



**LAW REFORM**

COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

**ANNUAL REPORT 2013**

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## THE COMMISSION

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The Law Reform Commission comprises a President, one full-time Commissioner and three part-time Commissioners. In 2013, the Commission was comprised as follows:

**The Hon. Mr. Justice John Quirke**  
President

**Finola Flanagan BL**  
Full-time Commissioner

**Professor Donncha O'Connell**, Faculty of Law, NUI Galway  
Part-time Commissioner

**Marie Baker SC**  
Part-time Commissioner

**Tom O'Malley BL**  
Part-time Commissioner

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## COMMISSION RESEARCH STAFF

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**Director of Research:**  
Raymond Byrne

**Project Manager for Access to Legislation:**  
Alma Clissmann

**Assistant Project Manager for Access to Legislation:**  
Jane Murphy (from September 2013)

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## LEGAL RESEARCHERS<sup>1</sup>

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Joseph Harrington, Morgan Harris, Colm Kitson, Kate McGovern, Kerri McGuigan, Karen McLaughlin, Aidan McMahon, Sarahrose Murphy, Roz O'Connell, Aileen O'Leary, Fiona O'Regan, Denise Roche, Emma Roche-Cagney, Mary Travers.

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## COMMISSION ADMINISTRATION STAFF

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**Head of Administration:** Ciara Carberry

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<sup>1</sup> Not all members of research staff were employed for the full calendar year.

**Legal Information Manager:** Órla Gillen (from May 2013)  
Conor Kennedy (to March 2013)

**Executive Officers:** Deirdre Bell (to July 2013)  
Deirdre Fleming (from August 2013)

**Staff Officer:** Annmarie Cowley

**Clerical Officers:** Ann Browne  
Liam Dargan  
Joseph Cooke

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## **FOREWORD**

On behalf of the Law Reform Commission I am pleased to introduce our Annual Report for 2013.

When the current Commission was appointed in mid-2012, our early priorities were the completion of the remaining projects in the Third Programme of Law Reform and the development of a Fourth Programme which will address important legal issues requiring law reform.

This draft Report identifies the progress made in these matters during 2013 including approval by Government of our Fourth Programme in October and completion and publication of Reports on Civil Law Aspects of Missing Persons, Jury Service, Mandatory Sentences, Sexual Offences & Capacity to Consent and Aspects of Domestic Violence.

I would like to thank my fellow Commissioners Flanagan, O'Malley, Baker and O'Connell for their commitment, work and support during 2013.

As Commissioners, we are greatly indebted to the many people who enhance and assist the Commission in fulfilling its function. I wish to acknowledge especially the work of Commission's small but dedicated staff – both research and administrative, the voluntary advice and assistance which the Commission has received from the many individuals and groups with whom it has consulted and the cooperation and courtesy which it has received from Government departments and, in particular, the Attorney General and her Office.

The work completed to date has been considerable and there is much more to be done. I know that the Commission, its staff and its management are determined to deliver an excellent service and an excellent Fourth Programme.

I look forward to working with them as we address the challenges that will accompany the delivery of meaningful reform of the laws of Ireland in the coming years.

Mr Justice John Quirke,  
**PRESIDENT**

September 2014.

## CHAPTER 1

### INTRODUCTION

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#### OVERVIEW OF THE COMMISSION'S WORK IN 2013

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The Commission's role under the *Law Reform Commission Act 1975* is to keep the law under review, to make recommendations for law reform and to make current law accessible. The key developments in 2013 were the following:

- *Approval by Government of Fourth Programme of Law Reform*  
After extensive public consultation, the Commission's proposal to research and report on eleven projects for its *Fourth Programme of Law Reform* was approved by Government in October 2013 in accordance with the 1975 Act.
- *Publication of six Reports and three Issues Papers*  
In 2013 the Commission published the following six Reports:
  1. *Report on Civil Law Aspects of Missing Persons* (LRC 106-2013)
  2. *Report on Jury Service* (LRC 107-2013)
  3. *Report on Mandatory Sentences* (LRC 108-2013)
  4. *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013)
  5. *Report on Fourth Programme of Law Reform* (LRC 110-2013)
  6. *Report on Aspects of Domestic Violence* (LRC 111-2013)

The Commission published the following three Issues Papers:

1. *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013)
  2. *Issues Paper on Domestic Violence: Harassment* (LRC IP 2-2013)
  3. *Issues Paper on Consolidation of Evidence Legislation* (LRC IP 3-2013)
- *Access to legislation*  
The Commission's work on access to legislation included the following:
    1. Updates to the Legislation Directory, the online index of legislative changes to Acts and Statutory Instruments
    2. Updates to the Classified List of Legislation, which comprises over 2,000 Acts that are in force organised under 36 subject titles; and the preparation of a Classified List of Statutory Instruments
    3. Updates to over 180 Revised Acts, which are Acts as amended showing changes made since enactment

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#### FUNCTIONS OF THE COMMISSION

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The Commission is a statutory body established by the *Law Reform Commission Act 1975* which requires the Commission to keep the law under review and to conduct research with a view to reforming the law. Law reform is defined to include:

- the development of law
- its codification (including its simplification and modernisation)
- the revision and consolidation of statute law

Since it was established, the Commission has published over 190 documents (Issues Papers, Consultation Papers, Working Papers and Reports) containing proposals for law reform. A full list of Commission publications is available on the Commission's

website at [www.lawreform.ie](http://www.lawreform.ie) where all publications are available to download free of charge.

### **Programmes of Law Reform and Requests from the Attorney General**

The Commission's research work comes from two main sources:

- Programmes of Law Reform prepared by the Commission and agreed by Government and laid before the Houses of the Oireachtas
- Requests from the Attorney General in relation to particular matters

The Commission's has had three *Programmes of Law Reform: 1977-1999, 2000-2007 and 2008-2014*. On 8 October 2013 the Government approved the Commission's *Fourth Programme of Law Reform*.

### **Development and Approval of Fourth Programme**

Between October 2012 and September 2013 the Commission conducted a wide-ranging public consultation exercise to develop a draft Fourth Programme of law reform which the Government approved in October 2013.

