



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

STATUTE LAW RESTATEMENT

(LRC CP 45-2007)

IRELAND

**Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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First Published July 2007

ISSN 1393 - 3140

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 82 Reports containing proposals for reform of the law; eleven Working Papers; 44 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie.

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ACKNOWLEDGEMENTS

The Commission would like to acknowledge the assistance of the following people in the preparation of this Consultation Paper:

Claire Allison, Statute Law Database, Ministry of Justice, England and Wales

Holger Bagola, Publications Office of the European Communities

Sean Barton, McCann FitzGerald Solicitors

Stephen Byrne, National University of Ireland, Maynooth

Cladonia Limited

Michael Collier, Government Supplies Agency

Infrasys Limited

Tony Hopkins, Statute Law Database, Ministry of Justice, England and Wales

Ann Howard, Department of Defence

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Brian Hunt, Mason, Hayes & Curran Solicitors

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Triona Quill, Better Regulation Unit, Department of the Taoiseach

Evelyn Robinson, Office of Parliamentary Counsel, Office of the Attorney General

Michael Rubacki, Parliamentary Counsel's Office, New South Wales, Australia

Conor Verdon, Company Law Review Group, Department of Enterprise, Trade and Employment

The Commission would also like to acknowledge and thank all those who submitted suggestions of candidate Acts for inclusion in the Programme of Statute Law Restatement.

Full responsibility for the content of this publication, however, lies with the Commission.

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TABLE OF LEGISLATION

Bail Act 1997	1997, No. 16	Irl
Bankruptcy Act 1988	1988, No. 27	Irl
Building Societies Act 1989	1989, No. 17	Irl
Capital Acquisitions Tax (Consolidation) Act 2003	2003, No. 1	Irl
Carriage of Dangerous Goods by Road Act 1998	1998, No. 43	Irl
Children Act 2001	2001, No. 24	Irl
Commission to Inquire into Child Abuse Act 2000	2000, No. 7	Irl
Commission to Inquire into Child Abuse Act 2000	2000, No. 7	Irl
Competition (Amendment) Act 2006	2006, No. 4	Irl
Control of Clinical Trials Act	1987, No. 28	Irl
Criminal Evidence Act 1992	1992, No. 12	Irl
Criminal Justice (Administration) Act 1924	1924, No. 44	Irl
Criminal Justice (Forensic Evidence) Act 1990	1990, No. 34	Irl
Criminal Justice (Public Order) Act 1994	1994, No. 2	Irl
Criminal Justice (Safety of United Nations Workers) Act 2000	2000, No. 16	Irl
Criminal Justice (Theft and Fraud Offences) Act 2001	2001, No. 50	Irl
Criminal Justice Act 1999	1999, No. 10	Irl
Criminal Justice Act 2006	2006, No. 26	Irl
Criminal Law (Insanity) Act 2006	2006, No. 11	Irl
Criminal Law (Jurisdiction) Act 1976	1976, No. 14	Irl
Dangerous Substances Act 1972	1972, No. 10	Irl
Destructive Insects and Pests (Consolidation) Act 1958	1958, No. 11	Irl
Finance Act 2006	2006, No. 6	Irl
Fire Services Act 1981	1981, No. 30	Irl
Firearms Act 1925	1925, No. 17	Irl
Fisheries (Consolidation) Act 1959	1959, No. 14	Irl
Freedom of Information (Amendment) Act 2003	2003, No. 9	Irl
Freedom of Information Act 1997	1997, No. 13	Irl
Guardianship of Infants Act 1964	1964, No. 7	Irl
Health Act 1947	1947, No. 28	Irl
Health Act 1970	1970, No. 1	Irl
Interpretation Act 1987 (NSW)	1985, No. 15	Aus

Interpretation Amendment Act 2006 (NSW)	2006, No. 43	Aus
Irish Medicines Board (Miscellaneous Provisions) Act 2006	2006, No. 3	Irl
Irish Medicines Board Act 1995	1995, No. 29	Irl
Law Reform Commission Act 1975	1975, No. 3	Irl
Legislation Publication Act 1996 (TAS)	1996, No. 17	Aus
Maritime Jurisdiction Act 1959	1959, No. 22	Irl
Misuse of Drugs Act 1977	1977, No. 12	Irl
Offences Against the State (Amendment) Act 1998	1998, No. 39	Irl
Planning and Development Act 2000	2000, No. 30	Irl
Reprints Act 1972 (NSW)	1972, No. 48	Aus
Reprints Act 1992 (QLD)	1992, No. 27	Aus
Safety, Health and Welfare at Work Act 2005	2005, No. 10	Irl
Sea-Fisheries and Maritime Jurisdiction Act 2006	2006, No. 8	Irl
Social Welfare (Consolidation) Act 1981	1981, No. 1	Irl
Social Welfare (Consolidation) Act 1993	1993, No. 27	Irl
Social Welfare Consolidation Act 2005	2005, No. 26	Irl
Social Welfare Law Reform and Pensions Act 2006	2006, No. 5	Irl
Stamp Duties Consolidation Act 1999	1999, No. 31	Irl
Status of Children Act 1987	1987, No. 26	Irl
Statute Law Revision (pre 1922) Act 2005	2005, No. 32	Irl
Statute Law Revision (Pre-Union Irish Statutes) Act 1962	1962, No. 29	Irl
Statute Law Revision Act 2007	2007, No. 26	Irl
Succession Act 1965	1965, No. 27	Irl
Taxes Consolidation Act 1997	1997, No. 39	Irl
Teaching Council (Amendment) Act 2006	2006, No. 2	Irl
Transport Act 1950	1950, No. 12	Irl
University College Galway (Amendment) Act 2006	2006, No. 1	Irl

INTRODUCTION

A Statute Law Restatement and Better Regulation

1. This Consultation Paper arises from a Government decision in May 2006, at the request of the Attorney General, that the Law Reform Commission undertake a Programme of Statute Law Restatement. Statute Law Restatement, as provided for in the *Statute Law (Restatement) Act 2002*, is an administrative consolidation of an Act, as amended subsequently, which is made available in printed electronic form in a single text and is certified by the Attorney General as an up-to-date statement of the Act in question as amended.¹ After certification, the Restatement must be laid before each House of the Oireachtas and it can then be published 21 sitting days later.² A Restatement does not have the force of law and therefore does not alter the substance of the law.³ Because of this it does not actually require Oireachtas time to debate its terms, but it can be cited in court as evidence of the relevant law.⁴

2. As this Consultation Paper discusses, Statute Law Restatement forms part of the overall policy of Better Regulation, which includes the objective of making legislation more accessible.⁵ In terms of the accessibility of statute law it can also be seen against the background of the ongoing commitment to modernise the Statute Book in Ireland. This includes the pre-1922 Statute Law Revision Project in the Office of the Attorney General⁶ and the recent and planned enactment of modernising and consolidating

¹ Section 2 of the *Statute Law (Restatement) Act 2002*. It may be noted that, in the United States, the word “Restatement” refers to a quite different process, by which the American Law Institute (ALI) prepares non-statutory draft codes, called Restatements which have formed the basis for statutory codes in many of the 50 states.

² Section 8 of the 2002 Act.

³ Section 4 of the 2002 Act.

⁴ Section 5 of the 2002 Act.

⁵ See, in particular the Government White Paper, *Regulating Better* (2004), available at www.betterregulation.ie. Better Regulation has a remit that extends beyond accessibility to legislation.

⁶ This has culminated in the enactment of the *Statute Law Revision Act 2007*, which contains the first definitive “White List” of the 1,364 pre-1922 Acts that continue, in whole or in part, to be law in the State.

legislation across diverse areas of the law.⁷ Against this modernising setting, the Commission is conscious that a Programme of Statute Law Restatement must also be consistent with the Government's policy on the Information Society. In particular, the Government's Information Society Action Plan, *New Connections*,⁸ outlines an eLegislation strategy, under which all legislation will be submitted to the Oireachtas electronically. The Commission fully supports this approach.⁹ The Commission notes that the *Statute Law (Restatement) Act 2002* provides that Restatements may be made available in printed or electronic form, and that all Restatements already certified by the Attorney General and placed before the Houses of the Oireachtas have been made available electronically on the Attorney General's website.¹⁰ The Commission is committed to ensuring that its Programme of Statute Law Restatement will be fully compatible with the ongoing development of the eLegislation project.¹¹

B Statute Law Restatement and the Law Reform Commission

3. Prior to the Government decision in 2006, responsibility for the preparation of Statute Law Restatements rested with the Statute Law Revision Unit (SLRU) in the Office of the Attorney General. The Government decision (and the Attorney General's request) was based on the view that, because of the priority which must be given within the Office of the Attorney General to the ongoing extensive Government and Oireachtas legislative programme, it was appropriate that another body should be given responsibility for the preparation of a Programme of Statute Law Restatement. The Law Reform Commission was chosen for two reasons. First, its statutory mandate under the *Law Reform Commission Act 1975* is to keep the law under review with a view to law reform, and this includes "codification [of the law] (including in particular its simplification and

⁷ These developments are discussed in more detail in the Consultation Paper at paragraphs 2.03 - 2.27.

⁸ Available at www.taoiseach.ie. On the development of the eLegislation project, see the *New Connections* 2nd Progress Report (2004), paragraph 3.6, available at www.taoiseach.ie.

⁹ The Commission's eConveyancing Project has already drawn on the policy underlying *New Connections*: see *Report on eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79-2006), paragraph 1.12.

¹⁰ See www.attorneygeneral.ie and paragraph 1.34, below.

¹¹ The Commission notes that, during the Oireachtas debate on the *Statute Law Revision Act 2007*, the Government stated that it intended that all pre-1922 Acts which remain on the Irish Statute Book five years after the passing of the 2007 Act will be made available on-line: see Dáil Éireann Committee Stage debate on the *Statute Law Revision Bill 2007*, Select Committee on Finance and the Public Service, 13 March 2007, available at www.oireachtas.ie

modernisation) and the revision and consolidation of statute law.”¹² Second, in carrying out its general mandate of law reform, the Commission often develops informal restatements of existing Acts in order to prepare the groundwork for its examination of the law with a view to its reform.¹³ The Commission has also benefited from informal restatements prepared by Government Departments in areas of law relevant to the Commission’s Programme of Law Reform.¹⁴ In that respect, the preparation of a Programme of Statute Law Restatement fell clearly within the Commission’s existing statutory mandate in the *Law Reform Commission Act 1975* and would assist in the ongoing process of law reform envisaged by the 1975 Act.¹⁵

4. It should be noted that, in accordance with the 2002 Act, the Attorney General will continue to certify the texts of Statute Law Restatements which are prepared by the Commission. This will involve ongoing liaison between the Commission and the Attorney General, which already applies in the context of the existing statutory mandate of the Commission under the *Law Reform Commission Act 1975*.

C Example of benefit and complexity of Restatement: the Freedom of Information Act 1997

5. To illustrate the benefits that arise from – and the complexity involved in – Statute Law Restatement, the Commission has prepared a draft Restatement of the *Freedom of Information Act 1997*, attached as an

¹² See section 1 of the *Law Reform Commission Act 1975*.

¹³ A recent example is the informal Restatement of the *Adoption Act 1991*, appended to the Commission’s *Consultation Paper on Aspects of Intercountry Adoption* (LRC CP 43-2007), available at www.lawreform.ie

¹⁴ For example, the Department of Justice, Equality and Law Reform had prepared a draft Restatement of the 7 Acts comprising the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004*. This was provided to the Commission when the Department became aware that, in the context of preparation of its *Report on Public Inquiries Including Tribunals of Inquiries* (LRC 73-2005) (which formed part of the Commission’s *Second Programme of Law Reform 2000-2007*), the Commission would be making comprehensive recommendations for consolidation and reform of the legislation in this area. The Commission’s Report included a draft Bill, and the essential elements of that Bill have been incorporated into the *Tribunals of Inquiry Bill 2005*, which proposes to repeal and replace the 1921 to 2004 Acts.

¹⁵ Since Statute Law Restatement involves a new and complex additional activity for the Commission, the decision of the Government in May 2006 was followed by a process leading to sanction by the Department of Finance of dedicated additional staff resources for the Commission. Sanction for three researchers was given in September 2006, and sanction for a project manager was given in January 2007.

Appendix to this Consultation Paper.¹⁶ The 1997 Act was chosen because it meets the three key criteria for selection as a candidate for Restatement. Firstly, it is used frequently by a wide range of people, including the State bodies to which it applies: the media, the general public and the legal profession. Secondly, it has been amended a number of times since 1997, and all users would therefore benefit from its provisions, as amended, being brought together in a single text. Thirdly, the process of Restatement could also ease the general regulatory burden on businesses.

6. Since the 1997 Act was enacted, over 100 amendments have been made to it, and the draft Restatement incorporates those amendments into a single text. For anybody familiar with the 1997 Act, it is well-known that it was amended in important respects by the *Freedom of Information (Amendment) Act 2003*. However, it is worth noting that the 2003 Act accounts for only about 50% of the amendments made to the 1997 Act: the remaining 50% are contained in 76 Acts, Orders or Regulations enacted or made since 1997. While the amendments made to the 1997 Act by the 2003 Act were extremely significant in terms of the scope of the principal rules on access to public information set out in the 1997 Act, the remaining 50% include some which specify, for example, the extent to which certain public bodies come within the terms of the 1997 Act. Thus, the amendments to the 1997 Act by the *Safety, Health and Welfare at Work Act 2005* specify to what extent the functions exercised by the Health and Safety Authority come within the 1997 Act. This illustrates some aspects of the complexity involved in providing a complete Restatement of what, at first sight, appears to be just a matter of “cutting and pasting” the text of the 2003 Act into the text of the 1997 Act. It also reinforces the clear benefit of allowing all those affected by the 1997 Act to know the up-to-date position concerning the rules on access to public information set out in the 1997 Act, as amended, and the range of public bodies covered by its terms. A Programme of Statute Law Restatement would repeat this benefit across a wide range of statute law.

D Public Consultation on Statute Law Restatement

7. On 25 May 2006, arising from the Government’s decision that the Commission undertake a Programme of Statute Law Restatement; the

¹⁶ Appendix A consists of three versions of the draft Restatement of the *Freedom of Information Act 1997* together with a list of the 76 Acts, Orders and Regulations which have amended the 1997 Act. As discussed in Chapter 4, below, these versions were prepared to provide interested parties with alternative visual presentations of a Restatement in order to assist the Commission in the preparation of a definitive template for the Programme of Statute Law Restatement.

Taoiseach announced a public consultation process. This process took place during the second half of 2006 and was conducted under the guidance of a Steering Group which comprised representatives of the Department of the Taoiseach, the Office of the Attorney General and the Commission.¹⁷ The process included a number of elements: contact with all Government Departments; extensive advertisements in the national media requesting suggestions for inclusion in the Programme; dedicated space on the Commission's website (www.lawreform.ie) for this purpose; and communication with interested parties, including the Law Society of Ireland, the Bar Council of Ireland and many other community and social partner organisations and individuals with an interest in this area.¹⁸ This process resulted in the submission of 60 candidate Acts for possible inclusion in a Programme of Statute Law Restatement. At the end of the consultation process, the Steering Group considered the general suitability of the candidate Acts on the basis of a number of general criteria, and this Consultation Paper sets out in detail the application of these criteria to the candidate Acts, and also a suggested method for prioritising the Acts in the proposed Programme of Statute Law Restatement.¹⁹

E Statute Law Restatement and the Chronological Tables

8. Before turning to an outline of the contents of this Consultation Paper, the Commission wishes to note here (for reasons which will become clear) the importance of the *Chronological Tables of the Statutes* in the preparation of Restatements. The Chronological Tables consists of an Index listing in chronological order all amendments to legislation made by Acts and Statutory Regulations and Orders which have been enacted or made since 1922. The Chronological Tables is a crucial document for all those involved in researching what amendments have been made to legislation since 1922. Key users include parliamentary counsel in the Office of the Attorney General who prepare new legislation, those involved in the preparation of Statute Law Restatements and members of the legal profession. Until 2007, functional responsibility for the maintenance of the Chronological Tables of the Statutes resided with the Office of the Attorney

¹⁷ The Commission is particularly grateful for the assistance provided in this process by Mr Philip Kelly, Assistant Secretary General, Department of An Taoiseach, Ms. Audrey O'Byrne, Assistant Principal Officer, Department of An Taoiseach, Ms Triona Quill, Head of Better Regulation Unit, Department of An Taoiseach and Ms Deirbhle Murphy, Chief Parliamentary Counsel, Office of the Attorney General.

¹⁸ The Commission notes that the social partnership agreement, *Towards 2016*, available at www.taoiseach.ie, which was concluded in May 2006, refers to the development of a programme of Statute Law Restatement in the context of the general policy of Better Regulation: see paragraph 1.26.

¹⁹ The criteria and prioritisation are discussed in detail in paragraph 4.57 below.

General. On the basis of the prioritisation given to statutory drafting in the Office of the Attorney General which resulted in the transfer of Statute Law Restatement to the Commission,²⁰ the Attorney General requested the Commission to take over this functional responsibility, and the Commission agreed to this request.²¹ The ongoing maintenance by the Commission of the Chronological Tables will greatly assist in the inputs required in preparing Statute Law Restatements, and will complement the liaison required between the Commission and the Attorney General in the certification of Restatements.²²

9. The Commission now turns to outline the purpose and content of this Consultation Paper.

F Purpose and Outline of this Consultation Paper

10. As already indicated, this Consultation Paper sets out the result of the public consultation process which occurred in the second half of 2006. The Commission was also conscious that, in taking responsibility for the preparation of a Programme of Statute Law Restatement, which involved a significant new dimension to its existing statutory mandate, it would be appropriate to use the normal consultative mechanisms which it employs in making proposals for law reform generally. This involves publishing a Consultation Paper which sets out a review of the area in question, followed by a consultation process and then publishing a Report which sets out the Commission's final Programme of Statute Law Restatement. This Consultation Paper differs, however, from others published by the Commission in one important respect: the Commission has agreed to prepare a Programme of Statute Law Restatement and this Consultation Paper therefore sets out some of options in terms of how that programme will be carried out.

11. This Consultation Paper begins in Chapter 1 by placing the enactment of the *Statute Law (Restatement) Act 2002* against the general background of the policy of regulatory reform.

12. Chapter 2 examines the role of Restatement alongside other methods of tidying the Statute Book, including the pre-1922 Statute Law

²⁰ See paragraph 3 above.

²¹ Since the maintenance of the Chronological Tables involves a new activity for the Commission (as with Statute Law Restatement), the decision to transfer functional responsibility from the Office of the Attorney General to the Commission was followed by a process leading to sanction by the Department of Finance of dedicated additional staff resources for the Commission. Sanction for two researchers and a project manager was given in January 2007.

²² See paragraph 4 above.

Revision Project in the Office of the Attorney General²³ and the recent and planned enactment of modernising and consolidating legislation across diverse areas of the law.²⁴ It also examines comparable projects in other States, including Australia, New Zealand and the United Kingdom. This includes a discussion of the Commission's general role in law reform and the wider Government policy expressed, for example in the 2004 White Paper, *Regulating Better*.

13. Chapter 3 discusses an issue which the Commission regards as crucial to the ongoing success of a Programme of Statute Law Restatement, the technological aspects. This includes, in particular, the use of appropriate technology to ensure that Restatements are future proofed and that they meet the Government's eLegislation policy.²⁵ This is especially important because it is clear that many candidate Acts for Restatement, such as the *Freedom of Information Act 1997*, are likely to be amended on virtually a yearly basis. As a result, the manner in which Restatements are stored and maintained electronically must be able to meet the demand for it to be updated. In any event, even where a Restatement does not require regular updating, it is important to have access to a repository or database of textual material which may form the basis of a later formal consolidation or reform of the law in question, or which may form a component part of a larger database of the tidied up Statute Book.

14. In Chapter 4, the Commission discusses the specific elements that make up a Programme of Statute Law Restatement. This includes the inputs, work process and outputs involved. The inputs involved include the source of the text which would form the basis for, for example, the Restatement of the *Freedom of Information Act 1997*. A number of electronic sources are discussed, including the electronic Irish Statute Book maintained by the Office of the Attorney General,²⁶ which comprises the full text of all Acts (primary legislation) and Statutory Regulations and Orders (secondary legislation, made under primary legislation) enacted and made since 1922. The Commission also discusses the importance of the *Chronological Tables of the Statutes*, which is also available as part of the electronic Irish Statute Book, in the preparation of Restatements.²⁷ Chapter 4 also sets out the application of the selection criteria being applied to the candidate Acts, and a

²³ This has culminated in the enactment of the *Statute Law Revision Act 2007*, which contains the first definitive "White List" of the 1,364 pre-1922 Acts that continue, in whole or in part, to be law in the State.

