

## Issues Paper Number 3

### Consolidation of evidence legislation (LRC IP 3-2013)



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

*This is the third Issues Paper published by the Law Reform Commission. The purpose of an Issues Paper is to provide a summary or outline of a project on which the Commission is embarking or on which work is already underway, and to provide readers with an opportunity to express views and to make suggestions and comments on specific questions. The Issues Papers are circulated to members of the legal professions and to other professionals and groups who are likely to have a particular interest in, or specialist knowledge of, the relevant topic. They are also published on the Commission's website ([www.lawreform.ie](http://www.lawreform.ie)) to ensure they are available to all members of the public.*

*These Issues Papers represent current thinking within the Commission on the various items mentioned. They should not be taken as representing settled positions that have been taken by the Commission.*

*Comments and suggestions are warmly welcomed from all interested parties and all responses will be treated in the strictest confidence. These should be sent to the Law Reform Commission:*

*via email to [evidence.consolidation@lawreform.ie](mailto:evidence.consolidation@lawreform.ie) with the subject line **Evidence***

*or*

*via post to IPC House, 35-39 Shelbourne Road, Dublin 4, marked for the attention of Evidence Researcher*

*We would like to receive replies no later than close of business on 13<sup>th</sup> September 2013 if possible.*

### **ACTS CONSIDERED IN THIS ISSUE PAPER**

- [1. WITNESSES ACT 1806 \(REPEAL WITH RE-ENACTMENT PROPOSED\)](#)**
- [2. EVIDENCE ACT 1843 \(REPEAL WITH PARTIAL RE-ENACTMENT PROPOSED\)](#)**
- [3. EVIDENCE ACT 1845 \(REPEAL WITH RE-ENACTMENT PROPOSED\)](#)**
- [4. TREASURY INSTRUMENTS \(SIGNATURE\) ACT 1849 \(NO PRELIMINARY PROPOSAL\)](#)**
- [5. EVIDENCE ACT 1851 \(REPEAL WITH PARTIAL RE-ENACTMENT PROPOSED\)](#)**
- [6. EVIDENCE AMENDMENT ACT 1853 \(REPEAL AND REPLACEMENT WITH DIFFERENT PROVISIONS PROPOSED\)](#)**
- [7. DOCUMENTARY EVIDENCE ACT 1868 \(REPEAL WITH PARTIAL RE-ENACTMENT PROPOSED\)](#)**
- [8. EVIDENCE FURTHER AMENDMENT ACT 1869 \(REPEAL WITHOUT REPLACEMENT PROPOSED\)](#)**
- [9. COUNTY BOUNDARIES \(IRELAND\) ACT 1872 \(REPEAL WITH PARTIAL RE-ENACTMENT PROPOSED\)](#)**
- [10. BANKERS' BOOKS EVIDENCE ACTS 1879 AND 1959 \(RE-ENACTMENT WITH AMENDMENT PROPOSED\)](#)**

- [11. DOCUMENTARY EVIDENCE ACT 1882 \(REPEAL WITH PARTIAL RE-ENACTMENT PROPOSED\)](#)
- [12. OATHS ACTS 1888 AND 1909 \(REPEAL AND REPLACEMENT WITH UPDATED PROVISIONS PROPOSED\)](#)
- [13. DOCUMENTARY EVIDENCE ACT 1895 \(REPEAL WITHOUT REPLACEMENT PROPOSED\)](#)
- [14. EVIDENCE \(COLONIAL STATUTES\) ACT 1907 \(REPEAL WITH PARTIAL RE-ENACTMENT PROPOSED\)](#)
- [15. CRIMINAL JUSTICE \(EVIDENCE\) ACT 1924 \(REPEAL WITH RE-ENACTMENT PROPOSED\)](#)
- [16. DOCUMENTARY EVIDENCE ACT 1925 \(REPEAL WITH RE-ENACTMENT PROPOSED\)](#)
- [17. CRIMINAL EVIDENCE ACT 1992 \(REPEAL WITH RE-ENACTMENT OR REPLACEMENT PROPOSED\)](#)
- [18. SECTIONS 15 TO 19 OF CRIMINAL JUSTICE ACT 2006 \(REPEAL WITH RE-ENACTMENT PROPOSED\)](#)
- [19. SECTION 8 OF STATUTE LAW REVISION ACT 2007 \(PARTIAL REPEAL AND RE-ENACTMENT PROPOSED\)](#)

## **BACKGROUND**

As part of its forthcoming *Report on Evidence* (the “Report”) the Commission is considering recommending the consolidation of existing legislation concerning the law of evidence, together with reform of three areas of the law of evidence: hearsay, documentary (including electronic) evidence and expert evidence. The Commission envisages the Report having two aspects. The Commission first intends to discuss and make recommendations concerning a general consolidation of the existing legislation on the law of evidence, both pre-1922 and post-1922, (the “general consolidation”). This will be the focus of Chapter 1 of the Report. In the remaining chapters of the Report, the Commission also intends to discuss the consolidation and reform of the law on hearsay, documentary (including electronic) evidence and expert evidence, on which the Commission has published three separate Consultation Papers (the “specific reforms”). The law in these three areas comprises a combination of common law and legislation, and the Commission’s Report will involve recommendations proposing consolidating and reforming the existing law. In this context, the Commission is minded to take this opportunity to consolidate into a single Bill the existing legislation together with the reforms being proposed on hearsay, documentary and electronic evidence and expert evidence. While this would not produce, at this stage, a comprehensive statement in legislative form of all the law of evidence, the Commission considers that, taking into account the reforms being proposed in the three specific areas mentioned, it would constitute a worthwhile step in that direction.

In approaching this task, the Commission has found that some provisions in existing legislation, many of which are in pre-1922 Acts, are obsolete or have been superseded and the Commission is contemplating recommending that those be repealed without replacement. Some provisions are still relevant and are in keeping with the Commission’s recommendations for reform in the forthcoming Report and the Commission is considering recommending that these provisions be retained by setting them out in consolidated form (subject to minor drafting changes) in the draft *Evidence Bill* to be appended to the Report (the “draft Bill”). This would therefore facilitate the repeal of the Acts in which they are currently found.

The Commission is currently inclined towards appending to its forthcoming Report a single draft Evidence Bill containing both the general consolidation and the specific reforms discussed above, which would in general apply to both civil and criminal proceedings. This general approach would be subject to some exceptions such as in the area of hearsay in respect of which the Commission is currently inclined to the view that separate treatment for civil and criminal proceedings is required. The overall purposes of the draft Bill are therefore:

- (1) to consolidate in a single Bill (and update where necessary) the existing legislation on the law of evidence, both pre-1922 and post-1922, that remains relevant;
- (2) to consolidate and reform in the same Bill the existing law on hearsay, documentary (including electronic) evidence and expert evidence, whether derived from common law or legislation;
- (3) to thereby contribute to a possible future comprehensive statement in legislative form of the entire general law of evidence.

***The Commission is seeking the views of interested parties in relation to the following two issues. These views will be considered by the Commission in producing the Report.***

## **INTRODUCTION**

The law of evidence is currently a product of the interaction of common law and legislative provisions. Here the Commission examines that interaction and sets out its intended recommendations on consolidating the existing legislation on the law of evidence currently in force. The Commission does not consider every Act relating to the law of evidence.

### **Issue 1: Acts excluded from scope of consolidation**

1.01 Some Acts govern ancillary matters of civil or criminal procedure rather than set out substantive rules of evidence. These include the *Evidence Act 1815*,<sup>1</sup> the *Evidence on Commission Act 1831*,<sup>2</sup> the *Perpetuation of Testimony Act 1842*,<sup>3</sup> the *Evidence by Commission Act 1843*,<sup>4</sup> the *Judgments (Ireland) Act 1844*,<sup>5</sup> the *Foreign Tribunals Evidence Act 1856*,<sup>6</sup> the *Evidence by Commission Act 1859*,<sup>7</sup> the *Foreign Law Ascertainment Act 1861*,<sup>8</sup> the *Evidence by Commission Act 1885*<sup>9</sup> and the *Witnesses (Public Inquiries) Protection Act 1892*.<sup>10</sup> The Commission dealt with these in its *Report on Consolidation and Reform of the Courts Acts* (the “Courts Report”).<sup>11</sup> The Commission incorporated into the Draft Courts (Consolidation and Reform) Bill appended to that Report the provisions in these pre-1922 Acts that remain of relevance, which thus facilitated the Commission’s recommendation that these Acts could then be repealed.

