



Spotlight

Post-enactment scrutiny (*PeS*) by Parliament

Oireachtas Library and Research Service

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Abstract

Post-enactment scrutiny (*PeS*) is the review of a piece of legislation which is in force. Introduced as part of the last government (2011-2016)'s political reform agenda, Standing Orders of both Houses of the Oireachtas provide for a process post-enactment scrutiny and the Programme for Partnership Government (2016) commits to supporting it. This Spotlight uses expert literature on legislative scrutiny, and the experience of other parliaments, to outline the purpose and potential benefits of post-enactment scrutiny, parliament's role in post-enactment scrutiny, the conditions under which it is most likely to be effective, and how best to approach *PeS* both with respect to the process and the actual focus of a post-enactment review.

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Legal Disclaimer

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Introduction

Post-enactment scrutiny (also known as post-legislative scrutiny) is the review of a piece of legislation which is in force. It is sometimes undertaken in an *ad hoc* manner by government departments, can be prompted by a 'review clause' inserted into a specific piece of legislation or may be undertaken through a structured process which covers all or most Acts.

There is some *ad hoc* post-legislative scrutiny undertaken in Ireland. First, as Hunt points out 'some pieces of existing legislation will invariably be subjected to some level of Departmental review in circumstances where amendments to those pieces of legislation are being considered.'¹

Second, the Statute Law Revision Project - initially based in the Office of the Attorney General and transferred to the Department of Public Expenditure and Reform in 2012 - involved a degree of post-legislative scrutiny. It was, however, focused on whether the continuance of that legislation was required. There was no assessment of the policies upon which that legislation was based. The Law Reform Commission's Work Programmes also involve post-legislative scrutiny of certain Acts.²

Further, some pieces of legislation, by way of a sunset clause, make explicit provision for their continuance to be affirmed by the Houses of the Oireachtas. Other Acts stipulate that their operation must be reviewed after a period of time, a task for which the Minister is generally responsible.

For example, under the *Gender Recognition Act 2015 (s.7)*, a review of the operation of the Act is to begin two years after its commencement and a report made to the Houses of the Oireachtas no later than 12 months after the review begins.

The *Regulation of Lobbying Act 2015 (s2)* requires a review of the operation of the Act after one year and another after three years and that review be completed within six months and laid before both Houses of the Oireachtas.

Section 95 of the *Criminal Justice (Forensic Evidence & DNA Database System) Act 2014* requires a review of the operation of the part of Act relating to the DNA Database System and Section 11(6) requires a review of the operation of that section.

Formal post-legislative scrutiny process for Ireland

As part of the political reform agenda, the Government aspires to implement a formal process of post-enactment scrutiny for all legislation in Ireland. The Programme for Government commits to 'support post-enactment review of legislation by Oireachtas Committees,'³ this reiterating a commitment to the concept by the last Government (2011-2016).⁴ Under Dáil Standing Order 164A and Seanad Standing Order 168 (2016):

Twelve months following the enactment of a Bill, save in the case of the Finance Bill and the Appropriation Bill, the member of the Government or Minister of State who is officially responsible for implementation of the Act shall provide a report which shall review the functioning of the Act and which shall be laid in the Parliamentary Library.

While Standing Orders place the onus on Government Ministers to provide the post-enactment report, Oireachtas Committees are empowered to consider them and to require a Minister or Minister of State to appear before them to discuss post-enactment reviews.⁵

¹ Hunt (2011) *The Role of the Houses of the Oireachtas in the Scrutiny of Legislation* Houses of the Oireachtas, Parliamentary Fellowship P.69

² See [here](#) for most recent publications of the Law Reform Commission.

³ [Programme for Partnership Government](#) (2016) p.149.

⁴ Approved by motion on 17th October 2013 and effective from 5 November 2013, Standing Order 141A introduced post-enactment scrutiny to procedure for the duration of the 31st Dáil (as the change was introduced by sessional rather than by standing order). These sessional orders were adopted in Standing Orders by the 32nd Dáil.

⁵ Standing Order 85 lists the powers which the Dáil may confer on Select Committees and this power is under (6C).

This *Spotlight*:

- Discusses the purpose and potential benefits of post-enactment scrutiny including the rationale for parliament's role in the process;
- Considers how best to approach *PeS* both with respect to 'the process' and to the actual 'focus of the post-enactment review' drawing on evidence from other parliaments and the operation of *PeS* in the Houses of the Oireachtas to date.

1. Purpose of Post-enactment Scrutiny (*PeS*)

While there is no single approach to undertaking post-enactment scrutiny, there is some consensus that its primary purpose is to ascertain whether the legislation (usually an Act) has achieved the original policy objectives.

Following extensive consultation on post-legislative scrutiny, the *UK Law Reform Commission* found wide-spread support that its principal purpose was to **'to see whether the legislation is working out in practice as intended and, if not, to discover why and to address how any problems can be remedied quickly and cost-effectively.'**⁶ An inquiry by the *Scottish Parliament* (2016) concluded that its purpose is to assess **the extent to which the policy intentions of a piece of legislation are being delivered and if not, why not.**⁷ Addressing problems may require the amendment or even the revoking of the legislation or of associated secondary legislation.

Other studies have pointed to its benefits for the public policy-making process in general, an OECD (2012) study noting that ex-post evaluation of legislation helps to 'redefine interventions and improve the quality of future decisions **by highlighting unintended consequences that had not been assessed.**'⁸ Further, the simple requirement that legislation be reviewed, and the possibility that this review might be designed and/or examined by another body, may affect the way in which legislation is planned and drafted. For example, it may ensure that **greater consideration is given at the drafting and parliamentary scrutiny stages to how the legislation will be implemented** and how the performance of the legislation will be assessed. Thus, if carried out effectively, it should have benefits for public policy and legislation.

In recommending *PeS* for the Houses of the Oireachtas, Hunt⁹ predicted benefits to the quality of legislation: it would keep older legislation, and the need to retain it, under review and provide the opportunity to identify and address teething problems with, and unforeseen effects of, newer legislation. He also predicted positive consequences for the policy-making process arguing that *PeS* can improve the implementation and delivery of policy objectives and contribute to the overall furtherance of 'Better Regulation.'

In sum, there are clear benefits associated with the post-enactment review of legislation. But questions remain as to which institution(s) should undertake post-enactment review and through what process and using what approach (i.e. what questions should be asked?) These questions are considered in Sections 2 and 3.1 and Section 3.2 respectively.