²⁴ These developments are discussed in detail in the Consultation Paper below.

²⁵ See paragraph 2, above.

²⁶ See www.irishstatutebook.ie

²⁷ See paragraph 8 above.

suggested method for prioritising the Acts in the proposed Programme of Statute Law Restatement.²⁸ In terms of outputs, the Commission discusses various detailed issues concerning the visual presentation of Restatements, taking into account that they would be presented in electronic form. This is of particular importance in light of the Commission's view that the Restatements would, after certification, be published in a publicly-accessible database and that this would also be consistent with the need to ensure that they were future proofed.

15. In Chapter 5 the Commission sets out a summary of the main issues identified in the Consultation Paper and on which it would greatly welcome views and suggestions from interested parties.

16. Appendix A contains three versions of the Commission's draft Restatement of the *Freedom of Information Act 1997*. Version 1 was drafted according to the House Style that was developed for Restatements by the Statute Law Revision Unit (SLRU) in the Office of the Attorney General. Version 2 is based on the editing style that is used in the UK Statute Law Database.²⁹ Version 3 is based primarily on the UK editing style, but the text of all non-textual amendments are printed in full, as in the SLRU House Style of Version 1. Appendix A also contains a list of the 76 Acts, Regulations and Orders which amended or otherwise affected the 1997 Act.

17. Appendix B contains a list of the candidate Acts which were suggested for inclusion in the Commission's Programme of Statute Law Restatement, analysed by reference to general selection criteria and the likely complexity involved in their completion.

18. This Consultation Paper is intended to form the basis for a Report which will contain the Commission's final Programme of Statute Law Restatement. The Commission seeks views and suggestions on the issues dealt with in this Consultation Paper and in particular under the three categories identified in Chapter 5: firstly, the candidate Acts to be included in the Programme, secondly, the visual presentation of the Restatements and, thirdly, technological and management issues. In order to prepare its final Programme in a timely manner, the Commission requests that these views and suggestions be made by 30 September 2007. They can be submitted in writing to the Commission or by email to restatement@lawreform.ie

²⁸ The criteria and prioritisation are discussed at paragraph 4.57 below. The application and prioritisation of the criteria are set out in detail at Appendix B below.

²⁹ See www.statutelaw.gov.uk

CHAPTER 1 **STATUTE LAW RESTATEMENT AND REGULATORY REFORM**

A Introduction

1.01 In this Chapter, the Commission discusses the general background to the *Statute Law (Restatement) Act 2002*, in particular how the 2002 Act fits into the policy of Better Regulation. The Commission also discusses how Statute Law Restatement complements the Commission's general statutory mandate.

1.02 In Part B the Commission examines the historical setting in which statute law reform has taken place in a common law system such as Ireland. It also discusses how the preparation of a Programme of Statute Law Restatement will complement the Commission's mandate under the *Law Reform Commission Act 1975* to keep the law under review. In Part C, the Commission discusses recent developments in regulatory reform in Ireland, in particular the policy of Better Regulation of which Statute Law Restatement forms an important component. In Part D, the Commission outlines the provisions of the *Statute Law (Restatement) Act 2002* and the specific developments which occurred prior to the Government decision in 2006 to request the Commission to prepare a programme in this area.

B Historical view of regulatory reform and statute law in Ireland

1.03 In historical terms, regulatory reform and the need to make laws accessible for those affected by them dates back to the development of civilized society. In about 1750 BC, the Babylonian king Hammurabi issued a legal code in 282 sections, which set out in written form many of the customary laws which had developed up to then, with significant reforming amendments.¹ Since the publication of the Hammurabian Code, all legal systems have examined the need to ensure that their legal rules are set out in an accessible form. In the remainder of this Part, the Commission sets out how Ireland has tackled this issue.

¹ See generally Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) p.104, which notes that for example, that the blood feud and private retribution were prohibited under the Hammurabian Code.

(1) Civil Law and Common Law legal systems

1.04 In Europe, Codes were also developed during the time of the Roman Empire, and the Civil Law legal systems of Continental Europe are the modern day successors of that legal heritage. Though modern scholarship acknowledges the growing similarity between the civil law and common law systems, significant differences between the two remain.² In a Civil Law legal system, the Codes comprise a complete statement of the legal rules and principles for that State, supplemented by the interpretations placed on them by the courts in specific instances. It can also be stated that, in a Civil Law legal system, the Codes constitute “the Statute Book.” In France, the Codes are still linked to Napoleon, who was committed to the concept of comprehensive codes that would be publicly accessible to all citizens, by contrast with the system associated with the *ancien regime*. The phrase *Jurisprudence* describes the judicial interpretation of the Code provisions.

1.05 Until 1922, Ireland was part of Britain and the United Kingdom, and this historical connection has resulted in the inheritance of a different regulatory system, described as a Common Law system. This Common Law heritage is shared with the legal systems of former British colonies, including Australia, New Zealand, South Africa³ and the United States of America. In a Common Law legal system, the courts played a key historical role in announcing or developing legal principles and rules. These rules - of common law and equity - remain a significant part of the legal landscape in the 21st century.

1.06 In the Common Law legal systems, statute law or legislation is a second source of legal principles and rules and, increasingly from the 17th century onwards, began to replace common law rules. This process of gradual replacement of common law rules has accelerated in recent years, though in most Common Law systems the statutory or legislative reforms are done on a topic-by-topic (Act-by-Act) basis, without the benefit of a Code-like superstructure or architecture into which the reforming provisions can be placed.

(2) Regulatory reform in Civil Law and Common Law legal systems

1.07 This brief sketch of the Civil Law and Common Law legal system serves to explain some key differences in the approach required to the

² See *Codifying the Criminal Law, the Report of the Expert Group on the Codification of the Criminal Law* (November, 2004) available at www.justice.ie The Report resulted in the establishment of the Criminal Law Codification Advisory Committee, under Part 14 of the *Criminal Justice Act 2006*: see also paragraph 2.21 below.

³ South Africa also has a Civil Law legal heritage through its Dutch connections.

general process of regulatory reform. In a Civil Law system regulatory reform may simply involve asking whether a provision of a Code requires reform and then slotting in that reform to the existing Code architecture. By contrast, in a Common Law system regulatory reform involves the need to examine the relevant judge-made rules of common law and equity, then to consider whether they should be codified in statutory form (as they are, or with amendments) and then to take into account whether some existing (usually piecemeal) statutory reforms should be incorporated into the reform process (as they are, or with amendments). This more complex process of reform takes place without the benefit of an overall Code-like architecture into which the reforms can be inserted. Equally, while statute law has increasingly become the dominant source of law in the Common Law legal systems (including Ireland) the phrase “the Statute Book” does not refer to an identifiable repository or database of legal rules such as the Codes of the Civil Law legal systems.

1.08 The need for regulatory reform - in the sense of the gradual replacement of common law principles with statutory principles - has long been acknowledged as an important part of public policy. Indeed, it predates the foundation of the State in 1922, although as the Commission notes below, it has been given a clearer focus of attention in recent years. Accessibility to the law is an obvious imperative in a democracy governed by the rule of law.

1.09 In the United Kingdom during the 19th century and early 20th century an enormous amount of political and legal reform took place. This created the fundamental features of the political and legal systems which remain in early 21st century Ireland. In terms of legislation, this took two forms: firstly, statute law which repealed and at the same time replaced many common law rules and also repealed older legislation; and secondly more straightforward removal of lists of obsolete legislation. The removal of obsolete legislation was done by enacting a series of Statute Law Revision Acts, especially in the second half of the 19th century. These Acts primarily involved the repeal of long lists of legislative “dead wood,” but did not include any Acts which - even in part – were still of relevance.

(3) *Regulatory reform and law reform in Ireland to the 1970s*

1.10 When the State was established in 1922, Article 73 of the 1922 Constitution carried over the laws that applied in Ireland up to that date. Article 50 of the 1937 Constitution contained a similar provision. The State did not, therefore, begin life with a blank legislative canvas but carried over virtually all the pre-1922 laws which had been in place up to that time. In general terms, this included the statute law enacted by all Parliaments which actually exercised control over Ireland, or which were deemed to have done so, particularly arising from the Elizabethan extension of control over most

parts of Ireland from the early 17th century. It is estimated that about 23, 370 Acts were passed by these various Parliaments prior to 1922.⁴

1.11 Between the 1920s and the 1950s, a certain amount of reform of the laws of Ireland occurred but there was no systematic approach to the issue. The first major change in approach occurred with the publication in 1962 by the Department of Justice of a *Programme of Law Reform*.⁵ The 1962 Programme stated that the Government had decided that “a clearly defined programme of law reform should be pursued consistently and systematically over an extended period.”⁶ Reflecting the reality that much of our legislation at that time predated the foundation of the State in 1922, the Programme also stated that the “ultimate aim is to have all our statute law contained in Acts of the Oireachtas.”

1.12 The Programme acknowledged that its content was limited to the areas of responsibility of the Department of Justice, but the topics identified ranged over such diverse areas as guardianship of children, succession law, bankruptcy law and the “guilty but insane” verdict in criminal law. The areas listed here have been reformed since 1962, through the *Guardianship of Infants Act 1964*, the *Succession Act 1965*, the *Bankruptcy Act 1988* and the *Criminal Law (Insanity) Act 2006*, though this list also indicates that the pace of reform has ranged from relatively fast to slow. The 1962 Programme also noted that the Government was “conscious of the desirability of removing from the Statute Book all obsolete and unnecessary enactments”⁷ and this led to the *Statute Law Revision (Pre-Union Irish Statutes) Act 1962*, which repealed (in whole or in part) over 160 pre-1800 Acts.

(4) The Commission’s law reform role

1.13 Another major development in this area was the enactment of the *Law Reform Commission Act 1975*, which conferred a wide-ranging law reform function on the Commission to “... keep the law under review and ... undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform.”⁸

⁴ Much of this information was collected within the Office of the Attorney General in the Pre-Independence Project leading to the enactment of the *Statute Law Revision Act 2007*.

⁵ Department of Justice, *Programme of Law Reform* (Pr. 6379), laid by the Minister for Justice before each House of the Oireachtas, January 1962.

⁶ *Ibid* at 5.

⁷ *Ibid* at 16.

⁸ Section 4 of the *Law Reform Commission Act 1975*.

1.14 The 1975 Act thus makes clear that the Commission's role includes reform of substantive areas of law. It also refers to the removal of obsolete laws through statute law revision, because it also defines law reform to include: "... in relation to the law or a branch of the law, its development, its codification (including in particular its simplification and modernisation) and the revision and consolidation of statute law."⁹ The Commission's statutory mandate thus involves a combination of developing, codifying, simplifying and modernising the law. Indeed, the ultimate aim of codifying Irish law was envisaged when the *Law Reform Commission Act 1975* was enacted¹⁰ and it continues to form a backdrop to the Commission's work.¹¹ The Commission intends that the Programme of Statute Law Restatement will facilitate this ultimate aim.

1.15 Since the establishment of the Commission, a significant amount of reform has occurred based on recommendations made by the Commission. These have included: the abolition of the status of illegitimacy by the *Status of Children Act 1987*,¹² reform of the law on theft and fraud (an area that had been identified in the 1962 Programme) by the *Criminal Justice (Theft and Fraud Offences) Act 2001*,¹³ and the proposed comprehensive reform of land law and conveyancing law (some of which dates back to the 12th century) by the *Land and Conveyancing Law Reform Bill 2006*,¹⁴ which was passed by Seanad Éireann in November 2006.

1.16 As the Taoiseach stated in a speech to mark the 30th Anniversary of the Commission in 2005:¹⁵

"The establishment of the Commission in 1975 recognised the need for a co-ordinated approach to law reform. This meant standing back from particular sectoral interests and taking a broad view of the law

⁹ Section 1 of the 1975 Act.

¹⁰ See O'Connor, "The Law Reform Commission and the Codification of Irish Law" (1974) 9 Ir. Jur. (n.s.) 14.

¹¹ See Keane, *Thirty Years of Law Reform 1975 -2005*, a lecture to mark the Commission's 30th Anniversary, available at www.lawreform.ie

¹² This arose from the Commission's *Report on Illegitimacy* (LRC 4-1982).

¹³ This arose from the Commission's *Report on the Law Relating to Dishonesty* (LRC 43-1992) and recommendations made by other bodies in the area.

¹⁴ This arose from the Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005). The 2006 Bill was restored to the Dáil Order Paper in June 2007 in the aftermath of the 2007 General Election.

¹⁵ Speech by the Taoiseach, Mr Bertie Ahern, T.D. on the occasion of the 30th Anniversary of the Law Reform Commission, 23 June 2005, available at www.taoiseach.gov.ie, quoted in the Commission's *Seminar Paper: the Third Programme of Law Reform* (LRC SP3-2007), at 2.

in general. What was envisaged – and what has been achieved over that time – is an impartial agency, engaged in the task of law reform, with the flexibility to consult freely with outside experts from legal and other disciplines.”

1.17 The Commission is naturally conscious that it plays just one part in the law reform process. Under the Constitution of Ireland, law reform is a matter exclusively for the Oireachtas. In addition the Government as a whole, and the Department of Justice, Equality and Law Reform in particular, has a crucial role in this area, acting in conjunction with the Office of the Attorney General and other Government Departments. Much of actual law reform – in the sense of legislation enacted every year – originates from reviews of the different branches of our law conducted by Government, often with the assistance of specialised working groups or committees with a law reform remit, including the Commission.

(5) Recent developments in regulatory reform

1.18 Since the establishment of the Law Reform Commission the issue of regulatory reform in its widest sense has become a major topic of public debate in Ireland, reflecting worldwide discussion on this area. In this wide sense, regulatory reform ranges beyond law reform and encompasses issues such as reform of governmental functions and reducing red tape for business. However, a central aspect of the regulatory reform process includes the issue of reform and modernisation of laws, including reform of substantive areas of law and the removal of obsolete law by statute law revision. Another tool which has been identified is the consolidation of laws, whether by the formal enactment of Consolidation Acts¹⁶ or through administrative consolidation by means of Statute Law Restatements. The Commission now turns to examine in more detail the recent developments in regulatory reform in Ireland, and in particular the role played by Statute Law Restatement in that process.

C Restatement and Regulatory Reform

1.19 There has been a renewed interest in tidying or modernising the Statute Book in recent years. This commitment to reform was signalled by the establishment of the Statute Law Revision Unit (SLRU) within the Attorney General’s Office in 1999. That Unit’s mandate was to draw up a programme of statute law revision and consolidation. Prior to that initiative responsibility for statute revision rested with the Statute Law Reform and Consolidation Office in the Attorney General’s Office. That body was established in 1951 but had effectively ceased to function in the 1980s.

¹⁶ For example, the *Taxes Consolidation Act 1997* and the *Social Welfare Consolidation Act 2005*.

(1) Accessibility to legislation

1.20 There is a fundamental obligation on the State to make legislation accessible to the public. This duty stems from the role that legislation plays in governing the relationship between state and citizen. One of the basic principles of our legal system is that “ignorance of the law is no excuse”. A person cannot plead a lack of knowledge of the law which regulates his or her behaviour. A State that wishes to rely on that principle must at least make law accessible to the public so that they can acquire such knowledge should they so wish.

1.21 One commentator has described up-to-date legislation that is easily accessible and comprehensible to the public as “part of the basic infrastructure of society, as essential as the roading system or a reliable telecommunications system.”¹⁷

1.22 In Ireland, the content of the Statute Book can be divided into the pre-1922 and post-1922 eras. Before 1922 23,370 Acts were passed which could have potentially been applied to Ireland. Since 1922, 3,189 Acts have been passed by the Oireachtas.

1.23 Much work has been done recently on the pre-1922 Statute Book by the Office of the Attorney General. The 23,370 Acts have been assessed and a “White List” of the Acts that are to remain on the Statute Book has been drawn up. The *Statute Law (Revision) Act 2007* lists 1,364 pre-1922 Acts that are to remain on the Statute Book. The position as regards pre-1922 legislation has been clarified greatly by this project though it must be noted that electronic versions of pre-1922 Acts are not yet available.

1.24 The position regarding post-1922 Acts is that the Office of the Attorney General publishes electronic versions of all 3,189 post-1922 Acts on the Irish Statute Book Online website, www.irishstatutebook.ie. This is a free to access public website. The Acts on the website are displayed as passed by the Oireachtas. In other words, amendments that have been made to Acts are not incorporated. The website currently (July 2007) contains a disclaimer concerning the accuracy of all Acts from 1922 to 1998, which clearly creates difficulties for those who wish to rely on this important electronic database.¹⁸ The Commission understands that the Office of the Attorney General is working to remedy this problem. It is not possible at this

¹⁷ Geoff Lawn “Improving Public Access to Legislation: the New Zealand experience” at 11, available at www.pco.parliament.govt.nz/pal/gla3.shtml

¹⁸ See Hunt, “Electro-Shock!” *Gazette*, Law Society of Ireland Aug/Sept 2006, p.18 (available at www.lawsociety.ie). This article also discusses the difficulties with the online Irish Statute Book against the background of eLegislation projects in other States, such as Tasmania, as to which see paragraph 2.41, below.

stage to state precisely how many of the 3,189 post-1922 Acts remain in force, though the Commission estimates that it is less than 2,000.

1.25 At present the State provides no access to “in-force” versions of Acts. An in-force version of an Acts refers to a version of an Act in which all amendments made to that Act have been incorporated. Although private publishers offer this service for certain areas of law, this can be extremely expensive. Without access to in-force versions of Acts it becomes very difficult to ascertain the current law. It is often necessary to trawl through many volumes of legislation in order to find all the amendments to an Act.¹⁹ A Programme of Statute Law Restatement would assist in this respect.

(2) *Reducing Red Tape*

1.26 Accessibility to the Statute Book in Ireland can be seen in the broader context of general regulatory reform. In 1999, the Government adopted the recommendations in *Reducing Red Tape – An Action Programme of Regulatory Reform in Ireland*.²⁰ That report focused on the importance of regulation to continued economic growth and greater competitiveness. One of the key recommendations was the process of “making legislation more coherent and more easily accessible to those who use it.” This Report marked the beginning of a national programme of regulatory reform, and accessible legislation constitutes a central element of this programme.

1.27 A report in 2001 by the OECD provided further political impetus for the establishment of a coherent statute law reform and revision programme in Ireland.²¹ That report made a connection between regulatory reform in Ireland and continuing economic growth. It stated: “Regulatory reform is seen as a way to open up important infrastructure and policy bottlenecks to further growth and to attain efficiency improvements that can help manage inflationary pressures.”²² It also stated that: “Reform aims at limiting those no longer needed, streamlining and simplifying those that are needed and improving the transparency of application.” The enactment of what became the *Statute Law (Restatement) Act 2002* was welcomed in the report as an important step in the process of regulatory reform.

¹⁹ See paragraph 5 and 6 of the Introduction to this Paper and paragraphs 2.07-2.14, below.

²⁰ *Reducing Red Tape – An Action Programme of Regulatory Reform in Ireland 1999*, available at www.betterregulation.ie

²¹ *Regulatory Reform in Ireland* (OECD, 2001), available at www.betterregulation.ie

²² *Ibid* at 15.

1.28 In 2004, the Government issued a White Paper *Regulating Better*.²³ That paper was seen as a response to the 2001 OECD Report. The White Paper identified six principles of better regulation that should be achieved. These are: necessity, transparency, consistency, accountability, proportionality and effectiveness. Excessive regulation in any particular area, or red tape, was found to frustrate all interested parties and to place barriers between the Government and the general population.

1.29 The White Paper refers to the aim of making legislation “more accessible to all and better understood”. It considers that this is to be achieved through “revision, restatement and repeal” of legislation. It identified clarification of legislation as playing an important role in reducing the red tape that affects small businesses. Within that context it called for minimising the use of non-textual amendments in order to ensure greater clarity in legislation.²⁴ The Paper also endorses “greater use of e-Government and IT to increase the transparency and accessibility of regulations”.

D The Statute Law (Restatement) Act 2002 and Developments to 2006

1.30 The *Statute Law (Restatement) Act 2002* was enacted against this background of regulatory reform. The 2002 Act was based on similar restatement processes that have existed in Australia and Canada for many years. The 2002 Act is based most closely on the system in place in New South Wales since 1972 and Queensland since 1992.²⁵

1.31 The fact that Restatement processes have existed in other common law jurisdictions since the 1970s highlights the need for such an initiative in Ireland. Since the foundation of the State there has been no systematic policy in place to track and tidy the increasing amount of legislation being passed by the Oireachtas each year. The *Statute Law (Restatement) Act 2002* seeks to address this need in the wider context of other initiatives to modernise the Statute Book.

