Parliamentary Follow-up of Law Commission Bills

An Irish Perspective

Ciarán Burke[*]

Abstract

This article seeks to present a brief outline of the various means through which the draft bills and recommendations drafted by the Law Reform Commission of Ireland and published in its reports are followed up by the Irish Parliament, the Oireachtas. The Commission's position within the Irish legislative architecture is explained, as is the process through which bills become laws in Ireland. The Commission, it is noted, occupies an unusual role. Although there is no requirement for its publications to result in legislation, ultimately the lion's share of its output is followed up on in the legislative process in one form or another, with its publications attracting the attention of both the government and opposition parties. The challenges and advantages presented by operating within a small jurisdiction are also outlined, while some thoughts are offered on the Commission's future.

Keywords: law reform, legislation, Ireland, drafting, parliament.

A The Commission's Statutory Mandate and Role in Context

The Law Reform Commission of Ireland (LRC) is a well-established and highly regarded institution embedded in Ireland's policy- and lawmaking structure. Its establishment in 1975 can be seen as part of a broader movement by common law jurisdictions to restate, revise, codify and modernize the common law, inter alia, through the creation of bespoke law reform institutions. Despite having enacted two written constitutions, Ireland nonetheless possesses a strong 'common law' inheritance, including judge-made law and a hybrid system of judicial review.[1] As early as 1951, the first institutionalized version of a 'law reform commission' was established, known as the Statute Law Reform and Consolidation Office, replacing previous ad hoc, part-time or otherwise limited reform efforts.[2] This institu-

* Professor of International Law, Friedrich Schiller Universität, Jena, and former Director of Research at the Law Reform Commission of Ireland. The author would like to thank Alexandra Molitorisová for her help in preparing this article.

1 F. Michael & D. Leonard, *Constitutional Law of Ireland*, 3rd ed., Bloomsbury Professional, West Sussex and Dublin, 2013, pp. 31-58.

2 Committee on Court Practice and Procedure, the Landlord and Tenant Commissions and the Bankruptcy Law Committee.

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tion essentially evolved into a branch of the drafting service of the Office of the Attorney General – the government's legal advisor. A decade later, initial signs that the creation of an independent law reform *agence propre* was contemplated could be discerned in the government's White Paper entitled 'Programme of Law Reform'[3], but it was not until 1966 that the Advisory Committee on Law Reform was established and not until 1974 that the first legislative proposals for the LRC were introduced in the Dáil.[4] After the establishment of the LRC in 1975, the Statute Law Reform and Consolidation Office remained responsible for drafting of consolidations and revisions of law[5] until 1988 when it was finally abolished,[6] with the LRC developing progressively more responsibility in these areas in subsequent decades.

In establishing the LRC, the Irish government clearly drew inspiration, first from its own successes in innovative law reform in the 1960s (the Succession Act 1965, based, to a significant degree, on the Swiss *Zivilgesetzbuch* being one prominent example), and, second, from the experience of neighbouring jurisdictions in the UK and around the wider common law world in the 1960s and 1970s. These decades witnessed the establishment of law reform commissions in England and Wales (1965), Scotland (1965),[7] Northern Ireland,[8] New South Wales (1966)[9] and Canada (various provinces until the mid-1970s). The LRC was loosely modelled on UK, Canadian and Australian bodies that had tried and tested certain methods of achieving law reform. All of these commissions possess similar traits that relate to the appointment of the commissioners, their independence, their financial accountability, the creation of Programmes of Law Reform with the consent of the government and their respective models for public consultations.[10]

The LRC's mandate is embedded in the Irish Law Reform Commission Act 1975 that charges the Commission to "keep the law under review [...] undertake examinations and conduct research with a view to reforming the law, and formulate proposals for law reform". Providing suggestions for law reform includes develop-

3 It was published in 1962. *See* for example, Law Reform Commission, *Annual Conference 2017 – 5th Programme*. Available at: www.lawreform.ie/_fileupload/Annual%20Conference%202017/Annual%20Conference%202017-2.pdf (last accessed 20 March 2020).

4 Law Reform Commission Bill, 1975, introduced by the then AG Declan Costello. *See* Dáil Éireann debate, Tuesday, 4 February 1975, Vol. 277, No. 10. Available at: www.oireachtas.ie/en/debates/debate/dail/1975-02-04/30/ (last accessed 20 March 2020).

5 Notably, the Companies Act, 1963, and the Income Tax Act, 1967.

6 E. Donelan, 'Recent Developments in Statute Law Revision in Ireland', *Statute Law Review*, Vol. 22, No. 1, 2001, pp. 1-19.

7 However, it was contemplated as early as 1828 Brougham suggested it. *See* H. Boggis-Rolfe, 'The Law Commission: Its Work and Methods', *The Law Teacher*, Vol. 1, No. 2, 1967, pp. 27-32.

8 First within the Ministry of Home Affairs, later in 1974 within the Department of Finance and Personnel and since 2007 as an independent Law Reform Commission. *See* N. Faris, 'Law Commissions – What is the Essence of Their Law Reform Role?', *IALS Student Law Review*, Vol. 2, No. 1, 2014. Special Issue: Law Reform and Child Protection, pp. 52-62.

9 And other states and territories up until 1974, with the Australian Law Reform Commission in 1975.

10 *Supra* note 9.

ment of the law or any branch thereof, and its codification,[11] primarily entailing the simplification and modernization of law that is often very complex and difficult to understand. The 1975 Act marked a brand new systematic approach to law reform in Ireland, carried out by fully employed suitably qualified experts, usually with extensive experience in legal research. Unlike its predecessor, the Statute Law Reform and Consolidation Office, which was required to follow the instructions from governmental departments,[12] the LRC can act independently and to initiate its own projects as it considers appropriate. Although the independence of the LRC is not stipulated expressly in its statute, it is ensured via a variety of mechanisms and standards of excellence, including thorough research.[13] In 2006, the LRC was given functional responsibility in the area of revision of acts, which entailed their (electronic) publication[14] in a single text featuring all amendments and changes,[15] essentially a descriptive – rather than prescriptive – form of de facto consolidation.

Although a late adopter of the law reform commission model, Ireland has embraced its benefits. In the late 1980s and early 1990s, a number of the founding statutes of law reform commissions around the wider common law world were repealed, funding was withdrawn or commissions were downsized. In many cases, this occurred as a result of an opposition political party (conservative parties in Australia and Canada) seizing power and overturning previous policies and reforms.[16] Other criticisms aimed at law reform agencies were directed at their alleged lack of independence from the executive branch.[17] In some cases, this was certainly a matter of institutional design (Northern Ireland), whereas in others (Victoria), criticisms derived from the scope of mandated inquiries, with a law reform commission seemingly operating "as a loyal branch of the Attorney-General's office".[18] The LRC has not been immune to such concerns. Following the 2008 financial crisis, a government spending review recommended its abolition; while the Commission was ultimately not abolished, its position has remained somewhat vulnerable. For example, between 2008 and 2014, the LRC's budget was reduced by 50%, a reduction with the potential to significantly affect the

11 Codification refers to a process "whereby laws relating to a particular subject are collected into one text stating the law as it stood at the time of enactment". E. Donelan, 'Statute Law Revision, Codification and Related Policies in Ireland', *International Journal of Legal Information,* Vol. 29, No. 2, 2001, pp. 323-354.

12 *Supra* note 7.

13 D. Costello, 'Law Reform: New Departure', *Dublin University Law Journal,* Vol. 1, No. 1, 1976, pp. 6-7.

14 Consolidation refers to the process "whereby the Oireachtas enacts an Act which collects in a single Act previous Acts relating to a particular topic"; for example, the Social Welfare (Consolidation) Act, 1993. *See also supra* note 12.

15 Law Reform Commission, *Revised Acts.* Available at: http://revisedacts.lawreform.ie/revacts/intro (last accessed 20 March 2020).

16 N. Rees, 'The Birth and Rebirth of Law Reform Agencies', *Australian Law Reform Agencies Conference*, Vanuatu, 2008.

17 *See* the example of the Northern Ireland Law Reform Commission. *Supra* note 9.

18 *Supra* note 17. *See also* D. Whelan, *The Comparative Method and Law Reform* (LL.M. Thesis, The National University of Ireland, 1988).

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quality of its output.[19] In 2007, the Office of the Attorney General conducted an Expenditure Review of the LRC,[20] in which it measured the LRC's value for money on the basis of a set of performance indicators. The Review concluded that the LRC delivers the expected value for the money, since the Commission had met its objectives, increased the impact of its work, introduced new types of output and is generally valued by a variety of different stakeholders. The Irish government also recently reaffirmed its commitment to the implementation of a progressive law reform programme in its Programme for a Partnership Government.[21]

This article is primary concerned with the implementation of the LRC's recommendations, including draft bills. This topic has received very limited attention in academic literature. Most of what does appear in the literature is specific to a particular inquiry on the part of the LRC, discussing particular recommendations in a specific field of law.[22] Very little has been written about its approach to implementation and about the parliamentary follow-up to the LRC's Final Reports. This article attempts to rectify this lacuna.

