



Criminal Law
Codification
Advisory Committee

An Coiste Comhairleach um Chódú an Dlí Choiriúil

Annual Report 2009

(PRN. A10/0642)

Mr Dermot Ahern T.D.
Minister for Justice, Equality and Law Reform
94 St Stephen's Green
Dublin 2

11 March 2010

Dear Minister,

In accordance with section 175 of the Criminal Justice Act 2006, I have the honour of submitting to you the annual report of the Criminal Law Codification Advisory Committee for the year ended 31 December 2009.

This is the third Annual Report of the Advisory Committee.

In 2009, we continued the implementation of our first work programme. I am pleased to say that a draft of the non-fatal offences against the person part of the code was submitted to the Department by the Advisory Committee in April 2009. First drafts of offence provisions dealing with criminal damage offences, public order offences, theft and related offences, offences relating to stolen property and offences relating to trespass were considered by the Advisory Committee in 2009. The Advisory Committee also examined draft provisions on objective and fault elements, causation, limits on consent and ineffective consent. These provisions will be located in the General Part of the code which will set out general principles of criminal liability.

I would like to commend the contribution of the members of the Advisory Committee during the year and their continuing commitment to the project. I would also like to express my appreciation and that of the Advisory Committee to the staff of your Department for their expertise and dedication.

We are also indebted to UCD for its continuing support and, in particular, the dedication and enthusiasm of the staff of the Research Support Unit in providing us with the research support required to enable us to fulfil our obligations under the Criminal Justice Act 2006.

The Advisory Committee is aware that your Department proposes to conduct a review of the codification project during 2010. In that context, we look forward to submitting a draft early in 2010 of the work produced during the 2007-2009 funding period and co-operating with your Department on its evaluation of the codification project to be conducted this year.

Yours sincerely,

(Professor) Finbarr McAuley
Chairman

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Introduction

The Criminal Law Codification Advisory Committee, which was established on 1 February 2007 under Part 14 of the Criminal Justice Act 2006, is the statutory body responsible for overseeing the development of a programme for the codification of the criminal law.

The Advisory Committee, which is chaired by Professor Finbarr McAuley, consists of representatives of the judiciary, the legal profession, legal academia, the Department of Justice, Equality and Law Reform, the Office of the Attorney General and the Office of the Director of Public Prosecutions.

The Advisory Committee is assisted in the discharge of its functions under the 2006 Act by the Criminal Law Codification Research Support Unit, staffed by UCD School of Law. The codification project is funded by the Department of Justice, Equality and Law Reform, which also provides administrative support to the Advisory Committee to assist it in its work.

Section 175 of the 2006 Act requires the Advisory Committee, no later than three months after the end of each calendar year, to submit to the Minister for Justice, Equality and Law Reform a report on the performance of its functions and activities during the preceding year.

This report is structured to provide information as follows:

- (i) Background to the codification project
- (ii) Statutory role of the Advisory Committee and codification structures
- (iii) Report of activities in 2009
- (iv) Appendices.

Background to the codification project

Purpose of the project

On 1 February 2007, the then Tánaiste and Minister for Justice, Equality and Law Reform, Mr Michael McDowell, commenced the criminal law codification project by establishing the Criminal Law Codification Advisory Committee. The role of the Advisory Committee is to oversee the development of a programme for the codification of the criminal law.

The criminal law of Ireland is housed in a multiplicity of statutes and court judgments. The main purpose of the codification project is to create a clear, accessible statement of the criminal law in a single instrument.

The advantages of codification for lawyers and citizens include:

- Improved access to the law
- Greater clarity in the statement of the rules and principles of the criminal law
- Enhanced understanding of the law
- Improved consistency in the application of the law.

Origins of the codification project and establishment of the Expert Group on the Codification of the Criminal Law

The Irish codification project has its origins in the Programme for Government 2002 to 2007 in which a commitment was made to codify the criminal law into a single Crimes Act. This commitment was in line with other Government initiatives to modernise and bring clarity and enhanced accessibility to the law (as for example the Better Regulation Initiative and the Statute Law Revision Programme).