1.32 The 2002 Act enables the Attorney General to publish a certified version of the text of an Act incorporating any amendments made subsequently in one up-to-date document in paper or electronic format. A Restatement does not amend existing law and accordingly restatements do not require scrutiny by the Houses of the Oireachtas. The 2002 Act simply

²³ Available at www.betterregulation.ie

²⁴ For a discussion of non-textual amendments, see paragraph 4.24 below.

²⁵ See paragraphs 2.41 - 2.47 for further discussion of position in New South Wales and Queensland.

requires the Attorney General to lay the certified restatements before both Houses of the Oireachtas for a period of 21 days before publication.

1.33 Section 5 of the 2002 Act provides that once certified by the Attorney General a restatement may be cited in court as *prima facie* evidence of the legislation contained in it. In the event of a conflict between the primary legislation and the restatement, the primary legislation will take precedence.

1.34 Responsibility for the carrying out of Restatements lay originally with the Office of the Attorney General. The Statute Law Revision Unit (SLRU) developed a Restatement Guide and Policy to assist Department officials wishing to develop draft Restatements. The SLRU also developed a specific presentation style for Restatements.²⁶ Four Restatements have been certified by the Attorney General to date (July 2007) and are available on the website of the Office of the Attorney General.²⁷

- Sale of Goods Act 1893 and Part II of 1980 Restatement (certified 27 February 2003).
- Defence Acts 1954 to 1998 and Court Martial Appeals Restatement (certified 4 May 2004).
- Tourist Traffic Acts 1939 to 2003 Restatement (certified 17 May 2004)
- Succession Act 1965 Restatement (certified 18 May 2004).

1.35 The Commission is aware that the preparatory work involved in drafting these Restatements included considerable liaison between the SLRU and the relevant Government Departments. The Commission is also aware that considerable progress was made on the drafting of a number of other Restatements prior to the transfer of responsibility for this area to the Commission.

E Conclusion

1.36 As set out in the Introduction to this Paper, in 2006 the Government (at the request of the Attorney General) decided that the Law Reform Commission should take over responsibility for the preparation of a Programme of Statute Law Restatements. Since then the Commission has engaged in a public consultation process regarding the Acts that should be included in that programme.²⁸ In preparation for this Paper the Commission

²⁶ See Version 1 of the Restatement of the *Freedom of Information Act 1997* in Appendix A.

²⁷ See www.attorneygeneral.ie/slru/restatements.html

²⁸ See paragraph 4.53.

has also looked in detail at the process of Restatement, including the way in which Restatements should be presented.²⁹ The Commission now turns to examine these specific areas in subsequent chapters.

²⁹ See Chapter 4.

CHAPTER 2 STATUTE LAW RESTATEMENT AND TIDYING THE STATUTE BOOK

A Introduction

2.01 In this Chapter, the Commission discusses how Statute Law Restatement can contribute to the various processes currently in place to tidy up the Irish Statute Book, which is an important element of the policy of Better Regulation. The Commission examines this in terms of processes already in place in the State and internationally.

2.02 In Part B, the Commission discusses one of the most significant projects ever undertaken in this respect, the pre-1922 Acts Project conducted by the office of the Attorney General, which has resulted in a definitive list of the pre-1922 Acts that remain on the Irish Statute Book. The Commission also discusses some practical difficulties in accessing the text of Acts, whether pre-1922 or post-1922, because of the growing number of Acts which amend previous Acts. In Part C, the Commission discusses the various strategies used to tidy up the Statute Book, including statute law consolidation, codification and Statute Law Restatement. The many benefits to these strategies arising from Statute Law Restatement are identified. In Part D, the Commission discusses similar projects in other States – notably the “Reprints” project in New South Wales on which the *Statute Law (Restatement) Act 2002* was based – and how some of these have developed into eLegislation projects under which statute law is comprehensively updated and made publicly available through websites.

B Finding the Irish Statute Book

(1) *The Irish Statute Book and the pre-1922 Acts*

2.03 As outlined in Chapter 1, the Commission acknowledges that it is not possible at present to speak of an Irish Statute Book in the sense of a single location or source where one can find a complete list of legislation or Acts that currently apply in Ireland. As already discussed,¹ when the State was established in 1922 all pre-1922 Acts were carried over and continued to apply until replaced by legislation enacted by the Oireachtas. Thus, to

¹ See paragraph 1.10, above.

compile the complete list of Acts that comprise the Irish Statute Book necessarily involved an examination of the legislative output of all the Parliaments and legislatures that exercised jurisdiction over Ireland until 1922, beginning with the 11th Century Norman Conquest of England, first “exported” to Ireland in the 12th Century. It is remarkable that, until 2007, there was no definitive list of the pre-1922 Acts which actually applied to Ireland. This represented a significant obstacle to any attempt to describe the content of the Irish Statute Book, which is an obvious prerequisite to engaging in the important task of modernising the Statute Book - of which Statute Law Restatement forms an element. This obstacle to beginning the process of modernising the Irish Statute Book has now been removed.

(2) *The Statute Law Revision Act 2007 and the “White List” of pre-1922 Acts.*

In recent years, and as part of the Government’s *Better Regulation* policy,² the Office of the Attorney General has been engaged in a “Pre-Independence Project,” which has culminated in the enactment of the *Statute Law Revision Act 2007*. This Project involved the first comprehensive audit of what turned out to be 23,370 pre-1922 Acts of the various Parliaments which exercised legislative authority over Ireland. Of these, the project team concluded that 12,557 Acts had not applied to Ireland,³ 9,277 Acts had already been repealed and 3,188 Acts were obsolete and have now been repealed by the 2007 Act. This process has left the State with the first definitive list (the “White List”) of 1,364 pre-1922 Acts which remain on the Statute Book and which are listed in Schedule 1 of the 2007 Act. This is an enormous achievement, which provides the basis for the development of a complete legislative code for Ireland when these 1,364 Acts are added to the 3,189 Acts enacted by the Oireachtas since 1922 of which the Commission estimates that less than 2,000 remain in force.

2.04 The *Statute Law Revision Act 2007* is not, of course, the first Act of that title. As discussed in Chapter 1, Statute Law Revision Acts began to be enacted in the 19th Century, and they achieved significant progress in tidying up the Statute Book of that time. Since the establishment of the State, three general Statute Law Revision Acts were enacted,⁴ and they contained extensive lists of Acts deemed to be obsolete and therefore appropriate for repeal, in whole or in part. The *Statute Law Revision Act 2007* differs in two fundamental ways from these earlier examples: first, it

² See paragraph 1.26.

³ Many of the pre-1922 Acts passed by the United Kingdom Parliament applied to the colonies of the vast British Empire, while others applied to the constituent parts of the United Kingdom itself, including Ireland.

⁴ The *Statute Law Revision (Pre-Union Statutes) Act 1962*, the *Statute Law Revision Act 1983* and the *Statute Law Revision (pre 1922) Act 2005*.

repeals all remaining pre-1922 Acts that are obsolete, and, second, it includes a definitive list of 1,364 pre-1922 Acts that should be retained at least temporarily on the Statute Book because they may retain some relevance. As the 2007 Act completed its legislative passage, it was noted that over 10% of the Acts retained by the 2007 Act are scheduled for repeal by the *Land and Conveyancing Law Reform Bill 2006*,⁵ which has been passed by Seanad Éireann, and which originated in the Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law*.⁶

(3) *The Irish Statute Book as a series of 3,000 Acts and amending Acts*

2.05 With the enactment of the *Statute Law Revision Act 2007*, we can now say that the content of the “Irish Statute Book” comprises 1,364 pre-1922 Acts and about 2,000 Acts passed by the Oireachtas since 1922 which remain in force. No doubt, a similar statement could be made about the content of the comparable Statute Book of many similar-sized States. It might, therefore, seem to be a relatively easy task to complete the process of modernising the Statute Book. It might be thought, for example, that this could be done by electronically scanning the text of the pre-1922 Acts⁷ and placing them in a database alongside the Acts passed by the Oireachtas since 1922. The Commission is conscious, however, that this is not possible.

2.06 This is primarily because, by contrast with the Code-based approach of the Civil Law legal systems of other European States such as France,⁸ the Parliaments that have legislated for Ireland – whether before 1922 or since – have not enacted laws as component parts of a wider Code. Instead, legislation was enacted – and continues to be enacted – in the form of an annual series of Acts without an overarching framework and which in many instances involve amending Acts superimposed on previous Acts.

(a) *Finding the text of the Explosives Acts, as amended*

2.07 To illustrate this, we can take two examples from the pre-1922 era, the *Explosives Act 1875*⁹ (which deals primarily with the regulatory system for the civil use of explosives) and the *Explosive Substances Act*

⁵ See Vol. 186 Seanad Éireann Debates col. 2203 (1 May 2007).

⁶ LRC 74-2005. The 2006 Bill was restored to the Order Paper of Dáil Eireann in June 2007

⁷ In any event, this assumes that the issue of Crown copyright of pre-1922 Acts could be resolved.

⁸ See paragraph 1.07 above.

⁹ 1875 (38 & 39 Vict.), c. 17

1883¹⁰ (which deals primarily with the criminal offences associated with the possession and use of explosives).¹¹

2.08 As originally enacted, the 1875 Act consisted of 122 sections and about 25,000 words. But the text of the 1875 Act has been amended by a number of Acts, Orders and Regulations since 1875, including the *Explosives Act 1875 Adaptation Order 1926*, the *Explosives Act 1875 Adaptation Order 1935*, the *Transport Act 1950*, the *Dangerous Substances Act 1972*, the *Fire Services Act 1981*, the *Carriage of Dangerous Goods by Road Act 1998*, the *European Communities (Transport of Dangerous Goods by Rail) Regulations 2003* and the *Criminal Justice Act 2006*. To a less daunting extent, as originally enacted, the 1883 Act consisted of 9 sections and about 1,500 words. Similarly, the text of the 1883 Act has been amended by a number of Acts since 1883, including the *Criminal Justice (Administration) Act 1924*, the *Criminal Law (Jurisdiction) Act 1976*, the *Criminal Evidence Act 1992*, the *Bail Act 1997*, the *Offences Against the State (Amendment) Act 1998*, the *Criminal Justice Act 1999* and the *Criminal Justice (Safety of United Nations Workers) Act 2000*.

2.09 The typical legislative process for amendments to, for example, the 1883 Act is to specify in the post-1883 Act that a particular section – or part of a section - of the 1883 Act is to be replaced by new text to be “inserted” by the amending Act. This “insertion”, however, is not at present actually entered on a paper or electronic copy of the text of the 1883 Act as previously amended.¹² In order to set out the current text of the 1883 Act as it applies in Ireland, it would be necessary to begin with the original copy of the 1883 Act and then to take account of all post-1883 amendments to the original text. This is a complex exercise which the Commission examines in more detail in Chapter 4, because it is essentially a description of the task involved in Statute Law Restatement: the process which leads to an up-to-date version of any Act, such as the *Explosive Substances Act 1883*.

¹⁰ 46 & 47 Vic., c. 3.

¹¹ The Commission’s analysis of the word count in the 1875 and 1883 Acts is derived from the electronic version of the Acts in the UK Statute Law Database, www.statutelaw.gov.uk. The list of amending Acts is based on the material in the Chronological Tables of the Statutes, available at www.irishstatutebook.ie, and which is discussed at paragraph 2.16, below.

¹² The 1875 and 1883 Acts, as amended by the Parliament of the United Kingdom, remain on the UK statute book. An electronic version of the text of the 1875 and 1883 Acts, as they apply in the UK, can be viewed on the UK Statute Law Database, www.statutelaw.gov.uk

(b) *The growth of amending Acts and Miscellaneous Provisions Acts*

2.10 In recent years, the pace of legislative activity – law reform in its widest sense – has increased significantly, and this has led to a proliferation of Acts which consist primarily of amendments to previous Acts. The first six Acts passed by the Oireachtas in 2006 illustrate this. These were: the *University College Galway (Amendment) Act 2006*, the *Teaching Council (Amendment) Act 2006*, the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*, the *Competition (Amendment) Act 2006*, the *Social Welfare Law Reform and Pensions Act 2006* and the *Finance Act 2006*.

2.11 The fifth and sixth Acts passed in 2006, dealing with social welfare, pensions and finance, are annual features of the Oireachtas legislative calendar. In large measure, they implement the year’s budgetary measures by way of amendments to previous Social Welfare Acts, Pensions Acts and Taxes Acts. From the specific perspective of any comprehensive tidying up of the Statute Book, they indicate that an annual update (in both cases involving large amounts of text) is required in these specific areas.

2.12 The first four Acts also indicate the general breadth of current legislative activity including education law, the regulation of medical products and competition law. The titles of the first four Acts of 2006 also indicate that they involved amendments to previous Acts on these topics. Indeed, the use of the word “miscellaneous” in the *Irish Medicines Board (Miscellaneous Provisions) Act 2006* hints that the amendments range over a potentially broader area than the regulation of medical products, though it would be difficult to appreciate this without an examination of the actual content of the 2006 Act, which the Commission considers is worth providing here.

2.13 The more obvious amendments made by the *Irish Medicines Board (Miscellaneous Provisions) Act 2006* were to the *Irish Medicines Board Act 1995*. These included amendments to implement the provisions of an EC Directive, 2004/23/EC, which sets standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells for human applications. Another amendment to the 1995 Act enabled the Minister for Health to make Regulations providing for nurse prescribing, which the title of the 2006 Act may have merely hinted at. But the 2006 Act also involved significant changes which would not be obvious on a perusal of its title. For example, the 2006 Act amended the *Misuse of Drugs Act 1977* in order to transfer from the Minister for Health to the Irish Medicines Board (IMB) the function of licensing controlled drugs under the 1977 Act. The 2006 Act also amended the *Control of Clinical Trials Act 1987* to confer additional enforcement functions on the IMB. The 2006 Act also amended the *Health*

Act 1947 to enable country of origin meat traceability requirements to be imposed on retail outlets and restaurants; and it amended the *Health Act 1970* concerning eligibility for dental, ophthalmic and aural health services. Many other examples of this form of “omnibus amendment” Act could be given,¹³ and the Commission notes here that they underline the complexity of comprehensively tidying up of the Statute Book.

(c) Finding the text of the Freedom of Information Act 1997, as amended

2.14 In the immediate context of preparing this Consultation Paper, the Commission was conscious of the need to provide a relevant sample of a Statute Law Restatement which would set out alternative presentation styles for consultative purposes. Bearing in mind the difficulties already noted in terms of finding the source text of older legislation such as the Explosives Acts, the Commission decided to use the *Freedom of Information Act 1997* as the chosen example. This legislation was also chosen because of its key importance to Irish society in general, and would thus be the kind to which the Commission would give priority in the development of its Programme of Statute Law Restatement. The example chosen appears at first sight to be a relatively straightforward matter of “cutting and pasting” into the text of the *Freedom of Information Act 1997* the relevant amendments made by the *Freedom of Information (Amendment) Act 2003*. It is true that the 2003 Act contains about 50% of the significant textual changes to the 1997 Act. However, as the draft Restatement indicates the remaining 50%, were made by other Acts without the title “Freedom of Information”, such as the *Safety, Health and Welfare at Work Act 2005*. A total of 110 textual changes were made to the *Freedom of Information Act 1997*, and 54 of those changes came from 40 Acts, other than the *Freedom of Information (Amendment) Act 2003*. In addition, a number of other non-textual changes to the 1997 Act were also made.¹⁴ This underlines the complexity of what appears at first sight to be a relatively straightforward process.

C Aids and other Strategies deployed to tidy up the Statute Book

2.15 In this Part, the Commission examines the various aids and strategies which have been deployed to date to tidy the Statute Book, which

¹³ The *Criminal Justice Act 2006* contains 197 sections, a number of which involve entirely new provisions, but some of which also involve amendments to, for example, the *Explosives Act 1875* (referred to in paragraph 2.07 above), the *Firearms Act 1925*, the *Criminal Justice (Forensic Evidence) Act 1990*, the *Criminal Justice (Public Order) Act 1994* and the *Children Act 2001*. Further changes to some of these Acts were made by the *Criminal Justice Act 2007*.

¹⁴ For the full list of Acts, Regulations and Orders affecting the 1997 Act, see Appendix A to this Consultation Paper.

have included general statute law reform, statute law consolidation, and codification. This allows the Commission to place Statute Law Restatement in the context of these other strategies (and which have, of course, been greatly facilitated by the *Statute Law Revision Act 2007*).

(1) *The Chronological Tables of the Statutes*

2.16 The difficult task of tracking all amendments made to Acts is made somewhat easier by the document known as the *Chronological Tables of the Statutes*,¹⁵ which contains the cumulative list of amendments made by Acts passed since 1922 and which, until 2007, has been compiled under the auspices of the Office of the Attorney General, from which virtually all Acts emerge in the form of Bills prepared by the Office of Parliamentary Counsel (OPC).¹⁶ Since 2007, the Commission has agreed, at the request of the Office of the Attorney General, to take over responsibility for the compilation and maintenance of the *Chronological Tables of the Statutes*.¹⁷

(2) *Consolidation and general statute law reform*

2.17 Consolidation involves putting together a series of related Acts into the form of a single Act. Unlike Statute Law Restatement, Consolidation requires Oireachtas time and the enactment of a Consolidation Act. Additionally parts of the Act may be required to be rewritten in order to update the language of the Acts or to ensure consistency between the consolidated Acts. Consolidation is usually a long, labour intensive process. A Consolidation Bill may often take a number of years to prepare. This alone may prevent the process beginning in the first place.

2.18 There are a total of 6 Consolidation Acts currently on the Irish Statute Book.¹⁸ This relatively low figure needs to be qualified by reference to a number of proposed Consolidation Bills. For example, in 2005 the

¹⁵ The current version of the *Chronological Tables of the Statutes* is available in electronic form as part of the electronic Irish Statute Book hosted by the Attorney General, www.irishstatutebook.ie

¹⁶ Until 2000, Parliamentary Counsel were known as Parliamentary Draftsmen.

¹⁷ See paragraph 8 of the Introduction to this Paper. The history of the Chronological Tables, first published in 1870, is discussed in *Bennion on Statute Law*, 3rd ed (1990), pp.325ff, available at www.francisbennion.com. Until 1985, the Irish version of the Chronological Tables was published in a single volume which also included an *Index to the Statutes*, an alphabetical index to each section of every Act passed since 1922, using the marginal note (heading) of each section as the basis for the Index entry. The *Index to the Statutes* has not been updated since 1985 and there is no publicly accessible electronic version of it available.

¹⁸ *Social Welfare Consolidation Act 2005* (which replaced previous Consolidation Acts of 1993 and 1981), *Capital Acquisitions Tax Consolidation Act 2003*, *Stamp Duties Consolidation Act 1999*, *Taxes Consolidation Act 1997*, *Fisheries (Consolidation) Act 1959* and *Destructive Insects and Pests (Consolidation) Act 1958*.

Department of Justice, Equality and Law Reform published the Scheme of a Sale of Alcohol Bill. If enacted this would update the law relating to the sale and consumption of alcohol. The Bill would repeal the *Licensing Acts 1833 to 2004*, as well as the *Registration of Clubs Acts 1904 to 2004*. These Acts would be replaced by more modern provisions.¹⁹ The Commission is also aware of ongoing work to consolidate the *Merchant Shipping Acts 1894 to 2004* and the Financial Services legislation.

2.19 A further example is the *Land and Conveyancing Law Reform Bill 2006*, which arose from the Commission's *Report on Reform and Modernisation of Land Law and Conveyancing Law*.²⁰ The 2006 Bill will repeal over 150 pre-1922 Acts, as well as repealing parts of many post-1922 Acts. The 2006 Bill modernises the language of many of the provisions in the existing body of legislation. In common with many other general statute law reform legislation, the 2006 Bill also replaces a number of relevant common law and equitable (judge-made) rules. The Commission is also currently engaged in a project which seeks to consolidate, with reform, the legislation setting out the jurisdiction of the courts, both pre-1922 and post-1922.

2.20 Restatement will complement consolidation and other major statutory reform projects by offering a more immediate way of assembling a coherent picture of the law in appropriate areas. Many areas, such as planning law and employment law are prime candidates for consolidation work. A Restatement of the legislation governing these two areas of law would then assist a subsequent consolidation project.

(3) Codification

2.21 An authoritative definition for Codification is difficult to locate. The 2004 Report of the Expert group on the Codification of Criminal Law states that Codification includes certain "stable components" including its accessibility, comprehensiveness and its mutually consistent and reasonably certain provisions.²¹

2.22 Codification of the law is thus a process which results in the creation of a "code" in some form or other. This process of codifying the law is one which can involve other methodologies. In other words the process of

¹⁹ An example of part-consolidation is the *Sea-Fisheries and Maritime Jurisdiction Act 2006*, Part 3 of which consolidates the *Maritime Jurisdiction Act 1959 to 1988* and repealed 15 Acts in their entirety as well as repealing a number of Acts in part. Despite this part-consolidation, the 2006 Act retained a number of significant Acts in place, albeit with substantial amendments.

