Issues Paper

ACCESSIBILITY, CONSOLIDATION AND ONLINE PUBLICATION OF LEGISLATION

(LRC IP 11 - 2016)

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About the Commission

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. The *Fourth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's work on Access to Legislation makes legislation in its current state (as amended rather than as enacted) more easily accessible to the public in three main outputs: the Legislation Directory, the Classified List and the Revised Acts. The Legislation Directory comprises electronically searchable indexes of amendments to primary and secondary legislation and important related information. The Classified List is a separate list of all Acts of the Oireachtas that remain in force organised under 36 major subject-matter headings. Revised Acts bring together all amendments and changes to an Act in a single text. The Commission provides online access to selected Revised Acts that were enacted before 2006 and Revised Acts are available for all Acts enacted from 2006 onwards (other than Finance and Social Welfare Acts) that have been textually amended.

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Background to this Issues Paper and the Questions Raised

1. This Issues Paper forms part of the Commission's *Fourth Programme of Law Reform*.[1] It describes how legislation – in particular Acts of the Oireachtas, which constitute the main source of law in the State – is currently made available publicly, and examines how this could be improved to make it more accessible. The Issues Paper discusses in particular to what extent planned programmes of consolidation, and maximising technology in the online publication of legislation, could enhance accessibility. The Issues Paper therefore deals with how legislation is published, rather than how it is drafted or its actual content.

2. Making legislation more accessible is important from a number of perspectives.[2] These are:

    - The democratic perspective: legislation that is not accessible suggests that knowledge of the law is to be confined to an exclusive group of persons, whether lawyers or other professionals such as tax advisers. Democratic principles require that the public generally should have access to the law and should have an adequate opportunity to know the law. In the digital age this has been explicitly recognised by the Council of Europe.[3]

    - The constitutional or rule of law perspective: one of the basic principles of any system of law is that ignorance of the law is no excuse. In a State such as Ireland where the rule of law is of central importance, it is vital that all citizens have access to the law as it currently stands.

    - Facilitating those who regularly need to access the law: analysis shows that a broad range of people are required regularly to access the law. A survey carried out in 2006 of those accessing the main online legislation database, the electronic Irish Statute Book (eISB), found that 58% of eISB users were public servants, of whom 27% worked in a legal capacity and 31% worked in a non-legal capacity. A further 30% came from a broad range of areas including the academic, business and library sectors, while just 12% of users were lawyers.[4]

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

2 See generally, Hunt, The Irish Statute Book: A Guide to Irish Legislation (First Law, 2007), which contains proposals to improve accessibility of legislation. See also Hunt, Role of the Houses of the Oireachtas in the Scrutiny of Legislation (Houses of the Oireachtas, 2010), which contains proposals to improve the role of the Houses of the Oireachtas in the pre-legislative and post-legislative review of legislation.

3 See the 2001 Council of Europe Recommendation Rec(2001)3 on online delivery of court and legislative information, discussed at paragraph 3.33.

4 See Office of the Attorney General, Maintenance of the Electronic Irish Statute Book (eISB) (2009) (a Value for Money and Policy Review), available at http://www.attorneygeneral.ie/.

- The economic point of view: improved access to legislation is also a key part of the State's policy on regulatory reform and reducing the cost of doing business. The current stock of Acts that remain in force, comprising over 3,000 Acts enacted over many centuries is not available in a coherent, consolidated, form, by contrast with many other states such as the USA. This makes it extremely time-consuming, and therefore costly, merely to produce the answer to the question: what is the current law on this topic? This adds to the regulatory burden faced not only by businesses but also State bodies responsible for understanding and regulating vital activities. This increased cost of legal compliance, for businesses and the State, could be reduced by producing a coherent, consolidated, legislative stock.[5]

For these reasons, the State is obliged to make legislation available in an accessible form.

3. The Issues Paper begins, in Part 1, by describing the current state of accessibility to legislation in Ireland. This includes a discussion of the sources of legislation in Ireland, including legislation enacted before the State was established in 1922 and which remains in force. Legislation is often amended in significant ways after it has been enacted, and Part 1 of the Paper discusses the various strategies used from the 19th century onwards to "tidy the statute book" that is, to make legislation accessible. This has included the publication of collections of revised Acts (administrative consolidations) and the enactment of consolidation Acts and "mini-code" Acts, all intended to bring together narrow or broad subjects into a relatively coherent state. These approaches have continued, to a greater or lesser extent, into the 21st century and Part 1 then describes to what extent current arrangements, including the use of online and digital technology, make it possible to find or track the text of an Act in its current, as-amended, form. This includes the extent to which the main online resources, the electronic Irish statute book (eISB), the Houses of the Oireachtas Legislative Observatory and the Commission's Access to Legislation work, have improved online accessibility to legislation in Ireland.

4. Part 2 of the Issues Paper then discusses how the current position in Ireland may be compared and contrasted with developments in a number of other states. Mirroring the discussion in Part 1, the 19th century saw significant efforts in other countries to make legislation more accessible. This included the enactment of comprehensive statutory codes of law in the Civil Law states of Europe, such as France and Germany. In Common Law jurisdictions (those who share a British heritage), such as the United States, comprehensive collections of Revised Acts were published in the second half of the 19th century, along the lines of those published in the UK (and Ireland, then part of the UK). However, in the 20th century, the USA (and other Common Law states such as Australia and New Zealand) also enacted significant codifying Acts in areas

[5] On the link between regulatory reform and accessibility of legislation see, for example, Department of the Taoiseach, *Regulating for a Better Future – A Government Policy Statement on Sectoral Economic Regulation* (2013), Department of the Taoiseach, *Building Ireland's Smart Economy – A Framework for Sustainable Economic Renewal* (2009) and Organisation for Economic Cooperation and Development, *Better Regulation in Europe: Ireland* (2010), each available at www.taoiseach.gov.ie.

such as commercial and criminal law. This contradicted the idea that codification belonged to Civil Law states only.

5. Part 2 also discusses how in recent decades many jurisdictions, Civil Law and Common Law, have used digital technology to make their laws more accessible. A number of other states have used technology to go beyond what is currently available in Ireland. Many states now provide online Revised Acts within days of the enactment of amending legislation; and an increasing number have also designated the online version of their legislation as the official version, which means that the printed, paper, version has no official status.

6. Part 3 of the Issues Paper then turns to examine how accessibility of legislation could be further improved by building on the current arrangements discussed in Part 1, and it assesses to what extent developments in other states, discussed in Part 2, could be adapted or applied in Ireland. This includes asking whether a programme or programmes of consolidation of legislation and the application of digital technology could facilitate this.

7. Part 3 of the Issues Paper therefore seeks views on the following 5 issues:

1. Whether the 4 principles tentatively identified by the Commission (that legislation should be comprehensive, up-to-date, freely available and underpinned by defined legislative publishing standards) are sufficient for the purposes of this project (see page 52).

2. What initiatives should be taken to produce comprehensive law and how such initiatives should be approached (see page 54).

3. What practices should be employed to enable the ongoing production of current versions of legislation (see page 63).

4. How legislation might be published to assist those accessing the law, including by making best use of information and communications technology (see page 67).

5. How best to develop and maintain effective standards to underpin accessibility of legislation (see page 78).

PART 1

ACCESSIBILITY OF LEGISLATION IN IRELAND

1.01 This Part of the Issues Paper describes the current state of accessibility of legislation in Ireland. To understand this, it is important to bear in mind that the legislation currently in force in Ireland includes over 1,000 Acts enacted before the State was established in 1922 as well as over 2,000 of the 3,000 Acts enacted by the Oireachtas since 1922.

1.02 During the 19th century in particular, when the volume of legislation began to accelerate with the corresponding growth in the reach of State regulation, it was recognised that there was a pressing need to bring some order to this increased volume, a need to "tidy the statute book" that is, to make legislation more accessible.

1.03 This Part therefore discusses the various strategies used from the 19th century onwards. This included the publication by a Statute Law Committee of official volumes of Revised Acts, administrative consolidations of all in-force Acts. Other approaches included the enactment of consolidation Acts, which brought together collections of legislation on a topic, and "mini-code" Acts, which placed on a statutory footing common law (judge-made) rules. These were all intended to bring together either narrow, or broad, subject areas into a relatively coherent state. These approaches have continued, to a greater or lesser extent, into the 21st century.

1.04 Part 1 then describes how these arrangements have been adapted and enhanced through the use of online and digital technology. This includes to what extent the key online resources – the electronic Irish statute book (eISB), the Houses of the Oireachtas Legislative Observatory and the Commission's Access to Legislation work – have improved online accessibility to legislation in Ireland.

1.1 The body of legislation that applies to Ireland

1.1.1 Sources of Irish legislation

1.05 The body of Irish legislation, or the "Irish statute book", comprises all Acts (primary legislation) and statutory instruments (secondary legislation) applicable to Ireland. Acts usually contain generally applicable legal principles and rules, for example, provisions that make certain matters criminal offences, or provisions concerning the principal rules on taxation, or the key provisions regulating an economic activity such as banking. Article 15.2.1° of the Constitution of Ireland 1937 confers on the Oireachtas sole and exclusive responsibility for enacting Acts. In addition, pre-1922 Acts applicable to Ireland were also carried over into Irish law by Article 73 of the Irish Free State Constitution 1922 and, subsequently, by Article 50 of the Constitution of Ireland. **About 3,200 Acts remain in force – of which about 2,000 have been enacted since 1922 and about 1,200 are pre-1922 Acts.**[6]

1.06 Statutory instruments are statutory provisions made by a person (often a Government Minister) under a power delegated to him or her by an Act. They usually contain detailed rules or regulations to supplement the general principles or rules in the Act under which they are made: for this reason, they are often referred to as secondary legislation. Statutory instruments are usually limited to expanding on the principles and policies of the parent Act.[7] They cannot usually amend or repeal an Act or create a criminal offence.[8] **Of over 35,000 statutory instruments made since 1922, about 15,000 remain in force (or appear to remain in force).**[9]

1.07 Article 29.4.6° of the Constitution, which is considered below, allows a significant derogation from the rule that secondary legislation may only expand on the principles and policies contained in a parent Act. Section 3 of the *European Communities Act 1972* provides that Regulations made by a Minister under section 3 may have the same legal effect as an Act where this is necessitated by membership of the European Union.[10] Regulations made under section 3 of the 1972 Act may also amend an Act where this is necessary to give full effect to an EU law requirement and may create both summary and indictable offences where the Minister making the Regulations considers it necessary to give full effect to the EU law provision. The growing number of obligations that arise under EU law means that the number of Regulations made under section 3 of the 1972 Act has become increasingly common. For example, 134 statutory instruments were made under section 3 of the 1972 Act in 2015, which comprised about 20% of statutory instruments made in 2015.

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[6] See the discussion of the Commission's Classified List of In-Force Acts in Ireland, at paragraphs 1.31 to 1.33 below.

[7] For a consideration of the constitutional limitations on the power of the Oireachtas to delegate legislative power, see *Cityview Press Ltd v An Chomhairle Oiliuna* [1980] IR 381.

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

[9] See the discussion of the Commission's Classified List of In-Force Acts and Statutory Instruments in Ireland, at paragraph 1.33 below.

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

Currently, there are just under 2,000 Regulations made under section 3 of the 1972 Act which remain in force.[11]

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

1.2.1 Consolidation projects in the 19th century

1.08 When the State was founded in 1922, it inherited a significant amount of pre-1922 legislation which had, to some extent, undergone a process of rationalisation and reform in the century prior to independence. In the early 19th century, the state of English law and legislation, which had developed in a piecemeal and unstructured way from the 12th century onwards, was subjected to widespread criticism by political philosophers such as Jeremy Bentham (one of the "fathers" of 19th century British political reform and of statutory codification) and writers and campaigners such as Charles Dickens (who had pilloried the chaotic and unjust nature of court procedures in novels such as *Bleak House*). In response, and in parallel with the political reforms that began in legislative form from the 1830s onwards, many Acts were enacted to consolidate the law, in recognition of the need to bring coherence and organisation to the legislative stock in the United Kingdom, which at that time included the island of Ireland.

1.09 Throughout the second half of the 19th century, a significant number of Acts consolidated the law and "mini-codes" were enacted in areas as diverse as commercial law, the court system, criminal law, prison law and taxation. These consolidating and codifying Acts were carried over and remained in force under Article 73 of the Constitution of the Irish Free State 1922 and, subsequently, under Article 50 of the Constitution of Ireland 1937. Many of these Acts remain in force, in whole or in part, at the time of writing, while some have been replaced by post-1922 successor consolidations and mini-codes.

[11] See the discussion of the Commission's Classified List of In-Force Acts and Statutory Instruments in Ireland, at paragraphs 1.31 to 1.33, below.

1.2.2 Statutes Revised

1.10 In addition to the formally enacted reforming and mini-codifying Acts, a separate programme was undertaken to publish a semi-official collection of all Acts that remained in force and in their amended form, rather than their as-enacted form. This involved the publication of the multi-volume *Statutes Revised* under the supervision of the Statute Law Committee, which was established in 1868 by the UK Lord Chancellor, Lord Cairns. The first edition of the *Statutes Revised* was published between 1870 and 1885 and it comprised a comprehensive collection of all public general Acts enacted in Westminster that remained in force up to 1878, including all amendments. The second edition of the *Statutes Revised* comprised 24 volumes covering all Acts in force up to 1920 and incorporating all amendments up to the year immediately preceding each volume's year of publication. The first 20 volumes of this second edition, taking the law up to 1900, were published between 1888 and 1909 and as such can be relied upon as accurately stating the law applicable to Ireland at their time of publication. A parallel exercise was carried out in respect of Acts enacted in the pre-1800 Irish Parliament, which culminated in the publication in 1885 of *Irish Statutes Revised.* Thus, when the State was established it inherited a relatively clear collection of almost all legislation in force in 1922.[12]

1.3 Developments since 1922: consolidations

1.11 On Ireland's independence in 1922 it inherited the stock of legislation that had been consolidated and revised by the 19th century projects considered above. Although the State initially failed to maintain Revised Acts in their up-to-date form, a number of consolidations and mini-codes of the law continued to be enacted as the State sought to put in place the legislative framework for the new State.

1.12 From the early 1960s onwards the drive to consolidate and streamline the statute book was accelerated as the State, and in particular the Department of Justice, sought to modernise its stock of legislation. The 1962 White Paper entitled *Programme of Law Reform*[13] set out for the first time a specific list of proposals for statutory reform with the ultimate intention of having in place an Irish Statute Book comprised exclusively of Acts of the Oireachtas. Under this Programme a number of significant consolidations occurred such as the *Guardianship of Infants Act 1964* and the *Succession Act 1965*. Some reform proposals suggested in the 1962 Programme took many decades to be implemented, such as the reform of the law on criminal insanity, which was enacted in the *Criminal Law (Insanity) Act 2006.*

[12] It was acknowledged that the collection in the *Statutes Revised*, and more particularly, the collection in *Irish Statutes Revised*, was not comprehensive, and it was not until the enactment of the *Statute Law Revision Act 2007* that a comprehensive list of pre-1922 Public Acts, including pre-1800 Acts of the Irish Parliament, was compiled, including a definitive list of 1,364 pre-1922 Public Acts that were retained in Schedule 1 of the 2007 Act.

[13] *Programme of Law Reform* (Pr 6379, Department of Justice, 1962).

1.13 In addition, a number of reforms proposed for consideration in the 1962 *Programme of Law Reform*, such as on the civil liability of occupiers, consolidation of the courts legislation and reform of trustee law, later formed the basis of projects included in Law Reform Commission Programmes of Law Reform (the Commission was established in 1975). Separately, a number of Government Departments have prepared consolidations or mini-codes which have continued to be enacted since the 1960s. Some of these have been enacted on foot of recommendations from advisory groups such as this Commission or from specially-convened bodies such as the Company Law Review Group, and sometimes also on the responsible Department's own initiative. As a consequence of such consolidations a number of areas of the law have been enacted within relatively self-contained mini-codes.

1.4 Developments since 1922: Revised Acts

1.14 As to the publication of Revised Acts, that is Acts in their amended rather than as-enacted form, it was not until 2006 that work began again on a planned programme to publish a significant number of the most-used Acts in Revised form. In 2007, the Commission began, at the request of the Government (on the initiative of the Attorney General) the first post-1922 planned programme of publishing Revised Acts. The first programme included over 100 of the most-used pre-2006 Acts; and in its subsequent ongoing work programme the Commission maintains on its website Revised versions of all amended post-2006 Acts (other than Finance and Social Welfare Acts) and over 130 pre-2006 Acts, currently (December 2016) a total of over 290 Revised Acts. This work has, to some extent, bridged the gap back to the work of the pre-1922 Statute Law Committee on the *Statutes Revised*.

1.5 Current Position

1.15 As a consequence of the projects undertaken to date some progress has already been made in making legislation accessible in a relatively comprehensive and current form. By virtue of consolidation projects undertaken prior to 1922 and those that have been carried out since the State was established in 1922 (albeit not under a structured programme), a number of pre-1922 and post-1922 mini-codes provide relatively comprehensive statements of the law in a number of areas. In addition, Revised Act versions of some of these are also available on the Commission's website, which ensures that they are maintained in an up to date state. The following is a list of some of these mini-codes that remain in force[14] (using examples from the 36 headings in the Commission's *Classified List of In-Force Legislation*[15] and also indicating where revised versions of such mini-codes are available on the Commission's website):

[14] As noted below, some of these mini-codes, such as the *Firearms Act 1925*, have experienced some degree of degradation since their enactment due to the enactment of subsequent standalone amending Acts.

[15] See Law Reform Commission, *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62- 2010), and the discussion at paragraphs 1.31 to 1.33, below.

Heading 1 Agriculture and Food

- *Animal Health and Welfare Act 2013*[16] **(available as revised)**

Heading 3 Business Occupations and Professions

- *Pharmacy Act 2007* **(available as revised)**
- *Medical Practitioners Act 2007* **(available as revised)**
- *Nurses and Midwives Act 2011* **(available as revised)**

Heading 4 Business Regulation, Including Business Names, Company Law and Partnerships

- *Industrial and Provident Societies Act 1893*
- *Companies Act 2014*[17] **(available as revised)**

Heading 5 Citizenship, Equality and Individual Status

- *Data Protection Act 1988* **(available as revised)**
- *Equal Status Act 2000* **(available as revised)**

Heading 6 Civil Liability Contract and Tort) and Dispute Resolution

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

Heading 7 Commercial Law

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

Heading 8 Communications and Energy

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

Heading 9 Courts and Courts Service

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

[16] This Act provides for a significant rationalisation of the law on animal welfare repealing 28 Acts in whole and 7 Acts in part and replacing them with one consolidated regime.

[17] This Act builds on the progress of three previous consolidation projects in 1862, 1908 and 1963. In the years after the enactment of the *Companies Act 1963*, however, it experienced significant degradation as reform was effected by means of new standalone Acts and statutory instruments made under section 3 of the *European Communities Act 1972*. On foot of this growing inaccessibility the Company Law Review Group produced in 2007 a draft General Scheme of the *Companies Consolidation and Reform Bill*. On foot of this work the *Companies Act 2014* was enacted in December 2014, providing a consolidated framework for company law in Ireland, repealing and replacing 23 Acts in whole and 9 Acts in part. The Act further revokes and replaces 15 statutory instruments and two instruments or charters.

Heading 10 Criminal Law

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

Heading 12 Education and Skills

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

Heading 14 Employment Law

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

Heading 17 Family Law

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

Heading 18 Financial Services and Credit Institutions

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

Heading 20 Garda Síochána (Police)

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

Heading 21 Health and Health Services

- *Mental Health Act 2001* **(available as revised)**

Heading 23 Land Law, Succession and Trusts

- *Trustee Act 1893*
- *Succession Act 1965*[18] **(available as revised)**
- *Land and Conveyancing Law Reform Act 2009*[19] **(available as revised)**

[18] This was enacted on foot of the Department of Justice's *Programme of Law Reform* (1962), discussed above, paragraphs 1.12 and 1.13. Since 1965 it has remained the unitary statement of law on succession. The Act repealed and replaced 37 Acts in whole and 36 Acts in part, spanning legislation dating back to the 13th century (the *Curtesy Act 1226*).

