



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

CONSOLIDATION AND REFORM OF ASPECTS OF THE LAW OF EVIDENCE

[LRC 117-2016]

Report

Consolidation and Reform of Aspects of the Law of Evidence

(LRC 117-2016)

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The Law Reform Commission is an independent statutory body established by the Law Reform Commission Act 1975. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its Fourth Programme of Law Reform was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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SUMMARY

1. This Report forms part of the Commission's *Third Programme of Law Reform*¹ and it follows the publication of 3 Consultation Papers and an Issues Paper on aspects of the law of evidence, a *Consultation Paper on Expert Evidence*² a *Consultation Paper on Documentary and Electronic Evidence*,³ a *Consultation Paper on Hearsay in Civil and Criminal Cases*⁴ and an *Issues Paper on Consolidation of Evidence Legislation*.⁵ The Report contains the Commission's final recommendations on these areas, together with a draft *Evidence (Consolidation and Reform) Bill* in Appendix A to implement those recommendations.

(1) Consolidating and reforming the law of evidence, with a view to codification

2. The draft *Evidence (Consolidation and Reform) Bill* incorporates existing legislative provisions on the law of evidence, whether pre-1922 or post-1922, that remain relevant (as discussed in Chapter 9), together with reforms arising from the recommendations in the Report concerning hearsay, documentary and electronic evidence and expert evidence. In that respect, the draft Bill is essentially a consolidation and reform measure.
3. Given the importance and scope of the three aspects of the law of evidence dealt with in this Report, the draft Bill in Appendix A would constitute a significant step towards achieving the long-standing and widely endorsed aspiration to move towards a comprehensive statute or code on the law of evidence.⁶
4. Codification in its true form would require not merely a statement in legislative form of the entire law of evidence (derived from the common law and the relevant existing Acts) but also the drafting of a generally applicable template that sets out the rules of evidence in an agreed format. The draft Bill in Appendix A is not that sort of codification of the law of evidence. Rather, it is a consolidation and reform of existing legislative provisions in the specific areas of the law of evidence on which the Commission has consulted. Bearing in mind these limitations, if enacted the Bill would allow for the consequential repeal in full of 18 Acts — 15 pre-1922 Acts and 3 post-1922 Acts— and for the repeal of seven sections in 3 other post-1922 Acts.

¹ See *Report on Third Programme of Law Reform* (LRC 86-2007), Projects 7, 8 and 11.

² LRC CP 52-2008.

³ LRC CP 57-2009.

⁴ LRC CP 60-2010.

⁵ LRC IP 03-2013.

⁶ See the Minister for Justice's *Programme of Law Reform* (Pr. 6379, 1962), paragraph 26 (13-14) (desirability of a comprehensive code); Law Reform Commission *First Programme of Law Reform* (1977), paragraph 11 (8-9) (similar aspiration); and Law Reform Commission *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988) 1 (noting general agreement on the desirability of a code, pending which reform proposals for particular areas should be developed).

5. In preparing this Report and the draft *Evidence (Consolidation and Reform) Bill*, the Commission has had as much regard as possible to relevant principles of codification and to the approach taken by comparable law reform bodies where similar wide-ranging projects on the law of evidence have been undertaken.⁷ The Commission has also taken into account its own approach to recent comparable projects, particularly where these involved a combination of statutory consolidation of existing common law rules as well as textual updating of statutory rules. These have included the consolidation and reform of the Courts Acts,⁸ the consolidation and reform of substantive criminal law⁹ and reform and modernisation of land and conveyancing law¹⁰ and of trust law.¹¹
6. The overall purposes of the draft *Evidence (Consolidation and Reform) Bill* are therefore to:
 - (1) 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) consolidate and reform the existing law on hearsay, documentary (including electronic) evidence and expert evidence, whether derived from common law or legislation;
 - (3) contribute to a possible future comprehensive statement in legislative form of the entire general law of evidence.
7. **The Commission recommends that the recommendations in this Report should be incorporated into an Evidence Bill which should also include a consolidation of existing Evidence Acts; and a draft Evidence Bill to this effect is therefore appended to the Report.**
- (2) **The Report and draft Evidence Bill applies to civil and criminal proceedings**
8. The law of evidence has traditionally been based on common law but has increasingly been modernised and reformed by legislation.¹² The

⁷ In broad terms, the sequencing used in the draft Bill in Appendix A has followed the sequence in the Australian *Evidence Act 1995*. Bearing in mind that the draft Bill in this Report is not a codifying Bill, there are a number of elements of the Australian 1995 Act that do not find parallels in this Report's draft Bill.

⁸ *Report on Consolidation and Reform of the Courts Acts* (LRC 97 – 2010).

⁹ *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87 – 2008), *Report on Defences in Criminal Law* (LRC 95 – 2009) and *Report on Inchoate Offences* (LRC 101 – 2010). These Reports have been incorporated into the work of the Criminal Law Codification Advisory Committee.

¹⁰ *Report on Modernisation and Reform of Land Law and Conveyancing Law* (LRC 74-2005), which led to the enactment of the *Land and Conveyancing Law Reform Act 2009*.

¹¹ *Report on Trust Law: General Proposals* (LRC 92-2008).

¹² Leading textbooks agree on this analysis. See, for example, McGrath, *Evidence* (Thomson Round Hall, 2005) at xix; Keane, *The Modern Law of Evidence* 4th ed (Butterworths, 1996) at 1-4; and Tapper *Cross and Tapper on Evidence* (11th ed. Oxford University Press, 2009) at 1-5. See also the discussion in Chapter 9, below, of 19 *Evidence Acts*, 16 pre-1922 Acts and 3 post-1922 Acts.

Commission's general approach is that the recommendations for reform in this Report and in the draft Evidence Bill should apply both to civil and criminal proceedings as far as possible and the Commission's draft Evidence Bill reflects this.

9. The Commission recommends that, subject to specific exceptions discussed in the Report, the recommendations in the Report and the draft *Evidence Bill* should apply to both civil and criminal proceedings.

(3) The Report and draft Evidence Bill applies to traditional and electronic evidence

10. The Commission emphasises that the draft Evidence Bill is in general applicable to all forms of evidence, regardless of origin. This is especially the case for documentary evidence, whether in the form of paper-based (or vellum-based) documents, or documents generated electronically through human intervention or through an entirely automated process involving virtually no human intervention. The literature in this area supports the benefit of applying the law to traditional as well as digital technology (what were previously referred to as "new" or "emerging" technologies).¹³ The Commission agrees with this approach and has therefore attempted to draft its recommendations with this in mind to the greatest extent possible. The Commission also discusses the impact of cloud technology, which may involve separate complicating issues such as the country of origin of documents that may be generated. These developments highlight the increasingly cross-border nature of civil and criminal proceedings. Any reform of the law of evidence must take this into account.

(4) General rules of evidence

11. **Chapter 1, *General Rules of Evidence: Relevance and Admissibility***, briefly sets out some of the basic rules and principles of the law of evidence in order to lay the foundation for the analysis of the specific aspects of that law discussed in the chapters that follow. The Commission recommends in Chapter 1 that the draft Evidence Bill should provide that, in civil cases, evidence may be admitted by agreement of the parties and, in criminal cases, by agreement of the parties subject to the consent of the trial judge. The Commission also recommends that the recommendations in this Report are not to be construed as altering or affecting general common law rules or any enactment concerning the admissibility of evidence including without prejudice to the discretion to exclude evidence on the grounds that its prejudicial effect outweighs its probative value.

¹³

Smith, "Legislating for Electronic Transactions" *C.T.L.R.* 2002, 8(3), 58-62.

(5) Hearsay evidence in general

12. **Chapter 2, *The Rule Against Hearsay***, considers the rule against hearsay in general. The Commission considers the history and development of the rule and discusses the continuing relevance of the principles and rationales which motivate the general exclusion of hearsay evidence, subject to inclusionary exceptions. The Commission also analyses the exact scope of the rule. It is noted that distinguishing hearsay from original or real evidence is notoriously difficult and is the source of much of the confusion and uncertainty which surrounds the hearsay rule. The Commission therefore makes recommendations as to how hearsay may be more precisely identified including a statutory definition of hearsay and a statutory provision clarifying that implied assertions are admissible in evidence.
13. The proposed definition of hearsay is that is any statement, whether made verbally, by conduct, or contained in a document, which is made out of court by a person who is not called as a witness and is presented in court as testimony to prove the truth of the fact or facts asserted.
14. The proposed statutory provision allowing implied assertions is that implied assertions are admissible in evidence, except where it can reasonably be supposed that the purpose of making the statement was to cause another person to believe the matter implied.

(6) General exclusionary rule for hearsay, but presumptions of admissibility for business records and children's evidence

15. The question of whether a generally inclusionary approach to hearsay should be adopted in civil proceedings is also addressed. The Commission has concluded that, having regard in particular to the requirements of constitutional justice, there should not be a general inclusionary approach to hearsay in civil proceedings. The Commission has, however, recommended that there should be significant reform of the inclusionary exception for business records. The Commission recommends that the exception, which currently applies only in criminal cases, should be extended to civil cases and that, among other reforms, the draft Evidence Bill should provide that business records are presumed admissible in evidence. Business records are arguably the most commonly adduced form of hearsay evidence, especially in civil cases, and the introduction of a presumption in favour of their admissibility would address many of the difficulties with the hearsay rule encountered in civil proceedings.
16. The Commission has also had regard to problems encountered with the application of section 23 of the *Children Act 1997*, which permits the introduction of the hearsay evidence of children under certain conditions. The Commission understands that in practice this procedure can be lengthy,

causing delay and anxiety to vulnerable children. It has therefore recommended that the draft Evidence Bill provide that hearsay evidence of children in both public law and private law proceedings should benefit from a presumption of admissibility.

(7) Other inclusionary exceptions to the rule against hearsay

17. **Chapter 3, *Exceptions To The Rule Against Hearsay***, considers the large number of common law inclusionary exceptions to the rule against hearsay and makes recommendations for reform. Evaluating the justification underlying the various exceptions, the Commission recommends the retention of most of these exceptions but makes proposals for reform in the case of others. It is recommended that a trial judge should be under an obligation to give a direction to the jury on the potential unreliability of dying declarations. It is also recommended that the exceptions to the rule against hearsay for declarations of deceased persons made in the course of duty, and for declarations of deceased persons as to pedigree should be abolished.
18. Chapter 3 also recommends the extension of section 16 of the *Criminal Justice Act 2006* (which provides for the admission of previous witness statements) to civil proceedings and recommends that previous convictions should be admissible in subsequent civil proceedings.
19. The Commission also recommends that none of the recommendations in this report, or the provisions of the draft Bill, should be taken as precluding the judicial development of the rule against hearsay.

(8) Documentary and electronic evidence

20. **Chapter 4, *Documentary and Electronic Evidence***, deals with a range of issues in respect of documentary and electronic evidence. The Commission makes recommendations for a statutory definition of a “document”, for the abolition of the best evidence and original document rules and for a codification of the rules on the authentication of documents. The Commission also recommends that the draft Evidence Bill should provide that voluminous documents may be admitted by proof of a written summary of such documents. The Commission also recommends that disputes as to the quality of an electronic or digital recording should go to weight rather than admissibility.

(9) Signatures and identification

21. **Chapter 5, *Signatures and Identification***, analyses the law of signatures, both handwritten and electronic, as well as various other methods of electronic authentication of documents. The Commission proposes a statutory definition of signature and proposes that advanced electronic signatures, as defined by

Article 26 of Regulation (EU) No. 910/2014 on Electronic Identification and Trust Services for Electronic Transactions (the eIDAS Regulation), should be given the same legal effect as handwritten signatures.

(10) Expert evidence defined

22. **Chapter 6, *Expert Evidence***, sets out the history of expert evidence and the nature of the concerns which have prompted the Commission’s consideration of the issue. The chapter then discusses the question of defining “expert” and “expertise” and what kinds of expert skill and knowledge should be admissible in court. Recommendations are made for a statutory definition of an “expert” and for the purposes of clarifying that expertise gained through experience is sufficient to qualify a witness as an expert, provided that the evidence is reliable and testable.
23. The proposed statutory provision would define “expert” as a person who appears to the court to possess the appropriate qualifications, skills or experience about the matter to which the person’s evidence relates (whether the evidence is of fact or of opinion), and who may be called upon by the court to give independent and unbiased testimony on a matter outside the knowledge and experience of the court.

(11) Admissibility of expert evidence

24. **Chapter 7, *Admissibility of Expert Evidence***, analyses the continuing relevance of the foundational rules of expert evidence, the common knowledge and ultimate issue rules. The Commission comes to the conclusion that these rules, where not applied inflexibly, operate to promote best practice in the presentation of expert evidence and protect against real dangers of usurping the role of the finder of fact. It is therefore recommended that they should be retained.
25. The chapter also considers the question of whether a “threshold” or “gate-keeping” test for the reliability of scientific evidence should be introduced. In carefully considering this question, the Commission has had regard to a great deal of case law and commentary, including the decision of the US Supreme Court in *Daubert*¹⁴, the recommendations of the Law Commission of England and Wales as well as the approach of the Irish courts to the issue of unreliable science. Having reflected on the issue, the Commission has decided not to recommend a statutory threshold test for the reliability of expert evidence. The Commission expresses a number of reservations as to the utility of the *Daubert* test, including the unsuitability of judges to the task of assessing scientific method and the limits it places on the adversarial process, before concluding that it is for the courts to determine whether

¹⁴ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

some form of threshold reliability test should apply. The Commission does however make recommendations for reform in respect of the duties of expert witnesses presenting scientific evidence. These are discussed below.