B Selection of Reforms and the 'Icarus Principle'

As with other law reform commissions in their early days, it was proposed that the LRC's

> programme would not be confined to technical law, but would cover areas of social policy, where legal knowledge and expertise were necessary to assist in the formulation of reforming legislation.[23]

In the atmosphere of welfare liberalism, law reform commissions were expected to be 'socially transformative' and to instigate a critical debate about topics of great public interest.[24] Since its establishment, the LRC framed the vast majority

19 R. Mac Cormaic, 'AG's Office Warns Government on Effect of Cuts', *The Irish Times*, 27 October 2014. Available at: www.irishtimes.com/news/crime-and-law/ag-s-office-warns-government-on-effect-of-cuts-1.1977815.

20 Attorney General, *Expenditure Review Initiative. The Law Reform Commission*. December 2007. Available at: www.attorneygeneral.ie/pub/Value_for_Money_Policy_Review_The_Law_Reform.pdf (last accessed 20 March 2020).

21 Programme for Government – Programme for a Partnership Government, May 2016. Available at: https://assets.gov.ie/3221/231118100655-5c803e6351b84155a21ca9fe4e64ce5a.pdf (last accessed 20 March 2020).

22 *See*, for example, W. Duncan, 'Ireland: The Status of Children and the Protection of Marriage', *Journal of Family Law* Vol. 27, 1988-1989, p. 163. Or C. McGlynn, 'More than a Breach of Privacy: Image-Based Sexual Abuse and the Irish Law Reform Commission on Harmful Communications', in Association of Criminal Justice Research and Development Association (Ed.), *Cybercrime – 19th Annual Conference Report*, 2017.

23 *Supra* note 19.

24 D. David, 'The Historical Necessity of Law Reform', Paper presented at the Alex Castles Memorial Lecture in Australian Legal History, Flinders University Law School, 24 August 2006, p. 14. As cited by Rees, *supra* note 17.

of its project proposals by adopting Programmes of Law Reform in accordance with Sections 4 and 5 of the 1975 Act. This model mimicked that of the Law Commission of England and Wales, requiring government approval of Programmes before they could be implemented.

Since its establishment, the LRC has prepared five Programmes of Law Reform, with the first lasting from 1977 to 1999 and the subsequent Programmes being considerably shorter in duration. The Programmes are prepared in consultation with the Attorney General and are then submitted by the Taoiseach (Prime Minister) to the government. The government may subsequently approve the Programmes with or without modification, and where the government gives its approval to the Programme, a copy of the Programme is laid before both Houses of the Oireachtas (Parliament).

The LRC's Programmes have treated a broad variety of topics, including controversial social policy issues. In recent years (the Fourth and Fifth Programmes), the Commission included a number of salient societal issues in its schedule, including privacy and technology in the digital era, compensating victims of crime, harmful communications and digital safety, and compulsory acquisition of land. The diversity of topics covered by a single Programme (for example, the Fifth Programme ranges from adult safeguarding to the liability of hotels and unincorporated associations) provides evidence that the Commission's work is designed to serve the interests of society as a whole.[25] The Commission has shown that it is willing to examine any area of law of the State (including any private and or public international law), any area of substantive law (the common law, statute law, statutory instruments and case law) and procedural law pertaining to legal procedures and matters of legal practice.[26] However, there is perhaps a certain degree of truth in the view that law reform agencies tend to be more preoccupied by the substantive law rather than access to justice.[27] The LRC has been greatly concerned with various aspects of the law of evidence;[28] however, it has dealt with procedural laws only sparingly, for example in the 2004 Report on Judicial Review Procedure, the 2005 Report on Multi-Party Litigation and the 2006 Report on Prosecution Appeals and Pre-Trial Hearings. Also, similar to England and Wales, the LRC may propose that an examination of a particular branch of the law is undertaken by another agency or body. For example, it was suggested that the examination of the financial limits on magistrates' orders in domestic and affiliation proceedings should be referred to an interdepartmental committee.[29]

25 *Supra* note 9, p. 56. Citing Mr Justice Ronan Keane's paper considering and celebrating the work of the Irish Law Reform Commission in 2005.

26 *See* Section 1 (Interpretation) of the Irish Law Reform Commission Act 1975.

27 Zander, M., 'Law Reform: How to Get It', *Dublin University Law Journal*, Vol. 1, No. 2, 1976, p. 7.

28 Law Reform Commission, *Report: Consolidation and Reform of Aspects of the Law of Evidence*. LRC 117-2016. Or *Report: Search Warrants and Bench Warrants*. LRC 115-2015.

29 *Supra* note 8.

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The LRC developed the Fifth Programme of Law Reform on the basis of several considerations. These included public benefit, suitability for analysis by legal expertise, the maintenance of balance between narrow- and wide-focus projects and the aim of complementing and not duplicating the efforts of other bodies engaged in law reform activities. The LRC is no outsider in the Irish policymaking structure. From a 'macroscopic' policymaking view, Programmes of Law Reform are crafted with the knowledge that there are many different actors in the field of law reform. Although the LRC remains one of main drivers for conducting law reform, there are many other channels available for pursuing legal and regulatory change. These include departmental and interdepartmental committees, ad hoc commissions and committees appointed by the government,

> as well as periodic reports from internal government policy units, reports from government instrumentalities such as the sentencing councils, the children's commissions, the human rights commissions, and even the courts' annual reports.[30]

An example of this is the Expert Group of the Review of the Mental Health Act 2001, which produced a report with a list of recommendations in 2014,[31] the Competition Authority's Report on the Legal Profession, the 1996 Report of the Constitution Review Group and the Reports of the Oireachtas Committee on the Constitution.[32] As such, avoiding duplication may involve consultation with a variety of other bodies.

However, the LRC does not regard the activities of other actors in the field as competition. It attempts to play an active role in a broader context of regulatory reform, which involves engaging in pre-legislative scrutiny of the schemes of bills and in detailed scrutiny of Private Members' Bills by Oireachtas Committees, a process in which the LRC's research has often been employed.[33] The LRC meets twice a year with the Department of Justice and Equality to review and discuss matters of mutual interest, both in criminal law and in civil law.[34] It is also possible that other bodies involved in policymaking may refer a matter to the LRC for consideration indirectly. For example, in 2018 the Personal Injuries Commission delivered two reports with 14 recommendations, one of which proposed that the LRC should bring forward draft legislation to cap damages that courts may award in certain classes of cases. The issue was acted upon promptly: a project on the

30 T. Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law', *Erasmus Law Review*, Vol. 8, No. 3, 2015, pp. 130-138.

31 Report of the Expert Group on the Review of the Mental Health Act 2001. Available at: www.mhcirl.ie/File/rpt_expgroupreview_mha2001.pdf (last accessed 20 March 2020).

32 R. Byrne et al., *The Irish Legal System*, 6th ed., Bloomsbury Professional, 2014, p. 473.

33 Law Reform Commission, *Fifth Programme of Law Reform*. Report LRC 120-2019. Available at: www.lawreform.ie/_fileupload/Programmes%20of%20Law%20Reform/LRC%20120-2019%20-%20Fifth%20Programme%20of%20Law%20Reform.pdf (last accessed 20 March 2020).

34 Law Reform Commission, *Annual Report 2016*. Available at: www.lawreform.ie/_fileupload/annualreports/Annual%20Report%202016%2024%20July%202017%20FINAL.pdf (last accessed 20 March 2020).

topic was included in Fifth Programme of Law Reform, and an Issues Paper (setting out the framework of examination and inviting contributions from the public and other stakeholders) was published on the topic in 2019.[35] On the other hand, to completely avoid overlap in areas of mutual interest is almost impossible, given the number of bodies that may present law reform proposals. Therefore, similarities with reform projects and activities undertaken by other bodies (specialist agencies, the Department of Justice, the Law Society, the Irish Human Rights and Equality Commission) as well as individual specialists, academia or NGOs may occur. This may be construed as being to the benefit of the government and the legislature, as it creates an *à la carte* menu from which the most convenient of the expert suggestions may be selected. However, such duplication also reduces the unique appeal of a bespoke law reform agency and may be viewed as a challenge to such agencies going forward.