2. Why give parliament a role in post-enactment scrutiny?

It would be possible to leave post-enactment scrutiny to government and its agencies. Minister's departments have mechanisms in place and resources to review the legislation they are responsible for implementing. However, there are at least three particular reasons for giving parliament a leading role in setting the agenda for post-enactment review.

⁶ [UK Law Reform Commission \(2006\) Post-legislative scrutiny](#) (report commissioned by the UK Government following a recommendation from the UK House of Lords Committee on the Constitution) p. 8.

⁷ Scottish Parliament Standards, Procedures and Public Appointments Committee (2013) [8th report \(Session 4\)](#)

⁸ OECD (2012) *Evaluating laws and regulations: the case of the Chilean Chamber of Deputies*, OECD Publishing, Chapter 1

⁹ Hunt (2011) cited above p.70

- **Parliament as law maker**

Firstly, the Constitution (Article 15.2.1) vests the sole and exclusive power for making legislation in the Houses of the Oireachtas, a role which it generally (though not exclusively) carries out by scrutinising legislation proposed by government.

Advocates of post-enactment scrutiny by parliament argue that parliament's responsibility for legislative scrutiny should not end at the point of enactment, with little or no evaluation of whether the legislation has achieved its aims.¹⁰ While government, and the wider system of public administration, are responsible for the implementation of legislation, it is argued that parliament is concerned with the effect of its laws in practice.

Further, it is argued that engaging legislators in post-enactment scrutiny strengthens parliament's role in all stages of the legislative process and improves legislative scrutiny in general. Examining the merits of *PeS* in Australia, Francis highlights its 'salutary effect': it focuses the minds of legislators at the pre-scrutiny stage on the difficulties, or side-effects, which may arise during the implementation of the legislation.¹¹

In fact, *PeS* can be seen as complementing the pre-legislative scrutiny and formal legislative process by enabling parliament to 'close the legislative review loop' (see infographic at Appendix 1). Potential issues or problems highlighted in the pre-legislative and formal legislative scrutiny processes may be revisited during post-enactment scrutiny. In this sense, post-enactment scrutiny has the potential to encourage systematic, routine and collective monitoring of key areas or provisions which were queried by legislators during earlier stages of scrutiny.¹²

- **Parliament's oversight and accountability roles**

Post-enactment scrutiny by parliament is also consistent with its oversight and accountability roles which originate in Articles 28.4.1 of the Constitution (the Government is responsible to the Dáil) and the Dáil's right to remove the Government.

To exercise oversight and hold government accountable parliament is involved in what political scientists refer to as a 'chain of delegation and accountability' between principals and agents of various types; that is voters and elected representatives, legislators and ministers, ministers and civil servants (including public servants in agencies) (Box 1).¹³ As every chain in the link runs the risk of the agent not performing to the expectations of the principal, *ex ante* (before the fact) and *ex post* (after the fact) accountability mechanisms are necessary to ensure compliance. **Post-enactment review is one such mechanism.**

Box 1: Chain of accountability

Strom et al (2010) describe the chain of delegation in a parliamentary democracy as:

- **Indirect**, in that voters (the ultimate principals) directly elect only their parliamentary representatives (and typically not also a range of executive or judicial offices);
- **Singular**, in that each link of the parliamentary chain of delegation tends to feature a single principal and often a single agent; and
- **Hierarchical**, in that accountability relations between different government agencies tend to be vertical (featuring parliamentary supremacy) rather than horizontal featuring checks and balances.

Thus, they conclude that parliamentary democracy **simplifies delegation but relies heavily on parliament to control the political executive** (government and its public administration).

¹⁰ See Francis Angus (2008) 'Review of Australia's Asylum Laws and policies: a case for strengthening parliament's role in protecting rights through post-enactment scrutiny. *Melbourne University Law Review* (2008, Vol.32). He notes that this argument was made by the UK House of Lords Committee cited above (2004)

¹¹ Francis Angus (2008) p.92.

¹² This is noted by Francis (2008) as strengthening parliament's legislative scrutiny role in general p. 92.

¹³ See MacCarthaigh Muiris in MacCarthaigh and Manning 'The Houses of the Oireachtas' Dublin, IPA: 2010, 360-1 and Strom K, Muller and Bergman (2003) *Delegation and Accountability in Parliamentary Democracies* Oxford: Oxford University.

- **Parliament as a representative political forum**

While voters ultimately hold governments to account, parliament represents them and exercises this role on their behalf between elections. Post-enactment scrutiny can enhance parliament's capacity to ensure that legislation does, ultimately, improve outcomes for citizens. Whether legislation is proportionate in terms of costs and benefits, or has negative consequences for particular groups which may outweigh its positive effects, are issues regularly raised by parliament. Post-enactment review offers an additional tool, a structured opportunity, for parliament to address these concerns on behalf of the electorate.

Further, as the representative political forum, parliament may have the best chance of having a post-enactment review implemented. An empirical study of post-enactment review of anti-terrorism laws in four states found that *ad hoc*, isolated reviews by outside agencies can suffer from the lack of a political champion.¹⁴

Risks to Parliament Playing a key role

While there are clear benefits to giving parliament a key role in *PeS*, there are also risks. A process of post-enactment scrutiny should be designed in light of these risks.

First, there are well-documented barriers to parliament's engagement in effective oversight and scrutiny – information asymmetry, political will and time constraints - will also affect its capacity to carry out *PeS*

- **Information asymmetry**

Firstly, government has more information about its actions than parliament does. To provide effective oversight parliament needs to have access to such information. However the agent (the government) has the incentive to withhold information. The tools of oversight (such as the right to receive and to request certain information) can narrow the information gap.¹⁵

- **Political will, skills and knowledge**

Even if information from government were freely available, there is no guarantee that members of parliament have the skills and knowledge, and back-up in terms of resources, to process and analyse complex technical information¹⁶ Further, effective scrutiny is not always perceived as leading to electoral gain. If parliamentarians are unwilling or unable to perform the oversight role then the chain of accountability fails, undermining to some extent democratic accountability.

- **Time constraints**

Parliamentarians and parliamentary committees have a myriad of demands on their time, focus and energy. Committees' agendas are full and adding post-enactment scrutiny to the list risks further reducing the space for elective studies.¹⁷

Second, there is the risk that, rather than scrutinising the implementation of the Act, parliamentary committees will re-visit what may have been controversial policy debates which took place during the passing of the bill.¹⁸

¹⁴ Lynch Andrew (2012) 'The impact of post-enactment review on anti-terrorism laws: four jurisdictions compared' *Journal of Legislative Studies* Vol.18:1 p. 78. The UK, Australia, Canada and New Zealand were considered.