There was a high level of awareness that the history of criminal law codification, particularly in other common law jurisdictions, tells a mixed story of success and failure. While codification has been achieved in many jurisdictions such as Canada, Australia, New Zealand and the USA, it has been less successful in others. Jurisdictions nearer home, such as England and Scotland, have not yet succeeded in establishing criminal codes. Consequently, it was clear that before embarking on a codification project, a necessary first step was to conduct a thorough examination of the feasibility of such a course of action.

Accordingly, an Expert Group was established in January 2003 to consider possible approaches to codification and to advise on the scope and extent of such approaches, in particular identifying any areas where the Group considered codification may give rise to policy difficulties. The Expert Group

was chaired by Professor Finbarr McAuley and included criminal law representatives from the State apparatus, practice and legal academia.

In its report, *Codifying the Criminal Law*, published in November 2004, the Expert Group outlined the overall structure and style of a criminal code and recommended that codification be undertaken on a phased basis using the various tools of restatement, consolidation and law reform in developing and maintaining the code.

The Expert Group emphasised the need for a long-term commitment to the codification project and recommended the establishment of a statutory Criminal Law Codification Advisory Committee to oversee the implementation of a programme of phased codification.

The Expert Group also recommended that the Advisory Committee's role should not cease with the creation of the code but that it should also have a role in ensuring the ongoing maintenance of the code.

Design of the Criminal Code

The Expert Group recommended that the criminal code should consist of two parts. The first part, the General Part, should contain the general principles of criminal liability. The second part, the Special Part, should contain the core criminal law offences.

The Group, in recommending a phased approach, proposed that the first code instrument should consist of a General Part and a Special Part comprising the four categories of offences which have been modernised in relatively recent enactments. These are the Criminal Justice (Theft and Fraud Offences) Act 2001; the Non-Fatal Offences against the Person Act 1997; the Criminal Justice (Public Order) Act 1994 and the Criminal Damage Act 1991.

Statutory Role of the Advisory Committee and Structures

Statutory Role of the Advisory Committee

Section 168 of the Criminal Justice Act 2006 provides that the function of the Criminal Law Codification Advisory Committee is to oversee the development of a programme for the codification of the criminal law.

More specific functions of the Advisory Committee are:

- (a) to plan, monitor and review the implementation of a programme for the development of a criminal code (“the code”),
- (b) to advise and assist the Minister for Justice, Equality and Law Reform on consolidation of areas of criminal law for inclusion in the code,
- (c) to advise and assist the Minister in relation to the amendment and future maintenance of the code,
- (d) to undertake or commission, or collaborate or assist in, research projects relating to the codification of criminal law,
- (e) to consult, on any particular matter which the Committee considers relevant, persons qualified to give opinions thereon,
- (f) to monitor, review and advise and assist the Minister on international developments in the codification of criminal law in so far as they may be relevant to the development of the code,
- (g) to advise and assist the Minister on any other related issues, including issues submitted by the Minister to the Committee for consideration.

Contact Details

Further information can be obtained from:

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Members of the Criminal Law Codification Advisory Committee

Professor Finbarr McAuley, Chairman, Professor of Law, University College Dublin and Law Reform Commissioner

Mr Conal Boyce, Solicitor, Member of the Criminal Law Committee of the Law Society of Ireland

Ms Valerie Fallon, Department of Justice, Equality and Law Reform

Mr Matthew Feely, Office of the Attorney General

Ms Elizabeth Howlin, Office of the Director of Public Prosecutions

Cllr Dr Richard Humphreys SC

Mr Patrick MacEntee SC, QC

The Hon. Mr Justice Patrick J. McCarthy, Judge of the High Court

Professor Paul O'Connor, School of Law, University College, Dublin

Ms Mags O'Driscoll, Barrister-at-Law

Ms Lia O'Hegarty, Consultant on legislation and public affairs and member of the Human Rights Commission

Mr Caoimhín Ó hUiginn, former Assistant Secretary, Department of Justice, Equality and Law Reform

Criminal Law Codification Research Support Unit

The Research Support Unit, located in the School of Law in University College Dublin, undertakes research tasks assigned to it by the Advisory Committee. Its members are:

Professor Finbarr McAuley BCL, LLB, MPhil (Edin), LLD, Director

Professor Paul A. O'Connor BCL, LLM, LLM (Penn), BL

The Research Support Unit's full-time researcher is Ms Jane Mulcahy BCL (Law and German), LLM (NUI).