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<sup>1</sup> 55 Geo 3 c 157. Despite its broad name, this Act deals with the fairly narrow matter of giving evidence on commission.

<sup>2</sup> 1 Will 4 c 32.

<sup>3</sup> 5 & 6 Vict c 69.

<sup>4</sup> (1843) 6 & 7 Vict 82.

<sup>5</sup> 7 & 8 Vict c 90.

<sup>6</sup> 19 & 20 Vict c 113.

<sup>7</sup> 22 Vict c 20.

<sup>8</sup> 24 & 25 Vict c 11.

<sup>9</sup> 48 & 49 Vict c 69.

<sup>10</sup> 55 & 56 Vict c 21.

<sup>11</sup> LRC 97-2010 at 271.

1.02 The Commission therefore excludes those Acts from consideration in this Issues Paper. The Commission is also inclined towards excluding them from the forthcoming Report as they may properly be categorised as dealing with court procedure and the Commission sees no reason to depart from the view expressed in its 2010 Report. The Commission is also inclined to exclude from consideration specific *ad hoc* evidence provisions in regulatory or criminal legislation, discrete aspects of the law of evidence such as confessions, the rules of evidence for statutory tribunals and the rules of evidence for parliamentary witnesses.

1.03 The Acts listed below under the heading for Issue 2 contain the main generally applicable statutory changes to the law of evidence with which the Report will be concerned but there are many other Acts that affect the law of evidence both directly and tangentially. For example the *Criminal Justice Act 2007* allows an officer of the Garda Síochána not below the rank of chief superintendent to apply to extend a period of detention and in doing so to give evidence of matters not within his or her personal knowledge but within the personal knowledge of another member. That is an exception to the rule against hearsay. Similarly, many statutes provide that particular certificates are evidence of the truth of their contents (for example section 20I of the *Jurisdiction of Courts and Enforcement of Judgments Act 1998* as amended by the *Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012*) or that an entry on a register is evidence of a particular fact or state of affairs.

1.04 The Commission will advert to some specific provisions in various parts of the Report but will not (and does not here) list all the statutes that make provision connected with the law of evidence. The Commission's provisional view is that there is such a large number of these statutes and they are concerned with so wide a variety of subjects that including them in a report on the general law of evidence would not be practical.

1.05 The Commission is inclined towards excluding from the scope of the Report those aspects of the law of evidence that require separate and detailed consideration in their own right for example the law on confession evidence and its related legislation. For the same reason the Commission is not planning to consider the *Criminal Justice (Forensic Evidence) Act 1990* as amended.

1.06 The Commission is not planning to deal with the statutes that set out the rules of evidence applicable to statutory tribunals. The Commission is therefore inclining towards not covering the *Tribunals of Inquiry (Evidence) Act 1921* or any of the amending legislation in the Report.<sup>12</sup>

1.07 Section 5 of the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013* repeals and replaces all of the existing legislation dealing with the giving of evidence before parliamentary chambers or committees, for example the *Parliamentary Witnesses Act 1858*<sup>13</sup> and the *Parliamentary Witnesses Oaths Act 1871*.<sup>14</sup> The Commission is therefore not inclined to deal with this area (giving evidence to parliamentary committees) in the Report.

1.08 A large number of enactments passed by the pre-1801 Parliament of Ireland, pre-1707 Parliament of England and pre-1801 Parliament of Great Britain have been retained in the State under the *Statute Law Revision Act 2007*. The Commission has examined these and concluded that none of

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<sup>12</sup> The *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, *Tribunals of Inquiry (Evidence) (Amendment) Act 1997*, *Tribunals of Inquiry (Evidence) (Amendment) Act 1998*, *Tribunals of Inquiry (Evidence) (Amendment) (No 2) Act 1998*, *Tribunals of Inquiry (Evidence) (Amendment) Act 2002*, and *Tribunals of Inquiry (Evidence) (Amendment) Act 2004*.

<sup>13</sup> 1858 (21 & 22 Vict) c 78

<sup>14</sup> 1871 (34 & 35 Vict) c 83

these is relevant to the Report. The Commission is therefore not currently planning to recommend the repeal of any of these Acts.

*Q.1: Do you agree that the legislation that the Commission proposes to exclude from the scope of the Draft Evidence Bill to be appended to its forthcoming Report on Evidence should be so excluded and that the legislation that the Commission has included in the scope of that Draft Evidence Bill (for which see Issue 2 below) should be included?*

## **Issue 2: re-enactment or outright repeal**

2.01 A large number of Acts of Parliament of the post-1800 United Kingdom of Great Britain and Ireland (carried over by the 1922 and 1937 Constitutions) remain in force. Some of these are very important to the law of evidence. After 1922 the Oireachtas also passed several important Acts affecting the law of evidence. The Commission discusses the content of these Acts below in chronological order beginning with the *Witnesses Act 1806*.

2.02 The Commission briefly summarises its intended recommendation for each Act in parentheses immediately after the title of the Act. The Commission is considering recommending that some Acts be repealed without replacement. It is considering recommending that some Acts be repealed but re-enacted as part of the consolidated legislative scheme in the Draft Evidence Bill to be appended to the forthcoming Report on Evidence. Some Acts that the Commission proposes to recommend re-enacting may need to be updated or amended rather than simply re-enacted and the Commission discusses this for each affected Act below. For some Acts, the Commission is likely to take a provision-specific approach. In the case of these Acts, the Commission is considering recommending that some provisions be repealed without replacement and that other provisions be repealed but either re-enacted as part of the draft Bill or else replaced with equivalent amended or updated provisions in the draft Bill.

### **1. *Witnesses Act 1806 (Repeal with re-enactment proposed)***

2.03 The *Witnesses Act 1806* clarifies the scope of witness privilege. It is clarifying legislation, intended to declare the law rather than amend it.<sup>15</sup> It was introduced to resolve doubts about “whether a [w]itness can... refuse to answer a [q]uestion... the answering of which may establish, or tend to establish that he owes a [d]ebt, or is otherwise subject to a [c]ivil [s]uit...”. It provides that a witness cannot refuse to answer a question relevant to the matter in issue on the basis that answering it may establish or tend to establish that the witness owes a debt or is otherwise liable to be sued whether by the Crown or any other party provided answering the question has no tendency to accuse the witness or expose him or her to penalty or forfeiture of any nature whatsoever.

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<sup>15</sup> “Whereas Doubts have arisen... Be it therefore declared and enacted by the King’s most Excellent Majesty...”.

