Commission considers that a suitable, and descriptive, name for the multi-agency body would be the Accessibility and Consolidation of Legislation Group (ACLG).
- [4.56] To ensure that the work of the Accessibility and Consolidation of Legislation Group is carried out, both in respect of overseeing planned programmes of consolidation and in respect of the other functions recommended in later Chapters of this Report, the Commission considers that the Group should be required to report annually to the Oireachtas on progress made to date towards fulfilling its duties. The Commission is aware that requiring the Group to report to the Oireachtas could require time and may also require amendments to be made to the Standing Orders of both Houses of the Oireachtas.
- [4.57] To ensure that the work of the Group is informed by user experience and to reflect the fact that legislation is accessed by a diverse range of groups across society, the Commission considers that the Group should be guided by an advisory board. The membership of this advisory board should comprise representatives from various groups with an interest in the accessibility of legislation, including those involved in policy development as well as end users of legislation, including members of the public. This would ensure that the Group takes full account of the needs of a key "consumer" or "client" of legislation, the citizen.
- [4.58] A number of consultees pointed out that the functions envisaged for the Group, notably overseeing and coordinating the preparation of phased programmes of consolidation and phased programmes of Revised Acts, will of course require to be properly resourced. The Commission fully concurs with this view, and considers that, in order to be effective, the Group ought to be appropriately resourced. The Commission is not in a position to describe, or prescribe, the level of appropriate resources for the Group.²⁷ The Commission considers, however, that in order for the Group to function effectively in terms of producing regular outputs such as programmes of consolidations and other publications related to its functions proposed in later chapters, it would be necessary that its resources should include a modest, but permanent, secretariat. This would ensure that the members of the Group would have the benefit of a complement of personnel dedicated to the roles and functions of the Group, thus avoiding the risk that the members of the Group would take on this role as an "add-on" to existing roles.
- [4.59] The Commission considers that the Group should, as with the case of comparable groups in the other jurisdictions discussed above, be established on a statutory basis, and this is provided for in the Draft Scheme of a Bill in Appendix B of this Report.

²⁷ The Commission took the same approach in its *Report on Harmful Communications and Digital Safety* (LRC 116-2016), para 3.81.

However, bearing in mind the challenge involved in securing Oireachtas time to enact such a Bill, especially in the prevailing (August 2020) circumstances of the Covid-19 pandemic, the Commission considers that it would be suitable to establish the Group, at least initially, on a non-statutory, administrative, basis. In that situation, the relevant Heads of the Draft Scheme (Heads 3 to 17, and 13) could be used as the basis for the terms of reference of the Group. The Commission considers that, in any event, it would be important that the Group should be resourced with, at the least, a modest, but permanent, secretariat.

- R. 4.07** The Commission recommends that a multi-agency body should be established to oversee and coordinate planned programmes of Consolidation Bills as defined in this Report (and other functions proposed in later recommendations), bringing together existing entities with relevant expertise, including:
 - (a) the Office of Parliamentary Counsel to the Government;
 - (b) the Office of the Attorney General;
 - (c) the Office of Parliamentary Legal Adviser to the Oireachtas;
 - (d) the Bills Office of the Houses of the Oireachtas;
 - (e) the Law Reform Commission;
 - (f) representatives from Government Departments with high legislative experience; and
 - (g) other legislative policy experts.
- R. 4.08** The Commission recommends that this multi-agency body be called the Accessibility and Consolidation of Legislation Group.
- R. 4.09** The Commission recommends that the Accessibility and Consolidation of Legislation Group should oversee and coordinate and, so far as practicable, implement the programme in accordance with the defined timeframe of five years set out in each programme and that, for this purpose and for its other functions set out in this Report, it should be suitably resourced which should include at the least a permanent secretariat.
- R. 4.10** The Commission recommends that the Accessibility and Consolidation of Legislation Group should be required to report annually to the Oireachtas on progress made to date towards fulfilling its duties.

R. 4.11 The Commission recommends that an advisory board should be established to guide the Accessibility and Consolidation of Legislation Group in its work. The Commission recommends that membership of this advisory board should include representatives from various groups with an interest in the accessibility of legislation, including those involved in policy development and end users of legislation, including members of the public.

6. Ongoing maintenance and review of the collection of legislation

[4.60] In the Issues Paper, the Commission, working from the assumption that a programme of consolidation is to be undertaken, proceeded to consider how the stock of consolidated legislation might be maintained into the future. In recent decades, a number of initiatives have been undertaken in other jurisdictions, which have assisted authorities in providing, in part, for an ongoing process of review and rationalisation of the collection of legislation. Such initiatives include:

1. Sunsetting provisions;
2. Automatic repeal or revocation provisions for certain spent or obsolete provisions; and
3. Provision for the ongoing review of the stock of secondary legislation.

[4.61] The primary purpose of each of these initiatives has been to identify methods through which obsolete or ineffective legislation can be repealed more efficiently, with a view to facilitating a collection of legislation in which only substantive legislation that conforms to identified standards of accessibility remains in force. In the Issues Paper, the Commission gave particular consideration to the possibility of making provision for the automatic repeal and revocation of certain classes of legislation and to the question of how to facilitate the ongoing review of the stock of secondary legislation within the State. The Commission now turns to consider these in light of the submissions received from consultees, and having further considered those proposed initiatives.

(a) Automatic repeal or revocation provisions

[4.62] One approach that has been adopted in some jurisdictions is to provide for the automatic repeal and revocation of identifiable classes of legislation as they become

spent or obsolete.²⁸ Once such a period comes to an end or the specified effect occurs, the legislation is spent.

[4.63] In the Issues Paper, the Commission considered that such a provision could potentially be adopted in Ireland, with possible classes of legislation including:

1. Automatic repeal of spent Appropriation Acts;
2. Automatic repeal and revocation of amending provisions in legislation as well as purely amending Acts or instruments;
3. Automatic revocation of commencement orders; and
4. Automatic revocation of establishment orders.

[4.64] Having considered this matter, and taking account of the views of consultees, the Commission concludes that automatic repeal provisions should be approached with caution. While such provisions could be a useful tool in maintaining a streamlined collection of legislation, they also have the potential to create unintended accessibility issues. Repealing automatically can result in difficulties accessing readily the text of repealed legislation, which may still remain relevant for some years, for example, in a criminal prosecution for an offence committed some years ago, as has been the position in many cases in recent decades. This problem, the accessibility of point-in-time legislative information, is likely to become more acute where, increasingly, the text of legislation is made available, and is accessed, online. Consequently, the Commission does not consider that automatic repeal should become a standard feature of the legislative process.

(b) Provision for post-enactment review

[4.65] A number of submissions proposed that an alternative to automatic repeal or revocation clauses would be to require that statutory review provisions should be included in all Acts. At present, some but not all Acts require a statutory review of the operation of the Act within a specified period following its enactment.

[4.66] An example of this is section 5(1) of the *Defamation Act 2009*, which requires that, not later than five years following its enactment, the Minister for Justice and Equality must commence a review of the operation of the Act, and section 5(2) provides that this review "shall be completed not later than one year after its commencement." During

²⁸ Jurisdictions that have introduced automatic repeal provisions include the Australian Capital Territory (see section 89 of the *Legislation Act 2007*), the Isle of Man (see sections 54 and 55 of the *Manx Legislation Act 2015*), and New South Wales (see section 30C of the *Interpretation Act 1987*). In the United Kingdom, it is possible to provide for the automatic revocation of subordinate legislation only (see section 14A of the *Interpretation Act 1978*, as inserted by section 59 of the *Enterprise and Regulatory Reform Act 2013*).

the Oireachtas debates on the 2009 Act, the then Minister for Justice commented that section 5 was inserted into the 2009 Act because this area of the law was "evolving daily" and therefore ought to be kept under review.²⁹ The 2009 Act came into force on 1 January 2010,³⁰ so that the statutory review of the 2009 was scheduled to commence not later than 1 January 2015 and, therefore, to be completed by 1 January 2016. It is likely that the statutory review began internally within the Department of Justice and Equality within this timeframe, although the Commission notes that the first public indication of this review came in November 2016 when the then Minister announced the start of a public consultation exercise on the statutory review under the 2009 Act.³¹

- [4.67] The Commission also notes that, in November 2019, the Department organised an important symposium to discuss the key issues that had been identified in the review and it also published the submissions received in response to the public consultation.³² The Commission commends the commitment to the examination of the complex issues involved in this process,³³ but it is also clear that the timelines indicated in the 2009 Act were not applied in practice. At the time of writing (August 2020), the Programme for Government adopted in June 2020 contains a commitment to "[r]eview and reform defamation laws, to ensure a balanced approach to the right to freedom of expression, the right to protection of good name and reputation, and the right of access to justice."³⁴
- [4.68] A further example of a post-enactment review provision is section 75 of the *Mental Health Act 2001*, which requires the Minister for Health to report to the Oireachtas on the operation of the 2001 Act no later than 5 years following the establishment day,

²⁹ See the comments of the then Minister for Justice at the Report and Final Stages of the debate on the 2009 Act: Vol. 687 *Dáil Debates* at 737 (8 July 2009), available at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2009-07-08/debate/mul@/main.pdf>> accessed 26 August 2020.

³⁰ *Defamation Act 2009 (Commencement) Order 2009* (SI No 517 of 2009).

³¹ See "Tánaiste announces statutory review of Defamation Act 2009 and public consultation process" (1 November 2016), available at <<http://www.justice.ie/en/JELR/Pages/T%C3%A1naiste-announces-statutory-review-of-Defamation-Act-2009-and-public-consultation-process>> accessed 26 August 2020.

³² See "Review of the Defamation Act 2009 - Public consultation", available at <http://www.justice.ie/en/JELR/Pages/Review_of_the_Defamation_Act_2009_-Public%20consultation> accessed 26 August 2020.

³³ The Commission recognised the complexity of the competing rights and interests in this area in its *Report on Privilege for Reports of Court Proceedings under the Defamation Act 2009* (LRC 121-2019).

³⁴ *Programme for Government: Our Shared Future* (June 2020), at page 122.

which was 5 April 2002.³⁵ However, the review of the 2001 Act was not commenced until 2012 with the appointment of an Expert Group, because sections 6, 8 to 30, and 56 to 75 did not come into operation until 1 November 2006.³⁶ In its 2015 Report,³⁷ the Expert Group made 165 recommendations for amendments to the 2001 Act. However, at the time of writing (August 2020), only three of those recommendations had been implemented.³⁸

- [4.69] These two examples illustrate the question as to how to ensure compliance with a timeframe in post-enactment review provisions. Thus, it may be relevant to consider an additional requirement to report to the relevant Oireachtas Committee within the timeframe to explain, if such is the case, why a review may not be completed within the designated timeframe. In addition, it may be questioned whether the five year review clauses included in the two Acts discussed above should be applied more generally, that is, whether a shorter period might be required and sometimes a longer period could be sufficient. The Commission considers that these matters could be considered by the Accessibility and Consolidation of Legislation Group for inclusion in post-enactment legislative standards, which are discussed in Chapter 7, below.
- [4.70] The Commission is aware that progress has been made in post-enactment legislative processes. In June 2016, the Standing Orders of both Houses of the Oireachtas were amended to introduce a post-enactment review requirement for Government sponsored Bills. Standing Order 164A of the Standing Orders of Dáil Éireann requires the Minister who is responsible for implementing a Government sponsored Bill to produce a post-enactment report 12 months following the enactment of that Bill. This post-enactment report must be placed in the Oireachtas Library. Standing Order 85(6C) allows the Dáil to empower a Select Committee to call the responsible Minister to attend before it to consider the report produced under Standing Order 164A. Finance Bills and Appropriation Bills are excluded from this reporting requirement. In relation to Government sponsored Bills that are initiated in the Seanad, Standing

³⁵ *Mental Health Act 2001 (Establishment Day) Order 2002* (SI No 91 of 2002).

³⁶ *Mental Health Act 2001 (Commencement) Order 2006* (SI No 411 of 2006).

³⁷ *Report of the Expert Group on the Review of the Mental Health Act 2001* (2015).

³⁸ Implementing recommendation 90, section 2 of the *Mental Health (Amendment) Act 2015* deleted “unwilling” from section 59(1)(b) of the *Mental Health Act 2001*. The effect of this amendment was that it was no longer lawful to administer electro-convulsive therapy without a person’s consent, where that person was capable of giving such consent. Similarly, implementing recommendation 92, section 3 of the 2015 Act deleted “unwilling” from section 60 of the 2001 Act. The effect of this amendment was that it was no longer lawful to administer medication to a person for a continuous period of 3 months without a person’s consent, where that person was capable of giving consent. Implementing recommendation 67, section 4 of the *Mental Health (Renewal Orders) Act 2018* substituted section 4(3) of 2001 Act, the effect of which was to reduce the maximum period of a renewal order from 12 months to 6 months.

Order 168 of the Standing Orders of Seanad Éireann sets out the same post-enactment report requirement.

(c) Ongoing review of collection of statutory instruments

- [4.71] As noted in Chapter 2,³⁹ the Commission’s Classified List of In-Force Legislation has identified a significant number of statutory instruments that have not been formally revoked but which are probably obsolete. Hundreds of statutory instruments are made every year.⁴⁰ Many of these subsequently cease to have any effect but nonetheless remain in force, giving rise to potential confusion. Accordingly, in the Issues Paper the Commission considered whether a structured process should be put in place to ensure the ongoing review of the State’s stock of secondary legislation. In particular, the Commission identified two potential approaches to facilitate continuous review, namely, requiring periodic audits of secondary legislation or establishing a general power to revoke spent or obsolete secondary legislation. Both of these approaches are discussed below.
- [4.72] In 2019, the Commission commenced work on completing the final phase of the Statute Law Revision Programme (SLRP),⁴¹ as part of its work on Access to Legislation. This final phase of the SLRP entails reviewing all relevant secondary materials between 1821 and 1922 in order to create a definitive list of all pre-1922 secondary legislation that is in force. The Commission intends to complete this work in 2022, which will coincide with the centenary of the State. Once this work has been completed, the State will have, for the first time in its history, a complete list of all in-force legislation, both primary and secondary. In the final stages of the SLRP, all secondary legislation that is identified as being in force will be digitised and made available on the eISB. This underlines the status of the eISB as the principal online repository of all legislation in force in the State. One of the key benefits of this element of the SLRP is that it will facilitate future simplification of the collection of secondary legislation, providing a definitive reference point from which future consolidation can proceed.

(i) Periodic audits of statutory instruments

- [4.73] The first option identified by the Commission would involve requiring Government Departments, and any other body with the power to make statutory instruments, to undertake periodic audits of secondary legislation under their remit and identify an action plan for streamlining the stock of instruments. This would ensure that those responsible for secondary legislation are under an ongoing duty to keep the

³⁹ See para 2.54, above.

⁴⁰ For example, exactly 700 statutory instruments were made in 2019.

⁴¹ The previous work carried out under the SLRP is discussed in Chapter 2.

coherence and comprehensiveness of the secondary legislation under their remit under review. The advantage of this approach is that it capitalises on relevant knowledge and expertise, on the basis that the Departments and bodies are generally fully acquainted with the secondary legislation under their respective remits.

- [4.74] With regard to identifying secondary legislation under a Department's remit, the Classified List of In-Force Legislation can be considered to have already done much of the groundwork. The Classified List not only identifies all secondary legislation currently in force, but also identifies responsible Government Departments in relation to parent Acts and their associated secondary legislation.

(ii) Power to revoke spent legislation

- [4.75] An additional measure, adopted in the Commonwealth of Australia, is a general power to revoke spent or obsolete secondary legislation. Section 48E of the *Legislation Act 2003* confers a general power on Australia's Governor-General to revoke by regulation legislative instruments that are spent or unnecessary. Section 48E(2) requires that, prior to exercising this power, the Governor-General must satisfy the Attorney-General that the statutory instrument is spent or is no longer required. In the Issues Paper, the Commission considered that such a provision could potentially provide a more efficient basis for managing Ireland's stock of secondary legislation.

(d) Conclusions and recommendations

- [4.76] The Commission notes the concerns, raised by a number of consultees in submissions to the Issues Paper, regarding any general sunsetting or other general automatic repeal or revocation provisions. The Commission agrees that it is preferable that legislation, including specific provisions within legislation, be expressly repealed or revoked. The long-accepted convention is that legislation is permanent once it has been enacted and until it is repealed. This convention provides an element of certainty in respect of the applicability of legislation. The widespread use of sunsetting or automatic repeal provisions would require legislation to be periodically confirmed to prevent it from being automatically repealed. This would become time-consuming and impractical. Accordingly, the Commission has concluded that it would not be appropriate to recommend any general sunsetting provisions or other general automatic repeal or revocation provisions.
- [4.77] The Commission considers, rather, that a general provision for post-legislative statutory review of Acts could assist the State in managing its collection of legislation. Such a review would allow the State to identify legislation that is suitable for repeal or to recommend consolidation with other legislation. Such reviews should, ideally, commence within five years of an Act being enacted. In conducting post-enactment reviews, the Commission considers that the six Key Principles of Better Regulation set

out in the 2004 Government White Paper *Regulating Better*,⁴² could be instructive. The six Key Principles were derived from OECD *Guiding Principles for Regulatory Quality and Performance*,⁴³ and were endorsed in the Government's 2013 Policy Statement *Regulating for a Better Future*.⁴⁴ Those six Key Principles are:

1. Necessity: is the Act necessary?
2. Effectiveness: is the Act targeted?
3. Proportionality: do the advantages of regulation outweigh the disadvantages?
4. Transparency: have stakeholders been consulted with?
5. Accountability: is it clear who is responsible and for what under the Act?
6. Consistency: does the Act give rise to anomalies and inconsistencies due to other legislation in the area?

- [4.78] The Commission also considers that it would be of considerable assistance in terms of the principle of comprehensiveness and transparency to provide for the ongoing review of secondary legislation. It is worth noting in this respect that the 2004 White Paper *Regulating Better* proposed that a statutory instrument should be consolidated after it has been amended three times. Accordingly, the Commission considers that provision should be made for the periodic review and consolidation of secondary legislation in force. This should apply to all Government Departments and any other body with power to make secondary legislation, and the relevant Department or body should identify all secondary legislation under its remit that remains in force, and identify an action plan for reducing the stock of secondary legislation under its remit.

⁴² *Regulating Better: A Government White Paper setting out six principles of Better Regulation* (June 2004), available at <<https://www.gov.ie/en/publication/2083d0-better-regulation-archive/>> accessed 26 August 2020.

⁴³ OECD, *Guiding Principles for Regulatory Quality and Performance* (2005); available at: <<https://www.oecd.org/fr/reformereg/34976533.pdf>> accessed 26 August 2020.

⁴⁴ *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (Department of the Taoiseach, 2013), available at: <http://web.archive.org/web/20190208174434/https://www.taoiseach.gov.ie/eng/Publications/Publications_2013/Policy_Statement_on_Economic_Regulation_20131.pdf>.

- R. 4.12** The Commission recommends that consideration should be given by the Government and the Oireachtas to a presumptive requirement that legislation should include a review of its operation within five years of being enacted, or such other period as may be considered appropriate, that such a review should take account of relevant Better Regulation principles, that it should be concluded and published within one year of the commencement of the review, and should be considered by the relevant Oireachtas Committee, taking account of the post-enactment legislative standards in Recommendation 7.06, below.
- R. 4.13** The Commission recommends that each Government Department and other body with power to make secondary legislation should carry out periodic audits of secondary legislation under their remit. Such audits should identify all secondary legislation under their remit that remain in force and identify an action plan for reducing the stock of secondary legislation under their remit. The Commission also recommends that they should consider the feasibility of consolidating statutory instruments that have been amended more than three times.

CHAPTER 5 MAINTAINING CONSOLIDATED LEGISLATION IN A COHERENT FORM

1. Introduction

- [5.1] This Chapter considers the second guiding principle set out in Chapter 1, currency, that is, how legislation, once consolidated, can continue to be maintained in a coherent form. As discussed in Chapter 1, providing access to current versions of legislation is an essential part of improving the accessibility of legislation. Maintaining legislation in its current form means that legislation should continue to be updated and made available to the public, incorporating all amendments to the legislation concerned. While a consolidation project brings the law together in a single Act (or a single set of Regulations, as the case may be), it is inevitable that, in the increasingly fast-moving world we inhabit, the consolidated Act (or statutory instrument) will be amended on a regular basis. An effective maintenance system will ensure that the consolidated law remains in a coherent, accessible, state, maintains the benefits of the initial consolidation effort, and prevents the risk of lapsing back into an incoherent and degraded form.
- [5.2] Accordingly, this Chapter considers how to ensure that legislation is maintained and made available to the public in its up-to-date, and coherent, form. The Chapter begins by examining the core issue that arises in this respect: whether to enact a statutory duty to publish revised versions of legislation, that is, up-to-date versions of legislation and, if so, the exact form of such a duty. The Chapter then discusses to what extent, if any, revised versions of legislation could include modest editing provisions, such as updating the name of a Minister or a statutory body where this has happened after the original legislation was enacted.

2. Duty to produce and publish revised versions of legislation

- [5.3] The core question in terms of the maintenance principle is whether there should be a statutory duty to publish revised versions of legislation, and, if so, what form that would take. As noted in Chapter 2, as a result of a Government mandate in 2006, and consistent with its statutory duty concerning the revision and consolidation of legislation, the Commission's Access to Legislation work includes preparing and publishing Revised Acts, which are administrative consolidations of Acts.¹ At the time of writing (August 2020), the Commission publishes and maintains more than 380

¹ See paras 2.46-2.51, above.

Revised Acts on its website,² to which the eISB also provides links. This collection of Revised Acts comprises all textually amended Acts enacted from 2005 onwards (excluding the Finance Acts), as well as more than 150 of the most-used pre-2005 Acts.

- [5.4] In some other jurisdictions, similar collections of Revised Acts, some referred to as Reprints and some forming a virtually invisible element of an online legislation database, are carried out under a statutory duty. Enacting such a statutory duty and imposing it on a particular body has the benefit of ensuring that legislation is maintained in its up-to-date form, as it requires the relevant body to ensure that this happens.
- [5.5] In the Issues Paper, the Commission sought views as to whether it would be appropriate to recommend the enactment of such a statutory duty in Ireland. The Commission now turns to review briefly the position in other jurisdictions. This is followed by a review of submissions received on this issue, and the Commission's conclusions and recommendations.

(a) Statutory duties to publish revised legislation in other jurisdictions

(i) Australia

- [5.6] As noted in Chapter 3, in the second half of the 19th century, a number of Australian states and territories engaged from time to time in wholesale reviews of the legislation they had inherited from their British colonial past. These revisions of their collection of legislation were carried out along the lines of the 19th century English exercises of compiling comprehensive collections of Revised Acts, without any specific legislative mandate. While these exercises were successful in their own right, an increasing problem was that, with the growth of legislative activity in the 20th century, these collections of the Revised Acts became out-of-date and of less use with the passing years. It was therefore decided that it was more appropriate to put in place rolling, and ongoing, requirements to publish Revised Acts. It was also decided to place such obligations on a statutory basis. As noted below, many of these states and territories have moved beyond a paper-based approach to this issue towards online publication of Acts-as amended. The Commission discusses the application of online technology in Chapter 6 of the Report, below.

a. New South Wales

- [5.7] New South Wales was one of the first Australian states or territories to enact a statutory system requiring the publication of up-to-date, as amended, Acts, in the *NSW Amendments Incorporation Act 1906*. The 1906 Act was replaced by the NSW

² <<http://revisedacts.lawreform.ie/>> accessed 26 August 2020.

Reprints Act 1972. While the term “reprint” might suggest merely re-publication of the original text of an Act, the 1972 Act required that such Reprints were, indeed, the text of the Act-as amended. It is not, perhaps, surprising that since NSW was the first Australian jurisdiction to have in place a statutory system requiring the publication of Acts-as amended, it has also moved towards an online publication system. Thus, the NSW 1972 Act was repealed by the NSW *Interpretation Amendment Act 2006*, and the NSW 2006 Act inserted a new Part 6A into the NSW *Interpretation Act 1987*, which now requires the online publication of up-to-date legislation on the NSW legislation website.

b. Tasmania

- [5.8] Tasmania was also at the forefront, with New South Wales, of enacting statutory regimes to require the publication of Acts-as amended, through the Tasmanian *Amendments Incorporation Act 1906*, which also authorised the publication of amended Acts. In 1997 a database of Tasmanian Legislation in electronic form was established, which is discussed in Chapter 6, below.

c. Commonwealth of Australia

- [5.9] The Commonwealth of Australia has, arguably, the most detailed statutory duty to produce and make available revised versions of legislation.³ Under the *Legislation Act 2003*, the First Parliamentary Counsel must establish a Federal Register of Legislation, which must contain revised versions of legislation, to be made available to the public on an approved website.⁴

- [5.10] Under the 2003 Act, a revision must be prepared and registered in the following circumstances:⁵

1. Where an Act or statutory instrument has been amended;
2. Where a statutory instrument has been annulled by Parliament; or
3. Where a provision in an Act has been repealed, lapsed, expired, or has otherwise ceased to be in force by virtue of a provision in another Act.

³ The *Legislation Act 2003* uses the terminology of “compilation”, rather than revision or consolidation.

⁴ *Legislation Act 2003*, section 15C.

⁵ Section 15Q(1) of the 2003 Act refers to and defines such effects or occurrences as “required compilation events”.

- [5.11] The First Parliamentary Counsel must prepare a revision of an Act "as soon as practicable".⁶ A revision of a statutory instrument must be prepared by the relevant rule-maker (such as a Minister) within 28 days.⁷
- [5.12] In addition to these circumstances in which a revision *must* be prepared, a revision *may* also be prepared in the following circumstances:⁸
1. Where provisions of the legislation concerned have commenced;
 2. Where instruments have been automatically revoked under sections 48C and 48D of the 2003 Act;
 3. Where a legislative provision has been modified;
 4. Where a legislative provision has been impliedly amended;
 5. Where a legislative provision has been repealed, lapsed, expired or otherwise ceased to be in force by virtue of another provision in that Act;
 6. Where, if no revision has been registered for the legislation concerned, the text of the legislation as registered otherwise ceases to show the text of the Act or instrument as in force; and
 7. Where, if a revision has been registered for the legislation concerned, the text of the latest registered revision otherwise ceases to show the text of the legislation as in force.
- [5.13] The 2003 Act also provides that, in relation to statutory instruments, the First Parliamentary Counsel may notify the relevant rule-maker (such as a Minister) requiring the relevant rule-maker to produce a revision of a statutory instrument. In addition, the First Parliamentary Counsel may prepare and register a revision regardless of whether any of the mandatory or discretionary events, listed above, has occurred.
- d. Queensland
- [5.14] The Queensland *Statute Law Revision Act 1908* broadly followed the NSW approach enacted in 1906 in authorising the publication of Acts-as amended. The 1908 Act was repealed and replaced by the *Reprints Act 1992*, under which the Office of the Parliamentary Counsel in Queensland has the authority to produce reprints of legislation.⁹ Reprints are produced for all in-force Acts and secondary legislation. Reprints are authorised versions if they are published on the Queensland legislation

⁶ *Legislation Act 2003*, section 15T(1).

⁷ *Legislation Act 2003*, section 15R(1).

⁸ Section 15Q(2) of the 2003 Act refers to and defines such effects or occurrences as "discretionary compilation events".

⁹ A reprinted Act can also be described as a consolidated Act.

website.¹⁰ Although the statutory duty in the 1992 Act is not obligatory, since 2002 the Office of Parliamentary Counsel has prepared a reprint for both primary and secondary legislation for each date on which an amendment was made to the legislation.¹¹

- [5.15] Since 2019, indicative reprints have been available on the legislation website.¹² These indicative reprints, which are unofficial and unauthorised versions of legislation, contain track changes that incorporate forthcoming amendments to the relevant Act or instrument that are contained within a Bill. They can be accessed on the Queensland Legislation website by viewing the legislative history of a Bill that has been introduced to Parliament. Generally, indicative reprints are produced within 5 days of the introduction of the amending Bill to Parliament.

e. South Australia

- [5.16] Section 5 of the *Legislation Revision and Publication Act 2002* requires an ongoing programme of revision and publication to be undertaken under the supervision of the South Australian Commissioner for Legislation Revision and Publication. Section 5(2) provides that the primary objective of such a programme is to produce revised versions of legislation, incorporating all amendments, and to produce up-to-date copies of legislation that are available to the public.

f. Western Australia

- [5.17] In Western Australia, Reprints are authorised consolidations of Acts and secondary legislation that are printed by the Government Printer in accordance with the *Reprints Act 1984*. Section 5 of the 1984 Act is drafted in discretionary terms, providing that the Attorney General of Western Australia "may" direct the Government Printer to print reprints of legislation. There is, therefore, no mandatory obligation to produce revised versions of state legislation in Western Australia. Although reprints are, as the term may suggest, printed in hardcopy format occasionally, the electronic versions are

¹⁰ <<https://www.legislation.qld.gov.au/>> accessed 26 August 2020.

¹¹ <<https://www.legislation.qld.gov.au/information/qldreprintsandthiswebsite#When%20is%20a%20reprint%20prepared>> accessed 26 August 2020.

¹² <<https://www.legislation.qld.gov.au/help/irtc-2>> accessed 26 August 2020.

much more up-to-date.¹³ Revised versions or “reprints” of primary and secondary legislation are published on the Western Australian legislation website.¹⁴

(ii) New Zealand

- [5.18] New Zealand has also been engaged for over 100 years in ensuring that the content of its collection of legislation has been maintained in an up-to-date condition. In 1908, New Zealand enacted a comprehensive consolidation, or revision, of its entire collection of legislation. The *New Zealand Statutes Drafting and Compilation Act 1920* provided for reprinting of Acts along the lines of those enacted in Australia, discussed above. New Zealand continued, throughout much of the 20th century, to publish complete collections of Revised Acts, continuing the approach that had been adopted in England and Wales in the 19th century. Towards the end of the 20th century, following the enactment of the *Acts and Regulations Publication Act 1989*, New Zealand moved towards a policy of having annual reprint programmes. This involved publishing individual Reprints rather than complete collections, based on extensive consultation to determine which Acts should be reprinted. New Zealand also moved towards an online approach, now known as the Legislative Enactments of New Zealand (LENZ), discussed in Chapter 6, below.
- [5.19] Following the New Zealand Law Commission’s 2008 Report, *Presentation of New Zealand Statute Law*,¹⁵ the New Zealand *Legislation Act 2012* was enacted, which was subsequently replaced by the *Legislation Act 2019*. The 2019 Act includes not only a general requirement to prepare and publish programmes of consolidations (discussed in Chapter 4), but also the obligation to publish Revised Acts, which are referred to as reprints in New Zealand. Section 70 of the 2019 Act requires New Zealand’s Chief Parliamentary Counsel to arrange for a reprint to be published electronically when primary or secondary legislation is amended. Under section 71(1), a reprint must be published electronically as soon as practicable following amendment to the relevant Act or instrument. Section 71(2) sets out a similar discretionary duty in respect of printed versions of reprints. In practice, the Parliamentary Counsel’s Office produces a new online reprint each time an Act or instrument is amended, which is published on the New Zealand Legislation website, and a new “as at” date is given to the reprint, which indicates how up-to-date the particular reprint is. Where a reprint does not bear

¹³ Parliamentary Counsel’s Office of Western Australia, “How to read legislation, a beginner’s guide” (May 2011), at 29; available at: <https://department.justice.wa.gov.au/_files/How_to_read_legislation.pdf> accessed 26 August 2020.

¹⁴ <<https://www.legislation.wa.gov.au/legislation/statutes.nsf/home.html>> accessed 26 August 2020.

¹⁵ New Zealand Law Commission, *Presentation of New Zealand Statute Law* (Report 104, 2008).

the New Zealand Coat of Arms, it is an unofficial revision and is referred to as an “eprint” as opposed to a “reprint.”

(iii) United States of America

- [5.20] Under the federal United States Code (USC),¹⁶ the Office of Law Revision Counsel (OLRC), located in the US House of Representatives, must prepare and publish annual supplements to, and new editions of, the complete USC, subject to approval by the House Judiciary Committee. The OLRC must also prepare and publish a completely new edition of the USC every 6 years, that is, at the end of each Session of Congress. During each Session of Congress, the OLRC must publish an annual supplement that incorporates all amendments to the USC made during that year, which involves publishing 5 annual supplements in each Session of Congress. These updates of the USC are published in print form, but are also published online with an advance digital certificate to verify the authenticity of the contents of the USC itself.

(b) Conclusions and recommendations

- [5.21] The Issues Paper asked consultees whether there should be a duty to produce revised versions of legislation where amended. The majority of consultees were in favour of enacting a statutory duty to do so.
- [5.22] The Commission notes in this respect that such a statutory duty has been enacted in a number of common law jurisdictions with a similar legislative legacy and comparable collection of legislation, such as Australia, New Zealand, and the United States.
- [5.23] The Commission has, as noted above, on the basis of the Government decision of 2006 and consistently with its statutory mandate under the *Law Reform Commission Act 1975* concerning the consolidation and revision of statute law, developed and maintained a significant body of Revised Acts. At the time of writing (August 2020), this stands at over 380 Revised Acts, which includes all textually amended Acts since 2004 (other than Finance Acts), and a selection of as over 100 most-used pre-2004 Acts. The Commission considers that, bearing in mind that similar duties have been enacted in comparable jurisdictions, enacting a general statutory duty requiring the production and publication of revised versions of legislation whenever amended, would ensure that the work of producing Revised legislation would thus be placed on a sustainable basis into the future.

¹⁶ Section 202 of Title 1, Chapter 3, of the USC (1 USC §202) contains the obligation to publish annual supplements to, and new editions of, the USC. Section 285b of Title 2, Chapter 9A, of the USC (2 USC §285b) confers the obligation to prepare these on the Office of Law Revision Counsel, subject to the approval of the House Judiciary Committee.

- [5.24] The Commission has therefore concluded that a general duty to produce and publish legislation in Revised Act form should be placed on a statutory basis. The Commission considers that, consistently with the types of statutory duties found in comparable jurisdictions, the duty should be reinforced by a requirement that Revised versions of legislation should be published as soon as is reasonably practicable after the relevant amending provision comes into force. The Commission also considers that the statutory duty should apply to both Acts (primary legislation) and statutory instruments (secondary legislation).
- [5.25] The Commission recognises, however, that it would not be realistic to recommend the enactment of an across-the-board or generally applicable duty to produce and publish Revised versions of all in-force legislation, whether Acts or statutory instruments, with immediate effect. As already noted in Chapter 2, the reality is that there are over 3,000 Acts and over 15,000 statutory instruments currently in force, and the vast majority of these have been amended many times. Bearing in mind the level of resources that would be required to achieve this, it is not realistic to expect that these could all be produced and published in their as amended, Revised, form within a short timeframe. The Commission considers that it would therefore be appropriate to recommend that the statutory duty should apply from a defined starting reference year, to allow a period during which consolidation programmes, as discussed in Chapter 4, can address some of these Acts and statutory instruments.
- [5.26] Bearing in mind the work already completed to date by the Commission, to maintain in Revised form all Acts enacted from 2004 that have been textually amended (other than Finance Acts), the Commission considers that it would be appropriate to recommend that all Acts enacted from 2000 onwards should, within three years, be published and maintained in Revised format. The Commission also recommends that, after that initial three-year period, there should be a duty to prepare a series of planned programmes of publishing Revised Acts and, where practicable, of statutory instruments. These programmes of producing and publishing Revised legislation would complement the planned programmes of consolidated legislation recommended in Chapter 4 and ensure that legislation consolidated under those programmes does not become degraded.
- [5.27] The programmes to consolidate legislation and the programmes to maintain and publish Revised legislation should have the same ultimate objective: a comprehensive statement of the State's collection of legislation in its up-to-date state. In preparing for that ultimate objective, the programmes should ensure that, in the medium term (that is, after the initial three year period), the candidate legislation should be chosen on the basis of the same general criteria, namely, that they are the most used and of most relevance to all stakeholders, including the general public. The Commission considers that, if these planned programmes are suitably resourced and make best use of

relevant data analytics and automated processes, it would be possible to envisage publishing the text of all in-force Acts (primary legislation) in their Revised, as amended, form by the end of a 10 year time frame after the initial 3-year period. It is probable that publishing the text of all 15,000 in-force statutory instruments (secondary legislation) in their as amended form could take longer, although it is also likely that a significant amount of rationalisation of statutory instruments could run in parallel with the programmes of consolidating Acts. The precise details of how this would be achieved would be a matter to be considered by the Commission in collaboration with the Accessibility and Consolidation of Legislation Group recommended in Chapter 4.