Criminal Law Codification Secretariat

The provision of a full-time Criminal Law Codification Secretariat by the Department of Justice, Equality and Law Reform came to an end in Autumn 2009. Administrative support to the Advisory Committee is now provided from within the Criminal Law Reform Division of the Department.

Report of Activities in 2009

Advisory Committee Meetings

The Advisory Committee held 9 meetings in 2009, on the following dates:

22 January

27 February

2 April

7 May

18 June

23 July

8 October

12 November

17 December.

General Part

In modern criminal codes, the General Part deals with the principles of criminal liability and other matters of general application to all of the offences contained in the Special Part.

In the first half of 2009, the Advisory Committee considered a first draft of General Part provisions on fault elements and physical elements. The Research Support Unit drafted a number of issues papers to aid the Advisory Committee's discussions. These included issues papers on fault elements and the draft objective elements scheme.

The Advisory Committee also examined draft provisions on causation, ineffective consent and limits on consent.

Special Part

Following the submission of a draft Part on Non-Fatal Offences against the Person to the Advisory Committee in December 2008, a further draft was produced to reflect the discussions at the Advisory Committee's meetings and the observations of Advisory Committee members. The revised draft was submitted to the Department of Justice, Equality and Law Reform in April 2009.

First drafts of the following offence provisions were considered by the Advisory Committee in 2009:

- (i) Criminal Damage Offences,
- (ii) Public Order Offences
- (iii) Theft and Fraud Offences, Offences Relating to Stolen Property and Offences Relating to Trespass.

Review of the Codification Project

The Department of Justice, Equality and Law Reform proposes to conduct a first evaluation of the criminal law codification project in 2010. To facilitate the review process, the Advisory Committee will submit a draft of the work produced during the 2007-2009 funding period early in 2010. This document will provide a first tangible view of how the codification project has developed since its inception. The Advisory Committee looks forward to co-operating with the Department on the review of the project.

Appendix 1: First Programme of Work 2008 – 2009

Introduction

- 1.01 Following the recommendation of the Expert Group on the Codification of the Criminal Law, the inaugural code instrument will consist of a General Part and the core of a Special Part.
- 1.02 Accordingly, the Code Team will produce a comprehensive set of provisions covering these areas in the form of a Draft Criminal Code Bill.

The General Part

- 1.03 In modern criminal codes the General Part deals with the principles of criminal liability and other matters of general application to all of the offences contained in the Special Part.
- 1.04 Accordingly, the design and drafting exercise in respect of the General Part will comprehend all or most of the following:

Preliminary and Ancillary Matters

- (a) Interpretation and purpose section
- (b) Dictionary and definitions
- (c) Use of explanatory notes
- (d) Use of illustrative examples
- (e) Temporal limitations on application of code: commencement date and delayed application provisions; transitional provisions
- (f) Scope of application of code to code offences and non-code offences
- (g) Amendment and maintenance

Elements of an Offence

- (a) General principles on distinction between physical and fault elements
- (b) Physical elements
- (c) Causation
- (d) Fault elements
- (e) Mistake of fact
- (f) Mistake of law
- (g) Strict liability

General Defences

- (a) Age
- (b) Sane automatism
- (c) Insanity and diminished responsibility

- (d) Intoxication
- (e) Duress
- (f) Necessity
- (g) Legitimate defence
- (h) Lawful authority
- (i) Entrapment

Complicity

Inchoate offences

- (a) Attempt
- (b) Incitement
- (c) Conspiracy

Corporate criminal responsibility

- (a) General principles
- (b) Physical elements
- (c) Fault elements
- (d) Defences

Proof of criminal responsibility

- (a) Legal burden of proof
- (b) Evidential burden of proof
- (c) Standard of proof
- (d) Averments

Geographical application

The Special Part

- 1.05 The Special Part of the code will eventually contain all of the principal offences in the criminal calendar.
- 1.06 The calendar of offences included in the Special Part will be subdivided into a series of discrete categories or chapters according to subject-matter.
- 1.07 Offence chapters will be ranked in terms of relative seriousness, as will the catalogue of offences included in each chapter.
- 1.08 Following the recommendation of the Expert Group on the Codification of the Criminal Law, the Special Part will be drafted and enacted on a phased basis.
- 1.09 The Expert Group also recommended that the Special Part of the inaugural code instrument should be confined to the catalogue of offences found in the recently enacted mini-codes, viz.,