- 2.04 This Act, consisting of a single provision, remains in force unamended in the State (and in the UK).<sup>16</sup> It makes clear that a witness cannot refuse to answer a question on the sole ground that answering would expose the witness to civil proceedings.
- 2.05 *The Commission is considering recommending that the Witnesses Act 1806 be repealed and re-enacted with minor modifications (such as replacing the Crown with the State) in the draft Bill.*

### **2. Evidence Act 1843 (Repeal with partial re-enactment proposed)**

- 2.06 A series of 19<sup>th</sup> century Acts abolished and replaced various common law rules of evidence that prohibited certain persons from giving evidence in a civil or criminal case. The common law prohibited people with criminal convictions from giving evidence in any civil or criminal proceedings. It also prohibited anyone with an interest in civil proceedings from giving evidence in those proceedings. Section 1 of *Evidence Act 1843*<sup>17</sup> abolished both of these rules.
- 2.07 The 1843 Act continued the common law rule that neither the parties themselves nor their spouses were competent witnesses. These rules were eventually abolished by the *Evidence Act 1851*, the *Evidence Amendment Act 1853* and the *Evidence Further Amendment Act 1869*, each discussed in detail below. Neither the accused nor their spouse was a competent witness in a criminal trial until the *Criminal Evidence Act 1898*. The *Criminal Justice (Evidence) Act 1924* and the *Criminal Evidence Act 1992* now contain the relevant statutory provisions on the competence of the accused and his or her spouse to give evidence.<sup>18</sup>
- 2.08 *The Commission is considering recommending that the provision on the ability of persons with a criminal conviction or an interest in the civil proceedings to testify in the Evidence Act 1843 be consolidated into the draft Evidence Bill. The Commission also is considering recommending that the 1843 Act be then repealed in its entirety because the remaining provisions in the 1843 Act on the competence and compellability of parties and their spouses have been superseded by subsequent legislation.*

### **3. Evidence Act 1845 (Repeal with re-enactment proposed)**

- 2.09 When the *Evidence Act 1845* was passed statutory reforms had already allowed certain public documents to be admitted as an exception to the hearsay rule but the Preamble to the 1845 Act records that these reforms had been “greatly diminished” in effect by the need to prove that the documents were genuine. The 1845 Act was passed to circumvent this.
- 2.10 Section 1 of the 1845 Act concerns public documents admissible under any past or future Act. Legislation sometimes required documents to be sealed, signed or stamped. Section 1 made

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<sup>16</sup> See *Archbold’s Criminal Law and Procedure* (2013) at [§12-3] at 1486.

<sup>17</sup> Confusingly, at least three major 19<sup>th</sup> century Evidence Acts are commonly referred to as “*Lord Denman’s Act*”. (Lord Denman initiated each Bill and private members’ Bills used to be called for their promoters). The three Acts are the *Evidence Act 1843*, the *Criminal Procedure Act 1865* and the *Evidence Further Amendment Act 1869*. The Commission’s *Report on Family Law* (LRC 1-1981) at 31, used “*Lord Denman’s Act*” to refer to the 1869 Act.

<sup>18</sup> The *Evidence Act 1898* was formally repealed only in 2007 by the *Statute Law Revision Act 2007*.

any such document that purported to be sealed, signed or stamped as required admissible without any proof that it really had been sealed, signed or stamped. The list of affected documents is very widely drafted:

- (1) any certificate,
- (2) any official or public document,
- (3) any document or proceeding of any corporation or joint stock or other company and
- (4) any certified copy of any
  - (i) document,
  - (ii) bye-law,
  - (iii) entry in any register or other book or
  - (iv) other proceeding.

- 2.11 Section 2 compels all judges and judicial officers to take judicial notice of the signatures of judges of the Superior Courts at Westminster on judicial or official documents.
- 2.12 Under section 3 copies of all private and local and personal Acts of Parliament are admissible in evidence if they purport to be printed by the Queen's Printers, without any proof that they have been so printed. Copies of the journals of either House of Parliament or Royal Proclamations which purport to have been printed by the Printers to the Crown or the Printers to either House of Parliament must also be admitted in evidence without any proof that they were so printed. Section 8 of the *Statute Law Revision Act 2007* provides for specific additional methods of proving the old local and personal Acts to which the 1845 Act applies.
- 2.13 Section 4 as amended creates an offence of forgery in relation to the materials covered by the Act. Section 4 was amended by the *Statute Law Revision (No 2) Act 1893* in respect of penalties on conviction for forgery. Section 4 was also amended by the *Forgery Act 1913* which deleted the provisions in the 1845 Act on forgery of public documents generally. The effect was that the forgery offence in section 4 of the 1845 Act was from then on limited to forgery of private and local Acts. The *Criminal Justice (Theft and Fraud Offences) Act 2001* repealed the *Forgery Act 1913* and now deals with forgery of most public documents but this does not include private and local Acts so this element of the 1845 Act is still relevant.
- 2.14 *The Commission is considering recommending that the provisions in the Evidence Act 1845 on the admissibility of certain public documents and on the forgery of certain other documents be consolidated into the draft Evidence Bill. The Commission is considering recommending that the 1845 Act then be repealed in its entirety.*

#### **4. Treasury Instruments (Signature) Act 1849 (No preliminary proposal)**

- 2.15 The Commission is subjecting this Act to further analysis before settling upon a preliminary view. The Commission nevertheless welcomes comments on this Act.

#### **5. Evidence Act 1851 (Repeal with partial re-enactment proposed)**

- 2.16 There are several important provisions in the *Evidence Act 1851*. Section 2 of the 1851 Act makes it a general rule subject to some specified exceptions that all parties are competent and compellable witnesses in their own proceedings and it makes any person or people on

whose behalf the proceedings are brought or defended competent and compellable too. It applies to a wide variety of trials (the trial of any issue joined, or of any matter or question) and inquiries (any inquiry in any suit, action or other proceeding) before any court or any person with power by law or by party consent to hear, receive and examine evidence. The exceptions are in section 3 (discussed next), section 4 (excepts proceedings in adultery or breach of promise to marry) and section 5 (preserves the effect of the *Births and Deaths Registration Act 1837*). It applies to viva voce evidence and evidence by deposition.

- 2.17 Section 3 has three elements. First, it provides that the Act shall not render any defendant (or accused) in criminal proceedings competent or compellable to give evidence at his or her own trial. This is the first exception to the general principle in section 2 and it preserves the common law regarding the competence and compellability of defendants and accuseds.
- 2.18 The defendant or accused in criminal proceedings is now competent under section 1 of the *Criminal Justice (Evidence) Act 1924* but under section 1(a) of the 1924 Act is still not compellable. The 1924 Act supersedes the 1851 Act. It retains the non-compellability rule but implicitly repeals the no-competence rule.<sup>19</sup>
- 2.19 If a defendant or accused decides to testify, they can no longer avail of the protection against self-incrimination in the 1851 Act. Section 1(e) of the 1924 Act now provides that “a person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.”
- 2.20 The Commission is therefore considering recommending that this first element of section 3 of the 1851 Act be repealed without replacement.
- 2.21 Second, section 3 provides that nothing in the Act makes a person compellable to answer any question tending to criminate himself or herself. The wording of this second element is very general: “nothing herein contained... shall render any [p]erson compellable to answer any [q]uestion tending to criminate himself or herself”. Unlike the first and third elements, the second element does not limit its scope to “any criminal [p]roceeding”. Similarly, nothing in the wording limits the “person” to an accused or defendant, as opposed simply to a witness.<sup>20</sup>
- 2.22 The 1924 Act does not deal with the second element of section 3 of the 1851 Act: it does not provide for any right to protection against self-incrimination. The 1851 Act is the only statutory formulation of the right not to incriminate oneself in answering a question. The Act preserves such right as may have already existed, however. It does not confer or recognise a general right not to incriminate oneself. Rather, it provides that “nothing [t]herein contained” (*ie* contained in the Act itself or perhaps in section 3 of the Act) renders a person compellable to answer a question tending to criminate himself or herself. The Act thus identifies the potential source of such compellability against which the Act guards as the Act itself or one of its sections. If the Act or that section is repealed then there is nothing to protect against and the protective clause is redundant. If there was another source of compellability (outside the Act) then the protective clause in the Act would do nothing to defeat that. It is therefore not a formulation of a general right against self-incrimination so much as a provision that ensures that the Act itself does not compel self-incrimination.

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<sup>19</sup> Under section 5 of the 1924 Act, the 1924 Act overrides all previous Acts except the *Evidence Act 1877*.

<sup>20</sup> This interpretation appears to be supported by Gavan Duffy P in *Attorney-General v Ingham & Ors* (1948) 82 ILTR 79: “The Evidence Act, 1851, made all parties to any proceedings ‘competent and compellable’ witnesses, but the Act was not to render any person charged with an offence competent or compellable to give evidence against himself or to compel anyone to answer incriminating questions.”