The LRC also supports and facilitates the work of other bodies engaged in law reform activities by means of its Access to Legislation project, which renders legislation more accessible by creating electronically searchable indexes of amendments to primary and secondary legislation, by maintaining a separate list of all Acts that remain in force and by the aforementioned revision of Acts. The Access to Legislation project is sponsored by the government and occasionally features legislative proposals.[36]

Apart from Programmes of Law Reform, the LRC must act upon requests from the Attorney General to undertake an examination of, and conduct research in relation to, any branch of law or issue. Since the Attorney General is already intensively consulted in the process of preparation of the Programmes for Law Reform, recourse to the request for examination of a specific area of law comes up only sporadically. Since 1975 the Commission has published 43 reports on matters referred to it by the Attorney General. However, most of these came in a cluster of requests in 1989 that pertained to aspects of criminal law (8 resulting reports), sexual offences (3 reports), compensation for personal injuries (2 reports), sheriffs (2 reports) and conveyancing law and practice (12 reports).[37]

The LRC's Programme for Law Reform is a widely consulted document. Two years prior to the adoption of the Fifth Programme, Mr Justice John Quirke, the then president of the LRC, sent letters to a number of public bodies, educational institutions and NGOs, including the Central Bank of Ireland, the Oireachtas Committee on Justice and Equality and the various Ombudsman bodies, and invited them

35 Law Reform Commission, *Issues Paper*: *Capping Damages in Personal Injury Actions*. LRC IP 17, 2019. Available at: https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/51280 (last accessed 20 March 2020).

36 *Supra* note 34. *See also* Law Reform Commission, *Accessibility of Legislation*. Available at: www.lawreform.ie/welcome/online-accessibility-of-legislation.379.html (last accessed 20 March 2020).

37 Law Reform Commission, *Attorney General References*. Available at: www.lawreform.ie/law-reform/attorney-general-references.246.html (last accessed 20 March 2020).

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to compose submissions for the Programme.[38] This entails that the LRC proactively engages with other stakeholders in the policymaking arena. The targeted call for submissions is followed by a general notice that is published on the LRC's website and invites contributions from the general public. In addition, the LRC held a series of five consultative meetings throughout Ireland seeking views from citizens and other interested parties. Relevant parties could thus express their submissions in writing as well as orally. The LRC also held separate meetings with individuals and representative groups, including those who had made written submissions as to the possible projects to be considered.[39] Altogether, 77 individuals, organizations and public bodies made written submissions that shaped the Fifth Programme of Law Reform, suggesting more than 126 areas of law for inclusion in the Programme. These included the Central Bank of Ireland; the Department of Children and Youth Affairs; the Department of Health; the Department of Housing, Planning and Local Government; the Department of Justice and Equality; the Office of the Director of Public Prosecutions; the Irish Human Rights and Equality Commission; the National Disability Authority; the Office of the Ombudsman and the National Child and Family Protection Agency. Accordingly, even public bodies with significant policymaking capacity submitted suggestions for law reform, with the goal that their policy suggestions would ultimately lead to research and in time be transformed into a coherent legislative bill. The role of an independent law reform agency may thus be seen to attend to all places where the law has not been looked into by the government.[40] To choose from the vast amount of suggestions, the LRC discussed and sought approval for 15 selected projects in consultation with the Attorney General's Consultative Committee on Law Reform, which comprises representatives of all governmental departments, the Law Society of Ireland and the Bar Council of Ireland. The projects that are taken up by the LRC are accorded considerable expert attention. After the Committee's approval, the draft Programme is forwarded to the Attorney General, who submits the Programme for governmental approval, after which the draft Programme travels to the Oireachtas Joint Committee on Justice and Equality and is finally considered by the Oireachtas itself.

The Programme of Law Reform does not have any formal connection to the Legislative Programme published by the government, given the LRC's independent status. Nonetheless, the Legislative Programme follows similar consultation rounds among senior officials across the government and the Office of the Attorney General. It clarifies the legislative priorities of the government, outlines the status of Bills under preparation by various governmental departments and is updated periodically, specifically twice per year (summer and autumn/winter Dáil terms). It may also feature legislative proposals emanating from the LRC, and it provides a good indication of the intake percentage of the LRC's proposals by the government.

38 *Supra* note 34.
39 *Ibid.*
40 *Supra* note 28.

The LRC also publishes a strategy statement, usually covering a two-year period, that sets out key objectives, outcomes and performance indicators of the LRC's work alongside its strategy. Although it has been suggested that law reform commission bodies tend to strive for a high implementation rate,[41] the LRC has not included such a measure as a performance indicator. Rather, the yardstick employed is that it has successfully managed and completed all projects in a given Programme of Law Reform as well as existing requests from the Attorney General.[42] New requests from the Attorney General are occasionally urgent in nature and may in practice be given priority over existing or forthcoming projects contained in the Programme of Law Reform. However, no such prioritization is explicitly prescribed by the 1975 Act.

The LRC also informs on its work through the publication of annual reports.[43] The LRC is required by Section 6 of the 1975 Act to report on its activities to the Attorney General at the end of each year. The Attorney General forwards the Report to the Taoiseach, who submits it to government and lays it before the Houses of the Oireachtas. The LRC includes a table of implementation on its website that is regularly updated and provides information on draft bills and published heads.[44]

To deliver tangible results, the LRC relies on a particular methodology,[45] a set of standards on research processes and consultations. "Law reform requires research, and research calls for skills which are only acquired by training and experience,"[46] supported by high quality standards. In addition the LRC considers that the "consultation process is of central importance to the Commission's work".[47] Consultations significantly improve the quality of the law reform process and include roundtables, workshops and the LRC's annual conference. The LRC's annual conference is a widely attended event that provides information on the LRC's current work so that, for example, Members of the Oireachtas are notified of projects that may fall within their areas of interest.[48] The LRC consultations

41 *Supra* note 9.

42 Law Reform Commission, *Strategy Statement 2018-2020*. Available at: www.lawreform.ie/_fileupload/Strategy%20Statement/LRC%20SS%202018%202020.pdf (last accessed 20 March 2020).

43 Although the last published report is the Annual Report 2016.

44 Law Reform Commission, *Table of Implementation* (Updated January 2020). Available at: www.lawreform.ie/publications/table-of-implementation-of-law-reform-commission-recommendations.171.html (last accessed 20 March 2020).

45 "To achieve the goals set out in its Programmes 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." *See supra* note 34.

46 *Supra* note 14.

47 *See* Law Reform Commission, *Twenty Second Report*, 2001. Available at: www.lawreform.ie/_fileupload/annualreports/ar22.htm (last accessed 20 March 2020).

48 *See* Seanad Éireann debate, Wednesday, 13 November 2019, Vol. 268, No. 4. Available at: www.oireachtas.ie/en/debates/debate/seanad/2019-11-13/8/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

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are wider than those of a standard legislation process.[49] Suggestions come from professional lawyers, professional organizations as well as from the public. They are often made with regard to so-called Issues Papers (previously known also as Working Papers and Consultation Papers). Issues Papers contain a brief analysis of a specific area of law followed by a set of questions on which consultees are asked to provide their views and submissions.[50] Issues Papers, and the responses to them, are taken into consideration in the drafting of Final Reports that include a detailed account of Irish law and a comparative analysis, and a draft bill if considered necessary. "Before drafting the Report, a seminar is usually held to which the Commission invites interested parties, including those who have made submissions."[51] Final Reports are greatly improved through consultation processes, and this in turn improves the acceptability of the proposals,[52] overcoming objections and fostering agreement among relevant parties.[53] The Final Report must state more than what the law should be; its findings must be supported by comprehensive, compelling and rational arguments.[54] The result is a structured 'issue identification-consultation-consideration-finalizing proposal' work process. Submissions by the interested parties may also be made with regard to the so-called Discussion Papers that represent a special category of output of the LRC that do not contain any recommendations for law reform. All in all,

> the procedures to be adopted by the Law Reform Commission in Ireland are [...] matters within its complete discretion [...] and its statute gives it the flexibility which be needed to adapt these procedures [...] to Irish conditions.[55]

As previously noted, the Commission's implementation rate is not explicitly set out as a performance indicator. Nonetheless, it is not something that can be easily ignored by the LRC, or indeed by any law reform body. Public meetings at which the LRC presents its work often make reference to the fact that the LRC's implementation rate exceeds that of its equivalent bodies in the United Kingdom. Particularly after the 2008 economic crisis in Ireland, when the Commission's abolition was narrowly avoided, ensuring the continuing relevance of the LRC to Ireland's lawmaking process would seem imperative. However, such concerns may equally limit some of the Commission's most groundbreaking and ambitious work. The Commission was established a decade after the State had adopted sections of the Swiss *Zivilgesetzbuch* more or less verbatim into the Succession Act 1965. Yet when comparative research is engaged in by the Commission, it typi-

49 P.P. Biribonwoha, 'The Role of Legislative Drafting in the Law Reform Process', *Commonwealth Law Bulletin,* Vol. 32, No. 4, 2006, pp. 601-608.

50 *Supra* note 33, p. 468.

51 *Supra* note 34.

52 *Supra* note 28.

53 *Supra* note 14.