(12) Duties, immunity and procedural aspects of expert evidence

26. **Chapter 8, *Duties, Immunity and Procedural Aspects of Expert Evidence***, deals with a number of significant issues. With respect to the duties of expert witnesses, the Commission considers the various duties which have been identified by the courts, both in this jurisdiction and in others, as well as those privately imposed by professional bodies. The Commission reaches the conclusion that four key duties should be codified and set out in primary legislation, while provision should also be made for the Minister for Justice and Equality to draft, in consultation with a Working Group of suitable experts, a code of conduct for expert witnesses. It is further recommended that the trial judge should be empowered to exclude the evidence of an expert witness who fails to satisfy any of the proposed statutory duties. The Commission believes that this approach has the virtue of setting out in primary legislation the fundamental duties necessary to ensure the just and fair presentation of expert evidence while allowing a separate legal instrument to set out in detail the proper conduct of an expert witness. The level of detail of which a code of conduct would necessarily consist is naturally unsuited to primary legislation and it is also important that the code be simpler to amend so that it can respond to the changing legal landscape.
27. The Commission recommends that the following duties of expert witnesses be included in the draft Evidence Bill.
- The expert has an overriding duty to the court to provide truthful, independent and impartial expert evidence, irrespective of any duty owed to the instructing party.
 - The expert has 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 and all surrounding facts, including those which could detract from his or her evidence and, where relevant, his or her expressed opinion.
 - The expert has a duty to confine his or her evidence (whether of fact or opinion) to matters within the scope of his or her expertise, to state clearly when a matter falls outside the scope of his or her expertise and to distinguish clearly between matters of fact and matters of opinion when giving his or her expert evidence, whether given orally or in the form of a written report.

- The expert has 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.
28. The second listed duty has important consequences with respect to the Commission’s consideration of unreliable scientific evidence, discussed above. The Commission takes the view that where an expert is under a duty to clearly set out the underlying scientific methodology of his or her evidence, and where such evidence may be excluded where there is a failure to do so, the court has the benefit of hearing such evidence, and hearing it subject to the scrutiny of cross-examining counsel, while also having the power ultimately to exclude it.
29. The Commission then considers the immunity which currently protects expert witnesses from civil suit. The various judgments in the UK Supreme Court decision in *Jones v Kaney*, which abolished the immunity in the UK, are considered. The Commission takes the view that the immunity constitutes a derogation from a person’s right of access to the courts and the principle that where there is a wrong there must be a remedy. It is concluded that, in light of the absence of any apparent adverse impact arising from the removal of the immunity of barristers from suit, among other considerations, this derogation cannot be justified. The Commission recommends that the draft Evidence Bill should provide that the immunity be abolished and replaced with civil liability of an expert witness limited to circumstances in which it is established that the expert has acted with gross negligence in giving his or her evidence, that is, falling far short of the standard of care expected of such an expert. An important question which falls to be considered in light of this recommendation is whether experts should be required to carry adequate indemnity insurance to cover the costs of a potential award of damages. The Commission considers that this is matter to be regulated internally by professional bodies but it does recommend that the draft Evidence Bill provide that an instructing solicitor is under an obligation to make his or her client and the expert witness fully aware of the possible consequences of the failure to obtain such insurance.
30. Finally, the Commission considers certain procedural aspects of expert evidence, including the recent amendments to the Rules of the Superior Courts in the *Rules of the Superior Courts (Conduct of Trials) 2016* and the *Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016*.

(13) Consolidation of Evidence Acts

31. **Chapter 9** sets out the Commission’s proposals for the consolidation of the law of evidence generally, including proposals for the repeal of various obsolete statutes. Among the more significant statutes which it is proposed to

repeal and replace with suitably updated provisions in the draft Evidence Bill are the *Bankers Books Evidence Acts 1879 and 1959*, the *Criminal Evidence Act 1992* and the *Oaths Acts 1888 and 1909*. The recommendation to replace the *Oaths Acts* takes into account the problems which have arisen in the High Court in relation to the proper procedure for the swearing of the oath. The President of the High Court has reiterated the current law that affidavits must be sworn on the Bible or other appropriate religious text unless the deponent has a stated objection to swearing the oath. The Commission recommends that a person should be permitted to testify on oath or affirmation without the need to indicate religious belief.

(14) Summary of recommendations

32. **Chapter 10** comprises a summary of all the recommendations made in the report.

(15) Draft Evidence (Consolidation and Reform) Bill

33. **Appendix A** contains the draft Evidence (Consolidation and Reform) Bill.

(16) Evidence in bodies other than courts

34. **Appendix B**, *Evidence in Bodies Other Than Courts*, responds to concerns raised with the Commission about the absence of defined and consistent evidential rules for non-court bodies and adjudicators who nevertheless act in a quasi-judicial capacity and have the power to determine significant issues. Examples discussed include the Medical Fitness to Practice Committee, the Pensions Ombudsman and the Financial Services Ombudsman. While the Commission does not make a recommendation of any general application to these bodies, it is likely that the recommendations made in the Report may assist in developing codes of practice to promote more defined and consistent rules of evidence in such bodies.

CHAPTER 1

GENERAL RULES OF EVIDENCE: RELEVANCE AND ADMISSIBILITY

A Relevance

- 1.01** Relevance is a pre-condition to the admissibility of all evidence. Each piece of evidence must be relevant to an issue in the case in order to be admitted. This fundamental rule of evidence applies to both oral and documentary evidence in both civil and criminal cases. When a piece of evidence is relevant it must also be admissible for it to be introduced. So whilst a piece of evidence may be relevant to a case it may not be admissible – for example it might breach the rule against hearsay (discussed in Chapters 2 and 3) or be inadmissible because it was obtained in breach of a constitutional right. Similarly, the opinion of a witness might be relevant, but the general rule is that witnesses should speak only to facts, though this rule is subject to a very important exception, namely the opinion of experts (discussed in Chapters 6-8).
- 1.02** As a general rule all relevant evidence is admissible. Healy notes that: “All evidence relevant to a fact at issue is receivable unless rendered inadmissible by an exclusionary rule of evidence such as the rule against hearsay and opinion assertions or against evidence disclosing the accused’s record or bad character. By contrast, irrelevant evidence is never admissible.”¹
- 1.03** In the absence of a statutory definition in Ireland, it is worth exploring the approach taken in other common law jurisdictions to the specifics of the rule. The Australian *Evidence Act 1995* provides:
- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
 - (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness; or
 - (b) the admissibility of other evidence; or

¹ Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004 Dublin) at 1-17. See also, McGrath, *Evidence* (2nd ed. Round Hall, 2014) Chapter 1.

(c) a failure to adduce evidence.²

1.04 It is debatable to what extent such a definition is useful to judges in determining the question of relevance. It is very difficult to exhaustively define a concept which is so basic and commonly understood. The most helpful definition in the literature comes from Stephen:

“any two facts to which it is applied are so related to each other that according to the common course of events one wither taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.”³

1.05 On this view relevance takes the form of a syllogism in which the offered evidentiary fact is the minor premise and the major premise is some proposition of truth which the finder of fact is invited to consider.⁴ In more simple language, O’Donnell J put it succinctly when he said “evidence is relevant to an issue when if accepted it would tend to prove or disprove it.”⁵

1.06 However determining relevance in a particular case may not always be easy. The evidence may not relate directly to the issue to be proved in the case but could concern the credibility of a witness or the reliability of another piece of evidence. Demonstrating the broad nature of the concept of relevance and highlighting why it might be difficult for a court to establish relevance, the Australian Law Reform Commission noted in its 1985 *Interim Report on the Law of Evidence*⁶ that:

“there are three distinct senses of relevance and... the definition should reflect them. They are:

(a) relevance in the primary sense; i.e. a direct or indirect tendency to affirm (or negate) the existence of a fact in issue.

(b) relevance to credit; i.e. while the material may or may not go to the issues, it tends to fortify or to weaken the reliability of evidence admitted as relevant in the primary sense.

(c) relevance on a *voir dire*;⁷ i.e. relevant to a question of whether other material is admissible under headings (a) or (b) above. (eg, evidence as to the qualifications of an alleged expert; as to the voluntariness of a confession; as to the competence of a child to

² Section 55 of the Australian *Evidence Act 1995*.

³ James Fitzjames Stephen, *Digest of the Law of Evidence* (12th ed.) art. 1, cited in *Cross & Tapper on Evidence* (11th ed. Oxford, 2007) p. 69.

⁴ Cross & Tapper identify this line of reasoning elsewhere in the works of Stephen. See *Cross & Tapper on Evidence* (11th ed. Oxford, 2007) p. 69, 70.

⁵ *Galway City Council v Samuel Kingston Construction Ltd* [2010] IESC 18 at [50].

⁶ Australian Law Reform Commission, *Evidence* (ALRC Report 26, 1985), Volume 1, (Interim), paragraph [642].

⁷ From Old French; “to speak the truth”, a *voir dire* is the preliminary examination of a juror, witness or, as in this context, a piece of evidence in the absence of the jury. A *voir dire* is often referred to as “trial within a trial” as the parties fight out what evidence may be put to the jury.

testify; as to the true character of a purported 'dying declaration.')

- 1.07 Arising from this, Australia enacted the statutory definition of relevance quoted above.
- 1.08 Other common law jurisdictions including New Zealand⁸ and the United States⁹ have recognised the importance of understanding the term "relevance" and have included definitions in their Evidence Acts.
- 1.09 The Commission agrees that there are three senses of relevance as outlined by the Australian Law Commission but does not recommend the introduction of a statutory definition of relevance.

(1) *Establishing relevance*

- 1.10 The trial judge decides whether evidence is admissible, but the party presenting the evidence must establish its relevance and must prove that it should not be excluded on the basis of any exclusionary rule.
- 1.11 This may be difficult when considering what is known as "circumstantial evidence" which is "any fact from the existence of which the judge or jury may infer the existence of a fact in issue".¹⁰ Circumstantial evidence consists of pieces of evidence, which in and of themselves, are not necessarily relevant to a fact in issue, but what taken together with other pieces of evidence, may tend to prove or disprove a fact in issue. Atkin LJ discussed the problem of circumstantial evidence in the following terms:

"Evidence of independent facts, each of them in itself insufficient to prove the main fact, may yet, either by their cumulative weight or still more by their connection of one with the other as links in a chain, prove the principal fact to be established."¹¹

- 1.12 Circumstantial evidence illustrates the fact that relevance is ordinarily a matter of degrees and is context-specific. It is therefore difficult to set down

⁸ Section 7 of the New Zealand *Evidence Act 2006* defines the term as evidence that "has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding."

⁹ Rule 401 of the United States *Federal Rules of Evidence* sets out a test for "relevant evidence" Evidence is relevant if:
 (a) it has any tendency to make a fact more or less probable than it would be without the evidence;
 and
 (b) the fact is of consequence in determining the action.

The Californian Evidence Code contains the most comprehensive relevance provisions of the US State evidence codes: "Relevant evidence" is defined at section 210 of the Code which states that relevant evidence means evidence "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Section 350 states that no evidence is admissible except relevant evidence. Section 351 states that all relevant evidence is admissible except where provided for by statute. The Californian *Evidence Code* explicitly states that "irrelevant evidence is not admissible." No other state evidence code does this.

¹⁰ *People (DPP) v Lafferty*, Court of Criminal Appeal, 22 February 2000.

¹¹ *Thomas v Jones* [1921] 1 KB 22.

authoritative or detailed guidance as to rulings of relevance and accordingly the adjudication of relevance falls squarely within a trial judge’s discretion.¹²

B Admissibility

(1) Reliability

1.13 While the general rule has always been that that which is relevant is admissible, concerns about the reliability of evidence led to the development of a number of rules of admissibility. Reliability now constitutes the motivating concern behind many rules of admissibility.¹³ These include the rule against hearsay, the rule concerning opinion evidence, the best evidence rule and the original document rule, and are the subject of close examination in the body of this report.

1.14 The rule against hearsay prevents the use of out of court statements to prove the truth of their contents. This rule is subject to many exceptions, discussed in detail in Chapters 2 and 3. The rule against opinion evidence prohibits witnesses from giving their opinion as evidence, subject to the exceptions in relation to expert witnesses. The rule against opinion evidence is discussed in detail in Chapter 6. The “best evidence rule” dictates that only the best evidence of a matter can be adduced so that inferior evidence is inadmissible where better evidence is available. The best evidence rule gave rise to the “original document rule” which requires that where a document is adduced in evidence the original of that document must be produced in court. This rule has been largely abrogated in criminal cases by the *Criminal Evidence Act 1992* but remains in civil cases, subject to a number of exceptions¹⁴ and is discussed in later in the report.

(2) Agreement to admit

1.15 In practice, where facts are not in dispute, the parties to civil proceedings often agree to admit evidence despite the fact that it conflicts with a principle or rule of admissibility. In *Hughes v Staunton*¹⁵, the High Court (Lynch J) noted that the parties had “sensibly agreed” that he could examine their books of discovery and take them into account to such extent as he saw proper even though many of the documents were hearsay. Lynch J supported

¹² Thayer has argued that doctrine of precedent is inapplicable to question of relevance, such is its inherently discretionary nature. See Thayer “Law and Logic” (1900) 14 *Harv LR* 139. Thayer may overstate the point to some extent. The better view is that such decisions may inform future courts but are unlikely to be binding in any sense.

¹³ In past times, the competency or incompetency of the witness was the dominant consideration in admissibility. See Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (4th ed. 1886) p. 272.

¹⁴ See *Leopardstown Club Ltd v Templeville Developments Ltd* [2010] IEHC 152.
¹⁵ High Court 16 February 1990.

the practice of admitting hearsay by consent, noting that the Commission had published a *Report on the Rule Against Hearsay in Civil Cases*¹⁶ making such a recommendation. He expressed the hope that the Oireachtas would enact legislation giving effect to the Commission's recommendation.¹⁷

- 1.16** In *Shelley-Morris v Bus Átha Cliath*¹⁸, which was also a personal injuries action, the Supreme Court noted that it had been agreed between the parties that medical reports from the United Kingdom would be received into evidence instead of requiring that they be proved by oral evidence.¹⁹
- 1.17** The introduction of affidavits into evidence, a permitted form of hearsay, is also subject to agreement of the parties by virtue of the *Rules of the Superior Courts 1986*.²⁰ Order 39, Rule 1 provides that a judge may not allow proof of some fact or facts to be dispensed with by affidavit where the other party *bona fide* desires the production of the witness for cross-examination, where such witness is available. This power is derived from s.66 of the *Supreme Court of Judicature (Ireland) Act 1877* which provides that a judge of the High Court can order "for special reasons" that evidence may be given on affidavit.
- 1.18** This practice has been placed on a statutory footing in the New Zealand *Evidence Act 2006* and parties may, in both civil and criminal proceedings, agree to admit evidence despite the fact that it is not otherwise admissible and to admit evidence offered in any form or way agreed by all parties.²¹ The 2006 Act provides that:
- (1) In any proceeding, the Judge may,—
 - (a) with the written or oral agreement of all parties, admit evidence that is not otherwise admissible; and
 - (b) admit evidence offered in any form or way agreed by all parties.
 - (2) In a criminal proceeding, a defendant may admit any fact alleged against that defendant so as to dispense with proof of that fact.
 - (3) In a criminal proceeding, the prosecution may admit any fact so as to dispense with proof of that fact.²²

¹⁶ *The Rule against Hearsay in Civil Cases* (LRC 25-1988).