Since 2006 the Commission's work has also involved making legislation more accessible to the public. The Commission produces:

- the Legislation Directory, an online searchable guide to legislative changes which is regularly updated and published on the Irish Statute Book online website. This includes a Directory of Statutory Instruments from 2000 to 2014.
- the Classified List of Legislation; this was updated and published twice in the course of 2013. Ongoing work to identify in-force Statutory Instruments and classify them with their parent Acts moved to a phase of consultation with government departments in 2013.
- Revised Acts: 180 Revised Acts including textually amended Acts from 2006 onwards, other than Finance and Social Welfare Acts, were published and maintained.

The 2013 development of the Access to Legislation project is discussed in Chapter 3.

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## STRATEGY STATEMENT 2012-2014

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The Commission's *Strategy Statement 2012-2014* provides the framework for the work of the Commission in the three year period covered. The *Strategy Statement* reflects the views of the Commission on what needs to be done to maximise its contribution to law reform and to ensure that the organisation operates to optimum efficiency and effectiveness and makes the best use of available resources. The Commission's Mission Statement is: "to keep the law under independent, objective and expert review, to make consequent recommendations for law reform and to make current law accessible for all." Like its predecessors, the *Strategy Statement* sets out the key priorities of the Commission for 2012-2014, including clear responsibilities and accountabilities for the achievement of these priorities.

### **Key Objectives in the Strategy Statement**

The *Strategy Statement 2012-2014* identifies three Key Objectives. These are:

#### *Key Objective 1: Law Reform*

*To review the law and to conduct research with a view to developing, simplifying, modernising and codifying the law of Ireland.*

#### *Key Objective 2: Access to Legislation*

*To make legislation in its current state easily accessible online to the public, as amended rather than as enacted, and provide related information.*

**Key Objective 3: Administration**

*To provide effective, modern and professional corporate administrative and business services to the Commission so as to support it in meeting its objectives.*

This Annual Report follows the sequence of these Key Objectives.

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## METHODS OF WORK AND CONSULTATION PROCESS

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The Commission's work is based on careful and thorough research. The Commission is conscious of the importance of ensuring that its proposals for reform are grounded in practice. In the course of preparing proposals, consultations are held with interested parties including legal practitioners, other relevant professionals, representative bodies, politicians and members of the Government and Government Departments and Offices, and members of the public who wish to engage with the Commission. The opinions and experiences of these contacts are taken into account in the Commission's publications.

### **Methodology**

To achieve the goals set out in its Programme of Law Reform and requests from the Attorney General, each project is assigned to Researchers who work under the general direction of the Director of Research. In the case of the Access to Legislation project, researchers work under the direction of the Project Manager.

The Commission carries out and reviews its work according to its annual Business Plan.

### **The consultation process**

Consultation is of central importance to the Commission's work. This may take several forms, for example meetings with experts or practitioners working in a particular area, or representatives of interest groups. The Commission also prepares and publishes consultative documents, such as Issues Papers and Consultation Papers. These provide a structured process through which written submissions are sought from interested parties. These submissions are taken into account in the drafting of the final Report on the subject, and any issues or concerns they raise are dealt with in the Report. Before drafting the Report, a seminar is usually held to which the Commission invites interested parties, including those who have made submissions.

The Commission includes a draft Bill in each Report where it makes recommendations requiring legislative change in accordance with its statutory remit under the 1975 Act to include draft legislation where it proposes reform of the law.

The Commission consults with interested parties in connection with the Access to Legislation project, including the Office of the Attorney General, government departments, the legal profession and the general public. The Commission takes account of developments in the Government's eLegislation strategy and the ongoing modernisation of the Irish statute book in the wider internationally accepted context of *Better Regulation*.

To facilitate accessibility, all Commission publications including consultations are available online on the websites of the Commission or the Irish Statute Book.

### **Communication with government departments**



The Commission communicates with government departments about both current and future projects. The Commission meets twice a year with the Department of Justice and Equality to review and discuss matters of mutual interest, both in criminal law and civil law.

#### **Meeting with Attorney General's Consultative Committee**

The Attorney General's Consultative Committee comprises representatives of certain government departments, the Council of the Bar of Ireland, the Law Society of Ireland and the Office of the Attorney General. In June 2013, the Commission met the Attorney General's Consultative Committee to discuss the draft Fourth Programme of Law Reform.

#### **Meetings with Oireachtas Committees**

The Commission holds periodic meetings with the Oireachtas Joint Committee on Justice, Defence and Equality to discuss the work programme of the Commission. The Commission meets with other Oireachtas Committees from time to time. In September 2013 the Commission discussed its draft Fourth Programme with the Oireachtas Joint Committee on Justice, Defence and Equality.<sup>2</sup>

#### **Conferences, visits and media contacts**

Commissioners and research staff regularly attend and participate in public seminars and conferences. Contacts with law reform bodies in other jurisdictions are also maintained through attendance at relevant seminars and through hosting visits from other law reform bodies. In general, Commissioners with coordinating and lead roles in specific projects and the Director of Research act as media spokespersons for the Commission.

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## DEVELOPMENT OF WORKING METHODS

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During 2013 the Commission systematically examined how it carries out all of its core functions to ensure it is making the best possible use of its resources to deliver an excellent, timely and relevant service to the Government and the public.

The Fourth Programme of Law Reform is different from previous programmes in that the projects chosen are carefully defined and designed so that they can be delivered within a relatively short period. This is to ensure that the work of the Commission remains relevant and that matters identified by the public and the Government as being important areas in need of law reform can be addressed promptly.

A new publication format, the Issues Paper, was introduced in 2013 as a way of consulting more effectively with interested parties. Their views and expertise on particular aspects or issues arising in the course of a larger project are obtained by putting specific questions relevant to a matter and inviting responses. This has worked well and the information gathered has been valuable.

The Legislation Directory and Revised Acts programmes were merged into a single project called Access to Legislation which has as its goal an easily-accessed online resource where an interested person can find out what is the current legislation on a particular topic (i.e. without having to work through all its various amendments over

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<sup>2</sup> Available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JUJ2013092500008?opendocument#J00100>

the years since enactment). All researchers in the Commission now work on this project during their term and this has improved the resources available for the project.

Our use of technology in communicating with the public was reviewed and changes to our website were implemented so as to make it more user friendly for those who are looking for a publication or seeking to give feedback on a Project. Our principal publication format is now online, with all of our publications available to download free of charge from our website.