- 2.23 It is not entirely clear what the effect of repealing the second element of section 3 of the 1851 Act would be. If the Act is repealed then it seems logical to conclude that the potential source of compulsion against which the protective clause operated would also be gone and that the protective clause could also be repealed without danger. This would leave the existing common law and/or constitutional rules in place as regards compelling witnesses to incriminate themselves. Nevertheless, lest the repeal of the protective clause be misconstrued as intended to repeal the protection altogether (as opposed to protection against compulsion occasioned by the Act) it might be prudent to enact a general statutory formulation of the right of a witness not to incriminate himself or herself by being compelled to answer a question that would, or would tend to, incriminate the witness.
- 2.24 The Commission therefore invites comment on whether it would be suitable to enact a provision restating in general form the right against self-incrimination to which the 1851 Act gave limited protection. The general provision would be subordinate, in the case of witnesses who are also accuseds or defendants, to the specific provisions re-enacted from the 1924 Act.
- 2.25 The third element of section 3 of the 1851 Act is that it continued to prohibit spouses from being competent or compellable to give evidence for or against each other in a criminal trial (see also the discussion of the *Evidence Act 1853* below). The current law (now in the 1924 Act and the *Criminal Evidence Act 1992*, both discussed below) is very different so this aspect of section 3 of the 1851 Act is obsolete. The Commission has accordingly concluded that section 3 of the 1851 Act should be repealed in its entirety without replacement.
- 2.26 Section 7 of the *Evidence Act 1851* deals with the method of proving foreign and colonial acts of state and judgments, decrees or orders or other judicial proceedings by examined copies or copies authenticated under the Act. A proclamation, treaty or other act of state must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs in order to be admissible. A judgment, decree, order or other judicial proceeding of any foreign court or colonial court or an affidavit, pleading or other legal document filed or deposited in any such court must purport to be either sealed or signed by a judge with a statement from that judge that the court does not have a seal in order for the document to be admissible in evidence. Section 7 also states that if a document purports to be sealed or signed the copies may be admitted in evidence in the manner that the original document would have been without any proof of the seal, signature, truth of the statement attached, or judicial character of the person making it being led. Section 7 of the 1851 Act overlaps to some extent with the *Evidence (Colonial Statutes) Act 1907*, discussed below.
- 2.27 Section 8 of the 1851 Act provides that any certificate of the qualification of an apothecary (a pharmacist) shall be admissible without proof of the seal of the relevant qualification body. This is now obsolete given Part 4, in particular section 23, of the *Pharmacy Act 2007*.
- 2.28 Under section 9 of the 1851 Act any documents admissible in England and Wales without proof of the seal or signature are equally admissible in Ireland and under section 10 any document so admissible in Ireland is admissible in England and Wales. Section 11 makes documents admissible thus in England and Wales or Ireland equally admissible in the Colonies.
- 2.29 Section 13 of the 1851 Act deals with how to prove a conviction or acquittal. It is sufficient to produce a certificate under the hand of the clerk of the court or other officer having custody of the record of the courts where the conviction or acquittal took place that the paper produced is a copy of the record of indictment, trial, judgment and conviction or acquittal.

- 2.30 Section 14 of the 1851 Act allows any book or document not already admissible by producing a copy to be proven by producing an examined or certified copy. The copy must be proved to be an examined copy or extract or must purport to have been signed and certified as a true copy or extract by an officer in whose custody the original is entrusted.
- 2.31 Sections 15 to 20 of the 1851 Act deal with offences under the Act and administrative matters relating to the operation of the Act.<sup>21</sup>
- 2.32 *The Commission is considering recommending that section 3 of the Evidence Act 1851 be repealed in its entirety without replacement (this concerns self-incrimination by an accused and the competence and compellability of the spouse of the accused). The Commission is also considering recommending that section 8 of the Evidence Act 1851 be repealed without replacement (this concerns the admission of certificates of qualification of pharmacists). The Commission is considering recommending that the remaining provisions of the Evidence Act 1851 that are of continuing relevance be consolidated into the draft Bill and that the Evidence Act 1851 then be repealed.*

#### **6. Evidence Amendment Act 1853 (Repeal and replacement with different provisions proposed)**

- 2.33 The *Evidence Amendment Act 1853* regulates the evidence that can be given by the husbands and wives of parties to civil proceedings (that is, any issue, proceeding, suit or action).
- 2.34 Section 1 of the 1853 Act provides that a husband or wife is competent and compellable to give evidence subject to the provisions of the Act. Section 2 of the 1853 Act restricts the application of section 1 by excluding criminal cases (references in section 2 of the 1853 Act to excluding cases of adultery were repealed by section 1 of the *Evidence Further Amendment Act 1869*).
- 2.35 Section 3 of the 1853 Act, which provided that husbands and wives shall not be compelled to disclose communications made to each other during their marriage, was repealed by section 3 of the *Criminal Evidence Act 1992*. Since the 1853 Act applies to civil proceedings only and the 1992 Act applies to criminal proceedings only, the Commission considers that it would be preferable to clarify that the prohibition in the 1853 Act on disclosure of communications between spouses has been repealed for the purposes of both civil and criminal proceedings, and accordingly so recommends.
- 2.36 *The Commission is considering recommending that the draft Evidence Bill should provide that to avoid any doubt the prohibition in the Evidence Amendment Act 1853 on disclosure of communications between spouses be regarded as repealed for the purposes of both civil and criminal proceedings. The Commission also is considering recommending that the draft Evidence Bill should include clear provisions regarding the competence and compellability of spouses in civil and criminal proceedings. The Commission intends further to recommend that the Evidence Amendment Act 1853 should then be repealed in its entirety.*

#### **7. Documentary Evidence Act 1868 (Repeal with partial re-enactment proposed)**

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<sup>21</sup> Section 17 of the 1851 Act was repealed by the *Forgery Act 1913* and section 20 was repealed by the *Statute Law Revision Act 1875*.

- 2.37 Section 2 of the 1868 Act allows *prima facie* evidence of any proclamation, order or regulation (hereafter, “instrument”) to be given in three specified ways. “Prima facie” means that the evidence can be rebutted but otherwise is to be taken as an accurate representation of the instrument. The three ways authorised by the Act are
- (1) producing a copy of the Gazette that purports to contain the instrument;
  - (2) producing the instrument purporting to have been printed by the Government printer (or an a printer authorised by a colonial legislature if in a colony);
  - (3) producing a copy or extract that purports to be certified to be true by specified persons (including the clerk or one of the Lords of the Privy Council). There is no need to prove the authenticity of the handwriting or official position of the person certifying.
- 2.38 The remaining sections extend the Act to the colonies,<sup>22</sup> create forgery offences,<sup>23</sup> define terms<sup>24</sup> and preserve existing means of proof.<sup>25</sup> Section 8 of the *Statute Law Revision Act 2007* gives additional methods of proving the old statutes (but not the other documents) to which the 1868 Act applies.
- 2.39 The application of the 1868 Act was extended to a number of pre-1922 bodies by a number of different Acts.<sup>26</sup> By way of example, the *Agriculture and Technical Instruction (Ireland) Act 1899* applied the 1868 Act to the Department of Agriculture and Technical Instruction. This body was subsequently amalgamated into the Department of Agriculture. There may, however, be a number of statutory instruments still in force in Ireland made by the Department of Agriculture and Technical Instruction. Of these pre-1922 Acts extending the application of the 1868 Act, only the *Documentary Evidence Act 1895*, discussed below, remains in force.

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<sup>22</sup> Section 3.

<sup>23</sup> Section 4.

<sup>24</sup> Section 5.

<sup>25</sup> Section 8.

