

Consolidation and Reform of Aspects of the Law of Evidence

In 2016 the Commission published a report ([LRC 117-2016 Consolidation and Reform of Aspects of the Law of Evidence](#)) on three aspects of the law of evidence, concerning the hearsay rule, documentary (including electronic) evidence and expert evidence, following up on its previous consultative papers on these subjects under the 3rd Programme of Law Reform: Projects 7, 8 and 11. The Report also included a consolidation of 19 pre-1922 and post-1922 Evidence Acts, discussed in its [Issues Paper on Consolidation of Evidence Legislation](#) (LRC IP 3-2013). The consolidation, together with the 87 final recommendations concerning the three aspects of the law of evidence, incorporated in to a draft Evidence (Consolidation and Reform) Bill included with the report, provide a contribution to a possible future codification of the law of evidence.

Hearsay in Civil and Criminal Cases

In 2010, the Commission published a [Consultation Paper on Hearsay in Civil and Criminal Cases](#) (LRC CP 60-2010) (3rd Programme of Law Reform, Project 8). The law of evidence concerning hearsay refers to any testimony given by a witness about words spoken or a document generated out of court by another person who is not produced in court as a witness, where the testimony is presented to prove the truth of what is asserted in the words or document involved. The 2016 report recommends that hearsay evidence should only be admissible, whether in civil or criminal cases, under the exceptions already established by the courts (such as for confessions, which are subject to many important protections) or under the reforms proposed for business records. With regard to business records, the report recommends that, in general, business records (whether electronic or paper records, such as emails or letters) should be presumed to be admissible in both civil and criminal cases (subject to procedural requirements to ensure that the records are reliable).

Documentary Evidence and Technology

In 2009, the Commission published its [Consultation Paper on Documentary and Electronic Evidence](#) (LRC CP 57-2009) (3rd Programme of Law Reform, Project 7).

The Commission recommends in its 2016 report that, subject to suitable safeguards (based on those that have been in place for many years in Australia and New Zealand), in cases where there is a huge number of documents presented in evidence, a written summary of such voluminous documents may be used to prove such documents in place of the documents themselves.

In relation to electronic signatures, the report recommends that there should not be a general requirement to use an advanced electronic signature based on Public Key Infrastructure (PKI), and that such a requirement should only be prescribed on a case-by-case basis. It also recommends that an electronic signature that complies with the 2014 EU Regulation on Electronic Identification and Trust Services for Electronic Transactions (the e-IDAS Regulation) should be given the same legal effect as a handwritten signature and therefore should be admissible on the same basis.

Expert Evidence

In 2008, the Commission published a [Consultation Paper on Expert Evidence](#) (LRC CP 52-2008) (3rd Programme of Law Reform, Project 11). The 2016 report recommends the following 4 main duties of an expert witness, should be set out in legislation and, in the event that an expert fails to comply with them, that a court may rule inadmissible his or her evidence:

- ~ an overriding duty to the court to provide truthful, independent and impartial expert evidence
- ~ a duty to state the facts and assumptions (and, where relevant, any underlying scientific methodology) on which his or her evidence is based and to fully inform himself or herself of any fact that could detract from his or her evidence
- ~ a duty to confine his or her evidence to matters within the scope of his or her expertise and
- ~ a duty to his or her instructing party to act with due care, skill and diligence, including a duty to take reasonable care in drafting any written report.

The report also recommends immunity of an expert from being sued should be abolished and replaced with a statutory provision that an expert should be capable of being sued only if the evidence is given in a grossly negligent manner.

The report also recommends that the Minister for Justice and Equality should publish statutory codes of practice of expert witnesses, prepared by a representative group of persons with suitable knowledge of the relevant areas; and that expert witnesses would be required to comply with the content of such a code of practice.

Consolidation and Reform of Evidence Acts

The Commission recommends that some of the 19 pre-1922 and post-1922 Evidence Acts should be repealed as they are obsolete, while other should be retained subject to suitable updating, as provided for in the draft bill included in the report. Among the pre-1922 Acts examined in the Report are the Oaths Acts 1888 and 1909. The Report recommends that a witness should continue to testify either on oath or by affirmation, but that a person choosing to give evidence by affirmation should not be required to state that he or she does not have any religious belief.