Work also began on modernising our meeting facilities with a view to allowing participants to join meetings via secure videoconference. This will provide an easy, cost effective way to arrange meetings regardless of the location of the parties, whether to consult with interested persons or groups in a distant location or facilitate our interactions with the Law Commissions of other jurisdictions as part of our comparative process.

Our Library and Information service was comprehensively reviewed and updated in 2013. A value for money review conducted on the subscribed journal collection led to rationalisation of print based subscriptions and a move to online resources with attendant savings in administrative processing time and physical storage space as well as enhanced desk-based access for researchers. A new in-house daily news alerter service was introduced to complement the weekly current awareness bulletin and the updates provided at the weekly legal research team meeting. A scoping/feasibility exercise was conducted on the possible uses of both social media and federated searching software within the Commission which will inform future policy in this regard.

## CHAPTER 2

### LAW REFORM: APPROVAL OF THE FOURTH PROGRAMME, PROGRESS ON COMPLETION OF THE THIRD PROGRAMME AND IMPLEMENTATION OF THE COMMISSION'S WORK

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#### APPROVAL OF THE FOURTH PROGRAMME

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In early 2013 the Commission completed its consultation on the development of its *Fourth Programme of Law Reform*. The final public seminar was held in NUI Galway on 27 February 2013 and the draft Fourth Programme was then prepared. The Commission selected projects for inclusion in the draft Programme that reflected current and anticipated needs of Irish society and were capable of completion within a relatively short time period. As a result, eleven projects were proposed:<sup>3</sup>

1. Corporate offences and regulatory enforcement
2. Disclosure and discovery in criminal cases
3. Sexual offences against children
4. Contempt of court and other offences and torts involving the administration of justice
5. Suspended sentences
6. Crime affecting personal safety, privacy and reputation, including cyber-bullying
7. Aspects of succession law
8. Compulsory acquisition of land
9. Landlord and tenant law for residential tenancies
10. Domestic implementation of international obligations
11. Codification/Consolidation/Simplification of the Law

In 2013 the Commission discussed the draft Fourth Programme with the Attorney General's Consultative Committee and the Oireachtas Committee on Justice, Defence and Equality.

In October 2013 the Government approved the draft Programme without amendment.

By the end of 2013 the Commission had completed initial scoping work on several projects in the Fourth Programme.

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#### PROGRESS ON COMPLETION OF THIRD PROGRAMME AND IMPLEMENTATION OF COMMISSION PROPOSALS IN 2013

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##### *(1) Overview of progress on completion of Third Programme*

In 2013 the Commission published six Reports and three Issues Papers; these related to the projects that remain to be completed from the *Third Programme of Law Reform* and to a request from the Attorney General made under the 1975 Act on mandatory sentences.

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<sup>3</sup> See *Report on Fourth Programme of Law Reform* (LRC 110-2013), pp.1-6 for an abstract of each of the 11 projects.

1. *Report on Jury Service* (LRC 107-2013) published in 2013 (Third Programme, Project 1).
2. Search Warrants and Bench Warrants: Report to be published in 2014 (Third Programme, Project 3).
3. Law of Evidence: *Issues Paper on Consolidation of Evidence Legislation* (LRC IP 3-2013) published in 2013; Report to be published in 2014 (Third Programme, Projects 7, 8 and 11).
4. *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013) published in 2013 (Third Programme, Projects 12 and 14).
5. *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013), *Issues Paper on Domestic Violence: Harassment* (LRC IP 2-2013) and *Report on Aspects of Domestic Violence* (LRC 111-2013) published in 2013 (Third Programme, Project 24).
6. Insurance Contracts: Report to be published in 2014 (Third Programme, Project 34).
7. *Report on Civil Law Aspects of Missing Persons* (LRC 106-2013) published in 2013 (Third Programme, Project 37).
8. Attorney General Request: *Report on Mandatory Sentences* (LRC 108-2013) published in 2013.
9. Fourth Programme: *Report on Fourth Programme of Law Reform* (LRC 110-2013) published in 2013.

## (2) Implementation of Commission proposals in 2013

The *Courts and Civil Law (Miscellaneous Provisions) Act 2013*, the *Credit Reporting Act 2013* and section 13 of the *Social Welfare and Pensions Act 2013* involved the implementation of recommendations made by the Commission. A number of Bills before the Oireachtas when this Annual Report was being prepared are based, in whole or in part, on Commission recommendations. These include the *Criminal Justice (DNA Database and Systems) Bill 2013* (enacted in June 2014), the *Assisted Decision-Making (Capacity) Bill 2013* and the *Criminal Justice (Spent Convictions) Bill 2012*. The Government has also published a number of Schemes of Bills (or Heads of Bills) related to Commission recommendations. These include the Scheme of a *Family Relationships and Children Bill*, Scheme of a *Landlord and Tenant Bill* and Scheme of a *Mediation and Conciliation Bill*. The Commission's website [www.lawreform.ie](http://www.lawreform.ie) includes a section containing a general overview of the implementation of Commission Reports, updated on a regular basis.

## (3) Detailed review of Commission work and implementation in 2013

The material in this part of the chapter is discussed under the following six general headings:

1. The Legal System and Public Law (pp.11-12).
2. Law of Evidence (p.13).
3. Criminal Law (p.13).
4. Civil and Commercial Law (p. 15).
5. Land Law and Trust Law (p.17).
6. Family Law (p.17).

## 1. THE LEGAL SYSTEM AND PUBLIC LAW

### Jury Service

In 2013, the Commission published its *Report on Jury Service* (LRC 107-2013) (3<sup>rd</sup> Programme of Law Reform, Project 1), following the publication of its *Consultation Paper on Jury Service* (LRC CP 60-2010). The Report takes account of concerns that the existing law and processes for jury selection do not involve selection of juries from

panels that are representative of the community. For example, the current jury panels compiled under the *Juries Act 1976* are limited to Irish citizens and exclude long term residents including EU citizens; by contrast, Irish citizens resident in England are qualified for jury service there. The 1976 Act also allows a wide group of persons, such as doctors, nurses, teachers and public servants, to be excused “as of right” from jury service in Ireland. Other concerns include the extent to which the availability of wireless technology might allow jurors in the jury room to search online for information about an accused rather than limit their decision to the evidence presented. There is also concern that the general right to inspect jury panel lists runs the risk that jury members are open to intimidation or jury tampering. The Report also examines reforms that might be required to deal with lengthy or complex criminal trials. The Report includes a draft *Juries Bill* intended to implement its recommendations.