[19] This Act was enacted on foot of recommendations made by the Commission in its *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005). This Report sought to replace an extensive patchwork of legislation in the area, almost all of which dated from before the foundation of the Irish state and which stated the law in an extremely complicated and archaic manner. The 2009 Act consolidates all existing legislation in the area, dating back to the 13th century (*Statute De Donis Conditionalibus 1285*) and repealed 149 Acts in whole and 22 Acts in part.

Heading 24 Licensed Sale of Alcohol

- *Intoxicating Liquor (General) Act 1924*

Heading 27 Natural Resources

- *Fisheries (Consolidation) Act 1959*

Heading 28 Oireachtas (National Parliament) and Legislation

- *Interpretation Act 2005*

Heading 30 Prisons and Places of Detention

- *General Prisons (Ireland) Act 1877*
- *Prisons Act 2007* **(available as revised)**

Heading 32 Social Welfare, Pensions, Charities and Religious Bodies

- *Social Welfare Consolidation Act 2005*
- *Pensions Act 1990*

Heading 33 State Finance and Procurement

- *Public Accounts and Charges Act 1891*
- *Customs Act 2015*[20]

Heading 34 State Personnel and Superannuation/Pensions

- *Superannuation Act 1876*

Heading 35 Taxation

- *Taxes Consolidation Act 1997*[21]
- *Stamp Duties Consolidation Act 1999*
- *Capital Acquisitions Tax Consolidation Act 2003*
- *Value-Added Tax Consolidation Act 2010* **(available as revised)**

Heading 36 Transport

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

[20] The 2015 Act represents a significant rationalisation of the law relating to customs. It repeals and replaces 16 Acts in whole and 36 Acts in part and revokes 24 instruments completely and 2 instruments in part.

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

1.6 Consolidation projects awaiting implementation

1.16 In addition to those mini-codes already enacted, a number of consolidation Bills are currently (December 2016) being undertaken or are awaiting implementation. These include Bills currently on the Order Papers of the Oireachtas, Bills planned under the Government Legislation Programme and draft Bills published as part of Commission Reports. These include (also using examples from the 36 headings in the Commission's Classified List of Legislation):

Heading 2 Arts Culture and Sport

- *National Monuments Bill*

Heading 4 Business Regulation, Including Business Names, Company Law and Partnerships

- *Gambling Control Bill*

Heading 9 Courts and Courts Service

- *Courts (Consolidation and Reform) Bill*[22]

Heading 10 Criminal Law

- *Criminal Code Bill*[23]
- *Bail Bill*
- *Criminal Justice (Corruption) Bill*

Heading 14 Employment Law

- *Family Leave Bill*

Heading 17 Family Law

- *Domestic Violence Bill*

Heading 18 Financial Services and Credit Institutions

- *Central Bank (Consolidation) Bill*

Heading 23 Land Law, Succession and Trusts

- *Landlord and Tenant (Law Reform) Bill*[25]

Heading 24 Licensed Sale of Alcohol

- *Sale of Alcohol Bill*[24]

[22] This refers to the draft *Courts (Consolidation and Reform) Bill* in the Commission's 2010 *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010). If implemented, it would provide for a significant consolidation of a considerable body of legislation currently scattered across numerous statutes over the centuries. In total the Bill proposed by the Commission would repeal 192 Acts in full, of which 135 pre-date the foundation of the State in 1922.

[23] This refers to the draft *Criminal Code Bill* published in 2010 by the Criminal Law Codification Advisory Committee, available at http://criminalcode.ie. The draft Criminal Code Bill is discussed at paragraph 3.16, below.

Heading 27 Natural Resources

- *Inland Fisheries (Modernisation and Consolidation) Bill*
- *Minerals Development Bill 2015*

Heading 36 Transport

- *Merchant Shipping Consolidation Bill.*

[24] A General Scheme of a *Sale of Alcohol Bill* was published by the Department of Justice and Equality in 2008. This proposes to repeal the *Licensing Acts 1833 to 2011*, as well as the *Registration of Clubs Acts 1904 to 2008*. The *Government Legislation Programme*, Summer Session 2016 states that pre-legislative scrutiny of this Scheme of Bill is to be scheduled.

[25] A General Scheme of a *Landlord and Tenant (Law Reform) Bill* was published by the Department of Justice and Equality in April 2011 on foot of the Commission's *Report on General Law of Landlord and Tenant* (LRC 85-2007). The General Scheme, if enacted, would repeal up to 35 Acts, many of which are pre-1922 Acts. The *Government Legislation Programme*, Summer Session 2016 states that work is ongoing on the Bill.

1.7 The electronic Irish statute book (eISB) publishes Acts in as-enacted form

1.17 The principal online source of the State's legislation is the electronic Irish Statute Book database (eISB), maintained by the Office of the Attorney General (AGO). The AGO first made the eISB available in 1998,[26] initially on CD-ROM and then online. The eISB is a free online database, and contains the full text of all Acts of the Oireachtas and of most Statutory Instruments as they were enacted or made since 1922,[27] and (since 2014) the full text of nearly all 1,364 pre-1922 public Acts retained in force by the *Statute Law Revision Act 2007*. The text of many of these pre-1922 Acts was taken from the as-amended version in the *Statutes Revised* published under the supervision of the pre-1922 Statute Law Committee.[28]

1.18 The eISB also contains an integrated link from each Act and statutory instrument to a database, the Legislation Directory, which provides users with information on amendments to legislation as well as (in respect of Acts enacted since 1998) other legislative information such as Commencement Orders and Regulations made under those Acts. Thus, while all legislation on the eISB is published in its original form, it is at least possible for users to track subsequent amendments directly from each Act to the relevant Legislation Directory entry for that Act. In addition, the eISB contains an external link to the body of over 290 Revised Acts, discussed above, published free online by the Commission on its website.[29]

1.19 A particular challenge to the provision of comprehensive legislative information in one source is European Union law, which forms part of Irish domestic law. EU Directives are implemented through national implementing legislation, sometimes in the form of an Act and sometimes in the form of a Statutory Instrument, and they are therefore included in the body of legislation published on the eISB. However, an increasing volume of EU law takes the form of an EU Regulation, such as the 2016 EU General Regulation on Data Protection.[30] An EU Regulation has "direct effect" under EU law, which means it becomes law without the need for an implementing Act or Statutory Instrument and is therefore not immediately visible or accessible to users of the eISB. The eISB does, however, contain an external link to the official EU law database, Eur-lex.

1.20 A number of private publishers also publish legislation in amended or consolidated form online. These are, however, subscription based.

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

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

[28] On the role of the Statute Law Committee see the discussion at paragraph 1.10, above.

[29] Available at *http://www.lawreform.ie/revised-acts/alphabetical-list-of-html-and-pdf-post-2006-revised-acts.557.html*. This collection of over 290 Revised Acts (as of December 2016) includes all post 2006 Acts which have been textually amended (other than Social Welfare and Finance Acts) and over 130 pre-2006 Acts. For a fuller consideration of these revised Acts see paragraphs 1.26 to 1.30.

[30] Regulation (EU) 2016/680.

1.8 The evidential status of print and online legislation

1.21 The *Documentary Evidence Act 1925* provides that the printed edition of an Act published by the Stationery Office (that is, the hard copy, paper, version) is *prima facie* evidence of the content of the law, unless otherwise proven, while section 13 of the *Interpretation Act 2005* provides that judicial notice may be taken of the enactment of an Act (Article 25.4.5° of the Constitution of Ireland provides that the text of an Act signed by the President and deposited in the office of the Supreme Court is "conclusive evidence" of the any post-1937 Act). The electronic versions of Acts published on the eISB therefore currently have no formal legal status, such as the *prima facie* evidential status given by the *Documentary Evidence Act 1925* to Stationery Office printed copies. In practice, however, the eISB is often relied on as the source of the text of Acts and statutory instruments. Similarly, Revised Acts as published on the Commission's website have been relied on in court.[31] As discussed in Part 2 of this Paper, a number of other states have conferred evidential status to the online version of legislation, including the online Revised (as amended) text of their legislation.

1.9 Current Accessibility Issues with Legislation in Ireland

1.22 Notwithstanding the online availability of legislation and the projects currently being pursued to improve public access to legislation,[32] access to legislation continues to be hindered by a number of features of Irish law which undermine the ability to ascertain the law with confidence. These include:

- the volume of legislation on the statute book: since 1922, over 3,000 Acts have been enacted of which about 2,000 remain in force; and over 35,000 statutory instruments have been made of which about 15,000 remain in force (or appear to remain in force although they may be obsolete, spent or superseded). This is in addition to over 1,100 pre-1922 Public Acts that remain in force. Legislation is currently arranged on the eISB chronologically and gives no direct indication as to whether it is in force or has been amended (although this information is available through the integrated link to the Legislation Directory entry for each Act), making it difficult to identify the current law.

- the absence of an up to date comprehensive statement of law on a given topic in a single legislative source: legislation is published as enacted and does not take account of subsequent amendment or original free-standing provisions in other Acts. For example, in order to obtain a comprehensive

[31] See for example the judgment of the High Court (Charleton J) in *Kerry County Council v An Bord Pleanála* [2014] IEHC 238, which involved an application for judicial review concerning the powers of An Bord Pleanála under the *Roads Act 1993*, as amended, and the *Planning and Development Act 2000*, as amended. Revised Act versions of both Acts are available on the Commission's website. In the *Kerry County Council* case, the High Court stated, at paragraph 19 of the judgment: "Essential to this issue on the duty of An Bord Pleanála when making decisions on road applications is the attempt to sort out the multifarious sections and amendments that define its functions and its duty. That, it might be said, is far from easy. The Law Reform Commission has performed a salutary public service in bringing this kind of legislation up to date on http://www.lawreform.ie/revised-acts/alphabetical-list-of-revised-acts.360.html. Quotes [that is, quotes in the judgment from the 1993 and 2000 Acts, as amended] are taken from this."

[32] See paragraphs 1.23 to 1.36 below.

picture of the law relating to sexual offences, a reader would have to consult a number of different pieces of legislation[33] and would also need to track the amendment history of each Act (through the Legislation Directory entry for each Act) to discover the current position.

- organised chronologically, not by subject matter: the Irish statute book is currently ordered in chronological order of enactment, from the early 13th century (the *Fairs Act 1204*) to the present day. Each piece of legislation is numbered in order of its enactment within a particular year. This chronological order in turn is the only order in which print or online versions of legislation is made available. Access by means of subject matter is not currently (December 2016) available (although the Commission's Classified List of In-Force Legislation remedies this to some extent, and the Commission intends to make this available on its website in hyperlinked format in the near future).

- substantially amended legislation: legislation is amended on an ongoing basis and in many cases very regularly. For example the list of amendments to the *Social Welfare Consolidation Act 2005* on the eISB runs to over 2,500 effects (primarily textual amendments). In the absence of a revised version of the 2005 Act it is extremely difficult and time consuming to track these amendments.

- indirectly amended legislation: the use of non-textual amendments[34] serves to obscure the law and can lead to errors on the part of users as to the application of legislation. By contrast with other jurisdictions there is no provision to incorporate any non-textual amendments textually into revised legislation, even if this were textually feasible.

- obsolete legislation: the Statute Law Revision Programme[35] has made an enormous contribution to the removal of much obsolete legislation, notably by facilitating the repeal of thousands of obsolete pre-1922 Acts and providing the first definitive list of retained pre-1922 Acts, though further work remains to be done to repeal Acts whose continuing relevance is doubtful, and also in respect of statutory instruments that remain in force.

- superseding legislation and statutory instruments: a particular problem that affects statutory instruments is that an Act that repeals a previous Act often does not also expressly revoke statutory instruments made under the repealed Act. Similarly, some statutory instruments that, in effect, supersede a previous statutory instrument may not explicitly revoke the previous

[33] See Example 1 on page 24, below. The Classified List of Legislation lists 12 different Acts in Force addressing sexual offences.

[34] A non-textual amendment is a provision which provides for the construction of text in other legislation. It does not directly alter the text of the any other legislation but rather consists of a discursive statement of the effect of the amendment on the existing law. An example of this can be seen with the *Fines Act 2010* which serves to effect globally a construction of references to all previous references to fines to correspond with the fine indexation set out in that Act.

[35] The extensive nature of the Statute Law Revision Programme, notably its contribution of a definitive list of pre-1922 Acts that remain in force, is discussed at paragraph 1.36, below.

statutory instrument. [36] This means that a user of the statute may have to engage in considerable research and interpretation to assess the currency of legislation, resulting in uncertainty.

- commencement information: a common feature of an Act is a provision that it will come into force on some date to be subsequently fixed by ministerial Commencement Order. A consequence of this is that a reader has no means of knowing by reference to the text of the legislation whether it is in force or when a particular provision came into force.[37] The use of such a commencement provision is defensible because it allows Departments and policy makers to make the necessary administrative arrangements prior to commencement of a provision. However, a negative consequence of this practice is that many non-commenced provisions of Acts remain on the statute book with varying degrees of likelihood of ever being commenced.[38]

1.10 Examples of accessibility problems with Irish legislation

Example 1 - Finding the law on sexual offences

The legislation on sexual offences is spread across numerous Acts, dating from 1885, and as a result it lacks any coherent structure.[39] Many of these Acts have been significantly amended through the years making it extremely difficult for any person to know with certainty the state of the law.

While some specific sexual offences are set out in one Act, many others are spread across different Acts requiring the reader to be able to identify the correct provision depending on the specific facts of a case. For instance statutory provisions defining rape, which also remains an offence at common law, is stated separately in both section 2 of the *Criminal Law (Rape) Act 1981* and section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*.

Similarly, sexual offences involving children are currently spread across a number of Acts, including the *Child Trafficking and Pornography Act 1998*, the *Criminal Law (Sexual Offences) Act 2006* and the *European Union (Combating the Sexual Abuse and*

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

[37] It should be noted that the legislative histories on the eISB for all Acts enacted from 1998 onwards contain Commencement Tables which provide this information. Each Revised Act published by the Commission also contains the substance of commencement orders in a note to the Act's commencement section. An approach that has been adopted in other jurisdictions incorporates Commencement Tables into revised texts of legislation: see for example the Office of Parliamentary Counsel of the Australian Commonwealth's Drafting Direction No. 1.3, paragraphs 103-108.

[38] For example the *Health (Mental Services) Act 1981* was never commenced but was not repealed for a further 25 years until the coming into force of the relevant provisions of the *Mental Health Act 2001*. Section 60 of the *Civil Liability Act 1961*, which would impose civil liability on local authorities for failure to maintain roads (sometimes referred to as "non-feasance", for example not filling a pothole) as opposed to malfeasance (negligent filling of a pothole, for which it may already be found liable), has not been brought into force at the time of writing (December 2016). No provision of the *Adventure Activities Standards Authority Act 2001* has been brought into force at the time of writing (December 2016). The provisions on licensing of indoor events in the *Licensing of Indoor Events Act 2003* have not been brought into force at the time of writing (December 2016).

[39] See Robinson and Molloy, "Piece by Piece", Law Society Gazette, Law Society of Ireland, July 2015, page 38.

Sexual Exploitation of Children and Child Pornography) Regulations 2015 (the 2015 instrument will be revoked when the *Criminal Law (Sexual Offences) Bill 2015*, discussed below, is enacted). Sections 248 and 249 of the *Children Act 2001* also contain offences relating to the protection of children from sexual exploitation.

The *Criminal Law (Sexual Offences) Bill 2015*, which is at the time of writing (December 2016) before the Oireachtas, will when enacted significantly reform the law on sexual offences, providing for a number of new offences and amending others. The 2015 Bill does not, however, consolidate the law in this area.

Example 2 - Finding road traffic law

The *Road Traffic Act 1961* was an important consolidating Act intended to bring together the main provisions on road traffic law. However, since the 1961 Act was enacted there have been a further 15 Road Traffic Acts as well as provisions in other Acts that now form what might loosely be called the "road traffic code." The collective citation *Road Traffic Acts 1961 to 2016* comprise 22 separate Acts in whole or in part of which 18 remain in force. Many of these separate Acts are themselves subject to regular amendment. This makes it extremely difficult for a reader to ascertain what the law on road traffic is at any given time. In addition, some need to be read in conjunction with related Acts such as the *Road Traffic Act 1933* and the *Local Authorities (Traffic Wardens) Acts 1975 and 1987*. Users also have to examine over 900 statutory instruments made under these Acts to get a complete picture of the "road traffic code".

An example of the difficulty in this area is to trace the current position concerning the offences related to drink-driving, probably the offences on the statute book most subject to legal challenges and appeals (because a conviction carries automatic disqualification from driving). These offences have at various times been governed by sections 49 and 50 of the 1961 Act, Part 5 of the *Road Traffic Act 1968*, Part 3 of the *Road Traffic (Amendment) Act 1978* and Part 3 of the *Road Traffic Act 1994*. Each of these provisions was substantially amended on a regular basis and both the 1978 and 1994 Acts substituted entirely new sections 49 and 50 into the 1961 Act dealing with the offence of driving under the influence of an intoxicant. The 1978 Act also substantially repealed the 1968 Act and set down new provisions for taking specimens. This was itself then repealed and replaced by the 1994 Act. Separately a standalone provision in section 4 of the *Road Traffic Act 2006* provided for the establishment of checkpoints and mandatory testing of all motorists stopped at a checkpoint. The relevant provisions of the 1961 Act, the 1994 Act and the 2006 Act were subsequently repealed by Part 2 of the *Road Traffic Act 2010*, which set down new provisions for offences of driving under the influence of an intoxicant as well as new procedures regarding the taking of specimens. The provision of the 2010 Act repealing the previous provisions came into force in part in 2011 and at the same time significant amendments to Part 2 of the 2010 Act made by the *Road Traffic (No. 2) Act 2011* also came into force. Part 2 of the 2010 Act has since been further amended by the *Road Safety Authority (Commercial Vehicle Roadworthiness) Act*

2012, the *Taxi Regulation Act 2013* and the *Road Traffic Act 2014*. The chaotic nature of the law in this area has been the subject of ongoing criticism[40] with commentators arguing for consolidation of road traffic legislation as a matter of priority.[41] Separately, however, the Commission has published a Revised Act version of all the Road Traffic Acts which remain in force.[42]

Example 3 - Finding the law on firearms

An example of the difficulties of access which accompany poor planning of legislation can be seen from the *Firearms Acts 1925 to 2009*. The collective citation which appears in section 1(2) of the *Criminal Justice (Miscellaneous Provisions) Act 2009* is made up of 10 pieces of primary legislation. The parent Act in this case is the *Firearms Act 1925* which originally comprised 30 sections. This Act has been amended many times. The Act's legislative history on the eISB[43] lists 161 effects against the Act of which 121 are textual amendments and 40 are non-textual effects. In addition to this a number of subsequent pieces of legislation have been enacted containing free standing provisions regulating firearms rather than inserting such new provisions into the parent Act. Five of these[44] remain in force and have to be consulted in conjunction with the parent Act to get a comprehensive statement of the law. These Acts have themselves subsequently been amended on a number of occasions also. In addition to these Acts the *European Communities (Acquisition and Possession of Weapons and Ammunition) Regulations 1993*[45] also makes provision for EU law requirements regarding the regulation of firearms. This in turn has been substantially amended by the *European Communities (Acquisition and Possession of Weapons and Ammunition) (Amendment) Regulations 2010.*[46] The consequence of this for anyone trying to gain an accurate picture of the law relating to firearms is that they will have to sift through an extensive patchwork of interrelated legislation tracking substantial amendments. Although firearms legislation has been substantially amended three times in the past decade[47] it has not been consolidated. Revised versions of Firearms Acts which remain in force are maintained by the Commission.[48]

[40] For criticism of the state of road traffic legislation see for example the judgment of Hardiman J in *Oates v Browne* [2016] IESC 7, [2016] 2 ILRM 1.

[41] See for example Pierse, "Spaghetti Junction", Gazette, Law Society of Ireland, October 2011, page 22.

[42] These include the *Road Traffic Act 1961*, *Road Traffic Act 1968*, *Road Traffic (Amendment) Act 1984*, *Road Traffic Act 1994*, *Road Traffic Act 2002*, *Road Traffic Act 2004*, *Road Traffic Act 2006*, *Road Traffic and Transport Act 2006*, *Road Traffic Act 2010* and the *Road Traffic Act 2014*.

[43] As of December 2016.

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

[45] S.I. No. 362 of 1993.

[46] S.I. No. 493 of 2010.