- [5.28] Ideally, both the Revised legislation programme and the planned programmes of consolidation would work in tandem with each other to achieve their shared ultimate objective. For example, as discussed in earlier chapters, there is a clear need to consolidate a number of areas of law, especially those where Revised Acts, while important because they provide up-to-date text of these Acts, do not meet all the principles of accessibility. Certain areas of legislation, such as the legislation on firearms and sexual offences, have become degraded over time, and the statutory rules related to each subject matter are no longer found in a single Principal Act. Even in those instances, such Revised Acts may, however, be of significant use to those preparing a consolidating piece of legislation, including Departmental officials, drafters and members of the Houses of the Oireachtas as legislators.
- [5.29] Then, after an effective consolidation has been prepared and enacted, and if relevant legislative standards continue to be applied in any amending legislation, Revised Acts are a completely suitable means of ensuring that the Principal Act remains fully accessible. A good example of this is the *Companies Act 2014*, which involved a combination of consolidation, reform, and part-codification. Since 2014, amendments to the 2014 Act (and there have been many, as is to be expected in this area of commercial law) have applied appropriate legislative standards, notably by inserting textual amendments only to the 2014 Act, so that the original integrity of the 2014 has been maintained. This means that the Revised Act version of the 2014 Act fully conforms to the principles of accessible legislation. Thus, both types of programmes, of consolidation legislation and of Revised legislation, are necessary and also complementary.
- [5.30] The Commission also recommends that the general statutory duty to produce and publish Revised legislation should apply where a series of relevant events have occurred. Having regard to the factors specified in the comparable legislation enacted in the jurisdictions discussed above, the Commission considers that the duty should apply where the following has occurred:

1. where a statutory provision has been textually amended;
2. where a statutory provision has been commenced; and
3. where a statutory provision has been repealed, expired, or has otherwise ceased to be in force by virtue of an express provision in another statutory provision.

[5.31] The Commission also recommends that there should also be a discretion to publish Revised legislation in the following circumstances:

1. where a statutory provision has been amended by a non-textual amendment; and
2. in the case of a statutory instrument, where it has been annulled by the Oireachtas.

[5.32] As already noted, the statutory remit of the Commission under the *Law Reform Commission Act 1975* includes the consolidation and revision of legislation. Given this remit, and given also the experience gained by the Commission in preparing and publishing Revised Acts on its website, the Commission considers that it should continue to be responsible for the preparation of Revised legislation, including the preparation of planned programmes of Revised legislation, which should be coordinated with the Accessibility and Consolidation of Legislation Group.

[5.33] The Commission also considers that, in light of these recommendations, the *Statute Law (Restatement) Act 2002* would no longer play an ongoing role in ensuring the accessibility of legislation. As discussed in Chapter 2, the 2002 Act empowers the Attorney General to certify texts of legislation, with amendments incorporated, as official restatements of the law. In practice, however, and for the reasons discussed in Chapter 2, the process envisaged in the 2002 Act has been overtaken by the production and publication by the Commission of Revised Acts. Accordingly, the Commission recommends the repeal of the 2002 Act.

R. 5.01	The Commission recommends that the Commission itself should continue to have the functional responsibility and general duty to produce and publish legislation in its Revised, as amended, format. The Commission also recommends that the duty should be set out in legislation and reinforced by a requirement that Revised versions of legislation should be published as soon as is reasonably practicable after the relevant amending provision comes into force.
R. 5.02	The Commission recommends that the general duty should apply to both Acts (primary legislation) and statutory instruments (secondary legislation).

- R. 5.03** The Commission recommends that the general statutory duty should initially apply to all Acts enacted from 2000 onwards and that all such Acts should, within three years, be published and maintained in Revised format. The Commission also recommends that, after the initial three-year period, there should be a duty to prepare a series of planned programmes of publishing Revised Acts, and of statutory instruments, which should complement the planned programmes of consolidated legislation recommended in Chapter 4. The Commission therefore also recommends that the preparation and oversight of Revised legislation should continue to be carried out by the Commission and agreed with the Accessibility and Consolidation of Legislation Group recommended in Chapter 4.
- R. 5.04** The Commission recommends that the programmes to consolidate legislation and the programmes to publish Revised legislation should have the same ultimate objective of a comprehensive statement of the State's collection of legislation in its up-to-date state. The Commission also recommends that the programmes should ensure that, in the medium term (that is, after the initial three year period), the candidate legislation should be chosen on the basis of the same general criteria, namely, that they are the most used and of most relevant to all stakeholders, including the general public.
- R. 5.05** The Commission recommends that the general statutory duty to produce and publish Revised legislation should apply where the following has occurred:
- (a) where a statutory provision has been textually amended;
 - (b) where a statutory provision has been commenced; and
 - (c) where a statutory provision has been repealed, expired, or has otherwise ceased to be in force by virtue of an express provision in another statutory provision.
- R. 5.06** The Commission recommends that there should also be a discretion to produce and publish Revised legislation in the following circumstances:
- (a) where a statutory provision has been amended by a non-textual amendment; and
 - (b) in the case of a statutory instrument, where it has been annulled by the Oireachtas.
- R. 5.07** The Commission recommends the repeal of the *Statute Law (Restatement) Act 2002*.

3. Editing Revised legislation, including updating references

- [5.34] The Commission now discusses to what extent, if any, revised versions of legislation could include, in addition to textual amendments, some limited editorial powers. In those common law jurisdictions, such as Australia and New Zealand, that have legislated for the publication of Revised legislation, provision is also made for some form of such editing, updating, powers. This usually includes a power to update references to Ministers or other bodies where their titles have changed or where responsibility for the legislation has been transferred to another Minister or body. They also typically include a power to update references to legislation that has since been repealed and re-enacted or a power to replace a general term such as the "establishment day" for a body with the actual date on which the body concerned was established.

(a) Typical editing powers for Revised legislation in other jurisdictions

- [5.35] Among the editing, or editorial, powers conferred on those preparing and publishing Revised legislation that can be found in other common law jurisdictions are:¹⁷
1. incorporating changes to the name, title, location, or address of a body, office, person or place;
 2. replacing a description of a date or time with the actual date or time;
 3. including gender neutral references;
 4. omitting from legislation any provisions that have expired, been repealed, or whose effect(s) have been nullified or overridden;
 5. altering the style or presentation of text or graphics to be consistent with current drafting practices, or to improve electronic or print presentation;
 6. changing references to a number, year, date, time, amount of money, penalty, quantity, measurement, or other matter, idea, or concept to be consistent with modern practice;
 7. incorporating transitional provisions in an amending Act or regulations;
 8. altering the title of legislation, or references to titles of other legislation, to conform to current citation practice;
 9. correcting spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature;
 10. making minor changes to ensure a consistent form of expression; and

¹⁷ The New Zealand Law Commission's *Report on Presentation of New Zealand Statute Law* (NZLC R104, 2008), at 93-95, contains an extensive review of the extent of the editing powers conferred on those preparing and publishing Revised legislation in many common law jurisdictions.

11. making a correction, where it is obvious both that an error has been made and what the correction should be.

(b) Constitutional limits to editing Revised Acts

- [5.36] A number of these editing powers, such as updating the name of a Minister, are entirely desirable from the point of view of ensuring the accessibility and transparency of the text of Revised legislation. For example, it would be of great benefit to those reading the Revised version of insurance legislation in Ireland that it would refer to the Minister for Finance as the current Minister with responsibility for this area; whereas if they read most insurance legislation in its as enacted form, they would find references to the Minister for Business, Enterprise and Innovation (and the many predecessors of that Minister, such as the Minister for Industry and Commerce).
- [5.37] However, some of the editing powers referred to in the list set out above that are found in other common law jurisdictions, notably those concerning making corrections where there has been an “obvious error”, would run the risk that they would be in conflict with the Constitution. In particular, Article 15.2.1° of the Constitution provides that the Oireachtas has the sole and exclusive power to enact legislation. Accordingly, any editorial power that could be interpreted as allowing the correction of errors in legislation is likely to be in conflict with the sole and exclusive law-making power conferred on the Oireachtas by Article 15.2.1°. In this respect, the Supreme Court has held, in *The State (Murphy) v Johnston*¹⁸ and *The State (Rollinson) v Kelly*,¹⁹ that if the Court was to correct even what appeared to be “obvious” errors in legislation, this would involve more than the perfectly acceptable interpretation of legislation but would involve changing the law, contrary to the exclusive law making role of the Oireachtas under Article 15.2.1°. The Supreme Court held that the appropriate solution to resolving such errors was for the Oireachtas to enact amending legislation.
- [5.38] In *The State (Murphy) v Johnston*, the Supreme Court refrained from correcting an obvious mistake it identified in section 23 of the *Road Traffic (Amendment) Act 1978*. The case concerned a prosecution for drink-driving under section 49 of the *Road Traffic Act 1961*. A crucial part of the prosecution case was a certificate from the Medical Bureau of Road Safety as to the level of alcohol in the defendant’s bloodstream: this certificate was issued under section 22 of the 1978 Act. Section 23 of the 1978 Act provided that this certificate was sufficient evidence of compliance with requirements under Part III of the 1978 Act, “or under Part III of the [Road Traffic] Act of 1968.” The Supreme Court accepted that this was an obvious error, because Part III of the 1968 Act referred to driving licences, and that the reference had most likely

¹⁸ [1983] IR 235.

¹⁹ [1984] IR 248.

been intended to be to Part V of the 1968 Act, which concerned driving offences. The Court concluded, however, that although this was an obvious error, the Court could not correct this mistake because that would involve amending the 1978 Act, rather than simply interpreting it. Any amendment to section 23 of the 1978 Act was, the Court held, a matter exclusively for the Oireachtas in accordance with its powers under Article 15.2.1° of the Constitution, not the courts. As it happened, this conclusion did not affect the defendant's conviction for drink-driving under section 49 of the 1961 Act. This was because there was no need for the prosecution to establish compliance with any provision of the 1968 Act to prove an offence under section 49; it was sufficient that there had been compliance with Part III of the 1978 Act, and on that point, there was no drafting error in section 23 of the 1978 Act.

- [5.39] In *The State (Rollinson) v Kelly*,²⁰ the defendant, a licensed bookmaker, had been charged with and been convicted of 56 separate betting offences, which had been brought under section 25(2) of the *Finance Act 1926* and Regulation 29 of the *Betting Duty (Certified Returns) Regulations 1934*. The drafting problem identified in the case was that the text of Regulation 29 of the 1934 Regulations provided that it was an offence to fail to make written returns to the Revenue Commissioners under Regulation 27 of the 1934 Regulations. However, it was clear that this was an obvious error, and that it should have referred to Regulation 26 of the 1934 Regulations, which concerned making returns. The Supreme Court held, by a 3-2 majority, that it could not correct this obvious error in the 1934 Regulations, on the same principle that it had applied in *The State (Murphy) v Johnston*. On that basis, the Court held that the convictions based on alleged contraventions of Regulation 29 of the 1934 Regulations were not valid convictions, and they were therefore quashed.
- [5.40] In other common law jurisdictions, similar concerns over the effect that some editorial powers could have on the law-making functions of their parliaments are usually addressed by a statutory provision to the effect that any use of editorial powers must not change the effect of the legislation being revised.²¹ The Commission acknowledges that this might also be possible in the Irish context. However, the Commission considers that such a "saving" provision might not be sufficient to prevent a conflict with Article 15.2.1° of the Constitution. For that reason, the Commission has concluded that it would be preferable not to recommend inclusion of any provision to

²⁰ [1984] IR 248.

²¹ For example, section 86(2) of the *Legislation Act 2019* (New Zealand), section 42(1) of the *Legislation Act 2006* (Ontario), section 15V(6) of the *Legislation Act 2003* (Commonwealth of Australia), section 115 of the *Legislation Act 2001* (Australian Capital Territory) and section 10 of the *Legislation Publication Act 1996* (Tasmania).

the effect that a Revised version of legislation could engage in any form of correction of even “obvious” drafting errors.

(c) Statutory provisions authorising editorial revision in other jurisdictions

(i) Commonwealth of Australia

- [5.41] In the Commonwealth of Australia, Chapter 2, Part 2, Division 3 of the *Legislation Act 2003* governs editorial powers. Under section 15V, the First Parliamentary Counsel is authorised to make editorial changes during the course of preparing revised versions of legislation, whether that be Acts, instruments, or notifiable instruments. Section 15X then explains what is meant by editorial changes, providing that such changes include the correction of spelling, punctuation, and grammar errors; and the updating of references, including the renumber of provisions. The First Parliamentary Counsel may only exercise the power to make editorial changes where he/she deems the changes necessary to either correct an error or to bring legislation into line with the Office of the Parliamentary Counsel’s current drafting practices. This is made clear by section 15(v)(2) of the 2003 Act.

(ii) Australian Capital Territory

- [5.42] Part 11.3 of the *Legislation Act 2001* concerns the making of editorial changes in the Australian Capital Territory. Again, it is the parliamentary counsel who is authorised to make such changes, by section 114 of the Act, during the course of preparing revised versions of legislation. Similar to the Commonwealth of Australia, parliamentary counsel must consider the editorial changes desirable in order to bring the relevant law into line with current drafting practices. Section 116 specifies what constitutes editorial changes for the purposes of Part 11.3; such changes include the correction of typographical errors; renumbering of provisions; updating of references; and correction of grammar, spelling, and punctuation.

(iii) New Zealand

- [5.43] In New Zealand, the Part 3 of the *Legislation Act 2019* authorises the Chief Parliamentary Counsel to make editorial changes to revised versions of legislation. Section 86 creates the power to make certain editorial changes to reprints that are authorised under section 87. Section 86(2) clarifies that the Chief Parliamentary Counsel may only make such textual changes that do not impact upon the legislative effect of the law.
- [5.44] The Chief Parliamentary Counsel is further empowered, by section 87, to make certain editorial changes to reprinted legislation. Such editorial changes include:

1. Replacing gender specific terms with gender neutral terms, where appropriate (consistent both with the legislative intent and current drafting practices);
2. Numbering and renumbering provisions where this is authorised by an Order in Council made under section 88;
3. Update references to bodies, people, offices, places, or things where they have been renamed or replaced with a different body, person, place, or thing;
4. Update punctuation where this is required for consistency with current drafting practices;
5. Section 87(l) provides a list of the "obvious errors" that can be made; these are:
 - a. Typographical and clerical errors;
 - b. Grammatical and spelling errors;
 - c. Errors in numbers and cross-references;
 - d. Errors due to amendments having been made;
 - e. "any other errors of a similar nature"; and
 - f. Transitional provisions or savers may be incorporated directly into the text of the reprint.

[5.45] Illustrative examples are given within the legislation for some of the changes permitted under section 87. Section 89 authorises the Chief Parliamentary Counsel to make changes to formatting, where such changes are necessary to bring the reprint in line with current drafting practice. Section 91 requires any editorial changes made to reprints to be indicated within the text of the reprint.

(iv) Canada

[5.46] While, as discussed, the Statute Revision Commission must periodically revise the public general statutes of Canada,²² it is the Minister who is required to maintain a consolidation of either a public general statute or regulation, as provided for in section 26 of the *Legislation Revision and Consolidation Act*. However, the duty to maintain consolidations is discretionary, rather than obligatory. Section 27(d) of the Act provides that the Minister may, in maintaining a consolidation, rectify grammatical and typographical errors where such rectification would not affect the legal content of the Act or regulation.

a. British Columbia

[5.47] Section 10 of the 1996 *Statute Revision Act* authorises the Lieutenant Governor in Council to correct errors in revisions of primary legislation by making regulations. In

²² See paras 3.34-3.35, above.

respect of secondary legislation, section 5 of the 1996 *Regulations Act* permits the Registrar of Regulations, in preparing the Consolidated Regulations, to make changes pertaining to style, format, and numbering, as well as to rectify any topographical or referential errors.

b. New Brunswick

- [5.48] Section 13(1) of New Brunswick's *Statute Revision Act* authorises the Lieutenant-General in Council to make regulations to correct any errors in revisions made under the Act. Permitted corrections include the amendment of cross-references.

c. Nova Scotia

- [5.49] In Nova Scotia, the Consolidation and Revision Officer, an office that is held by the Chief Legislative Counsel, is permitted by section 3(1)(e) of the *Statute Revision Act* of 1989 to make minor changes "to bring out more clearly" the legislature's intention, as well as to correct printing and typographical errors, during the course of preparing a statutory consolidation and revision. Section 8 of the 1989 Act authorises the Chief Legislative Counsel to change the numbering and arrangement of the statutes within a consolidation.

d. Ontario

- [5.50] In Ontario, Part V of the *Legislation Act 2006* permits the Chief Legislative Counsel to make certain alterations to laws that have been consolidated. Under section 42(2) of the 2006 Act, the Chief Legislative Counsel may, for example:

1. Alter the presentation or style of text; correct errors in the renumbering of provisions;
2. Update references to bodies, offices, persons, places or things, as required by amendment;
3. Replace descriptions of time or dates with the actual time or date; or
4. Make minor changes that are required for stylistic consistency.

- [5.51] Section 42(1) of the Act is unequivocal in providing that the Chief Legislative Counsel may only make such changes that do not modify the legal effect of any primary or secondary legislation. Notably, section 42(2) permits the Chief Legislative Counsel to rectify drafting errors where it is "patent" both that an error has been made and what had actually been intended. Similarly, section 42(3) allows for corrections to be made to any errors that arose during the consolidation of a law, whether such consolidation is published in electronic or print form. Where the Chief Legislative Counsel makes alterations in accordance with section 42(4)-(12), he or she is required by section 43(2) to provide notice of such alterations. In respect of alterations authorised under section 42(1)-(3), the Chief Legislative Counsel may provide notice at his or her discretion.

(v) *United States of America*

- [5.52] At federal US level, in preparing new editions of the United States Code (USC), the Office of Law Revision Counsel (OLRC), may, in accordance with §285b(1) of Title 2 of the USC, make minor amendments and corrections in order to remove ambiguities, contradictions, and other imperfections both of substance and of form. Upon completing a new edition of the Code, however, the OLRC must submit the new edition to the House Judiciary Committee for its approval. Accordingly, any changes made are subject to the final approval of the Judiciary Committee.
- [5.53] In the State of Virginia, §30-149 of the Code of Virginia authorises the Virginia Code Commission to correct errors in the Code, while §30-150 of the Code authorises the Commission to correct errors within the Virginia Administrative Code.²³ In addition, §30-149 provides that the Commission may correct only those printer's errors that are "unmistakable", such as spelling errors. The Commission may also renumber, rename, and rearrange titles, chapters, articles, sections, and tables within the Code, as well as amend cross-references.
- [5.54] One of the more unusual editorial powers that the Commission has is the authority to omit provisions that it deems to be inappropriate in a Code. This would include, for example, general repealing clauses and emergency clauses.

(d) Specific editorial provisions in Irish legislation

- [5.55] In addition to the editorial powers that are generally found in the other jurisdictions discussed above, a number of generally applicable references are set out in existing Irish legislation. The Commission considers that these could also be applied in preparing Revised legislation.

(i) Adaptation of Enactments Act 1922

- [5.56] The *Adaptation of Enactments Act 1922* contains a number of general adapting references from pre-1922 legislation. These ensure that references contained in pre-1922 legislation that remains in force could be adapted to apply to the equivalent post-1922 situation. For example, section 6 of the 1922 Act provides that any reference in pre-1922 legislation to the powers of a Resident Magistrate should be adapted to mean a reference to the powers of a judge of the District Court. The 1922 Act also provides for the making of Government Orders that adapt pre-1922 legislation, an example being the *Revenue Commissioners Order 1923*,²⁴ which established the

²³ The Virginia Administrative Code is an official compilation of regulations.

²⁴ *Revenue Commissioners Order 1923* (Executive Council Order No.2 of 1923).

Revenue Commissioners and ensured that they could continue the revenue-gathering functions carried out by the equivalent pre-1922 authorities.

(ii) Constitution (Consequential Provisions) Act 1937

- [5.57] The *Constitution (Consequential Provisions) Act 1937* contains a number of adapting references to legislation enacted between 1922 and December 1937, when the 1937 Constitution came into force. This was to ensure that references contained in legislation enacted before the 1937 Constitution came into force could continue in force under the 1937 Constitution. For example, section 3 of the 1937 Act provides that any reference to the President of the Executive Council in legislation enacted between 1922 and 1937 should be taken to refer to the Taoiseach.

(iii) Interpretation Act 2005

- [5.58] The *Interpretation Act 2005* contains a number of generally applicable provisions that are especially relevant to Revised Acts. For example, section 26(2)(f) of the 2005 Act provides that, where a piece of legislation is repealed and replaced by another provision, any reference to that legislation, or to a provision of that legislation, is to be construed as a reference to the new legislation or any provision of the new legislation.

(iv) European Union Act 2009

- [5.59] Section 5 of the *European Union Act 2009* contains a general reference as to how to interpret the meaning of the term "European Communities", "European Union" as well as the founding Treaties of the Communities and the Union in the wake of the amendments to the Treaties made by the Lisbon Treaty, which came to force in 2009.

(v) Fines Act 2010

- [5.60] The *Fines Act 2010* introduced a generally-applicable five-grade classification of fines, Class A to Class E, as well as a scheme for indexing the level of fines in all pre-2010 legislation. This was done largely on the basis of non-textual amendments to pre-2010 legislation.
- [5.61] The indexation for fines on summary conviction is set out in sections 4 to 8 of the 2010 Act. These sections create five separate classes of fines, Class A to Class E, depending on the severity of the relevant offence, with incremental maximum amounts set out. Sections 4 to 8 also provide that these classifications apply to pre-2010 legislation. Each individual class of fine is applied to certain fines prescribed in existing legislation, identified by the maximum fine prescribed in that provision and the date on which the fine was prescribed. Accordingly, where previous legislation set out a maximum fine on summary conviction, that amount is now replaced with the classifications set out in Part 2 of the 2010 Act.

[5.62] Section 9 of the 2010 Act also effected a non-textual increase to the maximum amount of fines on conviction on indictment prescribed in all legislation enacted prior to 1997. Section 9 contains a table that specifies seven different time periods ranging from 31 December 1914 up to 31 December 1996. Where legislation prescribed a maximum fine on conviction on indictment during any of these seven time periods, the amount is multiplied by the multiplier amount corresponding to that time period in the table. Accordingly, where legislation prior to 1997 set out a maximum fine upon conviction on indictment, that amount is now replaced by the amount specified in section 9 of the 2010 Act.

(vi) Council Regulation (EC) No. 974/98 on the euro

[5.63] Council Regulation (EC) No. 974/98 gave legal effect to the introduction of the euro currency, which occurred in 2002. Article 14 provides that, where any legal instrument refers to pre-euro national currency units, these are to be read as referring to the euro, according to the applicable conversion rate set out in Council Regulation (EC) No 2866/98. Thus, references in any pre-2003 national legislation to any amount in Irish punts (pounds) are to be interpreted as references to the applicable amounts in euro.

(e) Conclusions and recommendations

[5.64] The Issues Paper asked consultees whether those involved in producing Revised legislation should have editorial powers that would not affect the substance of the legislation. Consultees were, in general terms, favourably disposed to the general concept of some editorial provisions. A number of consultees expressed the view that it should be clear that any such editorial powers should not affect the meaning of the legislation, in particular having regard to the sole and exclusive law making function of the Oireachtas under Article 15.2.1° of the Constitution.

[5.65] A number of consultees also underlined the importance of ensuring accuracy in the exercise of any editorial powers. This included the importance of having some oversight or supervision in place prior to, or after, the exercise of any editorial power. Suggestions for appropriate oversight includes:

1. Setting out strict guidelines on the exercise of editorial powers;
2. Requiring consultation prior to an exercise of an editorial power;
3. Providing for ex-post challenges to any exercise of editorial powers; and
4. Requiring sign-off from either the Government, the Office of Parliamentary Counsel to the Government or the Oireachtas prior to an exercise of an editorial power.

[5.66] The Commission agrees with the views expressed by consultees that some types of editorial powers are appropriate, and that this reflects the approach found in the other common law jurisdictions discussed above. For example, allowing references in the

text of legislation to be updated would allow readers to understand the effect of the legislation in its current state. Editorial powers such as providing for gender neutrality would also allow the Revised legislation to be published consistently with modern legislative conventions.

- [5.67] The Commission also agrees, and emphasises, that having regard to Article 15.2.1° of the Constitution, any editorial powers must not alter the effect of the legislation being revised. Accordingly, they should be limited to situations in which no conflict with the enacted text could arise. In addition, where any editorial powers are used, these should be clearly indicated in the revised version of legislation.
- [5.68] The Commission also agrees that suitable oversight of the use of editorial powers is entirely appropriate, and is indeed also found in other jurisdictions. The Commission considers that the Accessibility and Consolidation of Legislation Group, discussed in Chapter 4, would be the most appropriate body to oversee the exercise of editorial powers. Bearing in mind the composition of that body, this would also ensure that the Oireachtas has a role in overseeing the use of editorial powers, which is entirely appropriate having regard to Article 15.2.1° of the Constitution.
- [5.69] The Commission also considers that, to avoid any doubt on the matter, it would be appropriate to provide that, in the event of any apparent conflict between the text of legislation as enacted (including any subsequently enacted amendments) and the text of revised legislation, the text as enacted must prevail.

R. 5.08 The Commission recommends that the legislation concerning Revised legislation should include provision to make the following editorial changes:

- (a) incorporating changes to the name, title, location, or address of a body, office, person or place;
- (b) replacing a description of a date or time with the actual date or time;
- (c) including gender neutral references;
- (d) omitting from legislation any provisions that have expired, been repealed, or whose effect(s) have been nullified or overridden;
- (e) altering the style or presentation of text or graphics to be consistent with current drafting practices, or to improve electronic or print presentation;
- (f) changing references to a number, year, date, time, amount of money, penalty, quantity, measurement, or other matter, idea, or concept to be consistent with modern practice;
- (g) incorporating transitional provisions in an amending Act or regulations;

- (h) altering the title of legislation, or references to titles of other legislation, to conform to current citation practice;
- (i) implementing adaptation references in the *Adaptation of Enactments Act 1922* and in any Orders made under the 1922 Act;
- (j) implementing adaptation references in the *Constitution (Consequential Provisions) Act 1937*;
- (k) implementing definitions and references in the *Interpretation Act 2005*;
- (l) implementing definitions and references the *European Union Act 2009*;
- (m) implementing fines indexation and fines classifications in the *Fines Act 2010*; and
- (n) implementing Euro currency conversions in Council Regulation (EC) No. 974/98 on the Euro.

- R. 5.09** The Commission recommends that it should be expressly provided that these editorial powers should be subject to the proviso that any editorial changes made must not alter the substance or effect of the legislation.
- R. 5.10** The Commission recommends that it should be expressly provided that any editorial changes are identified in each place they are made in a revised version of legislation.
- R. 5.11** The Commission recommends that the editorial powers should be subject to supervision by the Accessibility and Consolidation of Legislation Group recommended in R. 4.07, including through the publication by that Group of guidance on the use of the editorial powers.
- R. 5.12** The Commission recommends that it should be expressly provided that, in the event of any apparent conflict between the text of legislation as enacted (including any subsequently enacted amendments) and the text of revised legislation, the text as enacted must prevail.
- R. 5.13** Consistent with Article 15.2.1° of the Constitution, the Commission recommends that, where an obvious error is discovered within legislation in the course of preparing Revised legislation, this is to be communicated to the Accessibility and Consolidation of Legislation Group recommended in Chapter 4, which should bring this error to the attention of the Office of the Attorney General, the appropriate Department, and the Houses of the Oireachtas.

CHAPTER 6 USING ICT TO MAKE LEGISLATION IMMEDIATELY AVAILABLE

1. Introduction

- [6.1] This Chapter focuses on the third guiding principle set out in Chapter 1, that legislation should be made immediately available online.
- [6.2] As noted in Chapter 2, a number of initiatives undertaken in Ireland in recent decades have improved the online accessibility of legislation. These include the publication of the text of as enacted legislation online on the eISB, the availability on the eISB of the Legislation Directory, the Legislative Observatory of the Houses of the Oireachtas, the publication of Revised Acts on the Commission's website, and the integration of these as enacted and Revised versions of legislation on the eISB by means of direct hyperlinks. In this context, in the Issues Paper, the Commission sought views on how such initiatives could be further developed so as to make the best use of Information and Communications Technology (ICT) in improving the accessibility of legislation.¹
- [6.3] As already discussed in Chapter 1, one of the basic principles of law in a State such as Ireland, in which the concept of the rule of law applies, is that ignorance of the law is no excuse, and therefore that all persons are presumed to have knowledge of the law. Consequently, a person may be subject to provisions of a law regardless of whether he or she is aware of the law's contents, or even its existence. Because of the potential for injustice arising from this principle, there is an onus on the State to ensure that legislation is immediately available to the public. As O'Donnell J noted in the Supreme Court decision *Minister for Justice v Tobin*,² in a modern digital age, the ideal situation, in which legislation can be made immediately available to those affected by it, is decidedly more realisable than when paper printing represented the sole means of publication.
- [6.4] Accessible legislation in the digital age necessarily requires that legislation should be available online as soon as possible following its coming into force, and perhaps even before it is commenced. The importance of using ICT to make legislation accessible was recognised by the Council of Europe in its 2001 *Recommendation on the delivery*

¹ Since the publication of the Issues Paper, the Commission has published the *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018), a resource that is available online and which includes a list of over 1,400 international agreements to which the State has agreed to be bound. See paras 2.67-2.71, above, and the Commission's *Discussion Paper on Domestic Implementation of International Obligations* (LRC 124-2020).

² [2012] IESC 37, [2012] 4 IR 147, at page 324.

*of court and other legal services to the citizen through the use of new technologies.*³ The 2001 Recommendation includes a number of general principles concerning the online availability of legislation, including the principles that: legislation should be made available free online from an official source; that it should be available both in its as enacted form and in its as amended, revised, form; that it should include point-in-time information; and that it should be authenticated.⁴ While the 2001 Recommendation does not have the status of a Council of Europe Convention, Ireland is nonetheless obliged as a Council of Europe member State to report to the Committee of Ministers on its ongoing progress in implementing these principles.

2. The legal status of online legislation, including Revised Acts

(a) The legal status of legislation in Ireland

- [6.5] The topic of immediately available legislation requires, in the first instance, a consideration of how legislation should be published, and what status different publication sources of legislation should enjoy.
- [6.6] Section 13 of the *Interpretation Act 2005* provides that judicial notice may be taken of the enactment of an Act.⁵ This means that an Act can be entered into evidence in a court as proof of itself, without additional supporting evidence having to be produced alongside it. Article 25.4.5° of the Constitution provides that the only conclusive evidence of a post-1922 Act of the Oireachtas is the physical copy that has been signed by the President and deposited in the office of the Registrar of the Supreme Court. The only official version of an Act, therefore, is the hard copy that is signed by the President and enrolled for record in the Office of the Registrar of the Supreme Court.⁶
- [6.7] Because the official versions of Acts are not readily accessible to the general public, section 2 of the *Documentary Evidence Act 1925* provides that an Act "printed under the superintendence or authority of and published by the Stationery Office" can be relied on as *prima facie* (or presumptive) evidence of the content of the law, unless

³ *Recommendation on the delivery of court and other legal services to the citizen through the use of new technologies Rec (2001)3*, adopted by the Council of Europe Committee of Ministers on 28th February 2001 at the 743rd meeting of the Ministers' Deputies, available at: <https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016805e2aa7> accessed 26 August 2020.

⁴ *Ibid.*

⁵ Section 13 of the *Interpretation Act 2005* replaced section 6(1) of the *Interpretation Act 1937*.

⁶ Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 20.

otherwise proven.⁷ This means that a copy of an Act purchased from the Government Publications Office and "printed... and published" by the Stationery Office can be furnished to a court as evidence of that Act, unless there is evidence to the contrary. The *Documentary Evidence Act 1882* remains the relevant Act on the evidentiary status of pre-1922 legislation that remains in force in Ireland, and which provides that an Act or statutory instrument that "purports to be printed under the superintendence or authority of Her Majesty's Stationery Office" shall be conclusive evidence of its content.⁸

- [6.8] Traditionally in Ireland, the Stationery Office versions would have been the only publicly available source of legislation. In recent decades, however, the availability of the full text of Acts and statutory instruments on the eISB, the availability of PDFs of Acts on the Legislative Observatory of the Houses of the Oireachtas, and the availability of Revised Acts on the Commission's website have provided free access to online versions of legislation.⁹ Reliance on these online resources has largely superseded reliance on hard copy equivalents. None of these online resources currently enjoys the status, as set out in the *Documentary Evidence Act 1925*, of the print versions of Acts published by the Stationery Office, but the Commission is aware that both the text of legislation on the eISB and the text of Revised Acts are frequently cited in court. Revised Acts have been explicitly cited in judgments,¹⁰ and it has also been held that the website of the Houses of the Oireachtas is a public document, and as such could, in the absence of evidence to the contrary, be treated by the courts as proof of any information that is stated on it.¹¹

⁷ The Stationery Office is located within the Office of Public Works (OPW), which provides a mail order service through which Acts, Bills, and statutory instruments can be purchased. The OPW does not, however, provide these publications free of charge and specifically refers on its own website to the eISB as an avenue through which in-force laws in the State can be viewed. The physical sales office of the Stationery Office closed on 23 November 2012. See: <<https://www.opw.ie/en/governmentpublications/>> accessed 26 August 2020.

⁸ As discussed below at para 6.45, the use of the word "printed" in the 1882 Act has not prevented the UK's Queen's Printer from asserting *prima facie* evidential status for its online legislation published on <www.legislation.gov.uk> accessed 26 August 2020.

⁹ Free access to online legislation has also been made available via <www.acts.ie> accessed 26 August 2020, and the website of the British and Irish Legal Information Institute (<www.bailii.org> accessed 26 August 2020), although these sites are less up-to-date than the eISB or the Legislative Observatory.

¹⁰ For instance, see *Kerry County Council v An Bord Pleanála* [2014] IEHC 238, at para 19, and *The People (DPP) v FE* [2020] IESC 5, discussed at para 6.10, above.

¹¹ In *Mitchell v Member in Charge, Terenure Garda Station* [2013] 1 IR 651, at 660, the High Court (Hogan J) held that the Oireachtas website constituted a public document and as such could, in the absence of evidence to the contrary, be treated as proof of what was stated on it (in that case that the Official Debates on the website recorded that the required motions by both Houses continuing in force the *Offences Against the State Act 1998* had been passed).

- [6.9] The 1925 Act does not provide clarity as to whether the version of an Act "printed... and published" by the Stationery Office refers only to the printed, hard copy that can be purchased from the Government Publications Office, or whether it also includes the PDF versions that are published on the electronic Irish Statute Book (eISB). However, because currently (August 2020) the Stationery Office Stamp is not included on the PDF versions of Acts on the eISB, it would seem safe to conclude that the 1925 Act refers to the hard copy, paper versions only. However, the Stationery Office Stamp is included on the PDF versions of statutory instruments published on the eISB. Therefore, it is possible to argue that a link to the PDF of a statutory instrument on the eISB could be relied on in court as presumed evidence of the text of that instrument.
- [6.10] In any case, in practice the eISB is often relied on as the source of the text of Acts. Similarly, Revised Acts as published on the Law Reform Commission's website have been relied upon in court, including by the judiciary. For example, in *Kerry County Council v An Bord Pleanála*,¹² the High Court (Charleton J) relied on the text of the Revised Act versions of both the *Roads Act 1993* and the *Planning and Development Act 2000*, as published on the Commission's website.¹³ In *Narconon Trust v An Bord Pleanála*,¹⁴ the High Court (Heslin J) expressly welcomed the fact that counsel had provided to the Court a copy of the Revised Act version of the *Planning and Development Act 2000*.¹⁵ Similarly, in *The People (DPP) v FE*,¹⁶ the Revised Act version of the *Criminal Procedure Act 1993* was relied on. These developments in practice underline the importance of the accuracy of Revised Acts.¹⁷

¹² [2014] IEHC 238.

¹³ [2014] IEHC 238, at para 19: "Essential to this issue on the duty of An Bord Pleanála when making decisions on road applications is the attempt to sort out the multifarious sections and amendments that define its functions and its duty. That, it might be said, is far from easy. The Law Reform Commission has performed a salutary public service in bringing this kind of legislation up to date on <http://www.lawreform.ie/revised-acts/alphabetical-list-of-revised-acts.360.html>. Quotes [that is, quotes in the judgment from the 1993 and 2000 Acts, as amended] are taken from this."

¹⁴ [2020] IEHC 25.

¹⁵ [2020] IEHC 25, at para 3: "Counsel, very helpfully, furnished the court with an unofficial consolidation of the 2000 Act, prepared by the Law Reform Commission and updated to 24 October 2019 as well as an unofficial consolidated version of the Planning and Development Regulations 2001-2019, prepared by the Department of Housing, Planning and Local Government."

¹⁶ [2020] IESC 5, judgment of Charleton J at para 18.