<sup>26</sup> The application of the 1868 Act was extended to the Air Council by section 10(5) of the *Air Force (Constitution) Act 1917* (7 & 8 Geo 5) c 51; the Army Council by section 5 of the *Evidence (Amendment) Act 1915* (5 & 6 Geo 5) c 94; the Board of Education by the *Elementary Education Act 1870* (33 & 34 Vict) c 75 and the *Board of Education Act 1899* (62 & 63 Vict) c 33 (neither Act applied to Ireland); the Department of Agriculture and Technical Instruction by section 21(3) of the *Agriculture and Technical Instruction (Ireland) Act 1899* (62 & 63 Vict) c 50; the Forestry Commissioners by section 2(5) of the *Forestry Act 1919* (9 & 10 Geo 5) c 58; the Insurance Commissioners and Joint Committee by section 29(3) of the *National Insurance Act 1913* (3 & 4 Geo 5) c 37; the Local Government Board for Ireland by section 5 of the *Evidence (Amendment) Act 1915* (5 & 6 Geo 5) c 94; the Ministry of Agriculture and Fisheries by section 1 of the *Documentary Evidence Act 1895* (58 & 59 Vict) c 9 and section 1 of the *Ministry of Agriculture and Fisheries Act 1919* (9 & 10 Geo 5) c 91; the Ministry of Health by section 7(5) of the *Ministry of Health Act 1919* (9 & 10 Geo 5) c 21; the Ministry of Labour, the Ministry of Food and the Ministry of Shipping by section 11(4) of the *New Ministries and Secretaries Act 1916* (6 & 7 Geo 5) c 68; the Ministry of Pensions by section 6(5) of the *Ministry of Pensions Act 1916* (6 & 7 Geo 5) c 65; the Ministry of Transport by the *New Ministries and Secretaries Act 1916* (6 & 7 Geo 5) c 65 and the *Ministry of Transport Act 1919* (9 & 10 Geo 5) c 50 section 26(5); and the Postmaster-General by section 36 of the *Post Office Act 1908* (8 Edw 7) c 48.

2.40 *The Commission is considering recommending that the provisions in the Documentary Evidence Act 1868 concerning the proof of certain proclamations, orders or regulations be consolidated into the draft Evidence Bill. The Commission also is considering recommending that the 1868 Act then be repealed in its entirety.*

#### **8. Evidence Further Amendment Act 1869<sup>27</sup> (Repeal without replacement proposed)**

2.41 Section 1 of the 1869 Act amended section 2 of the *Evidence Amendment Act 1853*, discussed above.<sup>28</sup> Section 2 of the 1869 Act provides that the parties to any action for breach of promise to marry are competent to give evidence in such action. The action for breach of promise to marry was abolished by section 2 of the *Family Law Act 1981* which implemented the recommendation to that effect in the Commission's 1981 *Report on Family Law*.<sup>29</sup> The Commission also recommended in the 1981 Report that section 2 of the 1869 Act should be repealed on the basis that the cause of action on which it rested was to be abolished. The Commission considers that it would be safe, 32 years after the enactment of the 1981 Act (which provided a saver for actions begun before the 1981 Act came into force), to repeal section 2 of the 1869 Act.

2.42 Section 3 of the 1869 Act provides that the "parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties" are competent to give evidence in such proceedings (a proviso to section 3 was repealed by section 47(2) of the *Status of Children Act 1987*). The Commission had recommended in its 1981 *Report on Family Law* that the common law tort of criminal conversation, which in effect, was a civil claim for damages for adultery, should be abolished; this was implemented in section 1 of the *Family Law Act 1981*. The Commission had also recommended that a statutory family action for adultery should be enacted to replace the tort of criminal conversation. The 1981 Act did not implement this recommendation and in the Commission's view it is unlikely that the Oireachtas would enact such legislation in the future. The Commission therefore is considering recommending the repeal of the remaining elements of section 3 of the 1869 Act. Section 4 of the 1869 Act is the only other section in the Act and was repealed by section 6 of the *Oaths Act 1888*. The Commission has therefore concluded that the 1869 Act should now be formally repealed in its entirety.

2.43 *The Commission is considering recommending that the Evidence Further Amendment Act 1869, to the extent that it has not already been repealed, be repealed in its entirety because its remaining provisions are obsolete.*

#### **9. County Boundaries (Ireland) Act 1872 (Repeal with partial re-enactment proposed)**

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<sup>27</sup> The 1869 Act is sometimes referred to as *Lord Denman's Act* (see the Commission's *Report on Family Law* (LRC 1-1981) 31). While Lord Denman initiated in the UK Parliament what became the 1869 Act (as what might be described now as a Private Member's Bill), the informal title *Lord Denman's Act* is more commonly associated with the *Criminal Procedure Act 1865*.

<sup>28</sup> Section 1 of the 1869 Act was formally repealed by the *Statute Law Revision Act 1883* (this did not affect the amendment it had already made to section 2 of the 1853 Act).

<sup>29</sup> Law Reform Commission *Report on Family Law* (LRC 1-1981).

- 2.44 Section 2 of the *County Boundaries (Ireland) Act 1872* provides that every order made under the Act or any Act listed in the Schedule<sup>30</sup> shall be “conclusive evidence” of any fact or circumstance that is necessary to authorise the making of the order and shall be deemed to have been validly made.<sup>31</sup>
- 2.45 Section 3 of the 1872 Act makes copies of the orders referred to in section 2 admissible as conclusive evidence where they purport to be signed by the clerk of the Privy Council in Ireland or purport to have been published in the Dublin Gazette under the Queen’s authority. Section 4 states that a copy of any map or part of a map referred to in any order under section 2 which purports to have been certified by the clerk of the Privy Council shall be conclusive evidence of the original map or the extracted part of the map.
- 2.46 Section 5 related to the power of the Lord Lieutenant to order separation of baronies; it was repealed by the *Local Government (Ireland) Act 1898*.
- 2.47 The 1872 Act states that certain orders and copies of those orders are to be “conclusive evidence” of other matters. It could be argued that the constitutional validity of the statute is called into question by the use of the word “conclusive”. Case law indicates that where a justiciable controversy exists the Oireachtas cannot direct the courts as to how that controversy should be determined<sup>32</sup> nor limit the persons who may be heard before the court.<sup>33</sup> On the other hand the Oireachtas can direct the court to act in a particular manner once specific matters have been proved<sup>34</sup> or give a direction in relation to a matter other than the justiciable controversy under consideration.<sup>35</sup> Furthermore, the Oireachtas can effectively allow the definition of an illegal organisations to be determined by Government certificate even though the provision allowing this is phrased in terms of “conclusive evidence” of illegality.<sup>36</sup> For this reason, it is likely that the 1872 Act does not infringe the Constitution. It neither directs the court to determine a matter in a particular way nor does it remove from the courts the determination of essential ingredients of an offence.<sup>37</sup>

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<sup>30</sup> These are: 17 Vict c 17 (which appears to be a miscitation of 17 & 18 Vict c 17 - the *Boundary Survey (Ireland) Act 1854*), 20 & 21 Vict c 45 (the *Boundary Survey (Ireland) Act 1857*), 22 & 23 Vict c 8 (*Boundary Survey (Ireland) Act 1859*) and 34 & 35 Vict c 106 (*Detached Portions of Counties (Ireland) Act 1871*). These Acts are all still in force.

<sup>31</sup> See *Brown v Donegal County Council* [1980] IR 132.

<sup>32</sup> *Buckley v Attorney General* [1950] IR 67; *Maher v Attorney General* [1973] IR 140; *The State (McEldowney) v Kelleher* [1983] IR 289.

<sup>33</sup> *Cashman v Clifford* [1989] IR 121.

<sup>34</sup> *The State (O’Rourke) v Kelly* [1983] IR 58.

<sup>35</sup> *Fitzgerald v Director of Public Prosecutions* [2001] IEHC 88; [2003] 3 IR 247.

<sup>36</sup> *Sloan v Special Criminal Court* [1993] 3 IR 528. In that case, Costello J held (at 532) that a provision of the *Offences Against the State Act 1939* that made a Government order declaring an organisation to be unlawful “conclusive evidence” that it was unlawful was constitutionally permissible as it was simply a means of determining which organisations were unlawful. If the provision in 1872 Act can legitimately be analogised to this (by reasoning that it is in effect simply an exercise of the legislative power to define the boundaries of counties) then it may withstand constitutional scrutiny.