¹⁵ Saafeld, T. (2000) *Members of Parliament and Governments in Western Europe: Agency Relations and Problems of Oversight*. European Journal of Political Research 37, 353 -376. He discusses how government is an agent of parliament and this principal-agent relationship is affected by the information asymmetry between the groups. See also Oireachtas Library and Research Service (2016) [Spotlight: Parliamentary scrutiny of government performance](#)

¹⁶ ACCA (2011) [Parliamentary Financial Scrutiny in Hard Times](#), Association of Chartered Certified Accountants.

¹⁷ This risk is identified in most studies which look at applying *PeS* in a parliamentary context. For example, the UK House of Lords Committee on the Constitution on Parliament in the Legislative Process (2004); the UK Law Commission Report cited above (footnote 6) and by the Scottish Parliament Standards, Procedures and Public Appointments Committee (2013) and subsequent report in 2016 (see below).

In sum, adopting a systematic post-enactment scrutiny process has the potential to benefit the quality of legislation and the public policy-making process in general. And there are sound reasons for giving parliament a central role which are related to its role as legislator, as a representative forum, and its scrutiny and oversight functions.

Yet how *PeS* works in practice requires careful consideration, in light of the overall purpose of *PeS* and the risks identified (above).

3. Model for conducting *PeS*

This section draws on the above analysis and on the experience of other parliaments to consider the best model for developing *PeS* in a parliamentary context. There are two aspects to developing such a model which we look at in turn below:

1. The process adopted for post-enactment scrutiny; and
2. The focus and content of a *PeS* Review.

3.1. The post-enactment scrutiny process

By process we mean which actors play a role in post-legislative scrutiny, their precise role and at what point in time in the legislative process.

In general the *PeS* process will either be government or parliament led; formalised or ad hoc, or a combination of these approaches. Within parliament, *PeS* may be coordinated or even undertaken by one specific committee (a post-legislative scrutiny committee) or it may be the responsibility of each sectoral committee.

In the **UK House of Commons** the procedure is formal with the initial onus for *PeS* placed on government departments.¹⁹ Under this procedure, Select Committees may conduct *PeS* on memoranda which must be provided by Government Departments three-five years after an Act has passed.

Under UK Cabinet's Guidelines²⁰:

- The responsible department *must* submit a **post-enactment review memorandum** to the relevant Commons Select Committee within three-five years (timing is agreed with the Committee) unless it is previously agreed with the Committee that the memo is not required;
- The memo is a preliminary assessment of how the Act is working in practice relative to objectives and benchmarks identified during the passage of the Bill and in the supporting documentation;
- To ensure that the department has the necessary information to prepare the memo, the Cabinet Guidelines also say that when preparing new legislation departments must take into account the commitment to post-enactment review. It is suggested that between the impact assessment, explanatory notes and other statements made during the passage of a Bill, there should be enough indication of a Bill's objectives to allow any post-legislative review body to assess how it is working out in practice. The Guidelines stress that the information required for the Memo should be information and knowledge that the Department is collecting anyway.

Once the memorandum has been issued and received by a Select Committee, it decides, drawing on support from the House of Commons Scrutiny Unit, whether it wishes to conduct a fuller post-enactment inquiry into the Act. Select Committees tend to decide from a menu of options ranging

¹⁸ This risk was highlighted by the UK Law Reform Commission (2006) and stakeholders which it consulted and was noted by the UK Government in its *Post-legislative scrutiny Whitepaper* (2008) p. 12.

¹⁹ In 2008 the UK Government proposed this model for *PeS*. This was in response to a recommendation from the House of Lords Constitution Committee that more post-enactment review be taken and that the government come up with a framework for progressing this.

²⁰ UK Cabinet's Guide to Making Legislation (re-issued in June 2013).

from doing nothing to initiating a full inquiry (Box 2).²¹ They consider many topics, not all of which they will pursue. Often the consideration of potential inquiries will be informal with a formal decision recording only those inquiries that are agreed.²²

Box 2: Menu of possible responses to Government's Memos by Select Committees (UK)

- Take no action
- Send a list of written questions to the department/Minister
- Issue an invitation for public comment on the government's review (invite submissions);
- Initiate an oral evidence session with Minister/officials; or
- Initiative a full post-legislative review inquiry

Approximately 89 memorandums on post-legislative assessments have been published by UK Departments since 2008²³ of which 16 have been the subject of post-enactment review by the Parliament. Ten have been the subject of a full inquiry by a House of Commons Select Committee²⁴ a take-up-rate rate which the Leader of the House of Commons said indicated there was 'a big gap'.²⁵ A further six have been undertaken by the House of Lords which, on the recommendation of its *Liaison Committee* (2013), began the practice of establishing *ad hoc* committees to undertake post-legislative reviews of specific pieces of information (2013,p.10).

Table 1: UK House of Commons Full Post-Legislative reviews by Select Committees

Committee	Act reviewed and Report
Culture, Media and Sport Committee review of the <i>Gambling Act 2005</i> ;	The Gambling Act 2005: A bet worth taking? , July 2012, HC 421
Justice Committee review of the <i>Freedom of Information Act 2000</i> ;	Post-legislative scrutiny of the Freedom of Information Act 2000 , 26 July 2012, HC 96-I
Public Administration Select Committee review of the <i>Statistics and Registration Act 2007</i> ; 2012-13	Public Trust in Government Statistics – A review of the Statistics and Registration Act 2007 , 25 February 2013, HC 406
Public Administration Select Committee review of the <i>Charities Act 2006</i> ;	The role of the Charity Commission and 'public benefit': Post legislative scrutiny of the Charities Act 2006 , 6 June 2013, HC 76 2013-14
Health Committee review of the <i>Mental Health Act 2007</i> ;	Post-legislative scrutiny of the Mental Health Act 2007 , 10 July 2013, HC 584 2013-14
Justice Committee review of part 2 of the <i>Serious Crime Act 2007</i>	Post-legislative scrutiny of Part 2 (encouraging or assisting crime) of the Serious Crime Act 2007 , 13 September 2013 2013HC 639 2013-14
Communities and Local Government Committee Review of the <i>Greater London Authority Act 2007</i> ;	Post-legislative scrutiny of the Greater London Authority Act 2007 and the London Assembly , 9 October 2013, HC 213 2013-14
Joint Committee on Human Rights review of the <i>Terrorism Prevention and Investigation Measures Act 2011</i> .	Post-legislative scrutiny: Terrorism Prevention and Investigation Measures Act 2011 , 15 January 2014, HC 1014 2013-14

²¹ Presentation by the Scrutiny Unit (2005) and information from UK House of Commons officials to the Oireachtas L&RS [2017].