¹⁷ "Parliament has long since amended the law of evidence to cope with the foregoing problem and our Law Reform Commission issued a report entitled *The Rule against Hearsay in Civil Cases* on the 10 September 1988 which hopefully will soon result in remedial legislation in this State".

¹⁸ *Shelley-Morris v Bus Átha Cliath* [2003] 1 IR 232, 238.

¹⁹ [2003] 1 IR 232, 238 This decision and *Hughes v Staunton* are discussed at greater length in the *Consultation Paper on Hearsay in Civil and Criminal Cases* at paragraphs 4.05-4.06.

²⁰ *Rules of the Superior Courts 1986*, S.I. No.15 of 1986.

²¹ Section 9 of the New Zealand *Evidence Act 2006* provides that evidence which is not admissible under the Act may be admitted by agreement.

²² *Ibid.*

- 1.19** The emphasis in the New Zealand *Evidence Act 2006* is on facilitating the admission of relevant evidence where concerns of reliability are assuaged by the express consent of the parties.
- 1.20** This practice of admitting evidence in breach of rules of admissibility by consent is however, always subject to the constitutional right a trial in due course of law and to fair procedures as protected by Articles 38.1 and 40.3.1°. ²³ Thus a court could overrule an agreement to admit evidence and insist that it be introduced and proved.
- 1.21** **The Commission recommends that in civil cases, the draft Evidence Bill should provide that relevant evidence which would otherwise be ruled inadmissible may be admitted where the parties involved have consented to its admission. The Commission also recommends that, in criminal cases, the draft Evidence Bill should provide that relevant evidence which would otherwise be ruled inadmissible may be admitted where the parties involved have consented to its admission and the Court is satisfied that to do so would not prejudice the right of the accused to a trial in due course of law.**

(3) *Determining admissibility*

- 1.22** Where the admissibility of evidence is challenged by one side in a jury trial, the procedure for a *voir dire* ("a trial within a trial") in the absence of the jury is followed. It has been said that this should be held at the point at which the admissibility of the evidence is challenged²⁴. However, the Court of Criminal Appeal in *The People (DPP) v McCann*²⁵ stated that:

"Consideration should be given to the introduction of a system whereby contests on the admissibility of evidence - when clearly foreseen by prosecution and defence - could be resolved at the outset of the trial so that, as far as practicable, a jury may hear all the relevant and admissible evidence in a coherent and uninterrupted progression and without the need for the jury to withdraw to their room, or otherwise absent themselves from the courtroom, for protracted periods of time."

- 1.23** Another advantage is that it would be known from the start of a trial and before any evidence were given, whether evidence whose admissibility was in dispute would or would not be admitted. This would allow both prosecution and defence better to assess the strength of their respective cases. On occasion this might facilitate an early plea by the accused who would be

²³ The right to fair procedures encompasses a range of individual rights designed to ensure a fair trial and parity between parties. It includes the right to be heard, the right to cross examine witnesses, the right to legal representation and the right to an unbiased hearing. For a further discussion of fair procedures generally see Hogan and Whyte, *Kelly: The Irish Constitution* (4th ed. Lexis Nexis 2003).

²⁴ *Attorney General v McCabe* [1927] IR 129.

²⁵ *People (DPP) v McCann* [1998] 4 IR 397.

aware of the admission of certain inculpatory evidence or it might encourage the prosecution to accept a plea to a lesser charge than that brought.

- 1.24** However it is not always possible to identify before the start of a case and before evidence has been given what evidence is in dispute. This may only become clear when the evidence is to be introduced. The trial judge should therefore be given the power to allow a *voir dire* at the start of a trial where appropriate or allow it to take place at the point when the evidence is given and about which a contest as to admissibility arises. The General Scheme of the *Criminal Procedure Bill*, approved by the government in June 2015, envisages just such a power.²⁶ It provides that the court may, upon its own motion or that of the parties, conduct a preliminary trial hearing on whether certain material ought to be admitted in evidence.²⁷ The proposed legislation now forms a part of the current *Programme for Government*²⁸ and the Minister for Justice and Equality has recently informed the Dáil that the Bill is currently being drafted by the Office of the Parliamentary Counsel.²⁹

C Discretion to Exclude Relevant Evidence

- 1.25** It has been noted that "modern courts are less concerned with degrees of probative value, taken in the abstract, than with the possible disadvantages of admitting particular items of evidence. The typical example of this is evidence which, although of probative value in itself, has a prejudicial effect"³⁰ and would therefore be excluded.³¹ This discretion means that courts may, notwithstanding its adherence to formal rules of admissibility, refuse to admit a piece of evidence where its probative value is outweighed by its prejudicial effect. The meaning of "prejudice" is not always clear. The Australian Law Reform Commission stated:

"There is some uncertainty over the meaning of 'prejudice'. But, clearly, it does not mean simply damage to the accused's case. It means damage to the accused's case in some unacceptable way, by provoking some irrational, emotional response, or giving evidence more weight than it should have."³²

- 1.26** *Phipson on Evidence* divides prejudice into two categories:

²⁶ Dept. of Justice and Equality, General Scheme of a Criminal Procedure Bill, available at http://justice.ie/en/JELR/Pages/Criminal_Procedure_Bill .

²⁷ Ibid.

²⁸ Department of An Taoiseach, A Programme for a Partnership Government p.101.

²⁹ See Parliamentary Questions, 15th November 2016 available at <http://justice.ie/en/JELR/Pages/PQ-15-11-2016-140> ..

³⁰ Phipson on Evidence (18th ed. Sweet & Maxwell 2013) at [7-16].

³¹ New Zealand Evidence Act 2006, section 8.

³² Australian Law Reform Commission, Evidence, ALRC Report 26 Volume 1, (Interim) 1985, paragraph [957].

1. Reasoning Prejudice – Reasoning prejudice refers to the tendency of juries to give evidence significantly more weight than it actually deserves. The classic example is the effect of knowledge of a previous conviction for the same offence on the mind of the average juror.

2. Moral Prejudice – Moral prejudice refers to the possibility of jurors being deflected from the question of guilt or innocence on the present charge by external considerations.

(a) ‘Bad person’ prejudice. The most obvious kind of moral prejudice, that which tells the juror “someone like this should not be walking the streets”.

(b) ‘Accumulation prejudice’. Where a great number of charges are listed on the same indictment, the jury may assume that at least one of them must be true and accordingly convict on many, if not all, charges.

(c) ‘Diversion Prejudice’. Where evidence of some discreditable conduct is in issue, the jury may focus its attention solely on the veracity of that claim rather than the actual guilt or innocence of the accused.

1.27 The courts exercise a general discretion to exclude relevant evidence in both civil and criminal proceedings where its probative value is outweighed by its prejudicial effect. This is mandated by the constitutional rights to a fair trial and fair procedures. The courts have been reluctant to outline the precise scope of the discretion, preferring instead to deal with each determination on the basis of the facts before the court. Geoghegan J summarised this in *The People (DPP) v Meleady*:

“It is well established that, although there is no authority to permit a criminal court to admit, as a matter of discretion, evidence which is inadmissible under an exclusionary rule of law, the converse is not the case. A judge as part of his inherent power, has an overriding duty in every case to ensure that the accused receives a fair trial and always has a discretion to exclude otherwise admissible prosecution evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value.”³³

1.28 This discretion has been put on a statutory footing in both Australia³⁴ and New Zealand.³⁵

³³

[2001] 4 IR 16, 31.

³⁴

Section 136 of the Australian *Evidence Act 1995*. The Act does not define “prejudicial effect”, which is referred to as “unfair prejudice” but does define “probative value” as “the extent to

- 1.29** The implementation and operation of the Australian *Evidence Act 1995* were reviewed in 2005 and it was observed that the legislative intent of the 1995 Act was to provide a level of consistency in the use of the terms probative value and unfair prejudice.³⁶ The combined report noted that the Act had not resolved this issue and that uncertainty as to the scope of the terms “probative value” and “unfair prejudice” persists in Australian law.³⁷
- 1.30** A different approach is taken by the US *Federal Rules of Evidence* which allow relevant evidence to be excluded where its probative value is substantially outweighed by listed factors but this exclusion is always discretionary. Rule 403 states:
- “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”³⁸
- 1.31** The use of the term “needlessly presenting cumulative evidence” is a novel feature of the US Code but is likely to fall under the “waste of time” provision of the Australian and New Zealand legislation.³⁹
- 1.32** **The Commission recommends that the recommendations in this Report should not be construed as altering or affecting general common law rules or any enactment concerning the admissibility of evidence. They are also intended to be without prejudice to the discretion to exclude evidence on the grounds that its prejudicial effect outweighs its probative value.**

which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue”. See further Australian Law Reform Commission, *Evidence*, ALRC Report 26 Volume 1, (Interim) 1985, paragraph [644].,

35

Section 8 of the New Zealand *Evidence Act 2006* provides:

(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

- (a) have an unfairly prejudicial effect on the proceeding; or
- (b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

36

Combined Report on Uniform Evidence Law in 2005 between the Australian Law Reform Commission, the Victoria Law Reform Commission and the New South Wales Law Reform Commission. *Combined Report on Uniform Evidence Law*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report December 2005, Chapter 16.

37

Ibid at 16.36 – 16.73

38

Rule 403, *Federal Rules of Evidence*, Art. IV, ‘Relevance and Its Limits’.

39

See Section 8(1)(b) of New Zealand *Evidence Act 2006* and section 135(c) of the Australian *Evidence Act 1995*.

D The Principle of Orality

- 1.33** The common law settles controversies in trials before a finder of fact, which may be a judge or a jury depending on the case. Witnesses with direct knowledge⁴⁰ of relevant facts are brought before the court, swear an oath (or affirmation)⁴¹ to tell the truth, and tell the court what they know by responding to during examination-in-chief and cross examination. This mechanism for putting the facts before the fact-finder has given rise to the principle of orality⁴² and the rule against hearsay.
- 1.34** The principle of orality remains fundamental in all trials: evidence should ideally be placed before the court through testimony delivered orally by one or more witnesses for each side of the case or controversy. The Supreme Court has held that “the rule that witnesses at the trial of any action must be examined *viva voce* and in open court is of central importance in our system of justice and is not to be lightly departed from.”⁴³ Giving evidence orally in person aims to ensure that the court can inspect the demeanour of the witness and to maximise the likelihood that the witness will tell the truth by compelling the witness to swear an oath to speak the truth and by forcing the witness to take an isolated position in a public forum where the focus of all present settles entirely on what the witness is saying.
- 1.35** Oral testimony remains an important element of the trial process: Welborn contends that “live testimony may be essential to the perception of fairness, regardless of the real relationship between live testimony and the accuracy of outcomes.”⁴⁴
- 1.36** In furtherance of this, the rule against hearsay aims to avoid information that comes from a source not present and not under oath from being relayed to the fact-finder. The fact that the source is not present in court presents three problems: his or her demeanour cannot be inspected, he or she has not sworn an oath and he or she cannot be cross-examined in open court.⁴⁵

⁴⁰ “Ideally, in the theory of our law, a witness may testify only to the existence of facts which he has observed with one or more of his own five senses.” Kingsmill-Moore J in *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185, 190.

⁴¹ “It is a fundamental principle of the common law that for the purpose of trials in either criminal or civil cases *viva voce* evidence must be given on oath or affirmation.” Finlay CJ in *Mapp v Gilhooly* [1991] 1 IR 253, 262. In its 1990 *Report on Oaths and Affirmations* (LRC 34-1990) the Commission recommended abolition of the oath for witnesses in civil and criminal trials and its substitution by a form of affirmation. The Commission returns to this recommendation in Chapter 9 and in the draft Evidence Bill.

⁴² “One of the cardinal principles of our system of justice”, see Delany and McGrath. *Civil Procedure in the Superior Courts* (Round Hall 2nd ed. 2005) at p. 479 [18-02].

⁴³ *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 IR 504, 515. This is also reflected in Order 39, rule 1 of the *Rules of the Superior Courts 1986*.

⁴⁴ Welborn, “Demeanour” (1991) 76 *Cornell LR* 1075, 1092.

⁴⁵ See, for discussion of these three problems (no oath, no demeanour and no cross-examination), McGrath, *Evidence* (2nd ed. Round Hall, 2014) at [5-04] – [5-18].

- 1.37** However, whilst common law courts favour oral evidence from direct witnesses whose demeanour and delivery can be inspected first-hand⁴⁶ the value of witness demeanour as a guide to truth or reliability is controversial.⁴⁷ A number of specific statutory exceptions to the principle of orality have also been enacted by the Oireachtas over the years.⁴⁸
- 1.38** Cross-examination has been described as “the most effective method for testing a witness’s evidence”.⁴⁹ In its 1980 *Working Paper on the Rule Against Hearsay* the Commission noted that the lack of a mechanism to examine the credibility of a witness is one of the main objections to admitting out-of-court statements.⁵⁰ The common law proceeded on the basis that the requirement for a witness to appear in person to give testimony (and to be tested on that testimony by cross-examination) makes it more likely that the witness will tell the truth as the possibility exists of being found, in public and in person, to have lied.
- 1.39** The right of the accused in a criminal trial to cross-examine witnesses is an internationally recognised fundamental right.⁵¹ It is also recognised that cross-examination is not a fool proof method of testing a witness’s evidence and that the absence of cross-examination does not justify the exclusion of all hearsay evidence.
- 1.40** However, an increasingly technologically advanced society provides, and depends on, more reliable and efficient methods of keeping track of what has happened than can possibly be provided by the unassisted recollection of witnesses even if their account of events is exposed to the rigour of cross-examination.⁵² Therefore certain exceptions for pieces of documentary evidence, which are generated by computers and machines and are naturally impossible to subject to cross-examination, are necessary in the reality of our modern society. Nonetheless, owing to the fact that intention and state of mind remain the essential elements of serious criminal offences, the right to

⁴⁶ This is discussed in detail at paragraphs 1.15-1.19 of the *Consultation Paper on Hearsay in Civil and Criminal Cases*.