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

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

Example 4 – Finding drug offences

The law governing drug offences is contained in the *Misuse of Drugs Act 1977* and has been subject to considerable amendment. For example the amendment history on the eISB[49] for the 1977 Act lists 104 textual amendments and 53 non-textual effects. In addition readers will also be required to be familiar with separate standalone provisions in the *Misuse of Drugs Act 1984*, the *Criminal Justice Act 1994*, the *Criminal Justice (Drug Trafficking) Act 1996*, the *Licensing (Combating Drug Abuse) Act 1997*, *the Criminal Justice (Illicit Traffic by Sea) Act 2003* and the *Criminal Justice (Psychoactive Substances) Act 2010*. These Acts have in turn been subsequently amended on a number of occasions and users will have to be familiar with the up to date law in these Acts also. Separately the Commission has published a Revised Act version of the *Misuse of Drugs Act 1977*.

Example 5 – The cost of not knowing that a defence to a charge of criminal damage was amended

In *The People (DPP) v Kelly* [2011] IECCA 25 the defendant had been tried on a charge of criminal damage to a US plane in Shannon Airport, contrary to section 2 of the *Criminal Damage Act 1991*. Section 6 of the 1991 Act provides various "lawful excuse" defences to a charge under section 2. These had been amended by section 21 of the *Non-Fatal Offences Against the Person Act 1997*, 7 years before the first of the defendant's 2 trials. This does not appear to have been known by those involved at either trial and was only discussed in detail when the defendant, who had represented herself at trial, successfully appealed against her conviction. While the amendment made to the 1991 Act by the 1997 Act was contained in the Legislation Directory entry on the eISB, there was no up-to-date text of the 1991 Act as amended by the 1997 Act publicly available at the time of the trial. If it had been, the substantial cost of the two trials and appeal might have been either greatly reduced or avoided completely. The 1991 Act, as amended, is now one of over 290 Revised Acts available on the Commission's website.

[49] As of December 2016.

Example 6 - Substantial amendment to provisions regarding governance of the Health Service Executive (HSE)
The law governing the management of the State's national health service, the Health Service Executive (HSE), is difficult to follow. A person should be able to find with relative ease the provisions concerning the general governance structure of the HSE and the functions of its chief executive. The *Health Act 2004*, which established the HSE, originally provides that there was a HSE board with its own budget and a HSE chief executive. However, in 2013 the *Health Service Executive (Governance) Act 2013* made numerous amendments to the 2004 Act, including by replacing the HSE board with the HSE Directorate, now headed by the HSE director general. And, in 2014, the *Health Service Executive (Financial Matters) Act 2014* made further amendments to the 2004 Act by removing the HSE's separate budget and making further amendments to the functions of the HSE director general. None of these hugely significant changes made in 2013 or 2014 is set out in the official,[50] paper, version of the *Health Act 2004* as published under the authority of the Stationery Office: this is because that version contains the text of the 2004 Act as originally enacted.[51]

1.11 Current approaches to improving accessibility of legislation

1.11.1 Information *on amendments and related matters for Acts and statutory instruments on eISB*

1.23 The eISB contains information on amendments, and related matters, for all Acts and for some statutory instruments (at the time of writing (December 2016), all changes made to statutory instruments since 1997). This allows users of legislation to track the current state of an Act. It has been described as "the one identifiable publication upon which the coherence and accessibility of our Statute Book rests."[52] This legislative information was previously made available on the eISB as a separate database called the Legislation Directory. Since 2016, the eISB contains a direct link to this information from the online text of each Act and instrument. Since 2006 the Commission has been responsible for producing and maintaining this information.

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

[51] It should be noted that the eISB contains a direct link from the text of every Act, including the 2004 Act, to a page that contains a legislative history page where all amendments to the 2004 Act are listed.

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

1.24 The information provided has been progressively expanded since the Commission took over functional responsibility for the Legislation Directory in 2006 (at the request of the Office of the Attorney General, which followed the request by the Government in 2005 for the Commission to take responsibility for the preparation of Revised Acts). Each Act enacted from 1998 onwards has its own separate page linked to the Act affected, providing additional information to the amendment history of the Act. This includes a commencement table setting out the commencement information in relation to each section in the Act, a table setting out any other associated statutory instrument made under the Act and a table listing amendments to the Act.[53] In 2011 the Legislation Directory was expanded to include comparable amendment histories for statutory instruments; at the time of writing (December 2016) all legislative effects made by statutory instruments from January 1997 are tracked. The eISB therefore now provides a complete legislative history for all instruments made in or since 1997.

1.25 Nonetheless the information provided has its limitations. These include:

- For legislation enacted prior to 1998 commencement and associated secondary legislation information is not available.[54]
- Some legislation such as taxation or social welfare Acts are amended frequently and extensively. This quickly makes the legislation's legislative history unwieldy.[55]
- Information for secondary legislation is not complete. As mentioned above only legislative changes made by secondary legislation made since 1 January 1997 are included in this database. Prior to 1997 a user cannot rely on the information contained on eISB to be a complete statement of effects to secondary legislation.[56]

[53] A comparison of the old and the new formats is set out in Figures 1 and 2 below.

[54] Commencement information for legislation enacted before 1998 is available in a separate page within the eISB entitled "Commencement Orders". The only way to ascertain if secondary legislation has been made under an Act enacted before 1998 is to carry out a search of the statutory instruments on the eISB database using the title of the Act in question. This is a time consuming practice and invariably entails a user having to trawl through numerous references to the Act in non-associated legislation in order to identify associated secondary legislation.

[55] For example see the consideration of the Legislation Directory entry for the *Social Welfare Consolidation Act 2005* at paragraph 1.22 above.

[56] It is envisaged that this will in the future be expanded to give complete legislative histories for Statutory Instruments going back to 1973.

27	**Succession Act, 1965.**	Appl.	2/1985, s. 7, sch., par. 7 26/1995, ss. 1(2), 15A 33/1996, s. 18 1/2003, ss. 12, 108
		Power to make o. extinguishing rights under.	6/1989, ss. 17, 46(2)
		Rstrct.	26/1995, ss. 1(2)(a), 14
		S. 3(1) am.	9/2015, ss. 1(5), 64 24/2010, ss. 1(2), 69 14/2008, ss. 1(2), 67 26/1987, ss. 1(2)(b), 28(a) 8/1976, s. 68(1)
		S. 3 (1), def. of "pecuniary legacy" appl.	1/2003 s. 113(1)(b)
		S. 3 (1A), subsec. ins.	26/1987, s. 1(2)(b), 28(b)
		S. 4A ins.	26/1987, ss. 1(2)(b), 29
		S. 4A(1) am.	9/2015, ss. 1(5), 65(a)
		S. 4A(1A) ins.	9/2015, ss. 1(5), 65(b)
		S. 4A(2) am.	9/2015, ss. 1(5), 65(c)
		S. 4A(2A) ins.	9/2015, ss. 1(5), 65(d)
		S. 4A(4) subsec. substit.	21/2010, ss. 2, 173
		S. 5 designated as s. 5(1)	14/2008, ss. 1(2), 68(a)
		S. 5(2) subsec. ins.	14/2008, ss. 1(2), 68(b)
		S. 5(3) subsec. ins.	14/2008, ss. 1(2), 68(b)
		S. 6, am. prosp.	11/1981, ss. 4, 33 (3)
		S. 6 (3) am.	31/2004, ss. 1(2), 47(a)
		S. 6 (5), subsec. ins.	31/2004, ss. 1(2), 47(b)
		S. 9 am.	8/1976, s. 68(1)
		S. 9, non applic. of	1/2003, s. 113(1)

Figure 1: Legislative history in its original format for part of the *Succession Act 1965* (incorporating amendments up to 1 January 2016).

Updated to 13 October 2016

Passports Act 2008

No. 4 of 2008

Contents

Commencement

Section	Commencement Date	Commencement Information
Whole Act (except s. 14(8)&(9))	1 November 2008	Commenced by the Passports Act 2008 (Commencement) Order 2008 (S.I. No. 412 of 2008), art. 2

Other Associated Secondary Legislation

Section	Other Associated Secondary Legislation
S. 9(1)	Passports (Periods of Validity) Regulations 2008 (S.I. No. 414 of 2008)
S. 19(15)	Passport (Appeals) Regulations 2008 (S.I. No. 413 of 2008)

Effects

How Affected	Affecting Provision
S. 8 transfer of functions under	Finance (Transfer of Departmental Administration and Ministerial Functions) Order 2011 (S.I. No. 418 of 2011), arts. 1 (2), 3 & sch. 1
S. 11(1) deleted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2), 38(1)(a), 38(2)
S. 11(2) deleted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2), 38(1)(b), 38(2)
S. 11(2A)-(2C) inserted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2), 38(1)(c)
S. 11(4) substituted	Gender Recognition Act 2015 (No. 25 of 2015), ss. 1(2), 38(1)(d)

Figure 2: Legislative history in the new format for *Passport Act 2008* (incorporating amendments up to 13 October 2016).

1.11.2 Revised Acts

1.26 The Commission also maintains a body of Revised Acts. These are administrative consolidations which bring together in a single text all amendments and changes to the Act. This renders the law more accessible for all users, enabling them to have an up to date statement of the law.[57] Such revised Acts also provide significant assistance to Departments, providing a useful starting point to work from, where they wish to carry out consolidations or plan amending legislation.

1.27 The Commission's work on Revised Acts involves the development of the scheme in the *Statute Law (Restatement) Act 2002* which provided that the Attorney General could certify the text of a Restatement, the text of an Act as amended, which would then have prima facie legal status as to the content of the Act. In 2006 the Government requested the Commission to take functional responsibility for the development of a programme of Restatements. Subsequently, it became clear that because of the number of Acts that came within the first programme, over 100, and because of the ongoing number of amendments to those Acts, certificates by the Attorney General would quickly become obsolete once an Act had been amended again.

1.28 As a result, the Commission concluded that it was not practicable to seek such certifications for restatements whenever amended and it was therefore preferable to prepare "Revised Acts", which had the benefit of mirroring the name given to the pre-1922 publications of Acts-as-amended prepared under the supervision of the Statute Law Committee, discussed in Part 1 of this Paper. The Commission maintains revised versions of over 130 pre-2006 Acts and all post-2006 Acts (other than Finance Acts and Social Welfare Acts) which have been textually amended, currently (December 2016) over 290 Revised Acts in total.

1.29 At the time of writing (December 2016) Revised Acts are available on the Commission's website, although they are scheduled to appear on the eISB in the future.

1.30 A limitation to the accessibility of Revised Acts is that they can only provide a comprehensive statement of the law where subsequent legislative reform is made by means of direct amendment[58] to that Act. Where subsequent amendments are made by new standalone provisions in separate enactments,[59] the accessibility of the Revised Act is degraded because of the need to consult the Revised Act as well as the separate standalone provisions from another, later, Act.

[57] See the comparison of section 5 of the *Succession Act 1965* published as revised by the Law Reform Commission and published as enacted on the eISB in Figures 3 and 4 below

[58] Direct textual amendments operate by means of direct amendments to the text of the parent legislation by inserting, deleting or substituting text for the legislation's original text.

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

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

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

Presumption of simultaneous death in cases of uncertainty.

[New]

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

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

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

Annotations

Amendments:

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

Figure 4: section 5 of the *Succession Act 1965* as published in revised form by the Commission. This can be contrasted with section 5 as originally enacted above (Updated to 18 January 2016).

1.11.3 Classified List of In-Force Acts and Statutory Instruments in Ireland

1.31 A Classified List of In-Force Acts in Ireland was first developed by the Commission in 2010 in consultation with all Government Departments. It comprises a list of all post-1922 Acts that remain in force (and over 100 pre-1922 Acts) organised under 36 subject headings.[60] These 36 headings have taken account of: (a) some near universal and conventional headings, such as Civil Liability, Commercial Law, Criminal Law and Taxation; (b) areas of responsibility of Government Departments in Ireland; (c) headings unique to Ireland, such as Heading 21, Irish Language and Gaeltacht; and (d) headings used in comparable classified compilations of Acts in other Common Law countries, notably the United States of America (both at federal and state level).

1.32 The Classified List was originally developed at the request of the eLegislation Group, convened under the auspices of the Department of the Taoiseach, with a view to identifying all post-1922 legislation still in force and to identify related groups of Acts. In its *Consultation Paper on a Classified List of Legislation in Ireland*[61] the Commission proposed to publish and maintain a classified list of legislation in force, and since then the Commission has updated it on a regular basis and its current version[62] covers all Acts enacted up to the *Energy Act 2016* (No. 12 of 2016). The Classified List serves a clarificatory purpose and is useful as regards identifying legislation belonging to different government departments and as a subject index, listing legislation by topic and grouping related legislation together.

1.33 Building on the work of the Classified List of In-Force Acts, in May 2016 the Commission published on its website the first draft Classified List of In-Force Acts and Statutory Instruments, comprising not only Acts that are in force but also all secondary legislation made under these Acts.[63] The current version of the draft List[64] covers all Acts enacted up to the *Energy Act 2016* (No. 12 of 2016) and all statutory instruments up to the *Sea-Fisheries (Codend Mesh Size) Regulations 2016* (S.I. No. 510 of 2016). This list comprises a list of over 2,000 Acts and over 15,000 statutory instruments and provides a list of all in-force Acts enacted and statutory instruments made since 1922. The list also identifies over 3,000 statutory instruments which the Commission believes may be spent or obsolete and thus could be revoked. This should significantly assist Departments in their efforts to streamline the stock of secondary legislation under their remit.

[60] See Classified List entry under the Family Law Heading in Figure 5 below.
[61] See Law Reform Commission *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62- 2010).
[62] Version 13, available at *http://www.lawreform.ie/_fileupload/Classified_List/Classified%20List%20of%20Acts%20v%2013.pdf*.
[63] See Classified List entry under the Family Law Heading in Figure 6 below.
[64] Version 13, available at *http://www.lawreform.ie/_fileupload/Classified_List/Class%20List%20of%20Acts%20with%20SIs%20v%2013.pdf*.

17. FAMILY LAW

17.1 MARRIAGE

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

17.2 CIVIL PARTNERSHIP AND COHABITANTS

Justice	Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010	24/2010

17.3 CHILDREN AND PARENTAL DUTIES

- **17.3.1 GENERAL**

Justice	Children and Family Relationships Act 2015	9/2015
Justice	Guardianship of Infants Act 1964	7/1964
Justice	Status of Children Act 1987	26/1987
Justice	Children Act 1997	40/1997
Justice	Legitimacy Act 1931	13/1931

- **17.3.2 CHILD CARE AND PROTECTION**

Children[200]	Child Care Act 1991	17/1991
Children[201]	Child Care (Amendment) Act 2007	26/2007
Children[202]	Child Care (Amendment) Act 2011	19/2011
Children	Child Care (Amendment) Act 2013	5/2013
Children	Child Care (Amendment) Act 2015	45/2015
Children	Children First Act 2015	36/2015
Children[203]	Protections for Persons Reporting Child Abuse Act 1998	49/1998
Justice	Protection of Children (Hague Convention) Act 2000	37/2000
Justice	Children Act 1997	40/1997

[200] See S.I. No. 488 of 2011.
[201] See S.I. No. 488 of 2011.
[202] See S.I. No. 488 of 2011.
[203] See S.I. No. 218 of 2011.

- **17.3.3 CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS**

Justice	Child Abduction and Enforcement of Custody Orders Act 1991	6/1991

- **17.3.4 OMBUDSMAN FOR CHILDREN**

Children[204]	Ombudsman for Children Act 2002	22/2002

17.4 ADOPTION

Children[205]	Adoption Act 2010	21/2010
Children	Adoption Act 2013	44/2013

17.5 CHILD AND FAMILY AGENCY

Children	Child and Family Agency Act 2013[206]	40/2013

17.6 DIVORCE AND JUDICIAL SEPARATION

- **17.6.1 DIVORCE**

Justice	Family Law (Divorce) Act 1996	33/1996
Justice	Family Law Act 1995	26/1995
Justice	Family Law (Miscellaneous Provisions) Act 1997[207]	18/1997
Justice	Civil Law (Miscellaneous Provisions) Act 2008[208]	14/2008

- **17.6.2 JUDICIAL SEPARATION**

Justice	Judicial Separation and Family Law Reform Act 1989	6/1989

- **17.6.3 PRIVATE INTERNATIONAL LAW/CONFLICTS OF LAW**

Justice	Domicile and Recognition of Foreign Divorces Act 1986	24/1986

17.7 MAINTENANCE[209]

Justice	Family Law (Maintenance of Spouses and Children) Act 1976	11/1976
Justice	Maintenance Act 1994	28/1994

17.8 DOMESTIC VIOLENCE

Justice	Domestic Violence Act 1996	1/1996
Justice	Domestic Violence (Amendment) Act 2002	30/2002

[204] See S.I. No. 218 of 2011.
[205] See S.I. No. 218 of 2011.
[206] Repealed Family Support Agency Act 2001 (54/2001); see S.I. No. 214 of 2011, S.I. No. 215 of 2011 and S.I. No. 216 of 2011 (only remaining statutory function of Department of Community, Equality and Gaeltacht Affairs that was, under the 2001 Act, transferred to Children and Youth Affairs).
[207] Note: 1997 Act also enacted changes to, for example, succession law: see Title 23, Land Law, below.
[208] This Act is also classified at Titles 2.9: Publications, 9.1: General Jurisdiction of Courts and 23.4: Succession and Wills.
[209] Maintenance Orders Act 1974 (16/1974) was repealed by European Communities (Maintenance) Regulations 2011 (S.I. No. 274 of 2011), reg. 25.

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Figure 5: Entry for Family Law Heading from Version 13 of the Classified List; the Acts shaded in purple represent Acts which are available in revised versions published on the Commission's website.

17. FAMILY LAW

17.1 MARRIAGE

Justice	Family Law Act 1995 ➢ Family Law Act 1995 (Commencement) Order 1996, S.I. No. 46 of 1996	26/1995
Justice	Marriage Act 2015 ➢ Marriage Act 2015 (Commencement) Order 2015, S.I. No. 504 of 2015	35/2015
Justice	Deceased Wife's Sister's Marriage Act 1907	7 Edw. 7, c. 47
Justice	Deceased Brother's Widow's Marriage Act 1921	11 & 12 Geo. 5, c. 24
Justice	Married Women's Status Act 1957	5/1957
Justice	Family Law Act 1981	22/1981
Justice	Family Law Act 1988	31/1988

17.2 CIVIL PARTNERSHIP AND COHABITANTS

Justice	Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ➢ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010, S.I. No. 648 of 2010 ➢ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010, S.I. No. 649 of 2010 ➢ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011, S.I. No. 642 of 2011 ➢ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2012, S.I. No. 505 of 2012 ➢ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2013, S.I. No. 490 of 2013 ➢ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2014, S.I. No. 212 of 2014 ➢ Civil Partnership (Recognition of Registered Foreign Relationships) Order 2016, S.I. No. 132 of 2016	24/2010

17.3 CHILDREN AND PARENTAL DUTIES

➢ **17.3.1 GENERAL**

Justice	Children and Family Relationships Act 2015 ➢ Children and Family Relationships Act 2015 (Part 10) (Commencement) Order 2015, S.I. No. 263 of 2015	9/2015

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Figure 6: Extract from entry for Family Law Heading from Version 13 of the Draft Classified List of Legislation in Ireland Comprising Acts and Statutory Instruments.

1.11.4 Legislative Observatory of the Houses of the Oireachtas

1.34 The Legislative Observatory of the Houses of the Oireachtas[65] comprises the following elements:

- the full text of all Bills as initiated since 1997, including their Explanatory Memoranda
- the full text of all Bills as amended, and as passed by both Houses of the Oireachtas since 1997
- hyperlinks to the Official Debates in both Houses of the Oireachtas on all such Bills
- the full text of all Acts of the Oireachtas enacted since 1997
- the full text of the official translations into the Irish language of all Acts enacted since 1922

1.35 One of the significant benefits of the Legislative Observatory is the availability of hyperlinks to the Official Debates on Bills initiated since 1997, because these debates provide considerable insight into the background to the resultant Acts. A second major benefit is that the text of the Acts on the website is a PDF of the Act, which reflects almost exactly the print version of Acts as published under the authority of the Stationery Office.[66] As noted above, the *Documentary Evidence Act 1925* provides that the Stationery Office print version is *prima facie* evidence of the content of the law in an Act.