Among the recommendations in the Report are:

- Jury panels should be based on the electoral registers for Dáil, local and European elections, which would allow not only Irish citizens but also EU citizens and other long-term residents (the Report recommends a minimum residency requirement of at least 5 years) to be selected for jury service. This would add about 200,000 persons to those qualified for jury service.
- Jurors should be able to read, write, speak and understand English to the extent that they can carry out their functions and they should be reminded of this when summoned for jury service.
- The existing blanket excusal from jury service “as of right” for many professionals and public servants should be repealed, and be replaced by an individualised excusal “for good cause.”
- Jurors should be allowed deferral of service for up to 12 months to facilitate those who have good reasons to decline jury service when they are initially summoned for jury service.
- A person with a disability should be eligible for jury service unless, taking account of practicable supports and accommodation that are consistent with the right to a trial in due course of law, the disability would mean that he or she could not perform the duties of a juror. The Report also recommends that specific research should be conducted on this matter. This research should examine developing codes, standards and practical experience from other jurisdictions, and should then determine whether it would be feasible to apply these in the jury system in Ireland.
- The number of objections to jurors without the need to give any reason (peremptory challenges), which is currently 7 for both the prosecution and the defence, should be retained; and pre-trial questionnaires to jurors should continue to be prohibited.
- A modest daily flat rate payment should be paid to jurors to cover their travel and subsistence costs; and the government should consider what other means could be used to alleviate the financial burden that jury service involves for small businesses and self-employed persons, including the use of tax credits and insurance.
- To address jury tampering, the right to inspect the jury panel should be limited to being examined by legal advisers 4 days before the start of a trial; and that the law on jury tampering should be set out in a single comprehensive offence.
- Juries should be given a specific warning not to access the internet during a trial and that such inappropriate enquiries should be made a specific offence
- A court should be allowed to empanel up to 3 additional jurors where the judge estimates that the trial will extend beyond three months.
- Research should be carried out on matters such as jury representativeness, juror comprehension, juror management and juror capacity and competence. This research should be subject to appropriate confidentiality safeguards to ensure that jury deliberations are not revealed.

The recommendation on additional jurors in lengthy trials was implemented through an amendment to the *Juries Act 1976* by the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*. The Government Legislation Programme Spring-Summer Session 2014 (Section C) states that a *Juries Bill* is to be published to implement the Commission's Report.

#### **Search Warrants and Bench Warrants**

In 2013, the Commission approved the text of a draft Issues Paper in connection with its project on search warrants and bench warrants (Third Programme of Law Reform, Project 3) and the *Issues Paper on Search Warrants* (LRC IP 4-2014) was published in early 2014. The Commission will publish its Report on this matter by the end of 2014.

#### **Alternative Dispute Resolution: Mediation**

The Government Legislation Programme Spring-Summer Session 2014 (Section B) states that a *Mediation Bill* is to be published to implement the Commission's *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) (3<sup>rd</sup> Programme of Law Reform, Project 5).

#### **Consolidation and Reform of the Courts Acts**

The Government Legislation Programme Spring-Summer Session 2014 (Section B) states that a *Courts (Consolidation and Reform) Bill* is to be published, which would implement the Commission's 2010 *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010) (Third Programme of Law Reform, Project 6).

#### **Tribunals of Inquiry**

The *Tribunals of Inquiry Bill 2005*, based on the draft *Tribunals of Inquiry Bill* in the Commission's *Report on Public Inquiries Including Tribunals of Inquiry* (LRC 73-2005) (Second Programme of Law Reform, Project 8), was awaiting Report Stage in Dáil Éireann in 2013.

## **2. LAW OF EVIDENCE**

#### **DNA Database**

The *Criminal Justice (Forensic Evidence and DNA Database System) Act 2014* (enacted in June 2014 and published as a Bill in 2013) derives from the Commission's 2005 *Report on the Establishment of a DNA Database* (LRC 78-2005) (Attorney General request).

#### **Hearsay, Documentary Evidence and Expert Evidence**

In 2013, the Commission published an *Issues Paper on Consolidation of Evidence Legislation* (LRC IP 3-2013) in connection with its composite *Report on the Law of Evidence*, which will incorporate three projects in the *Third Programme of Law Reform*. These are: Project 7 (Documentary and Electronic Evidence), Project 8 (Hearsay Rule) and Project 11 (Expert Evidence). The Commission intends to publish its Report on this area by the end of 2014.

## **3. CRIMINAL LAW**

#### **Sexual Offences: Capacity to Consent**

In 2013, the Commission published its *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013) (Third Programme of Law Reform, Projects 12 and 14), following the publication in 2011 of a *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011). This forms part of a general review of the law on sexual offences being undertaken by the Department of Justice and Equality. It

also builds on the Commission's previous work on the civil law of capacity, culminating in a 2006 Report that recommended the enactment of new capacity legislation, which is now envisaged in the Government's *Assisted Decision-Making (Capacity) Bill 2013*.

The main recommendations in the Report are:

- Section 5 of the *Criminal Law (Sexual Offences) Act 1993* should be repealed and replaced because it fails to respect the right to sexual expression of persons whose capacity may be at issue and does not deal with all situations in which exploitation or abuse may arise.
- Legislation should be enacted to replace section 5 of the 1993 Act that would be based on a functional test of capacity, which is a rights-based approach that is in line with the UN's 2006 Convention on the Rights of Persons With Disabilities and also with the *Assisted Decision-Making (Capacity) Bill 2013*.
- The legislation to replace section 5 of the 1993 Act should provide that a person has capacity to consent to any sexual act where he or she is able to choose to agree to the specific sexual act involved (including where he or she has been given suitable decision-making assistance) because he or she: (a) understands the nature and reasonably foreseeable consequences of the act; (b) can use or weigh up relevant information in deciding whether to engage in the sexual act; and (c) is able to communicate his or her decision (whether by talking, using sign language or any other means).
- The new legislation should make clear that no offence is involved where two persons whose capacity to consent may be at issue (for example because of an intellectual disability) engage in a sexual act and where no exploitation or abuse of either person is involved.
- The new legislation should cover all forms of sexual assault (including sexual assault and rape) and also any other acts that involve exploitation or abuse (such as unwillingly having to watch others involved in sexual acts).
- The accused should, in general, have a defence of reasonable belief that the person has capacity to consent, but this defence should not be available to persons in a position of trust or authority (which should include close family members and professional carers) in relation to whom there should be a rebuttable presumption that he or she knew that the person did not have capacity to consent.
- Guidelines should be developed for those working in the criminal justice system to identify current obstacles and examine methods by which the participation in court proceedings of persons covered by the proposed legislation could be enhanced.
- National standards should be developed by all relevant agencies to ensure a consistent approach to sex education, which should include the risks of exploitation or abuse, for all persons affected by the reforms proposed in the Report.