54 G. Murphy, *Law Reform Agencies,* International Cooperation Group, Department of Justice of Canada, 2004.

55 *Supra* note 14.

cally begins – and often finishes – in the common law realm. A conservative approach is notable in much of what the Commission has accomplished in the recent past, with only limited engagement with the wider world. This has certainly made its output easier for successive governments to ingest. However, purpose of a specialist agency has the potential – and according to the wording of the 1975 Act – the vocation, to be significantly broader. The Commission, somewhat unfortunately, finds itself bound by the 'Icarus principle': while its independence is beyond dispute, and is central to everything it does, a too-bold assertion of this independence in its selection of projects or its policy recommendations is likely to imperil its very existence. On the other hand, a too conservative approach risks its independence becoming irrelevant as it produces content that anticipates the policy priorities of the government of the day.

C How Acts Are Made

In order to assess the influence of the LRC on legislation in Ireland, it is good to have at least a basic understanding of the Irish legislative process. In Ireland, the Oireachtas possesses exclusive lawmaking capacity. There are a number of means via through which policy ideas are transformed into legislation in Ireland. Among the principal sources of these policy ideas are the Programme for Government, European Union laws and decisions of the European courts. Between 2010 and 2013, many legislative proposals were adopted on the basis of the EU-IMF Programme, for example the Credit Institutions (Stabilisation) Act 2010.[56] Specific legislative proposals may come from ad hoc commissions and their reports, such as the Magdalen Commission Report of 2013. Bills may be also presented by Members of the Dáil and the Seanad (the upper and lower houses of Parliament). However, the Dáil may not pass legislation that involves tax or expenditure of public money without a prior recommendation or a money message by the government supporting such expenditure.

Before the government publishes a bill, a General Scheme of the bill, often called the heads of the bill, is published. The government may then open a public consultation relating to a bill or to its policy ideas, via a Green or White Paper,[57] following the British practice.[58] The General scheme of the bill or the heads of the

56 European Commission, 'The Economic Adjustment Programme for Ireland', Occasional Papers 76, 2011. Available at: https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf (last accessed 20 March 2020).

57 For example, Department of Communications, Climate Action Environment, *Green Paper on Energy Policy in Ireland*. Available at: www.dccae.gov.ie/en-ie/energy/topics/Electricity/policy-development/Pages/Policy-Development.aspx and *White Paper 'Ireland's Transition to a Low Carbon Energy Future 2015-2030'*. Available at: www.dccae.gov.ie/en-ie/energy/topics/Energy-Initiatives/energy-policy-framework/white-paper/Pages/White-Paper-on-Energy-Policy-in-Ireland-.aspx (last accessed 20 March 2020).

58 *Supra* note 33, p. 583. A Green Paper is somewhat more discursive in that sets out various ideas and approaches without committing the government to any particular course of action. A White Paper tends to be more definitive in that it typically sets out a clear governmental view on the matter.

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bill is usually scrutinized by an Oireachtas Committee before the text of the bill is finalized. This is the so-called pre-legislative scrutiny, which ends with a report making recommendations to the government that is laid before the Houses of the Oireachtas. In a similar fashion, bills introduced by Private Members[59] are also scrutinized by an Oireachtas Committee, though only if the bill passes Second Stage in the House of the Oireachtas and the Member who is sponsoring the bill asks the relevant committee to undertake such scrutiny. The relevant committee then produces a report that may recommend the House either to move the bill to Committee Stage or not to proceed to Committee Stage. The report is also laid before the Houses of the Oireachtas. Even where the committee does not recommend proceeding to the Committee Stage, the Member sponsoring the bill may still move a motion in the House to progress the bill to Committee Stage, though only following a debate in the House. The committee undertaking scrutiny of a bill may invite interested parties to attend meetings, discuss the bill and make submissions to the bill. Some examples of such Private Members' bills include the Female Genital Mutilation Act 2012, the Construction Contracts Act 2013 and the Smoking in Vehicles Act 2014. Generally, in order for Private Members' bills to be successful in the Oireachtas, some political support on the part of the government is needed.

If individual ministers intend to enact new legislation, they first present bills to the government, which ultimately decides whether or not to introduce legislation to the Oireachtas. By this time, the advice of the Attorney General will usually have been obtained.[60]

> The decision to introduce legislation is made on foot of a document known as a 'Memorandum for Government'. The Memorandum sets forth in detail the background to the Bill and the view of the Ministers concerned with the Bill.[61]

The Memorandum includes the heads of the bill which the government must approve. Once a decision has been taken by the government, the department concerned sends the Attorney General a letter requesting that the Parliamentary Counsel (Draftsman) draft the legislation in accordance with the approved heads. On the foundation of the State, the services of the Parliamentary Draftsman were assigned to the Attorney General by virtue of the Ninth Schedule to the Ministers and Secretaries Act 1924.[62] The Office of Parliamentary Counsel now resides within the Office of the Attorney General. The Parliamentary Counsel may liaise with civil servants of the department promoting the bill or with lawyers on the

59 A Private Member's Bill is a bill that is not sponsored by a minister, minister of state, the Attorney General or the Leader of the Seanad. *See supra* note 33, p. 576.

60 *Supra* note 33, p. 585.

61 *Ibid.*

62 Office of the Attorney General, *History*. Available at: www.attorneygeneral.ie/pc/pc_history.html (last accessed 20 March 2020).

advisory side of the Office of the Attorney General.[63] The model entails that the process of legislative drafting in Ireland is centralized in order to ensure its uniformity, with the Office of Parliamentary Counsel effectively serving as gatekeepers to the legislative drafting process. However, the process is far from transparent, with the Office jealously guarding its drafting manual and refusing to share its contents with other agencies – such as the LRC – that draft legislation. The reason for this lack of transparency is not immediately apparent.

In both Houses of the Oireachtas, a bill passes through five stages before it can be enacted. Bills can be initiated in both Houses. However, there are two exceptions to this rule: money bills and bills that seek to amend the Constitution can be initiated only in the Dáil. As per usual business, most bills are initiated in the Dáil by a government minister with responsibility for certain subject matters in question.[64] A bill presented by the government, the leader of the Seanad, and Private Members with prescribed support is automatically added to the Order Paper and proceeds to the Second Stage. By contrast, Private Members' Bills may be added to the Order Paper only if leave to introduce them in the House is granted. At Second Stage, the general philosophy and principles of the Bill are debated, and the House decides whether the bill proceeds to Committee Stage. The House is, however, also entitled to reject the bill. The Oireachtas Library & Research Service may prepare bill digests, impartial analyses of proposed government legislation, that aim to support Members of the Oireachtas in preparing for Second Stage debates. Such digests may also show the LRC's work on a particular subject matter.[65]

At Committee Stage, the bill is examined in detail, section by section, clause by clause, and Deputies may propose changes to the text. The bill is debated either by the entire house or by a select/special committee that usually consists of members with special expertise or interest in the subject matter. The list of proposed amendments is published, and each proposal is debated between those who presented or introduced the bill and those suggesting an amendment. Once the text is agreed, the bill moves to the Report Stage. This stage represents the last opportunity to amend the text of the bill though only with those amendments that were presented during Committee Stage. The government may also seek other amendments by effectively returning the bill to Committee Stage. At Report Stage, the House effectively reviews the work conducted during the Committee Stage.[66] Once all amendments are dealt with, the bill is received for final consideration, its Fifth Stage, which is conventionally scheduled immediately after

63 *See* for example, Office of the Attorney General, *Client Service Guide 2016-2018*. Available at: www.attorneygeneral.ie/pub/Client_Service_Guide_2016_2018_as_published.pdf (last accessed 20 March 2020).

64 *Supra* note 33, p. 574.

65 Dáil Éireann debate, Wednesday, 6 November 2019, Vol. 988, No. 7. Available at: www.oireachtas.ie/en/debates/debate/dail/2019-11-06/41/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission&highlight%5B3%5D=law&highlight%5B4%5D=reform&highlight%5B5%5D=commission (last accessed 20 March 2020).

66 *Supra* note 33, p. 576.

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Fourth Stage. When a bill passes this Stage in the House in which it was initiated, it is sent to the other House, in which the same stages of debate are repeated except for the First Stage. Once a bill has been passed by the Dáil and Seanad, the president signs it into law. It becomes an Act and is added to the Statute Book.

D Examples of Implemented Projects

The LRC aims to make its output practically useful and generally attaches a draft bill annexed to each Final Report. Attaching such a bill helps to ensure a speedy legislative follow-up so that the Commission's conclusions can be immediately introduced into the parliamentary process. It has been noted elsewhere that this drafting process "is a useful discipline and helps to uncover problems as well as assisting in their solution".[67]

A number of concerns have been voiced over law reform commissions attaching bills to their reports. It was argued that they are not resourced with sufficiently skilled personnel or that the Office of Parliamentary Counsel is better suited for that job.[68] In England, when the Law Commission was established, there was some doubt as to whether Parliament would find the time to implement its work. However, this did not prove to be a problem[69] since the Law Commission has had access to parliamentary draftsmen, which proved a useful resource for the purposes of speedy implementation of the Commission' work products. In Ireland, the LRC is responsible for its own drafting, with this work in practice usually falling to the Director of Research and the Chief Commissioner. Neither are members of the Office of Parliamentary Counsel and thus do not have access to the OPC's jealously guarded drafting manual. This has occasionally led to complaints that the LRC is not capable of drafting legislation to the same standard as that produced by the OPC. However, a good number of the Commission's draft bills have been enacted into legislation – with little by way of amendment – and thus the distinction between the quality of the OPC's output and that of the LRC may be more a matter of pride than of substance. Nonetheless, it warrants observing that it reflects poorly on the system as a whole that the OPC's drafting manual is not at least made available to other government agencies, or, better still, made public, where it could be commented upon and improved, *inter alia*, through engagement with academics and practitioners.