¹⁷ In *DPP v Sherlock* [2020] IEHC 362, the High Court (Humphreys J) identified an error in the Revised Act version of section 56(1) of the *Road Traffic Act 1961*. Immediately after the publication of the judgment on the Courts Service website, the Commission corrected the error

- [6.11] There is no equivalent provision to section 13 of the *Interpretation Act 2005* for secondary legislation, which means that judicial notice cannot be taken of statutory instruments. Consequently, statutory instruments have to be proven, in accordance with the procedure set out in section 4(1) of the *Documentary Evidence Act 1925*. Section 4(1) provides that instruments can be proven either by presenting a copy of the Iris Oifigiúil in which its making was announced or by producing the Stationery Office copy of the relevant instrument. This arises frequently in the prosecution of offences under the *Misuse of Drugs Act 1977*, because key ingredients of the offences are prescribed in statutory instruments made under the 1977 Act. In *The People (DPP) v Cleary*,¹⁸ the Court of Criminal Appeal held that the prosecution's failure to prove the *Misuse of Drugs Regulations 1988 and 1993* made under the 1977 Act was a breach of its duty under section 4(1) of the *Documentary Evidence Act 1925* and detrimental to the case against the defendant. The Court therefore allowed the appeal against conviction and did not order a retrial. This was again reiterated in *Kelly v DPP*,¹⁹ in which the High Court held that the trial judge had erred in taking judicial notice of the *Misuse of Drugs Regulations (Amendment) Regulations 1993*, on which the conviction was based. Instead, the onus was on the prosecution to prove the Regulations in the manner prescribed by section 4(1) of the 1925 Act and the prosecution's failure to do so meant that they had not met all of the essential proofs necessary to secure a conviction. The applicant's application was allowed, therefore, because the precise ingredients of the offence had not been proven.

(b) The legal status of online legislation in other jurisdictions

- [6.12] In contrast to the current situation in Ireland, a number of other jurisdictions, including at a supranational level the European Union, have already enacted legislation that confers *prima facie* (or presumed) evidential status on online versions of legislation, including on Revised Acts published online, rather than on the printed, as enacted versions. In addition, the Commission notes that some jurisdictions use mobile technology in the production and publication of legislation. As of 2009,²⁰ of the 27 EU Member States, 20 of them, 75% of EU Member States, had authenticated the online versions of their laws: see Table 1.
- [6.13] It is worth noting that in some EU Member States, including in Ireland, a distinction is drawn between, on the one hand, the official legal gazette or journal (in Ireland, Iris

on the Revised Act and inserted an editorial note referring to the previous error, and that it had been identified in the judgment in the *Sherlock* case.

¹⁸ [2005] IECCA 51, [2005] 2 IR 189.

¹⁹ [2010] IEHC 336.

²⁰ The most recent survey conducted by the European Forum of Official Gazettes refers to 2009.

Oifigiúil)²¹ and, on the other hand, the online legislation database or portal on which legislation is published (in Ireland, the electronic Irish Statute Book (eISB)).²² In EU Member States in which the online versions of laws are authoritative, either the electronic version of the official legal gazette or the legislation portal has been granted official status.²³ Where the electronic version of the gazette is the official source, the full text of laws must be published in the official gazette or database, as statutorily or constitutionally mandated.²⁴ In other Member States, no distinction is drawn between the legal gazette and the legislation portal.²⁵

EU Member State	Online Version of Legislation Authenticated / Legally Binding	Year Online Legislation Authenticated	Means of Ensuring Authenticity
Austria	Yes	2004	Electronic signature
Belgium	Yes	2003	Image format
Bulgaria	No	-	-
Croatia	No	-	-
Cyprus	No	-	-

²¹ Iris Oifigiúil is available at <www.irisoifigiuil.ie> accessed 26 August 2020.

²²The electronic Irish Statute Book (eISB) is available at <www.irishstatutebook.ie> accessed 26 August 2020..

²³ In the United Kingdom, it appears that the Queen's Printer has indicated that legislation published on the official portal (<www.legislation.gov.uk> accessed 26 August 2020) can be relied upon as having evidential status under the *Documentary Evidence Act 1882* (although as noted above, the 1882 Act refers to Acts "printed under the superintendence or authority of Her Majesty's Stationery Office"). In Italy, the gazette (*Gazzetta ufficiale della Repubblica italiana*) has official status. The gazette has been legally binding, alongside the paper edition, since 1 January 2009, whereas the texts of laws (both as enacted and as revised) that are published in the online legislation database, Normattiva (<www.normattiva.it> accessed 26 August 2020), are not official.

²⁴ In Estonia, for example, section 2(1) of the *Riigi Teataja Act* requires legislation to be published in the official journal (*Riigi Teataja*), while section 3(1) requires the same of official consolidations of Acts. Similarly, Article 72(4) of the Maltese Constitution provides that, once a law has received presidential assent, it shall be published in the online Government Gazette "without delay" and that laws do not come into effect until they have been so published.

²⁵ In Spain, for example, all legislation and legal notices are published in the Official Statute Bulletin (*Boletín Oficial del Estado*), the online version of which has been legally binding since 2009. It can be accessed at <www.boe.es> accessed 26 August 2020. This is also the case in Greece, where the Greek national gazette (*Efimeris tis Kiverniseos tis Ellinikis Dimokratias*) contains all legislation and legal notices. It can be accessed at <www.et.gr> accessed 26 August 2020.

Czech Republic	No	-	-
Denmark	Yes	2008	Chain of trust; digital and server signature; SSL protocol; ²⁶ other systems
Estonia	Yes	2002	Thawte web server certificate based on the HTTPS protocol
Finland	Yes (only where the paper addition cannot not be made available in cases of emergency)	2010	Secure HTTPS
France	Yes	2004	Dated; time stamped; electronic signature
Germany	No	-	-
Greece	No	-	-
Hungary	Yes	2008	A process based on the SHA-512 algorithm ²⁷
Ireland	No	-	-
Italy	Yes	2009	Electronic signature
Latvia	Yes	2012	Secure servers; electronic signature
Lithuania	Yes	2014	Electronic signature
Luxembourg	Yes	2016	Secure servers; chain of confidence
Malta	Yes (Subject to article 11A(4) of Statute Law Revision Act 1980 (as amended by s.63 of Act No. III of 2004) ²⁸)	2004	Original files saved in Adobe InDesign format
Netherlands	Yes	2009	Secure connection; deposition at a notary
Poland	Yes	2012	Electronic signature
Portugal	Yes	2006	Dated

²⁶ SSL refers to Secure Sockets Layer, which is a standard security protocol for establishing an encrypted link between a web server and a web browser in an online communication. This ensures that all data transmitted between the server and the browser remain encrypted.

²⁷ SHA-2 (Secure Hash Algorithm 2) is a set of cryptographic hash algorithms, of which SHA-512 is one hash function. A cryptographic hash is a kind of signature for text or a data file. SHA-2 was designed by the United States National Security Agency.

²⁸ Section 11A(4) of the 1980 Act provides that "the text of any law published on an internet site in accordance with this article shall be deemed to be a true representation of the law incorporating all amendments up to the date indicate on the internet site", provided that there is no evidence to the contrary. Therefore, in cases of discrepancy between the online and printed versions of statutes, the printed version prevails.

Romania	Yes	2009	Electronic signature
Slovakia	Yes	2016	Electronic signature
Slovenia	Yes	2007	Time stamped; electronic signature
Spain	Yes	2009	Dated; time stamped; electronic signature
Sweden	Yes (Statutes issued after 1 April 2018 only) ²⁹	2018	Electronic stamp / digital certificate

Table 1: Status of Online Legislation in 27 EU Member States

[6.14] In the Issues Paper, the Commission sought the views of consultees as to what legal status, if any, should be given to online versions of legislation, including to Revised Acts.³⁰ The submissions received strongly favoured granting official status to online versions of Acts and statutory instruments. The majority of respondents were in favour of the online versions of legislation serving as the official versions, as this reflects modern digital practice and would bring Ireland into line with many other jurisdictions, including the majority of European Union Member States, as well as with the European Union itself, and with many other common law jurisdictions. Concern was expressed by some consultees about Revised Acts. Some thought they should not be granted official legal status until a suitable period has passed, allowing for phased programmes of consolidation to have been firmly established.

(c) Legal basis for authenticating electronic versions of legislation

[6.15] For the online versions of legislation to serve as the official versions, it would be necessary to designate an online database of legislation as the authoritative source of all legislation in the State. The most obvious current candidate for this is the electronic Irish Statute Book (eISB). As mentioned above, a number of jurisdictions have enacted such legislative provisions, some of which are discussed in the following sections.

²⁹ All laws enacted in Sweden from 1 April 2018 onwards are deemed to have been promulgated by virtue of their publication on the Swedish Constitution Collection (*Svensk förfatningssamling*) (SFS) website, <<https://www.svenskforfatningssamling.se/>> accessed 26 August 2020. All laws enacted prior to 1 April 2018 were deemed to have been promulgated by virtue of their publication in the printed version of the SFS, the online version of which is available at <<http://rkrattsdb.gov.se/sfspdf/>> accessed 26 August 2020.

³⁰ *Issues Paper on Accessibility, Consolidation and Online Publication of Legislation* (LRC IP 11-2016) at 86.

(i) *Canada*

- [6.16] In Canada, since 1 June 2009, all consolidated Acts and regulations that are published on the Justice Laws Website are official,³¹ which means that the online versions as they appear on the website can be relied on for evidential purposes. The hardcopy versions also remain official. The legal basis for this is section 31(1) of the *Legislation Revision and Consolidation Act* (previously the *Statute Revision Act*), which provides:

"Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown."

- [6.17] The Act also makes clear that consolidated versions of legislation do not constitute new law. Thus, sections 31(2) and 31(3) of the Act provide that, in the event that inconsistencies arise between the original Act or, as the case may be, statutory instrument, and the relevant consolidated statute, the original Act or statutory instrument prevails. This means that the online versions, being published in consolidated form only, are presumed to be evidence of the law, subject to any evidence to the contrary.
- [6.18] Similar authenticating provisions have been enacted in Canada at the provincial level, some of which are outlined in the following sections.
- a. Manitoba
- [6.19] Part 5 of the Manitoban *Statutes and Regulation Act* provides that the bilingual version of an original or consolidated Act, or of a regulation, published on the Manitoba Laws website is the official version of that Act or regulation.³² Of particular relevance is section 29(1) which provides that, in the absence of evidence to the contrary, "an official copy of an original Act or regulation is presumed to be an accurate statement of that law" and is therefore admissible in court as evidence of the law. Similarly, section 29(2) provides for the admissibility of the official copy of a consolidated Act or regulation as evidence of the law.
- [6.20] Section 27(1) clarifies that the hardcopy version of an Act or regulation printed under the authority of the Queen's Printer is also an official copy. Section 27(2) makes it possible to attach a disclaimer to an Act or regulation that expressly states that the

³¹ <<http://laws-lois.justice.gc.ca/eng/>> accessed 26 August 2020.

³² <<http://web2.gov.mb.ca/laws/index.php>> accessed 26 August 2020.

online or hardcopy version of such an Act or regulation is not the official version. It is worth noting that, where a regulation is made in English only and not made in both English and French simultaneously, the English version is an official version of that regulation, whether published in printed or electronic form.

b. New Brunswick

- [6.21] Since 2011, New Brunswick Acts and regulations have been published online officially pursuant to the *Queen's Printer Act*. Section 1 of the Act defines "publish" as "to make public by or through any media", which encompasses publication via electronic means. The official website on which the statutes are published is housed on the website of the Government of New Brunswick.³³

c. Newfoundland and Labrador

- [6.22] The relevant legislation in relation to the authenticity of online legislation in Newfoundland and Labrador is its *Statutes Act*. Section 11(1)(b) of that Act, as inserted by section 3 of the *Statutes of Newfoundland and Labrador 2010*, provides that a copy of legislation, in either as enacted or consolidated form, is an official copy if it is accessed from the legislation website in accordance with section 17(b) of the Act. Section 17(b) empowers the Minister of Justice to make regulations prescribing the form or format in which online legislation shall be published. In 2011, the Minister for Justice made the *Official Copy Regulations* under section 17(b). Regulation 3 of the 2011 Regulations prescribes the format in which official hardcopy and official electronic versions of legislation may be accessed. The legislation website is the website of the Office of the Legislative Counsel of Newfoundland and Labrador, and section 10 of the *Statutes Act* requires the Office of the Legislative Counsel to maintain and safeguard the electronic database of as enacted and consolidated legislation.³⁴

d. Nova Scotia

- [6.23] Section 8(3) of the *Statute Revision Act* of 1989 provides that consolidations and revisions of the Nova Scotian statutes, as prepared, authorised, and published in accordance with the Act, may be relied upon as evidence of their contents pursuant to the *Evidence Act*.

e. Ontario

- [6.24] Similarly, in Ontario, Part IV of the *Legislation Act 2006* concerns the "Proof of Legislation", with section 35(1)(b) granting official status to a copy of a law that is

³³ <https://www2.gnb.ca/content/gnb/en/departments/jag/attorney-general/content/acts_regulations.html> accessed 26 August 2020.

³⁴ Section 10 was inserted by section 3 of the *Statutes of Newfoundland and Labrador 2010*.

accessed from the e-Laws website or that is in a prescribed format under section 41(1)(b).³⁵ In addition, section 41(c) of the Act authorises the Attorney General to make regulations that prescribe official copies for the purposes of section 35(1)(c). Section 41(b) also authorises the Attorney General to make regulations that prescribe forms or formats for the purposes of section 35(1)(b).

f. Québec

- [6.25] In Québec, section 7 of the *Act Respecting the Compilation of Québec Laws and Regulations* provides that any copy of a Compilation of the Québec Laws and Regulations that is published by the Québec Official Publisher "confers official status on the texts". Such official status is granted purely by virtue of the publication having been performed by the Québec Official Publisher. The medium through which such publication occurs is immaterial for the official status of the laws. The Compilation of the Québec Laws and Regulations is a consolidation of the laws and regulations that are in force and are either of a general and permanent nature or are used very regularly, as determined by the Minister of Justice.

(ii) Australia

- [6.26] At the federal level in Australia, from 2008 until its repeal in 2016, the *Acts Publication Act 1905*, as amended,³⁶ dealt with the electronic publication of Acts completely separately from the printed publication of Acts, which was provided for in Part 2 of the Act. The Act conferred "official status" on the ComLaw website, which has since been replaced by the Federal Register of Legislation.³⁷
- [6.27] The 1905 Act was repealed in 2016 and replaced by the *Legislation Act 2003*, as amended.³⁸ Chapter 2, Part 3 of the 2003 Act is concerned with "authorised versions" of legislation. Section 15Y sets out a simplified outline of this Part of the Act, providing that authorised versions of both primary and secondary legislation can be accessed from the "approved website." Section 15ZA of the 2003 Act provides more specifically that "[a]n electronic copy of a registered law or explanatory statement is an authorised version of the registered law or explanatory statement" provided that certain criteria, specified within the section, are met. These criteria include that the website on which

³⁵ <<https://www.ontario.ca/laws>> accessed 26 August 2020. See Kim, Barker, "Open Access to Canadian Legal Information" (2013) 31(4) *TALL Quarterly* 6, at 8.

³⁶ By the *Evidence Amendment Act 2008*.

³⁷ <www.legislation.gov.au> accessed 26 August 2020.

³⁸ The 1905 Act was repealed by the *Acts and Instruments (Framework Reform) Act 2015* which also amended the *Legislation Act 2003*. The 2015 Act was itself amended with effect from March 2016 by the *Acts and Instruments (Framework Reform) (Consequential Provisions) Act 2015*.

the law is published expressly states that the law is an authorised version or that the law itself states this.

- [6.28] Sections 15ZA(3) and 15ZA(4) of the 2003 Act provide that a printed copy of a law is also an authorised version, provided that the particular copy indicates this in a way that is prescribed by the rules. This also applies if the copy is produced directly from another authorised version, for example, if it is printed directly from the approved website, that is, from the Federal Register of Legislation.
- [6.29] Section 15ZA(6) sets out the forms through which it is possible to indicate that a version of the law is authorised. It provides that a logo, a particular form of words, or a unique identifier may be used to indicate that a version of the law is an official version. It also specifies that a combination of these forms can be used.
 - a. Australian Capital Territory
- [6.30] In the Australian Capital Territory, section 18 of *Legislation Act 2001* establishes the ACT Legislation Register and requires the Parliamentary Counsel to maintain it in electronic form. Section 19 specifies the contents that must be published in the Register, which includes Acts as enacted, secondary legislation as made, commencement information, explanatory material, Bills that have been introduced to the Legislative Assembly, and authorised republications.³⁹ Section 21 of the 2001 Act requires the Parliamentary Counsel to approve a website for the purposes of publishing authorised electronic legislation.
- b. New South Wales
- [6.31] Legislation published on the official legislation website of the Government of New South Wales is authorised for evidential purposes and certified as complying with the form specified under section 45C of the *Interpretation Act 1987*. Section 45C applies to both legislation as enacted and as amended. Section 45C uses the discretionary "may" rather than mandatory "shall" in conferring Parliamentary Counsel with the responsibility to publish legislation electronically on the NSW website. Nevertheless, in practice, all legislation is published on the NSW website, and it is possible to view both repealed and in-force legislation, as well as legislation as originally enacted, as amended, and as at a particular point in time.

³⁹ An authorised republication is defined in section 15 of the 2001 Act as being a republication of a law that has been authorised by the Parliamentary Counsel under the Act.

c. Queensland

- [6.32] In Queensland, all legislation enacted from 29 January 2013 onwards and published on the official Queensland Government website is authoritative.⁴⁰ Section 10A of the *Legislation Standards Act 1992* governs the authorisation of legislation, including reprints prepared under the *Reprints Act 1992*, by the Parliamentary Counsel. Section 7(l) of the 1992 Act provides that the Office of the Parliamentary Counsel is responsible for the printing and publication of all legislation, including Bills and relevant legislative information. Section 43(h) of the 1997 Act requires judicial notice to be taken of every official copy of Queensland legislation. Section 46A of the *Evidence Act 1997* provides that an official copy of Queensland legislation shall be proof of the law for evidential purposes, unless there is evidence to the contrary.

d. South Australia

- [6.33] Legislation published on the South Australian Legislation website is authorised and has evidential status where it has been published under the *Legislation Revision and Publication Act 2002*. Such legislation contains the authorising statement: "Published under the Legislation Revision and Publication Act 2002." Section 9 of the 2002 Act provides that where legislation has not been published under the 2002 Act, it cannot be relied upon as evidence of the law and is published for information only. Section 8(1)(b) provides that legislation may be published under the Act by electronic means, again imposing a discretionary obligation in this regard.

e. Tasmania

- [6.34] In Tasmania, section 6 of the *Legislation Publication Act 1996* addresses the status of online legislation, and provides that the law is "to be taken in all circumstances and for all purposes to be as [it] appear[s] from time to time in the authorised version" of the Act which is available on the database as at that particular date. Such online legislation must be accompanied by a certificate of the Chief Parliamentary Counsel stating that the legislation is authorised as at the date set down and incorporates any amendments made to the legislation.⁴¹

f. Victoria

- [6.35] Section 62 of the *Interpretation of Legislation Act 1984* authorises the Chief Parliamentary Counsel to authorise electronic versions of legislation. Again, similar to New South Wales, the use of the discretionary "may" is worth noting. In order for an electronic version to be authorised, it must be in the format that has been prescribed

⁴⁰ Rubacki, "Free Access Online Legislation in a Federation: Achievements of Australian Governments and Issues Remaining" (2014) 2 *Journal of Open Access to Law* 1, at 10.

⁴¹ Section 6(9) of the *Legislation Publication Act 1996*.

by the Chief Parliamentary Counsel, include the words "Authorised Version" at its beginning, and include "Authorised by the Chief Parliamentary Counsel" at the foot of each of its pages. Despite the discretionary nature of the Chief Parliamentary Counsel's authorisation power, in practice all legislation published on the Victorian Legislation and Parliamentary Documents website have been authorised from 1 January 2011 onwards.⁴² This includes both Acts as enacted and consolidated versions of Acts.

(iii) Hong Kong

- [6.36] Inspired by the Tasmanian approach toward authenticating its online legal database,⁴³ in Hong Kong all PDF copies of laws published on the Hong Kong e-Legislation (HKeL) database that are accompanied by a check mark icon and which include the words "Verified Copy" have legal evidential status.⁴⁴ A list of all verified legislation can be downloaded via a quick link on the homepage of the website. Section 5 of the *Legislation Publication Ordinance* (Cap. 614) governs the status of verified copies of legislation published on the HKeL database.⁴⁵ Under section 5(1), a copy is an official or "verified" copy if it is either published on or printed directly from an approved website (that is, the HKeL database) and it carries an official verification mark.

(iv) Iceland

- [6.37] It has been possible to rely on legislation published on the online version of the Icelandic Official Journal (*Stjórnartíðindi*) as evidence of the law since 8 November 2005. The Official Journal is produced under the *Regulation on the Issue of the Official Journal* (Regulation No. 958/2005). Article 1 of this Regulation mandates the electronic publication of the Official Journal on the www.stjornartidindi.is website. However, the Minister for Justice possesses the discretionary power to decide that the legal effect of publication, pursuant to Article 8 of the *Act on the Official Journal and the Official Gazette* (Act No. 15/2015), shall be based on the printed version of the Official Journal, as opposed to the electronic version. Article 8 of that Act concerns the legal effect of publication in the Official Journal, setting out the general principle that individuals cannot be bound by obligations contained in laws and regulations until such provisions have been published in the Official Journal. Obligations become enforceable against citizens from the day following their publication in the Official Journal. Conversely, the Government is bound by legislatively created obligations from

⁴² <<http://www.legislation.vic.gov.au/>> accessed 26 August 2020.

⁴³ Roger, "Statute Database Publication: How to Keep Statutory Law Current, Historical, Free and Useful" (2002) 4 *UTS Law Review* 74, at 75.

⁴⁴ <<https://www.elegislation.gov.hk/>> accessed 26 August 2020.

⁴⁵ *Ibid.*

the entry into force of the relevant legal instrument, regardless of publication in the Official Journal.

(v) *Isle of Man*

- [6.38] The Isle of Man's *Legislation Act 2015* was at least partially influenced by the Australian *Legislation Act 2003*.⁴⁶ Although, at the time of writing (August 2020), it has not been commenced, section 43 of the *Legislation Act 2015*, as amended by section 23 of the *Statute Law Revision Act 2015*, provides for the publication of legislation in an electronic gazette on a website approved by the Attorney General. Section 43(1)(b) of the 2015 Act sets out the definition for the electronic gazette as "a website approved by the Attorney General" for the purpose of the publication of Manx legislation. The approved website is likely to be www.legislation.gov.im, which currently provides access to legislation as well as to the online version of the official gazette of the Isle of Man, the *Isle of Man Legislation Newsletter*.
- [6.39] Section 98(3) of the 2015 Act inserts section 17A into the *Evidence Act 1871*, but at the time of writing (August 2020), section 98(3) and consequently section 17A, has yet to be commenced.⁴⁷ Once it comes into force, section 17A will provide for the *prima facie* evidential proof of the contents of the gazette as follows:

"In the absence of evidence to the contrary, the production of a printout of the electronic gazette is evidence of –
(a) that part of the gazette; and
(b) any day on which the printout states the part was published in the gazette."

(vi) *Malta*

- [6.40] Article 72(4) of the Maltese Constitution requires legislation to be published as soon as possible once it has been signed by the President. Article 16 of the *Interpretation Act* (Chapter 249 of the Laws of Malta) provides that the electronic publication of laws is sufficient for the purposes of Article 72(4), provided that a notice of the electronic publication is published in the official Government Gazette.⁴⁸ Electronic publication can be carried out either through the production and dissemination of a CD Rom or

⁴⁶ See paras 6.27, above.

⁴⁷ The part of the 2015 Act that relates to the gazette has yet (August 2020) to be commenced because particular resources and information technology systems need to be put in place before the authenticated version of the gazette goes live.

⁴⁸ The Government Gazette is available at:

<<https://www.gov.mt/en/Government/DOI/Government%20Gazette/Pages/Government-Gazette-Repository.aspx>> accessed 26 August 2020.

through publication on a public website. A hard copy of an electronically published law must be made available for public scrutiny within a Government Department or Office, and the public must be notified in the Government Gazette of the availability of this hardcopy.

- [6.41] Section 11A(4) of the *Statute Law Revision Act 1980* confers official status on the online versions of consolidated laws, and consolidated secondary legislation made under them, in the absence of proof to the contrary. A notification of the online publication of a consolidated law must also be published in the Government Gazette.

(vii) New Zealand

- [6.42] In New Zealand, all Acts and legislative instruments must be published in electronic form, both as enacted and as revised. Under sections 69 and 71(1) of the *Legislation Act 2019*, the Chief Parliamentary Counsel is required to ensure that electronic versions of legislation are published as soon as is practicable following enactment of the relevant Act. In accordance with sections 70 and 71(1) of the 2019 Act, the Chief Parliamentary Counsel must also publish revised versions of primary and secondary legislation electronically as soon as is practicable following the amendment of the relevant Act or instrument.
- [6.43] Under section 71(2) of the 2019 Act, the Chief Parliamentary Counsel may issue official print versions of legislation. The New Zealand Legislation database contains both official and unofficial legislation.⁴⁹ Versions of legislation on the online database that possess official evidential status include: all Acts and legislative instruments, whether as enacted or revised, since 2008; the latest revision of all Acts and legislative instruments enacted or made between 1931 and 2007, if still in force, as well as some earlier revised versions of some pieces of such legislation; and the latest revision and some earlier revisions of some pre-1931 Acts.
- [6.44] Section 72 of the 2019 Act obliges the Chief Parliamentary Counsel to ensure that official electronic versions of legislation that have been issued under section 78 of the Act can be accessed via, or downloaded from, a website that is maintained either by or on behalf of the New Zealand Government.

(viii) United Kingdom

- [6.45] In the United Kingdom, section 2 of the 1882 Act provides that an Act or statutory instrument that "purports to be printed under the superintendence or authority of Her Majesty's Stationery Office" shall be conclusive evidence of its content. Even though the 1882 Act refers to an Act or statutory instrument being "printed", the Queen's

⁴⁹ <<http://www.legislation.govt.nz/>> accessed 26 August 2020.

Printer has stated that since the UK Legislation Database www.legislation.gov.uk went live in 2002, the online versions of legislation published on it carries the same official status under the 1882 Act as the printed versions.⁵⁰ Both the printed and online versions of laws are generated from the same source document and an audit trail is maintained that demonstrates that the versions that are published in either format are the same as the version that was signed and submitted by either the UK Parliament, in the case of Acts, or the relevant Government Department, in the case of statutory instruments.

(d) Means of authenticating electronic versions of legislation

- [6.46] In addition to designating a website or database as the official source from which legislation can be accessed by the public, it is necessary to develop a system that ensures the authenticity and inalterability of the electronic versions of legislation.⁵¹ Having an official electronic signature or watermark reassures end users that the electronic versions of legislation that bear that signature or watermark can be relied on in court as presumptive evidence of their content. It also allows for unofficial versions to be published on the same database or website that do not bear the signature or watermark, where a revised version is pending an update following amendment. As can be seen in Table 1, above, a range of authentication methods have been employed in other EU Member States to ensure the authenticity of official online versions of legislation. These have included:
1. Certifying hard copy scanned into electronic form and displayed as PDF;
 2. Electronic signature based on a qualified certificate and created by a secure-signature-creation device;⁵²
 3. PDF format with authoritative logo;⁵³

⁵⁰ The "Guide to Revised Legislation on Legislation.Gov.UK", page 1 (available at <https://www.legislation.gov.uk/pdfs/GuideToRevisedLegislation_Oct_2013.pdf> accessed 26 August 2020) states: "The revised legislation on legislation.gov.uk is the official revised version of the statute book for the UK in electronic form."

⁵¹ This need was also recognised by the American Association of Law Libraries: see American Association of Law Libraries, *Access to Electronic Legal Information Committee and Washington Affairs Office, State-by-State Report on Authentication of Online Legal Resources* (March 2007), at 9.

⁵² It is essential that the end user of an online version of an Act or SI that has been downloaded can be completely confident that the downloaded document is the official, unaltered version.

⁵³ In Australia, the authoritative text is always in Adobe Acrobat format and is stamped either with "Authorised version", "Authoritative", or "Federal Register of Legislative Instruments".

4. Certification;⁵⁴
5. Encryption;
6. Public key infrastructure; and
7. Digital watermarking.

- [6.47] As discussed below,⁵⁵ EU law must be published in the electronic edition of the Official Journal on the EUR-Lex website in order to become enforceable. Authentication of the laws published on EUR-Lex is ensured through the use of either a qualified electronic signature or a qualified electronic seal, as defined in Regulation (EU) No 910/2014 on the mutual recognition of electronic identification and signatures, the eIDAS Regulation.⁵⁶ Regulation (EU) No. 216/2013 on the electronic publication of the Official Journal of the European Union was amended by Regulation (EU) No. 2018/2056 to take account of the eIDAS Regulation.⁵⁷
- [6.48] A qualified electronic signature is an electronic signature that has been created by an electronic signature creation device that meets the requirements set out in Annex II of the eIDAS Regulation.⁵⁸ A qualified electronic signature must also be based on a qualified certificate that is issued by a qualified trust service provider and meets the requirements that are specified in Annex I.⁵⁹ A qualified electronic seal is an electronic seal that is created by a qualified seal creation device that meets the requirements set out in Annex II of the eIDAS Regulation. A qualified electronic seal must also be based on a qualified certificate for electronic seal, which is an electronic seal that is issued by

⁵⁴ It is possible for authentication to be provided digitally by means of certification. The Australian Capital Territory uses VeriSign SSL certificates as a means of authentication. Denmark and Liechtenstein also use SSL certification, alongside electronic signatures.

⁵⁵ See paras 6.70-6.76, below.

⁵⁶ On the content and effect of the eIDAS Regulation generally, see the Commission's 2016 *Report on the Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), at paras 5.84-5.136.

⁵⁷ Article 2(1) of Regulation (EU) No. 216/2013 was amended by Article 1 of Regulation (EU) No. 2018/2056, replacing "advanced electronic signature" with "qualified electronic signature", updating the underlying framework to reflect the fact that Regulation (EU) No. 910/2014, the eIDAS Regulation, repealed and replaced Directive 1999/93/EC, the Electronic Signatures Directive, which had been implemented by the *Electronic Commerce Act 2000*.

⁵⁸ These requirements include that the confidentiality signature creation data are assured, that these data can practically occur only once, that these data cannot be derived, and that the signature is reliably protected against forgery.

⁵⁹ For example, Annex I requires a certificate to indicate that it has been issued as a qualified certificate, to contain the name or pseudonym of the signatory and an identity code, and to include data that represent the relevant trust service provider.

a qualified trust provider and that meets the requirements set out in Annex III to the eIDAS Regulation.⁶⁰

(e) The importance of publication for the enforceability of legislation

- [6.49] In considering how legislation should be made available to the public, the Commission is conscious that the question of how legislation is to be officially published may have implications for the enforceability of such legislation. While legislation may generally come into force and be enforceable upon being enacted, this is not necessarily always the case, particularly where the legislation implements EU law.⁶¹ Additionally, a trend appears to be developing, as discussed later in the Chapter,⁶² by which legislation does not automatically commence upon its enactment but is increasingly subject to the making of Ministerial Commencement Orders.

(i) General position: primary legislation

a. Presumption of commencement

- [6.50] The Irish approach to the commencement and enforcement of legislation derives from the pre-1922 approach that was taken under the law of the United Kingdom, under which an Act generally became valid and enforceable upon receiving Royal Assent.⁶³ This general principle of immediately enforceable legislation on enactment was

⁶⁰ These requirements are similar to those set out in Annex I. For example, Annex III requires a certificate to indicate that it has been issued as a qualified certificate, to contain validation data and the name of the creator of the seal, and to include data that represent the relevant trust service provider.

⁶¹ See paras 6.70-6.76, below.

⁶² See paras 6.194-6.199, below.

⁶³ Royal assent is the UK monarch's agreement that a Bill becomes an Act of Parliament. It is essentially a formality and, in practice, is granted by the Lords Commissioners (collectively known as the Royal Commission) on the monarch's behalf as opposed to by the monarch in person. King Henry VIII (1509-1547) introduced the process of assent by the Lords Commissioners in 1542. Queen Victoria (1837-1901) was the last UK monarch to grant assent in person (1854). While the general principle of immediate enforceability following Royal Assent still applies within the United Kingdom, commencement orders are also now commonly used. In *RM v Scottish Ministers* [2012] UKSC 58, 2013 SLT 57, the UK Supreme Court commented on the use of commencement orders, stating that the time at which a particular statutory provision becomes part of the law of the United Kingdom is determined by the commencement provision Parliament enacts. This confirmed the approach of the UK House of Lords in *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513.

retained by the Irish State after independence in 1922.⁶⁴ This is also apparent in Article 25.4.1° of the 1937 Constitution, which provides:

"Every Bill shall become and be law as on and from the day on which it is signed by the President under this Constitution, and shall, unless the contrary intention appears, come into operation on that day."

- [6.51] The presumption of commencement on enactment is reiterated in section 16(1) of the *Interpretation Act 2005*, which provides that every provision of an Act comes into operation on the date of its passing, unless otherwise provided for by a "contrary intention" as referred to in Article 25.4.1°. Thus, an Act may stipulate an alternative date on which all or some of its provisions are to come into effect, and may also provide for its commencement by empowering a Government Minister to bring provisions into force by way of a statutory instrument, generally a commencement order.⁶⁵ The use of commencement orders and the difficulty they can pose for the accessibility of legislation is discussed below.⁶⁶

b. Promulgation requirement

- [6.52] On enactment, there is a constitutional imperative, under Article 25.4.2° of the Constitution, for an Act to be promulgated in Iris Oifigiúil.⁶⁷ Although promulgation can be interpreted to encompass not only the announcement of the enactment of an Act but also the printing and publication of its text,⁶⁸ the Constitution provides a narrow interpretation. Promulgation as prescribed in Article 25.4.2° requires only the publication of a notice that the Act has been enacted and does not necessitate the

⁶⁴ Article 41 of the Constitution of the Irish Free State provided that "[s]o soon as any Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent."

⁶⁵ For a recent discussion of the impact of commencement orders on the work of the legislature, see Sheehy Skeffington, "Commencement Orders: A Creeping Incursion into the Legislature's Domain?" (2018) 59 *Irish Jurist* 93.

⁶⁶ See paras 6.151-6.156, below.

⁶⁷ The word "promulgate" is derived from the Latin word *promulgare*, which means to proclaim. On promulgation, see Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 20-21; Hogan, White, Kenny and Walsh, *Kelly The Irish Constitution* 5th ed (Dublin 2018) at paras 4.5.27-4.5.28, 4.5.35-4.5.40; and Bennion, *Statutory Interpretation: A Code* 6th ed (London 2002) at 197. Iris Oifigiúil, the Official Irish State Gazette, is available at <www.irisoifigiul.ie/> accessed on 26 August 2020.

⁶⁸ As Hunt points out, Bentham advocated for this broader interpretation of promulgation: see Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 20-21.

publication of the text of the Act. In contrast, an act of the European Union only becomes enforceable once it has been published in full on EUR-Lex.⁶⁹

- [6.53] Despite promulgation being required by Article 25.4.2° and the use of the imperative “shall”, however, failure to comply with this provision does not affect the validity of an Act that comes into force upon signature by the President. This is most likely the case because, as noted above Article 25.4.1° does not contain any qualifying language that suggests the coming into force of an Act following a signature by the President is contingent upon any of the requirements set out in the following sub-paragraphs of the Article being fulfilled. This is demonstrative of the distinction that can be drawn between the validity of a legal norm and its applicability. The validity of a law can be understood as referring to its membership as a legal norm within a given legal system (in the present context, a Bill that becomes an Act and part of the Irish statute book by virtue of its having been signed by the President). The applicability of a law, however, refers to its capacity to be used to justify legal action.⁷⁰ The Presidential signature can therefore be considered as part of the validity criteria of an Act, whereas the publication of a notice in Iris Oifigiúil can be viewed as an applicability criterion.⁷¹ This means that an Act becomes valid law as soon as it is signed by the President, pursuant to Article 25.4.1°, and provided that it is not repugnant to the Constitution or any provision thereof.⁷² An Act cannot be enforced against citizens, however, until such time as it is promulgated through the publication of a notice of its existence in Iris Oifigiúil, and provided that, where relevant, it has also been commenced.⁷³

c. Publication

- [6.54] The narrow construction of promulgation that is provided by the Constitution is not supplemented by any legislative obligation to publish the full text of Acts, either in printed or electronic form. Promulgation alone, through the publication of a notice in Iris Oifigiúil, is therefore sufficient for an Act to become enforceable.⁷⁴ It seems

⁶⁹ See paras 6.70-6.76, below.

⁷⁰ Noonan, “The Wending Path of the Law: Unconstitutionality in the Irish Courts” (2018), available at SSRN<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3170600> accessed on 26 August 2020.

⁷¹ *Ibid.* However, publication of a notice in Iris Oifigiúil is not necessarily the only criterion that must be fulfilled in order for an Act to become legally applicable. In certain instances, for example, a commencement order must be made in order to bring some, or all, of the provisions of an Act into effect. See paras 6.151-6.156, below.

⁷² Consistency with the Constitution is the only other validity requirement prescribed by the Constitution in respect of statute law, and is set out in Article 15.4.2°.

⁷³ For a discussion of the commencement of legislation, see paras 5.194-5.199, above.