⁴⁷ As discussed in the Consultation Paper, some Privy Council and English authority attach substantial weight to demeanour but English authority also cautions against placing too much faith in it (*Société d’Avances Commerciales (Société Anonyme Egyptienne) v Merchants Marine Insurance Co (The Palitana)* (1924) 20 L Rep 140, 152, per Atkin LJ). The English Law Commission was sceptical of demeanour as a guide to truth or reliability and this was reflected in its Consultation Paper and Report, both discussed at paragraph 1.17 of this Commission’s Consultation Paper. Hardiman J cited Atkin LJ’s reservations with approval in two Supreme Court decisions: *J O’C v Director of Public Prosecutions* [2000] 3 IR 478, 508 and *O’Callaghan v Mahon* [2006] 2 IR 32, 60.

⁴⁸ For example section 19(1) of the *Civil Liability and Courts Act 2004* provides that “[i]n a personal injuries action evidence as to any matter shall, where the court so directs, be given by affidavit.” Other examples (quite apart from provisions permitting bodies other than courts to proceed on foot of affidavit evidence) include sections 22, 34, 35 and 61 of the *Central Bank and Credit Institutions (Resolution) Act 2011* permitting motions grounded on affidavits; and section 14(4) of the *Civil Liability and Courts Act 2004* requiring the lodging in court of affidavits.

⁴⁹ Zuckerman, *The Principles of Criminal Evidence* (Oxford University Press 1989) at 93.

⁵⁰ Law Reform Commission *Working Paper on the Rule Against Hearsay* (LRC WP No 9-1980) at 193.

⁵¹ The right to confront witnesses by way of cross-examination is enshrined in the Sixth Amendment to the United States Constitution and in Article 6 of the European Convention on Human Rights.

⁵² *Cross and Tapper on Evidence* (9th ed. Butterworths 1999) at p. 535.

cross-examine remains a fundamental basis for the rule against hearsay and forms an important component of trials under the Constitution and at common law.⁵³

E Classifying Evidence: Oral, Physical and Documentary Evidence

1.41 Before considering whether evidence is admissible in court, it is necessary to classify the evidence that is at issue. There are three general types of evidence, “oral evidence”, which is spoken evidence given by witnesses in court, “physical evidence”, sometimes referred to as “real evidence”, and “documentary evidence.” The distinction between these types of evidence relates to the purpose for which they are presented in court. In turn, as the detailed discussion later in this Report makes clear, the classification of evidence has important consequences for the relevant rules of admissibility.

1.42 “Physical evidence” or “real evidence” is an object that a court can observe or examine⁵⁴ such as a knife, a gun, fingerprints or DNA, an item whose ownership is the subject of the litigation and which is introduced for the purpose of proving a fact at issue in the case by reference to the physical characteristics of the object. The prosecution may introduce a gun as physical evidence in an attempted murder trial, for example, to show that it was used in the attack. If the defendant’s fingerprints or DNA were found on it at the crime scene, these may be used as evidence that the defendant was at the crime scene. In the case of fingerprints or DNA evidence, the court may need the testimony of an expert witness to help it to understand their significance. In a passing-off action the court might require the expert opinion of a person working in the relevant industry to decide the question of whether the relevant items have the “requisite individual character”.⁵⁵

1.43 “Documentary evidence” is evidence introduced for the purpose of examining the contents of a document. For example if there is a dispute about whether a person agreed to deliver a 42-inch television as opposed to the 32-inch television actually delivered the buyer’s receipt containing the words “42-inch television” is very strong documentary evidence that the contract was for a 42-inch television. In the law of evidence a “document” includes not only written documents such as a receipt or will but any item from which

⁵³ It should be noted that intention and state of mind, while of paramount importance to more serious offences such as murder, sexual offences, theft and fraud, is not relevant to the majority of criminal cases which are tried on strict liability. In fact non-strict liability offences account for just 6,000 of 500,000 criminal trials annually.

⁵⁴ McGrath, *Evidence* (2nd ed. Round Hall, 2014) paragraph 12-55.

⁵⁵ *Karen Millen Ltd v Dunnes Stores Ltd* [2014] IESC 23.

information can be derived, such as photographs, letters, tape recordings, films, X-rays and emails.⁵⁶

1.44 A document is classified as “documentary evidence” only where it is introduced for an examination of its contents. Where the document is adduced to show that the document is in existence and not to prove the information contained in it, it is classified as real evidence. It might be introduced for another purpose unconnected with its contents and be classified as physical, not documentary evidence, for example, where an envelope with a fingerprint is introduced for the purpose of proving that the defendant sent a letter. Where a document was created without any human intervention, for example by a machine or electronic process, it may also be admitted as real evidence.⁵⁷ The classification of evidence is based on the purpose for which it is produced, not just its physical form. Particular issues in distinguishing between real evidence and electronic documentary evidence are discussed in Chapter 2.⁵⁸ Additionally, “original evidence”, a term which is used frequently in the chapters of this report dealing with the rule against hearsay, is used to denote evidence which is perceived directly by the witness through one of the senses. It is often used in distinguishing between hearsay and non-hearsay, with non-hearsay statements constituting “original evidence”.

⁵⁶ McGrath, *Evidence* (2nd ed. Round Hall, 2014) paragraph 12-03. Documentary evidence, including methods of proof and authentication of documents, is discussed in Chapter 4.

⁵⁷ *The People (DPP) v Murphy* [2005] 2 IR 125.

⁵⁸ See paras. 2.49 – 2. 65.

CHAPTER 2

THE RULE AGAINST HEARSAY

A Introduction to Hearsay

- 2.01** The rule against hearsay is one of the classic and most venerable exclusionary rules of evidence. It has been a central feature of the adversarial trial across the common law world for centuries and continues to play an extremely important role in the modern trial.¹ While the rule is hugely complex, hearsay is a familiar everyday concept and the rule corresponds to an ordinary sense of the unreliability of second hand information and the injustice of being incriminated by accusations which cannot be properly challenged.²
- 2.02** The rule is categorised by some as a vital component of a fair trial and of fair procedures and by others as complex, confusing and arbitrary. The rule has been subject to much refinement and reform since its emergence in the 18th and 19th centuries and no longer operates as unforgivingly as it once did. Nevertheless, concern remains that the hearsay rule as it stands serves to exclude evidence which is both relevant and reliable and requires further reform, if not abolition. The Commission in this report will analyse the present status of the rule, weigh its merits and shortcomings and reach conclusions as to how it may be reformed.
- 2.03** The rule against hearsay is that out-of-court statements may not be presented in court as proof of the truth of their contents. What this means in a more practical sense is well-articulated by an example given by Zuckerman: “In its most straightforward application, the rule forbids Jones to testify that Smith had told him that he, Smith, had seen the accused strike the fatal blow, when Jones’s testimony is adduced to prove that the accused struck the blow.”³
- 2.04** The rule against hearsay applies to any out-of-court statement, whether verbal or written, that is introduced as evidence for the purpose of proving the truth of the content of the statement. The law has traditionally been that

¹ For an illustration of the rule’s continuing significance see *The People (DPP) v Lynch* [2016] IECA 78. In *Lynch* the Court of Appeal quashed a conviction of armed robbery on the grounds that the prosecution had led evidence from the PULSE database which asserted that the motor cycle observed driving away from the crime scene was belonging to the accused. The assertion in the PULSE database constituted a hearsay statement of another guard who was not called to give evidence. The Court of Appeal ruled that the admission of this evidence was highly prejudicial to the accused and accordingly quashed the conviction.

² See Heffernan with Ni Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury, 2014) at 7-01. The authors note how non-lawyers commonly use the term in reference to gossip and other second-hand information.

³ Zuckerman, *The Principles of Criminal Evidence* (Oxford, 1989) p. 179.

hearsay evidence should not be admitted unless the person from whom the evidence comes is present to verify the statement and can be cross-examined to test and confirm the reliability of his or her evidence. Hence, the rule against hearsay is an exclusionary rule of evidence. The rule applies in both civil and criminal proceedings.

- 2.05** There are a number of important exceptions to the rule against hearsay which have developed over centuries at common law and in legislation under which hearsay evidence is admissible which are discussed in Chapter 3. There are also a number of circumstances in which an out-of-court statement may be admitted because the statement is not offered to prove the truth of its contents. This renders the evidence “non-hearsay”. These are discussed in Part B below.
- 2.06** The main reasons given for exclusion are that juries are ill-equipped to evaluate hearsay evidence, that such statements are not made under oath and they cannot be tested by cross-examination. These various reasons for the development of the rule against hearsay are now considered.

(1) *The rationale behind the rule against hearsay*

(a) *Distrust of the jury’s ability to evaluate hearsay evidence*

- 2.07** One of the reasons historically advanced for preserving the hearsay rule has been that jury members as non-lawyers are not familiar with sifting evidence and are liable to give untested hearsay evidence the same probative force as direct evidence. Originally it was believed that certain forms of evidence had a particular propensity to confuse and mislead jurors and for that reason hearsay statements were excluded; to include them would divert jurors from their proper task. It was generally believed that juries could not be expected properly to weigh up the reliability of hearsay on a case by case basis, and it was deemed preferable that a blanket ban on such evidence should be maintained.⁴
- 2.08** During the 19th century the concern was particularly prevalent about the ability of juries to handle hearsay evidence and its influence on hearsay doctrine is still evident in criminal proceedings in the 21st century. Choo notes that in jurisdictions where the mode of trial is the same in civil and criminal proceedings, the hearsay rule is largely the same but, in the Civil Law legal systems of Continental Europe, where very little reliance is placed on jury trial, the hearsay rule is not as significant.⁵

⁴ Scallan, “Constitutional Dimensions of Hearsay Reform: Towards a Three Dimensional Confrontation Clause” (1992) 76 *Minnesota Law Review* 623,627, n. 15.

⁵ Choo, *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 34.

2.09 On the other hand Williams was dismissive of the traditional distrust and paternalism towards juries.⁶ He pointed out the absurdity of, on the one hand, entrusting to a jury the substantial task of following a trial where its members are credited with following technical and subtle directions to dismiss evidence from consideration and yet, on the other hand, are regarded as incapable, even with the assistance of the judge's directions, of attaching the necessary degree of importance to hearsay. Studies differ as to whether juries fully understand the directions as to the law which they are given and there are precedent directions on hearsay in some jurisdictions to avoid the potential difficulty.⁷ While juries may use hearsay intelligently in ordinary life, it has been argued that a trial is "a proceeding in which finding the truth may require an understanding of institutional practices with which they have little or no dealings".⁸

(b) *Historical reliance on the oath*

2.10 One of the reasons advanced as to why a statement that is hearsay is deemed to be unreliable is because it is not made on oath in court. The oath historically had a central place in a system of justice; it stood for allegiance to the authority of the church and state and it was based on the belief that God would punish a liar. For that reason the idea persisted that oaths were an effective way to make witnesses tell the truth or face eternal damnation; thus it was viewed as a powerful disincentive to perjury. The religious character of the oath therefore meant that it embodied the "*highest possible security which men in general can give for the truth of their statements*".⁹ In time, the idea of divine retribution was supplanted by the idea that the effect the oath would have on the conscience of the witness was the law's best mechanism to ensure the witness spoke the truth.¹⁰ It is accepted that "for many modern persons, devoutly religious though they may be, the decline of belief in hell or divine punishment makes the... traditional basis of the oath inapplicable".¹¹ Nonetheless the taking of an oath or affirmation, particularly in a public courthouse, may at least give pause to the witness to reflect on their

⁶ Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed. 1963) at 207.

⁷ See Law Commission of England and Wales *Report: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) LC 245. On the request of the Law Commission, Sally Lloyd Bostock undertook a significant study of the effect of the disclosure of previous criminal convictions on juries. Bostock found little difference in the acquittal rate of persons when previous convictions were disclosed and those when they were not. See Bostock, "The effects on juries of hearing about the defendant's previous criminal record: a simulation study", (2000) *Crim. L.R.* (Sep) 734-755. On jury directions in Ireland generally, see Coonan and Foley, *The Judge's Charge in Criminal Trials* (Round Hall 2008).

⁸ Park "A Subject Matter Approach to Hearsay Reform" (1987) 86 *Michigan Law Review* 51, 60-61. See also Mueller "Post Modern Hearsay Reform: The Importance of Complexity" (1992) 76 *Minnesota Law Review* 367, who also argued that any changes in the hearsay rule should be undertaken with caution given the inherent differences between a trial and everyday life.

⁹ Whitcombe, *An Inquiry into Some of the Rules of Evidence Relating to the Incompetency of Witnesses* (London, 1824), 39.

¹⁰ See Law Reform Commission, *Report on Oaths and Affirmations* (LRC 34-1990), paragraph 2.7. See also the discussion of the *Oaths Acts* in Chapter 9 below.

¹¹ New South Wales Law Reform Commission Discussion Paper, *Oaths and Affirmations* (1980) paragraph 1.12.

conscience and encourage them to exercise greater caution when giving their testimony than they might otherwise be.

(c) *The principle of orality*

2.11 As has already been noted, a characteristic feature of court proceedings in Ireland, as a common law legal system, is that much evidence is delivered orally by witnesses with relevant firsthand knowledge of the matters in issue. A common justification for the system of giving evidence by oral testimony, including the hearsay rule, is that seeing the demeanour and hearing the evidence of a witness in the witness box is the best means of getting the truth.

2.12 Whilst today oral witness testimony is often supplemented by documentary, physical or scientific evidence, it still remains a definitive part of the trial process. In the Commonwealth Privy Council decision *Teper v R*¹² Lord Normand stated that, without the witness being present in court to give an account of his evidence, “the light which his demeanour would throw on his testimony is lost”.¹³ In the earlier English case *R v Collins*¹⁴ Humphreys J referred to “the one great advantage to which those who uphold the system of trial by jury always point - of the opportunity of not only seeing the witnesses who give evidence and hearing what they have to say, but also of observing their demeanour in the witness-box”.¹⁵

(d) *The need to test evidence through cross-examination*

2.13 Cross-examination has been described as “beyond any doubt the greatest legal engine ever invented for the discovery of truth”.¹⁶ It is considered to lie at the heart of the distinction between testimonial and hearsay evidence¹⁷ and it has been suggested that it is the objection to hearsay most strongly pressed today. When a party is presented with an out of court statement of a testimonial nature, they are deprived of the ability to test and examine the truth or accuracy of that statement, namely by way of cross-examination. The nature of hearsay evidence is that it is untestable; the maker of the statement cannot be pressed, prodded, harangued or even simply asked to clarify a given point. This denies the party against whom the evidence is adduced the opportunity to participate meaningfully in his or her own defence, particularly where the hearsay evidence speaks to a central issue in the case.