It should be noted that, while a draft bill is appended to the vast majority of LRC reports, this is not a universal feature. For a variety of reasons, the Commission may deem it expedient to leave it to the legislature to decide the form in which its recommendations should be enacted, if at all, rather than stipulating the precise form preferred. This may have to do with political expediency, the resources required to draft the bill in question, or for other reasons. The LRC typically does

67 *Supra* note 14.
68 *Supra* note 50.
69 *Supra* note 28.

not comment on the reasons for which it chooses not to include a draft bill with a Final Report. An example of a Report published without a draft bill is the Report on Aspects of Domestic Violence published in 2013, which recommended, inter alia, that a breach of a domestic violence order should remain a summary offence in order to ensure its constitutional validity and effectiveness. In this instance, the principal recommendation was to maintain the status quo ante; as such, the reason for failing to include draft legislation is clear. Other examples include the 1996 Report on Sentencing, wherein the LRC recommended primarily non-legislative reform. The 2006 Report on eConveyancing: Modelling of the Irish Conveyancing System recommended establishing an eConveyancing Group, while the 2013 Report on Mandatory Sentences recommended establishing the Parole Board on a statutory basis, something which ultimately occurred via the 2019 Parole Act (though this legislation was not drafted by the LRC). Further, in its 1985 Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and its 1985 Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters, the LRC recommended that the respective conventions should be ratified. Interestingly, although the Irish legal system conventionally requires adopting implementing legislation before an international treaty is ratified, the LRC does not attach a draft bill to its reports where it recommends that the State should ratify an international treaty. The Hague Convention Abolishing Requirements of Legalisation of Foreign Public Documents required the adoption of a statutory instrument (Court (No. 1) (Proof of Foreign Diplomatic, Consular and Public Documents) 1999) as well as a statutory provision (Section 50 of the Civil Law (Miscellaneous Provisions) Act 2008), but given that much of such Acts is effectively 'boilerplate' provision, the LRC has chosen in the past not to append draft bills on such topics to its Reports. However, it should be noted that when such reports are implemented, they are nonetheless included in the LRC's implementation table, which tends to take a broad view of the concept of 'implementation', thus allowing for a variety of forms of legislative follow-up.[70]

It has been noted elsewhere that while the LRC cannot be anxious about its implementation rate, it must nonetheless be conscious of the need to remain relevant.[71] This entails that implementation – taking account of the 'Icarus principle' discussed earlier – remains an important desideratum, though it should be acknowledged that being in a small jurisdiction also helps the LRC to remain in the public consciousness. While in larger jurisdictions non-lawyers may not be aware of the output of law reform bodies, the Commission's reports – and even certain issues papers – regularly make the mainstream newspapers, sometimes even on the front page. This ensures that pressure to implement the Commission's recommendations may be slightly greater than in larger jurisdictions, which may go some way towards accounting for the LRC's implementation rate exceeding that of the Law Commission of England and Wales, for example. However, the

70 *See supra* note 45. Column 'Information on Implementation'.

71 *Supra* note 17.

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fact that other specialized bodies (ad hoc commissions and the Irish Human Rights and Equality Commission, for example) may also make proposals for legislative reform means that the LRC is operating in an increasingly crowded marketplace, and questions may be asked as to whether this will affect the way in which it tailors recommendations in order to ensure maximum media exposure.

The present implementation rate for the LRC's reports is approximately 70% "in the sense that about 70 per cent have influenced the content of the later legislation".[72] The LRC maintains a table of implementation on its website, providing more concrete information on how its reports have been substantially implemented, partially implemented, are under consideration, awaiting response or have not been implemented, though the table does not provide statistical analysis but rather presents notes in relation to individual cases.[73] What is clear, however, is that in many cases any follow-up from the legislature has not been via direct implementation of the Commission's recommendations or the enactment of unamended draft bills. Rather, a variety of other forms of follow-up are possible. A number of past and present examples follow.

I Follow-up by Specialized Bodies

Some of the LRC's work products were followed up by specialized review groups and commissions which considered whether to move forward with certain LRC recommendations. An example of this is the LRC-recommended Corporate Crime Agency that was considered by the Review Group on Anti-Corruption and Anti-Fraud Structures and Procedures in Criminal Law Enforcement. Another example concerns the 2013 Report on Mandatory Sentences, which was incorporated into the Department of Justice Strategic Review of Penal Policy. The 1985 Report on Minors' Contracts was approved in the 2011 report of the Sales Law Review Group. The 1995 Report on Intoxication and the 2010 Report on Inchoate Offences were incorporated into the Programme Work of the Criminal Law Codification Advisory Committee. Finally, on the basis of recommendations laid out in the 2013 Report on Jury Service, the government established a Working Group on Juries in 2018.

II Non-Statutory Follow-up

Certain LRC Reports, such as the 1982 Report on Defective Premises, which contained a Draft Defective Premises Bill, were instead taken by the executive and transformed into non-statutory instruments, such as the HomeBond scheme. Other examples include the 2006 Report on eConveyancing, which was implemented by Law Society of Ireland, and the 2005 Report on Multi-Party Litigation, which was implemented by the Superior Rules Courts Committee.

72 *Supra* note 33, p. 469.

73 Compare with the ALRC, where 60% are substantially implemented; 8% are partially implemented; 2% are under consideration; 3% are awaiting response; and 7% have not been implemented. *See* Australian Law Reform Commission, *Implementation*. Available at: www.alrc.gov.au/implementation-final-reports/ (last accessed 20 March 2020).

III Partial Implementation

A number of the LRC's reports were implemented only in part. For example, the 2014 Report on Disclosure and Discovery in Criminal Cases, which included a Draft Criminal Procedure (Disclosure) Bill was implemented by Section 19A of the Criminal Evidence Act 1992 that was inserted by virtue of Section 39 of the Criminal Law (Sexual Offences) Act 2017. Such a result may cause some ambivalence for the Commission since, typically, reports are seen as a single piece of research, with recommendations attached at their foot. While in some instances the recommended legislative measures may be separable from one another, this is far from universally the case. As such, piecemeal implementation, while counted towards the LRC's much vaunted implementation rate, does not necessarily demonstrate that the legislature agrees with the Commission's analysis.

IV Multiple Draft Bills

The Commission occasionally engages in very complex and lengthy work projects, with the report's result containing multiple draft bills. For example, the 2018 Report on Regulatory Powers and Corporate Offences contained four draft bills reflecting more than 200 recommendations. It remains to be seen how many of these bills will be followed up, and in what form.

V Implementation via Multiple Steps

Certain reports have been implemented in multiple stages. For example, the 2016 Report on Harmful Communications and Digital Safety was implemented by the Harassment, Harmful Communications and Related Offences Bill 2017, which is – as of February 2020 – at its Third Stage in Dáil, he last debate having taken place in January 2018, and by the General Scheme of the Online Safety and Media Regulation Bill published in January 2020. It is important to note in this context that the 2017 Bill was sponsored by Opposition Private Member Brendan Howlin, rather than being government sponsored. Another example is the Draft Age of Majority Bill, contained in the 1983 Report on the Age of Majority, the Age for Marriage and Some Connected Subjects, which was implemented via the adoption of the Age of Majority Act 1985, and which further shaped the content of the Family Law Act 1995 and the Family Law (Miscellaneous Provisions) Act 1997.

VI Direct Implementation

A number of reports were implemented in full, via a single coherent Act. For example, the 2015 Report on Consumer Insurance Contracts was implemented by the Consumer Insurance Contracts Act 2019. The 1985 Report on Competence and Compellability of Spouses as Witnesses, which contained a Draft Criminal Evidence Bill, was implemented by the Criminal Evidence Act 1992. The 2005 Report on the Establishment of a DNA Database, which contained a Draft Criminal Justice (DNA Database) Bill, was implemented by the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (DNA Database).