⁷⁴ See paras 6.70-6.76, below.

reasonable to assume that, because primary legislation has always been published in practice, a legislative obligation to publish primary legislation has never been expressly set out,⁷⁵ and it has therefore never been deemed necessary to create such an obligation.

- [6.55] Notwithstanding the absence of a legislative obligation to publish the full text of Acts, however, it is clear that the *Documentary Evidence Act 1925* envisages that primary legislation will, as a matter of practicality, be printed and published. Section 2 of the 1925 Act confers *prima facie* evidential status on a copy of an Act of the Oireachtas "printed under the superintendence or authority of and published by the Stationery Office." Section 5 of the 1925 Act provides for the presumption that any Act that purports to have been published by the Stationery Office or by its authority shall be presumed to have been printed under its superintendence and authority and to have been published by the Stationery Office. It is evident, therefore, that the Stationery Office (now the Government Publications Office) is authorised to publish and print legislation, or, alternatively, to oversee its publication and printing. However, nowhere in the 1925 Act is the Stationery Office obliged to fulfil this function. In the context of the period during which the 1925 Act was enacted (that is, that the State had only recently been established), it seems unlikely that the primary purpose of the Act was to ensure the widespread publication and dissemination of all legislation. Rather, the main concern of the Act appears to have been to legislate against the publication – and sale – of unauthorised versions of legislation by unauthorised publishers. Indeed, section 6 of the 1925 Act provides that it is an offence to print or publish a copy of an Act or statutory instrument that falsely purports to have been printed by, or under the supervision or authority of, the Stationery Office.
- [6.56] Section 7(1) of the *Official Languages Act 2003*, which is discussed below,⁷⁶ also makes reference to the printing and publication of legislation, specifically requiring the text of any Act of the Oireachtas to be "printed and published in each of the official languages simultaneously."⁷⁷ This does not, however, impose an obligation on the State to publish legislation in order for it to become enforceable. The situation remains that, where an Act is signed by the President in accordance with the Constitution,⁷⁸ it is valid law from that date. Failure to publish the text of an Act does not affect the

⁷⁵ Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 23.

⁷⁶ See paras 6.85-6.90, below.

⁷⁷ As noted below, this is tempered by section 7(2) of the 2003 Act, which provides for the publication on the internet of an Act in one of the official languages.

⁷⁸ Article 25.4.1°: see paras 6.50-6.53, above. See also the obiter comments by the High Court (Davitt J) in *The State (Taylor) v Circuit Court Judge of Wicklow* [1951] IR 311, in which the President's function in this regard was described as being analogous to that of a Government Minister making an order to bring an Act into force.

enforceability of that legislation, provided it has been promulgated in Iris Oifigiúil and has been commenced, where commencement is required. This has been confirmed by the Supreme Court in *Minister for Justice v Adach*⁷⁹ and *Minister for Justice v Tobin*.⁸⁰

- [6.57] In *Minister for Justice v Adach*,⁸¹ the appellant's delivery to Poland was ordered by the High Court on foot of a European Arrest Warrant that had been issued in April 2008, prior to the enactment of the *Criminal Justice (Miscellaneous Provisions) Act 2009*, Part 2 of which concerned European Arrest Warrants, and which was commenced on 25 August 2009.⁸² The appellant sought an appeal under section 16(12) of the *European Arrest Warrant Act 2003*, which had been amended by section 12(f) of the 2009 Act to limit the grounds under which an appeal could be taken in cases where the High Court "certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." The Supreme Court (Hardiman J) held that the publication of the Act on the eISB was not necessary for its enforceability, and that "the process of promulgation consists exclusively of the publication of a notice in Iris Oifigiúil, by direction of the President, stating that the Bill has become law."⁸³ The Court therefore rejected the appeal on the basis that the 2009 Act applied because, first, a notice of the Act had been published in Iris Oifigiúil on 24 July 2009, prior to the appeal being heard in October 2009 and, secondly, section 10 had been commenced on 25 August 2009 by way of a commencement order, the making of which had also been published in Iris Oifigiúil. The grounds on which an appeal could be taken were thus deemed to have already been limited. It is important to note that the arguments made on behalf of the applicant in respect of the insufficient promulgation of the 2009 Act, were relatively weak. The applicant did not expressly claim to have been ignorant of the contents of the Act, nor did he claim that he was unable to consult the original copy of the Act enrolled in the Office of the Registrar of the Supreme Court.⁸⁴ Furthermore, it was noted that, in the High Court, the judge had drawn the applicant's attention to the Act and to its commencement.⁸⁵

⁷⁹ [2010] IESC 33, [2010] 3 IR 402.

⁸⁰ [2012] IESC 37, [2012] 4 IR 147.

⁸¹ [2010] IESC 33, [2010] 3 IR 402.

⁸² *Criminal Justice (Miscellaneous Provisions) Act 2009 (Commencement) (No 3) Order 2009* (SI No 330 of 2009).

⁸³ [2010] IESC 33, [2010] 3 IR 402, at 407.

⁸⁴ [2010] IESC 33, [2010] 3 IR 402, at 34-36.

⁸⁵ Hogan, White, Kenny and Walsh, *Kelly The Irish Constitution* 5th ed (Dublin 2018) at para 4.5.38.

- [6.58] In *Minister for Justice v Tobin*,⁸⁶ the surrender of the appellant, on foot of several European Arrest Warrants issued by Hungary, was originally rejected by the High Court and the Supreme Court, on the grounds that Tobin had not "fled" from Hungary, which was required by section 10 of the *European Arrest Warrant Act 2003*. Section 10 of the 2003 Act was later amended by section 6 of the *Criminal Justice (Miscellaneous Provisions) Act 2009*, which was commenced on 25 August 2009,⁸⁷ removing the flight requirement. A subsequent European Arrest Warrant was issued by Hungary in September 2009, on foot of which the appellant's surrender to Hungary was ordered by the High Court (Peart J), but the Court also certified an appeal to the Supreme Court. On appeal, the Supreme Court rejected the argument that, as the amending provisions had not yet been published on the eISB, the amendment to the 2003 Act was not in force at the time the new arrest warrant had been issued. The Court held that the publication of the notice of the Act in Iris Oifigiúil was sufficient.
- [6.59] Both *Adach* and *Tobin* related to the publication of a notice in Iris Oifigiúil that certain provisions of the *Criminal Justice (Miscellaneous Provisions) Act 2009* had been commenced by the making of the *Criminal Justice (Miscellaneous Provisions) Act 2009 (Commencement) (No. 3) Order 2009*. The notice in question merely stated that the 2009 Order had been made by the Minister for Justice under section 1(3) of the *Criminal Justice (Miscellaneous Provisions) Act 2009*.⁸⁸ It gave no indication as to the particular provisions that were being commenced, nor of the effect or content of any of those provisions. This illustrates that the interpretation the Supreme Court has taken in respect of the promulgation requirement is extremely narrow.

(ii) General position: secondary legislation

a. Presumption of commencement

- [6.60] Section 16(3) of the *Interpretation Act 2005* provides that a statutory instrument that does not have any specified commencement date comes into operation at the end of the day immediately preceding the date on which the instrument was made. Therefore, the general principle of a presumption of immediate enforceability also applies to secondary legislation. It is also possible to specify a prospective date within the statutory instrument itself, on which it or some of its provisions will come into force. However, unlike primary legislation, where the commencement of a statutory instrument is other than on the day of its making, such commencement is usually provided for within that statutory instrument itself and a separate piece of legislation.

⁸⁶ [2012] IESC 37, [2012] 4 IR 147.

⁸⁷ Section 6 of the 2009 Act was also commenced by *Criminal Justice (Miscellaneous Provisions) Act 2009 (Commencement) (No. 3) Order 2009* (SI No 330 of 2009).

⁸⁸ Iris Oifigiúil, Issue Number 68 of 2009 (25 August 2009).

or commencement order, is not required. In general, therefore, deferring the commencement of secondary legislation poses less of an accessibility issue than deferring the commencement of primary legislation.⁸⁹

b. Promulgation requirement

- [6.61] Similar to the promulgation requirement for Acts prescribed by the Constitution, section 3(1)(b) of the *Statutory Instruments Act 1947*, as amended by section 1 of the *Statutory Instruments (Amendment) Act 1955*, requires promulgation of a statutory instrument once it has been made, through publication in Iris Oifigiúil of a notice of its existence and of where a copy can be obtained. However, the enforceability of a statutory instrument is only adversely affected by the failure to publish such a notice in Iris Oifigiúil where a statutory instrument creates a criminal offence. Section 3(3) of the 1947 Act requires that, where a person is charged with contravening a provision in a statutory instrument and, where the prosecutor fails to prove that a notice had been published in Iris Oifigiúil prior to the alleged contravention having occurred, the charge must be dismissed unless reasonable steps had been taken to bring the import of the relevant statutory instrument to the notice of the public. This means that promulgation can only be characterised as an applicability requirement in respect of secondary legislation where that legislation creates a criminal offence.

c. Publication

- [6.62] Whereas there is no express constitutional or statutory requirement to print Acts, section 3(1)(d) of the *Statutory Instruments Act 1947* provides that a statutory instrument "shall" be printed "under the superintendence of the Stationery Office" as soon as possible after its making. The procedures set out in section 3 in relation to the publication of statutory instruments have been described as "strict",⁹⁰ which contrasts starkly with the lack of prescription of any such equivalent procedures in respect of the publication of Acts. However, non-publication of a statutory instrument does not impede its enforceability, once it has been appropriately promulgated, where promulgation is an applicability criterion.

(iii) Enforceability of unpublished legislation where the right to liberty is at risk

- [6.63] Although the decisions in the *Adach* and *Tobin* cases, discussed above, illustrate that the enforceability of legislation is not contingent on the publication of its text in full, there remains some doubt as to whether mere promulgation, as narrowly defined by the Constitution, would be sufficient where a person's liberty was at risk by virtue of that legislation. Both defendants in these cases raised the issue of their right to liberty

⁸⁹ See paras 6.194-6.199, below.

⁹⁰ Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (First Law 2007) at 23-24.

as grounds on which their surrender should not be ordered. It is worth considering the freedom of liberty aspect of these cases, therefore, notwithstanding the fact that it was raised unsuccessfully.

- [6.64] The claim in *Tobin* in relation to there being a risk to his right to liberty was relatively weak. Tobin was at risk of being arrested once the arrest warrant had been issued, during the period between the promulgation of the Act and its publication on the eISB. However, he was not in fact arrested and detained until after the Act had been published on the electronic Statute Book (eISB).⁹¹ Despite this, Tobin argued that an arrest that was made pursuant to a warrant that had been granted when the relevant legislation had not been published constituted a breach of Article 5 of the European Convention on Human Rights.⁹² Article 5 guarantees the right to liberty and security, prohibiting the deprivation of liberty except in specified cases and, crucially, "in accordance with a procedure prescribed by law". Relying on the Northern Ireland High Court decision in *Chaos v Spain*,⁹³ Tobin alleged that the warrant was issued at a time during which there was no such prescribing "law". In *Chaos*, the Northern Ireland High Court expressed the view that the European Court of Human Rights had firmly established that the Article 5 requirement of deprivation being carried out "in accordance with a procedure prescribed by law" means that such law must be "accessible and foreseeable."⁹⁴ The Court further clarified that accessibility involves making the published text of the relevant law available, citing the judgments in *Silver v United Kingdom*⁹⁵ and *R (Purdy) v Director of Public Prosecutions*⁹⁶ in support. However, in *Tobin*, the Supreme Court declined to express a view on the Convention argument, because the 2009 Act had been enacted, promulgated, commenced, and published by the time Tobin's liberty was deprived.
- [6.65] In the *Adach* case, Adach had also argued that there was a requirement under the Convention for more extensive promulgation, namely, that it would be necessary to publish the full text of an Act, when freedom of liberty was at stake. While the Supreme Court rejected this argument on the basis that Adach's liberty was not in fact at risk, the issue of whether mere promulgation, as narrowly defined by the

⁹¹ The full text of the 2009 Act was published on the eISB on 3 November 2009. Tobin was arrested on 10 November 2009.

⁹² The High Court ordered the endorsement of the arrest warrant on 14 October 2009, prior to the publication of the full text of the 2009 Act.

⁹³ [2010] NIQB 68.

⁹⁴ [2010] NIQB 68, at para 23.

⁹⁵ (1983) 5 EHRR 347.

⁹⁶ [2009] UKHL 45.

Constitution, would be sufficient where a person's liberty was in fact at risk thus remains to be decided in this jurisdiction.

- [6.66] In *Nolan and K v Russia*,⁹⁷ the applicant was prohibited entry into Russia and detained at Sheremetyevo airport, which he claimed was in breach of Article 5(1) of the Convention. The European Court of Human Rights emphatically stated that legal certainty is particularly important in cases concerning the deprivation of liberty.⁹⁸ In this case, however, the applicant was in fact deprived of his liberty by way of detention at the airport. The Russian Border Crossing Guidelines, in accordance with which he had been detained, had never been published or otherwise made available to the public.⁹⁹ The Court held unanimously that Article 5(1) of the Convention had been breached because the detention could not be considered lawful in circumstances where the national law under which he had been detained, that is, the Border Crossing Guidelines, had not been made publicly available.
- [6.67] In the leading textbook on constitutional law, the authors note that the accessibility of the law through its publication is a fundamental principle of the rule of law.¹⁰⁰ Fuller identified the need for laws to be promulgated and published as one of his eight principles of legality.¹⁰¹ Although Hart and other legal theorists draw a distinction between the official promulgation and general publication of laws (official promulgation being achieved through means that are determined by custom, constitution, or statute),¹⁰² Fuller draws no such distinction. Instead, Fuller contends that "there can be no greater legal monstrosity than a secret statute",¹⁰³ that is, one that is not made available in full to the general public. Fuller argues that where any of the eight principles of legality are not met, a law has not been made, meaning that an unpublished law is not a law. It is interesting to note, therefore, that in *Tobin*,¹⁰⁴ the

⁹⁷ (2009) App no 2512/04 (ECtHR, 6 July 2009).

⁹⁸ *Nolan and K v Russia* (2009) App no 2512/04 (ECtHR, 6 July 2009), at para 98.

⁹⁹ *Ibid*, at para 99.

¹⁰⁰ Hogan, White, Kenny and Walsh, *Kelly The Irish Constitution* 5th ed (Dublin 2018) at para 4.5.40.

¹⁰¹ Fuller, *The Morality of Law* 2nd ed (Yale University Press 1969), at 49-51.

¹⁰² Henle, "Principles of Legality: Qualities of Law – Lon Fuller, St Thomas Aquinas, St Isidore of Seville" (1994) 39 *American Journal of Jurisprudence* 47, at 54.

¹⁰³ Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630, at 651.

¹⁰⁴ [2012] IESC 37, [2012] 4 IR 147.

Supreme Court (O'Donnell J) acknowledged that Tobin's reliance on Fuller's conception of promulgation was appropriate.¹⁰⁵

- [6.68] The Commission is therefore conscious that the promulgation of legislation through a notice published in Iris Oifigiúil may not be sufficient for legislation to be enforceable where that legislation imposes a restriction on the right to liberty. While neither *Tobin* nor *Adach* involved, as a matter of fact, the deprivation of liberty on the basis of an unpublished Act, it is possible that a future case could arise in which that is the central issue. In this context, as well as in the context of the need to publish in full domestic measures that implement EU law, as discussed below, the Commission considers that a statutory duty to publish legislation in full, both primary and secondary, should be enacted, and that this could be achieved through electronic means.

(iv) Enforceability of measures implementing European Union law

- [6.69] In contrast to other domestic legislation, measures enacted or made for the purposes of implementing European Union law requirements may not be considered to be enforceable against the individual until they have been published in an official source.¹⁰⁶ Case law from the Court of Justice of the European Union (CJEU) has indicated a strict adherence to the principle of legal certainty where unpublished European acts purport to place obligations on the individual.¹⁰⁷ Accordingly, for example, where European acts have not been published in the Official Journal of the European Union in one or more languages understood by citizens in a particular Member State,¹⁰⁸ the CJEU has been unwilling to enforce those obligations against the citizens in that Member State.¹⁰⁹

¹⁰⁵ [2012] IESC 37, [2012] 4 IR 147, at 393.

¹⁰⁶ In this context, an "official source" refers to a publication source that can be relied upon as providing access to the official versions of legislation that can be produced in Court as evidence of their contents without further proof being required.

¹⁰⁷ For example, see *Oryzomyli Kavallas OEE and Ors v Commission* (Case 160/84) [1986] ECR 1643 and *Consorzio del Prosciutto di Parma v Asda* (Case C-108/01) [2003] ECR I-5121, I-5196.

¹⁰⁸ This is the most commonly occurring circumstance in which the Court has been required to consider the unavailability of European acts and may, in particular, arise where new Member States accede to the European Union. For a consideration of European case law on unpublished legislation see Bobek, "The Binding Force of Babel: the Enforcement of EC law Unpublished in the Languages of New Member States" (2007) 9 *Cambridge Yearbook of European Legal Studies* 43.

¹⁰⁹ Council Regulation 930/2004/EC of 1 May 2004 sets out derogations in respect of Irish and Maltese, providing for transition periods of 3 and 5 years, respectively, during which the institutions are not required to publish all the legislation in these languages.

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- [6.70] The relevance of CJEU case law regarding unpublished domestic implementing measures is made clear in the case of *Gottfried Heinrich*.¹¹⁰ In this case, Mr Heinrich was refused permission to board an aircraft by the Austrian authorities, as he was carrying tennis rackets in his luggage. In refusing him permission to board, the authorities were relying on an indicative list of prohibited articles set out in the annex to Regulation (EC) No. 2320/2002 and as further specified in the annex to Regulation (EC) No. 622/2003.¹¹¹ However, the annex to the 2003 Regulation had not, at that time, been published in the Official Journal. Indeed, article 3 of the 2003 Regulation stated that the measures set out in its annex shall not be published and shall only be made available "to persons duly authorised by a Member State or the Commission". The confidential nature of the article was further confirmed by article 1 of Commission Regulation (EC) No. 68/2004.¹¹²
- [6.71] Mr Heinrich sought a declaration that the Austrian authorities' actions in refusing his entry onto the aircraft were unlawful. The Independent Administrative Chamber for the Land of Lower Austria (*Unabhängiger Verwaltungssenat im Land Niederösterreich*) held that Regulation (EC) No. 622/2003 was not exclusively directed at State bodies, but was also directed at individuals and that, consequently, the non-publication of the rules of conduct that such individuals were required to adhere to constituted a breach of a fundamental principle of the rule of law. The Chamber therefore referred two questions for a preliminary ruling by the CJEU, the second of which asked whether an EU Regulation has binding force if it is not published in the Official Journal of the European Union, contrary to Article 254(2) TEC (now Article 297 TFEU).¹¹³
- [6.72] The CJEU restated the underlying principle of legal certainty as a general principle of European Union law,¹¹⁴ and, in keeping with this principle, held that neither an EU regulation nor national implementing measures can be binding on individuals if they have not had the opportunity to acquaint themselves with that regulation or the national implementing measure.¹¹⁵ The CJEU considered that Regulation (EC) No. 622/2003 possibly did impose obligations on individuals, but that Regulation (EC) No.

¹¹⁰ Case C-345/06.

¹¹¹ Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishing common rules in the field of civil aviation security; Regulation (EC) No. 622/2003 of 4 April 2003 laying down measures for the implementation of the common basic standards on aviation security.

¹¹² Commission Regulation (EC) No. 68/2004 of 15 January 2004 amending Commission Regulation (EC) No. 622/2003 laying down measures for the implementation of the common basic standards on aviation security.

¹¹³ Case C-345/06, at para 24.

¹¹⁴ Case C-345/06, at paras 42-47.

¹¹⁵ Case C-345/06, at paras 42-47.

2320/2002 did not provide the Commission with a power to deviate from the requirements set out in Article 254 TEC (now Article 297 TFEU).¹¹⁶ Accordingly, the CJEU held that the annex to Regulation (EC) No. 622/2003 had no binding force in so far as it sought to impose obligations on individuals.¹¹⁷

- [6.73] Of particular relevance to national implementing measures was that the CJEU noted that laws adopted by Member States to implement EU law must comply with general principles of EU law, including the principle of legal certainty. Accordingly, laws made by Member States to implement EU laws that impose obligations on individuals must be published in order to be enforceable.¹¹⁸ In an Irish context, this is most relevant to statutory instruments made under section 3 of the *European Communities Act 1972*.¹¹⁹
- [6.74] As to the question of what constitutes effective publication for the purpose of complying with the principle of legal certainty, the CJEU emphasised, in *Skoma-Lux sro v Celní ředitelství Olomouc*,¹²⁰ that legal certainty requires EU legislation "to allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them".¹²¹ In that case, the CJEU also rejected arguments that this could be achieved by the availability of EU law on an unofficial (as it then was) European database. Accordingly, publication is only achieved for the purpose of the principle of legal certainty where the text of the legislation has been published in full in the Official Journal of the EU.
- [6.75] In an Irish context, it would appear to be unclear when obligations contained in domestic legislation that implement EU law become enforceable against an individual. While the Constitution requires promulgation of all primary legislation in Iris Oifigiúil,¹²² this does not involve publication of the actual text of the legislation, but rather, as discussed above, the mere publication of a notice as to the existence of the legislation. This ambiguity over an effective publication date could arguably be resolved by establishing a statutory obligation to publish legislation and by conferring some type of official status on the publication of legislation on certain online sources.

¹¹⁶ Case C-345/06, at paras 61-63.

¹¹⁷ The CJEU, however, stopped short of declaring the Regulation void as advocated by Advocate General Sharpston. For a critique of the decision see Bobek, "Case C-345/06, Gottfried Heinrich, Judgment of the Court of Justice (Grand Chamber) of 10 March 2009" (2009) 46(6) Common Market Law Review 2077.

¹¹⁸ Case C-345/06, at para 45.

¹¹⁹ See paras 2.7-2.11, and 2.38, above.

¹²⁰ Case C-161/06.

¹²¹ Case C-161/06, at para 38.

¹²² Article 25.4.1° of the Constitution.

This could be achieved, as discussed above,¹²³ by designating, on a statutory basis, that the eISB is an authoritative database of legislation.

(f) The constitutional position of the Irish language

- [6.76] In respect of the publication of official versions of legislation, the Commission is conscious of the relevance of the Irish language and, in particular, of Article 8 of the Constitution, which recognises Irish as the first official language of the State and English as “a second official language”.¹²⁴ Similarly, Article 25.4.4° of the Constitution is relevant to the publication of legislation as it requires that a translation be issued in the other official language wherever an Act is enacted in one official language only.¹²⁵ The constitutional obligation that Article 25.4.4° establishes is underpinned by the *Official Languages Act 2003*, which is therefore also relevant to any discussion that focuses on the publication of legislation.

(i) Articles 8 and 25.4.4° of the Constitution

a. Acts of the Oireachtas

- [6.77] While Article 8.1 is unequivocal in enshrining Irish as the first language of the State, Article 8.3 sets out that provision may be made by law for the exclusive use of either Irish or English “for any one or more official purposes”. Article 8.3 was narrowly interpreted by the Supreme Court in *Attorney General v Coyne and Wallace*,¹²⁶ as entitling the State to choose to employ one of the two official languages for an official purpose unless provision is made by law for the use of both languages for such purpose.

¹²³ See para 6.15, above.

¹²⁴ The linguistic hierarchy that Article 8 establishes is a unique feature of the Irish constitutional framework. See Bergin, “Gaeilge Bríste: Irish Language Rights in *Ó Maicín v Ireland*” (2015) 18 *Trinity College Law Review* 214, at 216.

¹²⁵ Article 8 does not specify any timeframe during which such translation must occur. However, this has been addressed by the *Official Languages Act 2003*, as amended by the *Civil Law (Miscellaneous Provisions) Act 2011*: see paras 6.85-6.90, above. There is some incongruity between the wording of Article 8 and Article 25.4.4° of the Constitution. Article 8 refers to English as “a second official language”, which suggests an open list of languages, leaving open the possible addition of other second languages in the future, while Article 25.4.4° refers to “both” languages, indicating a closed list of two languages, English and Irish.

¹²⁶ (1967) 101 ILTR 17. Importantly, these cases concerned the absence of an English language version of the statutory notice of intention to prosecute, as required by section 55 of the *Road Traffic Act 1933*, rather than the absence of an Irish language version. On the facts of the cases, therefore, the decision was not incompatible with the recognition in Article 8.1 of Irish as the first official language of the State.

- [6.78] Despite this narrow construction, the Supreme Court has been very clear that Article 8.3 does not permit the State to enact legislation in one of the two official languages without providing an official translation in the other official language. In *Ó Beoláin v Fahy*,¹²⁷ the Supreme Court held that Article 25.4.4° included a duty to make publicly available an Irish language version of Acts enacted solely in English. The case concerned alleged contraventions of section 49 of the *Road Traffic Act 1961*, as inserted by section 10 of the *Road Traffic Act 1994*. The applicant wished to conduct the case through Irish and sought translated copies of both the 1961 and 1994 Acts, as well as of the *Road Traffic Act 1995* and the *Rules of the District Court 1997*.¹²⁸ An official translation of the 1961 Act had always been available to the applicant, as this had been published alongside the English version in the bound volumes of the Acts of the Oireachtas.¹²⁹ However, official translations of the 1994 Act and the 1995 Act were not made available until February 1999, in direct response to his request for such translated copies. The Supreme Court granted the declaratory relief sought that the respondents were constitutionally obliged to provide official Irish language translations of the Acts of the Oireachtas when they are signed into law by the President in English.¹³⁰ Even though the Acts had been officially translated by the time of its decision, the Court made the declaration in order to emphasise the "mandatory nature"¹³¹ of the duty articulated in Article 25.4.4°, which the State had breached "flagrantly and over a long period of time".¹³²
- [6.79] In the more recent case *The People (DPP) v Billings*,¹³³ the Court of Appeal limited the application of *Ó Beoláin* when it held that there is no obligation on the State to provide official translations of pre-1922 legislation. The defendant had alleged that the Special Criminal Court had breached his right to conduct his part of the trial through Irish due to the lack of an official Irish language translation of the *Explosive Substances Act 1883*. The Court distinguished the case from *Ó Beoláin* on the basis that the *Explosive Substances Act 1883* was not an Act of the Oireachtas.¹³⁴ Because the 1883 Act predicated the foundation of the State, it had not been signed by the President in

¹²⁷ [2001] 2 IR 279.

¹²⁸ SI No 93 of 1997.

¹²⁹ The Supreme Court noted in its judgment that the practice of publishing official Irish language translations of Acts alongside the English versions in bound volumes had ceased in 1980. In the 20 years that had elapsed since then, only a small number of Acts had been translated into Irish.

¹³⁰ [2001] 2 IR 279, at para 163.

¹³¹ [2001] 2 IR 279, at para 86.

¹³² [2001] 2 IR 279, at para 86.

¹³³ *The People (DPP) v Billings* [2019] IECA 149.

¹³⁴ [2019] IECA 149, at para 35.

accordance with Article 25.4.4° of the Constitution and was, therefore, not subject to the obligation in Article 25.4.4° for an official translation to be issued. The Court concluded that the absence of a translated version of the Act was, therefore, "not the result of inertia" on the State's part in fulfilling its obligation; rather, it was due to "a conscious decision" not to translate pre-1922 legislation.¹³⁵ It is worth noting that the relevant sections of the 1883 Act, sections 3 and 4, had been amended by sections 15(3) and 15(4) of the *Offences Against the State (Amendment) Act 1998*, respectively. However, the Irish language translation of the 1998 Act did not include a translation of the full text of sections 3 and 4 of the 1883 Act as amended.

b. Statutory instruments

- [6.80] As regards statutory instruments, in *Delap v Minister for Justice*,¹³⁶ the High Court expressly stated that no constitutional duty to translate secondary legislation arises from Article 8. In that case, the applicant, who was a solicitor who carried out a significant proportion of his practice through Irish, sought a declaration that the respondents were constitutionally required to issue him with a copy of the *Rules of the Superior Courts 1986* in the Irish language in order for him to be able to carry out his practice effectively. The High Court held that, while the absence of a translation of the 1986 Rules did not constitute an infringement of Articles 8 or 25.4.4° of the Constitution, the applicant was nonetheless entitled to a translation of the Rules on the basis of the right to access the courts, under Articles 40.3.1° and 34.3.1° of the Constitution.
- [6.81] The High Court decision in *Delap* was confirmed by the Supreme Court in *Ó Beoláin*. In addition to translations of the Road Traffic Acts, the applicant in *Ó Beoláin* had also sought a translation of the *Rules of the District Court 1997*. In 1998, the principal translator of the Translation Section (*Rannóg an Aistriúcháin*) of the Houses of the Oireachtas sent a circular to Government Departments, which indicated that, due to a shortage of staff, the Translation Section would only be in a position to translate statutory instruments into Irish where a certificate was provided that stated a "grave need" for the specific instrument to be translated.¹³⁷ As no such certificate had been issued in respect of the *Rules of the District Court 1997*, they had not been translated into Irish. The Court granted the declaration sought by the applicant, that the respondents were constitutionally obliged to provide an official translation of the 1997 Rules, despite the absence of a specific constitutional obligation to provide Irish translations of secondary legislation. The Court was careful to clarify, however, that the

¹³⁵ *Ibid.*

¹³⁶ [1980-1998] IR (Special Reports) 46.

¹³⁷ [2001] 2 IR 279, at para 86.

declaration was made in respect of the original text of the 1997 Rules only and did not imply a duty to translate all statutory instruments.¹³⁸

- [6.82] This was reiterated in *Ó Cuinn v An Taoiseach*,¹³⁹ in which the High Court granted a declaration that the State had breached its constitutional obligations by failing to provide an Irish translation of the *District Court (Criminal Justice (Mutual Assistance) Act 2008) Rules 2010*.¹⁴⁰ The Court held that, because an Irish version of the District Court Rules had not been made available until February 2015 – a delay of 5 years – this constituted a breach of the constitutional duty to provide a translation within a reasonable time, as set out in *Ó Beoláin* and confirmed in *Ó Murchú*.
- [6.83] There is also no statutory requirement to publish secondary legislation in both languages, because the *Official Languages Act 2003*, discussed below, deals exclusively with the bilingual publication of primary legislation, Acts. In 2013, the Houses of the Oireachtas Commission was given the responsibility to translate statutory instruments. Section 3 of the *Houses of the Oireachtas Commission (Amendment) Act 2013* inserted sections 4(2B)-4(2H) into the *Oireachtas Commission Act 2003*, obliging the Commission to provide such translations where they are requested by Government Ministers. It remains the case, therefore, that the State is not compelled, either by the Constitution or statute, to translate all statutory instruments.

(ii) Official Languages Act 2003

- [6.84] Subsequent to the decision in *Ó Beoláin*, the *Official Languages Act 2003* was enacted, section 7(1) of which provides:

"(1) As soon as may be after the enactment of any Act of the Oireachtas, the text thereof shall be printed and published in each of the official languages simultaneously."

- [6.85] Therefore, while there is no constitutional requirement for legislation to be published in order for it to become applicable law, as discussed above¹⁴¹ section 7(1) of the 2003 Act requires the simultaneous publication of Acts of the Oireachtas in both official languages as soon as possible following enactment.¹⁴² One reading of this section could lead to the conclusion that it creates a statutory obligation to print and publish legislation. However, this is not the purpose of section 7, nor of the Act as a whole.

¹³⁸ [2001] 2 IR 279, at para 91.

¹³⁹ [2015] IEHC 794.

¹⁴⁰ SI No 94 of 2010.

¹⁴¹ See paras 6.52-6.59, above.

¹⁴² See paras 6.77-6.80, above.

Rather, the purpose of the Act is to promote equality for both official languages of the State,¹⁴³ and the purpose of section 7 specifically is to promote such equality in respect of the printing and publication of legislation. Section 7(1) merely presupposes that Acts, as a matter of practice, are published "as soon as may be" following their signing into law by the President and it proceeds to impose the requirement that such publication should be carried out in both official languages, simultaneously.

- [6.86] This requirement does not, however, preclude the online publication of an Act in one official language only prior to its being printed and published in both official languages. Section 7(2) of the 2003 Act, which was inserted by section 62 of the *Civil Law (Miscellaneous Provisions) Act 2011*, provides:

"(2) Subsection (1) shall not operate to prohibit the publication on the internet of an Act of the Oireachtas in one official language only prior to its printing and publication in accordance with that subsection."

- [6.87] As amended by the 2011 Act, therefore, section 7 of the 2003 Act allows for the publication in electronic format of Acts of the Oireachtas in advance of their printing and publication in both official languages. During the Oireachtas debates on the 2011 Act, it was pointed out that this would ensure that a version of an Act can be made publicly available pending its official translation into Irish, which can take a few weeks and, on occasion, much longer.¹⁴⁴ As noted in the *Tobin* case,¹⁴⁵ above, prior to the changes made by the 2011 Act, there had been some considerable time lag between the enactment of some Acts and their availability in either print or online. The then Minister for Justice and Equality stated that the amendment to section 7 would, for example, help alleviate the risk of a constitutional challenge from a person whose rights are affected by a piece of legislation that is not readily accessible, as was argued (albeit unsuccessfully) in the *Tobin* case.¹⁴⁶

¹⁴³ Explanatory Memorandum to the *Official Languages Act 2003*; available at: <<https://www.oireachtas.ie/en/bills/bill/2002/24/?tab=documents>> accessed on 26 August 2020.

¹⁴⁴ This point was emphasised by the Minister for Justice and Equality during the Second Stage Dáil Éireann debate on the 2011 Act: see Vol. 738 *Dáil Éireann Debates* at page 239 (12 July 2011), available at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2011-07-12/debate/mul@/main.pdf>> accessed on 26 August 2020.

¹⁴⁵ [2012] IESC 37, [2012] 4 IR 147.

¹⁴⁶ The Minister addressed the issue of the risk of a constitutional challenge from an individual, the rights of whom are affected by an Act that is not readily accessible, in the Second Stage Seanad Éireann debate on the 2011 Act: see Vol. 209 *Seanad Éireann Debates* at page 145 (30

- [6.88] There was some opposition to the amendment to section 7 of the 2003 Act during the Oireachtas debates on the 2011 Act, on the ground that it suggested a dilution of the commitment in the 2003 Act to publish Acts in the Irish language.¹⁴⁷ The Minister for Justice and Equality replied that appropriate resources would continue to be given to the Houses of the Oireachtas Translation Section in order to meet the obligations set out in the 2003 Act.
- [6.89] The practical effect of the 2011 amendment of section 7 of the 2003 Act is that Acts are usually made available in the English language on the Oireachtas website,¹⁴⁸ and on the electronic Irish Statute Book (eISB),¹⁴⁹ within days of their enactment. The translated texts of legislation are not currently available on the eISB, and this absence was noted by some respondents in their submissions to the Issues Paper. Currently, the translations of all Acts and statutory instruments are only made available on the eISB via an external link to the Houses of the Oireachtas website.

(iii) Legal status of official translations

- [6.90] Where Acts are enacted bilingually, both language versions are legally applicable. In practice, however, only a very small number of Acts are bilingually enacted. Approximately 99% of the legislation passed by the Oireachtas is enacted or made in English only. As discussed, under Article 25.4.1° of the Constitution there is a clear obligation to translate this legislation into Irish. However, the translated text does not have any legal effect. This fact is borne out in judgments that have been delivered in the Irish language. In such cases, although the judgment may be delivered in Irish, the law is quoted in the language in which it has been enacted, which usually means in English. It is not quoted in its translated form as the translated version cannot be described as law, having not been enacted as such. This is evident, for example, in *Ó Beoláin v Fahy*, in which the relevant legislation, the *Road Traffic Act 1961*, was quoted

June 2011), available at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2011-06-30/debate/mul@/main.pdf>> accessed on 26 August 2020.

¹⁴⁷ See for example the comments of Senator Ronán Mullen, Vol. 209 *Seanad Éireann Debates* at page 157 (30 June 2011), available at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2011-06-30/debate/mul@/main.pdf>> accessed on 26 August 2020; and the comments of Senator David Cullinane Vol. 209 *Seanad Éireann Debates* at page 387-388 (7 July 2011), available at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2011-07-07/debate/mul@/main.pdf>> accessed on 26 August 2020.

¹⁴⁸ <www.oireachtas.ie> accessed on 26 August 2020. Official translations of Acts are also available on <www.acts.ie> accessed on 26 August 2020, but this website is currently (August 2020) up to date to 2009 only.

¹⁴⁹ <www.irishstatutebook.ie> accessed on 26 August 2020.

in English and not in Irish, as it had been enacted solely in English. In the same judgment, however, case law was quoted in Irish, as delivered, as was the Constitution.

- [6.91] Because translated versions of legislation have no legal effect, where a translation is not available or has yet to be produced for an Act enacted in one of the official languages, the legal applicability of that Act is not affected. Therefore, notwithstanding the constitutional duty to provide translated versions of legislation,¹⁵⁰ online versions of legislation can be granted *prima facie* (or presumptive) evidential status, even where a translated version is yet to be made available. Where an Act is enacted in both official languages of the State simultaneously, both versions of that Act would have to be granted *prima facie* (or presumptive) evidential status, in light of Article 8 of the Constitution.