### **Mandatory Sentences**

In 2013, the Commission published its *Report on Mandatory Sentences* (LRC 108-2013), following its *Consultation Paper on Mandatory Sentences* (LRC CP 66-2011), which was published in January 2012. This project followed a request from the Attorney General under the *Law Reform Commission Act 1975* to examine the law of mandatory sentences and, if appropriate, recommend reforms in relation to the circumstances in which it may be appropriate or beneficial to provide for mandatory sentences for offences.

The main recommendations in the Report are:

- The Commission supports previous recommendations (including in the 2011 *Report of the Thornton Hall Review Group*) that a Judicial Council should be able to develop and publish suitable guidance or guidelines on sentencing; and that these would have regard to decisions of the Supreme Court and the Court of Criminal Appeal, to the sentencing principles discussed in the Report, and to

information in databases such as the Court Service's Irish Sentencing Information System (ISIS).

- The mandatory life sentence for murder should be retained.
- Where an offender is convicted of murder, and is therefore sentenced to life imprisonment, legislation should provide that the judge may recommend a minimum term to be served by the offender.
- The Parole Board should be established on an independent statutory basis, and the Report welcomes the Government's proposal to introduce legislation to do so.
- The presumptive sentencing regime that applies to certain drugs and firearms offences should be repealed and should not be extended to any other offences. The Report notes that the presumptive drugs offences regime has had the following results: the adaptation of the illegal drugs trade to the sentencing regime by using expendable couriers to hold and transport drugs; that these relatively low-level offenders, rather than those at the top of the illegal drugs trade, are being apprehended and dealt with under the presumptive regime; a high level of guilty pleas in order to avoid the presumptive minimum sentence; and a consequent increase in the prison system comprising low-level drugs offenders. The Commission also recommends that a more structured, guidance-based sentencing system (as envisaged in the first recommendation mentioned above) would provide an appropriate alternative to these provisions. In the context of drug-related crime, the Commission also considers that law enforcement efforts may be beneficially supplemented by other initiatives, such as those highlighted in the research conducted by the Health Research Board and the Misuse of Drugs work sector of the British-Irish Council.
- The existing legislation concerning mandatory sentences (and, where relevant, presumptive sentences) that applies in the case of second and subsequent offences should also be repealed and should not be extended to any other offences. The Commission also recommends that the more structured, guidance-based sentencing system (as envisaged in the Report) would provide an appropriate alternative to these provisions.

### **Spent Convictions**

The *Criminal Justice (Spent Convictions) Bill 2012*, which would implement the key recommendations in the Commission's *Report on Spent Convictions* (LRC 84-2007) (Second Programme of Law Reform, Project 10), was awaiting Report Stage in Seanad Éireann in 2013. The 2012 Bill will not proceed to final stage until further consideration is given to whether it is fully compatible with the European Convention on Human Rights. This will take account in particular of the decision in the English case *R (T) v Chief Constable of Greater Manchester Police*,<sup>4</sup> in which it was held that some aspects of the comparable British legislation, the *Rehabilitation of Offenders Act 1974*, was not compatible with the right to protection of private life under Article 8 of the Convention.

## **4. CIVIL AND COMMERCIAL LAW**

### **Civil Law Aspects of Missing Persons**

In 2013, the Commission published its *Report on Civil Law Aspects of Missing Persons* (LRC 106-2013) (Third Programme of Law Reform, Project 37), following its *Consultation Paper on Civil Law Aspects of Missing Persons* (LRC CP 64-2011).

The Report notes that between 7,000 and 8,000 people are reported missing every year in Ireland, almost 20 every day. Most of these actually turn up within a very short time and less than 1% remain missing for a long time. According to the most recent

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<sup>4</sup> [2013] EWCA Civ 25, [2014] UKSC 35.



figures from the Garda Missing Persons Bureau, between 2003 and 2011 there were 62,426 missing person reports; of these 382 people remain missing. In the context of the violence in Northern Ireland from the 1970s to the late 1990s, this also includes “the Disappeared”, a group of 17 people who are presumed to have been killed but whose bodies had not been found. The Independent Commission for the Location of Victims’ Remains, established after the 1998 Good Friday Agreement to locate their remains, has to date located ten bodies so that seven of “the Disappeared” remain missing. Against this background in 2009 the Northern Ireland Assembly passed the *Presumption of Death Act (Northern Ireland) 2009*, which allows relatives to apply to court for a presumption of death order.

*Dealing with immediate problems:* the Report concludes that there is a need to have a statutory framework to deal with some immediate practical problems for family members (often referred to as those left behind). In particular, there is a need to allow access to a missing person’s bank account (especially where the bank account is in his or her sole name) so that bills can be paid. The Report therefore recommends that legislation should be enacted to allow the family left behind to apply to the Circuit Court after a person has been missing for 90 days to allow interim management of the missing person’s property. This would allow the family to pay bills or, for example, to renew insurance on a car or motorbike. This process could be in place for up to two years (with a possible extension of two more years).

*Presumption of death:* the current law is primarily based on a long-established rule that there is a presumption that a missing person is alive for up to seven years, and that a presumption of death applies after seven years. These are rebuttable presumptions, which means that a person can be presumed dead where they have been missing for less than seven years, and an absence of seven years does not always lead to a declaration of presumed death. The current law is limited in that family members may apply to the High Court to have the estate of the missing persons administered, but this does not allow them to obtain a death certificate. In some cases, an inquest can be held involving a missing person; and if it is almost certain that the missing person has died, a coroner can then make a declaration of death under the *Coroners Act 1962*, which allows the family to obtain a death certificate.