1.11.5 Statute Law Revision Programme

1.36 The Statute Law Revision Programme, which has been carried out in the Department of Public Expenditure and Reform (and, between 2004 and 2011, in the Office of the Attorney General), identifies spent or obsolete legislation for repeal or revocation. This work is a continuation of the pre-1922 work to consolidate, codify and modernise legislation discussed above. Between 1861 and 2005 a large number of Statute Law Revision Acts were enacted. A significant departure in approach came with the enactment of the *Statute Law Revision Act 2007*, which for the first time identified a definitive list of 1,364 pre-1922 public Acts that were retained in force; all other pre-1922 Acts were repealed.[67] The *Statute Law Revision Act 2009*, the *Statute Law Revision Act 2012* and the *Statute Law Revision Act 2015* have engaged in a similar exercise in respect of local, personal and private pre-1922 Acts and pre-1820 statutory instruments. The *Statute Law Revision Bill 2016*, currently before the

[65] Available at http://www.oireachtas.ie/ViewDoc.asp?fn=/documents/nav/legislation.htm.

[66] The PDF version of Acts on the Oireachtas website does not, however, carry the standard Stationary Office label that is contained on the print version. This Stationery Office label is available to download from the website of the Government Publications Office (which is part of the Office of Public Works), at http://www.opw.ie/en/governmentpublications/servicestogovtdeptsbodies/#d.en.23168.

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

Oireachtas (December 2016), has continued this programme by identifying approximately 300 Acts enacted between 1922 and 1950 that are obsolete and therefore suitable for formal repeal. The major contribution made by the Statute Law Revision Acts has been the elimination of thousands of redundant and obsolete legislation, the reduction in the number of Acts that remain in force and a definitive list of pre-1922 Acts that remain in force. Further ongoing work remains to be done to repeal Acts whose continuing relevance is doubtful, and also in respect of statutory instruments that remain in force.

PART 2

COMPARATIVE APPROACHES TO MAKING LEGISLATION ACCESSIBLE

2.01 This Part of the Issues Paper describes how a number of other states have approached the task of making their legislation accessible. A common theme is that significant efforts were made in the 19th century to provide access to comprehensive and up to date statements of the law. In the first half of the 19th century, the Civil Law states of Europe, such as France, Germany and Italy, enacted more or less comprehensive statutory codes of law. In the second half of the 19th century Common Law jurisdictions (that is, those who share a British heritage), such as the United States, Australia and New Zealand, enacted comprehensive collections of Revised Acts, which mirrored the approach taken at that time in the UK (and Ireland, then part of the UK). However, in the 20th century, the US, Australia and New Zealand went further than the UK by enacting significant codifying Acts in a wide range of areas including commercial and criminal law, thus contradicting the idea that codification belongs to Civil Law states only.

2.02 In the late 20th century and early 21st century, many jurisdictions, Civil Law and Common Law, have used digital technology to make their laws accessible. This Part of the Issues Paper indicates to what extent these developments mirror those in Ireland, such as that the full text of all legislation is available online free of charge. But a number of other states have also harnessed technology to go beyond providing the legislative text in its original, as enacted, form: many now provide online the Revised, amended, text of Acts within days (sometimes, within hours) of amending legislation coming into force. And an increasing number of states have enacted legislation to provide that the online version is the official statement of the law, and that the printed, paper, version no longer has official status. Since 2013, this is also the position with EU law: the online edition of the Official Journal of the European Union now has such official status.[68]

[68] See Regulation (EU) No. 216/2013 (OJ No. L 69, 13.3.2013, p. 1).

2.1 Early initiatives to make the law accessible: Common Law and Civil Law States

2.03 As previously noted by the Commission,[69] many states belong to one of two major "families" of legal systems, the Common Law family and the Civil Law family,[70] The Common Law family, to which Ireland belongs, comprises legal systems whose development have been influenced by the United Kingdom and is characterised by the gradual development of the law by judge-made precedent. Civil Law countries comprise most of continental Europe and their former colonies and is characterised by the development in the late 18th and early 19th centuries of comprehensive written codes as exclusive sources of law. Both the Common Law and Civil Law states can be considered to have their roots in ancient Roman law whose influence spread across all of Europe in the centuries after the collapse of the Roman Empire.

2.04 From the emergence of organised society in ancient times it became important to organise and arrange the law in a manner which made the law predictable and accessible. Even in ancient Babylon, the pre-democratic rulers wanted to make clear to their subjects what the basic rules were. The earliest surviving civil code is the Code of Hammurabi, produced around 1760 BC by the Babylonian king Hammurabi. The most famous code from ancient times, however, is the Roman *Corpus Juris Civilis*, a codification of Roman law produced between 529 and 534 AD by the Emperor Justinian I. The *Corpus Juris Civilis* is the historical basis for the concept of codification in most European Civil Law legal systems. Justinian's Code was based on earlier codes, consolidating them into one integral code. Those earlier versions have not, however, survived, leaving Justinian's Code as the only available source of Roman law from this period.

2.2 Codification in the 18th and 19th centuries

2.05 The next significant wave of statutory reform coincided with the period of Enlightenment which dominated political and jurisprudential discourse throughout the late 18th century in Europe. In line with the principles of the Enlightenment European states sought to rationalise their laws and make them available in authoritative codes. While the first attempts at modern codification in Europe began in the second half of the 18th century across a number of German states, the most influential codification project undertaken in this period was that carried out in France in the aftermath of the 1789 Revolution.

[69] Law Reform Commission, *Consultation Paper on the Classified List of Legislation in Ireland* (LRC CP 62-2010), at page 5.

[70] It should be noted, however, that these legal systems have experienced significant convergence in the second half of the 20th century and as such differences between these systems can no longer be considered as significant as they once were.

2.06 The origins of the Napoleonic Codes lay in the haphazard nature of French law under the *ancien regime*, summed up in the (possibly misleading) phrase "*La loi, c'est moi*." In fact, prior to the French Revolution, more than 400 codes of laws were in place in various parts of France, with customary law predominant in the north, and Roman law in the south. The French Revolution overturned these separate and diverse systems of law, establishing a single framework of laws for the emerging French nation State. The codification process took the form of a commission of experts, notably including Jean-Etienne-Marie Portalis, established in 1790. When Napoleon came to power, the commission's work gathered momentum and he is famously reported to have attended 36 of the commission's 87 meetings in person. The first code to emerge from the commission's work was the Civil Code, completed at the end of 1801, although not published until 1804. The Civil Code consolidated some basic revolutionary objectives. For example, in terms of land law, the Civil Code abolished feudal tenure, replacing it with virtually absolute rights. The Civil Code was followed by five subsequent Codes, four of which were enacted into law (the "original five Codes").[71]

2.07 These Napoleonic Codes were later "exported", with modifications, to the French Empire of the 19th and early 20th century. As already indicated, codification had already begun in other parts of Europe in the 18th century and this process accelerated during the 19th century. This was often associated with the French colonisation of Europe during that period, as well as the quite different influences of nation-building, such as the unification of Germany and Italy during the 19th century.

2.3 Initiatives across Common Law jurisdictions

2.3.1 Early initiatives in the United Kingdom

2.08 By contrast to the developing wave of codification across civil law jurisdictions, reform of the presentation and arrangement of law in common law jurisdictions developed at a slower pace. The antipathy to Napoleon and his legacy of codification of French law left a long shadow in the UK during the 19th century. Although a complete draft Criminal Code was prepared by an expert Commission,[72] it was never enacted into law by the UK Parliament. Nonetheless, towards the end of the 19th century a renewed interest was taken in improving access to the law. As noted above, ongoing criticism of the state of English law throughout the early 19th century would provide the impetus to undertake projects to improve access to the law. Throughout the second half of the 19th century, a significant number of Acts consolidated the law and enacted mini-codes in areas as diverse as commercial law, the court system, criminal law, prison law and taxation. Some of these, as noted above, remain in force in Ireland.

[71] Civil Code (*Code Civil des Français*) 1804, Code of Civil Procedure (*Code de Procédure Civile*) 1806, Code of Commercial Law (*Code de Commerce*) 1807, Code of Criminal Procedure (*Code d'Instruction Criminelle*) 1808 and the Criminal Code (*Code Pénal*) 1810; in addition the Rural Code (*Code Forestier*) was debated but not enacted into law.

[72] Ironically, the draft Criminal Code was transported to a number of British colonies, and was, for example, enacted in India in the 19th century as the Indian Penal Code. In the late 20th century, comprehensive criminal codes were prepared by the English and Scottish Law Commissions, but have not yet been enacted into law by the UK Parliament.

2.09 In addition to these formally enacted reforming and codifying Acts, a separate programme was undertaken to publish a semi-official[73] collection of all in-force Acts in their amended form. This involved the publication of the multi-volume *Statutes Revised* under the supervision of the Statute Law Committee, which was appointed in 1868 by the UK Lord Chancellor, Lord Cairns. The first edition of the *Statutes Revised* was published between 1870 and 1885 and it comprised a comprehensive collection of all public general Acts enacted in Westminster that remained in force up to 1878, including all amendments.

2.10 As the impetus to improve access to the law took hold in the UK this influenced legislative policy across the common law world. A number of the UK's colonies and former colonies would seek to implement similar projects and expand on them further.

2.3.2 Initiatives to consolidate the law in other common law jurisdictions

2.11 Early interest in improving access to the stock of legislation can be seen from projects across common law jurisdictions to comprehensively consolidate the statue book. As the legislative stock of these new legal systems began to grow the importance of keeping the law in consolidated form was recognised. The most notable consolidation project in this period took place in the United States. Here a thematic codification of all statute law was undertaken. In 1874 the *Revised Statutes of the United States*, which was published as a single volume, was approved by the United States President and enacted as an Act of Congress. This was intended to provide a complete codification of the federal laws of the United States. Similar codification projects as that at a federal level were also undertaken across a number of States.[74]

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

[74] See for example the consideration of codification in Maryland in the Commission's *Consultation Paper on a Classified List of Legislation in Ireland* (LRC CP 62- 2010), page 19.

2.12 Similarly projects were undertaken across Canada to comprehensively consolidate all law in force. The first such comprehensive consolidation at federal level in Canada occurred in 1886. Here a statutorily appointed Statute Revision Commission was appointed by statute for the purposes of a systematic consolidation. It undertook a revision of all public general Acts which was then published under a series of volumes entitled *Revised Statutes of Canada 1886*. This consolidation project was in turn replicated across a number of Canadian provinces including Ontario, Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia and Sasketchewan.[75]

2.13 In common with the Canadian approach, New Zealand also undertook a systematic consolidation of its legislation in 1908 in accordance with the *Reprint of Statutes Act 1895*. This built on a previous programme of consolidation carried out between 1879 and 1884, during which 50 consolidation Bills were prepared under the *Revision of Statutes Act 1879*, consolidating nearly 280 Acts and Ordinances.[76]

2.3.3 Initiatives to maintain revised versions of legislation in other common law jurisdictions

2.14 Building on the legacy of Lord Cairns and the Statute Law Committee, a number of jurisdictions also put in place effective systems to ensure the regular production of legislation as amended. For example the Australian Commonwealth was proactive in revising legislation from its establishment in 1901 thus ensuring the maintenance of its legislative stock in a coherent revised form. It first made provision for revision of enactments in the *Incorporation of Amendments Act 1905* which required amendments to be incorporated into any future reprints of the legislation. The first general reprint took place in 1913. Similar projects were also carried out across a number of Australian States with Victoria undertaking a full revision of its legislation in 1865, New South Wales undertaking its first official reprint in 1937 and South Australia undertaking its first general reprint in 1936. In addition Queensland, Tasmania and Western Australia all carried out revisions on a periodic basis during this period.

2.15 In New Zealand the now repealed *Statutes Drafting and Compilation Act 1920*[77] also allowed for general reprints of revised legislation. The first general reprint took place in 1931.

[75] See Berry, *Keeping the statute book up to date: a personal view*, Commonwealth Law Bulletin (2010) 36:1, 79-105, at page 84.
[76] New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (2008), page 103.
[77] Revision of legislation is now provided for under the *Legislation Act 2012*.

2.4 20th century initiatives in common law jurisdictions

2.4.1 Codification in the United States of America

2.16 Throughout the 20th century the progress made by common law states in rationalising its stock of legislation was maintained and strengthened. This can be particularly seen from the example of the United States of America. Building on the 1874 *Revised Statutes of the United States* from the early 20th century onwards, the US Congress approved the gradual development of the United States Code (USC). The USC is a compilation and codification of all the federal laws of the United States of America. It was initially adopted as a Code by Congress in June 1926.[78] It currently contains 54 major headings, called Titles, and is published by the Office of the Law Revision Counsel (OLRC).

2.17 In order to have a permanent revision and codification process in place, the OLRC was established in the US House of Representatives in 1974. The provisions detailing the powers and functions of the OLRC are set down in Title 2, Part 9A of the USC. The OLRC was established as an independent body under the authority of the Speaker of the House of Representatives. Its function is to prepare complete compilations of the general and permanent laws of the United States to be submitted to the Committee on the Judiciary with a view ultimately to the enactment of each Title as a positive law Title. It is also responsible for classifying newly enacted provisions to their proper place within the Code, identifying obsolete legislation for repeal, carrying out revisions of positive law Titles and publishing new editions of the Code.

2.18 The USC is composed partly of positive law Titles and partly non-positive law Titles. Positive law codification entails preparing and enacting codification bills by Congress to replace and restate existing law under that subject heading. As at the date of writing[79] there are 27 positive law Titles. By contrast non-positive law codifications merely compile existing legislation into a codified restatement. They are administrative codifications only and as such do not replace the existing law.

2.19 Under 1 U.S.C. 204 a printed version of the USC together with any supplements shall, in the absence of evidence to the contrary, be evidence of the law. In the event of a conflict between the provisions of a non-positive law Title to the Code and the legislation it codifies the provisions in the original legislation are determinative. As positive law Titles are enacted by Congress they constitute full legal evidence of the law. A fresh printed version is published every six years with annual supplements.

[78] Sess. I Ch. 712 1926 and Sess. I Ch. 713 1926.
[79] December 2016.

2.4.2 Consolidation initiatives

2.20 As has been noted, from the late 19th century a number of Canadian jurisdictions undertook systematic consolidations of their statute books. Over the course of the 20th century, progress was maintained across Canadian jurisdictions by continuing to undertake regular periodic systematic consolidations. The systematic consolidation of Canadian law undertaken in 1886 was repeated 5 more times up until 1985. Similarly in Ontario a total of 11 general consolidations of the statute book were undertaken between 1877 and 1990. More recently jurisdictions have moved away from systematic consolidations performed by ad hoc commissions to ongoing phased consolidation. At a federal level, for instance, a permanent Commission has been established to provide for consolidations on an ongoing basis.

2.21 New Zealand has also recently made provision for ongoing phased consolidation. Following the 2008 Law Commission *Report on the Presentation of New Zealand Statute Law*,[80] the New Zealand *Legislation Act 2012*[81] makes provision for ongoing phased programmes of consolidation. Under the 2012 Act the New Zealand Parliamentary Counsel Office is required to undertake triennial consolidation programmes with a view to consolidating and updating the statute book. The first consolidation programme was presented to the House of Representatives in 2014 and covers the period 2015 to 2017[82].

2.4.3 Revised legislation

2.22 Many Common Law countries who undertook early revised legislation projects continued to consolidate the gains made in those projects (in the case of Ireland, this has only been the case since the Commission took responsibility for this area in 2006). Throughout the 20th century further general reprints of legislation as enacted were carried out. For example, 3 more editions of the *Statutes Revised* were published by the Statute Law Committee in the United Kingdom, with the final edition completed in 1981 and published under the title *Statutes in Force*. Amendments up to 1991 continued to be incorporated into this loose-leaf publication.

2.23 Similarly in Australia the initial general reprint of legislation as revised was followed by similar reprints in 1936, 1952, 1974 and 1987 as well as a similar reprint of all regulations in force in 1956. Further general reprints were also undertaken in Victoria[83], New South Wales[84] and South Australia[85] while in 1960 the Northern Territory also produced its first full revision of all ordinances enacted since its separation from South Australia in 1911.

[80] A useful history of consolidation initiatives is provided in the New Zealand Law Commission's *Report Presentation of New Zealand Statute Law* (2008), at pages 102 to 104.
[81] Section 30.
[82] See *http://www.pco.parliament.govt.nz/revision-programme-2015-to-2017/*.
[83] 1890, 1915, 1928 and 1958.
[84] 1957.
[85] 1976.

2.24 Towards the end of the century the policy of general reprints of legislation as revised was abandoned in favour of "rolling reprint". Rolling reprint entailed the periodic revision of legislation as they were amended on an ongoing basis and their publication in pamphlet form thereafter. This enabled revisers to focus their work on the most amended legislation, more regularly providing revised versions[86].

2.25 As a consequence of the efforts of such states to maintain revised Acts, they had available to them a relatively up to date body of law when they began publishing their legislation online in the late 20th century. Because of this, these states were able to produce complete current law databases which could then be maintained when they moved online.

2.5 20th century developments in civil law countries

2.26 As with common law countries, civil law jurisdictions have in recent years had to confront the increase in the influence of statutory regulation across various sectors and resulting problems posed to the integrity of Codes. The original Napoleonic Codes of the early 19th century have not remained in their original form, although their essential content largely survived until well into the 20th century. From the second half of the 20th century most European States have been involved in a process of "decodification" and "recodification." In France, this has, in effect, involved the need to remove certain elements from the six original Codes and to develop and enact what are usually referred to as the "modern codes." These codes reflect the increased complexity of the modern State, including the introduction during the 20th century of near-universal social security (social welfare) and the increased statutory regulation of business. In France, it is noteworthy that, mirroring the number of Titles in the United States Code, over 50 "modern codes" have been published and enacted.[87] The effect of this has been that all the original Napoleonic Codes have been either extensively amended or re-drafted.

[86] For example Berry notes in his Article *Keeping the statute book up to date: a personal view*, Commonwealth Law Bulletin (2010) 36:1, 79-105, at page 73, that at the time of publication 21 such revisions had been carried out in Victoria in respect of the *Crimes Act 1958*.

[87] A list of French Codes is set out in the Commission's Consultation Paper on a Classified List of Legislation in Ireland at page 27. An English translation of many of these Codes, prepared by the French Government, is available at *http://www.legifrance.gouv.fr/*. Others are available through *http://www.droit.org/* (Institut Francais d'Information Juridique).

2.6 Late 20th century developments: the impact of technology

2.27 Towards the end of the 20th century the capacity of states to make the law accessible was transformed by advances in technology. Information technology has enabled states to make available legislation in its amended form more efficiently and in a cost effective manner. On foot of these advances a number of common law states have utilised technology in order to maximise its delivery of accessible legislation. Typically these initiatives include:

1. Provision of legislation online – towards the end of the 20th century states began putting their legislation online. This has facilitated free access to legislation from an immediately available source.
2. Automatic revision – a number of states have developed systems which enable them to incorporate amendments into legislation automatically or semi-automatically on an ongoing basis. This has facilitated production of revised legislation almost immediately on an amendment coming into force.
3. Point-in-time information – a number of states also retain historical versions of legislation. This facilitates point-in-time information enabling users of legislation to ascertain the law at any previous point in time.
4. Officialisation – increasingly states are recognising online versions of legislation as official or semi-official versions of legislation.

2.28 Examples of jurisdictions which have utilised technology to maximise public access to the law are considered below.

2.6.1 Tasmania

2.29 An example of a particularly innovative project is the EnAct project undertaken in Tasmania. The State legislative management EnAct system was established in 1997 and was an early example of an integrated legislative management system allowing for automatic revision of legislation. In the course of drafting amendments to legislation the amendments are made directly to the latest version of the amended Act using strike through and underline. These changes are then used to generate standardised amending forms within the text of the amending legislation.[88] On subsequent revision of legislation previous data fragments of the amended provision are retained enabling point-in-time searches. Where a user conducts an advanced search of the legislation database he or she can specify a specific date to search within. Individual data fragments of each piece of legislation which applied on that date are returned. By this means a user can access a snapshot of the law in force on the database as on that particular date, as if it were the entire database.[89]

[88] See Arnold-Moore T. et al, *Connected to the Law: Tasmanian Legislation Using EnAct*, 2000 (1) The Journal of Information, Law and Technology (JILT).
[89] *Ibid.*

2.30 The EnAct system is integrated with the State's official legislation website.[90] It provides revised versions of all Acts, as well as versions of Acts as enacted for all Acts enacted after 1 February 1997. Secondary legislation made after May 1998 is available as made and as amended. Point-in-time information is also available in relation to Acts after February 1997 and secondary legislation after May 1998. Section 6 of the *Legislation Publication Act 1996* addresses the status of online legislation, stating that the law is to be taken in all circumstances and for all purposes to be as they appear from time to time in that version of the Act which is on the database as at that date. Such online legislation is required to be accompanied by a certificate stating that the legislation is authorised as at the date set down and incorporates any amendments made to the legislation.