²⁰ LRC 74-2005.

²¹ See the Report of the Expert Group on the Codification of the Criminal Law: *Codifying the Criminal Law* (Department of Justice, Equality and Law Reform 2004).

Codification will regularly embrace Consolidation and Restatement. In that way the restatement project can “feed into” any codification project where required.

2.23 Arising from the Expert Group’s Report a Criminal Codification Advisory Committee has been established under Part 14 of the *Criminal Justice Act 2006*. Their task is to compile a draft criminal code. The scoping stage of the project was completed in 2004 and the Committee are now at the early stages of the compilation exercise. This project will make a major contribution to the organisation of much of the criminal legislation that has been passed.²² In that sense Restatement will complement the work of that Committee. It should also be noted that, as with the land and conveyancing law reform, codification of criminal law will also incorporate many common law rules.

(4) Statute Law Restatement

2.24 As already mentioned, Statute Law Restatement is essentially an administrative consolidation of Acts that does not make any changes to the law. Under the *Statute Law (Restatement) Act 2002*, the Attorney General can certify a restatement to be a statement of the law contained in the provisions of the statutes to which it relates. Restatements do not need to be passed by the Oireachtas, but the Attorney General is obliged to put restatements before both Houses for 21 days before the Restatement can be published.²³

(a) Process of Restatement

2.25 The process of Restatement involves the insertion of amendments into the text of an Act and presenting it as a single document representing an up-to-date statement of the law. The two most common types of amendments used by drafters are textual and non-textual amendments. A textual amendment is an amendment that directly alters the text of an Act, for example where an amendment Act states that a particular word should be “inserted” or “substituted” or “deleted”. A non-textual amendment is a modification to an Act that does not alter the text of the Act, where an amending provision instructs that a particular word should be construed in a certain way, such as where a previous reference to the Minister for Health is to be construed as a reference to the Irish Medicines Board.²⁴

²² The Report of the Expert Group noted that codification would build on legislation enacted in recent years (“mini-codes”) on foot of recommendations by the Law Reform Commission made in various Reports on substantive aspects of the criminal law see paragraph 1.15, above.

²³ See discussion at paragraph 1.30.

²⁴ See the discussion of the *Irish Medicines Board (Miscellaneous Provisions) Act 2006*, at paragraph 2.13 above.

2.26 A Restatement will also exclude the text of provisions that have been repealed. In place of the repealed provision, a note will appear citing the Act and the provision that effected the repeal.

2.27 The resulting Restatement consists of a single document containing the Act being restated which includes the textual and non-textual amendments that apply to it. For example, the draft Restatement of the *Freedom of Information Act 1997* consists of the basic text of the 1997 Act with all textual and non-textual amendments that have been made to it.²⁵

(b) Benefits of Restatement

2.28 The major and most obvious benefit of a Restatement is that it provides an up-to-date account of the law in question. The Commission will now examine some of the wider benefits of Restatement.

(i) Increased Transparency of Legislation

2.29 In the 2004 Government White Paper *Regulating Better*,²⁶ transparency and accountability were recognised as two of the six principles of better regulation to be promoted as part of the Better Regulation initiative. By restating a number of Acts into a single document the transparency of legislation will certainly be improved.

2.30 A tidier Statute Book will also serve to enhance accountability of the law. Peter Martin, the founder of the Legal Information Institute at Cornell University, commented that:

“Efforts to make law more accessible, more understandable, more clearly expressed are ultimately efforts to make law more effective and in a democracy, more accountable.”²⁷

(ii) Benefits to the Economy

2.31 The White Paper also recognised the importance of transparent regulation to the economy:

“Transparency of regulations is also critically important to the performance of the economy, not least because it guards against special interests gaining undue influence in markets. It generates greater trust on the part of consumers. It assures and satisfies investors that there is a level playing field, and encourages new entrants to sectors. In terms of the quality of public services, the

²⁵ See the Restatements of the *Freedom of Information Act 1997* in Appendix A.

²⁶ Available at www.betterregulation.ie

²⁷ Quoted in Teresa Scassa “The Best Things in Law are Free?: Towards Quality Free Access to Primary Legal Materials in Canada” at 22. Available at <http://www.ciaj-icaj.ca/english/publications/LD90-Scassa.pdf>

principle of transparency underpins the need for regulations to be as clear, straightforward and accessible as possible in their drafting, promulgation, codification and dissemination.”²⁸

2.32 Better regulation is of particular importance to Small and Medium Size Enterprises (SMEs). The current complexity of the statute book causes many problems for these smaller firms who lack the extensive legal resources of larger companies. A recent Communication from the European Commission states that SMEs constitute 99% of all enterprises in Europe and two-thirds of employment.²⁹ Considering the vital role that SMEs play in the economy it is important that they are facilitated to the greatest degree possible.³⁰

(iii) Benefits to the Legislative Process

2.33 The legislative process is likely to benefit from the restatement project in a number of ways.

- Restatements will assist legislators in their work. When the *Statute Law (Restatement) Act 2002* was being introduced in the Oireachtas a number of TDs commented that restatement of legislation would be of great assistance to them in their work because they find navigating the Irish Statute Book a difficult task.³¹ Although this difficulty partly arises from the complex language used in statutes, the fact that the legislation is spread over so many volumes adds to the obstacles that they face.
- A consequence of restatements being purely administrative consolidations is that they do not require re-enactment by the Oireachtas. For that reason restatements have the potential to prove more efficient than consolidations which tend to occupy valuable parliamentary time.

²⁸ Government White Paper *Regulating Better* at 26 (2004).

²⁹ Communication “Implementing the Community Lisbon Programme: A strategy for the simplification of the regulatory environment” COM (2005) 535.

³⁰ See also Government White Paper *Regulating Better* (2004) at 13. The White Paper recognises the particular value to SMEs of reducing red tape. Research for that Paper found that in a company with a staff of 8 or less, one member of staff will spend at least 50% of his or her time filling out forms.

³¹ Second Stage Dáil Eireann debate on the *Statute Law (Restatement) Bill 2002*, Available at <http://historical-debates.oireachtas.ie/D/0555/D.0555.200210160005.html>

- Restatements are also likely to enhance compliance with legislation. A better understanding of the law makes it much more likely that citizens will adhere to its requirements.³²
- Greater accessibility to legislation may also increase citizen participation in the legislative process. Restatements will facilitate lobbying by all citizens and not just those who can afford the expensive consolidated versions of statutes sold by commercial publishers. The Government White Paper recognises that greater regulatory transparency will empower citizens by giving them access to information which enhances their decision making abilities as participants in the community.³³

(iv) Benefits to the Legal System

2.34 Section 5 of the *Statute Law (Restatement) Act 2002* provides that a restatement is prima facie evidence of the law contained within it. Legal practitioners will be able to rely on a restatement in court as evidence of the law contained within it. One example of a Restatement that would be of huge benefit is a Restatement of the Planning Acts. The *Planning and Development Act 2000* has been amended on numerous occasions since 2000. Planning law, as well as being a matter of public concern, is much litigated and a Restatement of the Planning Acts would be particularly beneficial to all practitioners involved in the area.

2.35 Besides lawyers, restatements will also assist litigants wishing to ascertain their legal rights and obligations. In response to the Government Consultation Paper *Towards Better Regulation*, the Courts Service submitted that one of the main reasons for citizens’ frequent use of judicial review is the lack of clarity and quality of primary and secondary legislation.³⁴

2.36 Law reform as a process also stands to benefit from Restatement. The work involved in carrying out a Restatement will inevitably assist in identifying gaps in legislation or specific areas in need of reform. As already discussed, restatement has complemented the substantive law reform work being done by the Commission.³⁵

³² Uta Kohl, “Ignorance is no Defence but is Inaccessibility? On the Accessibility of National Laws to Foreign Online Publishers”, available at <http://www.frlii.org/spip.php?article81>

³³ Government White Paper *Regulating Better* (2004) at 26.

³⁴ Other reasons cited were poor quality of decision making and its implementation. See Report on the submissions to the Government Consultation Paper *Towards Better Regulation* (2002) at 14, available at www.betterregulation.ie

³⁵ See Paragraph 3 of the Introduction to this Consultation Paper.

(v) **Restatement and eLegislation**

2.37 The primary role of Statute Law Restatement is to enhance the accessibility of the Statute Book. As already discussed,³⁶ the Commission also sees Restatement in the context of the Government's eLegislation strategy and it is committed to ensuring that its Programme of Statute Law Restatement will be fully compatible with the ongoing development of the eLegislation project.³⁷ Since the eLegislation project is currently (July 2007) under development in the State, the Commission is conscious that its programme of Restatement must take into account technological developments that have already occurred,³⁸ and international experience of comparable projects in other States. The Commission's aim is ensure as far as possible that the Restatements generated by the Commission - and certified by the Attorney General - will be "future proofed" in the sense that they could be used as a component part of the fully developed eLegislation project.

2.38 The Commission notes in this respect that there is no uniform definition of the exact scope of eLegislation because the concept varies from jurisdiction to jurisdiction. In its purest form eLegislation initiatives appear to envisage the elimination of paper from the legislative process altogether. This is the position in Tasmania where the electronic versions of Acts represent the official versions of legislation.³⁹ Other eLegislation projects consist of a legislation database where in-force versions of Acts are published online. One example is the UK Statute Law Database which was made freely available to the public towards the end of 2006.⁴⁰

2.39 Common to all eLegislation projects is the incorporation of all relevant technological advancements and innovations to the work process. This is particularly the case as regards the drafting process for legislative restatements or legislation as enacted.

³⁶ See paragraph 2 of the Introduction.

³⁷ The Commission notes that, during the Oireachtas debate on the *Statute Law Revision Act 2007*, the Government stated that it intended that all pre-1922 Acts which remain on the Irish Statute Book five years after the passing of the 2007 Act will be made available on-line: see Dáil Éireann Committee Stage debate on the *Statute Law Revision Bill 2007*, Select Committee on Finance and the Public Service, 13 March 2007, available at www.oireachtas.ie

³⁸ The Commission has, for example, had the benefit of discussions with those involved in the development of the technological authoring tools used within the Houses of the Oireachtas in the preparation and presentation of amendments to Bills during the course of their legislative passage.

³⁹ See paragraph 3.54 for a more detailed discussion of the technology that is being used in Tasmania.

⁴⁰ See www.statutelaw.gov.uk

2.40 In many jurisdictions eLegislation initiatives have sprung from Restatement style projects. One example is New South Wales where a full “in-force” electronic database now exists. The *Statute Law (Restatement) Act 2002* was based on a policy adopted in New South Wales in the 1970s for producing reprints of legislation. Examining the position in other jurisdictions as regards management of legislation can provide insight, in the context of the Government’s eLegislation strategy, into how modernisation of the Irish Statute Book could develop in the future.

D Comparative Projects in other jurisdictions

(I) New South Wales

2.41 As stated above, one of the best examples of the contribution that a restatement style project can make comes from New South Wales. In 1972, the Parliamentary Counsels Office New South Wales (PCO) was given responsibility for the production of “reprints” of legislation under the *Reprints Act 1972 (NSW)*.⁴¹ During the Oireachtas debate on the *Statute Law (Restatement) Act 2002* it was noted that the “reprinting” in New South Wales was similar to the envisaged restatement process in Ireland.⁴²

2.42 Since the introduction of reprints, New South Wales has advanced to a point where all of their restated (or “reprinted”) statutes have been gathered into several electronic databases for free public access.⁴³

2.43 In 2006 those databases were launched as part of a website established as the official New South Wales Government site for online publication of legislation. The website has three main databases:

- The “In Force” database, a collection of current Acts and Statutory Instruments. This material is constantly updated and any amendments are usually consolidated within a three day period of their commencement. In addition to the currently in force material, this database also contains a collection of historical versions of current legislation, effectively providing point-in-time access.⁴⁴ The “In Force” Acts are published in HTML format which means they can be downloaded, searched quickly and provides relevant hyperlinking.

⁴¹ This Act was repealed by *Interpretation Amendment Act 2006 (NSW)*. Reprints are now governed by section 45D of the *Interpretation Act 1987 (NSW)* inserted by the 2006 Act.

⁴² Speech of Minister of State Mary Hanafin TD at Dáil Second Reading of the *Statute Law (Restatement) Bill 2002*, available at <http://historical-debates.oireachtas.ie>

⁴³ See www.legislation.nsw.gov.au/pdf/paperreprintsolicy.pdf

⁴⁴ See paragraph 3.13 for further discussion of point-in-time access.

- The “As Made” database, which contains a collection of Acts and statutory instruments as they were originally made. This material is published in PDF format and is merely the print files that are used to produce paper copies of new Acts and statutory instruments. It is in that sense a static collection.
- The “Repealed Legislation” database, a collection of all repealed legislation from a start date of 1 January 2002.

2.44 The New South Wales experience demonstrates how a restatement project can grow into a much larger eLegislation project. Moreover, it appears that New South Wales envisage that their restatement (or “reprint”) project has a limited life-span. In their recent Paper Reprints policy document the PCO recognises that “the paper reprints program is of diminishing utility as the majority of users of legislation rely solely upon the online products.”

2.45 The PCO is now working towards the authorisation of all electronic legislation. Section 45C(5) of the *Interpretation Act 1987 (NSW)* inserted by the *Interpretation Act 2006 (NSW)*, enables the Parliamentary Counsel to certify that the form of legislation on the website is correct. Section 45C(5) has not yet (July 2007) commenced and the PCO are currently working on developing a technical process that would allow electronic certification of Acts take place.⁴⁵

(2) Queensland

2.46 Aspects of the New South Wales reprint project can be seen in the State of Queensland. The Office of the Queensland Parliamentary Counsel (OQPC) has carried out a “reprinting” programme since 1992 under the *Reprints Act 1992 (QLD)*.

2.47 The OQPC publish electronic reprints on their own website. The 2005 Annual Report of the OQPC states that 75% of electronic reprints are published online within 2 weeks of amendments coming into force.⁴⁶

(3) New Zealand

The New Zealand experience is another example of how a restatement-type project has developed into an eLegislation project. New Zealand has had a system of reprinting, similar to New South Wales, in place since the 1920s. The reprinted legislation has authoritative status and may be relied on by the

⁴⁵ See paragraph 4.130 for further discussion of electronic certification. The Commission is very grateful to Michael Rubacki, Director of Legislation Services and Publication in the Parliamentary Counsel’s Office, NSW, for his help as regards the question of electronic certification.

⁴⁶ Available at www.legislation.qld.gov.au/Publications/OQPC/AnnualReport2005.pdf

courts and other users of legislation. Until 2003, reprinted statutes were published in the bound *Reprinted Statutes of New Zealand* series of legislation.

2.48 In 2003 a Reprints Unit was established within the Parliamentary Counsel Office (PCO). This unit is responsible for preparing and publishing hard copy reprints of Acts and Statutory Regulations, which are now published in pamphlet form. These Reprints have replaced the bound volumes of the Reprint Series which has now been discontinued. This system of reprints is now, in turn, likely to be superseded by the Public Access to Legislation (PAL) Project.

2.49 The aim of the PAL project is to provide up-to-date official legislation in both printed and electronic forms.⁴⁷ The PAL project is expected to be completed in the second half of 2007 and is likely to replace the current system of paper reprints. In the interim, free public access to unofficial versions of current New Zealand statutes is provided by the PCO through arrangements with a professional publisher, Brookers.⁴⁸

(4) Canada

2.50 In British Columbia, the Attorney General's Office runs the QPLegalEze website⁴⁹ in conjunction with private publishers to provide electronic access to legislation that is updated daily. There is a charge to use the website, although free access can be obtained through universities and public libraries.

2.51 In Ontario the E-Laws website⁵⁰ publishes consolidated statutes and regulations that are updated to within 10 business days of the enactment of a new law or amendment of an existing law. At the beginning of each consolidated statute there is a Notice of Currency. This notice states whether the consolidation is up-to-date.

(5) United Kingdom

2.52 In the United Kingdom, the Statutory Publications Office in the Ministry of Justice (formerly the Department of Constitutional Affairs) has made their Statute Law Database (SLD) available online for free public access, since December 2006.⁵¹

⁴⁷ See the website of the PCO for more details at www.pco.parliament.govt.nz/pal.shtml

⁴⁸ www.legislation.govt.nz

⁴⁹ See www.qplegaleze.ca/

⁵⁰ See www.e-laws.gov.on.ca/

⁵¹ See www.statutelaw.gov.uk

2.53 The Statutory Publications Office (SPO) team that compiled the SLD inherited the Statutes in Force (SIF) database, a “loose-leaf” style official edition of the revised statute book arranged according to subject matter and which was regularly updated until 1991. The SPO team developed this in electronic form until the SLD became publicly available in 2006.

2.54 The Statute Law Database now provides access to up-to-date versions of all UK legislation. Although not all Acts on the database are fully up-to-date to 2007 an “in-force” note is displayed on all Acts alerting a user if an Act has not been fully updated. The SLD offers historical versions of all Acts from 1991 onwards. The year 1991 was picked as a base date as this was the year the Statutes in Force Series was discontinued.⁵²

(6) Tasmania

2.55 In the State of Tasmania the response by the Government to calls to reorganise legislation in the 1990s led to an even more progressive system than in New South Wales, New Zealand, or the UK. Tasmania uses a state-of-the-art concept known as the EnAct system. This system is a legislative drafting, management and delivery system. The database uses the concept of both sessional (the version as assented to by the Governor) and historical (legislation consolidated at any particular point in time) versions of legislation.

2.56 The *Legislation Publication Act 1996 (TAS)* provides that the legislative database contains the official authorised versions of the legislation.⁵³ This makes Tasmania one of the few common law jurisdictions in which electronic legislation represents the official version of legislation.⁵⁴ Printed copies of legislation are also available. The Parliamentary Counsel’s Office (PCO) operates a “print on demand” policy, by which users of legislation can obtain printed copies of Acts from the Office should they so wish.

2.57 Although the electronic versions of Acts on the internal PCO server in Tasmania are the official authorised versions of legislation, the versions of Acts that are published on the public website are not certified as official authorised versions of legislation. The Commission understands that this may be due to technical concerns about downloading a document on

⁵² See also paragraphs 3.59 on the UK Statute Law Database.

⁵³ The Legislation Database is available at www.thelaw.tas.gov.au/divisions/opc/

⁵⁴ The Commonwealth of Australia and the Australian Capital Territories have also given official status to electronic legislation to varying degrees. See below at paragraph 2.59.

different desktop systems. In some cases there can be technical problems in downloading files if the user is using older hardware and software.⁵⁵

2.58 It may be noted that Quebec and the Canadian Federal Government are currently using a partial automation system. The software used in those jurisdictions “reads” the amending legislation and provides suggestions as to where the amendments should be inserted. Human editors are then given the possibility to override the suggested changes.

(7) Australian Capital Territory

2.59 The Australian Capital Territory (ACT) provides an “in-force” electronic database of legislation.⁵⁶ These “in-force” versions are called “Republications”. The Republications are published on a legislation website.

2.60 In addition to publishing in-force versions of law online, the ACT gives these versions authorised status. Unlike Tasmania, the Republications that are displayed on the legislation website have full authoritative status. The Republications are, however, displayed in PDF format and, as a result, contain no hyperlinks.

2.61 To ensure the authenticity of the Republications published on the website, the ACT has implemented certain security measures. Firstly the website uses a VeriSign SSL Certificate which is a form of digital authentication. By clicking on a VeriSign icon at the bottom of the legislation register’s homepage, a user can verify that the website is legitimate.⁵⁷

2.62 In addition to the VeriSign Certificate, the PCO have now begun to sign authorised documents digitally. Digital signatures are a way of encrypting electronic documents by applying a mathematical code – a “private key” – held securely by PCO. The user then uses a “public key” to confirm that the document was created by the PCO and to ensure that the document has not changed since it was last digitally signed. Users download the public key from the website. The public key need only be downloaded once as it will then apply to all documents held on the legislation register.⁵⁸

2.63 One disadvantage of this approach is that the extensive hyperlinking used in Tasmania and New South Wales is not feasible. The

⁵⁵ The Commonwealth of Australia has also limited their authorisation process to the versions residing on their in-house servers and not the versions delivered to either the website or a desktop.

⁵⁶ www.legislation.act.gov.au

⁵⁷ See www.legislation.act.gov.au/Updates/authentication.asp

⁵⁸ *Ibid.*

Republications are stored in PDF which does not permit hyperlinking.⁵⁹ An advantage however of displaying the Acts in PDF is that it offers sufficient security that the ACT are able to provide authorised electronic versions of legislation to the public via a free to access website.