²² Correspondence with Clerks in the UK House of Commons Scrutiny Unit, Committee Unit and the Library's Parliament and Constitution Unit.

²³ House of Commons Library, Standard Note SN/PC/05232 (May 2013). Updated information provided to L&RS by the Library *Parliament and Constitution Unit* (April 2017)

²⁴ One of the ten was an evidence session.

²⁵ UK House of Commons Political and Constitutional reform Committee and Northern Ireland Assembly Research Service (Raise) Briefing Paper (2017) supplied personally to the Oireachtas L&RS by staff in Northern Ireland Assembly's Research Service.

The Justice Committee	Evidence session on Post-legislative scrutiny of the Mental Capacity Act 2005 in November 2010.
The Environment, Food and Rural Affairs Committee	Post-legislative scrutiny: Flood and Water Management Act 2010 inquiry

Table 2: UK House of Lords Ad Hoc Post-Legislative Review Committees

Year	Committee and Act Reviewed
2012-13	Adoption Legislation Select Committee : <i>Children and Adoption Act 2006</i> and the <i>Adoption and Children Act 2002</i>
2013-14	Mental Capacity Act 2005 Committee : <i>Mental Capacity Act 2005</i> Inquiries Act 2005 Committee : <i>Inquiries Act 2005</i>
2014-15	Extradition Law Committee : <i>Extradition Act 2003</i> and Extradition Legislation
2015-16	Equality Act 2010 and Disability Committee : <i>Equality Act 2010</i> , particularly impact on people with disabilities
2016-17	Licensing Act 2003 Committee : <i>Licensing Act 2003</i>
2017-18	Natural Environment and Rural Communities Act 2006 reported in July 2017

Post-legislative scrutiny in the **Scottish Parliament** has developed in a more *ad hoc* fashion. While individual committees have undertaken inquiries, there is no systematic approach to assessing the impact of law and no specific requirements at present on government (outside of government's general responsibility to parliament and to provide parliament with information on request).²⁶

Following an extensive review in 2013 of possible approaches to carrying out *PeS*, the Scottish Parliament's Standards, Procedures and Public Appointments Committee found that *PeS* was already being carried out in Parliament; for example when Committees addressed policy issues which encompassed legislation or when review clauses were inserted into Bills. It recommended a continuation of this selective approach whereby post-legislative review takes place on the initiative of parliamentary committees.²⁷

However, when *PeS* is fully at the initiative of parliament, one of the main challenges for committees is how to prioritise legislation for *PeS*. The Scottish Committee identified 'trigger points' that might prompt the need for post-legislative scrutiny. It suggested that sectoral committees use these triggers points in a structured way to assess whether or not to undertake post-legislative scrutiny. Trigger points included:

- Representations made to a committee from individuals or organisations, or issues raised in the media, which suggest that a piece of legislation needs review due to a particular policy impact, or lack of impact;
- Members of the judiciary commenting that a piece of legislation should be revisited;
- A petition brought forward calling for a review of current legislation in a particular area;
- A committee inquiry being undertaken into an issue which includes an examination of current legislation;
- A sunset clause or a statutory review period being included in legislation requiring it to be revisited by the Parliament;
- A bill being passed containing a requirement that the Scottish Government must report to the Parliament on a particular provision;
- A committee deciding that it will undertake regular scrutiny of the implementation of a piece of legislation.

²⁶ Post-legislative Scrutiny (2017) Draft Briefing Paper undertaken by Research Service in the Northern Ireland Assembly on the scrutiny process in the other devolved parliaments.

²⁷ Scottish Parliament Standards, Procedures and Public Appointments Committee (2013) [8th report \(Session 4\)](#)

As such, *PeS* in Scotland has, to date, been conducted on the initiative of parliament. And 15 of the 220 Acts passed by the Scottish Parliament (1999 -2014) received post-enactment scrutiny of some sort, ten of which were reviewed formally by a committee.²⁸

Leaving *PeS* completely to parliament has presented some obstacles given the limited capacity and resources at the disposal of parliamentary committees. In fact, a report by the Scottish Parliament in 2016 argued that for *PeS* to be routinely built into committees' work programmes, government departments needed to play a formal role in the process. It recommended that departments be required to publish a post-legislative report on the implementation of each Act within 3-5 years of its passing.²⁹ In this the Report was recommending the approach taken by the UK Parliament, an approach which had been previously rejected by the Scottish Parliament in 2013 on the basis that it 'was better for Parliament to be in control of its own arrangements for post-legislative scrutiny, rather than government being seen to take the lead.'³⁰ No action has been taken on this recommendation as of December 2017.

The Scottish Parliament recently amended Standing Orders to give a specific committee responsibility for post-legislative scrutiny reports. Post-legislative scrutiny was added to the remit of the *Public Audit Committee* (renamed the *Public Audit and Post-Legislative Scrutiny Committee*)³¹ which undertook its first post-legislative scrutiny inquiry in 2017 (scrutiny of the National Fraud Initiative).³² This does not preclude other committees from undertaking *PeS* on an ad hoc basis as before.

In the **Swedish Parliament**³³ post-enactment review is a constitutional duty of parliamentary committees since 2011. Each Standing Committee is responsible for following-up and evaluating decisions of the Riksdag within its relevant policy area. In practice, committees engage in both ongoing and in-depth post-enactment reviews.

It is an **ongoing task** for committees to examine how legislation passed by parliament is being implemented and they use, for example, National Audit Office reviews, ex-post reviews by the Office for Better Regulation, hearings with Government Ministers and agencies, and annual information provided (with the budget) by the Government on the results it has achieved in different policy areas to conduct this ongoing review. In this task it is assisted by committee support staff and the in-house *Bureau for Research and Evaluation*.

Over the course of this ongoing post-legislative scrutiny, committees may highlight one or more pieces of legislation as in need of **in-depth review**; this is generally if a problem has been observed which is of interest to all/most political parties.

As such, while the initiative to undertake a formal, in-depth post-enactment review of legislation lies entirely with the Swedish Parliament, the Parliament itself relies heavily on information and reports provided by government and outside agencies to make this decision. Further, in prioritising legislation for *PeS*, parliamentary committees are assisted by the *Bureau of Research and Evaluation*.