<sup>37</sup> Delany notes that for the legislature to attempt to do either would be an impermissible infringement of the judicial domain. Delany “Interference by the Legislature in the Judicial Domain” (2003) 21 ILT 272.

- 2.48 *The Commission is considering recommending that the provisions in the County Boundaries (Ireland) Act 1872 concerning the conclusive evidential nature of certain orders be consolidated into the draft Evidence Bill. The Commission is also considering recommending that the 1872 Act should then be repealed in its entirety.*

#### **10. Bankers' Books Evidence Acts 1879 and 1959 (Re-enactment with amendment proposed)**

- 2.49 The 1879 Act makes bankers' books admissible as an exception to the hearsay rule. The 1879 Act also provides a mechanism for authorising copies so that they can be admitted in evidence.
- 2.50 The *Bankers' Books Evidence (Amendment) Act 1959* substituted a new section 9 for the original section in the 1879 Act specifying new definitions for "bank", "banker" and "bankers' books" in the 1879 Act. The 1959 Act also made it easier to use Revenue Commissioner certificates as evidence. The new section 9 of the 1879 Act has itself been amended repeatedly by, for example, the *Building Societies Act 1989*, the *Trustee Savings Bank Act 1989*, the *Central Bank Act 1999* and the *ACC Bank Act 2001*.
- 2.51 It would be possible to extend the definition of "bank" and "banker" in the 1879 Act to a wider range of institutions than those currently covered. The Oireachtas has already done so in one context. Section 13 of the *Disclosure of Certain Information For Taxation and Other Purposes Act 1996* has already extended the application of section 9 of the 1879 Act as amended to a wider range of institutions than covered by the definition of "bank" in the text of section 9 (to explicitly include credit unions, moneybrokers, investment business firms, and various other institutions and persons).
- 2.52 The 1996 Act does not amend the text of the 1879 Act. It merely provides that "for the purposes of the Bankers' Books Evidence Act, 1879, "bank" and "banker" in section 9 (1) (inserted by section 2 of the Bankers' Books Evidence (Amendment) Act, 1959 ) of the said Bankers' Books Evidence Act, 1879, shall include" the listed persons and institutions. The 1996 Act does not specify whether this extension is to apply generally or only in certain circumstances.
- 2.53 *The Commission is considering recommending that the 1879 and 1959 Acts as amended be incorporated into the Draft Evidence Bill, together with relevant provisions arising from recommendations concerning the admissibility of business records. The Commission would be interested to hear from respondents about whether they would favour extending the application of the Act for all purposes to a wider variety of institutions than those currently covered by the text of the 1879 and 1959 Acts as amended.*
- 2.54 *One means of doing so would be to incorporate the extend list of institutions in section 13 of the 1996 Act into the Draft Evidence Bill. The Commission would also welcome respondents' observations on this possibility.*

#### **11. Documentary Evidence Act 1882 (Repeal with partial re-enactment proposed)**

- 2.55 Section 2 of the *Documentary Evidence Act 1882* deals with how to prove an Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette or document. Some enactments make a copy of any of these documents that purports to be printed by the Government Printer, the Queen's Printer or a printer authorised by Her Majesty or under Her Majesty's authority conclusive evidence or evidence or else they give the copy some legal

effect or effects. Section 2 of the 1882 Act extends the effect of these enactments to a copy of any of the listed kinds of document that purports to be printed “under the superintendence or authority of Her Majesty’s Stationery Office”. Its function is simply to add the Stationery Office to the list of entities that have the ability to issue documents that are receivable in evidence.

- 2.56 Section 3 of the 1882 Act sets out the penalties for forgery (of purported Stationery Office documents). Section 4 extends the application of the Act to Ireland. Section 8 of the *Statute Law Revision Act 2007* provides for specific additional methods of proving the old Acts (but not the other documents) to which the 1882 Act applies.
- 2.57 *The Commission is considering recommending that the provisions in the Documentary Evidence Act 1882 on proving certain public documents be consolidated into the draft Evidence Bill. The Commission also is considering recommending that the 1882 Act then be repealed in its entirety.*

## **12. Oaths Acts 1888 and 1909 (repeal and replacement with updated provisions proposed)**

- 2.58 The *Oaths Acts 1888 and 1909* provide for the form of the oath or the formal affirmation to be taken by a witness in civil and criminal proceedings. In its 1990 *Report on Oaths and Affirmations*<sup>38</sup> the Commission recommended abolishing the obligation to swear an oath and instead requiring a witness to make a solemn statutory affirmation before giving evidence. This requirement would apply equally to oral evidence and to written evidence (an affidavit) that currently requires a sworn oath. The Commission also recommended that the law of perjury continue to apply where a person knowingly gave false testimony after making a solemn statutory affirmation. The recommendations in the 1990 Report have not been implemented.
- 2.59 The 1990 Report contains a comprehensive analysis of the constitutional provisions relevant to the form and content of the oath, particularly the religious beliefs provisions. The Commission does not intend in the forthcoming Report to review that analysis. The provisions of the 1888 and 1909 Acts should be incorporated in modern form into the draft *Evidence Bill* as part of the consolidation and it is for the Oireachtas to decide whether the provisions in those Acts remain relevant.
- 2.60 *The Commission is considering recommending that the provisions in the Oaths Acts 1888 and 1909 concerning the taking of oaths and affirmations be suitably updated and consolidated into the draft Evidence Bill. The Commission also is considering recommending that the 1888 and 1909 Acts then be repealed in their entirety.*

## **13. Documentary Evidence Act 1895 (repeal without replacement proposed)**

- 2.61 The 1895 Act contains one substantive section. It extended the *Documentary Evidence Acts 1868 and 1882* to the Board of Agriculture. This Act was retained by the *Statute Law Revision Act 2007*. It appears that the 1895 Act did not apply to Ireland as the “Board of Agriculture” mentioned in the 1895 Act operated in England and Wales only. This Board was the predecessor to the United Kingdom Ministry of Agriculture and Food, now the Department

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<sup>38</sup> *Report on Oaths and Affirmations* (LRC 34-1990).

for Environment, Food and Rural Affairs. The provisions of the *Documentary Evidence Act 1895* are therefore obsolete as they were never of any application to Ireland.

- 2.62 *The Commission is considering recommending that the Documentary Evidence Act 1895 should be repealed in its entirety as its provisions are obsolete.*

#### **14. Evidence (Colonial Statutes) Act 1907 (repeal with partial re-enactment proposed)**

- 2.63 Section 1 of the *Evidence (Colonial Statutes) Act 1907* applies to Acts, ordinances and statutes passed by the legislature of any British possession and orders, regulations, and other instruments issued or made, under the authority of any such Act, ordinance or statute. Section 1(1) compels all courts in the United Kingdom to receive in evidence copies of these that purport to be printed by the Government printer without proof that the copies were so printed.
- 2.64 Section 1(2) creates corresponding offences of forgery and tendering a forgery in evidence. Section 1(3) defines Government printer and British possession. Section 1(4) is a without-prejudice clause saving the *Colonial Laws Validity Act 1865*. Section 1(5) is the last provision and allows the effect of the Act to be extended by order to various jurisdictions.
- 2.65 *The Commission is considering recommending that the provisions in the Evidence (Colonial Statutes) Act 1907 concerning the proof of certain Acts be consolidated into the draft Evidence Bill. The Commission also is considering recommending that the 1907 Act then be repealed in its entirety.*

#### **15. Criminal Justice (Evidence) Act 1924 (repeal with re-enactment proposed)**

- 2.66 The *Criminal Justice (Evidence) Act 1924* was the first Act of the Oireachtas to make important changes to the law of evidence.<sup>39</sup>
- 2.67 Section 1 of the 1924 Act makes the accused a competent witness for the defence at every stage in the proceedings irrespective of whether the accused is charged solely or jointly with any other person. It imposes one condition and regulates a number of matters. The condition is that the accused can only be called on his own application.<sup>40</sup> The other provisions in section 1 are as follows. The prosecution cannot comment on failure by the accused or his or her spouse to testify.<sup>41</sup> The accused who testifies may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.<sup>42</sup> Every person called as a witness under this Act must give evidence from the witness box or other normal place from which witnesses give evidence.<sup>43</sup>

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<sup>39</sup> Paragraphs (c) and (d) were repealed by section 3 of the *Criminal Justice Act 1992*, and paragraph (h) was repealed by section 23(3) of the *Criminal Justice Act 1984*. Subparagraph (f)(ii) was amended and subparagraph (f)(iii) was inserted by section 33(a) the *Criminal Procedure Act 2010*.