2.14 In the trial of Sir Walter Raleigh in 1603, perhaps the most infamous case illustrating the dangers of hearsay evidence, the consequences of the want of

¹² [1952] AC 480.

¹³ *Ibid* at 486.

¹⁴ (1938) 26 Cr App R 177.

¹⁵ *Ibid* at 182.

¹⁶ Wigmore, Evidence (1972).

¹⁷ Choo *Hearsay and Confrontation in Criminal Trials* (Clarendon Press Oxford, 1996) at 32.

an opportunity to cross-examine are starkly evident.¹⁸ Raleigh was accused of conspiracy to commit treason by taking part in a plot to install Arabella Stuart as Queen of England.¹⁹ The principal evidence in the case was the written confession of his alleged co-conspirator, Lord Cobham, which Raleigh asserted he had since recanted and demanded he be allowed face his accuser:

“But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him... [H]e is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof. [T]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face...”²⁰

2.15 In response, the prosecution adduced evidence of a boat pilot who claimed he had been told by a Portuguese gentleman while docked in Lisbon that “Your King [James] shall never be crowned for Don Cobham and Don Raleigh will cut his throat before he come to be crowned.” Raleigh protested that “this is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?”²¹ Nonetheless he was convicted and sentenced to death. Despite a temporary reprieve from King James, he was eventually beheaded on October 29th 1618. Outrage at the injustice done to Raleigh inspired courts across the common law world to strengthen the prohibition of hearsay evidence.²²

2.16 The importance of testing evidence via cross-examination was recognised as central to the prohibition on hearsay in the leading Supreme Court decision in this jurisdiction, *Cullen v Clarke*.²³ This was echoed by the Commission in the 1980 *Working Paper on the Rule Against Hearsay*, where it was noted that the lack of a mechanism to examine the credibility of a witness is one of the main objections to the reception of out-of-court statements.²⁴ The Supreme Court, and particularly Hardiman J, has on many occasions asserted cross-examination as fundamental to the trial process. In *Maguire v Ardagh* Hardiman J stated:

¹⁸ For further detail on the origin and history of the rule against hearsay see Chapter 1 of the Consultation Paper and Lusty “Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials” (2002) 24 *Sydney Law Review* 361, at 363-364.

¹⁹ “The Treason Trial of Sir Walter Raleigh”, Harvard Law School Articles available at <http://law.harvard.edu/publications/evidenceiii/articles/note-treasontrial.htm>.

²⁰ *Raleigh’s Case*, 2 How. St. Tr. 1, 15–16, 24 (1603).

²¹ *Ibid.*

²² See *Lord Morley’s Case*, 6 How. St. Tr. 769, 770–771 (H. L. 1666), Raleigh’s Case is commonly cited in hearsay and confrontation judgments to this day, notably by Scalia J in the US Supreme Court in *Crawford v Washington* 541 U.S. 36 (2004).

²³ [1963] IR 368, at 378, discussed at paragraph 2.04, below. See also the English Law Commission’s 1997 *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC 245), at 3.15.

²⁴ Law Reform Commission, *Working Paper on the Rule Against Hearsay* (LRC WP No.9-1980) at 193.

“Where a person is accused on the basis of false statements of fact, or denied his civil or constitutional rights on the same basis, cross-examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication.”²⁵

- 2.17** The continuing importance of cross-examination as a rationale for the rule against hearsay was again reaffirmed in a judgment of Hogan J in the High Court:

“The legal system’s general lack of enthusiasm for hearsay evidence does not arise by reason of an embedded historical prejudice for which there is no modern rationale or because of the habitual and unthinking application of familiar technical rules. It is rather because as Hardiman J. pointed out in *McLoughlin*, the reception of such evidence tends to frustrate the right of effective cross-examination. This latter right is absolutely central to the truth-eliciting process, without which right no accused could effectively challenge his or her accusers...”²⁶

- 2.18** The right of the accused in a criminal trial to cross-examine witnesses is, today, an internationally recognised fundamental right. Article 6(3)(d) of the European Convention on Human Rights guarantees a person charged with a criminal offence the right: “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” It is also enshrined in the Sixth Amendment to the Constitution of the United States, known as the “Confrontation Clause”.

B Defining Hearsay, and the Distinction between Original Evidence and Hearsay

(1) *The scope of the rule against hearsay*

- 2.19** There is no general rule preventing a witness from testifying as to out-of-court words, statements or documents if the testimony is not being presented to prove the truth of its contents.

- 2.20** The rule against hearsay excludes secondary evidence so as to eliminate the danger of admitting evidence retold by a secondary source.²⁷ However, it may be difficult to tell what statements fall within the rule and what fall outside it. It can be especially difficult to tell what statements are original evidence and

²⁵ *Maguire v Ardagh* [2002] 1 IR 385, 704.

²⁶ *Clarke v Governor of Cloverhill Prison* [2011] IEHC 199 at [20].

²⁷ Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed. Stevens & Sons, London, 1963) at 195 -196. This is discussed in para. 2.03 of the Consultation Paper.

which hearsay. An out-of-court statement may be admissible as original evidence because the fact in issue is whether the statement or objection itself was or was not made²⁸, or to show the ability of the declarant to communicate²⁹ or because it is adduced to demonstrate the emotions or state of mind of the declarant, rather than the truth of the statement itself.³⁰ Implied assertions, where the statement is adduced to prove some fact or facts necessarily implied rather than those plainly stated, are the most commonly debated category of non-hearsay statement and are deserving of their own full consideration in the following section. If it is adduced for any of these purposes, it is not hearsay and is in principle admissible.³¹

- 2.21** *Subramaniam v Public Prosecutor*³² illustrates the distinction. In this case the Commonwealth Privy Council considered an appeal from a conviction in the Malay courts for a firearms offence. The defendant had pleaded the defence of duress to a charge of possession of ammunition for the purpose of helping a communist rebel insurgency. The defendant gave evidence that the rebels had threatened to kill him unless he followed their requests.
- 2.22** The trial judge excluded evidence of these threats as constituting hearsay evidence. The Privy Council overturned this ruling and held that evidence of the threats were adduced not as evidence of the truth of the content of the statement i.e. that they intended to kill him but as evidence of the duress that the defendant has been operating under. The out of court evidence of what had been said to the defendant by the terrorists was relevant to whether he had been acting under duress, regardless of the truth or otherwise of what was said. The conversations would be hearsay, and therefore not admissible, only if the purpose of submitting the evidence was to prove the truth of the contents of the statements. Canadian courts have also allowed evidence of out-of-court statements showing state of mind.³³
- 2.23** McGrath notes that despite the considerable volume of case law on the point, the distinction between out of court statements that come within the scope of the rule and those that don't remains "a cardinal and, at times misunderstood aspect of the rule against hearsay".³⁴ It has also been noted that this distinction is "invariably firmer in theory than in practice"³⁵ and can often be difficult to identify in complex cases.

28

R v Chapman [1969] 2 QB 436.

29

Donohoe v Killeen [2013] IEHC 22 at [12]. The High Court (Hogan J) held that while the statement of an absent witness to the road traffic accident would have been admissible as evidence of the fact that the victim of the accident was sufficiently composed for a conversation to have taken place, it was inadmissible to prove the truth of the facts the absent witness asserted, namely that the driver had broken a red light.

30

Ratten v R [1972] AC 378.

31

This is discussed at paragraph 2.08 of the *Consultation Paper on Hearsay in Civil and Criminal Cases*.

32

[1956] 1 WLR 965.

33

R v Baltzer (1974) CCC (2d) 118. Discussed at paragraph 2.10 of the Consultation Paper.

34

This is discussed further at paragraph 2.07 of the Consultation Paper.

35

Heffernan with Ni Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury, 2014) p. 302.

2.24 *Cullen v Clarke* is the leading Irish authority on the question and seeks to make the difference as plain as possible:

“[T]here is *no* general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There *is* a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay.”³⁶

2.25 The line running through the key decisions on this question may be set out thus: In determining whether or not a statement constitutes hearsay, the purpose for which the statement is being adduced is the crucial factor. The very same statement may serve both a hearsay and a non-hearsay purpose, as was the case in *Subramaniam*. The statement would have been inadmissible to prove the truth of what the terrorists had said but, as the Court ruled, it was perfectly admissible to prove that the declarant was acting under duress.

2.26 A decision of the High Court (Hogan J) makes the same distinction with particular clarity. *Donohoe v Killeen*³⁷ was a personal injuries action following a road traffic collision. The defendant while giving evidence recounted an overheard conversation in which a passer-by, who could not subsequently be located, allegedly accosted the plaintiff immediately after the accident, accusing her of breaking a red light. Hogan J disallowed this line of questioning but in giving reasons for doing so made some illuminating comments on when such evidence *would* be admissible:

“Here it may be observed that the defendant did not seek to elicit this information for the purposes of showing that the plaintiff had a conversation with the foreign national immediately after the accident. Such a line of questioning would have been permissible in order to show, for example, that she was sufficiently composed in the aftermath of the accident to have had a conversation of this nature. But the evidence was not sought to be tendered to prove that a conversation actually took place, but rather - impliedly - to prove the truth of what the missing witness had contended, i.e., that the plaintiff had gone through the red light. This is clearly inadmissible hearsay in the sense outlined by Kingsmill Moore J. in *Cullen*.”³⁸

³⁶ [1963] IR 368 at 378.

³⁷ [2013] IEHC 22.

³⁸ *Ibid* at para. 12.

2.27 The Court of Appeal also addressed this question in *The People (DPP) v Morgan*.³⁹ The case concerned an appeal from a conviction of murder. One of the main grounds of appeal was the admission of certain statements which counsel for the appellant argued constituted inadmissible hearsay. The statement was that of a friend of the appellant, a Mr Stephen Byrne, who had originally been a co-accused but had the charge withdrawn following a plea to a charge of manslaughter. A witness for the prosecution, a woman who had been present at the attack, asserted that Mr Byrne had put to the appellant in the immediate aftermath of the incident that he had been “jumping up and down on his [the deceased’s] head.”⁴⁰

2.28 The Court of Appeal ruled that this evidence did not constitute hearsay as it was not introduced for a testimonial purpose. The Court took the view that the statement was adduced to demonstrate the accused’s failure to respond to the accusation, a fact which amounted to an admission by conduct and thereby admissible hearsay. The statement of Mr Byrne was not adduced to prove the truth of its contents but rather as evidence that this statement was in fact made such that the admission by conduct could be demonstrated. Accordingly the statement of Mr Byrne was admissible as original evidence and the assertion by conduct of the appellant was admissible by way of the exception to the rule against hearsay for admissions. Edwards J stated that:

“It is clear... that the impugned evidence was being adduced as original evidence in order to demonstrate that the appellant, in addition to making oral admissions during the conversation, had made further admissions by his conduct.”⁴¹

2.29 In reaching this conclusion, the Court set out how hearsay and original evidence should be distinguished. The Court stated that:

“Whether or not the statement ... was properly to be regarded as hearsay or non-hearsay depended upon the purpose for which it was intended to be adduced. If, on the one hand, it was adduced, not just to establish that the statement was made, but also for the purpose of relying upon the truth of its contents, then it was hearsay. In other words if was being relied upon as testimonial evidence rather than as original evidence, that rendered it hearsay. If on the other hand it was adduced merely to establish that the statement was made, it was not hearsay.”⁴²

2.30 The Court went on to quote with approval the following passage of Macdonald JA in the Canadian case of *R v Baltzer*:

³⁹ [2015] IECA 50.

⁴⁰ *Ibid* at para. 12.

⁴¹ [2015] IECA 50 at para. 70. The Court also noted at para. 73 that even if the evidence were hearsay, it would be clearly admissible under the *res gestae* exception. The judgment is therefore an interesting illustration of the interrelationship of the various exceptions to the rule against hearsay.

⁴² *Ibid* at 64.

“Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristics but the use to which it is to be put. Whenever a witness testifies that someone said something, immediately one should then ask, ‘what is the relevance of the fact that someone said something’. If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is evidence – the truth or falsity of the statement is of no consequence: if the relevance lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is.”⁴³

- 2.31** Identifying where that distinction lies, between a statement adduced for a hearsay and a non-hearsay purpose, is crucial to the sensible application of the rule against hearsay. It is therefore of critical importance that the definition of hearsay be settled and clear. The Commission considers that a statutory definition is the best means of achieving this aim.
- 2.32** **The Commission recommends that the draft Evidence Bill should define hearsay as: “any statement, whether made verbally, by conduct, or contained in a document, which is made out of court by a person who is not called as a witness and is presented in court as testimony to prove the truth of the fact or facts asserted.”**

(2) *Implied assertions*

- 2.33** Implied assertions are arguably the most active fault line between hearsay and original evidence and have generated significant commentary and debate. While they come within the scope of the debate as to the distinction between hearsay and original evidence, they are deserving of their own analysis. An implied assertion is a statement that is not tendered to prove the truth of its contents but is taken to allow an inference to be drawn from it.
- 2.34** As has been discussed, hearsay statements are by their nature assertive or declarative, they are adduced to prove the facts they assert. As Lord Wilberforce has noted; “a question of hearsay only arises when words spoken are relied upon “*testimonially*”, i.e. as establishing some fact narrated by the words.”⁴⁴ Implied assertions are different in this crucial aspect; they do not seek to establish the truth of the statement made but can be used by the trier of fact to draw inferences, be they inculpatory or exculpatory. Such an inference will ordinarily involve some common understanding implied by the words which is probative to the facts before the court.

⁴³ (1974) 27 CCC (2d) 118 at 143 quoted at para. 66 of Edwards J’s judgment in *The People (DPP) v Morgan* [2015] IECA 50.

⁴⁴ *Ratten v R* [1972] AC 378 at 387.