2.6.2 New Zealand

2.31 In 2000 New Zealand undertook its Public Access to Legislation project aiming to maximise public access to the law. The result was the development of the Legislative Enactments of New Zealand (LENZ) system which has been in use in the legislative process since 2008. The LENZ system integrates the drafting, revision and publication of legislation to maximise public delivery of legislation. The system enables up to date legislation to be made available on the State's online database.[91] New Acts are published within five days of coming into force while secondary legislation[92] is published the day after it is promulgated in the State's official journal. The site aims to incorporate amendments into revised legislation within 15 working days of them coming into force.

2.32 All Acts and legislative instruments[93] must be published in both print and electronic form, both as enacted and as revised.[94] Under section 6 of the 2012 Act the Chief Parliamentary Counsel is required to ensure that electronic versions of legislation and any revised legislation are published as soon as practicable. Under section 17 the Chief Parliamentary Counsel may issue official print and electronic versions of legislation. The New Zealand Legislation database provides official and unofficial legislation. Versions of legislation which have official status include all Acts and legislative instruments whether as enacted or revised, since 2008; the latest revision of all Acts and legislative instruments enacted or made between 1931 and 2007 if still in force as well as some earlier revised versions of some pieces of such legislation; and the latest revision and some earlier revisions of some pre-1931 Acts.

[90] *http://www.thelaw.tas.gov.au/index.w3p*.
[91] *http://www.legislation.govt.nz/*.
[92] It should be noted that secondary legislation which is not drafted by the Parliamentary Counsel Office (PCO) is not currently available on the official database although the PCO is currently undertaking a project to include all legislation on the database; see *http://www.pco.parliament.govt.nz/about-asip/*.
[93] This is defined in the Act as including most Orders in Council, instruments made by a Minister that amends an Act or defines the meaning of a term used in an Act, instruments that an Act requires to be published under the 2012 Act or resolutions of the House of Representatives revoking, amending or substituting a disallowable instrument.
[94] Section 6.

2.6.3 Canada

2.33 Canada uses an integrated legislative information management system containing drafting, revision and publication functions. This facilitates automatic revision and publication of legislation enabling timely access to the law. Electronic versions of Canadian legislation in both official languages are available on the Justice Laws Website.[95] As of 1 June 2009, the revised Acts and regulations on the website are official and can be used for evidential purposes in accordance with section 31 of *Legislation Revision and Consolidation Act*.[96] In the event of any inconsistencies between a revised version of an enactment and the original provision, or its amendment, the original provision or amendment prevails.[97] Period in time information is available from 1 January 2003 for Acts and 22 March 2006 for Regulations.

2.6.4 Ontario

2.34 Ontario's legislative process is managed through its E-Laws system. E-Laws provides an integrated drafting, revision and publication system modelled largely on Tasmania's EnAct system.[98] All legislation both current and as enacted is available on the system's website.[99] Its database is current to 14 days for revised legislation and 2 days for legislation as enacted. The database also contains period in time information dating back to 2 January 2004 comprising all previous versions of a piece of legislation with an identified period during which the version was current. All such versions have evidential status under section 39 of the *Legislation Act 2006*.

[95] *http://laws-lois.justice.gc.ca/eng/*.
[96] (R.S.C., 1985, c. S-20).
[97] S. 31(2) and (3).
[98] Horn, *Legislative drafting in Australia, New Zealand and Ontario: notes on an informal survey*, The Loophole, Mar. 2005 (2005.1), p 55, at page 56.
[99] *http://www.ontario.ca/laws*.

PART 3

HOW TO IMPROVE ACCESSIBILITY OF LEGISLATION FOR THE FUTURE

3.01 Parts 1 and 2 of this Issues Paper discussed current arrangements to make legislation accessible in Ireland and in a number of other states. In this Part, the Issues Paper seeks to build on this analysis in order to identify how to improve accessibility of legislation for the future. The Commission begins by tentatively identifying 4 essential principles of accessible law. This Part then considers what practices or initiatives might be undertaken to consolidate the advances already made in providing accessible legislation, drawing on examples of best practice from other jurisdictions.

ISSUE 1

IDENTIFYING THE ESSENTIAL PRINCIPLES OF ACCESSIBLE LAW

3.02 Legislation can be considered to be accessible where a person can confidently access law from a publicly available, reliable source. In order for such a person to be able to access law confidently from a given source, the legislation should comply with some essential principles. The Commission has tentatively identified the following 4 principles to which legislation should conform, namely that legislation should be:

1. ***Comprehensive*** – there should be one Act per general subject matter; this is usually achieved by bringing together the law on a subject matter in a consolidating or codifying Act.

2. ***Current*** – Acts should be published to provide the reader with a comprehensive statement of the law incorporating all amendments.

3. ***Immediately available, in a way that makes best use of information and communications technology (ICT)*** – such comprehensive and up-to-date Acts (and all previous point-in-time versions) should be available from a reliable, ideally official, online source, be free to access and should utilise recent advances in ICT to enable users access related legal information.

4. ***Underpinned by specified standards of accessibility*** – legislative proposals should be formulated and enacted by reference to identified legislative standards.

3.03 The Commission seeks the views of interested parties as to whether these principles should form the basis for addressing the issues of accessibility of legislation in Ireland.

QUESTION 1

1(a). Do you consider that the 4 principles of accessibility tentatively identified by the Commission (that legislation should be comprehensive, current, immediately available to the public and underpinned by specified standards of accessibility) should form the basis for addressing the issues of accessibility of legislation in Ireland?

1(b). Do you consider that other principles should be taken into account in this context; and if so, please indicate what those would be.

Please type your comments (if any)

ISSUE 2

COMPREHENSIVE LEGISLATION

3.04 As has been pointed out previously in this Paper the Irish statute book comprises a vast array of legislation spanning numerous centuries from numerous different sources. At present there are approximately 3,100 public Acts and over 15,000 statutory instruments in force in Ireland. While some projects have been introduced in the past to streamline the statute book no initiative has ever been put in place to address comprehensively the volume of legislation in force. Accordingly it is desirable that consideration be given to how the volume of the statute book might be addressed and then effectively managed into the future. Examples of initiatives adopted in other jurisdictions include projects to repeal or revoke obsolete legislation, projects to consolidate or codify the statute book and the provision for general repeal or revocation provisions to manage the statute book on an ongoing basis. The Commission welcomes views on the desirability of such initiatives and how they should be approached.

3.2.1 Consolidation and codification as a means of streamlining the law

3.05 In order to move towards a position where Ireland can achieve one Act per subject it is important to consider how the backlog of existing unconsolidated legislation might be addressed. Projects to streamline the law have the capacity to make the statute book more accessible. For example the *Taxes Consolidation Act 1997* consolidated 40 different Acts. It also reduced the number of provisions to 1,104 sections and 32 Schedules from the pre-1997 position of more than 2,000 separate sections and 50 related Schedules. However, notwithstanding the high volume of legislation in force in Ireland, no coordinated plan for the streamlining of Irish law has been adopted in the history of the State. Consolidation has only been implemented as individual projects[100] at the responsible Department's own initiative. It appears highly desirable that a coordinated plan is put in place to streamline the statute book. The two common methods of streamlining legislation are codification and consolidation.

[100] For recent such examples see the *Companies Act 2014*, *Value-Added Tax Consolidation Act 2010*, *Land and Conveyancing Law Reform Act 2009*, *Social Welfare Consolidation Act 2005*, *Capital Acquisitions Tax Consolidation Act 2003*, *Criminal Justice (Theft and Fraud Offences) Act 2001*, *Stamp Duties Consolidation Act 1999*, *Non-Fatal Offences against the Person Act 1997* and *Taxes Consolidation Act 1997*.

a) Codification

3.06 While codification attracts significant discussion there is no one universally agreed definition of codification. It can entail full codification of the law, involving the systematic arrangement of all law under its respective subject headings. Such an approach involves the logical ordering of provisions within each code and includes the codification of all common law as well as legislation (statute law). As such it then becomes the exclusive source of law in respect of that field of law. A statutory codification by contrast involves the systematic arrangement of all statute law in a field under one heading. It does not, however, codify common law. Codification may take the form of a positive law codification, involving the enactment of a new Code to replace the existing law in a particular field, or may be administrative, involving the systematic restatement of existing law without actually replacing that law.

b) Consolidation

3.07 In contrast to codification, consolidation tends to be more limited in its scale. It involves the formal amalgamation of related legislation into a single Act and the incorporation of all subsequent amendments. It does not however necessarily hold the status of being the exclusive source of law in a field. An example of the distinction can be seen in the criminal sphere. As will be seen in the consideration of criminal law below a number of consolidations have occurred in recent years arranging particular branches of criminal law into one statute. In this regard they form "mini-codes" within the broader field of criminal law.

3.2.2 Potential for a systematic consolidation or codification project

3.08 As can be seen from Part 2 of this Issues Paper, above, a number of states have successfully undertaken projects systematically to codify or consolidate the law. As a consequence these states have been able to maintain their legislative stock in a relatively accessible form. Accordingly such a project merits consideration in Ireland also.

3.09 While a number of successful individual codification and consolidation projects have been undertaken in the past the Commission is mindful that a systematic codification or consolidation project may not be seen to be practicable. Such exercises involve significant ongoing commitment over an extended period. Given the scale of work that would have to be undertaken such a project would be unlikely to be seen as achievable. As such any plan for consolidation may have to be more focused in its application. Nonetheless the Commission believes that the ultimate objective should be the eventual consolidation of all legislation with a view to achieving the principle of one Act per subject and their ongoing maintenance in an up to date form after that.

3.2.3 Phased programmes of consolidation

3.10 As discussed above any project seeking to streamline the law of Ireland will likely have to be targeted in its application. Thus, phased consolidation programmes merit consideration. Such a project would not necessarily require the same level of commitment of resources but could still yield positive outcomes, as is done in New Zealand under its *Legislation Act 2012*. Under such an approach a body designated with responsibility for undertaking phased programmes would be required to publish periodically programmes of legislation consolidation. Such programmes of consolidation could be required to be undertaken over defined periods and could seek to address broad subject areas of the law. This would enable those responsible for such a programme, after public consultation with interested parties, to identify the subject areas where consolidation would be of most assistance.

3.11 Having regard to some of the examples of legislation discussed in Part 1 where difficulties of accessibility have been identified, a programme of consolidation could include areas such as:

- sexual offences legislation
- firearms legislation
- employment legislation
- family legislation
- road traffic legislation.

3.12 Any consolidations would allow for all amendments to be incorporated into one Act, for 2 or more Acts to be amalgamated, for inconsistencies to be addressed and for the removal of obsolete provisions. Such consolidations could have special procedures to facilitate accelerated enactment. The ultimate objective of such a plan would be an entirely consolidated statute book with one Act per subject matter being maintained up to date: this matter is discussed in Issue 3, below.

3.13 By way of example, in New Zealand on foot of a recommendation in the New Zealand Law Commission's *Report on the Presentation of New Zealand Statute Law*[101] provision is made for ongoing phased consolidation programmes in its *Legislation Act 2012.* The 2012 Act provides for the preparation of a 3 year consolidation programme that is presented to its Parliament. In essence, these programmes provide for the enactment of Acts that, apart from necessary technical changes, do not involve a change to the effect of the law. Once a specific consolidation Bill is drafted section 33 of the 2012 Act provides for a certification of the Bill by the Attorney General that no substantive change in the law is involved, after which a truncated parliamentary procedure is used to achieve accelerated enactment. The first revision programme under the 2012 Act was presented to the House of

[101] New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (2008) NZLC R104.

Representatives in 2014 which covers the period 2015-2017[102]. The first Bill under this programme[103] was introduced to the New Zealand Parliament in 2016.

3.2.4 Designated body

3.14 Any planned project of consolidation would require a responsible body to be designated for the purpose of the delivery of the project. Particular options could include designating the duty to a specific body such as the Office of Parliamentary Counsel to the Government (OPC) or the Law Reform Commission which would be responsible for undertaking consolidation or else allocating the duty to responsible line Departments. Designating a specific body is the approach used in many jurisdictions. Thus, in New Zealand the OPC carries out this function, while the Law Commission of England and Wales undertakes Consolidation Bill exercises from time to time. Similarly, a designated body carries out this task in many Canadian jurisdictions[104] as well as in the United States[105] and ensures that consolidation initiatives can proceed independently. The Commission is conscious that any consolidation project would inevitably have to compete for priority with other legislative projects as part of a Government's ongoing legislative programme. Where such conflicts emerge it may be unlikely that consolidation projects would retain priority. As such the Commission is seeking views as to whether it may be preferable to confer this function on a body that is specifically dedicated to carrying out consolidation projects.

3.2.5 Land and conveyancing and criminal law codification projects

3.15 While full codification of Irish law may be seen as impracticable, targeted codification projects have been successfully undertaken. For example the *Land and Conveyancing Law Reform Act 2009*[106] succeeded in bringing together virtually all previous law relating to land and conveyancing law. The 2009 Act involved codification in that it placed many common law rules concerning estates and interests in land on a statutory footing for the first time, and also consolidated (with reforms) much existing legislation, notably concerning conveyancing. The 2009 Act also repealed over 150 of the pre-1922 Acts that had been retained in force by the *Statute Law Revision Act 2007.*

3.16 Such codification projects should continue on identified appropriate areas of law. For example, the Commission seeks views as to whether work on the codification of criminal law should be completed. The Criminal Law Codification Advisory Committee was established under Part 14 of the *Criminal Justice Act 2006* on foot of the 2004

[102] See *http://www.pco.parliament.govt.nz/revision-programme-2015-to-2017/*.
[103] *Contract and Commercial Law Bill 2016*; this Bill repeals and replaces 11 Acts dating back to 1908 and provides a consolidated statutory framework in this area.
[104] For example see the analysis of consolidation projects in Canada in Part 2 of this Paper.
[105] See the analysis of the work of the Office of Law Revision Counsel at paragraph 2.17.
[106] The 2009 Act followed from the Commission's 2005 *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

Report *Codifying the Criminal Law.*[107] The Committee was established with the aim of overseeing a programme of codification of Irish criminal law. It published a draft *Criminal Code Bill* in 2010.[108] The draft Bill comprises 6 Parts. Part 1 of the draft Bill, the General Part, sets out general principles of criminal law, such as the fault element (*mens rea*) and act element (*actus reus*) of crimes, general defences (legitimate defence, provocation, necessity and duress) and inchoate liability (attempt, conspiracy and incitement).[109] Part 2 of the Bill was intended to include a codification of homicide offences.[110] Parts 3 to 6 of the Bill sought to codify those offences that had already been consolidated into 4 "mini-codes," namely criminal damage,[111] public order offences,[112] non-fatal offences against the person[113] and theft and fraud offences.[114] It was intended that ultimately all offences would be codified in accordance with the template set out in the draft Bill. Although the draft Bill has not yet been enacted, the question remains as to whether it is a suitable model to consider in the context of improving accessibility of criminal law.

3.2.6 Ongoing maintenance of stock of legislation

3.17 Assuming that a programme of consolidation is to be undertaken, it would appear necessary to ensure ongoing maintenance of the stock of legislation. In recent decades a number of initiatives have been taken in other jurisdictions which have assisted authorities in providing in part for an ongoing process of review and rationalisation of the legislative stock. Such initiatives have, for example, included automatic repeal provisions for spent or obsolete provisions as well as sunsetting provisions for secondary legislation and non-commenced primary legislation. The Commission considers that an effective plan for ongoing maintenance of legislation merits consideration as a means of ensuring that in the future the only law in force is substantive legislation which conforms to the 4 principles tentatively identified at Issue 1, above.

[107] Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (2004), available at http://criminalcode.ie/.
[108] Criminal Law Codification Advisory Committee, *Draft Criminal Code Bill and Commentary*, available at http://criminalcode.ie/.
[109] The Committee indicated that, to complete these elements of Part 1, it was likely to draw on the Commission's *Draft Criminal Law (Defences) Bill* in its 2009 *Report on Defences in Criminal Law* (LRC 95-2009) and the *Draft Criminal Law (Inchoate Offences) Bill* in its 2010 *Report on Inchoate Offences* (LRC 99-2010).
[110] Part 2 was not developed to draft form, but the Committee indicated that it was likely to draw on the Commission's *Draft Homicide Bill* in its 2008 *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008).
[111] *Criminal Damage Act 1991*.
[112] *Criminal Justice (Public Order) Act 1994*.
[113] *Non-Fatal Offence Against the Person Act 1997*.
[114] *Criminal Justice (Theft and Fraud Offences) Act 2001*.

3.2.7 Automatic repeal or revocation provisions

3.18 Ongoing maintenance of our stock of legislation in force could be significantly assisted by providing for the ongoing automatic repeal and revocation of identifiable classes of legislation as they become spent or obsolete into the future. Current legislative practice involves a significant amount of legislation the effect of which is limited either for a specific period or to a specified effect on another piece of legislation. Once such a period comes to an end or the specified effect occurs the legislation is spent. A provision automatically repealing or revoking such legislation would facilitate the retention of a current law database containing only substantive laws in force. Such provisions could, for example, include:

- automatic repeal of spent Appropriation Acts
- automatic repeal and revocation of amending provisions in legislation as well as purely amending Acts or instruments
- automatic revocation of commencement orders
- automatic revocation of establishment orders

3.19 Through an integrated legislative management system, commencement orders can be linked to their enabling Act. Accordingly such repeal or revocation could be automatically triggered on the coming into force of such provisions.

3.20 Where provision for automatic repeal or revocation of legislation is made a consequential provision making specific savings for the repealed legislation's effects could also be made.

3.21 An example of such a provision and the consequential savings is section 89 of the Australian Capital Territory *Legislation Act 2001*, which sets out types of legislation that are automatically repealed or revoked in certain circumstances. Section 89 of the 2001 Act provides:

> "(1) An amending law is automatically repealed on the day after—
>
> (a) all of its provisions have commenced; or
>
> (b) the last of its provisions that have not commenced are omitted or cannot commence
>
> ...
>
> (2) An appropriation Act is automatically repealed on the last day of the financial year for which it makes appropriations.
>
> (3) An amending provision of a law is automatically repealed immediately after all of the amendments and repeals made by it (or to which it relates) have commenced.
>
> (4) A commencement provision of a law is automatically repealed immediately after all of the provisions of the law have commenced.

(5) A commencement notice is automatically repealed on the day after the day, or the last of the days, fixed or otherwise determined by the notice for the commencement of a law.

(6) If an instrument making, or evidencing, an appointment (including an acting appointment) is a legislative instrument, the instrument is automatically repealed—

(a) on the day the appointment ends; or

(b) if the instrument makes 2 or more appointments that end on different days, on the day the last-ending appointment ends."

3.22 The automatic repeals provided for in section 89 of the 2001 Act do not affect the effect of the repealed legislation as general savings for such effects are provided by sections 86 to 88 of the Act which provide:

86 Repealed and amended laws not revived on repeal of repealing and amending laws

(1) If a law (the first law) is repealed by another law (the other law), the first law is not revived only because the other law is repealed

...

(2) If a law (the first law) is amended by another law (the other law), the continuing operation of the amendments made by the other law is not affected only because the other law is repealed and, in particular, the first law is not revived in the form in which it was in before the amendments took effect only because of the repeal

...

(3) This section does not limit any other provision of this chapter and is in addition to any provision of the law by which the repeal is made

...

87 Commencement not undone if repealed

(1) If a provision of a law providing for the commencement of the law is repealed after the law has commenced, the repeal of the provision does not affect the continuing operation of the law

...

(2) If a commencement notice providing for the commencement of a law is repealed after the law has commenced, the repeal of the notice does not affect the continuing operation of the law

...

(3) This section does not limit any other provision of this chapter and is in addition to any provision of the law by which the repeal is made

...

88 Repeal does not end effect of transitional laws etc

(1) The continuing operation of a transitional law or validating law is not affected only because the law is repealed.