In the **Belgian Federal Parliament** a full post-enactment review by parliament is triggered in one of three ways. One, by a petition to parliament which highlights problems arising from the implementation of a specific law (within 3 years of its enactment); two, by recommendations made in rulings of the Court of Arbitrage /Constitutional Law on the application of specific legislation; three, by issues raised in the General Prosecutor's Annual Report to Parliament which may

²⁸ See Annex to Standards, Procedures and Public Appointments Committee (2013) [8th report \(Session 4\)](#)

²⁹ Scottish Parliament Committee on Standards, Procedure and Public Appointments (2016) [Report on Committee Reform](#) 1st report (session 4), Executive Summary, p.2

³⁰ Scottish Parliament Committee on Standards.. cited above.

³¹ Its remit, outlined under Rule 6.1.5A, is to consider and report on any accounts laid before the Parliament; any report laid before or made to the Parliament by the Auditor General for Scotland; and any other document laid before the Parliament, or referred to it by the Parliamentary Bureau or by the Auditor General for Scotland, concerning financial control, accounting and auditing in relation to public expenditure and (now) post-legislative scrutiny.

³² For a copy of the Post-Legislative Scrutiny Report [see here](#)

³³ Information was provided by officials in the Swedish Parliament Bureau for Research and Evaluation.

highlight problems with the interpretation or enforcement of laws.³⁴ Once triggered the review is undertaken by a parliamentary committee which exists specifically for the purpose of post-enactment scrutiny.

In **Switzerland**, like in Sweden, parliament has a constitutional duty to evaluate the effectiveness of the legislation it adopts. In 1991, a specialist service within the parliamentary administration was established to carry out ex-post evaluations of legislation on behalf of parliamentary committees *and* on the initiative of the committee. It tends to conduct approximately three such reviews a year.³⁵ The committees themselves draw on the evaluation reports of Ministries and agencies in an ongoing way to prioritise laws in need of post-legislative review. However, there is no systematic obligation on the Federal Council (cabinet) to report in this way (it is reactive – in response to a PQ, interpellation).³⁶

Summary of Section 3.1

The evidence from other parliaments suggests that an effective process of *PeS* includes roles for government departments, parliament and for independent external bodies/agencies.

Further, an initial post-legislative review of Acts by government departments, and/or by an outside agency, is very helpful.

The experience in the UK and Scottish parliaments suggests that where the initiative rests fully with parliament to both prioritise the legislation for review and to conduct the review, the barriers associated with information asymmetry, low capacity and resources may be too high for the development of a systemic post-enactment review process.

This is backed by an OECD study which notes that parliamentary committees should ‘place themselves at the apex of the accountability structure’ taking a clearly public lead in post-legislative evaluation so that information, research and analysis is submitted to them as a matter of routine.³⁷

Even in Sweden and Switzerland, where *PeS* is a duty for parliamentary committees under their respective constitutions, committees rely on information from government and external bodies to conduct ongoing reviews of Acts, while gathering further material of its own where a committee undertakes an in-depth review.

The advantage of obliging government to provide an initial post-legislative review is that parliament is not using its already-stretched resources to investigate all Acts. The possible disadvantage is that it could become a tick-box exercise for departments. This can be avoided if:

- (i) the objectives of the Act in question are clear from at the outset; and
- (ii) If parliament and government formally agree on an approach to the government’s post-enactment report which is in line with best evaluative practice. This is discussed further in Section 3.2 below.

On the other hand, the evidence suggests that **parliament should retain the initiative in deciding whether to conduct a full post-enactment review.**

Trigger points like those identified by the Scottish Parliament (pp.9-10) are a useful way for parliamentary committees to select which Acts (if any) are in need of post-enactment scrutiny. These trigger points may be used by sectoral committees to identify the Acts (if any) which are in need of further *PeS* and ‘items for post-legislative scrutiny’ would be an item on their work programme. Alternatively, responsibility for identifying the Acts in need of *PeS* may be assigned to one coordinating committee (a post-enactment scrutiny committee) which would either refer the

³⁴ Westminster Foundation for Democracy (2017) *Post-Legislative Scrutiny* Comparative study of practices of Post-Legislative Scrutiny in selected parliaments. pp. 21-22

³⁵ Westminster Foundation for Democracy (2017) cited above pp. 37-8

³⁶ Agencies must produce an annual evaluation strategy on priority areas determined by the cabinet . The Legislation Projects and Methodology Division at the Department of Justice develops methodological principles for the application of laws and legislative evaluation (in collaboration with the Swiss Evaluation Society).

³⁷ OECD (2012) cited above p.26.

Act to the relevant sectoral committee or undertake the review itself.

Regardless of which type of committee (sectoral or thematic) identifies the Acts requiring *PeS*, the committee leading the *PeS* review tends to draw on expertise (internal to the parliamentary service or commissioned externally) to assist it with the scrutiny process.

3.2 The focus of post-legislative scrutiny

Bearing in mind the purpose of *PeS* (set out in Section 1), that one size does not fit all and that there is a need for flexibility in approach, **Table 3 (page 13)** sets out the information which a *full* post-enactment review of an Act would ideally contain (regardless of who is conducting it). The approach is drawn from an analysis of reports on *PeS* published by the UK and the Scottish Parliaments, the OECD and the European Parliament,³⁸ an analysis of the post-legislative scrutiny reviews undertaken by parliamentary committees in the UK, Sweden and Scotland and on Guidelines for legislative scrutiny designed by the L&RS for the Houses of the Oireachtas in relation to Standing Order 141 referrals.³⁹ Other sources are referenced if relevant.

For **technical Acts which have limited policy significance, an in-depth *PeS* review would be narrower** than what is set out in Table 3 but it would still include a statement of objectives, an update on the legislative context and a focus on how the Act is being implemented in practice (including the identification of legal issues and un-intended consequences if relevant).

Taking **Table 3** as its end point, **Table 4** sets out the information that parliament needs from government (and, where relevant, an independent body charged with undertaking a review) to enable it to decide whether or not a full post-enactment review by a parliamentary committee is necessary. The 'information needs' identified in Table 4 might form the content of the post-enactment report required under Standing Orders of both Houses of the Oireachtas. A report with this level of detail may require a time-frame longer than the one year after enactment currently set out in Dáil and Seanad Standing Orders.

³⁸ European Parliamentary Research Service Ex-Post Impact Assessment Unit IMPT Working Document, October 2015.

³⁹ Under Standing Order 141, if a Private Member's Bill passes second stage of the legislative process in the Dáil, rather than being referred to Committee for line-by-line scrutiny (as per government bills), it is referred to the relevant Committee which may decide to undertake detailed scrutiny on the bill and report back to the Dáil before the bill progresses to line-by-line scrutiny by the committee.