- 2.35** Implied assertions have never been directly considered by an Irish court but the judgment of Kingsmill Moore J in *Cullen v Clarke*⁴⁵, the most definitive statement in Irish law on hearsay, appears to contemplate their admissibility. Kingsmill Moore J is at pains to emphasise the limited scope of the rule against hearsay, reaffirming its reserved application to statements adduced to prove the truth of the facts which they assert. It is strongly arguable that such a formulation of the rule against hearsay necessarily contemplates the admissibility of implied assertions.
- 2.36** While there is scant discussion of implied assertions in this jurisdiction, they have been the subject of much debate in other common law jurisdictions. A classic example of an implied assertion is the English case of *R v Kearley*.⁴⁶ On foot of a warrant, the police conducted a search of a suspected drug dealer's property. Lingered after the search, they heard a number of phone calls to the suspect's answering machine from persons requesting drugs. These messages were one of the central pieces of evidence in trial against the accused, who objected to their entry on grounds that they were hearsay. The trial judge and the Court of Appeal took the view that they were admissible on grounds that they were evidence as to the belief of the callers rather than the actual guilt of the defendant. By a 3-2 majority the UK House of Lords reversed, arguing that the "necessary implication" of the messages was that the defendant was guilty.⁴⁷ In the view of the majority, to allow their entry into evidence would be to allow hearsay evidence by the back door.⁴⁸
- 2.37** The decision in *Kearley* has been the subject of much comment and controversy and its effect was reversed by the UK Parliament in the *Criminal Justice Act 2003*. The relevant provision of the Act provides that a statement shall not be considered hearsay save where it is intended to cause a person to draw a particular inference.⁴⁹ This issue of intent has been in key in judicial and academic consideration of implied assertions across the common law world, most notably in the United States and the United Kingdom.
- 2.38** Rule 801 of the Federal Rules of Evidence and section 115 of the *Criminal Justice Act 2003* provide that only express assertions come within the scope of the hearsay rule. The rationale behind this approach is two-fold. First, implied assertions are regarded as non-assertive conduct and absent an intent to imply a certain message such conduct cannot be regarded as assertive with respect to the fact or matter derived by implication. As one commentator has noted, it is reasonable to infer that passers-by had their umbrellas up for the sake of keeping dry, not for the purpose of telling

⁴⁵ [1963] IR 368 at 378.

⁴⁶ [1992] 2 AC 228.

⁴⁷ [1992] 2 AC 228 at 255.

⁴⁸ *Ibid.*

⁴⁹ *Criminal Justice Act 2003* s. 115 (3).

anyone it was raining.⁵⁰ The “statement” of the umbrella-users was in no way assertive and absent an intent to communicate a relevant fact i.e. that it was raining, it does not speak “testimonially” in any sense and accordingly cannot be considered hearsay.

- 2.39** Second, and perhaps most persuasively, where a person makes some statement or acts in a way consistent with a particular belief, but without intending to expressly communicate that belief, one of the principal hearsay dangers disappears - that of mendacity.⁵¹ It is practically impossible to intentionally fabricate the facts in such circumstances. One commentator has argued:

“A man does not lie to himself. Put otherwise, if in doing what he does a man has no intention of asserting the existence or non-existence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of veracity. Accordingly, the lack of opportunity for cross-examination in relation to his veracity or lack of it, would seem to be of no substantial importance.”⁵²

- 2.40** Hughes LJ gives an example to make the same point in the English case *Twist*:

“If a buyer for a large chain store telephones the sales director of a manufacturer, with whom he routinely does business, and orders a supply of breakfast cereal or fashion jeans he is generally not representing as a fact or matter either (a) that the sales director’s firm manufactures the flakes or the jeans or (b) that he the buyer works for the chain store. Crucially for the application of the Act, even if it be suggested that the order should be construed as an “implied assertion” of either fact (a) or fact (b), it will be beyond doubt in most cases that the caller does not have it as one of his purposes to cause the recipient to believe or act upon either of those facts.”⁵³

- 2.41** McGrath has outlined very similar reasons in his recommendation of reform to the US approach and has called for statutory intervention which mirrors Rule 801.⁵⁴ Both the US and UK regimes provide that evidence that the statement was made with the intent of communicating a relevant fact will render the statement inadmissible. The relevant provision in the UK legislation specifies that a statement or “matter stated” will only run afoul of the hearsay rule when the purpose of making the statement was “to cause

⁵⁰ Falknor, ‘The Hear-Say Rule as a “See-Do” Rule: Evidence of Conduct’, 33 *Rocky Mt. L. Rev.* 133 (1961) atp.136.

⁵¹ See judgment in *United States v Zenni* (1980) 492 F Supp 464.

⁵² Falknor, ‘The “Hear-Say” Rule as a “See-Do” Rule: Evidence of Conduct’, 33 *Rocky Mt.L. Rev.* 133 (1961)

⁵³ *Twist v R* [2011] EWCA Crim 1143 at [13].

⁵⁴ McGrath, *Evidence*, (2nd ed. Round Hall, 2014) at 299.

another person to believe the matter”.⁵⁵ Rule 801 of the Federal Rules of Evidence takes a similar approach, defining a statement for the purposes of the rule against hearsay as “a person’s oral assertion, written assertion or nonverbal conduct, *if the person intended it as an assertion.*”

2.42 The Australian *Evidence Act 1995* takes a similar approach though it differs slightly in that it addresses the question of implied assertions within the four corners of the statutory definition of the rule against hearsay:

“Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it *can reasonably be supposed* that the person intended to assert by the representation.”⁵⁶(emphasis added)

2.43 The condition that intention should be measured by reference to what “can reasonably be supposed” was inserted by Parliament in response to the judgment of the NSW Court of Criminal Appeal in *R v Hannes* in which Spigelmann CJ adopted an extremely broad interpretation of “intention” for the purposes of the section. The judge, speaking *obiter*, stated that “an implied assertion of a fact necessarily assumed in an intended express assertion, may be said to be “contained” within that intention. For much the same reasons, it is often that a person intends the natural consequences of his or her acts.”⁵⁷

2.44 As was argued by the Australian Law Reform Commission, taken at face value, this approach has no limitations.⁵⁸ If “intent” includes any necessary assumption underlying an express assertion, any given statement could be said to intend to assert an enormous number of facts. In essence such an approach would nullify the intended effect of the section. The judgment arguably flies in the face of parliamentary intention given the fact that the judge relies on the case of *Politt v The Queen*⁵⁹, a judgment which argued against the admissibility of implied assertions as a matter of common law, prior to the enactment of the *Evidence Act 1995*.⁶⁰ The NSW, Victoria and Australian Law Reform Commissions therefore recommended in their joint Uniform Evidence Law Report that the test of intention should be what the person can reasonably be supposed to have intended and that the court may take account of all the circumstances in reaching this conclusion.⁶¹ This recommendation was subsequently adopted.⁶²

⁵⁵ *Criminal Justice Act 2003*, s. 115(3).

⁵⁶ Section 59(1), *Evidence Act 1995*.

⁵⁷ *R v Hannes* (2000) 158 FLR 359 at para. 357.

⁵⁸ Uniform Evidence Law Report (2005) p. 197.

⁵⁹ (1991-1992) 174 CLR 558 at 620.

⁶⁰ *R v Hannes* (2000) 158 FLR 359 at para. 356.

⁶¹ Uniform Evidence Law Report (2005) p. 203.

⁶² *Evidence Amendment Act 2008*, ss. 17, 18.

- 2.45** Submissions received by the Commission generally favoured the admissibility of implied assertions, noting that while hearsay dangers are not entirely absent from implied assertions, they are much reduced.
- 2.46** However, one submission argued strongly against their admission in evidence. It was argued that “logically there is little difference between classic hearsay and an implied assertion.” The view was expressed that the same reliability dangers present themselves in the case of an implied assertion; it is an out-of-court statement which cannot be tested which is relied upon to prove that which is asserted, even though the assertion is indirect. This analysis is surely correct. The same barrier to the interrogation of the evidence presents itself in the case of implied assertion; there is no way to challenge the assertion in the absence of the declarant.
- 2.47** However the argument in favour of their admission asserts that fabrication in such a situation is so unlikely as to warrant a general rule in favour of their admission, even in the absence of the opportunity to cross-examine. It is also, as has been discussed, very difficult to square implied assertions with any existing definition of hearsay.
- 2.48** **The Commission recommends that implied assertions be allowed in evidence, save where it can reasonably be supposed that the purpose of making the statement was to cause another person to believe the matter implied.**

(3) *Distinguishing hearsay and real evidence in electronic recordings*

- 2.49** Identifying hearsay has proved particularly complex in the case of electronic and automated evidence. The case law on the subject is unclear and inconsistent, but it is also evident that, in practice, electronic recordings, particularly video recordings, are regularly admitted as real evidence.⁶³ There is however little judicial authority for the practice and the need to clarify whether audio and visual recordings, including telephone calls, constitute real evidence has been raised in a number of submissions.
- 2.50** Certain key distinctions can be made to clarify the evidential status of electronic evidence. The first is that fully automated evidence, created without the intervention of human agency, is well-established as constituting real evidence. The second is that electronic recordings will usually be best characterised as an out of court statement, but not one adduced to prove the truth of its contents.
- 2.51** Fully automated evidence is generally seen as significantly different from traditional electronic recordings. As discussed in the Consultation Paper, much of the debate turns on the degree of human interaction with the

⁶³ See McGrath, *Evidence* (2nd ed. Round Hall 2014) at p. 907.

electronic or automated device.⁶⁴ While information that a machine has been programmed to record automatically may be in some sense an out of court “statement”, the absence of human intervention means that the risk of falsification is minimal and the “Chinese whispers” danger (the concern that information relayed multiple times will become increasingly distorted) obsolete. They are accordingly safely regarded as real evidence provided they meet the requirement set down by the Court of Criminal Appeal in *The People (DPP) v Murphy*.⁶⁵

2.52 The *Murphy* case held that records created without human intervention are real evidence provided that authoritative evidence is adduced “as to the function and operation of the computer.”⁶⁶ Some uncertainty as to what exactly this requires has been expressed to the Commission. Does *Murphy* require simply an everyday user of the system or must an IT specialist be called to give evidence? Or someone involved in the original design or creation of the hardware. However the law with respect to such evidence is relatively well-settled and has been held in other jurisdictions to include records from a web server recording website access⁶⁷, telephone trace records⁶⁸ and call logs⁶⁹. In the case of CCTV footage, an extremely common piece of automatically generated evidence, the Supreme Court has clarified in *The People (DPP) v McD*⁷⁰ that not only is such footage real evidence, it is so ubiquitous that no evidence as to the ordinary function of a CCTV camera is required, in much the same way as no evidence as to how a traditional camera operates would ordinarily be required.⁷¹ McKechnie J stated that CCTV evidence is materially different from other computer evidence as at no point does the information “pass through the human mind” whereas in the case of information contained in other electronic devices, the finder of fact will require evidence to establish how the information was inputted.⁷² English authority has long suggested that CCTV footage falls under the category of automatic recordings.⁷³ The Supreme Court’s decision in *McD* is also notable for its comments about how “human intervention” should be understood. The Court states that “human intervention in this context means that such material has passed through a human mind and is simply reflective of human input.”⁷⁴ This suggests that “human intervention” should be narrowly construed.

⁶⁴ LRC CP 57-2009 at p. 149.

⁶⁵ [2005] IECCA 1.

⁶⁶ *Ibid.*

⁶⁷ *R v Coventry Magistrates Court* [2004] EWHC 905.

⁶⁸ *State of Louisiana v Armstead* 432 So. 2d 837.

⁶⁹ *R v Spiby* (1990) 91 Cr App R 186.

⁷⁰ *The People (DPP) v McD* [2016] IESC 71

⁷¹ *Ibid* at [37] to [63].

⁷² *Ibid.* See also decision of the Court of Appeal in *The People (DPP) v Kirwan* [2015] IECA 228 at [38].

⁷³ *R v Caldwell, R v Dixon* (1993) 99 Cr App Rep 73, see also *Cross & Tapper on Evidence* (11th ed. Oxford 2007) p. 64.

⁷⁴ *The People (DPP) v McD* [2016] IESC 71 at [63].

2.53 This becomes less clear for audio recordings and other electronic gathering of information instigated by human action. These kinds of records include telephone conversations, text messages, police interviews and other pre-planned information gathering. Recordings such as these are arguably documents in the same way as a written account of a particular happening. The relevant statutory definitions of a “document” would suggest this, particularly the *Criminal Justice Act 2011* which defines a document as “information recorded in any form and anything on or in which information is recorded and from which information can be extracted.” In *McCarthy v Flynn*, the Supreme Court, in ruling that x-rays constituted documents, looked to the etymology of the word:

“Etymologically the word “document” is derived from the Latin word “documentum” which in turn comes from the verb “docere”. It is therefore something which teaches or gives information or a lesson or an example for instruction. The main characteristic of a document is then that it is something which gives information.”⁷⁵

2.54 There is also English authority that devices which record information for the purpose of its later extraction must be considered documents irrespective of their form.⁷⁶

2.55 This poses a difficulty given that real evidence is usually defined by contrast with documentary evidence. Thus, *Phipson on Evidence* defines real evidence as a “material object, other than documents, produced for the inspection of the court.”⁷⁷ Documents have been held to be admissible as real evidence only to demonstrate some fact evident only from the bare fact of its existence. In *Leopardstown Club Ltd v Templeville Developments Ltd*⁷⁸ the High Court (Edwards J) explained the rule as follows:

“If a document is tendered in evidence as a material object, regardless of the words contained in it, for instance to show the bare fact of its existence, the substance of which is it is made (whether parchment or paper) or the condition that it is in (whether crumpled or torn or perhaps in the case of stolen banknotes stained with dye), it constitutes real evidence.”

2.56 This all suggests a serious difficulty in the classification of electronic and automated evidence. Nonetheless, the courts regularly, and uncontroversially, admit electronic recordings as real evidence.

2.57 Photographs and video and audio footage in particular are traditionally regarded as real evidence, though they must be relevant and meaningful to

⁷⁵ [1980] 114 ILTR 22 at 23.

⁷⁶ *Grant v Southwestern and County Properties Ltd*[1975] Ch 185.

⁷⁷ *Phipson on Evidence* (18th ed. Sweet and Maxwell 2013) at [1-14]. See also McGrath, *Evidence* (2nd ed. Round Hall 2014) noted at 2.08, there are three main types of evidence, “oral evidence”, “real or physical evidence” and “documentary evidence”.