Adopting a single coherent Act may also occur in cases in which the LRC recommends consolidation and codification of previous law, such as the Land and Con-

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veyancing Law Reform Act 2009, which was based on the 2005 Report on eConveyancing and which suggested replacing and codifying over 150 Acts dating from the 13th to the 20th century and many common law rules. The 2009 Act, however, also implemented a number of other LRC reports and accompanying draft legislation, namely the 1991 Report on Land Law and Conveyancing Law: Service of Completion Notices; the 1995 Report on the Interests of Vendor and Purchaser in Land during the Period Between Contract and Completion; the 1998 Report on Land Law and Conveyancing Law; Further General Proposals Including the Execution of Deeds; the 2000 Report on the Rule against Perpetuities and Cognate Rules, and Draft Perpetuities Bill; the 2000 Report on the Variation of Trusts, and Draft Variation of Trusts Bill; and the 2002 Report on the Acquisition of Easements by Prescription and Profits à Prendre. Apart from the preceding examples, other reports (such as the 2006 Report on Vulnerable Adults and the Law and the 2009 Report on Bioethics: Advance Care Directives) were transposed into a single legislative instrument (the Assisted Decision-Making (Capacity) Act 2015, which also represented a major step towards domestic implementation of the Convention on the Rights of Persons with Disabilities).

Even in cases in which the LRC did not attach a draft bill to its Report, the Report's recommendations were sometimes followed up via the adoption of a legislative Act. For example, the 1995 report 'An examination of the Law of Bail' was implemented by the Bail Act 1997.

VII Varying Speed of Implementation

It should be noted that certain reports are followed up by the government only with considerable delay. For example, the 2007 Report on General Law of Landlord and Tenant containing a draft Landlord and Tenant Bill was followed up in 2011 when the Department of Justice and Equality published the Scheme of the Landlord and Tenant Law Reform Bill. However, a further 8 years elapsed before the government, in its Legislation Programme, envisaged publishing the Landlord and Tenant Law Reform Bill. It further took 11 years to implement a 2004 Report: Finance (Tax Appeals) Act 2015 (Tax Appeals Commission). At one point, the government proceeded with the implementation of an LRC report (the 2005 Report on Public Inquiries including Tribunals of Inquiry); however, the implementing bill subsequently lapsed with the dissolution of the Dáil and the Seanad.

Some reports, on the other hand, are implemented very promptly. For example, the 1994 Report on Occupier's Liability was implemented with the adoption of the Occupiers' Liability Act 1995. The 2013 Report on Jury Service was implemented in part by the adoption of the Courts and Civil Law (Miscellaneous Provisions) Act 2013. Some recommendations also make their way into the legislative process relatively quickly, but the legislative process itself may continue for a prolonged period, in most instances when it comes to legislation introduced by Opposition Private Members. For example, the Draft Civil Liability (Amendment) (Prevention of Benefit from Homicide) Bill contained in the 2015 Report on Prevention of Benefit from Homicide is being implemented by the Civil

Liability (Amendment) (Prevention of Benefit from Homicide) Bill 2017, which was introduced by a Private Member and, in October 2018, was referred to Select Committee.

VIII LRC Follow-up

The LRC also followed up on some of its previous reports in later Programmes of Law Reform, often in cases in which legislative follow-up had not occurred in the interim. For example, the 1988 Report on the Rule Against Hearsay in Civil Cases that contained a Draft Hearsay in Civil Proceedings Bill was in part incorporated in the Children Act 1997 and then in 2017 incorporated in the Report on Consolidation and Reform of Aspects of the Law of Evidence. The 1994 Report on Contempt of Court was incorporated into the Fourth Programme of Law Reform, and later, in 2016, the LRC published an Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice. The 2002 Report on the Indexation of Fines: A Review of Developments recommended the indexation of the 'fines' system, which had already been outlined in the 1991 Report on Indexation of Fines and contained some of the same draft legislative provisions as in the 1991 report. These reports were implemented by the Fines Act 2010, as well as including recommendations from the 2003 Report on Penalties for Minor Offences.

IX Other Avenues

Some of the LRC's recommendations can also be transformed into a single section of an Act, such as the 2013 Report on Mandatory Sentences, which has been incorporated into the Judicial Council Act 2019, Section 21, prescribing ministerial review of mandatory minimum sentences within 2 years, and Section 29 of the Criminal Justice Act 1999, which provides a discretion for courts to reduce sentences where a guilty plea is entered (thus implementing a recommendation of the 1996 Report on Sentencing).

Certain LRC recommendations may also be transformed into a part of an Act. The Children and Family Relationships Act 2015, Part 4, implemented the Draft Children and Parental Responsibility Bill contained in the 2010 Report on Legal Aspects of Family Relationships, which Draft Bill provided for virtually automatic guardianship for fathers and allowed for any person taking parental responsibility to be treated as a joint guardian. Part 4 also implemented recommendations contained in the 1982 Report on Illegitimacy. Part 3 of the Criminal Law (Sexual Offences) Act 2017 implemented the LRC Draft Criminal Law (Sexual Offences and Capacity to Consent) Bill of 2013.

The LRC may include in its Report an entire draft bill, the heads of a bill, various draft legislative provisions or no draft legislative provisions or, alternatively, a recommendation that a particular legal instrument should be inserted into an existing statute. The 2010 Report on Personal Debt Management and Debt Enforcement, which included both a draft Personal Insolvency Bill and draft Heads of Bill to amend the Bankruptcy Act 1988, was transformed into the Per-

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sonal Insolvency Act 2012 and the Civil Debt (Procedures) Act 2015, which created a modern system for the resolution of personal debt. The Interpretation Act 2005, which codifies some common law rules of statutory interpretation, is based on the 2000 Report on Statutory Drafting and Interpretation: Plain Language and the Law, which contained several draft legislative provisions. The LRC can also suggest and draft statutory instruments rather than legislative Acts. In its 2005 Report on Multi-Party Litigation, the LRC included Draft Rules of the Superior Courts covering Multi-Party Actions.

The implementation of the LRC's reports may also be postponed or halted owing to unexpected legal developments. The 2002 Report on Title by Adverse Possession of Land was postponed in view of the ECtHR decision in the *Pye (Oxford)* case of 2007, and the same topic was scheduled for reconsideration by the LRC via its inclusion in the newest (Fifth) Programme of Law Reform.

Since its establishment the LRC has published 119 reports and, since 2000, the LRC published 40 reports that were followed up by legislative action. The government either introduced a bill in the Oireachtas that implemented some or all of the LRC's recommendations or published a General Scheme of a bill with the intention of publishing a bill at a later stage. In seven cases the legislative action came from a Private Member, in three cases from a Member of a Government Party. On average, it took the government 4 years from the publication of an LRC Report to initiate legislative action, that is, either to publish a General Scheme or to introduce a bill before the Oireachtas. The absolute majority of legislative actions was taken by the Department of Justice and Equality. The Department has principal responsibility for implementing proposals emanating from the LRC.[74] Other departments that have implemented LRC reports include the Department for Finance and the Department of Health. Two reports (the 2005 Report on Corporate Killing and the 2005 Report on Multi-Party Litigation) were followed up by Members of Sinn Féin, the then lead opposition party, in 2016 and 2017. As of February 2020 the introduced implementing legislation was awaiting further legislative process. (The Oireachtas passes approximately 40 Acts each year.[75])

The government has complete discretion as to whether or not to follow up on individual projects. It is under no obligation to do so, nor must it choose a particular form of follow-up or provide reasons for its choice. In principle there is nothing to stop the government from ignoring the LRC's output entirely, although press interest in LRC reports means that ministers are likely to be asked questions at regular intervals concerning the government's plans with regard to the LRC's proposals. The position of the government vis-à-vis the implementation of the LRC's proposals has markedly improved since the 1980s when it was often criticized for failing to bring legislation to the Oireachtas to implement the LRC's

74 *Supra* note 33, p. 469.

75 Houses of the Oireachtas, *How Laws are Made*. Available at: www.oireachtas.ie/en/visit-and-learn/how-parliament-works/how-laws-are-made/ (last accessed 20 March 2020).

reports.[76] It is not uncommon that the government is prompted to take action with regard to the implementation of LRC recommendations owing to external pressure or impetus, such as the transposition of EU law or compliance with international obligations, or indeed press interest in a particular issue area. The former was the case for the General Scheme Online Safety Media Regulation Bill 2019, which provides for necessary transposition of the amended Audiovisual Media Services Directive[77] and incorporated some of the recommendations of the LRC contained in its 2016 Report on Harmful Communications and Digital Safety.

Where information on implementation in the LRC's implementation table is missing, it is presumed that the relevant reports have not been yet implemented.[78] This is the case, for example, of the 2011 Report on Limitation of Actions that contained a Draft Limitations Bill, the 2015 Report on Search Warrants and Bench Warrants and the 2017 Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children.