(iv) Resource implications

- [6.92] Several of the submissions received in response to the Issues Paper suggested that increased investment ought to be made into the translation of both primary and secondary legislation, noting the current backlog in producing translations. Due to the need to alleviate the backlog and to continue to ensure accuracy in legislative translation, the Commission is of the view that consideration should be given to increasing resources allocated to the Translation Unit of the Houses of the Oireachtas. The Commission is of the view that efforts and resources should be concentrated on producing translations of the revised versions of legislation, without prejudice to clearing the backlog of the current legislative stock.

(g) Conclusions and recommendations

- [6.93] The Commission acknowledges the importance of the Irish language and of complying with Article 25.4.4° of the Constitution in particular. It is clear that the conferral of official status on the online version of legislation, including Revised Acts, could give rise to significant additional costs. However, as noted above, in practice both the text of legislation on the eISB and the text of Revised Acts are actually already often relied upon in court even though they do not currently possess official, *prima facie* (or presumptive), evidential status.
- [6.94] The Commission has concluded that there is merit in granting certain online publications *prima facie* (or presumptive) official status as evidence of the content of the law, analogous to that afforded by the *Documentary Evidence Act 1925* to hard copy paper versions published by the Stationery Office. The Commission has also concluded that the electronic Irish Statute Book (eISB) should be designated as the principal online source of legislation in Ireland. This change would reflect the current

¹⁵⁰ Articles 8 and 25.4.4° of the Constitution, as discussed above.

reality: the online published versions of legislation on the eISB have largely supplanted paper versions as the primary source of legislation, they are regularly cited in court, and provide greater clarity as to when the contents of legislation have been officially published. The Commission nonetheless considers that such a change should be carried out subject to the concerns raised over the existence of a possible duty to translate.

- [6.95] The Commission also considers that such *prima facie* (or presumptive) status should also be conferred upon any revised versions of legislation, including any point-in-time versions.
- [6.96] The Commission is also mindful of the importance of the authentication of any official online versions of legislation. The Commission considers that an online version of legislation should only be accepted as *prima facie* evidence of the content of the law where it is accompanied by a “qualified electronic signature” that complies with Regulation (EU) No. 910/2014 on the mutual recognition of electronic identification and signatures, the eIDAS Regulation.¹⁵¹ As noted above,¹⁵² this is the form of electronic signature that is required under Regulation (EU) No. 216/2013 on the electronic publication of the Official Journal of the European Union, as amended by Regulation (EU) No. 2018/2056 to take account of the eIDAS Regulation. This would not only ensure the authenticity of the document for the end user but would also have the benefit of allowing *prima facie* (or presumed) evidential status to be conferred on existing online versions of legislation on a gradual basis. This progressive introduction would be important, particularly in relation to some pre-1922 material.

R. 6.01	The Commission recommends that statutory provision be made to designate the electronic Irish Statute Book (eISB) as the principal online source of legislation in Ireland.
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¹⁵¹ On the content and effect of the eIDAS Regulation generally, see the Commission’s 2016 *Report on the Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), at paras 5.84-5.136.

¹⁵² See para 6.47, above.

- R. 6.02** The Commission recommends that the online version of an Act enacted and published by the Oireachtas, and of a Revised Act published in accordance with the requirements set out in R. 6.06, below, should have *prima facie* evidential status of the content of the Act (as already provided for in respect of printed copies under the *Documentary Evidence Act 1925*), subject to a “qualified electronic signature” being attached to that online version that complies with the requirements of Regulation (EU) No. 910/2014 on the mutual recognition of electronic identification and signatures, the eIDAS Regulation, which is the form of electronic signature that is required under Regulation (EU) No. 216/2013 on the electronic publication of the Official Journal of the European Union, as amended by Regulation (EU) No. 2018/2056 to take account of the eIDAS Regulation. Under the eIDAS Regulation, a “qualified electronic signature” must meet the following requirements:
- (a) It is uniquely linked to the signer;
 - (b) It can be identified by the signer;
 - (c) It is created using data created by the signer that is under his or her exclusive control;
 - (d) Any subsequent changes that are made to it can be detected and the signature must be invalidated as a result of those changes;
 - (e) It is certified by a qualified trust service provider (TSP);
 - (f) It is based on a qualified certificate that satisfies the minimum content set out in Annex I of the eIDAS Regulation, including, among others that:
 - (i) the certificate must issue as a qualified certificate;
 - (ii) the certificate must identify the qualified TSP issuing it;
 - (iii) the certificate must indicate the State in which the TSP is established; and
 - (iv) the certificate must contain electronic signature validation data that corresponds to the electronic signature creation data and the advanced electronic signature or seal of the qualified TSP; and
 - (g) It is created by a qualified electronic signature creation device that satisfies the minimum content set out in Annex II of the eIDAS Regulation, including, among others, that the device can ensure:
 - (i) the confidentiality of the electronic signature creation data is reasonably assured;
 - (ii) that the electronic signature creation data can practically occur only once; and

(iii) that the electronic signature data are reliably protected against forgery and use by others.

- R. 6.03** The Commission recommends that the online version of a statutory instrument published in accordance with the *Statutory Instruments Act 1947*, and of a revised statutory instrument published in accordance with the requirements set out in R. 6.06, below, should have *prima facie* evidential status of the content of the statutory instrument (as already provided for in respect of printed copies under *the Statutory Instruments Act 1947*), subject to a “qualified electronic signature” being attached to that online version that complies with the requirements of the eIDAS Regulation, as set out in R. 6.02, above.
- R. 6.04** The Commission recommends that recommendations R. 6.01 and R. 6.02 should be considered against the requirements in the Constitution concerning the issuing of translations of legislation that has been enacted or made in one of the official languages, and accordingly that sufficient resources should be allocated on an ongoing basis to the Translation Unit of the Houses of the Oireachtas for this purpose.
- R. 6.05** The Commission recommends that, in light of these resource implications, translation efforts should focus on Revised versions of legislation.

3. Making best use of ICT to improve accessibility: eLegislation

- [6.97] Regardless of the legal status that the online versions of legislation may have in the future, as discussed immediately above, the Commission is conscious of the need to explore how ICT could be used to build on advances already made in improving the accessibility of legislation. This includes enabling links between all available online legislative information and other related information resources, thus building towards what can be described as a vision of eLegislation.
- [6.98] It is important to place this discussion within the wider context of the justice system generally, where ICT has increasingly become a feature. This has included developments such as e-filing, electronic disclosure, digital case management, storage of case files and court bundles on the cloud, and remote decision-making through video link. Since February 2019, it has been possible to file applications for leave to the Supreme Court through the Courts Services Online (CSOL) web portal.¹⁵³ A new cloud-based document repository, Alfresco, has also been deployed in 2020 to ensure, for example, the availability online of court judgments on the Courts Service website, www.courts.ie. These initiatives became particularly important in the context of the global Covid-19 pandemic that emerged in 2020. Arising from this, significant

¹⁵³ Supreme Court of Ireland, *Annual Report 2018*, at page 100.

legislative reforms to underpin the use of ICT within the justice system were enacted in the *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020*. These developments signal the ongoing need to ensure that the best use is made of ICT within the justice system, including in the context of accessibility of legislation.

- [6.99] Indeed, these developments are entirely consistent with the Government's general digital-by-design policy, including GovTech, which has been described as applying emerging technologies, such as artificial intelligence and advanced data processing to improve the delivery of public services through increasing efficiency and lowering costs.¹⁵⁴ By way of example of the use of such technology in the context of legislation, in The Netherlands, the Law Pocket (*Wettenpocket*) application,¹⁵⁵ which is available to users of legislation, is a free mobile application that provides instantaneous access to up-to-date national and regional legislation,¹⁵⁶ as well as to legal text books and links to other resources. This could be described as the 21st century app version of the Napoleonic Codes, legislation available on the smartphone of every person, as opposed to being available in pocket-size books for every citizen.

(a) Current eLegislation initiatives

- [6.100] There is no single definition of eLegislation, but it can be described briefly as using ICT to maximum effect in the production, publication, and maintenance of legislation in a digital format and online. As noted above, a number of jurisdictions have put in place significant eLegislation processes that involve an end-to-end, integrated, approach to the production, publication, and maintenance of legislation online. This facilitates the semi-automatic generation of revised legislation and its automatic publication online. Such systems also retain historical versions of legislation, allowing for the publication of point-in-time versions of legislation.
- [6.101] In this context, a number of important eLegislation initiatives have already emerged in Ireland. The eLegislation Group, convened under the auspices of the Department of the Taoiseach, brings together a number of bodies involved in the legislative process (the Office of Parliamentary Counsel to the Government in the Office of the Attorney General, the eISB Project Team within the Office of the Attorney General, the Bills Office in the Houses of the Oireachtas, and this Commission), with a view to developing initiatives that are consistent with advancements made in other

¹⁵⁴ See *Cruinniú GovTech Report* (Department of Public Expenditure and Reform, November 2019), page 6, available at <<https://assets.gov.ie/42554/9f1238028b8f427facc97bf12a270410.pdf>> accessed on 26 August 2020.

¹⁵⁵ <<https://wettenpocket.overheid.nl/portal/>> accessed on 26 August 2020.

¹⁵⁶ Opijnen, Schreijer, Andreas, and Kroon, "Specialised Government Publishing: the Law Pocket and Linked Legal Data in the Netherlands" (2016) 4 *Journal of Open Access to Law* 1.

jurisdictions concerning eLegislation. In this respect, the eLegislation Group has facilitated discussions between the participating bodies on enhancements to the online publication of legislation on the eISB, the integration of the Legislation Directory into the eISB, the integration of Revised Acts into the eISB, the integration of Bills History from the Houses of the Oireachtas into the eISB, and the development by the Commission of the Classified List of In-Force Legislation in Ireland.

- [6.102] The Commission's involvement with the eLegislation Group has entailed participation in a number of initiatives intended to further improve the online availability of legislative information. This includes the improved use of ICT in certain aspects of the Commission's work in maintaining both the Legislation Directory on the eISB and the Classified List of In-Force Legislation in Ireland. This has already served to expedite the process of marking up effects on legislation and it is envisaged that semi-automation of the Classified List will also allow for its ongoing maintenance as legislation is enacted or repealed. The interoperability of this information has also been upgraded through enabling hyperlinking between the Classified List and the eISB. Additionally, a number of improvements have been made in respect of Revised Acts, including their publication by section. This has facilitated effective hyperlinking to specific sections within the Revised Acts, and the insertion of hyperlinks within the text of Revised Acts to other legislation. It is also envisaged that some degree of semi-automation might be achieved in relation to the process of producing Revised Acts in the future.
- [6.103] In addition to improvements to the process of producing Revised Acts, they are now integrated to their as enacted versions published on the eISB via an imbedded hyperlink on the eISB. This represents a significant step towards ensuring the availability of all legislative information on one open, online source.
- [6.104] In 2009, the Office of the Attorney General conducted a Value for Money and Policy Review on the maintenance of the eISB.¹⁵⁷ The Review recommended the integration of additional information onto the eISB, such as explanatory information, parliamentary debates, bilingual content, and links to international agreements and treaties.¹⁵⁸ As noted below, the recommendations concerning material within the control of the Houses of the Oireachtas have been achieved and are available through the eISB. In addition, as already noted, the Commission, as part of its Fourth Programme of Law Reform, published in 2018 a *Draft Inventory of International*

¹⁵⁷ Office of the Attorney General, *Value for Money and Policy Review: Maintenance of the electronic Irish Statute Book (eISB)* (February 2009), available at <http://www.attorneygeneral.ie/pub/eISB_VFMPR_Feb_2009.pdf> accessed on 26 August 2020.

¹⁵⁸ *Ibid* at 41.

Agreements Entered Into by the State, which includes links between over 1,400 international agreements and the related domestic legislation.¹⁵⁹

- [6.105] The Houses of the Oireachtas Legislative Observatory has successfully integrated its online legislative information, enabling users to navigate between related resources with ease, as well as to follow the legislative process from the initial introduction of a Bill through to its enactment. The Legislative Observatory provides access to Acts, Bills, Explanatory Memoranda, and Oireachtas debates. All related documents pertaining to a particular piece of legislation up to its enactment are grouped together under the title of the Bill. The grouped information connected to the Bill is itself easily accessible from the resulting Act via hyperlink.
- [6.106] The presentation of this information on the Oireachtas website further improves accessibility and navigability among other features,¹⁶⁰ fully integrating documents associated with both the Act and the Bill. Accordingly, members of the public are now able to access within the same web page: the text of the Act, in both English and Irish; all versions of a Bill up to enactment; related documents, such as Explanatory Memoranda; and Oireachtas debates. This information is presented under three user-friendly tabs, which allows for easy navigation. Each page also includes a status bar, enabling members of the public to see at what stage a Bill is currently at in the Oireachtas, and what stages remain.
- [6.107] The Parliamentary Workbench Content Management System (PWB) in the Houses of the Oireachtas provides an example of a completed eLegislation project. The electronic Statutory Instruments System (eSIS) produces electronic statutory instruments in XML and PDF format. Acts have been made available in XML format since 2004 from the Offices of the Houses of the Oireachtas. The eSIS system for the electronic production of statutory instruments was piloted in early 2007, and was made fully operational in June 2007, following a Government decision. It has been noted that the availability of Acts in XML format since 2004 has increased the level of accuracy and the efficiency of production of Acts.¹⁶¹

¹⁵⁹ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018), discussed at para 2.71, above. The Draft Inventory forms the first of the two published outputs of this project from the Commission's *Fourth Programme of Law Reform*. The second and final element is the Commission's *Discussion Paper on the Domestic Implementation of International Agreements* (LRC 124-2020).

¹⁶⁰ Accessible at <<https://www.oireachtas.ie/>> accessed on 26 August 2020.

¹⁶¹ Office of the Attorney General, *Value for Money and Policy Review: Maintenance of the electronic Irish Statute Book (eISB)* (February 2009), at 2, available at <http://www.attorneygeneral.ie/pub/eISB_VFMPR_Feb_2009.pdf> accessed on 26 August 2020.

(i) European Legislation Identifier (ELI) implementation

- [6.108] The European Legislation Identifier (ELI) system was first adopted by the Council of the European Union in 2012 and reaffirmed in 2017, and is a joint initiative between EU institutions and Member States.¹⁶² Its purpose is to provide online access to legislation in a standardised format and to facilitate the exchange and reuse of legal information across jurisdictions. The ELI includes: technical specifications on web identifiers (URLs) for legal information; metadata specifying how to describe legal information; and a specific language for exchanging legislation in machine-readable formats. The ELI makes information flows more effective and shortens the time taken to publish legislation and it encourages and facilitates interoperability between information systems.
- [6.109] At the time of writing (August 2020), Ireland had fully implemented pillars I and II of the ELI and had partially implemented pillar III.¹⁶³ Most legislation published on the eISB now follows the URI template: /eli/ {year}/ {type} / {Natural identifier}/ {Level 1...} / {Version} / {Point in Time} / {language}.

(ii) European Case Law Identifier (ECLI) implementation

- [6.110] The European Case Law Identifier (ECLI) was developed to enable EU Member States to access readily and accurately relevant judgments of other Member States applying EU law.¹⁶⁴ By requiring participating Member States to apply the uniform ECLI metadata to case law, the system allows that case law to be searched through one search engine using a single search interface. This means that the user can search the occurrences of a particular judgment in all participating national and cross-border databases. Implementation of the ECLI is voluntary. The national ECLI coordinator for Ireland is the Department of Justice and Equality. At the time of writing (August 2020), the exact form of the ECLI in Ireland had not been finalised.

(b) Beyond current eLegislation initiatives to linked data

- [6.111] Building on these initiatives, the Commission considered in the Issues Paper how ICT might be used to provide legislative information in a more innovative, and consequently, more accessible, manner. In particular, the Commission considered that connections could be developed between online sources of legislation and the various

¹⁶² Council Conclusions of 6 November 2017 on the European Legislation Identifier (2017/C 441/05). These conclusions build on the earlier Council conclusions inviting the introduction of the European Legislation Identifier (ELI) (2012/C 325/02).

¹⁶³ See <http://www.irishstatutebook.ie/pdf/ELI_URI_schema.pdf> accessed on 26 August 2020.

¹⁶⁴ <<https://e-justice.europa.eu/content/european-case-law-identifier-ecli-175-en.do>> accessed on 26 August 2020.

other legal and administrative sources of information online. Online legislative information can be considered to form part of an interconnected web of official online information. Supplementary sources permit greater understanding of the law, either by providing additional context to the issues being considered in preliminary documents, or by showing how the legislation has been subsequently enforced or applied. An effective strategy to make this interconnected web of data interoperable could significantly enhance the reader's understanding of the law.

- [6.112] There is a significant body of online legal and administrative information made available by the State. Publications that might be informative to those accessing legislation include:
1. reports from bodies such as the Law Reform Commission and the Company Law Review Group¹⁶⁵ that have informed legislation;
 2. general Schemes of Bills ("Heads of Bills") published by Government Departments;
 3. relevant pre-legislative scrutiny reports by Oireachtas Committees on general Schemes of Bills;
 4. texts of Bills from each stage of the legislative process through to enactment;
 5. Explanatory Memoranda to Bills;
 6. Oireachtas debates on Bills;
 7. official notification of the enactment of an Act in Iris Oifigiúil;
 8. in the case of legislation necessary to give effect to an EU law requirement, the relevant European act;
 9. international documents informing legislation such as treaties or reports of international bodies;
 10. guidance issued by Departments or other bodies, such as the Central Bank, responsible for operating and enforcing legislation;
 11. explanatory information on the law, provided free online by organisations such as the Citizens Information Board; and
 12. case law of the courts and other decision-making bodies (such as An Bord Pleanála, the Information Commissioner, the Ombudsman, and the Tax Appeals Commission) interpreting and applying the legislation concerned.
- [6.113] In the Issues Paper, the Commission therefore sought the views of consultees as to how ICT might assist users to be able to navigate this web of interconnected online

¹⁶⁵ The Company Law Review Group (CLRG), which was originally established under the *Company Law Enforcement Act 2001* and now under the *Companies Act 2014*, is a statutory body that advises the Minister for Business, Enterprise and Innovation in relation to the review and development of company law in Ireland.

information. The submissions received focused primarily on the content that should be included, with the majority suggesting that direct links be incorporated into legislation to relevant case law, any relevant reports or guidance, EU law, and explanatory materials. Other submissions also referred to the importance of highlighting whether a piece of legislation has been declared unconstitutional (which the eISB currently does) and, similarly, whether legislation is currently in force.

(c) Conclusions and recommendations

- [6.114] The Commission acknowledges that, consistently with general Government digital-by-design policy, including GovTech,¹⁶⁶ considerable progress has already been made in Ireland towards developing and implementing an effective eLegislation strategy that will maximise the public's ability to access legislation. As a consequence of this progress, significant legislative information is already available online, free of charge. Additionally, improvements have been made to the processes for generating online content, thus allowing material to be made available to the public more efficiently. Furthermore, some degree of interlinking online information has also been achieved through interlinking of legislation as enacted on the eISB, and Revised legislation on the Commission's website, as well as the integration of documents in the Legislative Observatory on the Houses of the Oireachtas website. This has significantly enhanced the ease with which a reader can navigate between related, online legislative information.
- [6.115] The Commission considers that it is important that this progress in the use of ICT should be continued. For example, through the development of the Parliamentary Workbench Content Management System (PWB)¹⁶⁷ and of the resulting collaboration between the Office of the Parliamentary Counsel (OPC) and the Bills Office in the Houses of the Oireachtas, their respective, and vital, legislative functions are now fully linked. Further technological enhancements could, for example, enable this Commission to prepare and published Revised Acts in a semi-automatic manner upon amending legislation coming into force. It would also enable the retention of previous point-in-time versions of legislation, and the automatic publication of legislation. Another possible development in terms of an end-to-end lifecycle approach would be to assign a unique identifier, possibly based on the ELI system, to each component of legislation, from the development of each Head (draft section) of Heads or Schemes of

¹⁶⁶ See the discussion at para 6.99, above, of *Cruinníú GovTech Report* (Department of Public Expenditure and Reform, November 2019), available at <<https://assets.gov.ie/42554/9f1238028b8f427facc97bf12a270410.pdf>> accessed on 26 August 2020.

¹⁶⁷ This software was developed specifically for the Oireachtas by Propylon Ltd as a modern drafting system. It manages the Bills generation, editing, and amendment process.

Bills, through to the sections in Bills and on to the sections in Acts. In addition, further efforts should be made to ensure interoperability between online sources of legislation and other linked data, which should include those sources set out above.

- [6.116] The Commission has also concluded that, in this respect, the proposed Accessibility and Consolidation of Legislation Group is best placed to develop an effective eLegislation Strategy, which would have as its goal making optimum use of ICT to make legislation more accessible to the public. The development of an eLegislation Strategy would also be consistent with the Government's previously noted digital-by-design policy, including GovTech,¹⁶⁸ and the commitment, in the Programme for Government adopted in June 2020, to develop a National Digital Strategy, which includes integrating digital services within the provision of public services.¹⁶⁹ The Commission also considers that such an eLegislation Strategy should include the various elements discussed above, including: developing an effective legislative management system, online publication of legislation as enacted and revised; developing capacity to online versions of legislation semi-automatically and automatically; developing capacity to make available point-in-time versions of legislation; and developing capacity to interlink between legislative content and other related material. The Group might consider establishing sub-committees to develop specific elements of the eLegislation Strategy, such as in connection with the standards related to electronic publication of legislation and quality control over digitally published Bills and Acts, which could be developed by a sub-committee comprising, for example, the Office of Parliamentary Counsel, the Bills Office and the Commission, who have developed expertise in this area. These detailed matters would be for the Group to determine once established.

R. 6.06 The Commission recommends that the Accessibility and Consolidation of Legislation Group should adopt an effective eLegislation strategy, making optimum use of ICT to make legislation more accessible to the public, and which should include the following elements:

- (a) a strategic plan to develop an effective legislative management system to integrate legislative standards, online publication of legislation as enacted and maintenance of revised legislation online;
- (b) development of capacity to generate automatically published online versions of legislation and generate semi-automatically revised versions of legislation;

¹⁶⁸ See para 6.99, above.

¹⁶⁹ *Programme for Government: Our Shared Future* (2020), at page 121; available at: <https://www.finegael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf> accessed on 26 August 2020.

- (c) where new revisions of legislation are created, development of the capacity to retain, and make available to the public, point-in-time versions of the legislation concerned; and
- (d) development of capacity to facilitate effective end-to-end interlinking between legislative content and other related material and resources, including:
- (i) reports from bodies that have informed the legislation;
 - (ii) Schemes of Bills published by Government Departments;
 - (iii) pre-legislative scrutiny by Oireachtas Committees;
 - (iv) Regulatory Impact Analyses;
 - (v) texts of Bills as published and as amended in the legislative process;
 - (vi) Explanatory Memoranda and notes;
 - (vii) Oireachtas debates on Bills;
 - (viii) official notification of the enactment of an Act in Iris Oifigiúil;
 - (ix) in the case of legislation giving effect to EU law, the relevant European instrument;
 - (x) in the case of legislation giving effect to an international agreement, that agreement and related reports of international bodies;
 - (xi) statutory codes and guidance issued after enactment under the legislation;
 - (xii) explanatory information provided online by State bodies such as the Citizens Information Board;
 - (xiii) case law of the courts interpreting and applying the legislation; and
 - (xiv) decisions of statutory bodies applying the legislation.

4. Accompanying explanatory information

- [6.117] Another question considered by the Commission in the Issues Paper, within the context of making legislation immediately available to the public, was whether appropriate explanatory information ought to be published alongside legislation. Such an initiative could potentially assist the State in making legislation, including its relevant impact upon citizens, immediately available to the public in a user-friendly format. A narrative explanation would provide readers of legislation with a simplified description of the purpose and effects of legislation in a user-friendly format. In this way, such an explanation could improve the user's ability not only to access but also more fully to comprehend, the law. In 2009, the Attorney General Office's Value for

Money Review of the eISB recommended that a single official website should contain all of the Acts and statutory instruments, as well as the Legislation Directory, and Irish language translations.¹⁷⁰ The Report also recommended that further contextual information be hosted on the same official website, such as Explanatory Memoranda and parliamentary debates.¹⁷¹

- [6.118] As part of its 2000 *Report on Statutory Drafting and Interpretation: Plain Language and the Law*,¹⁷² the Commission explored the role of Explanatory Memoranda as an aid to statutory interpretation. As part of this Report, the Commission recommended that Explanatory Memoranda should be updated to reflect amendments made during a Bill's passage through the Oireachtas. It also recommended that Explanatory Memoranda be made available online. Although Explanatory Memoranda of Bills as introduced are now published on the Oireachtas website, they are not generally updated as a Bill is amended,¹⁷³ and they are not generally made available alongside Acts on the eISB, which limits their usefulness.¹⁷⁴
- [6.119] In the Issues Paper, the Commission considered that it may be useful to consider again whether clear narrative explanations of legislation should be published alongside legislation and how this should be done.

(a) Explanatory materials currently available in Ireland

(i) Explanatory Memoranda

- [6.120] Currently, Explanatory Memoranda are only required for Government Bills that are initiated in either of the Houses of the Oireachtas. They are not required for Private Members' Bills initiated in Seanad Éireann, which is problematic, given the increase in the number of Private Members' Bills, which is discussed in Chapter 7 below.

¹⁷⁰ Office of the Attorney General, *Value for Money and Policy Review: Maintenance of the electronic Irish Statute Book (eISB)* (February 2009) at 3, available at <http://www.attorneygeneral.ie/pub/eISB_VFMPR_Feb_2009.pdf> accessed on 26 August 2020.

¹⁷¹ *Ibid.*

¹⁷² *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000).

¹⁷³ The Department of Business, Enterprise and Innovation updated the Explanatory Memoranda that had accompanied the *Companies Bill 2012* when it was enacted as the *Companies Act 2014*. The Department also published a series of 'Quick Guides' to the Act, which was accompanied by a Table of Origins and a Table of Destinations.

¹⁷⁴ It should be noted that a Report entitled *Explanatory Memoranda: An OPC Perspective* was forwarded to the Office of the Chief Whip, which included a recommendation on the publication post-enactment of revised Explanatory Materials. This has yet to be adopted as standard practice.

- [6.121] Standing Order 147A of the Dáil Éireann Standing Orders provides that a Government Bill shall only be printed if it is accompanied by an Explanatory Memorandum.¹⁷⁵ It also specifies that the Explanatory Memorandum must set out the objective of the Bill to which it is attached, as well as any changes to the existing law that the Bill proposes to make. The Memorandum must also provide an explanation of the provisions contained within the Bill “on a section-by-section basis”. If a Bill is to be substantially amended at either the Committee of Report States, the Ceann Comhairle or Oireachtas Committee Chairperson may, under Standing Order 150A of the Dáil Standing Orders, direct that a member in charge of the Bill produce a revised Explanatory Memorandum, the purpose being to allow members of the Dáil to better consider the specific amendments.
- [6.122] As regards Seanad Éireann, Standing Order 146 of the House’s Standing Orders requires Government Bills to be accompanied by Explanatory Memoranda that provide an explanation of the provisions of the Bill in a “readily intelligible manner”.¹⁷⁶ Again, any changes to the existing law that are being proposed must be included in the Memorandum. Standing Order 167 gives the Cathaoirleach (the Chair of the Seanad) the discretion to direct that a member in charge of a particular Bill must produce an updated Memorandum where the Bill in question is to be substantially amended, again, either at the Committee or Report States. Additionally, Standing Order 171 of the Seanad Standing Orders provides that a Memorandum, prepared by the Attorney General, must be prefixed to every Consolidation Bill. This Memorandum must specify any Acts that the Consolidation Bill proposes to repeal and indicate the sections of the Bill in which those repealed provisions are reproduced. Any textual amendments being made by the Consolidation Bill must also be included in the Memorandum.
- [6.123] Ideally, Explanatory Memoranda should be required to accompany all Bills, regardless of the House in which they are initiated and by whom they are initiated. The Commission is conscious of the resource implications of requiring Memoranda to be updated throughout the legislative process up until enactment. Some submissions received in response to the Issues Paper suggested requiring that they updated only when the Bill has been enacted as an Act and not throughout the various stages of the legislative process. The Commission notes that, although Explanatory Memoranda are

¹⁷⁵ The consolidated text of Dáil Éireann Standing Orders is available at <https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/dail/2019/2019-01-11-consolidated-dail-eireann-standing-orders-january-2019_en.pdf> accessed on 26 August 2020.

¹⁷⁶ The consolidated text of Seanad Éireann Standing Orders is available at <https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/seanad/2017/2017-09-29_seanad-eireann-standing-orders-relative-to-public-business-2017_en.pdf> accessed on 26 August 2020.

generated for the benefit of members of the Oireachtas, they have also proved to be useful to the courts as an extrinsic interpretative aid, for example in *Maher v Attorney General*¹⁷⁷ and *McLoughlin v Minister for the Public Service*.¹⁷⁸

(ii) Parliamentary Debates

- [6.124] As discussed in Chapter 2,¹⁷⁹ the Legislative Observatory of the Houses of the Oireachtas provides access to Dáil Éireann and Seanad Éireann debates, alongside PDF versions of related Bills, Acts, and Explanatory Memoranda. The integration of the debates with these documents enables readers to follow the legislative process from the initial introduction of a Bill through to its enactment. In its 2009 Value for Money Report on the eISB, the Office of the Attorney General recommended that consideration be given to extending the content of the eISB to include integration between legislation and parliamentary debates. This has since been achieved, following the considerable upgrades achieved in the Oireachtas Legislative Observatory. Notwithstanding these considerable developments since the Value for Money Report was published, it remains worthwhile to consider the benefits of integrating the information that is available on the Legislative Observatory with that of the eISB. The legislative process does not conclude with the enactment of a single Act. Acts may not come into effect until they are commenced through commencement orders, they may be significantly and repeatedly amended on multiple occasions, provisions may be subjected to declarations of unconstitutionality by the Supreme Court, and an Act may be repealed. Thus, of about 3,000 Acts enacted since 1922, just over 1,000 have later been repealed, leaving just over 2,000 in-force Acts of the Oireachtas. All of these elements form part of the legislative process.

(b) Explanatory material in other jurisdictions

(i) United Kingdom

- [6.125] The United Kingdom applies a process of publishing and updating Explanatory Notes, which is equivalent to the process proposed for Explanatory Memoranda in the Commission's 2000 Report.¹⁸⁰ Explanatory Notes produced on the introduction of a Bill are revised throughout the legislative process to take account of any amendments that are made to that Bill. The Explanatory Notes as fully revised on enactment are

¹⁷⁷ [1973] IR 140.

¹⁷⁸ [1985] IR 631. On the contrast between, on the one hand, the use of Explanatory Memoranda as interpretative aids and, on the other hand, the exclusion of reference to Oireachtas debates, see paras 7.40-7.41, below.

¹⁷⁹ See paras 2.55-2.57, above.

¹⁸⁰ *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at 54.

published along with the Act on the UK's online legislation database,¹⁸¹ together with a section-by-section explanation of the effect of each provision in the Act. It should be noted that the Explanatory Notes are not further updated where an Act is subsequently amended.

(ii) Commonwealth of Australia

- [6.126] In Australia, the use of simplified outlines, produced within the text of the legislation itself, is favoured as the means through which legislation is made clearer for users. Such outlines have been in use in Acts since 1991. They appear at the beginning of each Act and at the start of each Part of an Act and they encompass explanations in concise narrative form of the effect of each Act and Part thereof. The standards for the form and content of such outlines are set down in a guideline direction published by the Office of Parliamentary Counsel.¹⁸² The guideline direction states that the purpose of such an outline is that "each educated reader (whether with or without legal training or specialist knowledge) can easily gain a general understanding of what the legislation is about".¹⁸³ Such an outline does not form part of the law, but is for information purposes only. Section 15V(5)(b) of the *Legislation Act 2003* allows for changes to simplified outlines, as well as the insertion or removal of outlines as part of the editorial powers in the course of a revision.¹⁸⁴

(iii) Portugal

- [6.127] In Portugal, plain language summaries for Government legislation were published in Portuguese and English on the National Gazette (*Diário da República*) website between October 2010 and December 2011, when this practice was discontinued. The practice of publishing plain language summaries was reinstated since May 2017. The plain language summaries have no legal status and are published on the electronic version of the *Diário da República*, along with a clear disclaimer to that effect.
- [6.128] The plain language summary consists of a separate summary, which is published online alongside, and integrated with, the relevant legislation. The summary provides a short explanation in plain language of what the law does, what changes it will make, what its objectives are, and what date the legislation takes effect from.

¹⁸¹ <www.legislation.gov.uk> accessed 26 August 2020.

¹⁸² Available at <<https://www.opc.gov.au/drafting-resources/drafting-directions>> accessed 26 August 2020. This Direction 1.2A also contains a number of sample outlines that readers may find useful.

¹⁸³ Direction 1.2A, at para 16.

¹⁸⁴ See the discussion of editorial powers in Chapter 4, above.

(c) Conclusions and recommendations

- [6.129] The Commission considers that the provision of up-to-date accompanying explanatory information would be beneficial to the public, in that it would enable readers without legal training to understand the purpose and aims of a Bill or Act. Of the options explored above, the approach favoured in the United Kingdom, by which Explanatory Memoranda are revised up to enactment and published alongside Acts, is the one that most closely resembles the approach previously advocated by the Commission in its 2000 *Report on Statutory Drafting and Interpretation: Plain Language and the Law*.¹⁸⁵ This Recommendation was, in principle, accepted as Government policy in the 2004 White Paper, *Regulating Better*.¹⁸⁶
- [6.130] Such an approach would allow for Memoranda that contain wide-ranging narrative commentaries on matters relevant to the Bill, and Act, to be included in the explanatory material. Such matters could include, for example, the reasons the legislation is considered necessary, the intended effect of provisions of the Bill, and Act, and how the Bill, and Act, will interact with existing legislation or case law.
- [6.131] Among the submissions received, some caution was expressed in relation to reliance on narrative explanations of legislation, with some respondents making the point that such explanations could be subjective and open to incorrect interpretation. It would therefore be imperative that any such explanations be prepared carefully, with the requisite specialist knowledge, and that they be accompanied by a clear disclaimer that they do not constitute the law and should not be relied upon as such, emphasising that their purpose is explanatory in nature only. The Commission is conscious of the need to indicate that Explanatory Memoranda do not form part of the law, are non-binding, and that their sole purpose is to provide useful information. With this in mind, the Commission recommends the inclusion of a disclaimer to this effect.
- [6.132] The Commission is also conscious that there are important resource implications for producing narrative explanatory material. In particular, the Commission recognises that requiring additional explanatory material to be produced for publication alongside newly enacted Acts could potentially delay the online publication of such legislation. The Commission therefore agrees with those consultees who expressed the view that requiring Explanatory Memoranda to be updated throughout the legislative process would provide sufficient explanation of the purpose and effect of legislation

¹⁸⁵ *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at 81.

¹⁸⁶ *Regulating Better: A Government White Paper setting out six principles of better regulation* (Department of the Taoiseach, 2004), at 44, available at <<https://www.gov.ie/en/publication/2083d0-better-regulation-archive/>> accessed 26 August 2020.

and that further narrative explanations of legislation would not be necessary, beyond integrating links to other helpful websites such as the website of the Citizen's Information Board website, as recommended in R. 6.05, above.

R. 6.07 The Commission recommends that the Explanatory Memorandum to a Bill, in the form recommended in Recommendation R. 7.05, should be updated where the Bill is amended in the Oireachtas and that the updated Explanatory Memorandum should be published with the enacted Act or as soon as practicable after enactment.

5. Navigability of Legislation

- [6.133] Efforts to improve the delivery of legislation could also consider how best to maximise the navigability of legislation. At present, the Irish Statute Book is organised on the basis of the chronological order of enactment, currently (August 2020) from 1204 (the *Fairs Act 1204*) to the present time. Each piece of legislation is numbered in order of its enactment within a particular year. This chronological order, in turn, is currently used as the basis for arranging legislation online on the eISB. As a result, users will invariably need to know what they are looking for in advance of looking for it, or will have to be able to rely on the use of general search terms in the eISB's search engine.
- [6.134] Two possible means of improving the navigability of legislation, considered by the Commission in the Issues Paper, are the publication of legislation in a classified, subject-based, format; and reviving the previous practice of publishing an index to Irish legislation.¹⁸⁷ Such a classified list of legislation might be compared to the table of contents found at the beginning of a book, while an index of legislation could be compared to a well-developed subject index found at the end of a book (whether a print book or an eBook).

(a) Subject-based classification

- [6.135] As stated above, legislation is currently arranged in order of its enactment. Presenting legislation in a coherent, logical manner facilitates the navigation of the entire stock of in-force legislation, thus enabling users to access legislation with greater ease.¹⁸⁸ Arrangement of legislation by subject matter could significantly improve such navigability. In the Issues Paper, the Commission identified its Classified List of In-Force Acts and Statutory Instruments as a possible template for such a subject based classification.