E A Long Term View of Statute Law Restatement

2.64 The experiences from other jurisdictions demonstrate how restatement initiatives have grown into larger eLegislation type initiatives. A majority of common law jurisdictions have now created legislation databases that are fully up-to-date, often within days of enactment, and which offer many innovative database features on free-to-access public websites. These are entirely consistent with the Government's eLegislation strategy.

2.65 Some examples of restatement type initiatives that have played a critical role in the subsequent development of eLegislation projects include the Reprints series in New South Wales, which was the model used for the *Statute Law (Restatement) Act 2002*. New South Wales now offers free public access to an in-force database of legislation.

2.66 In this respect, therefore, the Commission considers that a Programme of Statute Law Restatement probably has a finite lifespan that should feed into a larger legislative enterprise. The developments that have taken place in the various jurisdictions discussed point towards this type of eLegislation as the future for the Irish Statute Book.

2.67 Although Restatement has the potential to make a significant contribution to a future eLegislation project, other factors will also be crucial. Essential to any eLegislation initiative will be cooperation between all those involved in the preparation and dissemination of legislation. Common technology would also be crucial to this process and the possibilities that exist in this regard are discussed later in the Paper.⁶⁰

2.68 Statute Law Restatement has many potential benefits for those working within the State on legislation. By way of example, many lawyers, media groups, government departments and public bodies may possess, for their own purposes, informal restatements of the Freedom of Information, 1997. A formal Restatement should reduce the need for such informal Restatements.

⁵⁹ PDF is a storage format which essentially takes an exact copy of the original document and converts it into PDF format. Documents that are stored in PDF can therefore guarantee a high level of accuracy but the negative side is that the documents once created are static.

⁶⁰ See paragraph 3.61.

2.69 A Programme of Statute Law Restatement has the potential for greater interaction between the various groups responsible for drafting and publishing legislation within the State which would be beneficial in the long term to the modernisation of the Statute Book. In the context of Restatement, the Commission sees as crucial the need for a close working relationship between it and the relevant Government Departments. The Commission is aware that this was part of the work involved in those Restatements which were generated in the Office of the Attorney General up to 2006.⁶¹ A similar, cooperative view is needed to modernise the Statute Book in the future. Closer cooperation between bodies working on legislation could be an initial step towards realising in practice the Government's eLegislation strategy.⁶²

2.70 International experience shows a project such as Statute Law Restatement has a finite lifespan. Indeed, the same is true of a Restatement of a specific Act, such as the Restatement of the *Freedom of Information Act 1997*. The 1997 Act has been amended virtually every year since it has been enacted, so that the version in Appendix A is likely to become of less value in 2008 and 2009. eLegislation addresses this problem through regular updating of legislation and the constant provision of "in-force" versions of Acts.

2.71 The Commission is conscious that Restatement, by its nature, is not a long term or comprehensive solution to tidying the Irish Statute Book. As a result, the Commission is anxious to ensure that any work done on Restatements will be able to contribute to any future electronic database of legislation which may be developed as part of the government's eLegislation strategy. The Commission therefore turns in the next chapter to an examination of the technological aspects of Statute Law Restatement, because this would assist in ensuring that work done by the Commission on its Programme of Statute Law Restatement is future proofed.

⁶¹ See Paragraph 1.34, above.

⁶² The following is a list of some of the public bodies and organisations working regularly on drafting, consolidation and publication of legislation in the State: the Office of Parliamentary Counsel; the Law Reform Commission; the Criminal Law Codification Advisory Committee; the Company Law Review Group; the Pre-Independence Project in the Office of the Attorney General; the Financial Services Legislation Consolidation group; Regulators, such as ComReg and the Commission for Energy Regulation; the Bills Office in the Houses of the Oireachtas; all Political Parties; and all Government Departments who are consistently engaged in the preparation of informal Restatements, draft Consolidation Bills, draft Bills and generating new amendments to existing Acts.

CHAPTER 3 **STATUTE LAW RESTATEMENT FROM A TECHNOLOGY PERSPECTIVE**

A Introduction

3.01 In Chapter 2, the Commission noted how the *Statute Law (Restatement) Act 2002* was based on comparable projects in other States, some of which had developed into eLegislation projects (which would be consistent with the Government's eLegislation strategy). Because of this, in the Commission's view the technological aspects of the Programme of Statute Law Restatement are vital, particularly to ensure that any Statute Law Restatements are future proofed in the event that they may become part of an eLegislation project in this State. In this Chapter, therefore, the Commission turns to examine the detailed technological aspects which would inform the Programme of Statute Law Restatement. In approaching this aspect of the project, the Commission has had the benefit of a number of discussions with various persons, nationally and internationally, with experience of relevant technology and comparable projects.¹

3.02 In Part B, the Commission discusses the repository of data, that is, the raw data of Acts that contain the basic elements needed to convert that data into various technological formats. The Commission examines national and international developments in this respect, which point to the emergence of XML (Extensible Markup Language) as the leading standard which would maximise future proofing. The Commission also examines in detail specific aspects of data maintenance. In Part C, the Commission discusses repository management application, that is, how the data will be managed internally when a Restatement is being prepared. In Part D, the Commission examines technological approaches in comparable projects internationally, and in Part E the Commission sets out its views on what approach is most likely to suit the Programme of Statute Law Restatement.

B The repository of data

3.03 The repository of data is the raw data of statutes that contains all of the basic elements needed in order to convert that data into various formats. Because the raw data of statutes is held together in one place, it is

¹ See the Acknowledgements at the beginning of this Consultation Paper.

described as a repository. In order to assist in highlighting the end-to-end nature of the technology, the Commission will assume that it will receive the relevant raw data in a vendor neutral format such as XML (Extensible Mark-Up Language).

(1) Extensible Mark-Up language (XML)

3.04 XML (Extensible Markup Language) is a type of mark-up language that is easily convertible into other formats and for that reason it might be considered wise to have the repository of data in XML format. XML has become a type of international standard although there are other options available. The data could be held in HTML (Hypertext Mark-Up Language), for instance, which would also allow for the data to be converted into other formats.

3.05 The Commission has, however, become inclined to the view that the most appropriate format to hold the material would be XML. The Commission understands that this is the format used by the Houses of the Oireachtas in recent years. This is consistent with the recommendations in 2004 of the Working Group on XML in the European Union. The European Forum of Official Gazettes of the European Union (the European Forum) – an initiative run by the Publications Office of the EU – sought co-operation with national official gazettes on common schemas for Legislative XML. It also sought co-operation with national legal database operators with a view to creating a one-stop-shop to national legal databases.²

3.06 Representatives from each of the European Institutions and Member States on that Group underlined the possibility of co-operation between Member States on the level of metadata which grew from the identification of 30 elements which were of common interest to each Member State. Significantly, the Working Group recommended altering schemas for the Official Journal of the European Union (OJ) from SGML to XML.³

3.07 This supports the view that XML is increasingly seen as the Mark-Up language of the future. It appears this is because not only can XML be easily converted into other formats but also that it has proven resilient over time in the face of technological evolution and would provide a greater probability of “future-proofing” the Programme of Statute Law Restatement.

(2) Future Proofing the project

3.08 Future Proofing means that technological decisions should be made with one eye on the inevitable fact that technology will advance and

² <http://circa.europa.eu/irc/opoce/ojf/info/data/prod/html/eu.pdf>

³ <http://formex.publications.europa.eu/>

evolve with the passing of time. The concept of future-proofing demands that the decision-maker is aware of the inevitability of that evolution process and makes every attempt to guarantee that the technological solution employed is resilient enough to withstand those changes.

3.09 Generally speaking, branded products, as opposed to tailor-made designed products, are easier to future proof in that the creator of branded products tends to ensure that the products are kept up-to-date with changes in the field.

(3) *Manner of retaining a repository of data*

3.10 Future Proofing is also relevant to another aspect of the repository: the manner in which it is held. It appears there are two options in this regard: (a) a flat-document management system or (b) a database.

3.11 As to a flat-document management system it would appear that this retains the independence of each individual file of raw material. Interactivity between the various files is guaranteed by cross referencing one file with another. This is commonly carried out by the use of links where a link from one document will take the user to another document. Flat Document Management Systems are a cheaper alternative to a full database and would take less time to create. On the negative side these types of systems tend to be relatively inflexible and lack functionality. In other words, there are a limited amount of tasks that can be carried out on this type of system.

3.12 A database is a more complicated device. This actually extracts the information from the various individual files and holds the information together inside one source. Using database schemas, the information can be brought together into various hierarchical or “nested” structures which would break down the data into different levels. A database would have several advantages over a flat-document management system. Generally, material can be retrieved more quickly from a database. In the context of the Programme of Statute Law Restatement, a database would provide greater flexibility for the project by allowing the Commission to categorise the data. This could be utilised for several purposes including providing an extremely accurate and flexible search capability across the database.

3.13 Another advantage with the database is that it appears it would provide greater functionality in that the Programme of Statute Law Restatement could provide more user-interface features (options for the web-user when accessing the website) such as point-in-time access. Point-in-time access is a facility where a web user can view how a particular statute looked at a given past date.

3.14 The Commission’s research suggests that this type of facility is more easily achieved when the repository is held together inside a database

than where the repository is held separately in flat-file format. It is, however, also clear that this type of device would be quite intensive from a time management perspective. In that respect, while a database could relatively easily carry out this particular function the Commission may concentrate on other more important matters in the early stages of the project and return to point-in-time access, for example, at some time in the future.

3.15 This last point highlights another important benefit of a database: the user is in control. As the creator of the database has already defined the parameters of the database, using database schemas means that the database can be created in such a way as to allow for functions such as point-in-time access at any given future point. For the most part this is achieved through the use of tagging.

(4) Tagging

3.16 Tagging describes the process of marking raw data within the database. The tags can mark information in virtually any way the creator of the database desires. These tags are then pulled together in order to serve whatever end-function the user requires. The tags also serve to construct the parameters of the database. In other words, tagging can assist greatly in providing, for instance, a flexible search capacity.

3.17 When a web-user wishes to search a website database, the search criteria he or she enters matches up with specific tags in the database. This is known as a proper parameter search. This can be contrasted to the search function usually found on a flat document management system which is generally not as fast and can be considerably less efficient.

(5) Is a Database really future-proof?

3.18 Another possible advantage with a database is the potentially unreliable evidence that a database is more future-proof than a flat-file format. The Commission's research on this matter suggest that a database held in XML format is a more future proof method of holding the repository of data.

3.19 While future proofing the project is clearly of vital importance, the difficulty lies in deciding what criteria should determine this notion. Future developments in technology are notoriously difficult to predict and in that way there is no guarantee that XML will remain as resilient in the future as it currently is.

3.20 While this is undeniably the case it would be unwise to ignore future proofing as a legitimate concern for the project. In that way it may well be wise to select the option which appears the most stable and resilient in the current technology environment. In any event, one very important consideration is that the database must viably take account of technological developments.

(6) One Database or Two?

3.21 The Commission understands from its research to date that it would be advantageous, if possible, to have two separate databases. One database would act as a temporary database holding the raw material in a particular format. That data could then be switched to a full database which would hold the repository in a different format.

3.22 The Commission understands that one benefit with this model would be that this type of work process could prove more efficient from a time management perspective than simply having one database.

3.23 It could also assist in lowering the “recovery time” of the database if there is a database disaster. The guaranteed “recovery time” is the length of time it would take to recover the database in the event of a database disaster. This type of consideration is important when the Commission comes to consider the question of who would maintain the repository of data.

3.24 The Commission is aware that the UK Statute Law Database currently uses two databases. This was in the context that the project inherited one database of legislation from the Revised Statutes.

3.25 In the event that the Commission ran one database, as opposed to two databases, the application of that database would have to be set up in order to allow amendments to the data to be “triggered” before appearing on the public access website.⁴

3.26 It should be noted that the decision whether to hold the repository of data in a database or in a flat document management system may well depend on the criteria which the Commission wants satisfied.

3.27 The Commission understands that the most critical aspect of the repository will be the indexing of material. If the indexing of the material is comprehensive and accurate then this will greatly assist the functionality of the repository.

(7) Maintaining the Data

3.28 Once the Commission is given the data in some format the question arises: who will maintain the data? It appears there are three options here: (i) buy the infrastructure including servers and house it in the Commission; (ii) buy the infrastructure including servers and allow an Internet Service Provider (ISP) to host the data remotely; (iii) do not buy any infrastructure and have the data hosted remotely.

⁴ This issue is discussed further in Part C, below.

3.29 Some important considerations when making this decision would include the questions of security of the data and having a back-up of the data.

3.30 Both of these processes are vital. In particular, the question of security is of the utmost importance as users of legislative databases must be confident that the information on the database is authentic. There are several technical processes that can assist in that regard including integrity checking, certification, digital watermarking, steganography, and user and authentication protocols.

3.31 Other considerations would include the question of licensing. From the Commission's initial research on this it would appear that a two-tier system can operate regarding licensing matters. Where such a system operates the first tier concerns the actual database. In that regard an installation licence would be required to place the database onto a server.

3.32 The second tier concerns the client licences which are paid to the vendor for each individual user. In other words, the vendor would upload the clients' database onto the vendor's server, charge an installation fee for that process, and would also charge for the connections to each individual user.

(8) Accuracy of the Data and the Corruption of Data

3.33 The credibility of the Programme of Statute Law Restatement depends on the accuracy of the Restatements which are presented to the Attorney General for certification under the *Statute Law (Restatement) Act 2002*. The accuracy of the Restatement is, in turn, critically dependent on the accuracy of the original repository of data which is available to the Commission.

3.34 With that in mind, the Commission is conscious that the Office of the Attorney General has entered a disclaimer to the effect that there are errors in the online version of the Irish Statute Book. The Commission is aware that the Office of the Attorney General is currently (July 2007) engaged in a process of remedying the errors which it has identified, and the Commission commends this process.⁵ The *Chronological Tables of the Statutes* will also play an important part in the Restatement Process. As already discussed,⁶ the Commission has recently agreed to take over responsibility for the Chronological Tables.

⁵ See paragraph 1.24, above. The question of what data the Commission can use as source data for Restatements is considered in more detail in paragraphs 4.05 - 4.15.

⁶ See paragraph 8 of the Introduction to this Consultation Paper.

(9) *Transfer of Data from one format into another*

3.35 If a clean electronic version of statutes is available to the Commission in XML format, for instance, the Commission could quite easily arrange to convert that data into other formats, including PDF. However, if the data is provided in another format then the Commission understands that it would have to convert the data into XML.

3.36 This conversion process could carry a relatively high degree of difficulty and cost. There would also be a question of the accuracy of the transfer. It appears that the data would have to be tested in order to ensure that it had transferred accurately. The Commission is aware that some transfer systems guarantee the accuracy of the transfer in excess of 99%.

(10) *Database Specifications*

3.37 The Commission understands that it is of vital importance to adhere to logic when defining database specifications. In that regard, it will be important to ensure that the database design is correct and robust. A relational database model is important where all the connections will connect to each other.

3.38 This concern highlights another issue, namely that the Commission will need to discuss with the creator of the database (if a database is considered desirable) to work through its specifications. This type of task would be time-consuming in its earlier stages but would be absolutely vital for the long-term future of the project.

C *Repository Management Application*

3.39 The repository management application concerns the method of managing the repository of data by the internal users of the repository in the Commission. These are individuals who will seek to withdraw information from the repository, edit that material, and reinsert the edited version back into the repository.

3.40 In this context, two matters need to be addressed. The first is the question of a system that will extract data from the repository on request. The second is the issue of applying change control software to the work processes involved. Overall, these matters concern the general question of management, revision and storage of the data.

(1) *Application Programme*

3.41 On all of those matters, the Commission is aware that a range of software options are available which could theoretically carry out those functions. However, it would be vital that the software is tailored to suit the particular requirements of the Programme of Statute Law Restatement. In that sense the Commission is conscious of the need to work in conjunction

with the software developer to ensure that the software is user-friendly from an internal users' perspective.

3.42 The two component requirements here – extracting the data and managing the work processes – could be covered by the same software or by two different interacting pieces of software. The Commission understands that both models exist and the Commission emphasises that it is not tied to any particular software package.

3.43 One model involves two different software packages which have been designed together and have been tailored to suit a particular design requirement. Another model is a type of all-in-one legislative software package that it appears would carry out both functions simultaneously.

3.44 In any event, the change control software will form a very important part of the Restatement process. An audit trail is required which would give the Commission control over the project and the continuing development of the project. It is vital that the Commission has a system where data integrity is maintained.

(2) Data Integrity

3.45 On the issue of data integrity, the Commission considers that automated tools which automatically update particular types of amendments may not provide the necessary 100% reliability which the Restatement project requires. Regardless of the type of repository management application that is used, the credibility of the project will depend on ongoing quality assurance by the Commission. No piece of project management software will carry out the function of restating "on its own". Ultimately, all of the various aspects of the Restatement process will be carried out and managed by a designated person in the Commission.

(3) Internal hierarchy

3.46 Another point to note is that repository management application can be set up to create an internal hierarchy which would restrict certain functions to certain users. For example, the task of actually updating the repository with edited data could be restricted to those in a supervisory role who could oversee and validate the work carried out by members of the project team in the Commission.

(4) Combining the work on the Chronological Tables with Restatement

3.47 The repository management application, if tailored in a particular way, could embrace both the Restatement project management and the work which will be carried out on the *Chronological Tables of the Statutes* in the Commission. This would greatly assist both projects from a time

management perspective. In that way, the repository management application will become a vital part of the overall Restatement project.

(5) Public Website and User-Interface Features

3.48 A public website would display the edited data from the repository. In other words, it will display the Restatements (once they have been certified in accordance with the *Statute Law (Restatement) Act 2002*) on a free-to-access public website. Design features are important in order to encourage users to access the website. In that sense it will be important that the site is user-friendly.

3.49 The range and extent of the various user-interface features which will be available to the user – such as a search capacity – will depend on the manner in which the repository is held. As already explained, where the data is retained on a database a greater number of features will be available to users. There is also a far greater likelihood that a database would allow the user to utilise new features into the future.

D Technology from a comparative perspective

3.50 The Commission turns to consider the technological innovations applied in other jurisdictions to comparable projects. In this context the Commission is aware of three projects: the EnAct system from Tasmania, the Agora-Lex Prototype from Belgium and the UK Statute Law Database (SLD).⁷

(1) Identification of data objects

3.51 Advancements made in legislative databases in all these jurisdictions appear to build on what is known as the unique identification of data objects. A data object in this context can be any piece of data in the database – an individual statute, the title of the statute, a section number, or potentially an individual paragraph. Each data object is uniquely identified so that each becomes digitally identifiable. In order for the system to work the method of identifying the objects must be transparent and uniform within the database.

3.52 The fundamental principle of unique identification of data objects is known as the “identification frame” which is fundamental to the “key

⁷ The material in this section has been drawn extensively on Arnold-Moore, “Point-in-time publication of legislation (XML and legislation)” www.frli.org/article.php3?id_article=67. Arnold-Moore et al, “Connected to the Law: Tasmanian Legislation Using EnAct”, 2000 (1) *The Journal of Information, Law and Technology (JILT)* and Moens, Maarten Logghe, Jos Dumortier, “Legislative Databases: Current Problems And Possible Solutions”, 2002 10(1) *JIL&IT*.

structure” of legislative databases. Setting up the identification frame can lead to some compelling results.

(a) *The EnAct System in Tasmania*

3.53 In Tasmania the EnAct system uses a function known as “slotting in”. This is a facility where the new law can slot into the old law on enactment: a type of digital restatement. This is achieved by tagging all of the data objects on the new law. For example where one provision repeals and re-enacts another provision the new provision can be tagged to slot into the place in the statute book occupied by the old provision.

3.54 In Tasmania the EnAct system works as follows. The drafters of the legislation mark amendments on a consolidation of the Principal Act using strike-through and underline markings. These markings are then captured in an internal representation of the changes called a Change Description Document (CDD). These changes are then used to generate amendment wordings, which are then generated automatically upon request.

3.55 Crucially, this process is managed by what is known as a workflow enactment service that keeps the CDD and the generated amendments together. In that way, when the changes are commenced, they will then be automatically applied to the Principal Act. However, if the Amendment Act does not enter into force then no changes will appear.

3.56 In Tasmania there are, effectively, two legislative databases. The first database is shared by the “Public Web Gateway” (the public free-to-access website) and the Printing Authority of Tasmania (PAT). The second database is known as a working database and is housed by the Office of Parliamentary Counsel (OPC). That database contains everything in the public repository, but also contains the draft Bills in preparation and all of the workflow information about the status of Bills and other draft legislation.

(b) *The Agora-Lex Prototype in Belgium*

3.57 The Agora-Lex prototype from Belgium, while broadly similar to the Tasmanian system, is different in many detailed respects. In Belgium restating the legislation is done manually through manual acquisition of the correct text and manual input into the database. Human error in this process of manual input has been recognised as inevitable but is minimised by the maximisation of intelligent software.