The Report recommends reform of the law on presumed death, in particular to ensure that families can deal as far as possible in the least expensive way with the emotional trauma of their loved one going missing. This would include clarifying the existing law on inquests to allow families of missing persons to apply for a coroner’s inquest and to have a declaration of presumed death; this would apply to cases where death is virtually certain. In cases where death is highly probable the Commission recommends that an application to the Circuit Court would be needed to provide not only for the administration of the missing person’s estate but also to make a presumption of death order, allowing the family of the missing person to obtain a death certificate. This would have the same legal effect as any other death certificate. The Commission recommends that, as far as possible, the law in the State should mirror the provisions of the 2009 Northern Ireland legislation, so that any cases involving “the Disappeared” that might be dealt with in the State would be based on a similar legal framework.

The Report also deals with the rare situations where a missing person who has been declared dead is actually alive and returns. It recommends that the proposed legislation would allow the person to have property returned to him or her, subject to any irreversible orders that have been made in the meantime, such as selling property. In addition, any person applying for orders under the proposed legislation would usually be required to take out an insurance bond to cover any financial loss to the missing person that might arise.

### **Adult Assisted Decision-Making Capacity**

The *Assisted Decision-Making (Capacity) Bill 2013*, which derives from the Commission's recommendations in its *Report on Vulnerable Adults and the Law* (LRC 83-2006) (Second Programme of Law Reform, Projects 27 and 28) to replace the wards of court system with a modern statutory framework on decision-making capacity for adults, passed Second Stage in Dáil Éireann in 2013.

### **Insurance Contracts**

During 2013, the Commission considered a number of draft chapters in connection with its draft *Report on Insurance Contracts* (Third Programme of Law Reform, Project 34), following its *Consultation Paper on Insurance Contracts* (LRC CP 65-2011), which was published in January 2012. The Commission's Report will be published in 2014.

### **Personal Debt and Credit Reporting**

The *Credit Reporting Act 2013*, which contains a statutory framework for credit reporting and credit checking, derived from the Commission's *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) (Third Programme of Law Reform, Project 2).

### **Recovery of Social Welfare Payment from Personal Injuries Awards**

Section 13 of the *Social Welfare and Pensions Act 2013*, which provides for the recovery of the value of certain illness-related social welfare payments from awards made in personal injuries claims, derives from the Commission's *Report on the Deductibility of Collateral Benefits from Awards of Damages* (LRC 68-2002) (Attorney General request).

## **5. LAND LAW AND TRUST LAW**

### **Landlord and tenant**

The Government Legislation Programme Spring-Summer Session 2014 (Section B) states that, following the publication in 2012 of the Scheme of a *Landlord and Tenant Bill* (which derived from the Commission's *Report on the Law of Landlord and Tenant* (LRC 85-2007) (Second Programme of Law Reform, Project 23), a *Landlord and Tenant Bill* is to be published.

### **Trust Law and the Settled Land Acts**

The Government Legislation Programme Spring-Summer Session 2014 (Section C) states that the *Scheme of a Trusts Bill* is to be published which would consolidate and reform the *Trustee Act 1893*, taking account of the Commission's *Report on Trust Law: General Proposals* (LRC 92-2008) and the Commission's work on its project on Trust Law and the Settled Land Acts (Third Programme of Law Reform, Project 21), which arises from the repeal of the Settled Land Acts by the *Land and Conveyancing Law Reform Act 2009*.

## **6. FAMILY LAW**

### **Domestic Violence**

In 2013 the Commission published its *Report on Aspects of Domestic Violence* (LRC 111-2013) (Third Programme of Law Reform, Project 24), following the publication earlier in 2013 of its two Issues Papers on this area. The Commission began this project in 2012 and the Report, which examines two specific issues concerning the current law of domestic violence, complements the general review of the law on domestic violence currently being undertaken by the Department of Justice and Equality.

*Bail law and domestic violence cases:* the first issue dealt with in the Report is whether current bail law as it applies to domestic violence cases should be retained or reformed. In particular, the question raised is whether, when a person is charged under the *Domestic Violence Act 1996* with breaching a barring order or safety order, should it be made possible to refuse bail on the basis that the person might commit another offence while on bail. This is called refusing bail for preventative reasons. The Constitution allows bail to be refused on this ground if a person is charged with a “serious offence” and where it is reasonably considered necessary to prevent the commission of another serious offence by that person while on bail. The *Bail Act 1997* defines a “serious offence” as an offence that must carry at least five years imprisonment on conviction and which is also specifically listed in the *Bail Act 1997* itself. The offence of breach of a domestic violence order currently carries a maximum sentence of 12 months imprisonment. The Report discusses whether the law should be reformed to make it a serious offence.

The Report recommends that the current law should be retained and that the offence of breach of a domestic violence order should not be changed into an offence that could carry five years imprisonment on conviction. Among the reasons listed in the Report for this conclusion is that such a change would not be in keeping with the general purpose of the *Domestic Violence Act 1996*, which is to ensure that victims of domestic violence can get access to effective protection through barring orders and safety orders. This could be put at risk if breach of an order was made a very serious criminal offence. The Commission’s Report also notes that the current law on bail allows a court to impose conditions that prohibit a person from making contact with the person who has applied for a barring order or safety order and that if the accused breaks any such condition his/her bail can be revoked. The Commission also recommends that there should continue to be a clear policy of prosecuting not only breaches of barring orders and safety orders but also that if this is accompanied by an underlying serious offence, such as assault causing harm or harassment, this should be prosecuted also.

*Harassment law and domestic violence:* the second issue discussed in the Report is whether the offence of harassment in the *Non-Fatal Offences Against the Person Act 1997* addresses sufficiently the problem of stalking in domestic violence cases. The Report notes that most prosecutions for harassment involve domestic cases, and usually involves stalking by former spouses and partners. The current law requires that the harassment must involve “following, watching, pestering, besetting or communicating” and must be done “persistently”. The Commission’s Report points out that the requirement of “persistence” means that a person can be convicted of harassment where stalking involves a single long episode of continuous following or pestering. By contrast, under English law the harassment or stalking must involve at least two separate types of conduct. The Report concludes that the current requirements in the 1997 Act impose appropriate legal thresholds and standards that should be met in order to convict a person of stalking. The Report also notes that some emerging types of unacceptable behaviour, such as the use of social media to post fake or misleading information, may not come within the current law on harassment. The Commission concludes that this and other forms of cyber-bullying should be examined as part of the project on that topic in its *Fourth Programme of Law Reform*.