(2) Subsection (1) does not apply to a law that is a transitional law or validating law because of modifications that it makes to another law.

(3) If a law (the savings law) declares a law (the declared law) to be a law to which this section applies—

(a) the effect of the declared law does not end only because of its repeal; and

(b) the effect of the savings law does not end only because of its repeal.

(4) A declaration may be made for subsection (3) about a law whether or not the Act is a law to which subsection (1) applies.

(5) A declaration made for subsection (3) about a law does not imply that, in the absence of a declaration about it, another law is not a law to which this section applies.

(6) This section does not limit any other provision of this chapter and is in addition to any provision of the law by which the repeal is made."

3.2.8 Ongoing review of stock of statutory instruments

3.23 As stated above at paragraph 1.33, the Commission's draft Classified List of In-force Acts and Statutory Instruments, published in May 2016, has identified a significant number of statutory instruments that have not been formally revoked but which are probably obsolete. Hundreds of statutory instruments are made every year[115]. Many of these subsequently cease to have any effect but nonetheless remain in force giving rise to potential confusion. Accordingly, it appears advisable that a structured process be put in place to ensure the ongoing review of our stock of secondary legislation. Such a plan could, for instance, simply involve a requirement for a Department or other body with the power to make statutory instruments to undertake periodic audits of secondary legislation under its remit[116] and identify an action plan for streamlining the stock of statutory instruments.

3.24 Another approach that could be used is the creation of a general power to revoke spent statutory instruments. This would facilitate ongoing review and revocation of obsolete statutory instruments. An example of such a power of revocation is section 48E of the Australian Commonwealth *Legislation Act 2003* which provides a general power to revoke statutory instruments, provided that the Australian Attorney-General is satisfied that the statutory instrument is spent or is no longer required.

[115] For example 642 instruments were made in 2015.

[116] In this regard the work of the Commission in publishing in May 2016 a draft Classified List of In-Force Acts and Statutory Instruments (see paragraph 1.33) can be considered to have already done much of the groundwork. This List not only identifies all secondary legislation in force but also identifies responsible Departments in relation to parent Acts and their associated secondary legislation.

QUESTION 2

2(a). Should there be a consolidation, as considered at paragraphs 3.10 to 3.13, of the statute book?

2(b). If so, how should such consolidation be approached?

2(c). Who should be responsible for such consolidation projects?

2(d). Should the criminal codification project, considered at paragraph 3.16, be completed?

2(e). Should there be any provision for general repeals or revocation of legislation?

2(f). If so what provisions should be made?

2(g). Should there be provision for the ongoing review of the stock of secondary legislation in force? If so, how should this be approached?

Please type your comments (if any)

ISSUE 3

MAINTAINING CONSOLIDATED LEGISLATION IN A COHERENT FORM

3.25 Another important consideration is how legislation can be maintained in a coherent state once it has been consolidated. While projects to streamline the law can succeed in bringing the law together, the continuously evolving nature of the law means that any consolidated law will continue to be subject to regular amendment. Failure to implement effective systems to ensure that such consolidated law remains in a coherent state risks degradation.

3.3.1 Duty to provide revised versions of legislation

3.26 The first issue in this context is whether there should be a statutory duty to provide revised versions of legislation, where amended. As noted in Part 1 of this Issues Paper, a Government decision in 2006 conferred functional responsibility on the Commission to prepare and publish administrative consolidations of Acts. On foot of this decision, at the time of writing (December 2016), the Commission now publishes and maintains up to date over 290 Revised Acts on its website, comprising all amended post-2006 Acts (except Finance and Social Welfare Acts) and over 130 of the most-used pre-2006 Acts.

3.27 In other jurisdictions, such work is carried out under a statutory duty,[117] which has the benefit of ensuring that legislation continues to be maintained in an up to date form into the future, and the Commission welcomes views as to whether this would be appropriate.

3.3.2 Extent to which revised versions could update legislation as enacted

3.28 Additionally, the exact extent to which revised versions could update the text of the legislation as enacted could be given a statutory basis. A number of common law jurisdictions refer to this as the issue of editorial powers,[118] which allow the revised versions to ensure that an Act, in revised form, is maintained up to date. Of particular relevance to keeping Acts current, editorial powers generally include the power to update references to bodies or persons where their title has changed or where

[117] For example section 6(5) of the *Legislation Act 2012* in New Zealand.

[118] For example see Part 2 subpart 2 of the *Legislation Act 2012* (New Zealand), Part V of the *Legislation Act 2006* (Ontario) and Chapter 2 Part 2 Division 3 of the *Legislation Act 2003* (Australian Commonwealth); a fuller analysis of editorial powers in many common law jurisdictions is contained in the New Zealand Law Commission's *Report on Presentation of New Zealand Statute Law* (NZLC R104,2008), at pages 93-95.

responsibility has been transferred to a new body or person. Additional powers could also include a power to update references to legislation which has since been repealed and re-enacted, a power to update references to a description of a date to the actual date[119] and more general powers to update the style and format.

3.29 Any editorial powers could not impinge on Article 15.2.1° of the Constitution, which confers on the Oireachtas the sole and exclusive power to enact legislation. Thus, the editorial power could be limited to situations where no conflict with the original text emerges. Where changes are made it may also be necessary to indicate that fact at a suitable place in the revised version of legislation. In the event of any apparent conflict between the text of legislation as originally enacted along with any subsequent amendments and the text of revised legislation, the original text would prevail. An example of provisions setting down editorial powers is provided below.

Example – Ontario

Editorial powers in relation to Revised Acts of Ontario legislation are governed by section 42(2) of the *Legislation Act 2006*, which allows for the following changes:

> "1. Correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature.
>
> 2. Alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation.
>
> 2.1 Make such minor changes as may be required to ensure a consistent form of expression.
>
> 2.2 Make such minor changes as may be required to make the form of expression of an Act or regulation in French or in English more compatible with its form of expression in the other language.
>
> 3. Replace a form of reference to an Act or regulation, or a provision or other portion of an Act or regulation, with a different form of reference, in accordance with Ontario drafting practices.
>
> 4. Replace a description of a date or time with the actual date or time.
>
> 5. After a bill has been enacted, replace a reference to the bill or a provision or other portion of the bill with a reference to the Act or provision or other portion of the Act.
>
> 6. If a provision provides that it is contingent on the occurrence of a future event and the event occurs, remove text referring to the contingency and make

[119] For example a reference to an "establishment day" could be replaced by the actual date on which the body concerned was established.

any other changes that are required as a result.

7. Make such changes to the title of an Act or regulation, including but not limited to omitting the year from the title of an Act, as are required to accord with changes in methods of citing Acts or regulations or changes in the electronic or print presentation of Acts or regulations, and make any other changes that are required as a result.

8. If an Act or regulation provides that references to a body, office, person, place or thing are deemed or considered to be references to another body, office, person, place or thing, replace a reference to the original body, office, person, place or thing with a reference to the other.

9. When the name, title, location or address of a body, office, person, place or thing has been altered, change references to the name, title, location or address to reflect the alteration, if the body, office, person, place or thing continues under the new name or title or at the new location or address.

10. Correct errors in the numbering of provisions or other portions of an Act or regulation and make any changes in cross-references that are required as a result.

11. If a provision of a transitional nature is contained in an amending Act or regulation, incorporate it as a provision of the relevant consolidated law and make any other changes that are required as a result.

12. Make a correction, if it is patent both that an error has been made and what the correction should be. "

3.30 To the extent that items 10 and 12 in this list from the Ontario *Legislation Act 2006* appear to allow for correcting cross-references and "obvious" errors, such editorial powers may be difficult to reconcile with the sole and exclusive law making power conferred on the Oireachtas in Article 15.2.1° of the Constitution. In this respect, the Supreme Court has also indicated a marked reluctance to correct even "obvious" errors in legislation.[120]

[120] See, for example, *The State (Murphy) v Johnson* [1983] IR 235 and *The State (Rollinson) v Kelly* [1984] IR 248, where the Supreme Court held that the courts would be usurping the exclusive law making role of the Oireachtas under Article 15.2.1° of the Constitution if they were to correct even what appeared to be "obvious" errors in legislation. The Supreme Court held that the appropriate solution to finding such errors was for the Oireachtas to enact amending legislation: a similar approach may be appropriate if any such errors were to be discovered in the course of preparing revised versions of legislation.

QUESTION 3

3(a). Should there be a duty to produce revised versions of legislation where amended?

3(b). Should revisers have any editorial powers where such editorial changes do not affect the substance of the legislation?

Please type your comments (if any)

ISSUE 4

MAKING LEGISLATION IMMEDIATELY AVAILABLE TO THE PUBLIC, INCLUDING BY MAKING BEST USE OF ICT

3.31 As noted above in Part 1 of this Issue Paper a number of initiatives taken in Ireland in recent decades have improved online accessibility of legislation. This includes the publication of legislation online on the eISB, the availability on the eISB of the Legislation Directory, the Legislative Observatory of the Houses of the Oireachtas, and the publication of Revised Acts on the Commission's website. In this context, the Commission seeks views on how these initiatives can be further developed to make the best use of Information and Communications Technology (ICT).

3.32 As was noted at the outset of this Paper a person is presumed to know the law. Consequently, a person may be subject to provisions of a law regardless of whether he or she is aware of the law's contents, or even its existence. Because of the potentially unjust nature of this principle there is an onus on the state to ensure that legislation is immediately available to the public. As O'Donnell J noted in *Minister for Justice v Tobin*[121] in a modern digital age the ideal situation whereby legislation is immediately available to those affected by it is decidedly more realisable than when paper printing was the sole means of publication.

3.33 Accessible legislation in the digital age necessarily requires that it should be available online as soon as possible. The importance of using ICT has been recognised by the Council of Europe in its 2001 *Recommendation on the delivery of court and other legal services to the citizen through the use of new technologies.*[122] The 2001 Recommendation includes a number of general principles concerning the online availability of legislation, including that legislation should be available free online from an official source, that it should be available both in its as-enacted form and in its as-amended, revised, form, that it should include point-in-time information[123] and that it should be authenticated. While the 2001 Recommendation does not have the status of a Council of Europe Convention, the State is nonetheless obliged to report to the Committee of Ministers on its ongoing progress in implementing these principles.

[121] [2012] IESC 37, [2012] 4 IR 147, at page 324.

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

[123] For a consideration of point in time legislative information see paragraphs 2.27-2.34, above.

3.4.1 The legal status of online legislation, including Revised Acts

3.34 The question of immediately available legislation requires, in the first instance, a consideration of how legislation should be published and what status different sources of legislation should have. At present, the *Documentary Evidence Act 1925* provides that only the printed, hard copy, of an Act published by the Stationery Office constitutes *prima facie* evidence of the text in the Act.[124] Traditionally the Stationery Office versions would have been the only publically available source of legislation.

3.35 In recent decades, however, the availability of the full text of Acts and statutory instruments on the eISB, the availability of PDFs of Acts on the Legislative Observatory of the Houses of the Oireachtas and the availability of Revised Acts on the Commission's website have provided free access to online versions of legislation. Reliance on these online resources has largely superseded hard copy publications. None of these online resources currently enjoys the status of the print versions of Acts published by the Stationery Office, but the Commission understands that both the text of legislation on the eISB and the text of Revised Acts are frequently cited in court. Revised Acts have also been explicitly cited in judgments,[125] and it has also been held that the website of the Houses of the Oireachtas is a public document and as such could, in the absence of evidence to the contrary, be treated as proof of what was stated on it.[126]

3.36 In contrast, as noted in Part 2 of this Paper, a number of other jurisdictions, and the EU, have enacted legislation to the effect that an online version of legislation, including online Revised Acts, constitutes the official version, rather than the print version.[127]

3.37 The Commission is conscious in this respect of the effect of Article 8 of the Constitution, which recognises Irish as the first official language of the State and English as the second official language. Article 25.4.4° requires that a translation be issued in the other official language wherever an Act is enacted in one official language only. In *Ó Beoláin v Fahy*[128] the Supreme Court held that this included a duty to make publicly available an Irish language version of an Act enacted in English.

3.38 Since the decision in *Ó Beoláin*, section 7(1) of the *Official Languages Act 2003* provides:

> "(1) As soon as may be after the enactment of any Act of the Oireachtas, the text thereof shall be printed and published in each of the official languages simultaneously."

[124] It should be noted that the *Documentary Evidence Act 1925* does not preclude the Stationery Office publishing revised Acts as semi-official statements of the law, although this has never been done.

[125] For instance see *Kerry County Council v An Bord Pleanála* [2014] IEHC 238, at paragraph 19, discussed at footnote 31 above.

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

[127] See paragraphs 2.27 to 2.34 above.

[128] [2001] 2 IR 279.

3.39 Section 62 of the *Civil Law (Miscellaneous Provisions) Act 2011* amended section 7 of the 2003 Act by adding section 7(2) into the 2003 Act, which provides:

> "(2) Subsection (1) shall not operate to prohibit the publication on the internet of an Act of the Oireachtas in one official language only prior to its printing and publication in accordance with that subsection."[129]

3.40 As amended by the 2011 Act, section 7 of the 2003 Act allows the publication in electronic format of Acts of the Oireachtas in advance of their printing and publication in both official languages. During the Oireachtas debates on the 2011 Act it was pointed out that this would ensure that a version of an Act is publicly available pending the official translation which may take a few weeks and sometimes longer. As noted in the *Tobin* case, above, prior to the changes made by the 2011 Act there had been some considerable time lag between enactment of some Acts and their availability in either print, or online, version. The then Minister for Justice stated that the change would, for example, help avoid the risk of a constitutional challenge from a person whose rights are affected by a piece of legislation which is not readily accessible, as was argued (though unsuccessfully) in the *Tobin* case. There was some opposition to the amendment to section 7 of the 2003 Act during the Oireachtas debates on the 2011 Act, in particular that this suggested a dilution of the commitment in the 2003 Act to publish Acts in the Irish language. The Minister for Justice replied that appropriate resources would continue to be given to the translation section in the Houses of the Oireachtas in order to meet the commitments in the 2003 Act. The effect of the amendment made to the 2003 Act is that Acts in the English language are usually available within days after enactment on the Oireachtas website, *www.oireachtas.ie*, and on the electronic Irish Statute Book (eISB), *www.irishstatutebook.ie*.

3.41 The Commission acknowledges the importance of the Irish language and of complying with Article 25.4.4° of the Constitution. It is also clear that the conferral of official status on the online version of legislation, including Revised Acts, could give rise to significant additional costs of translation and therefore seeks views as to whether such status should be conferred. As noted above, in practice both the text of legislation on the eISB and the text of revised Acts are actually already often used even though they do not currently have official, *prima facie*, evidential status.

[129] Seo *Acht na dTeangacha Oifigiúla 2003*, Alt 7, as Gaeilge:
"(1) A luaithe is féidir tar éis aon Acht den Oireachtas a achtú, déanfar an téacs den chéanna a chló agus a fhoilsiú go comhuaineach i ngach ceann de na teangacha oifigiúla.
(2) Ní oibreoidh fo-alt (1) chun toirmeasc a chur ar Acht den Oireachtas a fhoilsiú ar an idirlíon in aon teanga oifigiúil amháin sula ndéanfar é a chló agus a fhoilsiú de réir an fho-ailt sin."

3.4.2 Making Best Use of ICT to improve accessibility: eLegislation

3.42 Regardless of the legal status that the online versions of legislation may have in the future, as discussed immediately above, the Commission is conscious of exploring how ICT could be used to build on advances already made in accessibility of legislation. This includes enabling links between all available online legislative information and other related information resources, thus building towards what can be described as a vision of eLegislation.

a) Current eLegislation initiatives

3.43 There is no single definition of eLegislation, but it can be described briefly as using ICT to maximum effect in the production, publication and maintenance of legislation in a digital format and online. As noted in Part 2 of the Issues Paper, a number of jurisdictions have put in place significant eLegislation processes that involve an end-to-end, integrated, approach to the production, publication and maintenance of legislation online.

3.44 In this context, a number of important eLegislation initiatives have emerged in Ireland. The eLegislation Group, convened under the auspices of the Department of the Taoiseach, brings together a number of bodies involved in the legislative process (the Office of Parliamentary Counsel to the Government in the Office of the Attorney General, the Bills Office in the Houses of the Oireachtas and the Law Reform Commission) with a view to developing initiatives that are consistent with developments in other jurisdictions concerning eLegislation. In this respect, the eLegislation Group has facilitated discussions between the participating bodies in enhancements to the online publication of legislation on the eISB, the integration of the Legislation Directory on the eISB, the integration of Revised Acts on the eISB and the development of the Classified List of In-Force Legislation in Ireland.

3.45 In terms of the Commission's participation in the eLegislation Group, this has involved a number of initiatives intended to improve further the online availability of legislative information. This includes the improved use of ICT in certain aspects of the Commission's work in maintaining the Legislation Directory on the eISB as well as the Classified List of In-Force Legislation in Ireland. This has already served to speed up significantly the process of marking up effects on legislation and it is envisaged that semi-automation of the Classified List will also allow for ongoing maintenance of the Classified List into the future as legislation is enacted or repealed. The interoperability of this information is also expected to be improved by enabling hyperlinking between the Classified List and the relevant legislation. Additionally, it is envisaged that a number of improvements will be made with regard to revised Acts including their publication by section, allowing for effective hyperlinking to specific sections within the revised Act, and the insertion of hyperlinks within the text of revised Acts to other legislation. It is also envisaged that some degree of semi-

automation might be achieved with regard to the process of producing revised Acts in the future.

3.46 In addition to improvements in the process of producing revised Acts it is also envisaged that links to Revised Acts will be made available on the eISB in 2017. This represents a significant step towards the online availability of all legislative information through one online source.

3.47 Similarly, the Houses of the Oireachtas Legislative Observatory has also successfully integrated its online legislative information, enabling users to navigate between related resources with ease. The Legislative Observatory provides access to Acts, Bills, Explanatory Memoranda and Oireachtas debates. All related documents up to enactment are grouped together under the title of the Bill. The grouped information connected to the Bill is itself easily accessible from the resulting Act by hyperlink. The planned revamp of the Oireachtas website plans to further improve accessibility and navigability among other features.

b) Beyond eLegislation to linked data

3.48 Building on these initiatives, consideration could be given to how ICT might be used to provide legislative information in a more innovative manner. In particular, further connections might be developed between online sources of legislation and the various other legal and administrative sources online. Online legislative information can be considered to form part of an interconnected web of official online information. Additional sources allow for greater understanding of the law by providing additional context to the issues being considered in preliminary documents or by showing how the legislation has been subsequently enforced or applied. An effective strategy to make this interconnected web of data interoperable could significantly enhance the reader's understanding of the law.

3.49 There is a significant body of online legal and administrative information made available online by the State. Publications which might be informative to those accessing legislation include:

- reports from bodies such as the Company Law Review Group and the Law Reform Commission that have informed legislation
- general Schemes of Bills ("Heads of Bills") published by Government Departments
- relevant pre-legislative scrutiny reports by Oireachtas Committees on general Schemes of Bills
- texts of Bills from each stage of the legislative process through to enactment
- explanatory memoranda to Bills
- Oireachtas debates on Bills

- official notification of the enactment of an Act in the *Iris Oifigiúil*
- in the case of legislation necessary to give effect to an EU law requirement, the relevant European act
- international documents informing legislation such as treaties or reports of international bodies
- guidance issued by Departments or other bodies, such as the Central Bank, responsible for operating and enforcing legislation
- explanatory information on the law provided free online by organisations such as the Citizens Information Board
- case law of the courts and other decision-making bodies (such as An Bord Pleanála, the Information Commissioner, the Ombudsman, the Tax Appeals Commission) interpreting and applying the legislation concerned

3.50 The Commission therefore seeks views as to how ICT might assist users to be able to navigate this web of interconnected online information.

3.4.3 Accompanying explanations in narrative form

3.51 The process of making legislation immediately available in a user friendly form could also be augmented by the publication, alongside legislation, of appropriate explanations in narrative form of legislation. A narrative explanation would provide users of legislation with a simplified explanation of the purpose and effects of legislation in a user friendly form. In this way such an explanation could improve the ability to access the law confidently.