<sup>40</sup> Section 1(a).

<sup>41</sup> Section 1(b).

<sup>42</sup> Section 1(e).

<sup>43</sup> Section 1(g).



2.68 Section 1(f) strictly limits the questions about good or bad character that can be asked of an accused who testifies. There is a general prohibition (subject to exceptions) on asking any question tending to show that the witness is of bad character or has committed, been convicted of or been charged with any offence other than the offence for which the witness is being tried. If the witness is asked a prohibited question, the witness cannot be required to answer. The exceptions are:

- (1) where the proof of the conviction of the other offence is admissible evidence to show the witness's guilt in the current trial;<sup>44</sup>
- (2) where the witness has sought to establish his or her own good character by his or her own evidence or by asking questions of any witness;<sup>45</sup>
- (3) where the nature and conduct of the witness's defence is such as to impugn the character of the victim or a prosecution witness;<sup>46</sup>
- (4) where the witness gives evidence against any other person charged with the same offence;<sup>47</sup>
- (5) where the witness (or the witness's advocate) asked questions of any witness for the purpose of making, or the conduct of the defence is such as to involve, imputations on the character of an alleged victim who is deceased or is so incapacitated as to be unable to give evidence.<sup>48</sup>

2.69 Thus, section 1 clarifies that, while the accused is a competent witness, he or she cannot be compelled to testify by either the defence or the prosecution. The failure of the accused or his or her spouse to testify cannot be made the subject of commentary by the prosecution. The accused cannot be asked, or if asked, be compelled to answer, any question which would tend to show that he or she has previously committed, been charged with, or convicted of a criminal offence or that he or she is of bad character. The accused may be required to answer such questions if proof that the accused has committed or been convicted of the other offence is admissible in evidence to show that he or she is guilty of the offence with which he or she is charged, or if the accused has attempted to establish his or her good character or impugn the character of the alleged victim or a prosecution witness. In addition, the accused may be required to answer such questions if he or she has given evidence against another person charged with the same offence or if the accused has asked questions of any witness, or the conduct of the defence, is such as to attempt to impugn the character of the person in respect of whom the offence was allegedly committed and who is unable to give evidence by reason of death or incapacity.

2.70 Once an accused is called as a witness, however, the prosecution is not limited to matters raised in the examination-in-chief, and may cross-examine the accused as to any matter (excluding those listed in section 1(f) of the *Documentary Evidence Act 1924*), notwithstanding that it would tend to incriminate him or her as to the offence charged.

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<sup>44</sup> Section 1(f)(i).

<sup>45</sup> Section 1(f)(ii).

<sup>46</sup> Section 1(f)(ii).

<sup>47</sup> Section 1(f)(iii).

<sup>48</sup> Section 1(f)(iii).

- 2.71 Section 1A of the 1924 Act was inserted by section 33 of the *Criminal Procedure Act 2010*. It imposes conditions on an accused who intends to introduce witness evidence (including the accused's own evidence) on the character of any prosecution witness or the victim if the victim is either deceased or so incapacitated as to be unable to give evidence. The conditions are observance or excusal from a statutory notice period as follows. The general rule is that the accused must give at least 7 days' notice to the prosecution.<sup>49</sup> Alternatively, the accused can apply to the court for leave to adduce the evidence notwithstanding the failure to comply with the notice period, citing why it was not possible to comply.<sup>50</sup> If the court grants leave, this has the same effect as having complied (*ie* the accused can lead the evidence).
- 2.72 If the accused does lead Section 1A evidence, the accused loses his or her shield against bad character evidence. The accused may be called as a witness and asked questions that would show that the accused has been convicted of any offence other than the one charged, or is of bad character and the prosecution may ask other witnesses questions that would show the same.<sup>51</sup> Similarly, the accused may be asked questions and the prosecution may ask other witnesses questions that show the victim's good character.<sup>52</sup>
- 2.73 Section 2 of the 1924 Act provides that where the only witness for the defence on the facts of the case is the accused, he or she shall be called as a witness immediately after the prosecution has finished presenting its evidence.
- 2.74 Section 3 dealt with the order of closing speeches and was repealed and replaced by section 24 of the *Criminal Justice Act 1984*. The Commission addressed section 24 of the 1984 Act in the 2010 *Report on Consolidation and Reform of the Courts Acts*.<sup>53</sup>
- 2.75 Section 4 dealt with the competence and compellability of spouses as witnesses and was repealed and replaced by significantly reformed provisions in the *Criminal Evidence Act 1992*.
- 2.76 Section 5 applies the 1924 Act to all criminal proceedings notwithstanding any enactment in force at the commencement of the Act.

*The Commission is considering recommending that the provisions of the Criminal Justice (Evidence) Act 1924 as amended concerning the accused as a witness in a criminal trial be consolidated into the draft Evidence Bill. The Commission is also considering recommending that the 1924 Act then be repealed in its entirety.*

## 16. Documentary Evidence Act 1925 (repeal with re-enactment proposed)

- 2.77 The *Documentary Evidence Act 1925* deals with methods for proving public documents. Section 2 of the 1925 Act provides that proof of any Act of the Oireachtas may be given by the production of a copy of such an Act printed and published by the Stationery Office. Section 3 sets out the procedure for proving proclamations, orders and other official documents, while section 4 deals with the procedure for proving rules, regulations and bye-

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<sup>49</sup> Section 1A(a)(i).

<sup>50</sup> Section 1A(a)(ii).

<sup>51</sup> Section 1A(b)(i).

<sup>52</sup> Section 1A(b)(ii).

<sup>53</sup> *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010): see section 214 of the draft *Courts (Consolidation and Reform) Bill* appended to that Report.

laws. Section 5 further aids authentication by creating a presumption that a document appearing to have been published and printed by the Stationery Office was printed by the Stationery Office until the contrary is shown. This places the onus of proving that the document was not published by the Stationery Office on the person challenging the authenticity of the document. Section 7 of the 1925 Act allows for the authentication of official documents by Ministers. It provides that a Minister may authorise one or more individuals to authenticate his or her seal by their signature. Similarly section 15 of the *Ministers and Secretaries Act 1924* provides that where an order or other instrument issued by a Minister is affixed with an authenticated seal of that Minister or signature by that Minister, such document will be deemed to be such an order or instrument “without further proof”.