¹⁸⁷ *Issues Paper on Accessibility, Consolidation and Online Publication of Legislation* (LRC IP 11-2016) at page 75.

¹⁸⁸ New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (NZLC R104, 2008), at page 35.

(i) The Commission's Classified List of In-Force Legislation

- [6.136] As discussed in Chapter 2, in its 2010 *Consultation Paper on a Classified List of Legislation in Ireland*,¹⁸⁹ the Commission published a classified list of 2,000 in-force Acts of the Oireachtas, and over 100 pre-1922 Acts, under 36 subject headings.¹⁹⁰ In 2016, the Commission expanded the Classified List by publishing, for the first time, a draft Classified List of In-Force Acts and Statutory Instruments.
- [6.137] In early 2020, the Commission's Classified List of In-Force Legislation was reorganised into an electronic database (see Figure 6, below). The 36 subject headings now appear on the front page of the database and it is possible for users of the Classified List to drill down into the next level of major sub-headings, and then further into each of the Acts that are categorised under the various sub-headings. Ideally, following consolidation of the collection of Irish legislation as recommended in Chapter 4, the number of Acts that would appear beneath each of these headings would greatly reduce in number. In some cases, it may be possible for a single consolidation Act to appear under certain headings, for instance, a single "Marriage Act" could appear under the "17. Family Law" heading.
- [6.138] The structure of the Classified List could be used in addition to the long-established chronological format in the eISB to present legislation online. Such an approach could significantly enhance the navigability of the collection of Irish legislation.

CLASSIFIED LIST

- > Introduction
- > 1. Agriculture and Food
- > 2. Arts, Culture and Sport
- > 3. Business Occupations and Professions
- > 4. Business Regulation, Including Business Names, Company Law and Partnerships
- > 5. Citizenship, Equality and Individual Status
- > 6. Civil Liability (Contract and Tort) and Dispute Resolution
- > 7. Commercial Law

CLASSIFIED LIST OF LEGISLATION IN FORCE IN IRELAND

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INTRODUCTION

Classified List of In-Force Legislation: searchable and linked to full text on the eISB

Welcome to the Law Reform Commission's online Classified List of In-Force Legislation which went live in January 2020.

The key features of the Classified List are:

- It contains a searchable list of over 2,000 in-force Acts and over 15,000 statutory instruments organised under 36 Subject Headings or Titles.
- The 36 Subject Headings or Titles include: Business Regulation, Commercial Law, Criminal Law, Environment, Family Law, Health and Health Services, Land Law, Oireachtas (National Parliament) and Legislation, Taxation and Transport.
- The 36 Subject Headings or Titles are broken down into over 500 sub-headings, and the relevant Acts and statutory instruments can be found listed in those sub-headings.
- The search facility allows you to search for either:
 - the name of an Act or statutory instrument; or

Figure 6 The electronic database version of the Commission's Classified List of In-Force Legislation (available in this format since January 2020)

(b) Index to legislation

- [6.139] As outlined in Chapter 2, prior to the establishment of the State in 1922, the Statute Law Committee published and updated, on a regular basis, a Chronological Table to

¹⁸⁹ *Consultation Paper on a Classified List of Legislation in Ireland* (LRC 62-2010).

¹⁹⁰ See Chapter 2, above, for a discussion of how the Commission developed the 36 headings.

the Statutes and an Index of the Statutes.¹⁹¹ Following the establishment of the State, a comparable Index to the Statutes with Tables was periodically published between 1922 and 1985.¹⁹² The Index to the Statutes with Tables comprised two main elements:

1. A Chronological Table of Acts, which tracked all amendments to all Acts and which the Commission re-named the Legislation Directory in 2007 when it was conferred with functional responsibility for this;¹⁹³ and
2. A detailed subject-matter Index to Acts. No Index to the Statutes has been published in Ireland since 1985,¹⁹⁴ but such Indexes continue to be published in a number of other common law jurisdictions, including Australia.¹⁹⁵

(i) Value of a subject index in the digital age

- [6.140] The question arises as to whether, in a digital era, when legislation is now available online in a database such as the electronic Irish Statute Book (eISB), the previous role played by a detailed subject index has been made redundant by the availability of a search engine facility or through the use of data analytic tools.
- [6.141] It may be argued, however, that while a search engine facility or data analytics may be able to identify instances of any designated words or phrases searched for, they may not, as of yet, be able to suggest alternative words or phrases that carry the same or similar meaning. An index is, at minimum, a logical arrangement of entries designed to assist users in locating a specific document in a collection by reference to identified terms.¹⁹⁶
- [6.142] The dual purpose of an effective subject index would be to reduce the time and effort needed to identify and access specific material while simultaneously increasing the

¹⁹¹ As noted in Chapter 2, the Statute Law Committee was also responsible for the publication of Revised Acts and the Statutory Rules and Orders Revised.

¹⁹² The Index to the Statutes with Tables is also discussed in Chapter 2, above.

¹⁹³ As noted above, the Legislation Directory is now an integrated element of the electronic Irish Statute Book (eISB). On the change of name of the Chronological Table to the Legislation Directory, see the Commission's *Report on the Legislation Directory* (LRC 10-2010).

¹⁹⁴ As noted in Chapter 2, a Chronological Table of the Statutes 1922-1995 was published in 1996, thus continuing the first element of the Index to the Statutes with Tables, but it did not continue the second element, the Index to the Statutes. The Chronological Tables of the Statutes 1922-1995 became the basis for the Chronological Tables element of the electronic Irish Statute Book (eISB), which was, as noted above, renamed the Legislation Directory.

¹⁹⁵ For a fuller analysis of the use of Indexes in other jurisdictions see the New Zealand Law Commission *Issues Paper on Presentation of New Zealand Statute Law* (NZLC IP2, 2007), at pages 65-75.

¹⁹⁶ See International Organization for Standardization, *Information and documentation – guidelines for the content, organization and presentation of indexes* (ISO 999, 1996).

rate of success of pinpointing that information.¹⁹⁷ In that regard, an index to legislation not only provides users with a subject-based guide to all legislation, but could also identify significant concepts, terms, and phrases located in the text of legislation. It could then list these concepts, terms, and phrases alphabetically within subject headings and subheadings and identify the pieces of legislation in which they arise. Such an index could also link, through the use of hyperlinking, related concepts, thus making it easier for users to navigate through the listed subject headings. The inter-relation of concepts within such a subject index could enable users to navigate legislation in a manner in which a search engine facility may not. Accordingly, the Commission considered in the Issues Paper that the production and maintenance of a subject index to Irish legislation merits consideration as an aid to navigability. The submissions received in response to the Issues Paper were overwhelmingly in favour of legislation being made available electronically both chronologically and by subject, with a preference for a subject index being clearly discernible. Some submissions noted that the arrangement of legislation by subject would not only improve search functionality for users initially, but would also permit further improvements to be made as technology advances.

(c) Integrating references to EU law

- [6.143] As noted in Chapter 2, an additional factor that impedes the ability to appropriately navigate the laws applicable to them is European Union law, which forms part of Irish domestic law. Legal acts of the European Union legislation generally take the form of either a directive or a regulation; these are discussed separately in the following sections.

(i) EU directives

- [6.144] EU directives are implemented through national implementing legislation, occasionally in the form of an Act but more frequently in the form of a statutory instrument. However, while such transposing legislation is included in the body of legislation published on the eISB,¹⁹⁸ it is not immediately distinguishable from other national legislation. Furthermore, while the title and number of the relevant Directive that is being implemented may be included in the text of the implementing law on the eISB,

¹⁹⁷ New Zealand Law Commission *Issues Paper on Presentation of New Zealand Statute Law* (NZLC IP2, 2007), at 55.

¹⁹⁸ It should, however, be noted that, where a Directive has not been transposed within the given timeframe, or has not been transposed correctly, such a Directive may still have direct effect in national law against state bodies (see *Van Duyn v Home Office* [1974] E.C.R. 1337). Failure to fully implement an EU law requirement may also give rise to a claim against the State under the principle of State Liability (see *Francovich v Italian Republic* [1991] ECR I-5357).

the full text of the Directive is rarely included as a Schedule to an implementing Act,¹⁹⁹ and not to the Commission's knowledge in any implementing statutory instrument. A direct link to the text of the directive published on EUR-Lex is also not provided within the text of the implementing law.

- [6.145] The lack of transparency in this regard is particularly problematic in instances where Ireland fails in its obligation to implement a particular Directive within the designated implementation period, or where it fails to implement it fully.²⁰⁰ The eISB does not have any means through which to communicate to its users that the relevant piece of EU legislation constitutes applicable law within the State and can be relied upon in the courts as such, notwithstanding that it has not been fully, or even partially, implemented.
- [6.146] As noted in Chapter 2,²⁰¹ the Commission has made some progress towards remedying this particular accessibility issue, by creating and populating a section of the electronic Statute Book (eISB) from which all Regulations made under section 3 of the *European Communities Act 1972* can be accessed.²⁰² While this serves to mitigate the inaccessibility of EU directives to a certain extent, it does not do so completely, because, for example Regulations made under section 3 of the 1972 Act are not the only mechanism through which Ireland implements EU Directives.²⁰³

(ii) EU Regulations

- [6.147] As also noted in Chapter 2, an increasing volume of EU law takes the form of an EU Regulation, such as the 2016 EU General Data Protection Regulation (GDPR).²⁰⁴ Since an EU regulation is directly applicable under EU law,²⁰⁵ it becomes law within EU Member States without the need for an implementing Act or statutory instrument. Consequently, an EU Regulation is not immediately visible or accessible to Irish users

¹⁹⁹ A rare example is the Schedule to the *Liability for Defective Products Act 1991*, which contains the full text of the 1985 Product Liability Directive, Directive 85/374/EEC.

²⁰⁰ See paras 2.8-2.11, and 2.38-2.40, above.

²⁰¹ See para 2.38 above.

²⁰² <<http://www.irishstatutebook.ie/eli/isbc/s3eutoc.html>> accessed 26 August 2020.

²⁰³ In addition to the use of Acts, such as the *Liability for Defective Products Act 1991*, EU Directives have been implemented using ministerial Regulations made under Acts in a relevant subject area. For example, Directive 2014/45/EU was implemented by the *Commercial Vehicle Roadworthiness (Vehicle Testing) (Amendment) Regulations 2018* (SI No 117 of 2018), which was made under the *Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012*.

²⁰⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC.

²⁰⁵ See paras 2.38-2.39, above.

of the eISB, despite immediately forming part of the domestic law. In the Issues Paper, the Commission sought views as to how this challenge might be addressed.

(iii) Potential solutions

- [6.148] In addressing the question of how to make European Union law more visible, a number of respondents suggested that European Union law could be included in an official subject index. This would allow the public to have access, through one comprehensive subject index, to all laws applicable in Ireland, regardless of their source, and from that point of view could be considered a satisfactory solution. However, it would also be possible to go further than merely including the laws in an official subject index. And, as discussed in Chapter 2, a number of EU Member States have developed effective ways to address the limited visibility of EU legislation.²⁰⁶
- [6.149] It would be possible, as some EU Member States have done,²⁰⁷ to publish the full text of Directives alongside the corresponding implementing laws. Alternatively, as discussed in Chapter 2, Malta has developed an integrated search portal on its legislation website which provides access to the Official Journal of the European Union as well as to treaties, legislation, case law, and legislation.

(d) Commencement information

- [6.150] In the past, the majority of Acts enacted by the Oireachtas in any given year were self-commencing and therefore came into force on enactment.²⁰⁸ However, in recent years, the use of commencement orders has increased, to the extent that their annual number has either been on par with, or higher than, the number of Acts enacted within the same timeframe.²⁰⁹
- [6.151] In 2017, for example, 41 Acts were enacted, and 66 commencement orders were made.²¹⁰ Of those 41 Acts, 29 (70.73%) required a commencement order for the

²⁰⁶ See para 2.40, above.

²⁰⁷ EU Member States that publish the full text of EU directives include Croatia and Slovakia.

²⁰⁸ For example, in 1977, 22 (59.46%) of the 37 Acts enacted that year came into force immediately upon their enactment. In contrast, 12 (32.43%) were commenced completely by way of commencement orders. The remaining Acts were either commenced at a later date by provisions contained within the Acts (2 or 5.41%) or through a combination of enactment and commencement order (1 or 2.70%).

²⁰⁹ Sheehy Skeffington, "Commencement Orders: A Creeping Incursion into the Legislature's Domain?" (2018) 59 *Irish Jurist* 93, at 96.

²¹⁰ This information is available from the electronic Irish Statute Book (eISB).

coming into force either of the whole Act or part thereof,²¹¹ while only 7 (17.07%) commenced in full on enactment. The commencement of the remaining 5 Acts (12.20%) was contingent, either in part or in full, on a provision contained within the relevant Act itself.²¹² This contrasts with the figures from 1981,²¹³ for example, when 23 (62.16%) of the 37 Acts enacted that year came into force in full on their enactment, and only 11 (29.73%) required the making of a commencement order. The commencement of the remaining 3 Acts (8.11%) was contingent, either in part or in full, on a provision contained within the relevant Act itself. To a certain extent, therefore, it can be concluded that the principle of immediate enforceability seems to be eroding, at least in respect of primary legislation. See Table 2, below, for an overview of these figures, as well as of figures from a range of years in the intervening period between 1977 and 2017 in ten-year intervals.

Year	Number of Acts Enacted	Number of Commencement Orders Made	Acts Requiring Commencement Order (in full or in part)	Acts Commenced in Full on Enactment	Commencement Contingent on Provision within Act (in full or in part)
2017	41	66	29 (70.73%)	7 (17.07%)	5 (12.20%)
2007	42	80	23 (54.76%)	18 (42.86%)	1 (2.38%)
1997	46	50	26 (56.52%)	16 (34.78%)	4 (8.70%)
1987	34	14	9 (26.47%)	21 (61.76%)	4 (11.76%)
1977	37	18	13 (35.14%)	22 (59.46%)	2 (5.41%)

Table 2 Acts and Commencement Orders 1977 to 2017

- [6.152] Acts that have been enacted but have not yet been commenced by commencement orders have been described as existing in "a curious ambulatory zone of having the

²¹¹ At the time of writing (August 2020), some of these 29 Acts have yet to come into force. For example, the *Minerals Development Act 2017* was enacted on 26 July 2017 but has yet to be brought into force by a commencement order, to be made under section 1(2) of the 2017 Act.

²¹² An example of an Act that commenced in full on enactment is the *Health (Miscellaneous Provisions) Act 2017*. The *Competition (Amendment) Act 2017* was commenced in full on 7 September 2017 as opposed to on the date of its enactment.

²¹³ At the time of writing (August 2020), 1927 is the latest year for which commencement information was available in full on the Legislation Directory. The Commission's work in relation to updating the commencement information of primary legislation on the Legislation Directory is ongoing and it is intended to continue to back-fill this information to at least 1922.

status of law, albeit dormant law.”²¹⁴ In this regard, uncommenced legislation can be described as valid law, in that it has been enacted in accordance with Article 15 and signed by the President in accordance with Article 25.4.1° of the Constitution.²¹⁵ It remains, until commenced, however, legally inapplicable, in that it is not capable of being relied on in any setting.

- [6.153] The Supreme Court has held that the courts will not order a Minister to commence any Act or any provision within an Act that had not yet been commenced. Thus, in *The State (Sheehan) v Government of Ireland*,²¹⁶ which concerned the non-commencement of section 60(1) of the *Civil Liability Act 1961*, the Court declined to order the relevant Minister to make a commencement order. At the time of writing (August 2020), section 60(1) of the 1961 Act remains uncommenced. In *Rooney v Minister for Agriculture and Food*,²¹⁷ the Supreme Court appeared to suggest, *obiter*, that there might be circumstances in which it would order a Minister to make a commencement order. However, the Court did not make any such order in that case and it also expressed doubt as to whether it had the authority to do so, as this would involve a direct financial outlay.²¹⁸
- [6.154] Uncommenced legislation can also, on occasion, cause confusion for Government Departments, particularly before the practice of publishing legislation on the eISB began. This can be seen, for example, in the *Bord na gCapall (Assignment of Additional Functions) Order 1975*, which was made by the then Minister for Agriculture under section 33 of the *Horse Industry Act 1970*. The 1975 Order was made on 4 February 1975, even though Part 3 of the 1970 Act, which contained section 33, had not been commenced. Section 34 of the 1970 Act clearly stated that a commencement order was required to bring Part 3 of the Act into operation. The 1975 Order transferred functions from the Minister for Agriculture and Fisheries to the Board. These functions related to the “breeding, production and improvement of non-thoroughbred horses, other than the functions conferred on the Minister by the *Horse Breeding Act 1934*.” If any of the functions that the 1975 Order purported to transfer to the Bord were carried out by the Bord between 1975 and its dissolution in 1989 (by section 2 of the

²¹⁴ Sheehy Skeffington, “Commencement Orders: A Creeping Incursion into the Legislature’s Domain?” (2018) 59 *Irish Jurist* 93, at 95. A parallel can be drawn between the “ambulatory zone” in which non-commenced legislation exists and the status of legislation that the courts have declared to be unconstitutional. Neither category is legally applicable law.

²¹⁵ See discussion at paras 6.50-6.51, above.

²¹⁶ [1987] IR 550.

²¹⁷ [1991] 2 IR 539.

²¹⁸ This case concerned a requirement to pay compensation for the slaughter of diseased animals to prevent further infection.

Bord na gCapall (Dissolution) Act 1989) the exercise of such functions would have been without legal basis.

- [6.155] In order for legislation to be comprehensive and for the public to be able to easily ascertain the applicable law on any given day, it is important to be able to track the commencement status of legislation. It has become increasingly important to be able to do so given the diminishing number of Acts that come into force immediately on enactment and the frequency with which commencement orders are made. While the Legislation Directory does provide information on the commencement of Acts through its Commencement Tables, it is not always immediately obvious whether an individual section has not yet been commenced. At the time of writing (August 2020), the Commission was, as part of its Access to Legislation work, updating the commencement information of Acts so that the Commencement Tables would contain an entry for all provisions of an Act, including flagging where provisions were yet to be commenced. Although significant progress is being made towards increasing the accessibility of this information, the necessity to navigate to a separate tab in order to access it means that it is not immediately obvious whether an individual provision has been commenced when viewing the text of that provision. An alternative approach would be to signal sections that have not yet been commenced within the text of the provision itself, which would eliminate the need to click into the separate tab to access the Legislation Directory and search for a particular section. The same approach could be used to signal to users that a provision has been declared unconstitutional by the courts.

(e) Conclusions and recommendations

- [6.156] The Commission has concluded that a number of measures should be taken to improve the navigability of legislation. As regards the online arrangement of legislation, the Commission considers that legislation should be made available both chronologically and by subject matter. The default method of arrangement, however, should be by subject matter. The Commission considers that its Classified List of In-Force Legislation would be an appropriate template for the arrangement of legislation by subject.
- [6.157] Given that a subject index may be able to assist the public in navigating legislative provisions in a way in which digital technology may not, at least not currently, the Commission considers that there may be value in publishing an official subject index. Such an index could use the headings and subheadings in the Classified List as a starting point for identifying concepts within the subject index. It would then be possible to consider expanding the index to incorporate specific concepts that are addressed within legislation.

[6.158] The Commission is also conscious of suggestions made by a number of respondents, in submissions to the Issues Paper, that a subject index could also be further developed to include European Union provisions. The Commission considers that this would provide a satisfactory solution to the problem of integrating domestic and European Union law to make it more navigable by, and consequently more and patent and accessible to, the public.

- | | |
|----------------|---|
| R. 6.08 | The Commission recommends that standards for online publication of legislation should require its arrangement by subject matter as well as in chronological order, and that the Accessibility and Consolidation of Legislation Group recommended in R. 4.07 should consider the Commission's Classified List of In-Force Legislation as the template for the subject-based classification of legislation. |
| R. 6.09 | The Commission recommends that consideration be given to the development of an updated index to legislation, and to the development of a specialised search function to legislation which would enable users to readily identify both legislation that implements European Union law and those European Union acts that are directly applicable within the State. |

CHAPTER 7 PRE-LEGISLATIVE AND POST-LEGISLATIVE STANDARDS TO ASSIST ACCESSIBILITY OF LEGISLATION

1. Introduction

- [7.1] This Chapter considers what additional policy standards and processes could be put in place to assist with the accessibility of legislation and to underpin the principles of accessibility discussed in Chapter 1. The Chapter discusses these at the pre-legislative preparatory stage, the legislative stage itself, and the post-legislative stage. The Commission reiterates that this refers to legislative policy development and does not involve the separate matter of the drafting of legislation.
- [7.2] A number of initiatives have already been developed in Ireland that have improved the legislative policy process at each of these stages. This has included, at the pre-legislative stage the Legislative Work Bench (LWB), an IT process that facilitates secure exchange of texts between officials involved in developing a Bill. The Oireachtas has also developed technology-based solutions that facilitate Oireachtas members to track amendments as a Bill is debated and amended. At the post-legislative stage, Acts now often include post-legislative review provisions, which were discussed in Chapter 4, above.¹
- [7.3] The vast majority of Acts continue to arise from Government Bills, drafted under the long-established high standards of the Office of the Parliamentary Counsel to the Government. There has, in recent years, been a noticeable increase in the number of Acts enacted from non-Government Bills, Private Member's Bills which, it should be noted, now benefit from the availability of high quality drafting assistance, through the Office of Parliamentary Legal Adviser to the Houses of the Oireachtas. It is highly desirable that all legislative proposals, whether they arise from Government Bills or from Private Member's Bills, should be of the highest standard possible.² The Commission also considers in this Chapter initiatives that have been developed in a number of other jurisdictions, all of which have a common objective: to improve the processes in the production and enactment of legislation with a view to ensuring that legislation that is ultimately enacted is accessible and is of the highest quality.

¹ See paras 4.48-4.51, above.

² See the *Final Report of the Sub-Committee on Dáil Reform* (May 2016) and the *Capacity Review of the Office of the Parliamentary Legal Advisor (OPLA) of the Houses of the Oireachtas* (December 2016) for discussion of the increased number of enacted Private Member's Bills, with the drafting assistance of the Office of Parliamentary Legal Adviser to the Houses of the Oireachtas.

- [7.4] The specific issues that arise in this respect include:
1. At the pre-legislative stage, developing and maintaining guidelines or checklists for policymakers about relevant legal issues;
 2. Maintaining high level interaction and advice at a pre-legislative stage on legislative design and quality, including on the best use of ICT;
 3. Developing guidelines for the form and content of explanatory materials for Bills;
 4. Maintaining policies that facilitate effective scrutiny of legislation through the legislative process itself in the Oireachtas;
 5. Maintaining procedures for effective post-legislative scrutiny; and
 6. Arranging for the publication of all guidance.
- [7.5] In this context, in this Chapter the Commission considers whether the proposed Accessibility and Consolidation of Legislation Group should have responsibility for developing guidance on the legislative policy standards discussed above, whether such standards could be addressed earlier in the legislative cycle, and how effective scrutiny of legislation might be facilitated.
- [7.6] The Chapter concludes with a consideration of whether the relevant provisions on legislation should be consolidated into a single Act. While the Commission fully supports the desirability of such a consolidated Legislation Act, as noted below and having regard to the views of consultees, it has concluded that it should confine its recommendations to the accessibility issues that have formed the main focus of this Report.

2. Role of the Accessibility and Consolidation of Legislation Group

(a) Developments in Ireland concerning oversight of legislative policy standards

- [7.7] A number of initiatives have already been developed in Ireland that have improved the legislative process, including through the enhanced use of ICT.
- [7.8] At the pre-legislative stage, this has included the development of the Parliamentary Workbench Content Management System (PWB), discussed in Chapter 6, which is an electronic system that facilitates the secure exchange of draft legislative texts between officials involved in developing a draft Bill. The development of the PWB has enabled full integration between the respective roles of the Office of the Parliamentary Counsel to the Government (OPC) and the Bills Office in the Houses of the Oireachtas.
- [7.9] As noted above, the issue of legislative drafting standards falls outside the scope of this project and Report. The Commission nonetheless notes that the OPC has long-established drafting practices and conventions that ensure consistency in drafting Government Bills. For finance legislation, the Revenue Legislation Services (RLS) has

published a useful *Guide to the Legislative Process*,³ and the Department of the Taoiseach's *Cabinet Handbook*⁴ also contains additional important guidance on internal Government processes related to the preparation of Government Bills. In respect of Private Members' Bills, the Office of Parliamentary Legal Advisers to the Oireachtas (OPLA), established in 2019 as part of the Houses of the Oireachtas Commission,⁵ offers assistance in the initial research phase of preparing a Bill, as well as legal advice, policy analysis, and drafting services.

- [7.10] In connection with EU law, the *European Union (Scrutiny) Act 2002* introduced enhanced legislative scrutiny by the Houses of the Oireachtas of proposed EU Regulations, Directives, decisions under Articles 28 or 29 of the Treaty on European Union, and other proposed EU acts that require the approval of both Houses. Section 2 of the 2002 Act requires the relevant Government Minister to lay a copy of the text of the proposed EU measure before each House, together with a statement that explains the measure's content and purpose, as well as any potential implications for the State as a result of the measure. The measure must be laid by the Minister "as soon as practicable" following its presentation by the Commission of the European Communities or its initiation by an EU Member State, as applicable. The 2002 Act also requires Government Ministers to report at least twice annually to both Houses of the Oireachtas on EU measures, proposed measures, and other relevant developments at the EU level. In addition to this reporting function, section 5 of the 2002 Act requires the Joint Committee on European Union Affairs to report annually to both Houses. The 2002 Act also amended section 5 of the *European Communities Act 1972* to require the Government to report annually to both Houses on developments at the EU level.
- [7.11] The Oireachtas has also developed technology-based solutions that facilitate Oireachtas members to track amendments as a Bill is debated and amended. These have been discussed in Chapter 6, above.

³ Revenue Legislation Services, *Guide to the Legislative Process* (Revised edition, 2017), available at <<https://www.revenue.ie/en/tax-professionals/documents/legislative-process.pdf>> accessed 26 August 2020.

⁴ Department of the Taoiseach, *Cabinet Handbook* (Revised edition, 2019), available at <<https://assets.gov.ie/6813/2a580791a7b24dec97a550539a0faff.pdf>> accessed 26 August 2020.

⁵ Section 14C of the *Houses of the Oireachtas Commission Act 2003*, inserted by section 6 of the *Houses of Oireachtas Commission (Amendment) 2018*, established the Office of the Parliamentary Legal Advisers (OPLA), and came into force in 2019. On the role of the OPLA, see <[https://www.oireachtas.ie/en/how-parliament-is-run/houses-of-the-oireachtas-service/opla/#:~:text=The%20Office%20of%20Parliamentary%20Legal%20Advisers%20\(OPLA\)%20is%20the%20in,Parliament%2C%20its%20Members%20and%20staff](https://www.oireachtas.ie/en/how-parliament-is-run/houses-of-the-oireachtas-service/opla/#:~:text=The%20Office%20of%20Parliamentary%20Legal%20Advisers%20(OPLA)%20is%20the%20in,Parliament%2C%20its%20Members%20and%20staff)> accessed 26 August 2020.

- [7.12] At the post-legislative stage, Acts now often include post-legislative review provisions, which were discussed in Chapter 5, above.
- [7.13] In addition to these important developments, the Commission turns to discuss developments in other jurisdictions, including the role of different bodies to provide oversight of legislative policy standards.

(b) Comparative developments

(i) New Zealand

- [7.14] The Legislation Design and Advisory Committee (LDAC) in New Zealand is an example of a body that has been specifically established with a view to developing and maintaining legislative standards. The LDAC was established in 2015 as a reconstitution of the Legislation Advisory Committee (LAC) and the Legislation Design Committee (LDC). The LAC had been established in 1986 and was responsible for producing best practice guidelines for policy makers at the pre-drafting stage. It also monitored compliance with those guidelines and made submissions to the relevant Parliamentary Committee about them. In addition, Government Departments were encouraged to consult with the Committee at a pre-legislative stage regarding compliance with its guidelines.⁶ However, the LAC's impact on legislative standards was considered to be benign but peripheral, as most of the problems with legislation occur early in its design phase. This meant that it was often too late to remedy any problems once a Bill had been produced.⁷
- [7.15] As a consequence, the LDC was established in 2006, in the belief that some significant or complicated legislative proposals might benefit from high-level advice on the framework and design of the legislation at an early stage of policy development and that such advice could improve the quality of the final product.⁸ Its intended function was to examine similar issues that had been considered by the LAC, but do so much

⁶ For example, the Committee noted in its Annual Report 2012 that of the 42 Bills it reviewed in 2012, 20 Bills failed to comply with the guidelines resulting in submissions being made to select committee and 3 more Bills had minor issues on which the LAC engaged with the Department or Parliamentary Counsel.

⁷ *Improving the Quality of Legislation - the Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond* (2007) 15 Waikato Law Review 13 at page 16.

⁸ Cabinet Paper, Office of the Minister of Justice, Cabinet Policy Committee, *Legislation Design Committee and Law Commission Funding* (2006).

earlier in the legislative process. Notwithstanding the view that the LDC project had worked well,⁹ the LDC went into abeyance and ceased to meet after November 2008.¹⁰

- [7.16] On foot of a Productivity Commission Report of 2014, the LDAC was established in 2015, incorporating the work of the LAC and LDC. Unlike the previous Committees, which were in part comprised of independent membership, the LDAC is comprised solely of Government officials with policy, legal or economic backgrounds. In its current constitution, it is a dedicated internal Government Committee tasked with overseeing standards at the pre-drafting stage by producing guidance for policy makers, making submissions to Parliamentary Committees regarding compliance with the guidance set down, and engaging in high-level interaction and advice with policy makers on legislative design and quality.¹¹

(ii) Commonwealth of Australia

- [7.17] In contrast to the approach that has been adopted in New Zealand (that is, the establishment of a dedicated body to oversee certain aspects of legislative standards), in other jurisdictions the responsible drafting office will often also be involved in setting down general legislative standards. This is the case in the Australian Commonwealth, where the Office of Parliamentary Counsel (OPC) plays a significant role in identifying standards in respect of each phase of the process, setting down detailed guidelines for policy makers and drafters alike.¹² Guidance published by the Australian OPC includes:

1. A Drafting Manual;
2. A Legislative Instruments Handbook;
3. Drafting Directions;¹³
4. An Amending Forms Manual;¹⁴
5. A Plain English Manual;

⁹ New Zealand Productivity Commission, *Regulatory institutions and practices - final report*, 16 July 2014 at page 417.

¹⁰ Law Commission of England and Wales, *Consultation Paper on the Form and Accessibility of the Law Applicable in Wales* (Consultation Paper No. 223, 2015) at para 9.56.

¹¹ For a fuller consideration of the LDAC in respect of pre-drafting standards, see paras 7.24-7.26, below.

¹² Guidance issued by the OPC is accessible on its website at <<https://www.opc.gov.au>> accessed 26 August 2020.

¹³ This comprises a series of Directions issued by the First Parliamentary Counsel on specific issues of drafting, ensuring a consistent drafting approach is taken on each theme.

¹⁴ This manual sets out the amending forms that OPC drafters are to use to ensure a consistent approach is taken to amendments.

6. Giving written drafting instructions to OPC;¹⁵
7. Clearer Commonwealth Laws: causes of complex legislation and strategies to address these;
8. Reducing Complexity in Legislation;¹⁶ and
9. Drafting Notes.

(iii) United Kingdom

- [7.18] The arrangements for maintaining legislative standards in the United Kingdom are similar to those in the Australian Commonwealth. Between 2013 and 2020, the Office of Parliamentary Counsel was involved in coordinating the Good Law Initiative which had sought to look at all aspects of legislative practice with a view to improving public access to the law.¹⁷ The OPC viewed “good law” as law that is necessary, clear, coherent, effective, and accessible.¹⁸ Under the Good Law project, a number of initiatives were adopted to improve the accessibility of the law. These included improvements to the form and content of explanatory notes,¹⁹ and the publication of DefaLex.²⁰

(c) Conclusions and recommendations

- [7.19] The Commission considers that the maintenance and application of effective legislative policy standards could be enhanced through the work of the proposed Accessibility and Consolidation of Legislation Group (ACLG). As noted in Chapter 4, the ACLG would bring together existing key entities, such as the Office of Parliamentary Counsel to the Government, the Houses of the Oireachtas, the Law Reform Commission, Government Departments with high legislative experience and other relevant legislative policy experts. The ACLG would have the capacity and expertise to promote high legislative standards.

¹⁵ This provides a checklist for those giving instructions to Parliamentary Counsel.

¹⁶ This is directed towards Parliamentary Counsel and those providing instructions, and provides guidelines on minimising the complexity of legislation.

¹⁷ More detailed information regarding the work of the Good Law project, which in January 2020 was reintegrated back within Departmental priorities, can be accessed at: <https://www.gov.uk/guidance/good-law>.

¹⁸ See <https://www.gov.uk/guidance/good-law>.

¹⁹ See paras 7.39-7.40, below.

²⁰ This is a database which contains all in-force legislation under the remit of the Department of Environment, Food & Rural Affairs (DEFRA). The database allows users to navigate the legislation by, amongst others, type of legislation, category, jurisdiction or year. It is continuously updated and improved. This database can be accessed at <<http://www.legislation.gov.uk/defralex>> accessed 26 August 2020.

R. 7.01 The Commission recommends that the Accessibility and Consolidation of Legislation Group that it has recommended should be established, in R. 4.07, should also have the function of overseeing and coordinating the maintenance and development of relevant legislative standards.

- [7.20] The Commission now turns to discuss specific aspects of the maintenance of legislative standards.

3. Pre-legislative standards

- [7.21] There are currently no generally applicable standards or guidance set down for policy makers at the pre-legislative stage on matters of legislative quality or regarding how legislative proposals should interact with the rest of the State's collection of legislation.²¹ Therefore, the first opportunity to undertake such an assessment often arises only when the Heads of a Bill are presented to the Office of Parliamentary Counsel to the Government for drafting. By this stage, legislative proposals are already very far developed and this may pose difficulties in terms of ensuring that the legislative proposal is of a high quality.²² This could be greatly assisted and enhanced through the development of guidelines or checklists to inform policy makers and/or through interaction with policy makers at a pre-drafting stage.

(a) Guidelines for and interaction with policy makers

- [7.22] The first approach, the development of guidelines or checklists, has been adopted in a number of jurisdictions in recent decades,²³ in response to concerns that inadequate policy preparation was having a negative effect on the end product of the legislative process.²⁴ Such guidance gives policy makers tangible reference points against which they can assess the conformity of proposals to legislative policy standards. It has also

²¹ As noted above, the Revenue Commissioners and the Revenue Legislation Services have published the *Guide to the Legislative Process* (Revised edition, 2017), which provides detailed guidance on the preparation of finance legislation, including the development of legislative proposals at a pre-drafting stage.

²² See Palmer, "Improving the Quality of Legislation - the Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review* 13 at pages 16-17.

²³ For a consideration of approaches adopted in other jurisdictions see Oliver, "Improving the Scrutiny of Bills: the case for standards and checklists" (2006) *Public Law* 219.

²⁴ See House of Commons Constitutional and Political Reform Committee, *Ensuring Standards in the Quality of Legislation*, HC 85 (2013) which recommended that a Code of Legislative Standards for legislation be introduced to the UK Parliament. It should be noted, however, that the proposal for a Code has been rejected by the UK Government, which appears to be based on ongoing discussion as to the appropriate lead body in setting legislative drafting standards.

been acknowledged that checklists facilitate the subsequent scrutiny of legislative proposals.²⁵

- [7.23] This approach has also been employed in New Zealand, through the work of the Legislation Design and Advisory Committee (LDAC), discussed above. The LDAC produces Legislation Guidelines that set out guidance on a number of issues, including identifying the policy objective, the consultative process, assessing the consistency of the legislation with the existing body of law, and considering whether any constitutional or rule of law issues arise. These Legislation Guidelines are augmented by a checklist that provides an additional aid to officials seeking to measure compliance with the Guidelines.
- [7.24] The LDAC also applies the second approach, in that it provides direct advice to Government agencies about the design and content of Bills early on in their development. It was initially anticipated that the LDAC would be consulted on up to 25 Bills per year.²⁶ However, between July 2018 and December 2019, the LDAC reviewed 40 Bills before they were introduced, with 35 of these being reviewed in 2019.²⁷ Between July 2015 and December 2016, the LDAC reviewed 33 Bills; between July 2016 and December 2017, the LDAC reviewed 32 Bills; and between July 2017 and December 2018, the LDAC reviewed 19 Bills.
- [7.25] Government Departments are expected to seek pre-introduction review of legislative proposals by the LDAC in a number of instances. These instances include, for example, where the legislative proposal could be inconsistent with the Legislation Guidelines, constitutes a significant principal Act, or will affect the integrity of the statute book. The LDAC can also review legislative proposals from Government Departments if there are anticipated issues concerning the design of the Bill or if advice is sought regarding the application of the Legislation Guidelines.