3.58 The application of intelligent software means that manual data input is restricted to a minimum and the use of automatic updates are maximised. The use of a consistent numbering system is employed.

(c) *The UK Statute Law Database (SLD)*

3.59 The UK Statute Law Database (SLD) is a free-to-access database published by the Statutory Publications Office in the UK Ministry of Justice

(formerly the Department of Constitutional Affairs). The project has been running since 1991. The team who worked on that database has applied the technological advancements in the field to create a series of original solutions to legislative problems which are common to the United Kingdom and Ireland.

3.60 The UK Statute Law Database (SLD) has applied a custom-built package designed around an XML repository of data and two particular pieces of software – one of which interacts with the repository. Similar to the solution at the Houses of the Oireachtas, the SLD solution is end-to-end with a free-to-access public website housing the contents of the repository on the web at www.statutelaw.gov.uk

E Common Technology Solution

3.61 The preceding overview demonstrates the increasing importance of the technology solution in the statutory process. In some cases the latest advancements in technology are used to create a database of legislative material which the general public can access. In others the new technology is fundamental to the creation of new processes of legislative drafting and enactment.

3.62 In the Commission's view, the review also indicates that any technology solution must be well planned and cater for the various requirements in the legislative drafting process. This should include the various requirements of the different stakeholders in the area.

3.63 There are many different initiatives working simultaneously in the State on projects whose remit includes legislative process. Chief among these is the work of the Office of Parliamentary Counsel in the Office of the Attorney General in the preparation of Government Bills for presentation to the Oireachtas on the initiative of a lead Government Department. The work of the Commission on Restatement is another project comparable to the work of the Criminal Law Codification Advisory Committee, the Company Law Review Group, the Financial Services Legislation Consolidation Group, and the Pre-Independence Project which resulted in the enactment of the *Statute Law Revision Act 2007*.

3.64 The Commission is aware that a sophisticated technology solution in the context of the enactment process for legislation is now in use in the Houses of the Oireachtas. The technology allows for the various stages of the drafting of Bills and includes a procedure where various political party proposals for amendments to Bills are kept separately from each other. The solution allows users to access an editor which makes the process of drafting relatively straightforward. The solution is end-to-end with a core repository of data stored and managed. A free-to-access website housing all of the Bills

and Acts presented and enacted since 1997 is available on the Oireachtas website, www.oireachtas.ie

3.65 The absence of a uniform approach to technology has various consequences. One is that it can increase the workload and reduce productivity on a given project where, for instance, the same material is re-keyed at different locations.

3.66 On a more practical level, it could hamper the transfer of data between different stakeholders. In the Commission's view it appears vital that if, for example, a Restatement of the *Freedom of Information Act 1997* is certified in 2007, it should be possible for the Commission to transfer the Restatement to the Department of Finance, the lead Department for the 1997 Act, in a manner which will allow that Department to hold the "2007 Restatement" in a technological format so that it can be transferred back at some future point as a component of a future eLegislation project.

3.67 One feature that appears common worldwide to virtually all of the technology solutions in this area is the conversion of data repositories into XML format. As this chapter has already set out, the XML language has fast become the industry standard and it is envisaged that technology solutions into the future will continue to be built around XML. In the Commission's view, a legislative database with the core repository of data in XML format and with appropriate user-friendly software appears the ideal solution for Ireland.

CHAPTER 4 THE PROCESS OF RESTATEMENT

A Introduction

4.01 In this Chapter, the Commission discusses the detailed process of preparing individual Statute Law Restatements and the more general process of developing the Programme of Statute Law Restatement. The Commission is conscious of the need for a general Drafting Manual for Restatements and that such a Drafting Manual (House Style) was developed by the Statute Law Revision Unit (SLRU) in the Office of the Attorney General. The Commission will ensure that this House Style is continually developed for the Programme of Statute Law Restatement, taking account of the issues raised in this Chapter.

4.02 In Part B, the Commission examines the inputs involved in a Restatement, such as the source of the raw data, the *Chronological Tables of the Statutes*, the different types of amendments made to Acts, the effect of secondary legislation (such as Ministerial Regulations and Orders) and how to deal with commencement provisions. In Part C, the Commission examines an element which combines aspects of inputs and outputs, the selection criteria to be used in connection with the candidate Acts which have been suggested for inclusion in the Programme of Statute Law Restatement.

4.03 In Part D, the Commission turns to work processes and examines project management issues, including quality assurance. In Part E, the Commission discusses the visual presentation of Statute Law Restatements. The Commission discusses a number of specific variations which might be employed in this respect and, to assist wider discussion, the Commission has prepared three versions of a Restatement of the *Freedom of Information Act 1997*, which are included in Appendix A. In Part F, the Commission turns to examine aspects of the publication of Statute Law Restatements, notably their publication in electronic form and the related question of certification by the Attorney General, as required by the *Statute Law (Restatement) Act 2002*.

B Inputs

4.04 There are a number of steps involved in carrying out a Restatement. The principal mechanical tasks involved are (i) locating an

accurate copy of the Principal Act to be restated; (ii) using the chronological tables to identify the affecting provisions; (iii) inserting the correct amendments into the Restatement; and (iv) ensuring that all the affecting provisions have been commenced.

(1) Source of Data

4.05 The first step in carrying out a Restatement involves selecting an Act for Restatement. This first step assumes that a reliable electronic version of the Principal Act exists which can then be restated. The first matter therefore that the Commission needs to consider is the location of accurate electronic versions of Acts. There are a few different possibilities in this regard.

(a) The Irish Statute Book Online

4.06 The Attorney General's Office manages the Irish Statute Book Online, a free to access website where all Acts from 1922 to 2005 are displayed in HTML format. The Acts are displayed as passed by the Oireachtas.

4.07 As already discussed¹ the Commission understands that best international practice suggests that Restatements should be stored in XML format. Although the majority of Acts on the Statute Book Online do not appear to be stored in XML, the Commission understands that it would be possible to use the data from the website and convert it with relative ease into XML format.

4.08 The Commission is aware that the Office of the Attorney General has entered a disclaimer to the effect that there are some textual inaccuracies in the Acts on the Irish Statute Book Online.² The Commission also understands that the Attorney General's Office is taking steps to remedy the inaccuracies which have been identified, which the Commission commends.

4.09 In any event, as the Statute Law Restatement project also encompasses pre-1922 Acts – which are not included in the Irish Statute Book online – the Commission must consider other possible sources of legislation (the first Restatement certified by the Attorney General involved the *Sale of Goods Act 1893*).

(b) The Houses of the Oireachtas Website

4.10 The Oireachtas website displays Acts from 1997 onwards in PDF format. Storing the Acts in PDF format means that the electronic and hard copy versions of the Acts should be identical. This storage format guarantees

¹ See Chapter 3, above.

² See paragraph 1.24 above.

a high level of accuracy. The Oireachtas website is obviously limited as a source of data for Restatement because it currently displays Acts only as far back as 1997.

(c) *Hard Copy Versions of Acts*

4.11 If it is not possible to locate reliable electronic versions of Acts, the Commission may have to rely on hard copy versions of legislation as source data. This will be an issue as far as pre-1922 Acts is concerned. These Acts could then be generated into electronic form in two ways.

(i) *Electronic capture of the data*

4.12 The Commission understands that the text of hard copy versions could be captured using particular scanning software. Once captured this text could then be converted into XML format and used to generate Restatements. It would appear that a high level of accuracy can be achieved using this approach.

4.13 Although this option might be possible in relation to the Principal Acts being restated, there are clear limitations to this approach. It would not be feasible for the Commission to “capture” every Act on the pre-1922 Statute Book. This option would therefore, be limited to generating a reliable electronic version of the Principal Act.

(ii) *Manual insertion of the data*

4.14 A second option is to manually key the text of the Acts into electronic form. The Commission again understands that a high level of accuracy could be achieved. This approach may include a certain risk of typographical mistakes by reason of human error. Again, although the Commission could generate a number of the Principal Acts in this way, it would not be feasible to create versions of all the various amending Acts.

4.15 Sourcing reliable data is clearly a crucial step in the initial stages of the project. The Commission is anxious that the Restatement project begins on an accurate footing. The issue of having accurate data relates back to the need to future proof the project. In order for Restatements to be useful in the future, it is essential that they are carried out using accurate data.

(2) *Chronological Tables of the Statutes*

4.16 As already explained, the *Chronological Tables of the Statutes* are crucial to understanding the Irish Statute Book.³ The nature of the amendment process in Ireland is such that rather than re-enacting an Act that is to be amended, the Oireachtas simply enacts a separate Act to amend the earlier Act. This has the effect that Acts amending other Acts are heaped

³ See paragraph 2.16.

upon one and other and it becomes very difficult to ascertain a clear account of the law on any particular matter.

4.17 The *Chronological Tables of the Statutes* provide the link between this method of amending and understanding of the Statute Book. The Irish Statute Book Online publishes an electronic version of the Chronological Tables dating from 1922-2004. An example from the Chronological Tables concerning the *Freedom of Information Act 1997* is set out below to explain their nature and value.

13 Freedom of Information Act 1997	
s. 2 (1) am.	22/2002, s. 20(a) 4/2003, ss. 1(4), 23 (a) 9/2003, s. 2(a)(b) 9/2003, s. 2(c)

4.18 The Table entry in the Chronological Tables tells the user that s. 2(1) of the *Freedom of Information Act 1997* has been amended 4 times by the provisions listed in the right hand column. For example, the reference “9/2003” is to the *Freedom of Information (Amendment) Act 2003* (the ninth Act passed in 2003). Since Restatement involves incorporating all affecting provisions into the Principal Act being restated, the Chronological Tables will play a vital role in this process.

4.19 As already discussed, the Commission has recently taken over responsibility for maintaining the Chronological Tables.⁴ The first exercise the Commission will engage in is a verification process on the Chronological Tables that are already in place, which have been updated to 2005. The Commission will then continue to develop Chronological Tables for 2005 onwards. The Commission recognises the importance of having accurate Chronological Tables in order to produce accurate Restatements. Engaging in a verification process on the Chronological Tables will play an important part in achieving a high level of quality assurance for Restatements.

(3) *Types of Amendments*

4.20 In Ireland two types of amendments are used by drafters – textual and non-textual amendments. As explained earlier,⁵ a textual amendment is an amendment that directly alters the text of an Act. For example, where an amendment Act states that a particular word should be “inserted” or “substituted” or “deleted” into an earlier Act it is considered a textual amendment. Where a provision has been repealed, the text is left out and a

⁴ See paragraph 8 of the Introduction to this Consultation Paper.

⁵ See paragraph 2.25.

note is included citing the Act that effected the repeal. A non-textual amendment is a modification to an Act that does not alter the text of the Act. An example of a non-textual amendment is an amending provision that instructs that a particular word be construed in a certain way.

(a) Textual Amendments

4.21 Once reliable source data has been obtained, the Commission understands that incorporating textual amendments into a Restatement should be a straightforward process. They are much faster to incorporate than non-textual amendments because they simply involve inserting the text from the amending provision into the text of the Principal Act.

4.22 The Commission recognises that the use of textual amendments in legislative drafting is to be preferred to non-textual amendments because of the way in which they facilitate restatement and consolidation exercises. The Commission understands that, since 2001, drafting guidance indicates that non-textual amendments should be avoided

4.23 The manner in which textual amendments should be presented in a Restatement is discussed later.⁶

(b) Non-textual Amendments

4.24 Non-textual amendments are more problematic. The Commission understands that there are two separate problems posed by non-textual amendments. Firstly they are difficult to present in a Restatement. This problem is discussed in detail later in this Chapter.⁷ Secondly it can be difficult to determine what should constitute a non-textual amendment.

4.25 One option in defining a non-textual amendment is to draw a distinction between non-textual “amending” provisions and non-textual “application” provisions. A non-textual “amending” provision refers to a provision that changes the construction or meaning of an Act but does not actually alter the text of the Act. Such provisions can be as important as textual amendments in a Restatement.

4.26 An example of a non-textual “application” provision can be given by reference to section 7 of the *Freedom of Information Act 1997*. Section 34 of the *Commission to Inquire into Child Abuse Act 2000* provided for the application of section 7 of the 1997 Act to the Commission to Inquire into Child Abuse: this does not involve the textual amendment of any words in section 7 of the 1997 Act. The justification for including the full text of this type of amendment might not be considered as strong as the justification for including the text of a non-textual “amending” provision. The application of

⁶ See paragraph 4.83.

⁷ See paragraph 4.94.

the *Freedom of Information Act 1997* in the context of the *Commission to Inquire into Child Abuse Act 2000* is relevant only to a limited number of users of the Restatement.

4.27 The Commission recognises, however, that drawing a hard and fast rule in relation to non-textual “application” provisions is difficult since there may be certain application provisions that are extremely important to a particular Restatement.

4.28 The UK Statute Law Database includes as a non-textual amendment all non-textual “amending” provisions and all non-textual “application” provisions with the exception of provisions that simply apply definitions of the *Principal Act*.

4.29 It should be noted that the UK Statute Law Database only provides a reference to the non-textual amendment and does not include the text of it. This differs from the exact House Style of the Statute Law Restatement Unit (SLRU) which includes the full text of all non-textual amendments.⁸

4.30 The Commission recognises that a need to define a non-textual amendment for the purposes of Restatement arises primarily from the particular layout that was used in the SLRU House Style.⁹ If it is decided that it is sufficient simply to reference a reader to a non-textual amendment as is done in the UK, the issue of what constitutes a non-textual amendment will become much less important.

(4) Secondary Legislation

4.31 The Commission now considers the role that secondary legislation – primarily Ministerial Regulations and Orders – should have in the context of Restatement. The main purpose of secondary legislation is to supplement an Act and implement technical detail that is not contained in the Act itself. Increasingly, however, secondary legislation is also used to make amendments to primary legislation. This makes the question of incorporation of secondary legislation into Restatements extremely important.

(a) Amendment of Primary Legislation by Secondary Legislation

4.32 The law-making power of the State is vested in the Oireachtas by Article 15.2 of the Constitution. As a general rule, therefore, only the Oireachtas can enact – and subsequently amend – Acts. One recognised exception to this rule is section 3 of the *European Communities Act 1972*,

⁸ See paragraph 4.94 - 4.107 for full discussion of the presentation issues surrounding non-textual amendments.

⁹ See Appendix A at pp. 88-89 which shows the relevant part of the foreword of the draft Restatement of the *Freedom of Information Act 1997* (Version 1).

which permits a Minister to make amendments to primary legislation that are necessary to give effect to European Community Law such as an EC Regulation or an EC Directive.

4.33 Secondary legislation is often crucial to gaining a full understanding of an Act. *The Freedom of Information Act 1997* is an example of this. A total of 32 Regulations and Orders have been made under the 1997 Act.¹⁰ A number of those set out the bodies that are to come within the remit of the *Freedom of Information Act 1997*. Clearly, this is a very important part of the legislative scheme surrounding the 1997 Act. This example illustrates the point that primary legislation alone may not be sufficient to understand the law on a particular topic. Making secondary legislation accessible is essential to a complete understanding of the 1997 Act.

4.34 In preparing the draft Restatement of the 1997 Act, the Commission became increasingly aware of the use of secondary legislation to amend the text of the 1997 Act. Although Regulations under the *European Communities Act 1972* may be used to amend Acts, serious constitutional concerns are raised by the use of Ministerial Regulations to do this in a purely domestic context.

4.35 The most common example of this practice is the use of secondary legislation to amend the Schedule of the 1997 Act.¹¹ Quite apart from the constitutional concerns that this raises, the lack of accessibility to secondary legislation means that this is problematic on practical grounds. One of the problems with secondary legislation is the absence of any central overarching control over their dissemination, although the Commission acknowledges that the inclusion of Statutory Instruments on the Irish Statute Book Online has reduced this to some extent. The Commission is also conscious that a pilot scheme to develop a more centralised scheme for the dissemination of Statutory Instruments is being developed.¹²

4.36 In any event, the Commission considers that it is very important to recognise the significant impact that Statutory Instruments have on the Irish Statute Book. In the context of Restatement, it is crucial therefore that the effects of Statutory Instruments are in some way recorded. Including Statutory Instruments in a Restatement is, however, problematic for two reasons, firstly, the general lack of accessibility that exists as regards

¹⁰ See the list of Regulations and Orders in Appendix A.

¹¹ For example, the reference in paragraph 1(2) of the First Schedule of the *Freedom of Information Act 1997*, to “the Employment Equality Agency” was deleted by S.I. No. 67 of 2000.

¹² See para 3.6 of the 2004 2nd Progress Report on *New Connections*, the Government’s strategy for the Information Society, available at www.taoiseach.ie

secondary legislation and, secondly, the difficulties that surround sourcing and presenting Statutory Instruments as part of a restatement.

(b) Lack of Accessibility of Secondary Legislation

4.37 Statutory Instruments as a body of law suffer from a number of accessibility problems. Firstly Statutory Instruments can vary in format and substance depending on the Department that has produced them although the Commission understands that a Drafting Manual for the Preparation of Statutory Instruments was circulated by the Office of the Attorney General in 2004. Unlike Bills which are published by the Bills Office, each individual Department is responsible for publication of the Statutory Instruments that they produce. The lack of standardised publication adds to the difficulty in understanding the effect of Statutory Instruments. Secondly, no central electronic database of statutory instruments exists. The Irish Statute Book Online currently includes all Statutory Instruments to the end of 2005. While this is undoubtedly a valuable resource, it is unfortunate that the current absence of a centralised dissemination system means that over 1,000 Statutory Instruments made from the end of 2005 to date (July 2007) are not easily accessible.

4.38 The lack of a central up-to-date database of Statutory Instruments means that the more recent body of secondary legislation made in the State is difficult to access. The publication of Statutory Instruments is recorded in Iris Oifigiúil and members of the public can, in theory, then purchase a hard copy for a small fee from the Government Publications Office. Such a system is not satisfactory for the significant portion of the public who wish to access legislation online. The popularity of the Irish Statute Book Online indicates that demand for electronic access is high. Professional users of legislation may rely on commercial publishers for up-to-date electronic versions of Statutory Instruments, but subscriptions to these databases can be extremely expensive and beyond the reach of most citizens.

4.39 The lack of a central control means also that there is no body identifying the Statutory Instruments on the Statute Book that can be repealed or that are in need of consolidation. Statutory Instruments are rarely consolidated and are themselves a candidate for a Restatement type project.¹³ A further consequence of a lack of central authority is the lack of any coherency on the technology side. This aspect has already been discussed.¹⁴

¹³ The Commission is aware of some notable consolidating statutory instruments, including those made under the *Social Welfare Consolidation Act 2005*. In 2006, the *Value-Added Tax Regulations 2006* (SI No. 548 of 2006) were made. In 2007, examples of such consolidation include the *Prison Rules 2007* (SI No. 252 of 2007) and the *Safety, Health and Welfare at Work (General Application) Regulations 2007* (SI No. 299 of 2007).

¹⁴ See discussion at paragraph 3.61.

(c) *Statutory Instruments and Restatement*

4.40 A number of options exist as regards the inclusion of Statutory Instruments in a Restatement. The optimum solution would undoubtedly be to provide a list of all Statutory Instruments that have been made under the Act being restated. Each Statutory Instrument could be hyperlinked. By clicking on the hyperlink the user could be brought to a new page containing the text of the Statutory Instrument.

4.41 This optimum solution presents however a number of challenges. Firstly it would require significant resources. Secondly the problems already discussed regarding sourcing reliable electronic copies of primary legislation apply equally to obtaining reliable sources of secondary legislation. The current situation is that no fully up-to-date electronic source of secondary legislation exists that the Commission could use in the Restatement project. Nonetheless it is clear that this solution offers the greatest level of accessibility to the user and would make inroads in achieving a level of clarity and coherency of secondary legislation.

4.42 A less comprehensive solution is to provide a list of Statutory Instruments without any hyperlinks. From a user perspective this is a far less valuable solution because they then have to source the text of the affecting Statutory Instrument themselves. The problems involved in sourcing text of Statutory Instruments in Ireland have been outlined above.

4.43 The Commission is of the view that this listing option is the absolute minimum that should be provided to a user of a Restatement. Since the sourcing of a list of all Statutory Instruments made under a particular piece of legislation can be a time consuming task because of the lack of a comprehensive central database of Statutory Instruments, providing a list of Statutory Instruments would make an important contribution to a better understanding of legislation. The Commission has included a list of Statutory Instruments on the draft Restatement of the *Freedom of Information Act 1997* in Appendix A.