- the Criminal Damage Act 1991;
 - the Criminal Justice (Public Order) Act 1994;
 - the Non-Fatal Offences against the Person Act 1997;
 - and the Criminal Justice (Theft and Fraud Offences) Act 2001.
- 1.10 Accordingly, the programme of work on the Special Part of the inaugural code instrument will consist of drafting four code chapters incorporating the contents of these statutes.
- 1.11 The remaining categories of offence will then be added to the code on a phased basis at a later stage in the codification project. In order to facilitate this process, the Code Team will design a draft scheme for the Special Part as a whole, indicating where the remaining categories of offence should be inserted.

Methodology

Introduction

- 2.01 In the nature of things, the Work Programme outlined in the preceding section will involve the application of the technique of codification to the body of law earmarked for inclusion in the criminal code. By way of explaining how the Work Programme will proceed, it may be useful to identify the salient features of the technique of codification.
- 2.02 In respect of the Criminal Code as a whole, the key objective will be to collect the substantive law of crime in a single instrument that is logically organised and easy to read. In the modern era this is normally done by dividing the criminal code into two parts, one dealing with the principles of criminal liability (the General Part), the other with the criminal calendar (the Special Part).

Codifying the General Part

- 2.03 As regards the General Part, the accent will be on restatement. The task will be to restate the common and (small corpus of) statute law rules and principles governing the ascription of criminal liability in a comprehensive body of law capable of systematic application to all of the offences included in the Special Part.
- 2.04 It is important to stress that the restatement exercise will not take place in a vacuum. It will be guided by one of the standard legislative models or schemes – the American Model Penal Code is perhaps the best known example - that have been developed for the express purpose of reducing the General Part to codified form.
- 2.05 Broadly speaking, these schemes or exemplars track the content and design of the General Part of modern common law criminal codes, and reflect the balance of opinion in the international literature on such

matters as the optimum classification and sequencing of the elements of liability and the general defences. The most successful models place a premium on clarity of expression and logical organisation. They also make extensive use of drafting conventions and definitional templates designed to maximise ease of access and understanding for code users.

- 2.06 In the common law tradition, model schemes of this kind increasingly aim at completeness. The tendency is to articulate all of the liability rules needed to decide a criminal case within the compass of the General Part, as opposed to stating the general principles of criminal liability in outline form and leaving the courts to elaborate their meaning on a case-by-case basis.¹
- 2.07 In summary, a key challenge for the Advisory Committee will be to select a legislative model for the General Part that suits Irish conditions; and then to reformat the liability rules developed at common law (and supplemented by statute) so that they can be restated within the framework provided by the model.

Codifying the Special Part

- 2.08 In the case of the Special Part, the emphasis will also be on restatement, albeit that the body of law requiring restatement has already been reduced to statutory form – in the shape of the four mini-codes that have been selected for inclusion in the inaugural Special Part.
- 2.09 By and large, these statutes have been drafted in an accessible modern idiom; and, as the Expert Group on the Codification of the Criminal Law has observed, when viewed as a whole exhibit a reasonable measure of conceptual consistency. But they are far from being code-compliant. The clarity and style of the drafting varies from one mini-code to the other. The templates used to define offences are not uniform. Offence definitions sometimes include liability rules that more properly belong in the General Part; as do the extensive provisions dealing with the use of defensive force contained in sections 18 to 20 of the Non-Fatal Offences against the Person Act 1997. Some offences have arguably been misclassified as between the mini-codes. And there is some evidence of seemingly overlapping or superfluous offences.

¹ The latter practice was followed by the legislature in the four mini-codes that will form the basis of the inaugural Special Part. Thus while most of the offences in the mini-codes require proof of fault in the form of intention or recklessness, these terms are not defined in the original legislation, either in the interpretation sections or in the body of the enactments. On the argument from completeness, they will have to be defined in the criminal code – in the General Part, given that they will apply across the entire spectrum of offences in the Special Part.