E Parliamentary Involvement and the LRC'S Position Regarding Follow-up

The 1937 Constitution of Ireland hands a great deal of power to the executive, leaving it in charge of the lion's share of parliamentary business. The Oireachtas itself is a relatively weak actor in the legislation process. However, even in cases in which the government proposes new legislation and has the clear support of both Houses, it must defend its position and explain what it seeks to achieve.[79] Although, in the last 20 years Opposition Deputies took follow-up action with regard to the LRC's proposals, on only four occasions did LRC draft bills provide plenty of cannon fodder for Opposition Deputies during legislative debates. The impact of the LRC's suggestions may therefore not only be studied through black-letter implementation but also by scrutinizing Dáil and Seanad Debates, fora in which the quality of the LRC's output is generally acknowledged[80] and examination of the detail of its reports is generally welcome.[81] When, for example, Pearse Doherty, Deputy for the then opposition party Sinn Féin, asked the Dáil for leave to introduce the Consumer Insurance Contracts Bill in 2017, he plainly acknowl-

76 *Supra* note 33, p. 469.

77 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

78 For example, Law Reform Commission, *Report on Section 117 of the Succession Act 1965: Aspects of Provision for Children*. LRC 118-2017.

79 *Supra* note 33, p. 469.

80 Seanad Éireann debate, Wednesday, 3 July 2019, Vol. 266, No. 11. Available at: www.oireachtas.ie/en/debates/debate/seanad/2019-07-03/13/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

81 Seanad Éireann debate, Thursday, 11 April 2019, Vol. 265, No. 2. Available at: www.oireachtas.ie/en/debates/debate/seanad/2019-04-11/10/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

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edged the work and expertise of the LRC in drafting the legislation in the 2015 Report, upon which the bill was (heavily) based.[82] Independent Senator Marie-Louise O'Donnell sponsored the Criminal Justice (Judicial Discretion) (Amendment) Bill 2019 with the objective "to fulfil [the LRC's] recommendation" as regards prison time and mandatory life sentences.[83] Therefore, the relationship between the opposition parties and the LRC has occasionally been cast as one of allies as well as borrowers of the LRC's output in order to pursue their own political agenda, with the help of a state institution that enjoys relative independence and a good reputation, and whose budget, though modest, permits research beyond the abilities of many political parties.

Deputies occasionally inquire as to whether a responsible minister will issue a response to the recommendations of the LRC. In response to one such inquiry, the Minister of Justice, for example, praised the Report on Knowledge or Belief Concerning Consent in Rape Law as "a thorough and expert examination of [a] complex issue." He considered the Report to be an "important contribution to the debate" on the investigation and prosecution of sexual offences. He also stated that he had asked his officials to examine the Report in detail with a view to introducing proposals to implement its recommendations.[84] In response to the question concerning the 2017 Report on Consolidation and Reform of Aspects of the Law of Evidence, the Minister of Justice replied that the report

> is a serious piece of work that needs examination [... I]t is a result of extensive research and expertise [...] There is a plenty of food for thought and much work for the justice committee.[85]

In a similar fashion, Senator Catherine Noone recalled during a Seanad Debate that the LRC's Report on Damages should be scrutinized by all parties involved and that the officials from the Department of Justice continue to consider the contents of the Report in the context of examining further amendments of the Civil Liability (Capping of General Damages) Bill 2019 that was being debated at Second Stage.[86] Other ministers may be asked about the status of their plans to deal with a particular policy issue, to which they may reply by referring to an

82 Dáil Éirean debate, Thursday, 19 January 2017, Vol. 935, No. 2. Available at: www.oireachtas.ie/en/debates/debate/dail/2017-01-19/4/ (last accessed 20 March 2020).

83 Seanad Éireann debate, Wednesday, 3 July 2019, Vol. 266, No. 11. Available at: www.oireachtas.ie/en/debates/debate/seanad/2019-07-03/18/ (last accessed 20 March 2020).

84 Dáil Éireann debate, Wednesday, 20 November 2019, Vol. 989, No. 5. Available at: www.oireachtas.ie/en/debates/debate/dail/2019-11-20/3/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission#s6 (last accessed 20 March 2020).

85 Dáil Éireann debate, Tuesday, 23 May 2017, Vol. 951, No. 3. Available at: www.oireachtas.ie/en/debates/debate/dail/2017-05-23/18/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission#s23 (last accessed 20 March 2020).

86 Seanad Éireann debate, Thursday, 28 March 2019, Vol. 264, No. 11. Available at: www.oireachtas.ie/en/debates/debate/seanad/2019-03-28/9/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission&highlight%5B3%5D=law&highlight%5B4%5D=reform&highlight%5B5%5D=commission (last accessed 20 March 2020).

ongoing or just-finished LRC project.[87] It may also be suggested that a particular issue be referred to the LRC for further examination.[88] In that sense, the government may delay legislative action, while waiting for the LRC's recommendations to be published.[89] Even private companies such as Facebook welcomed the government's plans to ask the LRC to review a particular area of law.[90] The government may, of course, oppose the LRC's recommendations, although it would rarely do so openly, and later change its position.[91] Often, older LRC publications are recalled in legislative debates, even after a substantial lapse of time since their publication.[92]

The relevance of the LRC's reports is demonstrated by the fact that they are frequently invoked in legislative debates very soon after they are issued. For example, in December 2019 the Minister of Finance, introducing the Appropriation Bill 2019, responded to a matter raised by an Opposition Deputy regarding rising costs of insurance by pointing to the LRC's Issues Paper on Capping

87 *See* for example, Select Committee on Social and Family Affairs debate, Thursday, 24 June 2010. Available at: www.oireachtas.ie/en/debates/debate/select_committee_on_social_and_family_affairs/2010-06-24/6/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2010). Answers provided by the then Minister for Social Protection, Éamon Ó Cuív.

88 Committee of Public Accounts debate, Thursday, 18 July 2013. Available at: www.oireachtas.ie/en/debates/debate/committee_of_public_accounts/2013-07-18/2/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission.

89 Dáil Éireann debate, Wednesday, 13 November 2019, Vol. 989, No. 2. Available at: www.oireachtas.ie/en/debates/debate/dail/2019-11-13/8/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission#s11 or Select Committee on Social and Family Affairs debate, Thursday, 24 June 2010. Available at: www.oireachtas.ie/en/debates/debate/select_committee_on_social_and_family_affairs/2010-06-24/6/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

90 Joint Committee on Communications, Climate Action and Environment debate, Tuesday, 17 April 2018. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_communications_climate_action_and_environment/2018-04-17/3/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

91 Dáil Éireann debate, Wednesday, 27 March 2019, Vol. 981, No. 1. Available at: www.oireachtas.ie/en/debates/debate/dail/2019-03-27/4/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission&highlight%5B3%5D=law&highlight%5B4%5D=reform&highlight%5B5%5D=commission#s6 (last accessed 20 March 2020).

92 Dáil Éireann debate, Thursday, 16 May 2019, Vol. 982, No. 8. Available at: www.oireachtas.ie/en/debates/debate/dail/2019-05-16/39/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission&highlight%5B3%5D=law&highlight%5B4%5D=reform&highlight%5B5%5D=commission&highlight%5B6%5D=law&highlight%5B7%5D=reform&highlight%5B8%5D=commission&highlight%5B9%5D=reform&highlight%5B10%5D=commission&highlight%5B11%5D=law and Joint Committee on Justice and Equality debate, Wednesday, 13 March 2019. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2019-03-13/3/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission and Dáil Éireann debate, Tuesday, 18 September 2018, Vol. 972, No. 1. Available at: www.oireachtas.ie/en/debates/debate/dail/2018-09-18/30/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

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Damages in Personal Injuries Actions,[93] which was issued after the government had asked the LRC to undertake a detailed analysis as to whether the State could introduce constitutionally sound legislation to cap or limit the amount of damages a court might award. In other words, both the government and the opposition refer to the LRC's work to add weight to their statements.

As previously noted, quite often, when the LRC publishes an Issues Paper or a Final Report, it receives considerable coverage by the Irish media. Part of the reason for this is that Ireland is a small jurisdiction, so that the LRC's work has less competition for the front pages of national newspapers. Between January 2019 and February 2020, the largest Irish newspaper, *The Independent*, published 43 news stories on its website that mentioned the LRC, while the second largest newspaper, *The Irish Times*, covered a story featuring the LRC 21 times. The LRC usually launches a Final Report at a press event, to which it invites the relevant representatives of the government, the Attorney General and other persons who made submissions on the Issues Paper. A commissioner who took a special interest in the Report is usually available to provide further information or an interview.[94] However, this event generally represents a breakwater point. After the Report has been published, and the formal launch is complete, the LRC does not generally engage in subsequent events, such as giving statements on the implementation of its reports, engaging with views taken on its reports by other public bodies, or even at the level of participation in Oireachtas Committees. The LRC does not have a follow-up strategy, and it is perhaps closer to the truth to state that the Commission often goes out of its way *not* to follow up, refusing press questions concerning the government's interpretation of its recommendations and subsequent events. However, on occasions, representatives of the LRC may appear as witnesses between the Oireachtas Committees to discuss the LRC Reports. This was the case with the 2018 Report on Regulatory Powers and Corporate Offences, which was considered by the Joint Committee on Finance, Public Expenditure and Reform,[95] while the 2009 Report on Bioethics: Advance Care Directives[96] and the 2016 Report on Harmful Communications and Digital

93 Dáil Éireann debate, Tuesday, 17 December 2019, Vol. 991, No. 4. Available at: www.oireachtas.ie/en/debates/debate/dail/2019-12-17/30/?highlight%5B0%5D=reform&highlight%5B1%5D=commission&highlight%5B2%5D=law (last accessed 20 March 2020).