Table 3: Information required for an in-depth PeS review

Information needed	Possible Sources of data/information
Purpose: To allow the reviewer to assess how the policy objectives of the Act have been/are being achieved	
Set out the key policy objectives of the legislation, including the policy problem/issue it is designed to address (ideally with evidence which demonstrates the extent of the problem/issue) and how the legislation was expected to address it (i.e. through what specific actions). This is tied to the evaluative framework (see below) which is ideally developed <i>prior to</i> enactment.	Government consultation; Green Paper, White Paper; Regulatory Impact Assessment; Pre-legislative scrutiny process and report; Dáil debates on the Bill (especially Minister's explanation); Independent, impartial analysis usually supplied parliamentary research offices
Purpose: update of the legislative context – to set the scene	
Sets out factual information about progress in implementation of the Act such as: <ul style="list-style-type: none"> - When and how different provisions of the Act were brought into operation; - Any provisions not yet in force; - Any SIs and guidelines issued; - A list of (and access to) any reviews of Act undertaken. 	Minister's Department Reviews by other bodies (see Box 4, p. 16))
Purpose: focus on implementation, identify any possible improvements in delivery of policy aims, any un-intended policy or legal consequences of the Act	
Further information on how provisions have been brought into operation and, if provisions have not been, why not? Are there un-intended policy consequences as a result of the Act's implementation? Are there un-intended legal consequences and, for example, are there issues arising from the interpretation of the Act or provisions which have been the subject of litigation (past and pending?) In both cases, are possible solutions available to minimise their effect? The consequences of the Act's implementation for different groups of stakeholders (e.g. those who were/were not the original focus of the Act).	Minister Stakeholders and experts in the policy area (via consultation and/or Questions and Issues paper) Legal experts such as Law Reform Commission Legal cases Other departments/committees Data gathered for the evaluative framework.
Purpose: to create an evaluation framework and gather information and data to enable a reviewer to make a value judgement on the Act	
One, a framework for evaluating whether outputs (actions) are being implemented in a way which leads to the outcomes envisaged in the legislation and accompanying regulations. The framework should ideally identify indicators of the achievement of outputs and outcomes and data and/or information which can be used to measure/monitor these indicators. Two, a framework with which to evaluate the extent to which the policy objectives behind the Act are being achieved. This framework, which is required for an Impact-Assessment, should identify indicators with which to assess whether the Act is achieving its policy objective , i.e. the overall impact of the Act.	An evaluative frameworks, including indicators and the type of information needed to monitor them, should be agreed before implementation; Information may come from all the documents mentioned above, including any external reports and/or consultations. The Library and Research Service's Bills Digest may include suggested performance indicators. The Reviewer may develop <i>Questions and Issues Papers</i> to gather data where necessary (via call for public submissions, targeted or open).
Purpose: Cost of implementing the Act (Financial implications)	
Data on the cost of implementing the legislation Are they in line with projected costs? Are there enforcement and compliance costs (anticipated/not anticipated)? Who is bearing the cost?	Minister and Department; Public bodies involved in implementing the legislation; Public Accounts Committee and C&AG reports.

Table 4: Proposed content of the post-enactment review (required by Standing Orders)

Information needed	Detail
A. Policy objectives of the Act clearly stated	A summary of the policy objectives of the Act which sets out how the outputs (actions taken and implemented as a result of the Act) are designed to achieve these objectives (i.e. the idea or theory behind the legislation). It should also note any changed context to these objectives. If an evaluative framework has been prepared (as per point 1 in Table 3) this should also be included along with any administrative data to date.
B. The implementation of the Act to date.	Includes factual information on implementation: <ul style="list-style-type: none"> • When and how different provisions of the Act have been brought into operation; • Any provisions not yet in force; • Any SIs and guidelines issued; • A list of (and access to) any other reviews undertaken of the Act to date.
C. Preliminary assessment of the implementation of the Act	Explains implementation and identifies any un-anticipated legal or policy obstacles to the implementation of the Act and, if necessary, possible ways to improve on delivery of policy aims. It may be based on information gathered from stakeholders and agencies involved in implementing the provisions of the Act and on any other reviews of the legislation to date (including statutory reviews). It should conclude with a preliminary assessment of the extent to which the Act is meeting the objectives set out in point A (while it would not be a full evaluation).

3.2.1 Evaluation Framework

While there are similarities in aim, experts tend to distinguish between policy evaluation and ex-post impact assessment. The *Ex-Post Impact Assessment Unit in the European Parliament* describes the **purpose of evaluation** as to assess the performance of ongoing and completed legislative and/or policy actions and to learn what works, what is not working and why, with a view to influencing and bringing about any necessary change (in the legislation or in implementation mechanisms). The evaluation process itself involves the periodic analysis of data and information.

It describes **impact assessment**, on the other hand, as a type of evaluation but one which goes beyond analysing output, outcomes and the relevance of policy objectives, to identifying and appreciating the impacts of an intervention. It tends to go beyond description by looking at causality.⁴⁰

Regardless of the approach to PeS (evaluation or impact assessment), a well-designed evaluative framework is identified by experts as a precondition for effective policy analysis (as noted in Table 3). An evaluation framework should specify the activities (outputs) involved in delivering the policy and the anticipated outcomes of these activities.⁴¹ An evaluative framework should also clearly state the policy objectives in a way which, if possible, sets out the relative importance of different policy objectives (where there is more than one) and clears up or flags potential discrepancies between policy goals and administrative practice.⁴²

Evaluation requires effective monitoring which means linking specified actions to programme or legislative goals (i.e. to the objective of the legislation) and the collection of information and data about how the outputs, outcomes or policy objectives are being achieved. The type of information which may be used includes:

- Administrative data collected by Department or State Agencies (but it may be that it needs to be gathered/presented in a particular way to allow monitoring);

⁴⁰ European Parliamentary Research Service Ex-Post Impact Assessment Unit IMPT Working Document, October 2015.

⁴¹ Hogwood Brian W and Lewis A Gunn (1984) *Policy Analysis for the Real World* Oxford University Press p. 220.

⁴² Hogwood and Gunn cited above pp.222-223.

- Surveys of and/or consultation with clients/stakeholders/affected groups.

The challenges to evidence-based policy making should be borne in mind when undertaking post-enactment reviews. These include the need to build consensus around a policy solution, to aim for what is possible rather than what may seem to be the 'rationally' best policy solution, the scarcity of time and the needs and preferences of the many actors involved in implementing legislation.⁴³

4. Conclusion: bringing best practice to bear on PeS in the Houses of the Oireachtas

While a structured process of post-enactment review was incorporated into parliamentary procedure in November 2013 and re-affirmed in 2016, it is not yet conducted on a regular basis. As such, post-enactment scrutiny is new and developing.