⁷⁸ *Leopardstown Club Ltd v Templeville Developments Ltd*[2010] IEHC 152 at [5.12].

be admitted.⁷⁹ Photographic, video and audio evidence must also be authenticated. Video evidence is regularly tendered and admitted as real documentary evidence. The recording must be authentic and of sufficient quality and probative value.⁸⁰ Standard rules of evidence and judicial discretion apply and relevant, meaningful and authentic evidence may therefore be excluded in accordance with general principles of the law of evidence, for example because the prejudicial effect of the evidence outweighs its probative value.⁸¹

2.58 In criminal proceedings video footage is admissible as evidence and as a tool to identify an alleged offender, as is a still image taken from a video recording. The very high degree of reliability courts in Ireland attach to such evidence may be seen in the judgment of the Court of Criminal Appeal in *The People (DPP) v Maguire* where the Court described the role of the jury presented with video evidence as “similar to that of a jury brought to the scene of a crime.”⁸² However, courts have suggested that video evidence may be the best evidence available in situations beyond simple identification and should be admitted as evidence of events, rather than just identification. In *Eastern Health Board v MK*, Barrington J in the Supreme Court was of the opinion that as to video evidence generally, far from breaching the hearsay rule, “there may be cases where a tape recording, once established as being authentic, may be the best evidence of the happening of a particular event.”⁸³

2.59 Barrington J discussed the niche into which electronic and automated documentary evidence fell and how best the law of evidence could or should accommodate it. He noted that electronic evidence could be seen as an evolved type of evidence providing real insight and categorical evidence, building a clear picture of what occurred for presentation to the court. In doing so he discussed how:

“a tape recording may give an extremely accurate picture of how an accident happened. Likewise a tape recording may give a more accurate picture of a burglar than a witness who merely had a fleeting glance at him in a moment of crisis. Even in the case of reported speech a tape recording may be more accurate than hearsay because it can give us the exact words which the person whose speech is recorded used and also the demeanour of that person at the time when he used them.”⁸⁴

⁷⁹ See *The People (DPP) v Maguire* [1995] 2 IR 286, 290. Barron J describes the role of the jury presented with video evidence as “similar to that of a jury brought to the scene of a crime.”

⁸⁰ The quality of the video or audio evidence has been held to be a matter going to weight. See *The People (DPP) v Prunty* [1986] ILRM. 716.

⁸¹ See *The People (DPP) v Foley* [2007] 2 IR 486 where the video was excluded on the grounds that the prosecution purported to identify the suspect solely by the evidence of Garda who claimed to know him socially.

⁸² *The People (DPP) v Maguire* [1995] 2 IR 286, 290.

⁸³ [1999] 2 IR 99, 120.

⁸⁴ *Ibid.*

- 2.60** The Court thus indicated that it supported the admission of such data and placed it at least on a par with, if not superior to oral testimony in such circumstances. These comments were, however, strictly speaking *obiter*.⁸⁵
- 2.61** The continuing absence of any express judicial or statutory authority for the widespread categorisation of electronic evidence leaves some lingering doubt and uncertainty in the minds of practitioners. The importance of video and audio recordings to the modern trial makes clarity on this question an important issue. The Commission has received a number of submissions suggesting that this should be clarified in legislation.
- 2.62** While it has been suggested in submissions to the Commission that the position be clarified with an express statutory classification of certain electronic recordings as real evidence, there are reasons to be cautious about such an approach. Out of court statements tendered in the form of and audio or video recording have the potential to do as much injustice as traditional hearsay statements. In *Crawford v Washington*⁸⁶, the United States Supreme Court addressed this concern in the case which re-asserted the Sixth Amendment's confrontation clause. In *Crawford*, the Supreme Court overturned the appellant's conviction, finding it to be unsafe in light of the fact that a video-recorded statement of his wife (who was also accused of the same crime) given in interview in the police station was played to the court and entered in evidence against him.⁸⁷ The Court noted the resemblance of such evidence to the 16th and 17th century practice of pre-trial examinations by Justices of the Peace in England, particularly the trial of Sir Walter Raleigh.⁸⁸ *Crawford* illustrates that simply placing electronic recordings wholesale into the category of real evidence could seriously undermine the protection the rule against hearsay provides.
- 2.63** Much of the concern underlying the argument to classify electronic recordings as real evidence stems from a belief that subjecting such evidence to the strictures of the hearsay rule will work to unduly exclude reliable evidence. As has been expressed by a number judges quoted above, audio-visual recordings will ordinarily be highly probative and often more accurate and more reliable than eye-witness testimony.
- 2.64** Some of this concern may derive from a slightly inaccurate characterisation of the rule's scope. As previously discussed in the Report⁸⁹, there is no general rule against the introduction of out of court statements, only against the introduction of such a statement to prove the truth of its contents. The key

⁸⁵ While the Court was unanimous in ruling the evidence had been improperly admitted, the judges offered different approaches in allowing the appeal.

⁸⁶ 541 U.S. 36 (2004).

⁸⁷ The Supreme Court has upheld the constitutionality of giving evidence by live video-link but not recorded video statements as was the case here. See *Donnelly v Ireland* [1998] 1 IR 321.

⁸⁸ The Treason Trial of Sir Walter Raleigh: See

⁸⁹ <http://law.harvard.edu/publications/evidenceiii/articles/note-treasontrial.htm>.

See paras. 2.19 – 2.32 above.

question is the purpose for which the statement is adduced i.e. whether the statement is adduced to prove the truth of the facts asserted. Electronic evidence, such as video recordings will ordinarily not be relied on as proof of the truth of their contents in the manner of the evidence in *Crawford*. Rather the recording will be adduced to invite the jury to draw certain inferences. By way of example, video footage of a vehicle collision would not speak directly or testimonially in any sense to the culpability of the driver but is obviously an extremely valuable piece of evidence from which the jury can draw conclusions. More commonly, video evidence is adduced to assist in identification; a question which courts have insisted must be confirmed by a witness previously acquainted with the accused who can come to court to identify him or her.⁹⁰ Such evidence does not speak testimonially to the facts in issue but can rather be the reliable basis for the drawing of certain factual inferences and assisting witnesses in identifying the relevant persons. Thus generally audio-visual recordings will escape the hearsay rule unless it takes the form of a testimonial or accusatory statement of the like seen in *Crawford*.

- 2.65** Drawing careful distinctions around different species of electronic evidence, such as automatically generated evidence and non-hearsay documentary evidence, allows ample scope for the use of reliable evidence of this kind while continuing to properly proscribe the kind of evidence the law has always regarded as unreliable.

C Current Approach to Inclusion and Exclusion: Overview of the Law in Ireland

(1) *Statutory basis for admitting hearsay in interlocutory hearings*

- 2.66** Order 40, rule 4 of the *Rules of the Superior Courts 1986* provides that "[a]ffidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed." Hearsay evidence was admitted in proceedings seeking an interlocutory injunction in *Murphy v MC, JW, PC and JC* where the Supreme Court characterised reliance on hearsay as "one of the hallmarks of the traditional interlocutory procedure."⁹¹ In *Lowe v Burns*⁹² the High Court (Laffoy J) cited with approval Delany and McGrath who suggest that "it is possible for a deponent [in an

⁹⁰ See *The People (DPP) v Maguire* [1995] 2 IR 286 at 289 and *R v Leaney* [1989] 2 SCR 393.
⁹¹ Supreme Court 8 March 2004, ex tempore judgment of Keane CJ.
⁹² [2012] IEHC 162 at [3.6].

interlocutory application] to give second-hand hearsay evidence whereby he avers that he has been informed of something by X who in turn has been informed by Y.”⁹³

(2) **Restrictions on admission of hearsay in interlocutory hearings**

2.67 Nonetheless, even on interlocutory applications, hearsay is admitted only under important strictures.⁹⁴ A witness giving evidence by affidavit must explicitly name his or her source and no reliance may be placed on statements attributed to persons unnamed.⁹⁵ The witness must also give a sufficient level of detail and an affidavit in an application for an interlocutory injunction must not be vague and indefinite though it need not reach the level of detail expected at trial.⁹⁶

2.68 The courts have said that hearsay may not be suitable in certain circumstances, even in interlocutory applications. In *Jenkins v MxswEEP Ltd*⁹⁷ the High Court (Laffoy J) considered that it was not suitable to admit hearsay where there was a dispute between the parties as to the factual basis for the application. In *Ó Ceallaigh v An Bord Altranais*⁹⁸ the Supreme Court considered that an application for an interlocutory injunction preventing a midwife from practice pending the outcome of a professional disciplinary inquiry should not be made substantially on the basis of hearsay.⁹⁹ In *Moloney v Jury's Hotel plc*¹⁰⁰ the Supreme Court held that a court may not accept documentary hearsay evidence where it is contradicted by oral evidence in the case.

⁹³ Delany and McGrath, *Civil Procedure in the Superior Courts* (Round Hall 3rd ed. 2012) at paragraphs [20] - [71].

⁹⁴ An affidavit is, of course, a sworn document with penalties for falsehoods and a jurat. See, for example, Irvine J's deprecation of evidence on affidavit as "hearsay" in *Murray v Newsgroup Newspapers Ltd* [2011] 2 IR 156, 193 at [71]. See also *Smithkline Beecham plc v Antingen Pharmaceuticals Ltd* [1999] 2 ILRM 190 where McCracken J noted that it can be dangerous to rely upon hearsay in an application for an interlocutory injunction.

⁹⁵ *Collen Construction Limited v Building and Allied Trades Union and Daniel O'Connell* [2006] IEHC 159.

⁹⁶ In *JRM Sports Ltd v Football Association of Ireland* [2007] IEHC 67, Clarke J stated: "It is acceptable in interlocutory applications, because of the urgent nature of the application and the fact that affidavits have to be filed which deal with all of the relevant facts, for those swearing affidavits to give hearsay evidence and sometimes not to give the level of detail that might be expected if a case goes to trial with witnesses. Nonetheless it is not acceptable to simply state that the deponent has received an assurance from an unnamed person and in vague and indefinite terms. Those complaints are simply far too vague to be treated as substantial." [2011] IEHC 101.

⁹⁷ [2000] 4 IR 54. See also the discussion of *Borges v Medical Council* [2004] 1 IR 103 in Chapter 3.
⁹⁸ [2000] 4 IR 54, 96. "[A]pplications of this nature should not be based upon hearsay as to the substance of the application".

¹⁰⁰ Supreme Court 12 November 1999, discussed at paragraph 4.14 of the Consultation Paper.

(3) *Statutory provisions concerning the hearsay rule in criminal proceedings*

- 2.69** Section 21 of the *Criminal Justice Act 1984* implemented the provisional recommendation of the Commission in its 1980 *Working Paper on the Rule Against Hearsay*,¹⁰¹ by providing for the admissibility - in criminal proceedings only - of written statements as proof of the facts asserted in them, subject to the condition that this is not to occur where an objection is made within 21 days of receipt of notice of intention to tender the statement. The Act requires that the declarant be aware that if the statement were tendered in evidence, he would be liable to prosecution for any false representations made.
- 2.70** Part II of the *Criminal Evidence Act 1992* creates an exception to the rule against hearsay in respect of documents compiled in the ordinary course of business. The Act provides that a document is admissible to prove the facts it asserts in any criminal proceeding where the requirements of section 5 of the 1992 Act are met. The requirements are that the information was compiled (a) in the ordinary course of business; (b) was supplied by a person who had, or may be supposed to have had, personal knowledge of the matters dealt with and (c) where the information is in non-legible form, it be reproduced in the course of the normal operation of the reproductive system concerned.
- 2.71** There are a number of important limitations. It does not apply to privileged information or information compiled in anticipation of proceedings or any criminal investigation. The judge also retains a discretion to exclude evidence notwithstanding formal adherence to the requirements of s.5 where it is in the interests of justice to do so. A party intending to avail of s.5 must also give notice of his intent to do so by serving a certificate as to admissibility either as part of the book of evidence or not more than 21 days before trial. The 1992 Act is discussed in detail below.¹⁰²
- 2.72** Healy notes that where a statutory suspension of the rule against hearsay is likely to have a draconian effect for a party in the proceedings the courts tend to interpret the provision restrictively.¹⁰³ Thus in *Criminal Assets Bureau v Hunt*¹⁰⁴ the Supreme Court considered the effect of sections 8(5) and 8(7) of the *Criminal Assets Bureau Act 1996*, which provide that a bureau officer may exercise or perform his or her powers or duties on foot of any information received by him or her from another bureau officer and provides that any information, documents or other material obtained by bureau officers shall be admitted in evidence in any subsequent proceedings.

¹⁰¹ Law Reform Commission *Working Paper on The Rule Against Hearsay* (LRC WP 9 -1980).

¹⁰² See para. 2.146.

¹⁰³ Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004).

¹⁰⁴ *Criminal Assets Bureau v Hunt* [2003] 2 ILRM 481.

2.73 In *Hunt*, Keane CJ considered that the precise scope of the abridgement of the rule against hearsay made by those provisions was difficult to identify. He concluded that the 1996 Act did not intend to waive the hearsay rule but rather the rule was relaxed where it was a necessary proof in proceedings, whether under the 1996 Act or other legislation.¹⁰⁵ Thus, where a bureau officer takes certain actions as a result of information, documents or other material received from another bureau officer, the court may act on the sworn evidence of the bureau officer that he or she received the information, documents or other material from the other bureau officer

(4) *Limited statutory reform of the rule against hearsay in civil proceedings*

2.74 The *Bankers' Books Evidence Act 1879*¹⁰⁶ makes copies of entries from the books and records of banks admissible against any person as *prima facie* evidence. The term "bankers' books" is widely defined in the 1879 Act to include any records used in the ordinary course of the business of a bank, and includes correspondence from an account holder to the bank.¹⁰⁷ For an entry in a banker's book to be admissible, the person seeking to admit the copy must prove that it is an original copy of a document falling within the definition of bankers' books.

2.75 Similarly, a number of specific Acts dealing with the admissibility of documentary evidence allow for statements contained in documents compiled out-of-court to be admitted as evidence of the truth of those statements. For example section 68 of the *Civil Registration Act 2004* makes a signed register entry recording a birth, death or marriage evidence of the fact recorded.