3.52 As part of its 2000 Report *Statutory Drafting and Interpretation: Plain Language and the Law*[130] the Commission explored the role of explanatory memoranda as an aid to interpretation. As part of this Report it recommended that explanatory memoranda[131] should be updated to reflect amendments made during a Bill's passage through the Oireachtas. It also recommended that explanatory memoranda should be made available online. If implemented this would have greatly facilitated users to understand the law. However, although a number of recommendations contained in this Report were subsequently implemented,[132] explanatory memoranda are not generally updated as a Bill is amended[133] and they are not generally made available alongside Acts on the eISB, which limits their usefulness.

[130] LRC 61-2000.

[131] Explanatory memoranda are summaries of legislation published with some Bills at the time of their introduction into the Oireachtas. Their purpose is to act as a guide to the Bill and provide information for members of the Oireachtas.

[132] Including the online publication of explanatory memoranda on the Oireachtas website.

[133] It should be noted that a Report entitled *Explanatory Memoranda: An OPC Perspective* was forwarded to the Office of the Chief Whip with a recommendation included for publication post-enactment of revised Explanatory Materials; this has not been adopted as standard practice, however.

3.53 It may be useful to consider again whether clear narrative explanations of legislation should be published alongside legislation and how this should be done. Two examples of jurisdictions which provide such explanatory material in different forms are the United Kingdom and the Australian Commonwealth which are set out below.

Example 1 – United Kingdom
In the United Kingdom explanatory notes which are produced on the introduction of a Bill are revised throughout the legislative process to take account of any amendments. The explanatory notes as fully revised on enactment are published along with the Act on the State's online database[134] with section by section explanations of the effect of provisions. Such an approach, however, only revises explanatory notes up to enactment and does not amend explanatory notes where legislation is subsequently amended.

Example 2 – Australian Commonwealth
In Australia the use of simplified outlines produced within the text of the legislation itself is favoured as the means of making legislation clearer for users. Such outlines have been in use in Acts since 1991. They appear at the beginning of each Act and Part of an Act and encompass explanations in concise narrative form of the effect of each Act and Part thereof. The standards of form and content of such outlines are set down in Drafting Direction No. 1.3A[135] of the Office of Parliamentary Counsel's Drafting Directions series. The aim of the outline according to this Direction is that "each educated reader (whether with or without legal training or specialist knowledge) can easily gain a general understanding of what the legislation is about".[136] Such an outline does not form part of the law but is for information purposes only. Section 15V(5)(b) of the *Legislation Act 2003* allows for changes to simplified outlines as well as the insertion or removal of outlines as part of the editorial powers in the course of a revision.

[134] *www.legislation.gov.uk*.

[135] Available at *http://www.opc.gov.au/about/docs/drafting_series/DD1.3A.pdf.* This Direction also contains a number of sample outlines which readers may find useful.

[136] At paragraph 16.

3.4.4 Classified List of Legislation and an Index to Legislation

3.54 Efforts to improve the delivery of legislation could also consider how best to maximise navigability of legislation. At present the Irish statute book is ordered on the basis of chronological order of enactment, from 1204 (the *Fairs Act 1204*) to the present. Each piece of legislation is numbered in order of its enactment within a particular year. This chronological order in turn is currently used as the basis for arranging legislation online on the electronic Irish Statute Book (eISB). As a result, users will invariably need to know what they are looking for in advance or will have to be able to rely on the use of general search terms in the eISB's search engine. Two possible ways to address this problem would be to publish legislation in a classified, subject-based, format and to revive the previous practice of publishing an index to Irish legislation. Such a classified list of legislation might be compared to the table of contents found at the beginning of a book, while an index of legislation could be compared to a well-developed subject index found at the end of a book (whether a print book or an ebook).

a) The Commission's Classified List of Legislation

3.55 As stated above, legislation is currently arranged in order of enactment. Presenting legislation in a coherent logical manner facilitates the navigation of the entire stock of in-force legislation enabling users to access legislation with greater ease.[137] Arrangement of legislation by subject-matter could significantly improve such navigability. In its 2010 *Consultation Paper on a Classified List of Legislation in Ireland*[138] the Commission published a classified list of 2,000 in-force Acts of the Oireachtas (and over 100 pre-1922 Acts) under 36 subject headings. Since 2010, the Commission has published, and updated twice yearly, a *Classified List of In-Force Acts*, taking account of newly-enacted legislation and the repeal of legislation. The 36 headings in the Classified List have taken account of: (a) some near-universal and conventional headings, such as *Civil Liability*, *Commercial Law*, *Criminal Law* and *Taxation*; (b) areas of responsibility of Government Departments in Ireland; (c) headings unique to Ireland, such as Heading 21, Irish Language and Gaeltacht; and (d) headings used in comparable classified compilations of Acts in other common law jurisdictions, notably the United States of America (both at federal and state level). As noted above, in 2016, the Commission expanded this list by publishing for the first time a draft *Classified List of In-Force Acts and Statutory Instruments*. [139] In these Lists, all legislation in force is listed by category under 36 separate subject headings. This structure could be used in addition to the long-established chronological format in the eISB to present legislation online. Such an approach could significantly enhance the navigability of the stock of Irish legislation.

[137] New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (2008) NZLC R104, at page 35.
[138] *Consultation Paper on a Classified List of Legislation in Ireland* (LRC 62-2010).
[139] See footnotes 62 and 64 for links to the most recent versions of the Classified Lists.

b) Index to legislation

3.56 Prior to the establishment of the State in 1922, the Statute Law Committee[140] published and updated on a regular basis a *Chronological Table and Index of the Statutes*.[141] After the State was established, a comparable *Index to the Statutes With Tables* was published from time to time between 1922 and 1985.[142] These publications comprised 2 main elements: (a) a Chronological Table of Acts, which tracked all amendments to all Acts, and which the Commission re-named the Legislation Directory in 2007 when it was given functional responsibility for this;[143] and (b) a detailed subject-matter Index to Acts. No *Index to the Statutes* has been published in Ireland since 1985,[144] but such Indexes continue to be published in a number of other common law jurisdictions, including Australia.[145]

3.57 The question arises as to whether, in a digital era when legislation is now available online in a database such as the electronic Irish Statute Book (eISB), the previous role played by a detailed subject index has been made redundant by the availability of a search engine facility or through the use of data analytical tools. It may be argued, however, that while a search engine facility or data analytics may be able to identify instances of any designated words or phrases searched for, it may not (yet) be able to suggest alternative words or phrases carrying the same meaning. An index is, at minimum, a logical arrangement of entries designed to assist users in locating a specific document in a collection by reference to identified terms.[146] An index to legislation could provide users with not only a subject-based guide to all legislation but could also identify significant concepts, terms and phrases located in the text of legislation, listing these concepts, terms and phrases alphabetically within subject headings and subheadings and identifying the legislation in which they arise. Such an index could also link related concepts thus making it easier for users to navigate through the listed subject headings. The inter-relation of concepts within such a

[140] As noted in Part 1 of the Issues Paper, the Statute Law Committee was also responsible for the publication of Revised Acts.

[141] The 37th edition of the *Chronological Table and Index of the Statutes*, published in 1922, was published in 2 volumes. Volume 1 comprised the *Chronological Table* – which was renamed the Legislation Directory in 2007 when the Commission was given functional responsibility for its maintenance, and which is now an integrated element of the electronic Irish Statute Book (eISB)– and this tracked all amendments to Acts passed in Westminster up to 1921, including Acts that applied to Ireland. The Commission used this to compile entries in the Legislation Directory for the pre-1922 amendments to the 1,364 pre-1922 Acts retained in force by the *Statute Law Revision Act 2007*. Volume 2 of the 37th edition comprised the *Index of the Statutes*, which also indexed all Acts passed in Westminster up to 1921.

[142] The last edition of the *Index to the Statutes With Tables* covered the period from 1922 to 1985. Like its pre-1922 predecessor, it comprised 2 main elements, a Chronological Table of Acts of the Oireachtas enacted from 1922 to 1985 (which tracked all amendments to Acts of the Oireachtas and amendments made since 1922 to pre-1922 Acts) and a detailed subject-matter Index to Acts of the Oireachtas enacted from 1922 to 1985. The *Index to the Statutes With Tables* did not track amendments made prior to 1922 to pre-1922 Acts that remained in force, nor did it contain a subject-matter index to such pre-1922 Acts that remained in force (although this information could be found in the 37th edition of the *Chronological Table and Index of the Statutes* and as noted in footnote 141, above, was subsequently used by the Commission).

[143] As noted above, the Legislation Directory is now an integrated element of the electronic Irish Statute Book (eISB).

[144] A *Chronological Tables of the Statutes 1922-1995* was published in 1996, thus continuing the first element of the *Index to the Statutes With Tables*, but it did not continue the second element, the *Index to the Statutes*. The *Chronological Tables of the Statutes 1922-1995* became the basis for the Chronological Tables element of the electronic Irish Statute Book (eISB), which was as noted above renamed the Legislation Directory.

[145] For a fuller analysis of the use of Indexes in other jurisdictions see the New Zealand Law Commission *Issues Paper on Presentation of New Zealand Statute Law* (2007) NZLC IP2, at pages 65-75.

[146] See International Organization for Standardization, *Information and documentation – guidelines for the content, organization and presentation of indexes* (ISO 999, 1996).

subject index could allow users to navigate legislation in a manner that a search engine facility may not. Accordingly the production and maintenance of a subject index to Irish legislation merits consideration as an aid to navigability

3.4.5 Integrating references to EU law

3.58 As noted earlier in this Issues Paper a particular challenge as to the provision of comprehensive legislative information in one source is European Union law which forms part of Irish domestic law. EU Directives are implemented through national implementing legislation, sometimes in the form of an Act and sometimes in the form of a statutory instrument, and they are therefore included in the body of legislation published on the eISB.[147] However, an increasing volume of EU law takes the form of an EU Regulation, such as the 2016 EU General Regulation on Data Protection.[148] Since an EU Regulation has "direct effect" under EU law, it becomes law without the need for an implementing Act or Statutory Instrument and is therefore not immediately visible or accessible to Irish users of the eISB. The Commission welcomes views as to how this challenge might be addressed.

[147] It should, however, be noted that where a Directive has not been transposed, or has not been transposed correctly, such a Directive may still have direct effect in national law against state bodies (see *Van Duyn v Home Office* [1974] E.C.R. 1337); failure to fully implement an EU law requirement may also give rise to a claim against the State under the principle of State Liability (see *Francovich v. Italy* [1991] ECR I-5357).

[148] Regulation (EU) 2016/680.

QUESTION 4

4(a). What legal status, if any, should online versions of legislation, including Revised Acts, have?

4(b). How should online legislation interact with other relevant online information (such as relevant Reports, guidance, case law, etc.)?

4(c). Should legislation be accompanied by simplified narrative explanations of its provisions and, if so, how should this be approached?

4(d). How should official publications of legislation be arranged?

i. chronologically

ii. by subject matter

iii. both

iv. other?

4(e). If the answer to (d) is paragraph (ii) (that is, by subject matter) should the Commission's Classified List of In-Force Legislation be used as the basis for arranging legislation online?

4(f). Should there be an official subject index to Irish legislation?

4(g). Should an online legislation database also provide access to information on relevant EU law?

Please type your comments (if any)

ISSUE 5

STANDARDS TO UNDERPIN ACCESSIBILITY OF LEGISLATION

3.59 In order to ensure that legislation is produced in a manner that conforms to identified principles of accessibility, it is also important to consider how standards can be improved and maintained at each stage of the legislative process. In particular, it is helpful to consider to what extent current procedures for producing and amending legislation enable, or prevent, the development or maintenance of comprehensive legislation on a subject in one Act. In recent years a number of jurisdictions have come to understand the importance of putting in place an effective regime for maintaining standards in the legislative process. While initiatives have varied from jurisdiction to jurisdiction they can be seen to have a shared objective, namely to improve the processes in the production and enactment of legislation with a view to ensuring that legislation that is ultimately enacted is accessible and is of the highest quality.

3.60 A comprehensive approach to legislative standards should, in order to be effective, provide identifiable standards against which conformity can be measured at all relevant phases in the legislative cycle from policy formulation through to enactment and provide parameters against which legislation can be reviewed once enacted. Given the anticipated increased prevalence of legislation arising from Private Members' Bills,[149] it is highly desirable that all legislative proposals, regardless of their source, be of the highest standard possible.

3.61 The maintenance of high legislative standards seeks to ensure that the end product in a legislative process is a piece of legislation that is clear and accessible as to its purposes and effects, interacts appropriately with the rest of the statute book and in respect of which all legal and technical matters have been adequately addressed, thus avoiding unintended consequences and averting premature degradation.

3.62 Maintenance of such standards can be achieved through a number of initiatives including:

- developing guidelines or checklists for policymakers regarding the legal and technical issues at the pre-drafting stage

[149] See the *Final Report of the Sub-Committee on Dáil Reform* (2016) for discussion of the increased role anticipated for the enactment of Private Members Bills, with the assistance of the Office of Parliamentary Legal Adviser to the Houses of the Oireachtas.

- revising and maintaining guidance currently in existence, such as that in use by the Office of Parliamentary Counsel to the Government (OPC) in the Office of the Attorney General
- developing guidelines for the form and content of explanatory materials
- arranging for the publication of all guidance issued
- undertaking high level interaction and advice at a pre-drafting stage on legislative design and quality
- facilitating effective scrutiny of legislation through appropriate disclosures
- developing procedures for conducting effective post-legislative scrutiny
- assigning of responsibility to promote and maintain standards to a responsible body

3.63 In this context, the Commission seeks views on whether a body or bodies should be designated with responsibility for setting down and monitoring the type of legislative standards discussed above, whether such standards could be addressed earlier in the legislative cycle and how effective scrutiny of legislation might be facilitated. The Commission also seeks views on whether the relevant provisions on legislative practice should be consolidated into a Legislation Act.

3.5.1 Responsible body

3.64 At present there is no body designated as being responsible for setting down and monitoring the type of legislative standards discussed above. As a consequence, with the exception of the drafting practice and conventions of the Office of Parliamentary Counsel to the Government (OPC), guidelines prepared and published by the Revenue Commissioners[150] and some limited guidance on internal Government consultation published in the *Cabinet Handbook*,[151] there is limited oversight of legislative standards. This is in contrast to recent developments in some jurisdictions, where particular bodies are tasked with maintenance of standards at particular phases.

[150] Revenue Legislation Services, *Guide to the Legislative Process* (2016), available at http://www.revenue.ie/en/about/publications/other.html#guides. This was produced to assist in the production of taxation legislation and provides a detailed guide to all phases of the legislative process.

[151] Department of the Taoiseach, *Cabinet Handbook* (2007), available at http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2007/CABINET_HANDBOOK2007.pdf.

3.65 An example of a body specifically established with a view to establishing and maintaining legislative standards is the Legislation Design and Advisory Committee (LDAC) in New Zealand. This is a dedicated internal Government Committee tasked with overseeing standards at the pre-drafting stage by producing guidance for policy makers, making submissions to Parliamentary Committees regarding compliance with the guidance set down and engaging in high level interaction and advice with policy makers on legislative design and quality.[152]

3.66 In other jurisdictions the responsible drafting office will often be involved in setting down general legislative standards. For example in the Australian Commonwealth the Office of Parliamentary Counsel plays a significant role in identifying standards in respect of each phase of the process, setting down detailed guidelines for policy makers and drafters alike.[153] Similarly since 2013 the Office of Parliamentary Counsel in the United Kingdom has been driving the Good Law initiative which has sought to look at all aspects of legislative practice with a view to improving public access to the law.[154]

3.67 The maintenance and enforcement of effective legislative standards could be enhanced by the establishment or identification of a body or bodies with specified functions in the promotion of legislative standards. Where such bodies issue any guidance it would be helpful for such guidance to be made publically available. The Commission welcomes views as to what body or bodies should be tasked with maintenance of legislative standards and what specific functions should be assigned to such a body or bodies.

3.5.2 Pre-drafting standards

3.68 A particular improvement which could be made to legislative practice is ensuring that legislative standards are considered at a much earlier stage in the process. There are currently no generally applicable[155] standards or guidance set down for policy makers at a pre-drafting stage on matters of legislative quality or how those legislative proposals should interact with the rest of the statute book. As such the first opportunity to undertake this assessment is when the Heads of a Bill are presented to OPC for drafting. By this stage the proposals are already too far developed and any problems of design or quality are extremely unlikely to be remedied.[156] Two approaches which have been adopted in some jurisdictions, which the Commission considers merit consideration, are:

1. the development of guidelines or checklists to inform policy makers, and

[152] For a fuller consideration of the LDAC in respect of pre-drafting standards see below.
[153] Guidance issued by the OPC can be accessed at *https://www.opc.gov.au/about/documents.htm*.
[154] Information regarding the work of this project can be accessed at *https://www.gov.uk/guidance/good-law*.
[155] As noted above, the Revenue Commissioners and the Revenue Legislation Services have published *Guide to the Legislative Process* (2016), which provides detailed guidance on all stages of the production and enactment of taxation legislation, including the development of legislative proposals at a pre-drafting stage.
[156] See Palmer, "Improving the Quality of Legislation - the Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 *Waikato Law Review* 13, at pages 16-17.

2. undertaking high level interaction between the body and policy makers[157] at a pre-drafting stage providing advice on legislative design and quality.

3.69 The first approach has been adopted in a number of jurisdictions[158] in recent decades due to concerns that inadequate policy preparation was having a negative effect on the end product in the legislative process.[159] Such guidance gives policy makers tangible reference points against which they can assess conformity of proposals to legislative standards. It has also been acknowledged that checklists facilitate subsequent scrutiny of legislative proposals.[160] The second approach has also been employed in New Zealand and allows for high level input on significant legislative proposals on the design and quality of a Bill. These approaches to setting down and maintaining legislative standards at a pre-drafting stage are examined more fully in the example below.

Example – Pre-drafting standards in New Zealand and the Legislation Design and Advisory Committee (New Zealand)
An example of detailed pre-drafting guidance is the work of the Legislation Design and Advisory Committee (LDAC) in New Zealand. The LDAC was established on 29th of June 2015 as a reconstitution of the Legislation Advisory Committee (LAC) and the then defunct Legislation Design Committee (LDC). The LAC was established in 1986. As part of its remit it was responsible for producing best practice guidelines for policy makers[161] at the pre-drafting stage. The LAC's Guidelines set down detailed guidance on a number of issues including identifying the policy objective, consultation, assessing consistency of the legislation with the existing body of law and considering whether any constitutional or rule of law issues arise. The Guidelines are augmented by a checklist which provides an additional aid to officials seeking to measure compliance with the Guidelines. The LAC was also responsible for monitoring compliance with those standards and making submissions to the relevant Parliamentary Committee about them. In addition Departments were encouraged to consult with the Committee at a pre-legislative stage regarding

[157] It is unlikely that this would be appropriate for the Office of Parliamentary Counsel to the Government, given that Office's responsibility to the Government and Ministers, who are its clients.

[158] For a consideration of approaches adopted in other jurisdictions see Oliver, "Improving the scrutiny of Bills: the case for standards and checklists" (2006) *Public Law* 219.

[159] See House of Commons Constitutional and Political Reform Committee, *Ensuring Standards in the Quality of Legislation*, HC 85 (2013) which recommended a Code of Legislative Standards for legislation introduced to the UK Parliament. It should be noted, however, that the proposal for a Code has been rejected by the UK Government, which appears to be based on ongoing discussion as to the appropriate lead body in setting legislative drafting standards.

[160] *Ibid.* at page 18.

[161] See LAC, *Guidelines on process and content of legislation - 2014 edition*, October 2014. These Guidelines can be accessed at http://ldac.org.nz/guidelines/lac-revised-guidelines/.

compliance with its guidelines.[162]

The LDC was set up in 2006 partly as a response to the perceived limitations of the impact of the LAC. The LAC's impact on legislative standards was considered by Sir Geoffrey Palmer QC to be benign, but peripheral concluding that most of the problems with legislation occur early in its design phase and it is often too late to remedy such problems once a Bill has been produced.[163] As a consequence the LDC was established in the belief that some significant or complicated legislative proposals might benefit from high level advice on the framework and design of the legislation at an early stage of policy development and that such advice could improve the quality of the final product.[164] Its intention was to look at similar issues to the LAC but do so much earlier in the legislative process. Notwithstanding the view that the LDC project had worked well[165] the LDC went into abeyance and ceased to meet after November 2008.[166]

On foot of a Productivity Commission Report of 2014 the LDAC was established in 2015 incorporating the work of the LAC and LDC. Unlike the previous Committees which were in part made up of independent membership this Committee is comprised solely of Government officials with policy, legal or economic backgrounds. It is stated that the Committee will provide advice to government agencies about the design and content of bills earlier on in their development. According to the press release[167] announcing its establishment it is envisaged that the Committee will be consulted on up to 25 Bills *per* year[168]. The Committee will also take on responsibility for the maintenance of the LAC's Guidelines. The Committee also retains an external subcommittee to assess compliance of Bills which have not been reviewed by the main Committee. Where the subcommittee considers that standards have not been complied with it may make a submission to the relevant Parliamentary Committee as was previously done by the LAC.