An analysis of the reports finds that PeS has been implemented in an *ad hoc* way by Government Departments, the reviews include little depth (with some exceptions) and little analysis in the way of findings or recommendations. This is likely to be in part related to the short, one-year time-frame. To date, no parliamentary committee has decided to undertake a review of any enacted legislation on foot of a post-enactment report prepared by a Minister.

Two post-enactment review reports were laid before the Houses of the Oireachtas during the 31st Dáil:

- *Public Health (Sunbeds) Act 2014* Report (21 July 2015);
- *Merchant Shipping (Registration of Ships) Act 2014* Report (January 2016).

The first post-enactment report clearly states the policy objectives of the Act and assumes that they remain valid (perhaps unsurprisingly in the context of a public health issue). The review focuses primarily on the commencement of various sections of the Act and how it is being implemented, including regulations which have come into operation under the Act. It discusses issues of enforcement and compliance at this early stage.

The main purpose of the *Merchant Shipping (Registration of Ships) Act 2014* was to replace the *Mercantile Marine Act 1955* (as amended). Unlike the first Act (above), there exists a substantial history of regulation in this policy area. This report focused on explaining why the Act (saving one section allowing for the ratification of an international convention) had not yet been commenced. The report did not explain the policy objectives behind the Act i.e. what need it was addressing – beyond stating that its purpose was to replace the 1995 Act.

The report also highlights that it may be inappropriate to carry out post-enactment scrutiny until a substantive amount of time has passed and that that period may justifiably differ depending on the Act in question.

A further post-enactment review report - *State Airports (Shannon Group) Act 2014* – was laid before the Houses at the very start of the 32nd Dáil (April 2016). It notes that the Act was signed into law on 27 July 2014 and that the Report was laid 8 months later than set out in Standing Orders. This delay is useful as it allowed a longer timeline to report on the implementation and impact of the Act. The report sets out the primary purpose of the legislation and two secondary ones and gives an update on their current status:

- Shannon Group plc was incorporated under the *Companies Act* in August 2014 and the relevant State shareholdings were transferred to it in September 2014 (in accordance with s.28 of the Act which is the subject of the report);
- A funding plan by the trustee of the Irish Airlines (General Employees) Superannuation Scheme (IASS) was approved by the Pensions Authority in December 2014. The report

⁴³ Nutley and Web (2000) in Davies Huw T.O, Mutley Sandra, Peter C Smith, eds, *What Works?: Evidence-based policy and practice in public services* Bristol, The Policy Press (reprinted 2001, 2004, 2007, 2009) pp. 35-36.

notes that the provisions concerning this issue in the Act (s.34) facilitated implementation by the trustees of the funding solution. It may be noted that issues in relation to the IASS were the subject of very considerable interest during the second stage debate of the Bill;

- S.53 of the Act enables the Government to give effect to the 'Alternative A' insolvency arrangements (*vis-à-vis* financiers accessing their aircraft assets in the event of default or insolvency) and anticipated that this would occur in mid-2016.

A further eight post-enactment review reports have been laid since April 2016 in the 32nd Dáil. They are listed in Table 5 at the end of this Spotlight.

To what extent do conditions for effective *PeS* apply in the Houses of the Oireachtas?

The analysis in this *Spotlight* finds that post-enactment scrutiny by parliament will function best under certain conditions outlined in Sections 3.1 and 3.2 above and summarised below (**Box 3**).

Box 3: Summary of conditions for an effective process of *PeS*

- Government is obliged to provide a post-enactment review report which allows parliament to determine whether a further, more in-depth, review is necessary;
- Guidelines on what should be the approach and focus of the Government's post-enactment review report (in line with best evaluative practice) are agreed between parliament and government;
- There is sufficient time between enactment and the publication of the government's review for meaningful analysis of implementation;
- Government and Parliament (through the scrutiny process) ensure that all Bills are under-pinned by clearly-stated policy objectives. Clearly-stated policy objectives enable the development of an evaluative framework;
- Parliamentary Committees use *PeS* reports by government, reviews by other bodies and other trigger points in a systematic way to decide if, and when, to conduct further post-enactment scrutiny and include 'Acts for post-enactment scrutiny' as an item on their work programmes;
- Committees are empowered to seek further information from Ministers and officials on foot of *PeS* reports;
- If, after considering the government's report or reacting to another trigger, a committee identifies an Act requiring further investigation, parliamentary committees have access to the resources and expertise to support a full post-enactment review. For example, in the Swedish Parliament, a 'follow-up and evaluation' sub-Committee is established to lead and conduct the review with the support of the Evaluation and Research and Committee Secretariats. For some reviews external expertise is commissioned. In the UK Parliament, committees rely on the Scrutiny Unit, and in the Swiss Parliament on a small, specialist ex-post evaluation in-house service.⁴⁴

To date, and in line with best practice (Box 3), Standing Orders place responsibility on the Minister and his/her department for an initial post-enactment review of an Act. The analysis in this *Spotlight* suggests that **the process of post-enactment scrutiny by the Houses of the Oireachtas could be enhanced if:**

- Government and Parliament were to agree guidelines on the focus and content of the post-enactment review report required under Standing Orders of both Houses. These guidelines should ideally resemble the approach set out in Table 4;
- The timeframe for the Government's post-enactment report were extended from one year to three years with the option that for certain Acts (agreed between the Committee and the Minister) the timeframe should be five years;

⁴⁴ E.g. The Finance Committee commissions an external review of monetary policy every four years.

- Post-enactment reviews were to be directly referred to the relevant committee and given status/a degree of importance. For example, in the UK post-enactment memos are ‘command papers.’ Command papers tend to convey information or decisions which Government thinks should be drawn to parliament’s attention.⁴⁵
- Parliamentary Committees were to liaise with the relevant department to generate a list of Acts due for post-enactment review each year (i.e. a list of reports which the department expects to publish);
- Parliamentary Committees make full use of *PeS* Reports provided by Government, and of any other reviews of relevant legislation (Box 4), and of their powers to question Ministers and/or officials about the contents therein, to make a decision on whether to carry out its own further post-enactment scrutiny of any Act;
- Parliamentary Committees include ‘identifying the need for further *PeS* of any Acts’ as an agenda on its Work Programme;
- A Committee is guided by the scrutiny framework in Table 3 (p.13) when designing its post-enactment review and has access to resources and expertise required to undertake the work.