- 2.10 Moreover, in addition to the substantive law of crime in their respective domains, each of the four mini-codes contains significant if varying amounts of adjective law – dealing with evidence, procedure, and sentencing. This feature of the mini-codes tends to add clutter to offence definitions and thus to obscure the conduct rules contained in them, thereby compromising one of the key aims of codification.
- 2.11 In the result, the contents of the mini-codes will have to be reformatted before the restatement exercise proper can proceed.
- 2.12 Bearing in mind that the Special Part is designed to deal with the *substantive* law of crime, the adjective law mentioned in the preceding paragraph will have to be separated out and housed elsewhere, probably in a schedule at the back of the code instrument.
- 2.13 Similarly, given that one of the principal functions of the Special Part is to streamline the criminal calendar, it follows that the conduct rules in the mini-codes will have to be pruned of all irrelevant matter prior to restatement in the criminal code.
- 2.14 Moreover, given that conduct rules are primarily aimed at the public, the restatement exercise will have to be particularly attentive to the key codification values of simplicity, consistency, and structural uniformity. Offences will have to be defined in plain language and on the basis of a rigorous anti-scatter policy. The governing principle will be that, apart from terms of general application across the Special Part,² offences should be comprehensively defined as and where they appear in the criminal code.
- 2.15 Inevitably this will involve a departure from existing drafting and legislative practice, which relies extensively on the use of interpretation sections which have the effect of breaking up the definition of an offence by explaining certain key terms *before* the offence itself is introduced.
- 2.16 By parity of reasoning, offences will have to be structured according to a uniform template used throughout the Special Part. This template will be designed by the Code Team following a comprehensive survey of the four mini-codes.
- 2.17 Suffice it to say for present purposes that the template will aim at improved comprehension and ease of access for the ordinary citizen; and, accordingly, will specify such matters as:
- (i) the name of the offence;

² Which would naturally be defined in the General Part; see previous footnote.

- (ii) the definition of the offence, using a standard definitional form of the type 'A person commits an offence if...[listing the elements of the offence];
- (iii) the conditions under which a specific offence is not committed – 'A person does not commit an offence if...[etc]'; and
- (iv) the meaning of key terms used to define the offence.

2.18 In summary, the codification of the Special Part will involve reformatting the offences in the mini-codes as self-contained conduct rules that have been shorn of extraneous matter and that can be read and understood without the need for an elaborate system of cross-reference to other parts of the code instrument.

Statutory Drafting and Codification

2.19 Finally, a word on the drafting exercise itself. Statutory drafting is a highly complex and specialised activity, and the Advisory Committee is fortunate in having considerable expertise in this area within its ranks.

2.20 As the codification process gets underway, the Advisory Committee also intends to consult widely within and beyond the State apparatus on various aspects of statutory drafting.

2.21 In the nature of things, the preparation of the Draft Code will require the close involvement of the Department of Justice, Equality and Law Reform. In the final analysis, the Criminal Code will be produced in the form of a Draft Bill emanating from that Department. By the same token, as the measure will eventually be passed in the form of the Criminal Code Act, it goes without saying that it will have to go through the legislative process in the normal way. Hence the need for close cooperation with the Office of the Parliamentary Counsel as the draft measure is being developed.

2.22 However, as the foregoing discussion illustrates, codification and statute law drafting are not identical techniques. The technique of codification raises a host of drafting issues which appear to be unique to it, and which will need to be clearly understood by everyone involved in the making of the criminal code if the resultant instrument is to be worthy of that name.

2.23 The Advisory Committee will address this problem by producing a running commentary on its draft schemes as they are prepared. These schemes and accompanying commentaries will be circulated for comment to the relevant Government Departments and Offices and the wider legal community, and published on our website. They will also be tested in a series of seminars and public consultations which will

take place over the lifetime of the current phase of the codification project.

- 2.24 By way of attracting international comment, initial drafts of the offence templates to be used in the Special Part will be presented to the 22nd Conference of the International Society for the Reform of the Criminal Law in Dublin in July 2008.

Note:

The work programme was approved by the then Minister for Justice, Equality and Law Reform, Mr Brian Lenihan T.D., on 24 January 2008. In approving the work programme, the Minister asked the Advisory Committee to consider the feasibility of including homicide offences in the Special Part of the first code instrument.