(b) Conclusions and recommendations

- [7.26] The Commission considers that, in order for legislation to comply with the guiding principles of accessibility identified in Chapter 1, it is necessary to address legislative

²⁵ *Ibid* at page 18.

²⁶ In its *Report on the Form and Accessibility of the Law Applicable in Wales* (Law Com No. 366) the Law Commission of England and Wales noted that in its first 9 months the Committee had met with Departments and agencies on 15 Bills.

²⁷ *Annual Report of the Legislation Design and Advisory Committee* (December 2019) at page 6; available at <<http://www.ldac.org.nz/assets/annual-reports/2d3c3b5967/Annual-Report-2019.pdf>> accessed 26 August 2020.

policy standards as early as possible in the pre-legislative cycle. In this regard, it is important that policy standards are set down and followed at the pre-legislative stage.

- [7.27] The Commission considers that both measures considered above, namely the production of pre-legislative guidance and checklists and pre-legislative consultation with policy makers, could greatly assist in improving legislative standards at the pre-legislative stage. Accordingly, the Commission considers that both approaches should be pursued concurrently. The Commission also considers that this should be coordinated by the proposed Accessibility and Consolidation of Legislation Group through the publication of suitable guidance material. Bearing in mind the coordinating role envisaged for the Group, the Commission does not envisage that the Group would be involved in direct consultation on specific Bills, but would rather act as a coordinating body for the development of guidance on legislative policy standards, including how such consultations would be carried out.

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|----------------|---|
| R. 7.02 | The Commission recommends that the Accessibility and Consolidation of Legislation Group, recommended in R. 4.07, should oversee the development and maintenance of pre-drafting guidance and checklists for policy makers, in relation to standards at the pre-drafting stage of policy development. The Commission also recommends that the Accessibility and Consolidation of Legislation Group should arrange for the publication of this guidance material. |
| R. 7.03 | The Commission recommends that the Accessibility and Consolidation of Legislation Group should coordinate high level pre-drafting consultation with policy makers, at the pre-drafting stage of policy development, limited to providing policy guidance on legislative design and quality, including on the best use of ICT. This process should be carried out on any significant legislative proposals. |

4. Facilitating effective scrutiny

- [7.28] Effective consultation and scrutiny have a significant role to play in ensuring compliance with legislative policy standards.²⁸ In recent years a number of initiatives have sought to improve scrutiny of legislation. These include, as already noted, the adoption of pre-legislative scrutiny (PLS) procedures, and improvements in the provision of explanatory material to members of the Oireachtas. Such initiatives have greatly improved the capacity of members of the Oireachtas and the general public to

²⁸ For a consideration of the role played by legislative scrutiny in legislative quality see Hunt, *Role of the Houses of the Oireachtas in the scrutiny of legislation* (Houses of the Oireachtas, 2010).

scrutinise legislative proposals and as such, in the Issues Paper, the Commission considered how scrutiny of Bills might be further improved.

(a) Pre-legislative scrutiny

- [7.29] In 2011, during the 31st Dáil (March 2011–February 2016), the Oireachtas began the practice of undertaking pre-legislative scrutiny of some Bills and the process has since been formalised under Standing Orders.²⁹ In 2016, the 32nd Dáil (March 2016–January 2020) formally adopted pre-legislative scrutiny as a requirement for all new Government Bills. In 2017, an empirical analysis of the impact of pre-legislative scrutiny on legislative and policy outcomes during the 31st Dáil was conducted.³⁰ The analysis measured the impact of PLS by tracking the level of engagement and changes made to General Schemes of Bills (Heads of Bills) as a direct result of PLS. It concluded that pre-legislative scrutiny had a positive impact on the legislative process,³¹ finding that 41.71% of the recommendations made by Committees at the pre-legislative stage to Bills were accepted by Ministers.³²
- [7.30] Subsequently, the *Final Report of the Sub-Committee on Dáil Reform* recommended that pre-legislative scrutiny should be extended to all legislation, regardless of whether it is sponsored by a member of Government or by a private member.³³ This recommendation has been implemented in Standing Orders, and Bills sponsored by private members now undergo pre-legislative scrutiny if they pass Second Stage in the Dáil.
- [7.31] Pre-legislative scrutiny generally involves the advance publication of a General Scheme of a Bill before the text of that Bill has been finalised. The relevant Oireachtas Committee will then carry out hearings on the proposed legislation, receiving written

²⁹ For an overview of pre-legislative scrutiny in the Oireachtas between 2011 and 2014, together with an analysis of comparable practices in other parliaments, see Oireachtas Library and Research Service, *Pre-legislative scrutiny (PLS) by parliament*, No 8 of 2014, available at: <https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Final_Spotlight_PLS_17Dec2014_172050.pdf> accessed 26 August 2020.

³⁰ Martin, *The impact of pre-legislative scrutiny on legislative and policy outcomes* (Houses of the Oireachtas, 2017), available at <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-06-20_the-impact-of-pre-legislative-scrutiny-on-legislative-and-policy-outcomes_en.pdf> accessed 26 August 2020.

³¹ *Ibid.*

³² *Ibid.*

³³ *Final Report of the Sub-Committee on Dáil Reform* (May 2016), available at <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/sub_committee_on_dail_reform/reports/2016/2016-05-24_final-report-sub-comxmittee-dail-reform_en.pdf>

and oral submissions from the public.³⁴ On foot of this, the Committee forwards a Report to the relevant Minister outlining its observations and recommendations. An example of this approach is the process that preceded the enactment of the *Assisted Decision-Making (Capacity) Act 2015*.³⁵

- [7.32] It is possible to apply to the Business Committee for a waiver of pre-legislative scrutiny of either a Government or Private Member's Bill. For example, in 2018, the Minister for Justice sought a waiver from the Business Committee of pre-legislative scrutiny of the *Scheme of the Blasphemy (Abolition of Offences and Related Matters) Bill 2018*.³⁶ The request was made to the Committee on the basis that the Scheme of the Bill directly reflected the will of the people, as expressed through the referendum in 2018 that had approved the *Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Act 2018*.
- [7.33] It is also possible for a Committee to decide against carrying out the scrutiny of a particular Bill where that Bill is considered urgent. This was the case for the *Local Government Bill 2018*, for example, which the Joint Committee on Housing, Planning and Local Government decided not to scrutinise at the pre-legislative stage. The Minister for Housing, Planning and Local Government was subsequently criticised for proposing significant amendment to the *Local Government Bill 2018* at a very late stage in the legislative process, however, particularly in circumstances where the text of the Bill had not undergone pre-legislative scrutiny.³⁷

³⁴ A process that went beyond these traditional means of public consultation was the eConsultation process that preceded the enactment of the *Broadcasting Act 2009*. Here a dedicated website was created by the responsible Committee for the purpose of the consultation, which sought to engage in a more interactive consultation with the general public and facilitate public participation in Committee hearings. See Hunt, *Role of the Houses of the Oireachtas in the scrutiny of legislation* (Houses of the Oireachtas, 2010) at pages 68-69.

³⁵ Available at <[http://opac.oireachtas.ie/AWData/Library3/Mental Capacity Comm Report 151944.pdf](http://opac.oireachtas.ie/AWData/Library3/Mental%20Capacity%20Comm%20Report%20151944.pdf)> accessed 26 August 2020. Draft Heads of a Bill were initially published which were scrutinised by the Oireachtas Joint Committee on Justice, Defence and Equality in February 2012. The Committee received over 70 written submissions and held 2 days of oral hearings, receiving evidence from experts and stakeholders. On foot of this a Report was published on 1 May 2012. The Bill was subsequently published in July 2013 and enacted as the 2015 Act.

³⁶ Finn, "Justice Minister to seek fast-tracking of blasphemy Bill" (thejournal.ie, 11 December 2018); available at <<https://www.thejournal.ie/justice-minister-to-seek-fast-tracking-of-blasphemy-bill-4386078-Dec2018/>> accessed 26 August 2020. The 2018 Bill was enacted as the *Blasphemy (Abolition of Offences and Related Matters) Act 2019*.

³⁷ See, for example, the comments by Deputy Catherine Connolly, Vol.975 *Dáil Debates* page 47 (15 November 2018), available at <<https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2018-11-15/debate/mul@/main.pdf>> accessed 26 August 2020.

(b) Availability of explanatory material

- [7.34] Effective scrutiny of legislation has also been facilitated through the greater availability of information relating to legislative proposals. For example, where proposed legislation is being proposed on foot of recommendations from bodies such as this Commission or other specially formed groups such as the Company Law Review Group, this information may include Reports published by such bodies. Such Reports are made freely available online and can therefore be accessed by any person seeking to scrutinise legislative proposals arising from them.
- [7.35] Additional information and research assistance is also made available by the Oireachtas Library and Research Service. This Service operates out of the Oireachtas Library and since 2005 has had a formal role in providing members of the Oireachtas with an independent research service. In addition to providing an on-demand service to all members, it also prepares explanatory material to members relating to legislation being debated. This material includes Debate Packs, consisting of secondary sources on the Bill in question, and Bills Digests, which analyses the principal themes addressed in a Bill.³⁸ An important part of the work of the Library and Research Service has been the preparation of information packs for use by members of the Oireachtas. This ensures quality information is available to members of the Oireachtas when assessing Bills.

(c) Potential for further improvement: explanatory memoranda

- [7.36] While the above advances have played an important role in facilitating greater scrutiny of legislation, it is possible for further improvements to be made. For example, explanatory memoranda published along with Bills have the capacity to facilitate effective Parliamentary and public scrutiny. Where members of the Oireachtas, or the general public, are attempting to scrutinise legislation, there should be sufficient information available to enable them to do so. Such information should include:

1. A general explanation of the policy objectives – explanation should be given of the policy objectives of the Bill and the reasons for them;
2. An explanation of how those objectives are to be met;
3. Details of any supplementary material available (such as reports, reviews, international agreements or impact assessments);
4. Information about any significant legal issues which warrant additional scrutiny and whether there are any constitutional or rule of law considerations; and

³⁸ For a consideration of the work of the Library and Research Service see Hunt, *Role of the Houses of the Oireachtas in the scrutiny of legislation* (Houses of the Oireachtas, 2010) at pages 65-66.

5. A clear section-by-section explanation of the effects of each provision within the Bill.

[7.37] In its 2000 *Report on Statutory Drafting and Interpretation: Plain Language and the Law*, the Commission recommended that consideration should be given to direct involvement by Parliamentary Counsel in drafting or setting standards for explanatory memoranda.³⁹ In response to this, the Office of Parliamentary Counsel to the Government (OPC) produced a document entitled *Explanatory Memoranda: An OPC Perspective*, which it submitted to the Government Chief Whip in March 2002. However, it remains the position that there is no guidance directing the form or content of such memoranda. In order for the publication of explanatory material to have the effect intended it would be beneficial that guidelines standardising their form and content and establishing publication requirements were set down. Examples of approaches adopted in other jurisdictions are set out below.

(i) *Explanatory notes to Bills introduced to Parliament: United Kingdom*

[7.38] A useful example of a recent analysis of the adequacy of accompanying explanatory material is the review in the UK of the form and content of Explanatory Notes.⁴⁰ Explanatory Notes have been in use in the UK since the 1998-1999 parliamentary session, which sought to introduce a standardised structure for all explanatory notes.⁴¹ Notwithstanding this attempt at standardisation, the explanatory notes have been criticised for failing to achieve consistency in terms of the quality of legislative information they provide. The Hansard Society, in its evidence to the House of Commons Political and Constitutional Reform Committee for the purposes of its Report *Ensuring standards in the quality of legislation*,⁴² stated:⁴³

"the quality of [Explanatory Notes] is highly variable and they do not require departments/ministers to provide parliamentarians with detailed information about many of the decisions taken,

³⁹ *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000) at para 6.40.

⁴⁰ A review group based in the UK Office of the Parliamentary Counsel undertook a review of the form and content of explanatory notes for Bills and Acts between late 2014 and early 2015. The review group included members from other government departments and from other parts of the Cabinet Office.

⁴¹ Munday, 'Explanatory Notes and Statutory Interpretation' (2006) 170 Criminal Law and Justice Weekly (formerly Justice of the Peace) 124.

⁴² House of Commons Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation*, HC 85 (2013).

⁴³ The Hansard Society is a UK-based charity that works to promote democracy and to strengthen parliaments.

particularly in relation to the legal context and technical standards of the legislation.”⁴⁴

- [7.39] In April 2013, the English Office of the Parliamentary Counsel to the Attorney General (OPC) launched the Good Law Initiative, the objectives of which are to consider and analyse the challenges of producing legislation and improve the quality of legislation. As part of this initiative, the English OPC began a consultation on the form and content of explanatory notes.⁴⁵ On foot of this consultation, the English OPC adopted a revised draft format for explanatory notes, requiring the following:

1. an explanation of the policy background;
2. the legal background;
3. commentary on provisions;
4. commencement information;
5. information on financial implications of the Bill; and
6. information on related documents.⁴⁶

(ii) Statutory regulation of the content of explanatory notes: Queensland

- [7.40] An example of statutory regulation of the content of explanatory material can be found in Part 4 of Queensland’s *Legislative Standards Act 1992*. Section 23(1) of the 1992 Act provides that an explanatory note for a Bill must set out various items of information about the Bill in “clear and precise language.” These items of information include:
1. the Bill’s short title;
 2. the policy objectives of the Bill and the reasons for these objectives;
 3. the way in which the policy objectives will be achieved by the Bill and an explanation as to why this way of achieving the objectives is reasonable and appropriate;
 4. any reasonable alternative way of achieving the policy objectives and an explanation as to why the alternative was not adopted;

⁴⁴ House of Commons Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation*, HC 85 (2013) at page 21.

⁴⁵ As part of this consultation, the OPC worked with representatives from the Cabinet Office, from Parliament, and from the Legislation team at the National Archives to develop a new draft format for explanatory notes. The review group piloted this revised format for two short Government Bills, the *Armed Forces (Service Complaints and Financial Assistance) Bill 2014* and the *Lords Spiritual (Women) Bill 2014*. 11 written responses were received in relation to the pilot notes. Further information on this consultation can be found on the website of the UK Government at <<https://www.gov.uk/government/consultations/explanatory-notes-for-bills-new-format>> accessed 26 August 2020.

⁴⁶ See <<https://www.gov.uk/government/consultations/explanatory-notes-for-bills-new-format>> accessed 26 August 2020.

5. the administrative cost of implementing the Bill;
 6. the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency;
 7. a brief statement of the extent to which consultation was carried out in relation to the Bill; and
 8. an explanation of the purpose and intended operation of each clause of the Bill.
- [7.41] Section 24(2) of the 1992 Act provides that, if the explanatory note does not include the information required by section 24(1), the note must state the reason for such non-inclusion.
- [7.42] Section 24(1) of the 1992 Act prescribes the content of explanatory statements for secondary legislation, which is broadly similar information to that required by section 23 in respect of notes for primary legislation. Section 24(2) sets out the additional requirement that information be included in the note as to whether or not consultation in respect of the legislation took place and, either the way in which that consultation was carried out and any results arising from it, or the reason for not undertaking consultation. Section 24(3) further requires the accompaniment of the note by a regulatory impact statement for significant subordinate legislation.
- (iii) Standard of additional explanatory material published: New Zealand*
- [7.43] In New Zealand, in addition to explanatory notes, Departments have been required to publish a disclosure statement in conjunction with a Bill since July 2013. The purpose of such statements is to set out existing government expectations for the development of legislation and significant or unusual features of legislation that are expected to be used with care, thus facilitating better scrutiny of legislation and supporting the production of legislation that is consistent with good legislative practice.⁴⁷
- [7.44] The template for disclosure statements requires disclosure in four parts,⁴⁸ namely:

1. *Part One: General Policy Statement:* this Part requires a statement about the objectives that the Bill seeks to achieve and how it goes about trying to meet those objectives.

⁴⁷ Cabinet Office, *Disclosure requirements for Government legislation*, CO (13) 3, 4 July 2013 at para 2.

⁴⁸ See The New Zealand Treasury, *Disclosure Statements for Government legislation - technical guide for Departments*, June 2013.

2. *Part Two: Background Material and Policy Information:* this Part requires disclosure on important background material and policy analysis (such as any reviews or reports which have informed the Bill's policies, international agreements addressed in the Bill or regulatory impact analyses) that can throw further light on the underlying policy issues addressed by the legislation.
3. *Part Three: Testing of Legislative Content:* this requires disclosure regarding the quality assurance work internally and externally undertaken to test the content of the legislation.
4. *Part Four: Significant Legislative Features:* information about significant or unusual provisions that the legislation may contain which may warrant particular scrutiny.

- [7.45] This template was initially established on an administrative basis with the ultimate ambition being to create a statutory requirement for such statements.
- [7.46] The *Legislation Act 2019*, which replaced the *Legislation Act 2012* included a new Part 4 which introduces a statutory requirement to prepare disclosure statements. Under section 103 of the 2019 Act, the chief executive of the relevant Department is required to prepare a disclosure statement for all Bills, subject to limited exceptions. Section 104 sets out the minimum requirements for disclosure, largely mirroring Parts 2-4 of the administrative template. Under section 103(1), the duty to prepare disclosure statements applies to all Government Bills as well as Government amendments. Under section 107, secondary legislation may set down guidelines for the content of disclosure statements as well as their electronic publication.⁴⁹

(iv) Regulation of content of explanatory memoranda in Parliamentary Standing Orders: Wales

- [7.47] The Standing Orders of Senedd Cymru, the Welsh Parliament (previously the Welsh Assembly), govern the form and introduction of Bills. Standing Orders require that where any member of the Senedd wishes to introduce a Bill he or she must also lay an explanatory memorandum before the Senedd. Such a memorandum must:
1. State that in his or her view the provisions of the Bill would be within the legislative competence of the Senedd;
 2. Set out the policy objectives of the Bill;
 3. Set out whether alternative ways of achieving the policy objectives were considered and, if so, why the approach taken in the Bill was adopted;
 4. Set out the consultation, if any, which was undertaken on:
 - a. the policy objectives of the Bill and the ways of meeting them;

⁴⁹ Subject to the approval of the House of Representatives, pursuant to section 107.

- b. the detail of the Bill; and
 - c. a draft Bill, either in full or in part (and if in part, which parts);
 5. Set out a summary of the outcome of that consultation, including how and why any draft Bill has been amended;
 6. If the Bill, or part of the Bill, was not previously published as a draft, state the reasons for that decision;
 7. Summarise objectively what each of the provisions of the Bill is intended to do (to the extent that it requires explanation or comment) and give other information necessary to explain the effect of the Bill;
 8. Set out the best estimates of:
 - a. the gross administrative, compliance and other costs to which the provisions of the Bill would give rise;
 - b. the administrative savings arising from the Bill;
 - c. net administrative costs of the Bill's provisions;
 - d. the timescales over which all such costs and savings would be expected to arise; and
 - e. on whom the costs would fall;
 9. Any environmental and social benefits and dis-benefits arising from the Bill that cannot be quantified financially;
 10. Where the Bill contains any provision conferring power to make subordinate legislation, set out, in relation to each such provision:
 - a. The person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;
 - b. Why it is considered appropriate to delegate the power; and
 - c. The Senedd procedure (if any) to which the subordinate legislation made or to be made in the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (and not to make it subject to any other procedure); and
 11. Where the Bill contains any provision charging expenditure on the Welsh Consolidated Fund, incorporate a report of the Auditor General setting out his or her views on whether the charge is appropriate.
- [7.48] Each of these requirements must be made evident in the memorandum by means of an index or otherwise. Where a Bill is derived from existing legislation, whether for the purpose of amendment or consolidation, the memorandum must also be accompanied by a table of derivations explaining clearly how the Bill relates to the existing legal framework. The Standing Orders also require memoranda to be accompanied by Schedules setting out the text of existing legislation as it is to be amended by the Bill, showing clearly where the wording is amended.

(d) Conclusions and recommendations

- [7.49] The Commission considers that greater guidance for explanatory memoranda would be beneficial. Guidance should set down clear rules for the form and content of explanatory memoranda. Of the examples considered above, the approach of the UK Parliament appears preferable with regard to how to set down such standards. Guidance which is set down in statute or standing orders may prove too rigid and inhibit ongoing revision of guidance, designed to promote best practice.
- [7.50] The Commission considers that the proposed Accessibility and Consolidation of Legislation Group would be a suitable body to produce guidance on the form and content of explanatory memoranda.
- [7.51] Accompanying explanatory information should be sufficient to allow members of the Oireachtas and the general public to understand the general policy objective and the means of achieving those objectives, should be sufficient to enable members of the Oireachtas and the general public to test the consistency of the legislation with constitutional and international law principles and should provide a clear section by section explanation of the provisions of the proposed legislation.
- [7.52] The Commission also considers it important, from the point of view of facilitating scrutiny of legislation, to ensure that there is an effective end-to-end approach to scrutinising legislation. In this regard, adequate standards and procedures to facilitate oversight in the context of both pre-legislative scrutiny and post-legislative scrutiny would be helpful. This would reflect recent developments, such as the incorporation of procedures for pre-legislative and post-legislative scrutiny in Oireachtas Standing Orders, as discussed in Chapter 4.
- [7.53] The Commission also considers that legislative policy standards and procedures should underpin the entire policy cycle, from agenda setting and policy formulation, through to enactment, and post-enactment review. The Commission is conscious of related Better Regulation developments that have already taken place in an effort to establish and implement standards at the policy formulation stage of the policy cycle. Importantly, for example, Government Departments are required to carry out a Regulatory Impact Analysis (RIA) when proposing any new primary legislation or significant secondary legislation. This requirement was recommended in the Government's 2004 White Paper *Regulating Better*, discussed above in the Report. The

Department of the Taoiseach has prepared guidance documents for Government Departments on how to carry out Regulatory Impact Analysis.⁵⁰

- [7.54] The Commission is also conscious that Government has adopted a general evidence-based approach to policy formation.⁵¹ In 2016, the Department of Public Expenditure and Reform published *Consultation Principles and Guidance*,⁵² which formed part of the implementation of Ireland's Open Government Partnership (OPG) National Action Plan. The guidance document sets out key principles to assist Government Departments and other public bodies when consulting with citizens and other relevant stakeholders in developing not only legislation, but also policy and public services.
- [7.55] The Commission considers that the Accessibility and Consolidation of Legislation Group would be well positioned to play a coordinating role in reviewing and overseeing the implementation of these existing principles and requirements in respect of legislative policy development, as well as in the development of procedures and further guidance material to assist Government Departments.

R. 7.04	The Commission recommends that the Accessibility and Consolidation of Legislation Group should oversee the development of guidance on the form and content of explanatory memoranda for Bills and should arrange for this guidance to be published.
R. 7.05	<p>The Commission recommends that such guidance should promote explanatory information that:</p> <ul style="list-style-type: none"> (a) Is sufficient to allow members of the Oireachtas and the general public to understand the general policy objectives and the means through which those objectives will be achieved; (b) Is sufficient to enable members of the Oireachtas and the general public to test the consistency of the legislation with constitutional and international law principles; and (c) Provides a clear section-by-section explanation of the provisions of the proposed legislation.

⁵⁰ Department of the Taoiseach, *Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis* (June 2009), available at <https://govacc.per.gov.ie/wp-content/uploads/Revised_RIA_Guidelines_June_2009.pdf> accessed 26 August 2020.

⁵¹ The reorganisation of the Department of Justice and Equality was based, in part, on adopting an evidence-based approach to policy development. See the Commission's *Report on Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019), at para 1.15.

⁵² Department of Public Expenditure and Reform, *Consultation Principles and Guidance* (November 2016), available at <<https://assets.gov.ie/5579/140119163201-9e43dea3f4b14d56a705960cb9354c8b.pdf>> accessed 26 August 2020.

R. 7.06 The Commission recommends the adoption and maintenance of adequate standards and procedures to facilitate oversight throughout the entire policy cycle, including at the policy formation, consultation, pre-legislative and post-legislative stages of that cycle.

5. Consolidation of the law regarding legislation

[7.56] In parallel with the suggestions listed above, the Commission considers it is appropriate to consider the desirability of consolidating the existing law regarding legislation itself. In a number of jurisdictions, discussed below,⁵³ a Legislation Act has been enacted to consolidate the legislation concerning the production, publication, consolidation and interpretation of legislation. Such a consolidated Legislation Act would make the law relating to legislation more accessible and would be consistent with the principles set down in this Report. While the Commission therefore supports the desirability of such a consolidated Legislation Act, as noted below and having regard to the views of consultees, it has concluded that it should confine its recommendations to the accessibility issues that have formed the main focus of this Report to this point. The Commission nonetheless considers that it is appropriate to examine developments in other jurisdictions and to describe what might suitably be included in such a Consolidated Legislation Act, which might form part of a future programme of consolidation.

(a) Consolidated legislation Acts in other jurisdictions

(i) New Zealand

[7.57] The *Legislation Act 2012*, which as noted below has been replaced by the *Legislation Act 2019*, partially implemented a recommendation made by the New Zealand Law Commission in its 2008 *Report on the Presentation of New Zealand Statute Law*⁵⁴ for a consolidated Legislation Act. The 2012 Act brought together three previous Acts that concerned legislation and provided a coherent framework for the provisions contained within each of the existing Acts. The 2012 Act comprised four Parts, including a general provisions Part and three substantive Parts. These substantive Parts were:

1. Law relating to publishing, revising and consolidating legislation. This Part was arranged into three Subparts addressing:
 - a. publication requirements in relation to legislation,
 - b. the requirement to carry out revisions and the power to make editorial changes in the course of such revisions,

⁵³ See paras 7.55-7.64, above.

⁵⁴ New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (NZLC R104, 2008).

- c. the duty to carry out programmes of consolidation.
 - 2. Subordinate legislation. This Part regulated the making and annulment of secondary legislation as well as the incorporation by reference of material by secondary legislation.
 - 3. Parliamentary Counsel Office. This Part placed the Parliamentary Counsel Office on a statutory basis and prescribed its functions and powers.
- [7.58] The *Legislation Act 2019* completed the process of consolidation recommended in the New Zealand Law Commission's 2008 Report, by repealing and replacing the 2012 Act and also incorporating the *Interpretation Act 1999*. The 2019 Act also includes a new Part giving statutory effect to the requirement for Departments to prepare Disclosure Statements when publishing certain legislation.
- [7.59] The 2019 Act contains 7 Parts, Parts 2 to 7 of which comprise substantive provisions. These Parts are arranged as follows:
- 1. Part 2 addresses the interpretation and application of legislation.
 - 2. Part 3 addresses the drafting and publication of legislation and is separated into three subparts:
 - a. Subpart 1 sets out the key responsibilities of the Parliamentary Counsel Office in relation to drafting and publishing legislation.
 - b. Subpart 2 details editorial powers.
 - c. Subpart 3 sets down provision regulating the duty to carry out programmes of consolidation.
 - 3. Part 4 contains the new disclosure requirements for Government-initiated legislation.
 - 4. Part 5 regulates Parliament's oversight of secondary legislation. This Part sets own provisions regulating the duty to present secondary legislation to Parliament as well as prescribing rules and procedures relating to the annulment or confirmation of secondary legislation.
 - 5. Part 6 provides a statutory basis for the Parliamentary Counsel Office and prescribes its functions and powers.

(ii) Ontario

- [7.60] Another jurisdiction that has effectively consolidated its laws relating to legislation is Ontario. Ontario's *Legislation Act 2006* amalgamates all previous provisions concerning legislation into a single legislative framework. In addition to a General Part, which includes a general obligation to maintain an electronic database of legislation, the 2006 Act contains 6 Parts, which involve:

- 1. setting out general rules relating to statutes, such as commencement and citation;

2. setting down rules relating to regulations;
3. laying out the rules for establishing versions of legislation as official law;
4. prescribing editorial powers;
5. rules of interpretation; and
6. enabling the Chief Legislative Counsel to prepare revisions of legislation.

(iii) Commonwealth of Australia

- [7.61] An example of a partial consolidation of the law is the Australian Commonwealth's *Legislation Act 2003*, which consolidated its enactments on legislation⁵⁵ with the exception of the *Acts Interpretation Act 1901*.
- [7.62] Chapter 2 of the 2003 Act addresses the registration and publication of legislation and is divided into three Parts. These Parts address:
1. The maintenance of a register of legislation;
 2. The rules relating to the registration and publication of revisions of legislation. This includes rules as to when there is a duty to lodge a revised version of legislation and when there is discretion to lodge a revised version of legislation, as well as rules relating to editorial powers; and
 3. The rules for establishing versions of legislation as official law and for taking judicial notice of legislation.
- [7.63] Chapter 3 of the 2003 Act sets out provisions regarding secondary legislation. It is divided into four parts addressing:
1. Drafting standards;
 2. Scrutiny of secondary legislation;
 3. Repeal of spent secondary legislation; and
 4. Sunsetting of legislative instruments.

(iv) Isle of Man

- [7.64] In 2015, the Isle of Man undertook a partial consolidation of its laws related to legislation, resulting in the repeal and re-enactment of all existing legislation into two new Acts, the *Legislation Act 2015* and the *Interpretation Act 2015*. The *Legislation Act 2015* repealed and re-enacted 9 existing Acts and provided a consolidated framework for all laws relating to legislation, other than the general rules of interpretation.

⁵⁵ *Legislative Instruments Act 2003*, *Acts Publication Act 1905*, *Acts Citation Act 1976* and the *Ordinances and Regulation (Notification) Act 1972*.

[7.65] The Manx *Legislation Act 2015* comprises 8 Parts, including an introductory Part, a Part that sets out general provisions, and a Part prescribing repeals and amendments made by the Act. The substantive Parts of the 2015 Act are as follows:

1. Part 2 sets out common provisions for Acts. This includes the announcement, promulgation, and commencement of Acts.
2. Part 3 concerns other public documents. The Part governs their making and commencement and addresses the various Tynwald (Manx Parliament) approval procedures, encompassing both what are commonly called the 'affirmative procedure' and the 'negative procedure'.
3. Part 4 covers matters common to Manx legislation generally, such as the numbering, citation, and distribution of legislation, and amendment and repeal.
4. Part 5 governs provisions relating to the production of revised legislation and also sets out rules relating to the exercise of editorial powers.
5. Part 6 establishes a Legislation Consolidation Board and sets down a procedure for enacting consolidations produced by the Board.

(b) Existing Irish legislation concerning legislation

[7.66] In the Issues Paper, the Commission identified a number of Acts and one set of Regulations that contain provisions relevant to legislation generally. The Commission considered that, should a consolidation of the law relating to legislation be carried out, the provisions contained within this body of legislation may be relevant for the purposes of such a project. The legislation identified is considered below.

(i) Statute Law Revision Acts 1861 to 2015

[7.67] The *Statute Law Revision Acts 1861 to 2015* are, as discussed in the Report above, the body of Acts enacted since the middle of the 19th Century to carry out statute law revision. The Acts identify legislation for express repeal and as already noted, more recently, identify legislation for express retention and provide for implied repeal or revocation of legislation not retained. In addition, a number of these Acts also set down provisions relating to the citation of certain pre-1922 Acts as well as the evidential value of particular sources of pre-1922 legislation.

(ii) Documentary Evidence Act 1868

[7.68] The *Documentary Evidence Act 1868* sets down a number of ways in which *prima facie* evidence of any proclamation, order or regulation may be given.

(iii) Documentary Evidence Act 1882

- [7.69] The *Documentary Evidence Act 1882* provides for *prima facie* legal status for official publications, including legislation, produced under the superintendence or authority of the pre-1922 predecessors of the Stationery Office.

(iv) Short Titles Acts 1896 to 2015

- [7.70] The *Short Title Acts 1896 to 2015* were enacted to improve ease of citation of legislation by providing for the citation of legislation by means of short titles and collective citations.

(v) Adaptation of Enactments Act 1922

- [7.71] The *Adaptation of Enactments Act 1922* was enacted on the establishment of the State in order to facilitate continuity after 1922 in respect of the functions carried out by bodies established after 1922 when exercising functions under pre-1922 legislation.

(vi) Documentary Evidence Act 1925

- [7.72] As noted already in the Report, the *Documentary Evidence Act 1925* provides for the evidential status of Acts published under the authority of the Stationery Office.

(vii) Adaptation of Charters Act 1926

- [7.73] The *Adaptation of Charters Act 1926* empowers the Government to amend, by Order, any pre-1922 Charter in order to enable such a Charter to have full force and effect in the State.

(viii) Adaptation of Enactments Act 1931

- [7.74] The *Adaptation of Enactments Act 1931* empowers the Government to amend, by Order, any pre-1922 statute, or any secondary legislation made pursuant to such pre-1922 statute.

(ix) Constitution (Consequential Provisions) Act 1937

- [7.75] Sections 2 to 6 of the *Constitution (Consequential Provisions) Act 1937* applies to all pre-1937 legislation and empowers the Government to make special amendments and modifications, by Order, to enable such legislation to have full force and effect under the 1937 Constitution.

(x) Constitution (Verification of Petition) Act 1944

- [7.76] The *Constitution (Verification of Petition) Act 1944* prescribes the manner in which signatures to a petition to be presented to the President under Article 27 of the Constitution are to be verified.

(xi) Statutory Instruments Act 1947

- [7.77] The *Statutory Instruments Act 1947* sets out various provisions applying generally to statutory instruments, including provisions relating to the printing, promulgation, numbering, and citation of statutory instruments.

(xii) European Communities (Judicial Notice and Documentary Evidence) Regulations 1972

- [7.78] The *European Communities (Judicial Notice and Documentary Evidence) Regulations 1972*⁵⁶ provide for judicial notice of and the evidential status of certain EU documents, including the Treaties governing the EU and EU acts.

(xiii) Interpretation (Amendment) Act 1997

- [7.79] The *Interpretation (Amendment) Act 1997* provides a general saver for common law offences which have been abolished.

(xiv) Statute Law (Restatement) Act 2002

- [7.80] The *Statute Law (Restatement) Act 2002* empowers the Attorney General to certify texts of legislation, with amendments incorporated, as official restatements of the law. As noted in Chapter 2,⁵⁷ the procedure set down for certification in the 2002 Act proved impracticable and the practice of certifying Restatements has been discontinued in favour of the Revised Acts maintained by the Commission.

(xv) Official Languages Act 2003

- [7.81] Section 7 of the *Official Languages Act 2003*, as amended, prescribes the duty to publish Acts of the Oireachtas in both official languages.

(xvi) Interpretation Act 2005

- [7.82] The *Interpretation Act 2005* repealed and replaced the various Interpretation Acts previously in force. The Act is the primary source for the general rules of construction applicable to legislation. The Act also provides rules relating to the citation, commencement and operation of legislation.

(c) Conclusions and recommendations

- [7.83] The Commission considers that it would be appropriate that much of the law relating to legislation should be consolidated into a Legislation Act. While the Commission therefore supports the desirability of such a consolidated Legislation Act, a number of

⁵⁶ SI No 341 of 1972.

⁵⁷ See paras 2.30-2.31, above.

consultees considered that the Report should be concerned primarily with the accessibility issues that have formed the main focus of the Report to this point, and that a consolidated Legislation Act would best be considered separately. The Commission has ultimately concluded that this view has the merit of allowing focus on the accessibility issues already identified in the Report. The *Draft Accessibility and Online Consolidation of Legislation Bill* appended to the Report is therefore focused on those accessibility issues.

- [7.84] The Commission has nonetheless considered it would be useful to set out the Commission's views on the legislative provisions listed above, which may prove of assistance in a future consolidation process. The Commission's views on how each Act are set out below.

(i) *Statute Law Revision Acts 1861 to 2015*

- [7.85] The Commission is conscious of concerns raised by some consultees as to the appropriateness of the inclusion of the *Statute Law Revision Acts 1861 to 2015* in a consolidated Legislation Bill. It has been pointed out that these Acts provide an important historical record of the measures reviewed, repealed, and retained at each stage. Repeal would also not achieve much, as one would still have to consult the repealed Act to find out what had been repealed or retained. The Commission agrees with these concerns and therefore considers that these Acts should be excluded from any consolidation project.

(ii) *Documentary Evidence Act 1868*

- [7.86] The Commission considers that the provisions of the *Documentary Evidence Act 1868* should not be considered for inclusion in a consolidated *Legislation Bill*. This is because the Commission considers that it remains more appropriate to include the 1868 Act in the *Draft Evidence (Consolidation and Reform) Bill* appended to its 2016 *Report on Consolidation and Reform of Aspects of the Law of Evidence*.⁵⁸

(iii) *Documentary Evidence Act 1882*

- [7.87] The Commission considers that it would not be appropriate for the provisions of the *Documentary Evidence Act 1882* that relate to legislation produced under the superintendence or authority of the Stationery Office to be considered for inclusion in a consolidated *Legislation Bill*. This is also because the Commission considers that it remains more appropriate to include the 1882 Act in the *Draft Evidence (Consolidation*

⁵⁸ *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

*(and Reform) Bill appended to its 2016 Report on Consolidation and Reform of Aspects of the Law of Evidence.*⁵⁹

(iv) Short Titles Acts 1896 to 2015

- [7.88] As with the *Statute Law Revision Acts 1861 to 2015* above, consultees raised concerns as to the appropriateness of the inclusion of the *Short Title Acts 1896 to 2015* in a consolidation project, as they provide a record of short title citations for a number of Acts as well as a number of collective citations. The Commission agrees with these concerns and therefore considers that these Acts should be excluded from any consolidated *Legislation Bill*.