94 Law Reform Commission, *Report on Knowledge or Belief Concerning Consent in Rape Law*. LRC 122-2019.

95 Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach debate, Tuesday, 26 February 2019. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2019-02-26/3/ (last accessed 20 March 2020).

96 Joint Committee on Justice, Defence and Equality debate, Wednesday, 29 February 2012. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_defence_and_equality/2012-02-29/3/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission&highlight%5B3%5D=law&highlight%5B4%5D=reform&highlight%5B5%5D=commission (last accessed 20 March 2020).

Safety were considered during the debate on cybersecurity.[97] The representatives of the LRC were also afforded debate time for presenting the Programme of Law Reform.[98]

Proposals for law reform may be overtaken by intervening events or political considerations, and any legislation that is ultimately enacted may differ from the Commission's proposals, either slightly or substantially. At the Committee level, the draft bills contained in the LRC's reports may be restated in a variety of ways. However, if a position in a tabled bill is in line with the LRC's recommendations, this can be emphasized.[99] It is also possible that separate recommendations contained in the LRC's reports may spur legislative action without considering the LRC's draft bill. If related legislation is being debated in the Oireachtas, individual recommendations can be taken out from the Reports and inserted into the legislation under consideration when the bill is drafted or by the means of Committee Stage amendments. For example, the Minister of Finance stated during Second Stage Debate of the Financial Services and Pensions Ombudsman Bill 2017 that the decision to apply a 15-year 'long stop' for complaints by consumers to the Ombudsman was inspired by the long stop recommended by the LRC when it discussed introducing a discoverability test to extend the time limit for making personal injury claims.[100] During the Committee Stage debates of the Perjury and Related Offences Bill 2018, it was stated that the proposed maximum sentence for committing perjury was taken from a recommendation by the LRC.[101] This occasionally piecemeal approach by legislators is comprehensible mostly in the light of the fact that some Reports contain many dozens, if not hundreds, of recommendations, so it is difficult to act upon all of them at the same time. Also, a bill debated in the Oireachtas can be simply "guided by a report produced by the [LRC]",[102] which may also be the case where the bill precedes the Final Report of the LRC, but where the Deputies involved have taken cognizance of the Commis-

97 Joint Committee on Children and Youth Affairs debate, Wednesday, 18 October 2017. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_children_and_youth_affairs/2017-10-18/2/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

98 Joint Committee on Justice, Defence and Equality debate, Wednesday, 25 September 2013. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_ defence_and_equality/2013-09-25/4/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

99 Seanad Éireann debate, Tuesday, 14 February 2017, Vol. 250, No. 1. Available at: www.oireachtas.ie/en/debates/debate/seanad/2017-02-14/15/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

100 Seanad Éireann debate, Tuesday, 18 July 2017, Vol. 253, No. 1. Available at: www.oireachtas.ie/en/debates/debate/seanad/2017-07-18/12/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

101 Seanad Éireann debate, Wednesday, 17 April 2019, Vol. 265, No 4. Available at: www.oireachtas.ie/en/debates/debate/seanad/2019-04-17/18/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

102 Dáil Éireann debate, Wednesday, 8 March 2017, Vol. 942, No. 1. Available at: www.oireachtas.ie/en/debates/debate/dail/2017-03-08/5/ (last accessed 20 March 2020).

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sion's research work on the subject in question.[103] During the debates Deputies may also invoke background information and comparative analysis from the LRC's reports, although this is not always correctly attributed.[104]

F Conclusion

Ireland is a small jurisdiction and one that has a strange relationship with the common law. Dubbed 'an alien system, imposed by statute' by the drafter of Ireland's first Constitution (and later Chief Justice) Hugh Kennedy, the State has nonetheless ultimately embraced many of the trappings of its colonial legal inheritance. Inherited legislation as old as the Fairs Act 1204 remains in force. Despite the State's distancing itself from the British Commonwealth in other areas, the legal system maintained a close relationship with England and Wales in particular, with English cases often among the first that Irish law students encounter in university and English precedent cited as persuasive authority in the Irish courts.

In light of the above, the LRC's creation – following the example of England and Wales (as well as Scotland) – should come as no surprise. Its success, however, has perhaps something more uniquely Irish about it. The Commission is rightly proud of its '70% implementation rate', with the provisos described earlier about what that entails, but is aided considerably in making its voice heard by the size of the jurisdiction and the relatively limited level of competition for media attention. Leveraging the role of the media has been one of the Commission's undoubted – if perhaps inadvertent – achievements. Whether this will remain possible in an increasingly crowded environment, with other respectable quasi-autonomous state agencies offering reform proposals on a regular basis, remains to be seen. The field is certainly more crowded than it was in 1965.

Although Ireland is small, the LRC is smaller still. Its current budget is approximately 2 million euro per annum. This entails that its research staff is very limited indeed. However, as noted, the Commission's output is accorded great respect by legislators. Ministers will rarely openly gainsay anything the LRC has produced. In the Oireachtas, both on opposition and on government benches, Deputies afford the Commission's research great weight and act in accordance with it when it plays into their hands. This reflects a perception that the Commission produces excellent reports. However, maintaining this perception in the long term may prove challenging. The Commission currently employs five tenured research staff, as well as a number of researchers on fixed-term contracts. These

103 Joint Committtee on Justice, Defence and Equality debate, Wednesday, 29 February 2012. Available at: www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_defence_and_equality/2012-02-29/3/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission&highlight%5B3%5D=law&highlight%5B4%5D=reform&highlight%5B5%5D=commission (last accessed 20 March 2020).

104 Dáil Éireann debate, Thursday, 6 April 2017, Vol. 946, No. 1. Available at: www.oireachtas.ie/en/debates/debate/dail/2017-04-06/52/?highlight%5B0%5D=law&highlight%5B1%5D=reform&highlight%5B2%5D=commission (last accessed 20 March 2020).

researchers are expected to be legal polymaths, adept at putting their hand as much to constitutional law as to criminal law, to negligence as to divorce. Assuring the continuing quality of the LRC's output with such restrictions may prove difficult. The Commission's respectability reposes on the fact that its output is simply 'better' than what else is on offer. Maintaining this in a crowded marketplace, where certain other bodies possess specialists rather than generalists in their research teams, and where the budgets of other bodies dwarf that of the Commission, may prove challenging. Bending the government's – or indeed the opposition's – ear is likely to become ever more difficult.

Another issue that arises in a small jurisdiction is that of the dual roles of individual commissioners. While the Commission's members are typically selected from among the vanguard of legal minds in Ireland, and while a welcome openness to academics as well as practitioners has been shown by the government in appointing Commissioners (something not on display, for example, in Ireland's appointments to international courts and bodies, where an 'old boys network' restricts appointments to judges even when they are clearly not suited for the posts and have little knowledge of the specific legal area), the fact is that the pool of potential candidates is likely to be rather shallow. This is not to say that those members selected do not have the necessary credentials – Ireland is fortunate enough to have had a succession of excellent commissioners – but rather that in such a small legal community, assuring the independence of the Commission is somewhat difficult. Four of the five Commission members are part-time appointees, meaning that they maintain active interests in other areas, namely practice, academia or policy. At times, their expertise can even mean that they are asked by the government to undertake independent research on a related topic while supervising the finalization of an LRC report, as occurred during the preparation of the 2019 Report on Knowledge or Belief Concerning Consent in Rape Law. While the 2019 Report was finalized without disturbance, such overlaps have the potential to cause problems in the future.

In addition to these challenges, the 2008 financial crisis, which introduced the spectre of potential abolition, placed the Commission's selection of potential projects in stark relief. Clearly, retaining relevance represents a balancing act between pursuing realistic projects and producing proposals that are neither merely anticipatory of likely legislative needs nor reactive to events. It is one that the LRC has thus far accomplished with no little success. As noted elsewhere,

> a Law Reform Commission [is not] of course a substitute for good Government and it would be an error to consider that the answer to our social problems has been found by the establishment of [such a] Commission.[105]

However, failure by the government to take account of the Commission's work would negate its purpose. Until now, the LRC has ensured that in Ireland its work

105 *Supra* note 14.

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is placed high on parliament's agenda. It is inevitable that interest in reforming the law and in relying on a law reform commission as an engine room for reform will change over time. Reform fatigue sets in for even the most committed advocates of social change.[106] The LRC is now 45 years old. It has proven remarkably resilient and has carved out a central – and coveted – role in the legislative process. Whether it can retain this influence in the longer term remains to be seen.

106 *Supra* note 17.