### **Family Relationships and Children**

The Government Legislation Programme Spring-Summer Session 2014 (Section A) states that, following the publication in 2013 of the Scheme of a *Family Relationships and Children Bill* (which derived in part from the Commission’s *Report on Legal Aspects of Family Relationships* (LRC 101-2010) (Third Programme of Law Reform, Project 23), a *Family Relationships and Children Bill* is to be published.

## CHAPTER 3 ACCESS TO LEGISLATION

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### INTRODUCTION

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It is difficult for users of legislation to establish what the law in force is. This is a problem for professionals, legislators and the public alike. Acts and Statutory Instruments may be repeatedly amended without being consolidated into a single up-to-date piece of legislation. Thus the law on a particular matter is often spread across many pieces of legislation made over many decades, all of which have to be identified and read together to establish the current law.

This is unsatisfactory for all concerned.

The purpose of the Access to Legislation project is to make legislation in its current state more easily accessible online to the public, as amended rather than as enacted, and to provide other important related information. It comprises the Legislation Directory, the Classified List of Legislation and Revised Acts.

The **Legislation Directory** is an online index of legislative changes to legislation, including pre 1922 Acts that remain in force. It enables users to identify the amendments which affect a piece of legislation, including where provisions have been repealed, and indicates if a provision requires a commencement order to come into effect. From 2006 onwards, it also notes commencement orders and other related Statutory Instruments made under powers in an Act.

The **Classified List of Legislation** allows users to locate the legislation they seek. The Acts of the Oireachtas are published in chronological order by year, but are not arranged by subject matter. Therefore even when a user finds a principal Act such as the Family Law Act 1995, the legislation as listed chronologically does not assist in finding other family or child law legislation. The Classified List of Legislation lists over 2,000 Acts in force under 36 subject titles. Thus for example a user can find all family legislation under Title 17 and all legislation on Financial Services and Credit Institutions under Title 18.

The Commission also produces and publishes **Revised Acts** which show each amended Act with all its amendments, fully annotated, in a single readable document. This enables the reader to see the law as it currently is, as well as see information on previous versions. In addition, many provisions in Acts do not come into effect at the date of enactment and have no force until they are actually commenced by a commencement order made by the relevant Minister. The Revised Acts list all such commencement orders so the reader can see what provisions of legislation have come into force and when.

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### LEGISLATION DIRECTORY

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The Commission continued to update the Legislation Directory in 2013 to reflect changes made by both Acts and Statutory Instruments for publication on the

electronic Irish Statute Book website. The new Legislation Directory for Statutory Instruments from 2000 to 2012 was maintained to include changes made in 2013.

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## CLASSIFIED LIST OF LEGISLATION

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### **Classified List of Acts**

The Classified List of Acts was reviewed and updated twice in the course of 2013 showing all repealed and new Acts, and published on the Commission website.

### **Classified List of Statutory Instruments**

Research on the identification of the status of 35,000 Statutory Instruments made since 1922 and their classification was completed to first draft stage and was circulated to government departments for comment and feedback in December 2012.

Work started on the review of comments and feedback received from departments during 2013. When completed, this list will bring clarity to the status of all Statutory Instruments that remain in force and classify them under their enabling Acts. It is intended that the Classified List of Statutory Instruments will assist users in knowing what law is in force and assist government departments in identifying obsolete, spent, ineffective (for example, because of conflict with the EU Treaties), superseded and inappropriate instruments with a view to their revocation. With the creation of the Legislation Directory for Statutory Instruments there is now a database in which the revocation of instruments can be recorded and made available for easy consultation by all. This major review of Statutory Instruments will provide the groundwork for de-cluttering and rationalisation of the Statute Book.

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## REVISED ACTS

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In 2013 the Commission prepared, updated and published 180 Revised Acts on its website. They comprise around 100 frequently used Acts (for example legislation on employment, family, road traffic and planning), and Acts from 2006 onwards which were textually amended, other than Finance and Social Welfare Acts.

In 2013 a link to the alphabetic list of Revised Acts was installed on the home page of the Irish Statute Book website to increase their visibility and accessibility to users of legislation.

They may be viewed at

<http://www.lawreform.ie/revised-acts/alphabetical-list-of-revised-acts.360.html>.

## **CHAPTER 4 ADMINISTRATION**

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### **INTRODUCTION**

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The Commission's administration aims to provide effective, modern and professional corporate administrative and business services to the Commission so as to support it in meeting its objectives. The outcome is a satisfactory working environment where administrative units support the legal work of the Commission by providing excellent corporate business support services such as human resource management, financial management, legal and corporate support, information technology, and library and information services.

The current organisation structure of the Commission (as of December 2013) is set out in the Appendix.

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### **THE COMMISSION**

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The Commission consists of a President and four Commissioners. Commissioners are appointed by the Government for a term of up to five years, and their appointment may be renewed. The President of the Commission, Mr. Justice John Quirke, is a former judge of the High Court. The full-time Commissioner, Finola Flanagan, is a barrister and former Director General of the Office of the Attorney General. The three part-time Commissioners are: Marie Baker, Senior Counsel, Professor Donncha O'Connell, School of Law NUI Galway and Mr Tom O'Malley, barrister-at-law, and School of Law NUI Galway.

The Commission makes recommendations to Government on the content of the programme of law reform, determines the contents of the research output of the Commission (contained in Issues Papers and Reports), and makes key administrative and financial decisions. The Commission meets formally as a body at least ten times each year.

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### **MANAGEMENT COMMITTEE**

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The Commission's Management Committee consisted of the full-time Commissioner, the Head of Administration, the Director of Research and the Project Manager. The Management Committee met on a regular basis to review all major issues relevant to the efficient and effective operation of the Commission. One of the principal responsibilities of the Committee is to monitor progress on achieving the targets set out in the Commission's Annual Business Plan which is updated on a quarterly basis.

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### **ADMINISTRATIVE STAFF**

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The Commission's administrative and library staff consisted of a Head of Administration and a team of five staff as of December 2013.

During 2013, the Administration had overall responsibility for:

- Managing, processing and reporting on all financial transactions in the Commission
- Managing the Commission's accommodation and IT infrastructure
- Managing the Commission's human resource function
- Providing administrative support for the research function
- Carrying out a variety of administrative functions in relation to launches of publications and the printing of Reports and Consultation Papers

The Administration also arranged for the publication and distribution of the Commission's publications and planning and organising the various tasks associated with the launch of the Commission's publications as well as event management and corporate services associated with launches and seminars.