(5) *Commencement Provisions*

4.44 Most Acts contain a commencement provision. This provision may set out a specific date on which the Act is to come into force or it may provide that the relevant Minister may bring the Act or part of the Act into force on such day or days as he prescribes by Order or Orders.

4.45 Understanding the commencement date of any provision is extremely important. In a number of instances, a significant number of years may elapse before an Act is brought into force. Since a Restatement is an up-to-date administrative consolidation of Acts, the Commission recognises that best practice requires that the commencement provisions of the Acts being restated, and any affecting provisions, be ascertained as part of the internal

work process. The Commission has included commencement dates in the draft restatement of the *Freedom of Information Act 1997* in Appendix A.

(a) SLRU House Style

4.46 The SLRU House Style for Restatements provides that where an Act or provision is to be commenced on a date other than the date of passing, the commencement provision must be cited next to the section number of the affecting provision. Below is an example of a citation taken from the SLRU Restatement of the *Succession Act 1965*.

4.47 Under paragraph 30 of the Restatement of the *Succession Act 1965* the following note appears:

Affecting provision (textual) — 17/1989, ss.1 (2) (commencement), 29 (6).

This is a reference to s. 1(2) of the *Building Societies Act 1989* which states:

(2) This Act shall come into operation on such day or days as may be fixed by order or orders of the Minister, either generally or with reference to a particular purpose or provision, and different days may, be so fixed for different purposes and different provisions.

4.48 The value of referring the reader to section 1(2) of the 1989 Act is limited because the user cannot see from it the actual date when the 1989 Act came into force. To discover the actual date on which the 1989 Act came into force the user would need to look at the commencement order that brought it into force.

(b) UK Statute Law Database House Style

4.49 The UK Statute Law Database takes a different approach and includes a commencement date for each amending provision in the annotation. So, for example, the above annotation would appear as follows:

F1 Inserted (1.9.1989) by 17/1989 s. 29(6); S.I. No. 182 of 1989

4.50 The precise date of commencement (1 September 1989) is given in brackets after the initial instruction. The Statutory Instrument number of the Commencement Order used is also included. A hyperlink is also provided on the UK Statute Law Database, linking the citation of the Statutory Instrument to its actual text.

4.51 Versions 2 and 3 of the draft Restatement of the *Freedom of Information Act 1997* in Appendix A are done according to this style and

include precise commencement dates for each affecting provision and the citation of the relevant Commencement Order.

4.52 The Commission is of the view that since commencement dates must be identified as part of the internal work process of carrying out a Restatement it may be feasible to include a commencement date for all affecting provisions. This view is expressed subject to a proper document management system being available to Restatement, such as is used by the UK Statute Law Database. Identifying the commencement dates of affecting provisions can be a difficult and time consuming task. An Act may have a commencement provision, an establishment provision or an appointment day provision. Each of these provisions may then provide for the making of a commencement order by a Minister. Legislation cannot really be considered accessible if it is not possible to determine easily whether it is in force. Since Restatements seek to enhance accessibility it would be desirable to include commencement information for each affecting provision.

C Selection of Acts for Restatement

4.53 A crucial aspect of the Restatement process is project management. This can be divided into two stages, managing the initial stages of the project, including the selection of Acts for Restatement, and managing the work process of the project.

(1) Public Consultation Process

4.54 In the wake of the May 2006 Government decision that the Commission would prepare a Programme of Statute Law Restatement a public consultation process was announced.¹⁵ As a result, a large number of submissions were received from private individuals, Government Departments, practitioners, academics and various public bodies as to which Acts on the Statute Book should be included in the Programme of Restatement.¹⁶

4.55 A total of 60 Acts were submitted, and the candidate Acts are listed in Appendix B. Each Act on the list has been assessed in terms of the level of work involved in doing the Restatement and also the level of priority it should be given. The work level was assessed on the basis of the number of affecting provisions listed in the *Chronological Tables of the Statutes 1922 – 2004*, updated to take account of Acts passed in 2005 to 2007.

¹⁵ See paragraph 7 of the Introduction to this Consultation Paper.

¹⁶ See paragraph 4.71 for further discussion of the initial stages of the Restatement Project.

4.56 A priority level of high, medium or low was assigned to each Act. These priority levels were determined using the selection criteria that are outlined below.

4.57 During the Oireachtas debate on the *Statute Law (Restatement) Act 2002* and in the 2004 White Paper *Regulating Better* a number of key criteria were identified to indicate Acts which would qualify for Restatement:

- Acts which are in frequent use and are spread over a number of different volumes.
- Acts which are currently not easily accessible to the public. This is especially the case with pre-1922 legislation.
- The Restatement of Acts which might ease the regulatory burden on small business.

4.58 Since the ultimate aim of Restatement is to reduce the complexity of the Statute Book and make it more transparent and accessible, these criteria must be interpreted in light of this overarching objective.

4.59 *The Freedom of Information Act 1997* appears to meet all these criteria. The Restatement will aid both specialist users such as government departments, state agencies and journalists and also the general public for whom access to public information is a very important resource. In addition, a fully up-to-date single text setting out the 1997 Act, as amended, may assist businesses who seek access to information held by public bodies.

4.60 The Commission also considers that Restatements have a role to play both as a precursor to consolidation and as a means of keeping consolidated Acts updated in between consolidations.

4.61 Carrying out a Restatement of a particular area of law may identify a need for consolidation in that area. The work process that is involved in doing a Restatement will also facilitate any consolidation that is then undertaken. In that sense, the Commission sees the potential for restatements to “link in” to consolidation projects.

4.62 Restatements also offer a means of keeping already consolidated Acts up-to-date. Often significant periods of time may pass between consolidations, and Restatement could therefore fill that gap. Where informal rolling Consolidations are being maintained, it may be that the Commission will work with the relevant Government Department to produce a Restatement. In any event, the Commission is conscious of the great value of maintaining a close relationship with Government Departments which was a feature of the preparatory work leading to the Restatements made up to 2006 in the Office of the Attorney General.

4.63 The Commission has also identified a number of other criteria that are relevant to the selection of Acts for Restatement. These criteria are relevant to the assessment of a priority level but they have been accorded secondary importance to the key criteria set out above. These secondary selection criteria include:

- The level of work involved in a particular Restatement. The work level is assessed by reference to the number of Acts and the number of individual provisions that affect the Principal Act to be restated. Certain Restatements will involve more work than others. This is a factor the Commission will take into account in drawing up a Programme of Restatement. A balance needs to be struck between Restatements involving a high level of work and Restatements that may be completed in a shorter amount of time. That is not to say that the Commission will not take on complex Restatements. It is simply a factor that needs to be taken into account in planning a Programme of Restatement. For example, a Restatement of the *Unfair Dismissals Acts 1977 to 2001* would be an extremely complex task, but it has still been accorded high priority in the list in Appendix B.
- Whether an existing informal Restatement has been carried out. The Commission is aware of that a number of informal Restatements have been prepared by Government Departments and other key stakeholders (and that some of these were developed to an advanced level with the Office of the Attorney General when it had responsibility for restatements).
- Whether any proposals to make significant amendments to an Act exist. A Restatement may not be appropriate if an area of law is to be significantly amended or rewritten in the short term but would become so if the amendments have been recently made.

(2) *International Comparatives – New Zealand*

4.64 In New Zealand, the Parliamentary Counsel's Office (PCO) publishes Reprints of Legislation. Reprints are administrative consolidations of legislation much like Restatements. In order to determine which Acts should have priority in the Reprint programme of that year, the Reprints Unit carries out a survey with key users of legislation.

4.65 The Parliamentary Counsel Office (PCO) conducts a survey annually with key users of legislation to determine which Acts should have priority in the Reprint programme of that year.

4.66 The PCO has regard to the following factors in implementing its Reprinting Policy.

- (i) The volume of legislation being enacted;
- (ii) the amount, frequency, and significance of amending legislation;
- (iii) the Government's legislative programme;
- (iv) the usefulness of particular legislation to general and specialist users, including the legal profession, the judiciary and government departments;
- (v) the resources available to the PCO (both human and technological)
- (vi) the size and nature of the New Zealand market for printed reprints;
- (vii) the limits imposed by the price the market will pay for reprinted legislation;
- (viii) achieving a balance between electronic and printed products.¹⁷

4.67 An immediate difference between this policy and the criteria used by the Commission in the context of Restatement is the relevance of market need. Restatements are to be freely available to the public and therefore factors (vi) and (vii) above are not of relevance to Restatement.

4.68 Factor (v) – resources – is however of relevance to the Commission in implementing a Restatement policy. The value of having sufficient technological resources available to the project has been discussed at length in Chapter 3.

(3) *Application of Selection Criteria*

4.69 The Commission has applied the selection criteria in the following manner. Each of the three key criteria (frequent use, accessibility and easing the regulatory burden) were allocated 2 points each. The three secondary criteria (level of work, existence of informal restatement and proposals for amendment) were allocated 1 point each. An Act which satisfied all three of the key criteria scores 6 points. An Act which satisfies all of both the key and secondary criteria scores a maximum of 9 points. Each Act was assessed on this basis. An Act which scored less than 3 points was accorded a priority level of *low*. An Act which scored between 3 and 5 points was given a priority level of *medium*. An Act which scored 6 points or more was given a priority level of *high*. The table of Acts with the relevant priority levels are set out in Appendix B. A final Programme of Restatement will be drawn up after the consultation on this Consultation Paper.

¹⁷ PCO Reprinting Policy available at www.pco.parliament.govt.nz/legislation/reprints

4.70 During the consultation period the Commission welcomes submissions on the list of indicative Acts in Appendix B. The Commission also welcomes suggestions for additional candidate Acts for inclusion in the Final Programme.

D Project Management Issues

4.71 After the Government decision in May 2006 which transferred to the Commission responsibility for a Programme of Statute Law Restatement a Steering Group was established to guide the initial public consultation process. The Steering Group consisted of representatives of the Department of the Taoiseach, the Office of the Chief Parliamentary Counsel and the Commission.¹⁸ The Commission is especially grateful to the Department of An Taoiseach, and in particular the Better Regulation Unit, for its assistance in this phase of the project.

4.72 Since Statute Law Restatement involves a new and complex additional activity for the Commission, the decision of the Government in May 2006 was followed by a process leading to sanction by the Department of Finance of dedicated additional staff resources for the Commission. Sanction for three researchers was given in September 2006, and sanction for a project manager was given in January 2007.

(1) User Group

4.73 The Commission concurs with a suggestion made in preparing this Consultation Paper that it should establish a Statute Law Restatement User Group. The User Group would consist of stakeholders in the Restatement project and could be used in the initial stages of the project to identify key user requirements. It is essential that Restatements serve the purpose for which they are designed. The User Group could provide feedback in that regard.

4.74 Stakeholders in the Restatement Project include the Office of the Attorney General, in particular the Office of Parliamentary Counsel, Government Departments, topic steering groups such as the Criminal Law Codification Advisory Committee, and other groups who work on a regular basis with legislation including the social partners and consumers in general. Regular consultation with such users will be crucial to the success of the Programme of Restatement. A User Group will serve as a structured point of contact between the Restatement project and such interested parties.

¹⁸ See Paragraph 7 of the Introduction to this Consultation Paper.

(2) Quality Assurance

4.75 The issue of quality assurance is fundamental to making the Restatement project a success. Quality assurance of Restatements will be provided by both technological and human resources. In similar projects in other jurisdictions, the success of the projects was attributed in large part to strong project and change management skills by the personnel involved.¹⁹

4.76 The importance of technology to the Restatement project has been emphasised already.²⁰ The Commission sees technology as a vital element of proper quality assurance.

4.77 An examination of the document management system used in the UK Statute Law Database project²¹ provides a useful example of the technological options that are available. The UK Statute Law Database operates using two different programmes, a document management programme and an XML editing programme. The document management programme allows editors to view all the legislation that is held on the database. If an editor wishes to make an amendment to a piece of legislation they must “check it out” of the document management system and into the editing programme. All editorial changes can then be made to this “checked out” document. Strict rules are applied to ensure that editors stay within the logical structure of the document.

4.78 Using technology such as this offers the possibility of achieving high quality assurance. An audit trail of all work done on any particular document stored in the database is maintained. Furthermore, the software can apply specially designed rules to ensure that only certain changes can be made to the documents, and that original versions of all documents cannot be tampered with.

4.79 Apart from the issue of quality assurance, implementing a proper document management system is key to ensuring the longevity of Restatements. Throughout this Paper the Commission has expressed its view that Restatements are to be seen in the wider context of the Government’s eLegislation strategy and any future eLegislation type database. Proper document management will ensure that Restatements can be used in other projects in the future. By using quality assurance software the Commission

¹⁹ A report carried out by PriceWaterhouseCoopers for the New Zealand Parliamentary Counsel Office examined how the Government could improve public access to legislation. The report emphasised that in the most successful projects of this kind, in Tasmania and Victoria, this could in large part be attributed to the quality management and quality assurance skills of personnel involved. Report available at www.pco.parliament.govt.nz/pal/palreports.shtml at p. 51.

²⁰ See Chapter 3, above.

²¹ See Paragraphs 2.52 - 2.54.

will also be able to guarantee a high degree of accuracy of the information compiled during the Restatement if and when it is used in any future eLegislation type project. Indeed in the relative immediate term, this issue of transportability will assist in the context of any “updates” of a restatement.²²

(3) Review of Restatement Programme

4.80 The Commission will prepare a final programme of Restatement at the end of the consultation period for this Consultation Paper. But the Commission is also committed to ensuring that the Programme will be reviewed on an ongoing basis – a process which it already applies to its programmes of law reform.²³

E Presentation of Restatements

4.81 In order to discuss the presentation style of Restatements, the Commission has prepared three versions of a Restatement of the *Freedom of Information Act 1997*, which are set out in Appendix A to the Consultation Paper.

- Version 1 is a Restatement done according to the House Style developed by the Statute Law Revision Unit (SLRU) in the Attorney General’s Office.
- Version 2 is a Restatement done using an adapted version of the Editing Style used on the UK Statute Law Database.
- Version 3 is essentially identical to Version 2 with the exception that the text of non-textual amendments is included.

4.82 The Commission now turns to consider the major differences between the SLRU House Style and the UK approach. Since the primary objective of Restatements is to enhance accessibility to the Statute Book, the Commission will assess each approach from the perspective of user accessibility.

(1) Textual Amendments

4.83 As stated already, a textual amendment is an amendment that directly alters the text of the Act. Textual Amendments appear differently under the two approaches.

²² See Paragraph 3.67.

²³ See the Commission’s *Annual Report 2004*, Chapter 5, available at www.lawreform.ie

(a) SLRU House Style (Version1)

4.84 Under the SLRU approach, all textual amendments are identified by a note in blue underneath the section into which they have been inserted. The section containing the textual amendment appears without any editorial notes in the text. In other words, the Act appears as though it was passed in that form.

4.85 The following example shows a Restatement of section 13 of the *Freedom of Information Act 1997*, which concerns access to records using the SLRU House Style. Section 13 was textually amended by section 8 of the *Freedom of Information (Amendment) Act 2003*.

Access to parts of records.

13 —(1) Where a request under section 7 would fall to be granted but for the fact that it relates to a record that is an exempt record, by reason of the inclusion in it, with other matter, of particular matter, the head of the public body concerned, shall, if it is practicable to do so, prepare a copy, in such form as he or she considers appropriate, of so much of the record as does not consist of the particular matter aforesaid and the request shall be granted by offering the requester access to the copy.

(2) Subsection (1) shall not apply in relation to a record if the copy provided for thereby would be misleading.

(3) Where a requester is offered access to a copy of part of a record under this section, then (unless the record is one to which section 19(5), 22(2), 23(2), 24(3), 26(4), 27(4) or 28(5A) applies), the notice under section 8 (1) concerned shall specify that such access is offered pursuant to this section and that the copy does not purport to be a copy of the complete record to which the request under section 7 relates and shall also specify the nature of the matter contained in the record by virtue of which subsection (1) applies to the record.

Affecting Provision (textual) – 9/2003, s. 8

4.86 For a user, the advantage of this approach is that the text of the Act appears as a “clean version”. It appears to the reader as though passed in that form. This approach is also used in New Zealand. Reprints of legislation in New Zealand are produced as “clean versions” which, it is argued, makes them easier to read and use.

4.87 On the other hand, a failure to identify the precise portion of the text that has been affected can have negative consequences. It means that a user is unable to trace the history of an amendment. It also provides no possibility of developing a point in time access facility.

4.88 The technology aspects of “point in time” access have already been discussed.²⁴ Point in time access allows a user of a database to view the legislation on a particular date. Different varieties of point in time access are offered in many legislation databases. There are a number of advantages to point in time access. One example is a litigant who wishes to ascertain the law on the date his or her cause of action accrued rather than the law as it stands when accessing a database.

4.89 The Commission accepts that a point in time access facility may arguably be beyond the scope of Restatement. Such a facility is, however, likely to be included in a future eLegislation database in Ireland. In that respect, there is a strong argument for revisiting this issue.

4.90 In the SLRU document *A Guide to Restatement*, it is noted that the “clean version” can be justified because a user can go to the *Chronological Tables of the Statutes* to trace the history and effect of any amendment.²⁵

(b) UK Approach (Versions 2 and 3)

4.91 The following example shows a Restatement of section 13 of the *Freedom of Information Act 1997* using the UK Statute Law Database (versions 2 and 3) editing style.

13.—(1) Where a request under section 7 would fall to be granted but for the fact that it relates to a record that is an exempt record, by reason of the inclusion in it, with other matter, of particular matter, the head of the public body concerned, shall, if it is practicable to do so, prepare a copy, in such form as he or she considers appropriate, of so much of the record as does not consist of the particular matter aforesaid and the request shall be granted by offering the requester access to the copy.

(2) Subsection (1) shall not apply in relation to a record if the copy provided for thereby would be misleading.

(3) Where a requester is offered access to a copy of part of a record under this section, then (unless the record is one to which F14[[section 19\(5\)](#), [22\(2\)](#), [23\(2\)](#), [24\(3\)](#), [26\(4\)](#), [27\(4\)](#) or [28\(5A\)](#)] applies), the notice under section 8 (1) concerned shall specify that such access is offered pursuant to this section and that the copy does not purport to be a copy of the complete record to which the request under section 7 relates and shall also specify the nature of the matter contained in the record by virtue of which subsection (1) applies

²⁴ See paragraph 3.13.

²⁵ SLRU *A Guide to Restatement* Policy Paper No. 2 at 6. Available at www.attorneygeneral.ie/slr/Restatement_Guide_FEB2003.doc

to the record.

Annotations:

Amendments

F14 Substituted (11.4.2003) by 9/2003, s. 8

4.92 A number of features of this style can be noted:

- The precise portion of amended text is identified by a footnote in the text. The inserted text is highlighted in blue and contained in square brackets. The clear identification of each amendment inserted also has the advantage of being of use to any future eLegislation database.
- The effect of the amendment is listed in the annotation. In this example “substituted” is included before the citation of the amending Act. Other instructions might include “inserted” or “deleted”. This makes it clear to the reader the precise effect of the amendment that has been incorporated.
- The use of square brackets in addition to the colour blue to identify the incorporated text means that if users wish to print out Restatements the lack of a colour printer will not affect its level of utility.
- As a mechanism of editing text, footnotes are only minimally intrusive to the eye because they are commonly used in many different contexts and most users are likely to be familiar with the concept.

4.93 In preparing this Consultation Paper, the Commission spoke with a number of stakeholders in legislative publishing who shared the view that modern publishing practice in this context is to identify the precise portion of text that has been amended. The Commission also received some feedback on the different versions from potential users (lawyers and non-lawyers) all of whom favoured the presentation style of Versions 2 and 3 as opposed to Version 1. For this reason, the Commission is inclined to favour this mode of presentation, and welcomes comments on this.

(2) *Non-Textual Amendments*

4.94 As already stated, a non-textual amendment is an amendment that modifies the meaning or effect of the Act without actually altering the text of the Act. From a presentation perspective, the issue is whether the full text of a non-textual amendment needs to be included in a Restatement.

(a) SLRU Approach (Version 1)

4.95 Under the SLRU House Style the text of a non-textual amendment is reproduced in full underneath the section which it affects. If the non-textual amendment consists of a sub-section of an amending Act, it may be out of context to include it alone. The *SLRU Guide to Restatement* advises that such information as necessary be included in order to put the non-textual amendment in context. This may mean going beyond the citation in the *Chronological Tables of the Statutes*.

4.96 Below is the note which appears in the Version 1 (SLRU style) of the *Freedom of Information Act 1997* Restatement. Two non-textual amendments are listed in the Chronological Tables as applying section 7 of the 1997 Act and appear underneath section 7 as follows:

*Affecting Provision (non-textual) – 7/2000, ss. 31(1)(2)(3)(4)
- 13/2002, ss. 13, 31(1)(2)*

[7/2000 - ss. 2 (establishment), 34(1)(2)(3)(4) Commission to Inquire into Child Abuse Act 2000]

Application of the Freedom of Information Act 1997, to certain records.