[162] For example the Committee noted in its 2012 Annual Report that of the 42 Bills it reviewed in 2012 20 Bills failed to comply with the guidelines resulting in submissions being made to select committee and 3 more Bills had minor issues on which the LAC engaged with the Department or Parliamentary Counsel.

[163] *Improving the Quality of Legislation - the Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond* (2007) 15 Waikato Law Review 13, at page 16.

[164] Cabinet Paper, Office of the Minister of Justice, Cabinet Policy Committee, *Legislation Design Committee and Law Commission Funding* (2006).

[165] New Zealand Productivity Commission, *Regulatory institutions and practices - final report*, 16th July 2014, at page 417.

[166] Law Commission of England and Wales, *Consultation Paper on the Form and Accessibility of the Law Applicable in Wales* (2015) Consultation Paper No. 223 at paragraph 9.56.

[167] Available at *http://beehive.govt.nz/release/establishment-legislation-design-and-advisory-committee*.

[168] In its *Report on the Form and Accessibility of the Law Applicable in Wales* (Law Com No. 366) the Law Commission of England and Wales noted that in its first 9 months the Committee had met with Departments and agencies on 15 Bills.

3.5.3 Facilitating scrutiny of Bills

3.70 Effective consultation and scrutiny has a significant role to play in ensuring compliance with legislative standards.[169] In recent years a number of initiatives have sought to improve scrutiny of legislation. These include the adoption of pre-legislative scrutiny procedures and improvements in the provision of explanatory material to members of the Oireachtas. Such initiatives have greatly improved the capacity of members of the Oireachtas and the general public to scrutinise legislative proposals and the Commission seeks views on how scrutiny of Bills might be further improved.

a) Recent developments in pre-legislative scrutiny

3.71 In 2011, the Oireachtas began the practice of undertaking pre-legislative scrutiny of some Bills and the process has since been formalised under Standing Orders in 2013.[170] In 2014 a Protocol was also agreed between the Government and Oireachtas which set down procedures for notification of General Schemes of Bills and agreed the time period allowed in which the Oireachtas can respond to a Scheme.

3.72 Pre-legislative scrutiny generally involves the advanced publication of a General Scheme of a Bill. The relevant Oireachtas Committee will then carry out hearings on the proposed legislation, receiving written and oral submissions[171] from the public. On foot of this the Committee forwards a Report to the relevant Minister outlining its observations and recommendations. An example of this approach is the process which preceded the enactment of the *Assisted Decision-Making (Capacity) Act 2015*.[172]

b) Availability of explanatory material

3.73 Effective scrutiny of legislation has also been facilitated by the greater availability of information relating to legislative proposals. Such information may include, where

[169] For a consideration of the role played by legislative scrutiny in legislative quality see Hunt, *Role of the Houses of the Oireachtas in the scrutiny of legislation*, Houses of the Oireachtas (17th December 2010).

[170] For an overview of pre-legislative scrutiny in the Oireachtas between 2011 and 2014, together with a comparative analysis of comparable practices in other parliaments, see Oireachtas Library and Research Service, *Pre-legislative scrutiny (PLS) by parliament*, No. 8 of 2014, available at https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Final_Spotlight_PLS_17Dec2014_172050.pdf.

[171] An interesting process which went beyond these traditional means of public consultation is the eConsultation process which preceded the enactment of the *Broadcasting Act 2009*. Here a dedicated website was created by the responsible Committee for the purpose of the consultation which sought to engage in a more interactive consultation with the general public and facilitate public participation in Committee hearings (for a fuller analysis of this consultation see Hunt, *Role of the Houses of the Oireachtas in the scrutiny of legislation, Houses of the Oireachtas*, at pages 68 and 69).

[172] Available at http://opac.oireachtas.ie/AWData/Library3/Mental_Capacity_Comm_Report_151944.pdf; Draft Heads of a Bill were initially published which were scrutinised by the Oireachtas Joint Committee on Justice, Defence and Equality in February 2012. The Committee received over 70 written submissions and held 2 days of oral hearings, receiving evidence from experts and stakeholders. On foot of this a Report was published on 1 May 2012. The Bill was subsequently published in July 2013 and enacted as the 2015 Act.

proposed legislation is being pursued on foot of recommendations from bodies such as the Law Reform Commission or other specially formed groups such as the Company Law Review Group, Reports published by such bodies. Such Reports are made freely available online and so can be accessed by any person seeking to scrutinise legislative proposals arising from them.

3.74 Additional information and research assistance is also made available from the Oireachtas Library and Research Service.[173] This Service operates out of the Oireachtas Library and since 2005 has had a formal role in providing members of the Oireachtas with an independent research service. In addition to providing an on-demand service to all members it also prepares explanatory material to members relating to legislation being debated, including Debate Packs, consisting of secondary sources on the Bill in question, and Bills Digests, which material analyses the principal themes addressed in a Bill.[174] An important part of the work of the Library and Research Service has been the preparation of information packs for use by members of the Oireachtas. This ensures quality information is available to members of the Oireachtas when assessing Bills.

c) Potential for further improvement – explanatory memoranda

3.75 While the above advances have played an important role in facilitating greater scrutiny of legislation it is possible that further improvements could be made. For example, explanatory memoranda published along with Bills have the capacity to facilitate effective Parliamentary and public scrutiny. Where members of the Oireachtas or the general public are attempting to scrutinise legislation there should be sufficient information available to enable them to do so. Such information should include:

- a general explanation of the policy objectives - explanation should be given of the policy objectives of the Bill and the reasons for them
- an explanation of how those objectives are to be met
- details of any supplementary material available (such as reports, reviews, international agreements or impact assessments)
- information about any significant legal or technical issues which warrant additional scrutiny and whether there are any constitutional or rule of law considerations
- a clear section-by-section explanation of the effects of each provision within the Bill.

[173] For a consideration of the work of the Library and Research Service see Hunt, *Role of the Houses of the Oireachtas in the scrutiny of legislation*, Houses of the Oireachtas (2010), at pages 65-66.
[174] *Ibid.*

3.76 In its 2000 *Report on Plain Language in Legislation*, the Commission recommended that consideration should be given to direct involvement by Parliamentary Counsel in drafting or setting standards for explanatory memoranda.[175] In response to this Report the OPC produced a document entitled *Explanatory Memoranda: An OPC Perspective*. This document was submitted to the Government Chief Whip in March 2002. However, it remains the position that there is no guidance directing the form or content of such memoranda. In order for the publication of explanatory material to have the effect intended it would be beneficial that guidelines standardising their form and content and establishing publication requirements were set down. Examples of approaches adopted in other jurisdictions are set out in the examples below.

Example 1 – Explanatory Notes to Bills introduced to United Kingdom Parliament

A useful example of recent analysis of the adequacy of accompanying explanatory material is the analysis of the form and content of Explanatory Notes in the UK. The current format has been in use since 1999 and sought to introduce a standardised structure to explanatory notes. Notwithstanding this the explanatory notes have been criticised for failing to achieve consistency in quality of legislative information. In its evidence to the House of Commons Constitutional and Political Reform Committee for the purposes of its recent Report *Ensuring Standards in the Quality of Legislation* the Hansard Society stated:

> "the quality of [Explanatory Notes] is highly variable and they do not require departments/ministers to provide parliamentarians with detailed information about many of the decisions taken, particularly in relation to the legal context and technical standards of the legislation."[176]

On 16 April 2013 the Office of the Parliamentary Counsel launched the "Good law" Initiative, the objectives of which are to consider and analyse the challenges of producing legislation and improve the quality of legislation. As part of this initiative it began a consultation on the form and content of explanatory notes. On foot of this consultation which ended on 31st January 2015 the UK's OPC has adopted a new draft format requiring the following:

- an explanation of the policy background
- the legal background
- commentary on provisions
- commencement information
- information on financial implications of the Bill
- information on related documents[177]

[175] LRC 61-2000 at paragraph 6.40.
[176] House of Commons Constitutional and Political Reform Committee, *Ensuring standards in the quality of legislation*, HC 85 (2013).
[177] See *https://www.gov.uk/government/consultations/explanatory-notes-for-bills-new-format*.

Example 2 – Statutory regulation of the content of explanatory notes in Queensland

An example of statutory regulation of the content of explanatory material is provided by Queensland. Section 23(1) of the *Legislative Standards Act 1992* provides that an explanatory note for a Bill must set out various items of information about the Bill in clear and precise language, including:

- the Bill's short title
- policy objectives of the Bill and the reasons for them
- the way the policy objectives will be achieved by the Bill and an explanation why this way of achieving the objectives is reasonable and appropriate
- any reasonable alternative way of achieving the policy objectives and an explanation why the alternative was not adopted
- the administrative cost of implementing the Bill
- the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency
- a brief statement of the extent to which consultation was carried out in relation to the Bill
- an explanation of the purpose and intended operation of each clause of the Bill

If the explanatory note does not include the information mentioned in subsection (1), it must state the reason for non-inclusion. Section 24 further specifies the content of explanatory statements for secondary legislation requiring broadly similar information to section 23. Additionally section 24 requires enhanced information regarding the conduct of consultations or the reason for not undertaking consultation and for significant subordinate legislation the note must also be accompanied by a regulatory impact statement.

Example 3 – Standard of explanatory material published (New Zealand)

In New Zealand in addition to explanatory notes Departments have been required to publish a disclosure statement in conjunction with a Bill since July 2013. The purpose of such statements is to inform readers as to existing government expectations for the development of legislation and significant or unusual features of legislation that are expected to be used with care, thus facilitating better scrutiny of legislation and supporting the production of legislation that is consistent with good legislative practice.[178]

The template for disclosure statements requires disclosure in four parts,[179] namely:

- *Part One: General Policy Statement:* this Part requires a statement about the objectives that the Bill seeks to achieve and how it goes about trying to meet those objectives
- *Part Two: Background Material and Policy Information:* this Part requires disclosure on important background material and policy analysis (such as any reviews or reports which have informed the Bill's policies, international agreements addressed in the Bill or regulatory impact analyses) that can throw further light on the underlying policy issues addressed by the legislation
- *Part Three: Testing of Legislative Content:* this requires disclosure regarding the quality assurance work internally and externally undertaken to test the content of the legislation
- *Part Four: Significant Legislative Features:* information about significant or unusual provisions that the legislation may contain which may warrant particular scrutiny

This template was established initially on an administrative basis with the ultimate ambition of establishing a statutory requirement for such statements. The *Legislation Amendment Bill 2014* has sought to introduce a legislative scheme for such statements. Part 2 of the Bill proposes to insert a new Part 3A into the *Legislation Act 2012*. Under this Part the chief executive of the Department will be required to prepare a disclosure statement for all Bills barring some limited exceptions.[180] Subpart 1 sets down the minimum requirements for disclosure largely mirroring Parts 2-4 of the administrative template. Similar provisions are also made for Government amendments and disallowable instruments[181] in Subparts 2 and 3. Subpart 4 addresses publication requiring circulation of such statements to Parliament as well as their publication online.

[178] Cabinet Office, *Disclosure requirements for Government legislation,* CO (13) 3, 4th July 2013 at paragraph 2.
[179] See The New Zealand Treasury, *Disclosure Statements for Government legislation - technical guide for Departments*, June 2013.
[180] Section 57D as to be inserted.
[181] Secondary legislation which can be disallowed by resolution of Parliament.

Example 4 – Regulation of content of explanatory memoranda in Parliamentary Standing Orders (Wales)

Standing Order 26 of the Standing Orders of the Welsh Assembly governs the form and introduction of Bills to the Assembly. Standing Order 26.6 requires that where any member of the Assembly wishes to introduce a Bill he or she must also lay an explanatory memorandum before the Assembly. Such a memorandum must:

(i) state that in his or her view the provisions of the Bill would be within the legislative competence of the Assembly;

(ii) set out the policy objectives of the Bill;

(iii) set out whether alternative ways of achieving the policy objectives were considered and, if so, why the approach taken in the Bill was adopted;

(iv) set out the consultation, if any, which was undertaken on:

(a) the policy objectives of the Bill and the ways of meeting them;

(b) the detail of the Bill; and

(c) a draft Bill, either in full or in part (and if in part, which parts);

(v) set out a summary of the outcome of that consultation, including how and why any draft Bill has been amended;

(vi) if the Bill, or part of the Bill, was not previously published as a draft, state the reasons for that decision;

(vii) summarise objectively what each of the provisions of the Bill is intended to do (to the extent that it requires explanation or comment) and give other information necessary to explain the effect of the Bill;

(viii) set out the best estimates of:

(a) the gross administrative, compliance and other costs to which the provisions of the Bill would give rise;

(b) the administrative savings arising from the Bill;

(c) net administrative costs of the Bill's provisions;

(d) the timescales over which all such costs and savings would be expected to arise; and

(e) on whom the costs would fall;

(ix) any environmental and social benefits and dis-benefits arising from the Bill that cannot be quantified financially;

(x) where the Bill contains any provision conferring power to make subordinate legislation, set out, in relation to each such provision:

(a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;

(b) why it is considered appropriate to delegate the power; and

(c) the Assembly procedure (if any) to which the subordinate legislation made or to be made in the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (and not to make it subject to any other procedure); and

(xi) where the Bill contains any provision charging expenditure on the Welsh Consolidated Fund, incorporate a report of the Auditor General setting out his or her views on whether the charge is appropriate.

Each of these requirements must be made evident in the memorandum by means of an index or otherwise.[182] Where a Bill is derived from existing legislation, whether for the purpose of amendment or consolidation, the memorandum must also be accompanied by a table of derivations explaining clearly how the Bill relates to the existing legal framework.[183] Standing Order 26.6C also requires memoranda to be accompanied by Schedules setting out the text of existing legislation as it is to be amended by the Bill, showing clearly where the wording is amended.

3.5.4 Consolidation of law regarding legislation

3.77 In parallel with the suggestions listed above, it may be appropriate to consider the consolidation of existing law regarding legislation itself. In some jurisdictions, discussed below, a Legislation Act has been enacted to regulate the production, publication, consolidation and the interpretation of legislation. In Ireland, the following Acts (and one set of Regulations) contain provisions relevant to legislation generally:

- *Statute Law Revision Acts 1861 to 2015*
- *Short Titles Acts 1896 to 2015*
- *Adaptation of Enactments Act 1922*
- *Documentary Evidence Act 1925*
- *Adaptation of Charters Act 1926*
- *Adaptation of Enactments Act 1931*
- *Constitution (Consequential Provisions) Act 1937*

[182] Standing Order 26.6A.
[183] Standing Order 26.6B.

- *Constitution (Verification of Petition) Act 1944*
- *Statutory Instruments Act 1947*
- *European Communities (Judicial Notice and Documentary Evidence) Regulations 1972 (S.I. No. 341 of 1972)*
- *Interpretation (Amendment) Act 1997*
- *Statute Law (Restatement) Act 2002*
- *Interpretation Act 2005*

3.78 A Legislation Act would not only set down general rules for citation, commencement and interpretation of legislation but would also include provisions to ensure the ongoing management and streamlining of legislation. Such an Act might comprise the following elements:

- general rules relating to Acts such as commencement, effect of repeals, citation etc.
- rules relating to statutory instruments
- rules regarding the publication of official versions of legislation
- rules for revision of legislation
- rules prescribing editorial powers for revisions
- rules of interpretation
- rules relating to the setting down and maintenance of legislative standards
- provision for programmes of consolidation
- automatic repeal and revocation provisions

3.79 Examples of such Legislation Acts in other jurisdictions which provide useful guidance as regards the potential structure and content of such an Act are set down below.

Example 1 – Legislation Act 2012 (New Zealand)
On foot of a recommendation in its recent Law Commission *Report on the Presentation of New Zealand Statute Law*[184] a recommendation for a consolidated Act addressing legislation was implemented with the enactment of the *Legislation Act 2012*. This Act brought together most legislation in this area and comprised four Parts, including a general provisions Part as well as three substantive Parts, namely: 1. Law relating to publishing, revising and consolidating legislation. This Part is

[184] New Zealand Law Commission, *Report on Presentation of New Zealand Statute Law* (2008) NZLC R104.

arranged into three Subparts addressing:

- publication requirements in relation to legislation
- the requirement to carry out revisions and the power to make editorial changes in the course of such revisions
- the duty to carry out programmes of consolidation

2. Subordinate legislation. This Part regulates the making of and annulment of secondary legislation as well as the incorporation by reference of material by secondary legislation.

3. Parliamentary Counsel Office. This Part gives statutory effect to the Parliamentary Counsel Office and prescribes its functions and powers.

The *Legislation Amendment Bill* was introduced in 2014 and intends to complete the process of consolidation by inserting a new Part into the 2012 Act incorporating the *Interpretation Act 1999*. Additionally a new Part will also be inserted giving statutory effect to the requirement for Departments to make Disclosure Statements when presenting a Bill to Parliament.

Example 2 – Legislation Act 2006 (Ontario)

Another jurisdiction which can be seen to have an effective consolidation of the law relating to legislation is Ontario. In addition to a General Part, including a provision establishing a general obligation to maintain an electronic database of legislation, the *Legislation Act 2006* contains 6 Parts, namely:

1. A Part setting out general rules relating to statutes such as commencement and citation.
2. A Part setting down rules relating to Regulations.
3. A Part setting down the rules for establishing versions of legislation as official law.
4. A Part prescribing editorial powers.
5. An interpretation Part.
6. A Part enabling the Chief Legislative Counsel to prepare revisions of legislation.

Example 3 – Legislation Act 2003 (Australian Commonwealth)

An example of a partial consolidation to the law relating to legislation is the *Legislation Act 2003* in the Australian Commonwealth. On foot of the *Acts and Instruments (Framework Reform) Act 2015* a number of pre-existing enactments[185] were consolidated into a single statute renamed the *Legislation Act 2003.* This new 2003 Act partially consolidates all previous statutory regulation of legislation with only the *Acts Interpretation Act 1901* being omitted. The Act contains 4 Chapters including an introductory Chapter as well as a Chapter containing miscellaneous provisions at the end. Chapter 2 addresses the registration and publication of legislation and is divided into three Parts. These address:

1. The maintenance of a register of legislation.
2. The rules relating to the registration and publication of revisions of legislation. This includes rules as to when there is a duty to lodge a revised version of legislation and when there is discretion to lodge a revised version of legislation as well as rules relating to editorial powers.
3. The rules for establishing versions of legislation as official law and for taking judicial notice of legislation.

Chapter 3 sets out provisions regarding secondary legislation. It is divided into four parts addressing:

1. Drafting standards
2. Scrutiny of secondary legislation
3. Repeal of spent secondary legislation
4. Sunsetting of legislative instruments.

185 *Legislative Instruments Act 2003*, *Acts Publication Act 1905*, *Acts Citation Act 1976* and the *Ordinances and Regulation (Notification) Act 1972.*

QUESTION 5

5(a). Should there be a specified body designated with the task of maintaining and enforcing legislative standards?

5(b). What body should that be?

5(c). What functions should be designated to such a body?

5(d). Should any guidance issued concerning legislative standards be published?

5(e). How should standards concerning the pre-drafting stage be set down, promoted and enforced?

5(f). Should high level pre-drafting consultation such as that exercised in New Zealand be undertaken for Irish legislation?

5(g). What, if any, initiatives should be undertaken to improve scrutiny of legislation?

5(h). Do you think that it would be appropriate to enact a Legislation Act, which would regulate the production, publication, consolidation and the interpretation of legislation?

5(i). If the answer to (h) is yes, what provisions should be included in such an Act?

Please type your comments (if any)

Please fill in your name and contact details below. Click submit button to email your submission. If submitting by webmail please check your drafts folder and sent items to ensure that your email has been submitted.

First name *	
Surname *	
Telephone/mobile number	
Email address*	
Confirm email address *	
Organisation	

* Denotes required field

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