At the drafting and earlier scrutiny stages:

- Government ensures that the objectives of proposed legislation are clear and are explicitly linked to the actions specified in the proposed legislation. This may be achieved by way of a ‘purpose clause’⁴⁶ or this information may be clearly set out in a regulatory impact assessment;
- Parliament, through its scrutiny of legislation at the pre-legislative and formal stages, requests this type of information from Government which will allow it to develop an evaluative framework for use during post-legislative review.

Finally, the approach set out in section 3.2 can be brought to bear on Oireachtas Committees’s scrutiny of bills or Statutory Instruments (S.I.s) drafted to implement EU Directives. Given the European Commission’s increased focus on ex-post impact analysis, and a European Parliament resolution which considers that national parliaments should be involved in the ex-post evaluation of new legislation (2016), post-enactment scrutiny may increasingly become part of an Oireachtas Committee’s role.

Box 4 Reviews of legislation by other bodies

Many stakeholders monitor the implementation of legislation. These stakeholders may include bodies with a statutory duty to review legislation, professional bodies and commercial interests.

Some legislation may be reviewed as part of a Value for Money and Policy Review by a Department or the Comptroller & Auditor General if it relates to a budget line or programme that is under review.

Ombudsmen and bodies such as the Law Reform Commission (LRC) and the Irish Human Rights and Equality Commission (IHREC) also review the operation of certain pieces of legislation.

⁴⁵ Command Papers are one of five classes of formal parliamentary papers: House of Commons Bills, House of Lords Bills; House of Commons Papers, House of Lord Papers and Command Papers. See House of Commons [Information Office Factsheet 13: Command Papers](#).

⁴⁶ All government bills brought to the New Zealand parliament must be accompanied by a ‘purpose clause’ along with explanatory memo.

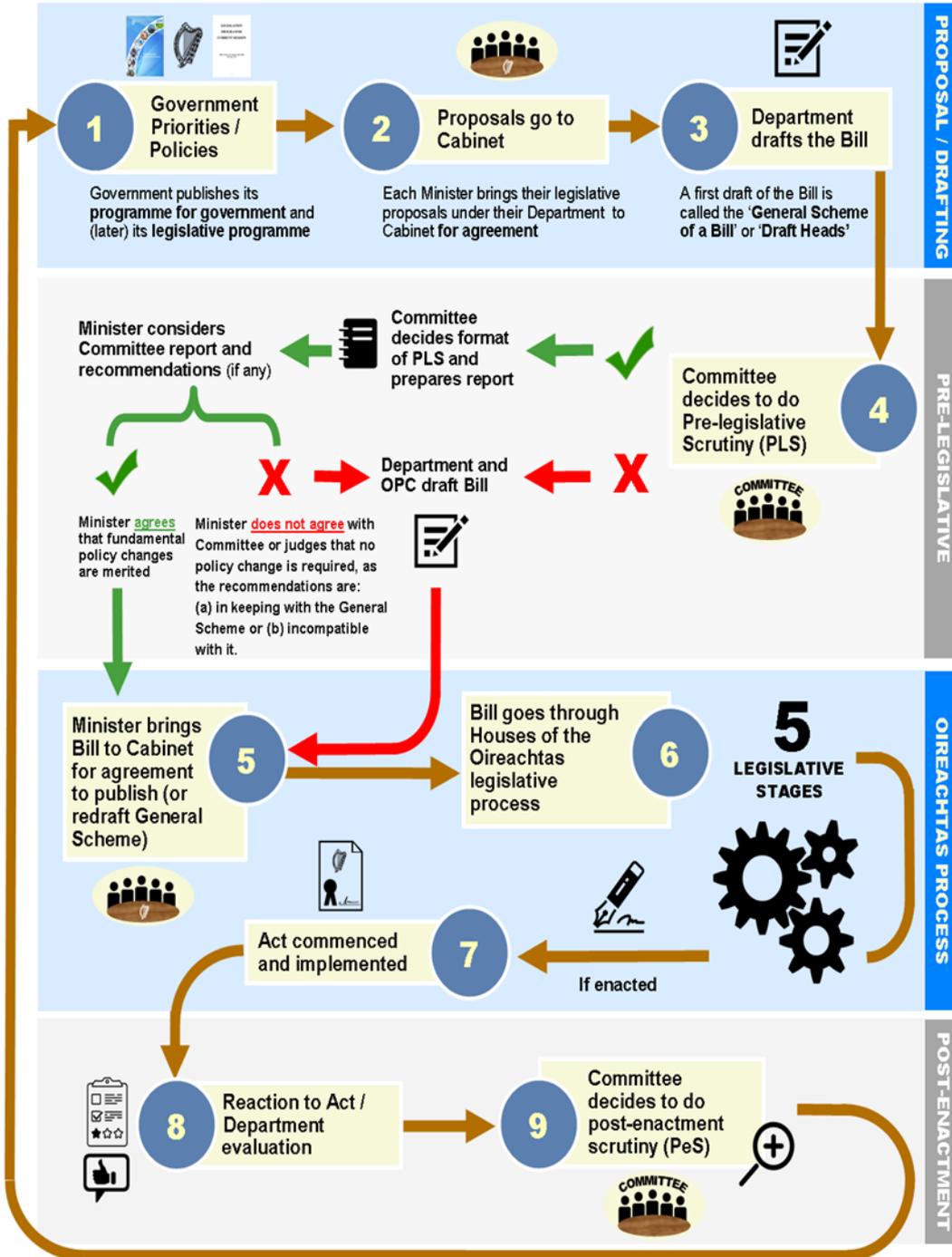
Table 5: Post-enactment scrutiny Reports laid before the Houses of the Oireachtas

Department	Post-enactment Review	Date of publication
32nd Dáil		
Justice and Equality	Proceeds of Crime (amendment) Act 2016	2017
Justice and Equality	Commission of Investigation (Irish Bank Resolution Corporation Act) 2016	2017
Communications, Climate Action and Environment	Energy Act 2016	2017
Justice and Equality	Criminal Justice (Forensic evidence and DNA database system) 2014	2017
Justice and Equality	Criminal Justice (Mutual Assistance) Act 2015	2017
Justice and Equality	Criminal Justice (Spent Convictions and Certain Disclosures) Act	2017
Transport Tourism and Sport	Harbours Act 2015	2016
Transport Tourism and Sport	Sport Ireland Act 2015	2016
Transport Tourism and Sport	State Airports (Shannon Group) Act	2016
31st Dáil		
Transport Tourism and Sport	Merchant Shipping (Registration of Ships) Act 2014	2016
Health	Public Health Sunbeds	2015

Appendix 1



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