- 2.78 Section 8 of the 1925 Act disapplies the *Evidence Act 1845*, the *Documentary Evidence Act 1868* and the *Documentary Evidence Act 1882* to any documents to which the 1925 Act applies but provides that in all other respects they continue to have the force of law.
- 2.79 *The Commission is considering recommending that the provisions of the Documentary Evidence Act 1925 concerning proof of Acts of the Oireachtas and other public documents be consolidated into the draft Evidence Bill. The Commission is also considering recommending that the 1925 Act then be repealed in its entirety.*

#### **17. Criminal Evidence Act 1992 (repeal with re-enactment or replacement proposed)**

- 2.80 The *Criminal Evidence Act 1992* made major amendments to the law of evidence but was clearly confined to criminal proceedings (including proceedings before a court martial and proceedings on appeal).
- 2.81 Part II of the *Criminal Evidence Act 1992* concerns the admissibility of business records. There is no equivalent provision for civil proceedings. Before the 1992 Act, business records were regarded as inadmissible hearsay, primarily on the assumption that the decision of the UK House of Lords to that effect in *Myers v DPP*<sup>54</sup> would be followed in this State. The 1992 Act provides that certain business records are admissible in evidence.
- 2.82 Section 5 of the 1992 Act provides that information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible once the information satisfies a number of conditions. They are that the information was compiled in the ordinary course of business and that it was supplied by a person who had, or could reasonably be expected to have had, personal knowledge of the matters dealt with. In the case of information in a non-legible form that has been reproduced in a permanent legible form there is a further condition: that it was reproduced in the normal operation of the reproduction system.
- 2.83 Part III of the 1992 Act concerns the admissibility of video link evidence, evidence given through an intermediary and video recording submitted as evidence in prosecutions for certain offences. It allows for the admission of such evidence where the witness concerned is a person under 18,<sup>55</sup> has a “mental handicap”<sup>56</sup> or in respect of video link evidence, in any other case with leave of the court.

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<sup>54</sup> [1965] AC 1001.

<sup>55</sup> The text of the Act read “17” but was amended by section 257(3) of the *Children Act 2001*.

- 2.84 Section 4 of the *Criminal Law (Human Trafficking)(Amendment) Act 2013* amends sections 15 and 16 of the 1992 Act<sup>57</sup> to ensure that the admissibility of video-recorded pre-trial statements under the 1992 Act extends to offences section 2, 4 or 7 of the *Criminal Law (Human Trafficking) Act 2008*.
- 2.85 Part IV of the 1992 Act concerns the competence and compellability of spouses and former spouses of the accused. Section 21 provided that spouses and former spouses are competent to give evidence at the instance of the prosecution, the accused and any person charged with the accused. Section 22 provides that in any criminal proceedings the spouse of an accused shall be compellable to give evidence at the instance of the prosecution where the accused is charged with an offence which involves violence or the threat of violence to the spouse, a child of the spouse or the accused, or any person who was at the material time under the age of 18 years. The section also applies where the accused is charged with a sexual offence alleged to have been committed against such a person or where the offence consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of either offence listed above. Former spouses are always compellable to give evidence at the instance of the prosecution, unless the offence charged is alleged to have been committed at a time when the marriage was subsisting and no decree of judicial separation or separation agreement was in force and it is not an offence in respect of which a spouse would be compellable to give evidence. Spouses and former spouses are always compellable at the instance of the accused under section 23
- 2.86 Where any person is charged with the accused in the same proceedings for an offence listed in section 22, section 24 states that the spouse or former spouse of the accused is compellable by that person unless, in respect of a former spouse, the offence charged is alleged to have been committed at a time when the marriage was subsisting and no decree of judicial separation or separation agreement was in force and it is not an offence in respect of which a spouse would be compellable to give evidence. Where a husband and wife (or persons who were formerly husband and wife) are charged in the same proceedings neither are competent at the instance of the prosecution and they are not compellable by virtue of sections 22, 23 or 24 to give evidence unless the person concerned is not, or is no longer, liable to be convicted at the trial as a result of pleading guilty for any other reason. Section 26 concerns marital privacy and states that nothing in Part IV shall affect any right of a spouse or former spouse in respect of marital privacy.
- 2.87 *The Commission is considering recommending that the provisions of the Criminal Evidence Act 1992, together with recommendations for reform in the forthcoming Report on Evidence, be consolidated into the draft Evidence Bill. The Commission also is considering recommending that the 1992 Act then be repealed in its entirety.*

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<sup>56</sup> This is the term used in the 1992 Act. The Commission is considering recommending that this be replaced in the draft Bill with updated terminology consistent with its previous recommendations (see the Commission's *Consultation Paper on Sexual Offences and Capacity to Consent* (LRC CP 63-2011) at 5).

<sup>57</sup> The Minister for Justice when introducing the Bill told the *Dáil* that "the main purpose of the amendment is to extend to human trafficking offences existing rules that make it easier for children to give evidence in criminal prosecutions" and to "provide for consequential changes to rules of criminal procedure". "Criminal Law (Human Trafficking) (Amendment) Bill 2013: Committee and Remaining Stages" 28 June 2013, *Dáil Debates* available here:

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013062800013?opendocument#L00300> (last checked 3 July 2013).

## 18. Sections 15 to 19 of Criminal Justice Act 2006 (repeal with re-enactment proposed)

- 2.88 At common law, previous witness statements are not admissible to prove the truth of their contents. Sections 15-19 of the *Criminal Justice Act 2006* introduced statutory provisions on the admissibility of certain witness statements. Notably, section 16 of the 2006 was introduced to deal with the situation where an available witness refuses to testify, denies making the statement or gives evidence materially inconsistent with his or her previous statement. The section does not apply to a witness who claims to have ‘forgotten’ his or her previous statement.
- 2.89 Section 16 applies to criminal prosecutions for arrestable offences.<sup>58</sup> To admit the statement the witness must confirm or it must be proved that he or she made the statement. The court must be satisfied that direct oral evidence of the fact would be admissible, that the statement was made voluntarily and that it is reliable. The statement must either have been given on oath or affirmation or contain a statutory declaration by the witness that the statement is true to the best of his or her knowledge or belief. In the alternative the court must be otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.
- 2.90 Section 16 also sets out the factors to which the court should have regard in deciding whether the statement in question is reliable. The statement is not to be admitted where the court is of the opinion that its admission is unnecessary, unfair to the accused or would not be in the interests of justice. In estimating the weight if any to be attached to the statement the court is to have regard to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.
- 2.91 *The Commission is considering recommending that sections 15-19 of the Criminal Justice Act 2006 concerning the admissibility of certain witness statements be consolidated into the draft Evidence Bill. The Commission is also considering recommending that sections 15-19 of the 2006 Act then be repealed.*

## 19. Section 8 of Statute Law Revision Act 2007 (partial repeal and re-enactment proposed)

- 2.92 The *Statute Law Revision Act 2007* repealed a large number of pre-1922 Acts and retained 1,364 pre-1922 Acts. The pre-1922 Acts already discussed above were among those retained by the 2007 Act.
- 2.93 Section 8 of the *Statute Law Revision Act 2007* establishes ways of giving “*prima facie* evidence of a statute”. These are in addition to the provisions of the *Evidence Act 1845*, the *Documentary Evidence Act 1868* and the *Documentary Evidence Act 1882* in so far as they relate to the pre-1922 statutes concerned. Section 8 of the 2007 Act also allows copies to be admitted of the listed documents, or copies of copies printed in the listed publication where they are certified by an official of a specified institution to be a true and accurate copy. Such copies will be admitted in evidence without any proof of the official position, authority or handwriting of the person signing the certificate.
- 2.94 *The Commission is considering recommending that the provisions relating to the modes of giving “prima facie evidence of a statute” and the admission of copies of certain specified*

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<sup>58</sup> Section 16(1).

*documents in section 8 of the Statute Law Revision Act 2007 be consolidated into the draft Evidence Bill and that section 8 of the 2007 Act then be repealed.*

*Q.2. Do you agree that the legislation listed above, which the Commission proposes to include in the scope of the Draft Evidence Bill to be appended to the forthcoming Report on Evidence, is a complete list of the relevant extant Evidence Acts?*

*Q.3: Do you agree with the Commission's proposals concerning the listed provisions as to, where relevant, their:*

*(a) repeal and re-enactment in consolidated form in the Draft Bill;*

*(b) repeal and replacement by updated or amended provisions in the Draft Bill; or*

*(b) repeal without replacement?*

*Q.4: Do you agree with the Commission's proposal that the Draft Evidence Bill should, in general, apply to civil and criminal proceedings, subject to some exceptions, such as in the area of hearsay in respect of which the Commission is currently inclined to the view that separate treatment for civil and criminal proceedings is required?*

*Q.5 Do you consider that a preferable approach would be to publish two draft Bills, a Civil Evidence Bill and a Criminal Evidence Bill?*