(v) Adaptation of Enactments Act 1922

- [7.89] The Commission considers that the provisions of the *Adaptation of Enactments Act 1922* should be repealed and re-enacted in any consolidated *Legislation Bill*.

(vi) Documentary Evidence Act 1925

- [7.90] The Commission considers that the provisions of the *Documentary Evidence Act 1925* should not be considered for inclusion in a consolidated *Legislation Bill*. This is also because the Commission considers that it remains more appropriate to include that in the *Draft Evidence (Consolidation and Reform) Bill* appended to its 2016 *Report on Consolidation and Reform of Aspects of the Law of Evidence*.⁶⁰

(vii) Adaptation of Charters Act 1926

- [7.91] The Commission considers that the provisions of the *Adaptation of Charters Act 1926* should be repealed and re-enacted in any consolidated *Legislation Bill*.

(viii) Adaptation of Enactments Act 1931

- [7.92] The Commission considers that the provisions of the *Adaptation of Enactments Act 1931* should be repealed and re-enacted in any consolidated *Legislation Bill*.

(ix) Constitution (Consequential Provisions) Act 1937

- [7.93] The Commission considers that sections 2 to 5 and section 6(2) of the *Constitution (Consequential Provisions) Act 1937* should not be considered for inclusion in any consolidated *Legislation Bill*.

⁵⁹ *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

⁶⁰ *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

(x) Constitution (Verification of Petition) Act 1944

- [7.94] The Commission considers that the provisions of the *Constitution (Verification of Petition) Act 1944* should not be considered for inclusion in any consolidated *Legislation Bill*.

(xi) Statutory Instruments Act 1947

- [7.95] The Commission considers that the provisions of the *Statutory Instruments Act 1947* should be repealed and re-enacted in any consolidated *Legislation Bill*.

(xii) European Communities (Judicial Notice and Documentary Evidence) Regulations 1972

- [7.96] The Commission considers that the provisions of the *European Communities (Judicial Notice and Documentary Evidence) Regulations 1972* should not be considered for inclusion in any consolidated *Legislation Bill* as they also properly belong in an *Evidence Bill*.

(xiii) Interpretation (Amendment) Act 1997

- [7.1] The Commission considers that the provisions of the *Interpretation (Amendment) Act 1997* should not be considered for inclusion in any consolidated *Legislation Bill*.

(xiv) Statute Law (Restatement) Act 2002

- [7.2] The Commission has already recommended that, as the procedure set down for certification in the *Statute Law (Restatement) Act 2002* has proved to be impracticable to operate, the 2002 Act should be repealed⁶¹ and should therefore not be considered for inclusion in any consolidated *Legislation Bill*.

(xv) Official Languages Act 2003

- [7.3] The Commission considers that section 7 of the *Official Languages Act 2003* should not be considered for inclusion in any consolidated *Legislation Bill*.

(xvi) Interpretation Act 2005

- [7.4] The Commission considers that the provisions of the *Interpretation Act 2005* should not be considered for inclusion in any consolidated *Legislation Bill*.

⁶¹ See paras 2.30-2.31 and 5.33, above, and Recommendation R. 5.07.

- R. 7.07** The Commission recommends the enactment of an *Accessibility and Online Consolidation of Legislation Bill* to implement the recommendations made in this Report concerning accessibility of legislation, a Draft Scheme of which is appended to the Report.
- R. 7.08** The Commission recommends the enactment of a *Legislation Bill*, prepared in a separate exercise to this Report, to repeal and re-enact certain provisions on legislation. Legislation suitable for inclusion in such a Bill are:
- (a) *Adaptation of Enactments Act 1922*;
 - (b) *Adaptation of Charters Act 1926*;
 - (c) *Adaptation of Enactments Act 1931*; and
 - (d) *Statutory Instruments Act 1947*.
- R. 7.09** The Commission recommends that the *Accessibility and Online Consolidation of Legislation Bill* should be arranged into the following parts:
- (a) establishment of the Accessibility and Consolidation of Legislation Group;
 - (b) programmes of consolidation;
 - (c) rules for revision of legislation;
 - (d) rules regarding the publication of official versions of legislation; and
 - (e) rules prescribing editorial powers for revisions.

APPENDIX A SUMMARY OF RECOMMENDATIONS

Chapter 1 Guiding Principles

- R. 1.01** The Commission recommends that, to be accessible, legislation should be:
- (a) comprehensive, that is, that all legislation that is in force is accessible;
 - (b) current, that is, that it is available in an up-to-date, as amended form;
 - (c) immediately available in a free to access online format; and
 - (d) based on defined legislative standards, at each stage of the policy cycle, including at pre-legislative and post-legislative stages.

Chapter 4 Comprehensive Legislation

- R. 4.01** The Commission recommends that, for the purposes of the Report, the term Consolidation Bill is used to mean a Bill that can involve, but not necessarily in all instances, the following: bringing together into a single piece of legislation the law on a particular area, including, where relevant, principles and rules that are set out in existing legislation and case law, together with elements of reform where required.
- R. 4.02** The Commission recommends that, so far as is practicable, subject areas of the law should be consolidated into single Principal Acts, so that there are as few Acts for each subject area as possible.
- R. 4.03** The Commission also recommends that, where it is not possible to consolidate a subject area into a single Principal Act, related Acts should be presented together under a general heading or sub-heading in an online classified legislation database, as discussed in Chapter 6.
- R. 4.04** The Commission recommends that the Accessibility and Consolidation of Legislation Group (see Recommendation R. 4.07, below):
- (a) shall prepare draft programmes of consolidation, to be carried out over a defined period of five years;
 - (b) that the Group shall carry out a public consultation exercise on each draft programme with interested parties, including those with policy-making responsibility, and

(c) that, having taken account of this consultation process, the Group shall publish the final content of the programme and implement the programme in accordance with the time frame set out in each programme.

R. 4.05 The Commission recommends that, in preparing a draft consolidation programme the Group should apply the following non-exhaustive criteria to determine the content of a programme of consolidation:

- (a) the legislation is frequently used;
- (b) the law covers a significantly wide and coherent area of law, comparable to a significant element of one of the 36 headings in the Classified List of In-Force Legislation;
- (c) the law is spread across numerous Acts and provisions (including in pre-1922 Acts);
- (d) the law has been amended many times, with the result that it is difficult to know the applicable law; and
- (e) significant preparatory work has already been completed (for example, the draft Scheme of a consolidation Bill has already been prepared).

R. 4.06 The Commission recommends that an initial draft programme of consolidation could propose the following areas for public consultation:

- (a) road traffic legislation;
- (b) employment legislation;
- (c) gambling control legislation;
- (d) sale of alcohol legislation;
- (e) monuments and archaeological heritage legislation;
- (f) consumer protection legislation; and
- (g) landlord and tenant legislation.

R. 4.07 The Commission recommends that a multi-agency body should be established to oversee and coordinate planned programmes of Consolidation Bills as defined in this Report (and other functions proposed in later recommendations), bringing together existing entities with relevant expertise, including:

- (a) the Office of Parliamentary Counsel to the Government;
- (b) the Office of the Attorney General;
- (c) the Office of Parliamentary Legal Adviser to the Oireachtas;

- (d) the Bills Office of the Houses of the Oireachtas;
- (e) the Law Reform Commission;
- (f) representatives from Government Departments with high legislative experience; and
- (g) other legislative policy experts.

- R. 4.08** The Commission recommends that this multi-agency body be called the Accessibility and Consolidation of Legislation Group.
- R. 4.09** The Commission recommends that the Accessibility and Consolidation of Legislation Group should oversee and coordinate and, so far as practicable, implement the programme in accordance with the defined timeframe of five years set out in each programme and that, for this purpose and for its other functions set out in this Report, it should be suitably resourced which should include at the least a permanent secretariat.
- R. 4.10** The Commission recommends that the Accessibility and Consolidation of Legislation Group should be required to report annually to the Oireachtas on progress made to date towards fulfilling its duties.
- R. 4.11** The Commission recommends that an advisory board should be established to guide the Accessibility and Consolidation of Legislation Group in its work. The Commission recommends that membership of this advisory board should include representatives from various groups with an interest in the accessibility of legislation, including those involved in policy development and end users of legislation, including members of the public.
- R. 4.12** The Commission recommends that consideration should be given by the Government and the Oireachtas to a presumptive requirement that legislation should include a review of its operation within five years of being enacted, or such other period as may be considered appropriate, that such a review should take account of relevant Better Regulation principles, that it should be concluded and published within one year of the commencement of the review, and should be considered by the relevant Oireachtas Committee, taking account of the post-enactment legislative standards in Recommendation 7.06, below.

- R. 4.13** The Commission recommends that each Government Department and other body with power to make secondary legislation should carry out periodic audits of secondary legislation under their remit. Such audits should identify all secondary legislation under their remit that remain in force and identify an action plan for reducing the stock of secondary legislation under their remit. The Commission also recommends that they should consider the feasibility of consolidating statutory instruments that have been amended more than three times.

Chapter 5 Maintaining Legislation in a Coherent Form

- R. 5.01** The Commission recommends that the Commission itself should continue to have the functional responsibility and general duty to produce and publish legislation in its Revised, as amended, format. The Commission also recommends that the duty should be set out in legislation and reinforced by a requirement that Revised versions of legislation should be published as soon as is reasonably practicable after the relevant amending provision comes into force.
- R. 5.02** The Commission recommends that the general duty should apply to both Acts (primary legislation) and statutory instruments (secondary legislation).
- R. 5.03** The Commission recommends that the general statutory duty should initially apply to all Acts enacted from 2000 onwards and that all such Acts should, within three years, be published and maintained in Revised format. The Commission also recommends that, after the initial three-year period, there should be a duty to prepare a series of planned programmes of publishing Revised Acts, and of statutory instruments, which should complement the planned programmes of consolidated legislation recommended in Chapter 4. The Commission therefore also recommends that the preparation and oversight of Revised legislation should continue to be carried out by the Commission and agreed with the Accessibility and Consolidation of Legislation Group recommended in Chapter 4.
- R. 5.04** The Commission recommends that the programmes to consolidate legislation and the programmes to publish Revised legislation should have the same ultimate objective of a comprehensive statement of the State's collection of legislation in its up-to-date state. The Commission also recommends that the programmes should ensure that, in the medium term (that is, after the initial three year period), the candidate legislation should be chosen on the basis of the same general criteria, namely, that they are the most used and of most relevant to all stakeholders, including the general public.
- R. 5.05** The Commission recommends that the general statutory duty to produce and publish Revised legislation should apply where the following has occurred:
- (a) where a statutory provision has been textually amended;
 - (b) where a statutory provision has been commenced; and
 - (c) where a statutory provision has been repealed, expired, or has otherwise ceased to be in force by virtue of an express provision in another statutory provision.

R. 5.06 The Commission recommends that there should also be a discretion to produce and publish Revised legislation in the following circumstances:

- (a) where a statutory provision has been amended by a non-textual amendment; and
- (b) in the case of a statutory instrument, where it has been annulled by the Oireachtas.

R. 5.07 The Commission recommends the repeal of the *Statute Law (Restatement) Act 2002*.

R. 5.08 The Commission recommends that the legislation concerning Revised legislation should include provision to make the following editorial changes:

- (a) incorporating changes to the name, title, location, or address of a body, office, person or place;
- (b) replacing a description of a date or time with the actual date or time;
- (c) including gender neutral references;
- (d) omitting from legislation any provisions that have expired, been repealed, or whose effect(s) have been nullified or overridden;
- (e) altering the style or presentation of text or graphics to be consistent with current drafting practices, or to improve electronic or print presentation;
- (f) changing references to a number, year, date, time, amount of money, penalty, quantity, measurement, or other matter, idea, or concept to be consistent with modern practice;
- (g) incorporating transitional provisions in an amending Act or regulations;
- (h) altering the title of legislation, or references to titles of other legislation, to conform to current citation practice;
- (i) implementing adaptation references in the *Adaptation of Enactments Act 1922* and in any Orders made under the 1922 Act;
- (j) implementing adaptation references in the *Constitution (Consequential Provisions) Act 1937*;
- (k) implementing definitions and references in the *Interpretation Act 2005*;
- (l) implementing definitions and references the *European Union Act 2009*;
- (m) implementing fines indexation and fines classifications in the *Fines Act 2010*; and
- (n) implementing Euro currency conversions in Council Regulation (EC) No. 974/98 on the Euro.

- R. 5.09** The Commission recommends that it should be expressly provided that these editorial powers should be subject to the proviso that any editorial changes made must not alter the substance or effect of the legislation.
- R. 5.10** The Commission recommends that it should be expressly provided that any editorial changes are identified in each place they are made in a revised version of legislation.
- R. 5.11** The Commission recommends that the editorial powers should be subject to supervision by the Accessibility and Consolidation of Legislation Group recommended in R. 4.07, including through the publication by that Group of guidance on the use of the editorial powers.
- R. 5.12** The Commission recommends that it should be expressly provided that, in the event of any apparent conflict between the text of legislation as enacted (including any subsequently enacted amendments) and the text of revised legislation, the text as enacted must prevail.
- R. 5.13** Consistent with Article 15.2.1° of the Constitution, the Commission recommends that, where an obvious error is discovered within legislation in the course of preparing Revised legislation, this is to be communicated to the Accessibility and Consolidation of Legislation Group recommended in Chapter 4, which should bring this error to the attention of the Office of the Attorney General, the appropriate Department, and the Houses of the Oireachtas.

Chapter 6 Using ICT to Make Legislation Immediately Available

- R. 6.01** The Commission recommends that statutory provision be made to designate the electronic Irish Statute Book (eISB) as the principal online source of legislation in Ireland.
- R. 6.02** The Commission recommends that the online version of an Act enacted and published by the Oireachtas, and of a Revised Act published in accordance with the requirements set out in R. 6.06, below, should have *prima facie* evidential status of the content of the Act (as already provided for in respect of printed copies under the *Documentary Evidence Act 1925*), subject to a “qualified electronic signature” being attached to that online version that complies with the requirements of Regulation (EU) No. 910/2014 on the mutual recognition of electronic identification and signatures, the eIDAS Regulation, which is the form of electronic signature that is required under Regulation (EU) No. 216/2013 on the electronic publication of the Official Journal of the European Union, as amended by Regulation (EU) No. 2018/2056 to take account of the eIDAS Regulation. Under the eIDAS Regulation, a “qualified electronic signature” must meet the following requirements:
- (a) It is uniquely linked to the signer;
 - (b) It can be identified by the signer;
 - (c) It is created using data created by the signer that is under his or her exclusive control;
 - (d) Any subsequent changes that are made to it can be detected and the signature must be invalidated as a result of those changes;
 - (e) It is certified by a qualified trust service provider (TSP);
 - (f) It is based on a qualified certificate that satisfies the minimum content set out in Annex I of the eIDAS Regulation, including, among others that:
 - (i) the certificate must issue as a qualified certificate;
 - (ii) the certificate must identify the qualified TSP issuing it;
 - (iii) the certificate must indicate the State in which the TSP is established; and
 - (iv) the certificate must contain electronic signature validation data that corresponds to the electronic signature creation data and the advanced electronic signature or seal of the qualified TSP; and
 - (g) It is created by a qualified electronic signature creation device that satisfies the minimum content set out in Annex II of the eIDAS Regulation, including, among others, that the device can ensure:

- (i) the confidentiality of the electronic signature creation data is reasonably assured;
- (ii) that the electronic signature creation data can practically occur only once; and
- (iii) that the electronic signature data are reliably protected against forgery and use by others.

- R. 6.03** The Commission recommends that the online version of a statutory instrument published in accordance with the *Statutory Instruments Act 1947*, and of a revised statutory instrument published in accordance with the requirements set out in R. 6.06, below, should have *prima facie* evidential status of the content of the statutory instrument (as already provided for in respect of printed copies under *the Statutory Instruments Act 1947*), subject to a “qualified electronic signature” being attached to that online version that complies with the requirements of the eIDAS Regulation, as set out in R. 6.02, above.
- R. 6.04** The Commission recommends that recommendations R. 6.01 and R. 6.02 should be considered against the requirements in the Constitution concerning the issuing of translations of legislation that has been enacted or made in one of the official languages, and accordingly that sufficient resources should be allocated on an ongoing basis to the Translation Unit of the Houses of the Oireachtas for this purpose.
- R. 6.05** The Commission recommends that, in light of these resource implications, translation efforts should focus on Revised versions of legislation.
- R. 6.06** The Commission recommends that the Accessibility and Consolidation of Legislation Group should adopt an effective eLegislation strategy, making optimum use of ICT to make legislation more accessible to the public, and which should include the following elements:
- (a) a strategic plan to develop an effective legislative management system to integrate legislative standards, online publication of legislation as enacted and maintenance of revised legislation online;
 - (b) development of capacity to generate automatically published online versions of legislation and generate semi-automatically revised versions of legislation;
 - (c) where new revisions of legislation are created, development of the capacity to retain, and make available to the public, point-in-time versions of the legislation concerned; and
 - (d) development of capacity to facilitate effective end-to-end interlinking between legislative content and other related material and resources, including:

- (i) reports from bodies that have informed the legislation;
- (ii) Schemes of Bills published by Government Departments;
- (iii) pre-legislative scrutiny by Oireachtas Committees;
- (iv) Regulatory Impact Analyses;
- (v) texts of Bills as published and as amended in the legislative process;
- (vi) Explanatory Memoranda and notes;
- (vii) Oireachtas debates on Bills;
- (viii) official notification of the enactment of an Act in Iris Oifigiúil;
- (ix) in the case of legislation giving effect to EU law, the relevant European instrument;
- (x) in the case of legislation giving effect to an international agreement, that agreement and related reports of international bodies;
- (xi) statutory codes and guidance issued after enactment under the legislation;
- (xii) explanatory information provided online by State bodies such as the Citizens Information Board;
- (xiii) case law of the courts interpreting and applying the legislation; and
- (xiv) decisions of statutory bodies applying the legislation.

- R. 6.07** The Commission recommends that the Explanatory Memorandum to a Bill, in the form recommended in Recommendation R. 7.05, should be updated where the Bill is amended in the Oireachtas and that the updated Explanatory Memorandum should be published with the enacted Act or as soon as practicable after enactment.
- R. 6.08** The Commission recommends that standards for online publication of legislation should require its arrangement by subject matter as well as in chronological order, and that the Accessibility and Consolidation of Legislation Group recommended in R. 4.07 should consider the Commission's Classified List of In-Force Legislation as the template for the subject-based classification of legislation.
- R. 6.09** The Commission recommends that consideration be given to the development of an updated index to legislation, and to the development of a specialised search function to legislation which would enable users to readily identify both legislation that implements European Union law and those European Union acts that are directly applicable within the State.

Chapter 7 Legislative Standards

- R. 7.01** The Commission recommends that the Accessibility and Consolidation of Legislation Group that it has recommended should be established, in R. 4.07, should also have the function of overseeing and coordinating the maintenance and development of relevant legislative standards.
- R. 7.02** The Commission recommends that the Accessibility and Consolidation of Legislation Group, recommended in R. 4.07, should oversee the development and maintenance of pre-drafting guidance and checklists for policy makers, in relation to standards at the pre-drafting stage of policy development. The Commission also recommends that the Accessibility and Consolidation of Legislation Group should arrange for the publication of this guidance material.
- R. 7.03** The Commission recommends that the Accessibility and Consolidation of Legislation Group should coordinate high level pre-drafting consultation with policy makers, at the pre-drafting stage of policy development, limited to providing policy guidance on legislative design and quality, including on the best use of ICT. This process should be carried out on any significant legislative proposals.
- R. 7.04** The Commission recommends that the Accessibility and Consolidation of Legislation Group should coordinate the development of guidance on the form and content of explanatory memoranda for Bills and should arrange for this guidance to be published.
- R. 7.05** The Commission recommends that such guidance should promote explanatory information that:
- (a) Is sufficient to allow members of the Oireachtas and the general public to understand the general policy objectives and the means through which those objectives will be achieved;
 - (b) Is sufficient to enable members of the Oireachtas and the general public to test the consistency of the legislation with constitutional and international law principles; and
 - (c) Provides a clear section-by-section explanation of the provisions of the proposed legislation.
- R. 7.06** The Commission recommends the adoption and maintenance of adequate standards and procedures to facilitate oversight throughout the entire policy cycle, including at the policy formation, consultation, pre-legislative, and post-legislative stages of that cycle.

- R. 7.07** The Commission recommends the enactment of an *Accessibility and Online Consolidation of Legislation Bill* to implement the recommendations made in this Report concerning accessibility of legislation, a Draft Scheme of which is appended to the Report.
- R. 7.08** The Commission recommends the enactment of a *Legislation Bill*, prepared in a separate exercise to this Report, to repeal and re-enact certain provisions on legislation. Legislation suitable for inclusion in such a Bill are:
- (a) *Adaptation of Enactments Act 1922*;
 - (b) *Adaptation of Charters Act 1926*;
 - (c) *Adaptation of Enactments Act 1931*; and
 - (d) *Statutory Instruments Act 1947*.
- R. 7.09** The Commission recommends that the *Accessibility and Online Consolidation of Legislation Bill* should be arranged into the following parts:
- (a) establishment of the Accessibility and Consolidation of Legislation Group;
 - (b) programmes of consolidation;
 - (c) rules for revision of legislation;
 - (d) rules regarding the publication of official versions of legislation; and
 - (e) rules prescribing editorial powers for revisions.

APPENDIX B DRAFT SCHEME OF BILL

DRAFT SCHEME OF

ACCESSIBILITY AND ONLINE CONSOLIDATION OF LEGISLATION BILL 2020¹

Bill

entitled

An Act to provide for the accessibility, consolidation, and online publication of legislation and of Revised legislation, to provide for the establishment of an Accessibility and Consolidation of Legislation Group and to provide for related matters.

PART 1 Preliminary and General

Head 1 – Short title and commencement

Provide for:

This Act may be cited as the Accessibility and Online Consolidation of Legislation Act.

This Act comes into operation on [date to be inserted].

Explanatory note

Head 1 is a standard provision setting out the short title and commencement date. The Interpretation Act 2005 provided for a definite commencement date.

Head 2 – Definitions

Provide for:

"Accessibility and Consolidation of Legislation Group" means the group referred to in Head 3.

¹ As noted in the Report at para 4.59, if the Accessibility and Consolidation of Legislation Group (ACLG) were to be established, at least initially, on a non-statutory administrative basis, the relevant Heads of this Draft Scheme, notably Heads 3 to 7 and Head 13, could form the basis for the terms of reference of the ACLG.

"Advisory Group" means the group referred to in Head 7.

"Consolidation Bill" in this Act only means a Bill that can involve, but not necessarily in all instances, bringing together into a single piece of legislation the law on a particular area, including, where relevant, principles and rules that are set out in existing legislation and case law, together with elements of reform where required.

Explanatory note

Head 2 is a standard provision containing definitions. The definition of "Consolidation Bill" refers to the recommendation in R. 4.01.

Head 3 – Guiding Principles

Provide for:

In carrying out the provisions of this Act, the following guiding principles shall be applied:

- (a) legislation should be comprehensive, that is, that all legislation that is in force is accessible;
- (b) legislation should be current, that is, that it is available in an up-to-date, as amended form;
- (c) legislation should be immediately available in a free to access online format; and
- (d) legislation should be based on defined legislative standards, at each stage of the policy cycle, including at pre-legislative and post-legislative stages.

Explanatory note

Head 3 refers to the recommendation in R. 1.01

PART 2 Accessibility and Consolidation of Legislation Group

Head 4 – Establishment of Accessibility and Consolidation of Legislation Group

Provide for:

- (a) The establishment of a body to be known as the Accessibility and Consolidation of Legislation Group;

(b) the membership of the Group shall include:

- (i) the Office of Parliamentary Counsel to the Government;
- (ii) the Office of the Attorney General;
- (iii) the Office of Parliamentary Legal Adviser to the Oireachtas;
- (iv) the Bills Office of the Houses of the Oireachtas;
- (v) the Law Reform Commission;
- (vi) representatives from Government Departments with high legislative experience; and
- (vii) other legislative policy experts.

Explanatory note

Head 4 refers to the recommendations in R. 4.07 and R. 4.08.

Head 5 – Resourcing and functions of Accessibility and Consolidation of Legislation Group

Provide for:

The Accessibility and Consolidation of Legislation Group shall be suitably resourced, which should include at the least a permanent secretariat, in order to carry out its functions, which are to:

- (a) prepare draft programmes of consolidation, to be carried out over a defined period of five years;
- (b) carry out a public consultation exercise on each draft programme with interested parties, including those with policy-making responsibility;
- (c) having taken account of this consultation process, publish the final content of the programme and oversee and coordinate and, so far as practicable, implement the programme in accordance with the time frame set out in each programme;
- (d) develop and maintain policy guidance in relation to the pre-drafting stage of legislative policy development;
- (e) develop and maintain policy guidance on legislative design and quality in connection with the best use of Information and Communications Technology (ICT);
- (f) develop an eLegislation strategy in accordance with Head 13;

- (g) develop and maintain policy guidance on the form and content of explanatory memoranda for Bills;
- (h) develop and maintain policy guidance on relevant legislative standards;
- (i) develop and maintain policy guidance on pre-legislative scrutiny and post-legislative scrutiny;
- (j) arrange for the publication of its policy guidance materials, including on the internet.

Explanatory note

Head 5 refers to the recommendations in R. 4.09, R. 6.06, and R. 7.01 to R. 7.06

Head 6 – Duty to Report Annually to the Oireachtas

Provide for:

The Accessibility and Consolidation of Legislation Group shall report annually to the Oireachtas on progress made to date towards fulfilling its functions and duties under this Act.

Explanatory note

Head 6 refers to the recommendation in R. 4.10.

Head 7 – Advisory Board

Provide for:

- (a) An advisory board shall be established to guide the Accessibility and Consolidation of Legislation Group in its work under this Act.
- (b) The advisory board shall comprise representatives from groups with an interest in the accessibility of legislation, including those involved in policy development and end users of legislation, including members of the public.

Explanatory note

Head 7 refers to the recommendation in R. 4.11.

PART 3 Publication and Evidential Status of Online Versions of Legislation

Head 8 – Electronic Irish Statute Book Principal Online Source of Legislation in Ireland

Provide for:

The Electronic Irish Statute Book shall be designated as the principal online source of legislation in Ireland.

Explanatory note

Head 8 refers to the recommendation in R. 6.01.

Head 9 – *Prima Facie* Evidence of Acts

Provide for:

(a) The online version of an Act published on the electronic Irish Statute Book or on the website of the Houses of the Oireachtas, and of a Revised Act published on the website of the Law Reform Commission, shall have *prima facie* evidential status of the content of the Act, subject to an electronic signature being attached to that online version in accordance with Head 11.

(b) In the event of any apparent conflict between the text of an Act or, as the case may be, a Revised Act, published in accordance with paragraph (a) and the text of the Act as enacted, the text as enacted shall prevail.

Explanatory note

Head 9 refers to the recommendation in R. 6.02.

Head 10 – *Prima Facie* Evidence of Statutory Instruments

Provide for:

(a) The online version of a statutory instrument published on the electronic Irish Statute Book, and where made in accordance with the requirements of the *Statutory Instruments Act 1947*, and the online version of a Revised statutory instrument published on the website of the Law Reform Commission, shall have *prima facie* evidential status of the content of the statutory instrument, subject to an electronic signature being attached to that online version in accordance with Head 11.

(b) In the event of any apparent conflict between the text of a statutory instrument or, as the case may be, a Revised statutory instrument, published in accordance with paragraph (a) and the text of the statutory instrument as made, the text as made shall prevail.

Explanatory note

Head 10 refers to the recommendations in R. 6.02 and R. 6.03.

Head 11 – Requirement of Qualified Electronic Signature for Online Versions

Provide for:

(a) The online version of an Act enacted and published on the Electronic Irish Statute Book or on the website of the Houses of the Oireachtas, and of a Revised Act published on the website of the Law Reform Commission, shall bear a qualified electronic signature in accordance with Regulation No.910/2014/EU (the eIDAS Regulation).

(a) The online version of a statutory instrument published on the Electronic Irish Statute Book, and where made in accordance with the requirements of the *Statutory Instruments Act 1947*, and the online version of a Revised statutory instrument published on the website of the Law Reform Commission, shall bear a qualified electronic signature in accordance with Regulation No.910/2014/EU (the eIDAS Regulation).

Explanatory note

Head 11 refers to the recommendations in R. 6.02 and R. 6.03.

Head 12 – Arrangement of Legislation in online classified legislation database

Provide for:

Related Acts and statutory instruments shall be presented together under a general heading or sub-heading in the online classified legislation database published by the Law Reform Commission.

Explanatory note

Head 12 refers to the recommendation in R. 6.08.

Head 13 – eLegislation Strategy

Provide for:

(a) The Accessibility and Consolidation of Legislation Group shall prepare and maintain an effective eLegislation Strategy, making optimum use of ICT to make legislation more accessible to the public.

(b) The eLegislation Strategy shall include the following elements:

- (a) a strategic plan to develop an effective legislative management system to integrate legislative standards, online publication of legislation as enacted and maintenance of revised legislation online;
- (b) development of capacity to generate automatically published online versions of legislation and generate semi-automatically revised versions of legislation;
- (c) where new revisions of legislation are created, development of the capacity to retain, and make available to the public, point-in-time versions of the legislation concerned; and
- (d) development of capacity to facilitate effective end-to-end interlinking between legislative content and other related material and resources, including:
 - a. reports from bodies that have informed the legislation;
 - b. Schemes of Bills published by Government Departments;
 - c. pre-legislative scrutiny by Oireachtas Committees;
 - d. texts of Bills as published and as amended in the legislative process;
 - e. Explanatory Memoranda and notes;
 - f. Oireachtas debates on Bills;
 - g. official notification of the enactment of an Act in Iris Oifigiúil;
 - h. in the case of legislation giving effect to EU law, the relevant European instrument;
 - i. in the case of legislation giving effect to an international agreement, that agreement and related reports of international bodies;
 - j. statutory codes and guidance issued after enactment under the legislation;
 - k. explanatory information provided online by State bodies such as the Citizens Information Board;
 - l. case law of the courts interpreting and applying the legislation; and
 - m. decisions of statutory bodies applying the legislation.

Explanatory note

Head 13 refers to the recommendations in R. 6.06.

Part 4 Revised Legislation

Head 14 – Publication of Revised Versions of Legislation

Provide for:

- (a) Within three years of the commencement of this provision, the Law Reform Commission shall prepare and maintain, and publish on its website, all Acts enacted from 2000 onwards in their Revised, as amended, form, and shall make them available for publication on the Electronic Irish Statute Book.
- (b) Within three years of the commencement of this provision, the Law Reform Commission shall, where practicable, prepare and maintain, and publish on its website, a selection of statutory instruments made from 2000 onwards in their Revised, as amended, form, and shall make them available for publication on the Electronic Irish Statute Book.

Explanatory note

Head 14 refers to the recommendations in R. 5.03.

Head 15 – Planned Programmes of Publishing Revised Versions of Legislation

Provide for:

- (a) Subject to Head 14, the Law Reform Commission shall prepare, in cooperation with the Accessibility and Consolidation of Legislation Group, a series of planned programmes for publishing Revised Acts, and where practicable of statutory instruments.
- (b) The programmes in paragraph (a) shall complement the planned programmes of consolidated legislation provided for under Head 23 and shall be carried out in the same time frame for such programmes.
- (b) The candidate legislation for the programmes in paragraph (a) shall be chosen on the basis of the same general criteria as set out in Head 24.

Explanatory note

Head 15 refers to the recommendations in R. 5.04.

Head 16 – Duty to Produce and Publish Revised Legislation

Provide for:

The duty to produce and publish Revised legislation under Head 14 *shall* apply where the following has occurred:

- where a statutory provision has been textually amended;
- where a statutory provision has been commenced; and
- where a statutory provision has been repealed, expired, or has otherwise ceased to be in force by virtue of an express provision in another statutory provision.

The duty to produce and publish Revised legislation under Head 14 *may* apply in the following circumstances:

- where a statutory provision has been amended by a non-textual amendment; and
- in the case of a statutory instrument, where it has been annulled by the Oireachtas.

Explanatory note

Head 16 refers to the recommendations in R. 5.05 and R. 5.06.

PART 5 Editorial Changes in Revised Legislation

Head 17 – Editorial Changes

Provide for:

The following editorial changes may be made to legislation during the course of the preparation of Revised legislation:

- (a) incorporation of changes to the name, title, location, or address of a body, office, person or place;
- (b) replacement of a description of a date or time with the actual date or time;
- (c) inclusion of gender neutral references;
- (d) omission from legislation any provisions that have expired, been repealed, or whose effect(s) have been nullified or overridden;
- (e) alteration to the style or presentation of text or graphics to be consistent with current practices, or to improve electronic or print presentation;

- (f) changes to references to a number, year, date, time, amount of money, penalty, quantity, measurement, or other matter, idea, or concept to be consistent with current practice;
- (g) incorporation of transitional provisions in an amending Act or statutory instrument;
- (h) alteration to the title of legislation, or references to titles of other legislation, to conform to current citation practice;
- (i) implementation of adaptation references in the Adaptation of Enactments Act 1922 and in any Orders made under the 1922 Act;
- (j) implementation of adaptation references in the Constitution (Consequential Provisions) Act 1937;
- (k) implementation of definitions and references in the Interpretation Act 2005;
- (l) implementation of definitions and references the European Union Act 2009;
- (m) implementation of fines indexation and fines classifications in the Fines Act 2010; and
- (n) implementation of Euro currency conversions in Council Regulation (EC) No. 974/98 on the Euro.

Explanatory note

Head 17 refers to the recommendations in R. 5.07.

Head 18 – Effect of Editorial Changes

Provide for:

Editorial changes made under Head 17 shall not alter the substance or effect of the legislation that is being revised.

Explanatory note

Head 18 refers to the recommendation in R. 5.08.

Head 19 – Identification of Editorial Changes

Provide for:

Editorial changes made under Head 17 shall be identified in each place they are made in the text Revised legislation.

Explanatory note

Head 19 refers to the recommendation in R. 5.09.

Head 20 – Supervision of the Exercise of Editorial Changes

Provide for:

The exercise of editorial changes under Head 17 shall be subject to supervision by the Accessibility and Consolidation of Legislation Group.

Explanatory note

Head 20 refers to the recommendation in R. 5.10.

Head 21 – Conflict Between Revised and As Enacted Legislation

Provide for:

Without prejudice to Head 9 and Head 10, in the event of any apparent conflict between the text of legislation as enacted (including any subsequently enacted amendments) and the text of revised legislation, the text as enacted shall prevail.

Explanatory note

Head 21 refers to the recommendation in R. 5.11.

Head 22 – Discovery of An Obvious Error

Provide for:

(a) Where an obvious error is discovered within legislation in the course of preparing Revised legislation, such error shall be communicated to the Accessibility and Consolidation of Legislation Group.

(b) The Accessibility and Consolidation of Legislation Group shall communicate such error to the Office of the Attorney General, the appropriate Government Department, and the Houses of the Oireachtas.

Explanatory note

Head 22 refers to the recommendations in R. 5.12.

PART 6 Planned Programmes of Consolidation

Head 23 – Planned Programmes of Consolidation

Provide for:

The Accessibility and Consolidation of Legislation Group shall prepare programmes of consolidation every five years in fulfilment of its functions under Head 5.

Explanatory note

Head 23 refers to the recommendation in R. 4.04.

Head 24 – Guiding Criteria for Consolidation Programme

Provide for:

In preparing a draft consolidation programme the Accessibility and Consolidation of Legislation Group shall apply the following non-exhaustive criteria to determine the content of a programme of consolidation:

- (a) the legislation is frequently used;
- (b) the law covers a significantly wide and coherent area of law, comparable to a significant element of one of the 36 headings in the Law Reform Commission's Classified List of In-Force Legislation;
- (c) the law is spread across numerous Acts and provisions (including in pre-1922 Acts);
- (d) the law has been amended many times, with the result that it is difficult to know the applicable law; and
- (e) significant preparatory work has already been completed (for example, the draft Scheme of a consolidation Bill has already been prepared).

Explanatory note

Head 24 refers to the recommendations in R. 4.05.

Head 25 – Subject areas of law in single Principal Act

Provide for:

Insofar as is practicable, subject areas of the law shall be consolidated into single Principal Acts, so that there are as few Acts for each subject area as possible.

Explanatory note

Head 25 refers to the recommendation in R. 4.02.

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation work makes legislation more accessible online to the public. This includes the Legislation Directory (an electronically searchable index of amendments to Acts and statutory instruments), a selection of Revised Acts (Acts in their amended form rather than as enacted) and the Classified List of Legislation in Ireland (a list of Acts in force organised under 36 subject matter headings).



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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975