Appendix 2: Part 14 of the Criminal Justice Act 2006

Section 167 *Criminal Law Codification Advisory Committee*

There stands established a body, which shall be known as An Coiste Comhairleach um Chódú an Dlí Choiriúil or, in the English language as, the Criminal Law Codification Advisory Committee and is in this Part referred to as the “Committee”, to perform the functions assigned to it by this Act.

Section 168 *Functions of Committee*

(1) The function of the Committee shall be to oversee the development of a programme for the codification of the criminal law.

(2) Without prejudice to the generality of *subsection (1)*, the Committee shall—

(a) plan, monitor and review the implementation of a programme for the development of a criminal code (“the code”),

(b) advise and assist the Minister on consolidation of areas of criminal law for inclusion in the code,

(c) advise and assist the Minister in relation to the amendment and future maintenance of the code,

(d) undertake or commission, or collaborate or assist in, research projects relating to the codification of criminal law,

(e) consult, on any particular matter which the Committee considers relevant, persons qualified to give opinions thereon,

(f) monitor, review and advise and assist the Minister on international developments in the codification of criminal law in so far as they may be relevant to the development of the code,

(g) advise and assist the Minister on any other related issues, including issues submitted by the Minister to the Committee for consideration.

Section 169 *Membership of Committee*

(1) The Committee shall consist of the following members, that is to say, a chairperson and such and so many ordinary members as may be appointed from time to time as occasion requires by the Minister.

(2) The members of the Committee shall be appointed by the Minister from among persons who in the opinion of the Minister have experience of, and expertise including Human Rights expertise in relation to, matters connected with the functions of the Committee.

Section 170 Conditions of office of members of Committee

(1) The Minister may at any time, for stated reasons, terminate a person's membership of the Committee.

(2) A member of the Committee may resign his or her membership of the Committee by notice in writing given to the Minister, and the resignation shall take effect on the day on which the Minister receives the notice.

(3) A member of the Committee shall, subject to the provisions of this Part, hold office upon such terms and conditions (including terms and conditions relating to remuneration and allowances for expenses) as the Minister, with the consent of the Minister for Finance, may from time to time determine.

Section 171 Vacancies among members of Committee

If a member of the Committee dies, resigns, or ceases to be a member of the Committee, the Minister may appoint a person to be a member of the Committee to fill the vacancy so occasioned in the same manner as the member of the Committee who occasioned the vacancy was appointed.

Section 172 Meetings and procedure

(1) The Committee shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its programme of work and may make such arrangements for the conduct of its meetings and business (including the establishment of subcommittees and the fixing of a quorum for a meeting) as it considers appropriate.

(2) The Committee may act notwithstanding one or more vacancies among its members.

(3) Subject to the provisions of this Part, the Committee shall regulate its own procedure by rules or otherwise.

(4) At a meeting of the Committee—

(a) the chairperson of the Committee shall, if present, be the chairperson of the meeting, or

(b) if and so long as the chairperson of the Committee is not present, or if that office is vacant, the members of the Committee who are present shall choose one of their number to be chairperson of the meeting.

(5) A member of the Committee, other than the chairperson, who is unable to attend a meeting of the Committee, may nominate a deputy to attend in his or her place.

Section 173 **Programme of Work of Committee.**

(1) The Minister shall, as soon as may be after the commencement of this Part and thereafter, at least once in every 2 years, after consultation with the Committee, determine a programme of work to be undertaken by the Committee over the ensuing specified period.

(2) Notwithstanding *subsection (1)*, the Minister may, from time to time, amend the programme of work, including the period to which the programme relates.

Section 174 **Funding of Committee.**

For the purposes of expenditure by the Committee in the performance of its functions, the Minister may in each financial year, with the consent of the Minister for Finance, advance to the Committee out of moneys provided by the Oireachtas such sum or sums as the Minister, after consultation with the Committee, may determine.

Section 175 **Report of Committee.**

(1) The Committee shall, not later than 3 months after the end of each calendar year, prepare and submit to the Minister a report on the performance of its functions and activities during the preceding year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.

(2) A report under *subsection (1)* shall be in such form as the Minister may approve and shall include information in such form and regarding such matters as the Minister may from time to time direct.

(3) The Committee shall supply to the Minister such information regarding the performance of its functions as the Minister may from time to time require.