34.—(1) A head may refuse to grant a request (including a request made before the passing of this Act) under section 7 of the Freedom of Information Act, 1997 ("a request"), if access to the record concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of the performance of its functions by the Commission or a Committee or the procedures or methods employed for such performance.

(2) Subsection (1) does not apply in relation to a case in which in the opinion of the head concerned the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

(3) Before forming the opinion referred to in subsection (1) or (2), a head shall consult with the Chairperson.

(4) A head shall refuse to grant a request in relation to a record held by the Confidential Committee and transferred to a public body by the Commission upon the dissolution of the Commission.

[13/2002 – ss. 13(establishment), 31(1)(2) Residential Institutions Redress Act 2002]

Application of Freedom of Information Act, 1997 to certain records

31.—(1) A head may refuse to grant a request (including a request made before the passing of this Act) under section 7 of the Freedom of Information Act, 1997 ("a request"), if access to the records concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of

the performance of its functions by the Board or the Review Committee or the procedures or methods employed for such performance.

(2) Subsection (1) does not apply in relation to a case in which in the opinion of the head concerned the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

4.97 Section 34 of the *Commission to Inquire into Child Abuse Act 2000* and section 31 of the *Residential Institutions Redress Board Act 2002* apply section 7 in two different contexts. The advantage of this approach is that the reader is provided with all the necessary information to interpret the Restatement. The disadvantage is that reproducing all non-textual amendments adds significantly to the amount of bulk text in a restatement, particularly when done in the style set out above.

(b) UK Approach (Version 2)

4.98 On the UK Statute Law Database, the text of non-textual amendments is not displayed. A non-textual amendment is identified by the use of a “c-note” underneath the relevant section which it affects. The user is referred to the non-textual amendment by displaying the relevant citation. A hyperlink to the text of the non-textual amendment is provided for Acts from 2003 onwards.

4.99 Under this approach the note in Version 2 under section 7 the *Freedom of Information Act 1997* Restatement appears as follows:

Annotations:

Modifications etc. (not altering text)

C11 s. 7 applied (23.5.2000) by Commission to Inquire into Child Abuse Act 2000, (7/2000) ss. 2, 34 (1)(2)(3)(4); S.I. No. 149 of 2000

C12 s. 7 applied (16.12.2002) by Residential Institutions Redress Act 2002, (13/2002), ss. 13, 31(1)(2); S.I. No. 520 of 2002

4.100 Immediately it is apparent that the amount of bulk text facing the reader is significantly reduced. Two arguments can be made in favour of this approach of referring a reader to the citation of a non-textual amendment. First, as regards non-textual “application” provisions, it can be argued that it is sufficient simply to reference the reader. A non-textual “application” provision is only relevant to users of the Restatement who wish to apply it in a particular context.

4.101 Second, the Commission is concerned that, from a presentation point of view, the inclusion of lengthy non-textual amendments may confuse the user. The SLRU advised including such information as necessary to put

the non-textual amendment in context, but non-textual amendments are sometimes difficult to understand outside of the Act of which they form part. This concern was raised in some of the views expressed by users to the Commission during the process leading to the publication of this Consultation Paper.

(c) Including the full text of non-textual amendments

4.102 If the text of non-textual amendments is to be included in a Restatement, two options can be considered.

(i) Hyperlink the citation reference to the text of the non-textual amendment

4.103 The UK Statute Law Database provides a hyperlink to the text of a post-2003 non-textual amendment. This is done by clicking on the citation and the user can view the text of the amendment on a separate webpage.

4.104 The Commission could achieve this by hyperlinking references to non-textual amendments to the relevant page on the Irish Statute Book online. This integration of sources would ultimately be desirable assuming the issues which give rise to the current disclaimer on the Irish Statute Book Online are resolved.

4.105 A hyperlink could be provided in relation to both non-textual “amending” provisions and non-textual “application” provisions. Since there would no longer be a space issue as regards presentation, this has the advantage that a broad definition of non-textual amendments could be adopted.

(ii) Adopt the editing style used in Version 3

4.106 Version 3 of the Restatement of the *Freedom of Information Act 1997* in Appendix B is identical to Version 2 with the exception that it includes the text of a non-textual amendment. The annotation style is the same, but underneath the “c-note” the text of the amending provision is set out. Below is the annotation note for section 7 of the *Freedom of Information Act 1997* using this Version 3 style.

Annotations:

Modifications etc. (not altering text)

C10 s. 7 applied (23.5.2000) by Commission to Inquire into Child Abuse Act 2000, (7/2000) ss. 2, 34 (1)(2)(3)(4); S.I. No. 149 of 2000
Application of the Freedom of Information Act 1997, to certain records.
34.—(1) A head may refuse to grant a request (including a request made before the passing of this Act) under section 7 of the Freedom of Information Act, 1997 ("a request"), if access to the record concerned

could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of the performance of its functions by the Commission or a Committee or the procedures or methods employed for such performance.

(2) Subsection (1) does not apply in relation to a case in which in the opinion of the head concerned the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

(3) Before forming the opinion referred to in subsection (1) or (2), a head shall consult with the Chairperson.

(4) A head shall refuse to grant a request in relation to a record held by the Confidential Committee and transferred to a public body by the Commission upon the dissolution of the Commission.

C11 s. 7 applied (16.12.2002) by Residential Institutions Redress Act 2002, (13/2002), ss. 13, 31(1)(2); S.I. No. 520 of 2002

Application of Freedom of Information Act, 1997 to certain records

31.—(1) A head may refuse to grant a request (including a request made before the passing of this Act) under section 7 of the Freedom of Information Act, 1997 ("a request"), if access to the records concerned could, in the opinion of the head, reasonably be expected to prejudice the effectiveness of the performance of its functions by the Board or the Review Committee or the procedures or methods employed for such performance.

(2) Subsection (1) does not apply in relation to a case in which in the opinion of the head concerned the public interest would, on balance, be better served by granting than by refusing to grant the request concerned.

4.107 A further option would be to include the text of all non-textual "amending" provisions in the manner set out above but to provide a reference only to all non-textual "application" provisions.

(3) *Prospective Amendments*

4.108 A prospective amendment refers to an amendment to legislation which is not yet in force. The SLRU House Style makes no reference to incorporation of prospective amendments into a Restatement.

4.109 The UK Statute Law Database divides future amendments into "successive" and "prospective" amendments. The difference between the two is that successive amendments have a specific start date. The user is alerted to a prospective amendment by a small "p" icon and, by clicking on it, can access the text of that amendment.

4.110 Since a full legislation database is not available to the Restatement project it would seem unlikely that the UK approach could be followed in

this regard. It might be possible, however, to alert a reader to the existence of a prospective amendment. This could be done by including a “p-note” and the citation of the prospective amendment. Alternatively if a policy of providing hyperlinks to non-textual amendments was adopted, a similar approach could be taken as regards prospective amendments. Structure of Restatements

4.111 The Commission now turns to consider the overall structure of a Restatement under the existing SLRU House Style and then what other structure might be adopted.

(a) SLRU House Style

4.112 The Restatements published to date use the existing SLRU House Style as a series of chapters in both hard copy and PDF electronic format. For example if a Restatement consists of a Principal Act and 3 Amendment Acts, it contains a foreword and 5 chapters.

4.113 The Foreword sets out the commencement provisions of the legislation being restated and a guide to the House Style used.

4.114 Chapter 1 consists of a Restatement of the Principal Act. Chapter 1 is divided into paragraphs which are numbered consecutively. The paragraph numbers match the section numbers in the Principal Act. Each paragraph has a heading which is the original side note of the Principal Act.²⁶

4.115 Chapters 2, 3 and 4 consist of any provisions from Amendment Acts that were not incorporated into the Principal Restatement. These are referred to as “left over” provisions. The “left over” provisions are listed as paragraphs, the numbers of which follow on from the last paragraph number in Chapter 1. This means that the number appearing beside a section is entirely different to the actual number of the section as enacted.

4.116 There are no “left over” provisions in the SLRU Style Restatement of the *Freedom of Information Act 1997* in Appendix A because all sections of the *Freedom of Information (Amendment) Act 2003* and those in the other Acts amending the 1997 Act were incorporated into the Principal Act Restatement in Chapter 1.

4.117 Chapter 5 consists of any miscellaneous amending provisions that apply to the Act as a whole. Again they are contained in paragraphs which are numbered continuously on from the previous chapter.²⁷

²⁶ See Appendix A at p. 87 and at p. 95.

²⁷ See Appendix A at p. 87 and at p. 197.

(b) *The advantages and disadvantages of a Chapter Structure*

4.118 The Chapter Structure has the advantage that all the relevant information can form part of a single document. This is particularly advantageous for any hard copy versions of Restatements. The Commission considers, however, that having a Chapter Structure for Restatements may also involve some disadvantages. The issue to be determined is how far a Restatement should stray in structure from the ordinary layout of legislation.

4.119 For regular users of legislation, maintaining the ordinary layout of the legislation might be the most user-friendly approach. For example, a regular user of legislation will go immediately to the end of a piece of legislation to view the Schedules. Under the SLRU approach, Schedules are inserted at the first place in which they are mentioned in the Act, as the Restatement of the *Freedom of Information Act 1997* based on the SLRU House Style illustrates.²⁸

4.120 Similarly, regular users of legislation will expect the number listed in the left hand side of the page to represent the relevant section number. Under the SLRU approach, the number on the left hand side of the page represents a paragraph number and not a section number.

(c) *Alternative Structures*

4.121 The most obvious alternative is to structure a Restatement, as in Versions 2 and 3, using the usual layout of an Act, with section numbers and side-notes.

4.122 Using this approach any “miscellaneous” amending provisions applicable to the entire Act are listed at the start of the Restatement. The contents of the Foreword could be incorporated as a “user guide” on the website housing the Restatements and a similar document could be attached to any hard copy version. Since most users are familiar with the concept of footnotes, it is likely that users would need very little further information in order to understand the annotation style.

4.123 This option would, however, have the effect that the “left over” provisions of the Principal Amendment Acts could not be incorporated into a single document with the Restatement of the Principal Act. Hyperlinks to the Amendment Acts could be provided underneath the Restatement of the Principal Act. Each Amendment Act could then be displayed in full on a separate webpage. The provisions incorporated into the Restatement of the Principal Act could be easily identified by highlighting them in a different colour. This is done on the UK Statute Law Database.

²⁸ See Appendix A at p. 165.

4.124 This approach would mean that the principal Amendment Acts would not form part of the hard copy Restatement unless it was decided to print them in full and attach them as an Appendix. It has the advantage, however, that the “left over” provisions of the Amendment Acts are displayed in their original context as part of an entire Act.

4.125 The Commission recognises that publishing the principal Amendment Acts in full on a separate webpage raises the same issues in relation to sourcing that data as discussed earlier.²⁹

F Publication of Restatements

(1) *Electronic Publication of Restatements*

4.126 The issue of publication is closely linked to the choice of editorial style. All documents need to be tailored in terms of presentation style to the way in which they are to be published.

4.127 Section 2(1) of the *Statute Law (Restatement) Act 2002* provides that Restatements may be: “made available in printed or electronic form in the form of a single text certified by the Attorney General”.

4.128 In view of the extensive use made of the Irish Statute Book Online, it is likely that a majority of users of Restatements will want to access them online. In the Commission’s view, Restatements should therefore be geared towards electronic publication on a designated website.

4.129 Section 2(2) of the 2002 Act requires that the Restatement be made available as a “single text”. If the Commission were to adopt the House Style of either Version 2 or Version 3, it might be difficult to describe the online version as a “single text”. Both Version 2 and Version 3 styles envisage hyperlinking throughout the Restatement. The nature of hyperlinks is that they cannot form part of a “single” document. One possibility is that the Commission could generate a separate single document electronic version of the Restatement in PDF format. This possibility is examined in more detail below.³⁰

(2) *Certification of electronic versions of Restatements*

4.130 Another issue for consideration is the question of certification. If publication of Restatements is to be geared to an electronic format, (which the Commission considers Government’s eLegislation strategy) it would be desirable that an electronic version could be certified. Section 2(2) of the 2002 Act does not specify what form certification should take. The Restatements which have been published to date on the Attorney General’s

²⁹ See the discussion at paragraph 4.05 ff.

³⁰ See paragraph 4.134.

website have been in PDF format. PDF versions of documents are useful for a number of different reasons. Firstly they are paginated and have the look and feel of a traditional printed page, which many users favour. Secondly a PDF document is an exact copy of the original information. This is an extremely valuable characteristic in terms of guaranteeing a high level of accuracy. A PDF document may therefore lend itself to electronic authorisation. The Commission has already referred to the system in the Australian Capital Territories where a system of electronic authorisation of PDF versions of Acts has been established.³¹

4.131 There are, however, strong arguments for suggesting that PDF should not be seen as the primary storage format for Restatements. PDF documents are essentially static documents. PDF excludes the possibility of hyperlinking text to other web pages. In the context of Restatements it is clear that hyperlinking might be a very valuable function in terms of the following matter: linking non-textual amendments to their full text; linking Principal Amendment Acts to their full text; and linking Statutory Instruments to their full text. A significant advantage of having a database is the potential for hyperlinking that it provides.

4.132 The Commission understands that other storage formats, in particular HTML, are more accessible in terms of downloading and searching documents as compared to PDF format. Documents that are stored in PDF can be problematic for users in that downloading a large document can take a significant amount of time and also scrolling down PDF documents can be a very slow process.

4.133 An optimum solution for Restatement would be to allow HTML versions of Restatements to be certified as authoritative versions. Other jurisdictions, however, do not seem yet to have developed to a point where HTML versions on the public website are authorised versions.³² The Commission needs therefore to consider other options as regards electronic certification.

4.134 An alternative solution is to publish two versions of each Restatement, one in PDF and one in HTML. Technology appears to have progressed sufficiently to the point where electronic authorisation of PDF documents can be considered reliable. This system is operated in the Australian Capital Territories, although they do not offer an additional HTML version. In view of the significant advantages that HTML offers to

³¹ See paragraph 2.59.

³² Both the Commonwealth of Australia and Tasmania have accorded authoritative status to the electronic versions of legislation that are stored on their in-house servers, but the Commission understands that the versions displayed on the public website are not “official” versions.

users, it would be preferable if the Commission could offer a HTML version in addition to a “certified” PDF version.

4.135 Security concerns could be dealt with in a similar manner to the system in the Australian Capital Territory.³³ A Restatement could carry a VeriSign certificate as a means of authentication. Furthermore each Restatement could be digitally signed by the Attorney General using a “private” and “public” key system. A printout of the PDF version could be laid before both Houses of the Oireachtas for 21 days. If the Commission were in a position to develop a database of Restatements it would seem that this might be a viable option. The Commission understands that if the primary data is stored in XML format, it is then possible to generate it into any number of formats, including both HTML and PDF. This option would allow electronic authorisation and, at the same time, allow users to enjoy the advantages associated with a database and HTML.

4.136 In practice this solution would mean that there would be certain differences between the HTML version and the authoritative PDF version. These differences would arise from the hyperlinking that could be included in a HTML version. For instance, at the end of a Restatement, the Commission could include a list of all the Principal Amendment Acts. In the HTML version each of these Acts could be hyperlinked to their full text. The provision that had been inserted into the Restatement could be highlighted in a different colour. In the “certified” PDF version this would not be possible, but the list of Principal Amendment Acts would be included at the end of the Restatement, possibly as an Appendix. A similar issue could arise as regards non-textual amendments depending on the House Style selected for Restatements.

4.137 A final option is to have only a hard copy version as the certified version. This option offers less to users of Restatements who may wish to access a certified version online. In particular, if Restatements are to be capable of being cited in Court, it would be very useful for practitioners if they were able to print the certified version from a website on demand. Alternatively, the certified hard copy could be scanned into electronic form and displayed as a PDF. There would, however, have to be quality assurance work done on the scanned PDF.

(3) *Restatement Website*

4.138 This discussion highlights the possibilities that exist as regards making Restatements accessible. Key to that accessibility is the provision of a designated website where the public can have free access to Restatements. A database would allow that website to offer users extensive search

³³ See paragraph 2.59.

possibilities and other functionalities.³⁴ Throughout this Consultation Paper the need to future proof Restatements has been emphasised and providing primary access via a website will ensure that aim is met. It would also reinforce the transparency of the Restatement process, which is a core element of the policy of Better Regulation, from which Statute Law restatement derives.

G Conclusion

In this Chapter, the Commission has examined in some detail the inputs, work processes and outputs associated with Statute Law Restatement. A fundamental aspect of inputs is the need to ensure the accuracy of source data, including Acts and Statutory Instruments. As to work processes, the Commission welcomes submissions and views on the format of the Restatements which will be included in the Commission's Programme of work. This includes general presentation and the electronic aspects of Restatements. Finally, the Commission very much welcomes suggestions for further candidate Acts for inclusion in the Programme of Restatement which the Commission will prepare at the end of the consultation period for this Consultation Paper.

³⁴ See paragraph 3.12.

CHAPTER 5 SUMMARY OF ISSUES IDENTIFIED

A Introduction

5.01 In this Consultation Paper, the Commission has discussed how it intends to prepare a Programme of Statute Law Restatement, on foot of the decision of the Government in May 2006 (at the request of the Attorney General) to take on this responsibility. The Consultation Paper has pointed out that this new function is entirely consistent with the Commission's statutory mandate under the *Law Reform Commission Act 1975* to keep the law under review and to recommend reform. The Paper has also noted that Statute Law Restatement forms part of two important Government policies. Firstly, it is a significant component of Better Regulation, which includes the modernisation of the Irish Statute Book, encompassing 1,364 pre-1922 Acts and up to 2,000 Acts enacted by the Oireachtas since 1922 and which remain in force. Secondly, Statute Law Restatement must be consistent with the vision of Ireland as an Information Society, of which the Government's eLegislation strategy forms an important element. The Commission is committed to ensuring that the Programme of Statute Law Restatement is fully compatible with both policies.

5.02 In the following paragraphs, the Commission sets out a summary of the main issues identified in the Consultation Paper and on which it would greatly welcome views and suggestions from interested parties. The Commission has divided these issues into three categories: firstly, the candidate Acts to be included in the programme, secondly, the visual presentation of the Restatements and, thirdly, technological and management issues.

B Candidate Acts for the Programme of Statute Law Restatement

5.03 This Consultation Paper sets out the result of the public consultation process which occurred in the second half of 2006 in the aftermath of the Government decision requesting the Commission to prepare a Programme of Statute Law Restatement. Appendix B sets out the list of 66 candidate Acts which have been suggested for inclusion in the programme, arranged in subject-matter order and in respect of which the Commission has applied the selection criteria referred to in Chapter 4. In applying the

selection criteria, the Commission considers that the overwhelming majority of these candidate Acts should be included in the programme and, indeed, that they are deserving of high priority status. *The Commission welcomes views on the application of the selection criteria to the candidate Acts suggested for inclusion in the Programme of Statute Law Restatement and also welcomes suggestions for further candidate Acts to be included in the final programme.*

C Presentation of Restatements

5.04 The Commission has discussed in the Consultation Paper the importance it attaches to the visual presentation of Restatements and the need to build on the publication template developed for Restatements by the Statute Law Revision Unit (SLRU) in the Office of the Attorney General. Appendix A contains three versions of the Commission's draft Restatement of the Freedom of Information Act 1997, and Chapter 4 explains in detail some of the presentational choices involved in preparing the three versions. *The Commission welcomes views on the three versions of the draft Restatement of the Freedom of Information Act 1997 contained in Appendix A, in particular the following matters: (a) reference to statutory instruments; (b) reference to commencement provisions; (c) presentation of textual amendments; (d) presentation of non-textual amendments; (e) reference to prospective amendments; and (f) the structure of Restatements.*

D Technological and related management issues

5.05 In Chapters 3 and 4, the Commission discussed the technological and related management issues associated with the Programme of Statute Law Restatement, which is especially important in the context of the Government's eLegislation strategy. The Commission has acknowledged that, in the context of a wider eLegislation project, the Programme of Statute Law Restatement has a finite lifespan and that any work done should be future proofed in the sense that Restatements should be capable of being incorporated into that wider project. In that respect, the Commission has identified a number of specific points which need to be addressed. *The Commission welcomes views and suggestions on the technological and related management aspects of the Programme of Statute Law Restatement, in particular the following matters: (a) the format in which data should be held and retained in a data repository, in particular the use of XML; (b) internal data repository management and its relationship with a public website; (c) the establishment of a Statute Law Restatement Users Group; (d) quality assurance, in particular document management and editing programmes; and (e) the electronic publication and certification of Restatements.*