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## RESEARCH AND LIBRARY STAFF

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The primary role of the research staff is to develop draft texts for consideration by the Commission. This includes preparing an initial Scoping Paper for a project which sets out the parameters of the areas under discussion. In the later stages of a project this involves the development of a draft Issues Paper or Report and, where the Commission deems it appropriate, a Seminar Paper.

### **Research Team**

The law reform research team is headed by the Director of Research, Raymond Byrne, barrister and formerly of the School of Law and Government, Dublin City University. The Commission's projects on the Legislation Directory, Classified List of Legislation and Statute Law Restatement are integrated into a single Access to Legislation project overseen by project manager, Alma Clissmann, solicitor. During 2013, the Commission maintained eight full-time Legal Researcher positions, filled by legal researchers engaged on temporary contracts.

The Director of Research leads and manages the law reform research team, and generally advises and assists the researchers with a view to assuring an appropriate output and quality of work. This includes carrying out general background research, preparing Scoping Papers, preparing draft documents and draft Issues Papers and Reports for consideration by the Commission. The Director, Project Manager and the research team meet regularly as a group to exchange views on the areas on which they are conducting research. Researchers are encouraged to publish in relevant law journals during their time with the Commission. This includes articles dealing with areas on which the researcher is actively involved.

### **Library and Information Services**

The primary role of the Commission's library is to anticipate and respond to the needs of the Commissioners and the Commission's research team for library and information services.

An expert review of the Library and Information service was carried out in 2013 and led to a significant reorganisation and modernisation of the service which was completed by the end of the year.

The Legal Information Manager/Librarian worked in consultation with the research teams to provide timely access to new electronic and hard-copy resources. An internal bulletin of current legal developments, focusing on new library acquisitions, was circulated to all staff on a weekly basis.

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## FINANCE

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### **Income and expenditure**

The Commission is funded by a grant-in-aid from the Minister for Public Expenditure Reform. Total income received in 2013 from all sources (including grant-in-aid, net deferred funding from pensions, transfers to capital account, sale of publications and income received from Department of Social Protection) amounted to **€2,301,139**.

Expenditure in 2013 amounted to **€2,298,400**. The expenditure covered salaries and superannuation of Commissioners and staff, rent and premises overheads, maintenance of the Commission's library, maintenance of the Commission's IT network and printing and distribution costs.

### **Prompt payments**

The Commission did not incur any late interest penalties during 2013 under the *Prompt Payment of Accounts Act 1997*, as amended by the *European Communities (Late Payment in Commercial Transactions) Regulations 2002*.

### **Audit Committee**

The Commission is audited by Audit Committee of the Office of the Attorney General.

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## ENERGY EFFICIENCY

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In accordance with the *European Communities (Energy End-use Efficiency and Energy Services) Regulations 2009* (SI No. 542 of 2009), and Directive 2006/32/EC, the Commission ensured during 2013 that it took appropriate steps concerning energy conservation and reduction measures.

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## GOVERNANCE ARRANGEMENTS

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Overall responsibility and accountability for Commission activities rests with the Commission. The Commission is assisted in that role by the Management Committee, the Administration and the Research team. The Accounting Officer for the Commission is the Director General of the Office of the Attorney General.

The Strategy Statement Key Objectives are matched at an organisation level by targets set out in the Commission's Business Plan. The Business Plan contains quarterly targets under each objective. Progress made in achieving these targets is monitored on a regular basis by the Management Committee.

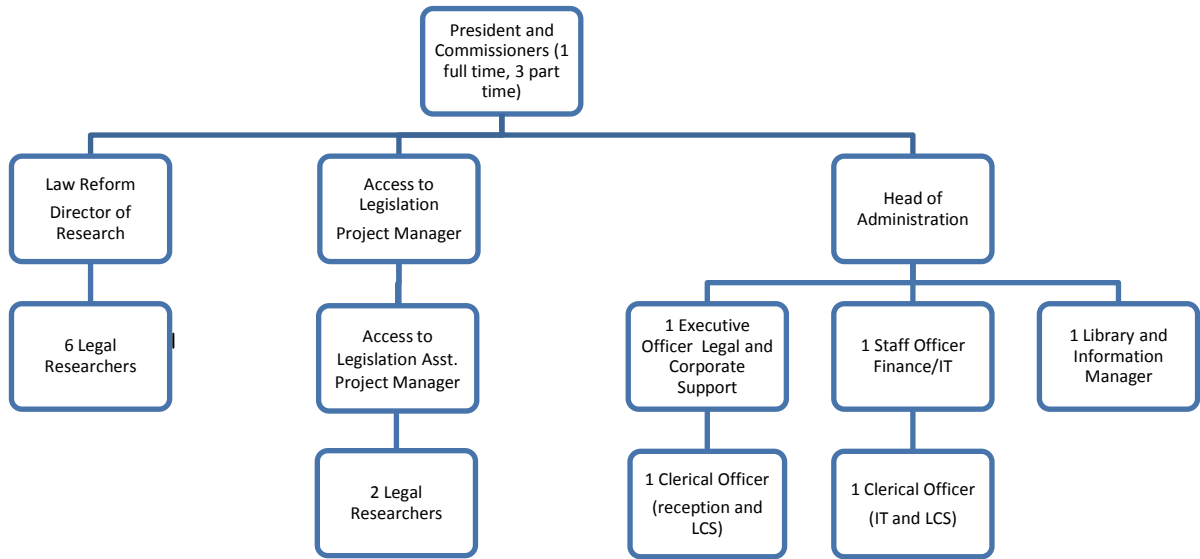
Performance of individual staff members is managed through the PMDS.



Under current accounting procedures, moneys are drawn down from the Office of the Attorney General on a monthly basis by way of a Grant-In-Aid. Commission internal financial controls and expenditure are monitored by the Comptroller and Auditor General on an annual basis. The Commission is also subject to audit by the Office of the Attorney General's Internal Audit Unit.

The Commission's Risk Register was last updated in November 2013 and is kept under regular review by the Commission.

**Appendix**  
ORGANISATION CHART



Law Reform Commission Organisation Chart at 31 December 2013