2.76 The *Taxes Consolidation Act 1997* also creates a limited exception to the rule against hearsay for computer-generated evidence used in tax cases.¹⁰⁸

2.77 In addition to the general proposals for reform made in the Commission's 1988 *Report on the Rule Against Hearsay in Civil Cases*¹⁰⁹ the Commission had recommended that out-of-court statements made by children be

¹⁰⁵ *Criminal Assets Bureau v Hunt* [2003] 2 ILRM. 481, 484.

¹⁰⁶ The *Bankers' Books Evidence Act 1879* as amended is discussed in detail at para. 2.130.
¹⁰⁷ *Volkering v Haughton* [2010] 1 IR 417, *R v Dadson* (1983) 71 Cr App R 91. Prior to the amendment of the 1879 Act by section 131(d) of the *Central Bank Act 1989*, Murphy J had suggested obiter that the term "bankers' books" would not include a file of the bank containing "various letters from various people" in *JB O'C v PCD* [1985] 1 IR 265. It has been suggested in Johnston, *Banking and Security Law in Ireland* (Butterworths, 1998) that this narrow meaning would be overtaken by the expanded definition of section 131(d).

¹⁰⁸ For example section 917M(4) of the *Taxes Consolidation Act 1997* (inserted by the *Finance Act 1999*) provides that "unless a judge or any other person before whom proceedings are taken determines at the time of the proceedings that it is unjust in the circumstances to apply this provision, any rule of law restricting the admissibility or use of hearsay evidence shall not apply to a representation contained in a document recording information which has been transmitted in accordance with section 917F(1) [which deals with the electronic transmission of returns.]"

¹⁰⁹ *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988).

admitted in family proceedings in certain circumstances subject to specific safeguards. The general proposals for reform in the Report were not implemented by the Oireachtas¹¹⁰ but this specific recommendation was implemented by section 23 of the *Children Act 1997*.

- 2.78** The Commission has consulted on the application of section 23 and understands that there are substantial difficulties with the section in practice, particularly in child care proceedings. Section 23 prescribes four situations in which the out of court statement may be admitted: (a) the child is unable to give evidence by reason of age, (b) the giving of oral evidence would not be in the interest of the welfare of the child, (c) its admission is in the interest of justice and (d) its admission would not cause unfairness to any of the parties.
- 2.79** While these provisions may not appear problematic, commentators have advised that section 23 does not give a “blanket licence” to admit hearsay evidence.¹¹¹ On the contrary, the number of factors to be considered by the court in allowing such evidence has provided fertile ground for protracted legal debate. A District Court decision, drawing on a number of precedents in child care cases, has identified a three step process.¹¹² First, a determination is made as to whether the child is competent to give evidence or if it is not in their best interests. Second the court will determine whether the evidence should not be admitted having regard to the interests of justice and fairness to the accused. Thirdly the court will decide what weight, if any, to be given to the hearsay evidence in light of all the circumstances.¹¹³ The Court also set down a number of sub-factors which should be used to determine each of the three questions. Thus, arguably the effect of section 23 has been to impose a relatively stringent test of admissibility.
- 2.80** While children’s hearsay statements are usually ultimately admitted, the Commission understands that adjudication on these issues has turned section 23 applications into a long, drawn out process. Reference was made to a child care case in which an application ran for more than three weeks. In this process, judges often interview children to see if they are capable of giving evidence, a task for which they may not be suited and for which they may not have any training.¹¹⁴ It is unsatisfactory that extremely vulnerable children will have to face such lengthy legal proceedings.
- 2.81** The Special Rapporteur on Child Protection has argued that, in the context of family and child care proceedings, out of court statements of children should

¹¹⁰ The Commission understands that preparatory work on a Government Civil Evidence Bill, based on the Commission’s draft Bill in the 1988 Report, had been initiated in the early 1990s, but that this did not proceed to the publication of a Bill.

¹¹¹ See Coulter, ‘Many challenges in dealing with children’s evidence in child protection cases where child sex abuse is alleged’ [2015] *I.J.F.L* 18(4), 85.

¹¹² *Child and Family Agency v VR*, District Court 7 October 2016.

¹¹³ *Ibid* at 4.

¹¹⁴ See MacMahon, ‘Can Anybody Hear Me? The Duty to Promote the Voice, Wishes and Interests of Children’, [2014] *I.J.F.L* 17(1), 4-8

be presumptively admissible subject to certain criteria going to weight.¹¹⁵ Dr Shannon also recommends that the judge continue to have a discretion to exclude statements where the interests of justice so require. This view was also expressed in submissions to the Commission.

- 2.82** It is arguable that the premise underlying the rule against hearsay, namely that evidence given on the stand, under oath, is more reliable than recorded statements, has lesser force with respect to children’s evidence in child care proceedings. Giving live evidence in such cases will almost invariably involve testifying with the child’s parents in the courtroom, and in some cases parents will even personally cross-examine them on the allegations of abuse. A child’s evidence in such cases is arguably much less reliable than a pre-trial statement made to a social worker or a Garda.
- 2.83** **The Commission recommends that the draft Evidence Bill provide a presumption in favour of the admissibility of children’s out of court statements in public and private proceedings involving the welfare of a child, or in any family law proceedings, subject to safeguards as to weight and a residual discretion to exclude where the interests of justice so require.**

(5) *Hearsay in proceedings other than court proceedings*

- 2.84** Administrative adjudicative bodies are required to act fairly and in accordance with the constitutional requirements of fair procedures.¹¹⁶ In *Kiely v Minister for Social Welfare*¹¹⁷ Henchy J held that quasi-judicial tribunals (in that case a social welfare appeals officer) must not subject one side to the full rigours of an oral hearing and cross-examination while relying on hearsay from the other side thereby denying one side the opportunity to test all the other side’s evidence.¹¹⁸ In *J & E Davy v Financial Services Ombudsman*¹¹⁹ Charleton J stated that tribunals are entitled to some latitude as to how they order their procedures but that they may not imperil a fair resolution of a conflict by adopting a procedure which infringes fundamental principles of constitutional fairness.¹²⁰ The extent to which administrative procedures must approach those of a court hearing depends on the

¹¹⁵ Shannon, Seventh Report of the Special Rapporteur on Child Protection (2014) at p. 73-74 available at <http://www.dcyv.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf>.

¹¹⁶ Noted in the *Consultation Paper on Hearsay in Civil and Criminal Proceedings*, Chapter 2.

¹¹⁷ *Kiely v Minister for Social Welfare (No. 2)* [1977] I.R. 267 at 281-282.

¹¹⁸ This is discussed at length in the Consultation Paper at paragraph 2.70 and 2.71. A tribunal may admit hearsay provided that the admission does not imperil a fair hearing. In *Kiely*, the fair hearing was imperiled by imbalance in the conditions under which the tribunal allowed the parties to lead evidence.

¹¹⁹ [2008] IEHC 256.

¹²⁰ This is discussed in detail in the Consultation Paper at para. 4.08.

consequences of an adverse decision for the person affected¹²¹ and indeed the Supreme Court decision in *Borges v Medical Council*¹²² involved a quasi-judicial tribunal but provides much guidance on the treatment of hearsay evidence in the courts. The Commission considers issues surrounding the receipt of evidence in non-court proceedings more fully in an appendix to this report.¹²³

D The Commission's 1988 Report on Hearsay in Civil Cases

2.85 In its 1988 *Report on the Rule Against Hearsay in Civil Cases*¹²⁴ the Commission examined the main reasons for excluding hearsay.¹²⁵ The Commission noted that it is clearly preferable that evidence be given orally in court and be testable by cross-examination¹²⁶ but recommended that, subject to a series of conditions and judicial safeguards, the rule against hearsay should be amended along the lines provided for in the English *Civil Evidence Act 1995* to provide for the admissibility of out-of-court statements in civil cases (that is, any assertion whether oral, written or by conduct) provided it was the best available evidence, the witness was unavailable (through death, refusal, poor health, or unknown or awkward location) and the other parties had advance notice. The Commission recommended that first-hand and multiple (second-hand or more remote) hearsay be treated alike¹²⁷ because automatically excluding remote hearsay might sometimes exclude potentially valuable evidence. The Commission also recommended that three specific safeguards be put in place, namely, a judicial discretion to exclude hearsay of insufficient probative value, that admissibility be conditional on calling the source as a witness for cross-examination whenever available, and an advance notice requirement.

2.86 There was some judicial support for the reform proposals made in the 1988 Report¹²⁸ and the Commission made broadly similar provisional recommendations in the *Consultation Paper on Hearsay in Civil and Criminal Cases*.¹²⁹ The Commission has reconsidered the issue and has changed its recommendation in this Report.¹³⁰

¹²¹ *Flanagan v University College Dublin* [1988] IR 724, 730-731.

¹²² *Borges v Irish Medical Council* [2004] 1 IR 103. Discussed more fully at para. 3.108 below.

¹²³ See Appendix B.

¹²⁴ LRC 25-1988. This was preceded by the *Working Paper on Hearsay* (LRC WP 9-1980).

¹²⁵ This is discussed further in paragraphs 4.17-4.24 of the Consultation Paper.

¹²⁶ *Ibid* at 6.

¹²⁷ At paragraph 9 on page 7 of the Report.

¹²⁸ See, for example, *Hughes v Staunton* High Court 16 February 1990, paragraph 3.02 above. See also Healy, *Irish Laws of Evidence* (Thomson Roundhall 2004) at 257.

¹²⁹ See paras. 4.106 – 4.117 of Consultation Paper (LRC CP 60 – 2010).

¹³⁰ See Part E of this Chapter.

2.87 The Commission argued in 1988 that the two functions of the law of evidence are to determine how facts may be proved in a court of law and what facts may not be proved there.¹³¹ In relation to the rule against hearsay it noted that:

“hearsay is excluded because the twin safeguards of an oath and cross-examination do not attend its introduction. The law takes the view that truth is best ascertained by the unrehearsed answers, on oath or affirmation, of witnesses who have actually perceived the relevant events and who are then subjected to cross-examination in the presence of the court. A hearsay statement is, by definition, not made before the court and, if the maker does not testify, he or she cannot be cross-examined nor can demeanour be observed or credibility tested. Where the hearsay statement narrated is oral, there is the possibility that it may be altered in the telling. Where it is made formally, there is the danger that it will be tailored to the requirement of the party making it. A further reason sometimes given for the rule is the possibility that a jury, where there is one, will be confused by a proliferation of evidence of little value. This would add to the cost of litigation. Hearsay evidence is also said to operate unfairly by catching the other party by surprise.”¹³²

2.88 The Commission noted that the exceptions to the rule against hearsay developed in a piecemeal fashion and the law could not be regarded as coherent and logical. “[W]hen the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case and without regard to any question of principle.” The Commission concluded that: “[t]he existing law, in so far as it consists of exceptions to the rule, can therefore legitimately be criticised as illogical, arbitrary and unduly complex. In addition, the general law as to hearsay, whatever the historical reasons may be, is manifestly far too restrictive.”¹³³ Nonetheless the Commission acknowledged that it was not without rationale or justification and that it was clearly preferable that evidence be given orally in court and tested by cross-examination. The Commission considered that the approach which would most effectively deal with the inadequacies in the law was that adopted in the Working Paper, i.e. providing that, in general, hearsay evidence should be admissible, but also providing that certain conditions must be met and specific safeguards observed before it is admitted summarised, as follows:

(a) the court should have a discretion to exclude any out-of-court statement which is of insufficient probative value;

¹³¹

1988 Report Chapter 2, para 1.

¹³²

1988 Report Chapter 2, para 4.

¹³³

1988 Report Chapter 2, para 6.

(b) the admissibility of such evidence should be conditional on the person who is the source of the information being called and subjected to cross-examination; and

(c) whenever that person is available advance notice should be required of the intention to call such evidence, unless the court in stated circumstances waives that requirement.

2.89 This, it was argued, was preferable to a rigidly exclusionary approach subject to exceptions, which carried the serious risk that valuable and relevant evidence not coming within any of the specific exceptions would be excluded. The reasoning on this matter in the Working Paper did not evoke any dissent (though there were only two responses) and was in line with the approach adopted in some other common law jurisdictions. The Commission now considers the rule against hearsay in civil proceedings afresh and gives reasons for preferring a different approach to the 1988 Report and the 2010 Consultation Paper.

E The Rule Against Hearsay in Civil Proceedings: Reconsidering the Recommendations of the 1988 Report

2.90 Civil proceedings generally concern private disputes the parties to which may be individuals and organisations. The State may also be involved in civil proceedings in certain family and company law matters, such as wardship, care and disqualification proceedings. Where an action is brought by or against the State for negligence, breach of contract or personal injuries etc, the action is a private law matter in spite of the State body being a public body. Judicial review proceedings involve matters of public law and are an exception to the general classification of civil proceedings as private disputes between private parties.

2.91 Criminal proceedings are usually initiated by the State acting through the Director of Public Prosecutions or a statutory body which is authorised to prosecute at summary level but a private individual (a “common informer”) may institute a private prosecution in minor offences triable summarily and initiate a prosecution on indictment.

2.92 In common law jurisdictions the dominant view¹³⁴ has come to be that certain rules of evidence should be applied differently in civil and criminal proceedings and in the 2010 *Consultation Paper on Hearsay in Civil and Criminal Cases* the Commission provisionally recommended that evidence

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The development of this view is discussed at paragraph 4.25 of the *Consultation Paper on Hearsay in Civil and Criminal Cases*: “[i]t is notable that as early as the 1960s, a dominant view, though not a consensus emerged that civil proceedings are to be differentiated from criminal proceedings”. See Zuckerman *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989) at 216.

should not be excluded in civil proceedings on the basis that it was hearsay.¹³⁵ Having considered the question further, the Commission has revised its view.

2.93 There are three reasons why the Commission recommends this approach.

- The human rights dimension: the Constitution imposes boundaries on the options for reform of the rule against hearsay rule. All proceedings, civil or criminal, must adhere to the Constitutional right to fair procedures¹³⁶ so reform of the rule against hearsay must not offend against these fundamental requirements. Art. 6(1) of the European Convention on Human Rights also binds contracting states to certain minimum requirements of fair procedures, including the rule against hearsay, in both civil and criminal proceedings.
- The practical effect: although some common law jurisdictions have formally abolished the rule against hearsay in civil proceedings, a number of safeguards remain in place and judges continue to be guided by the rule in determining what weight, if any, can be afforded to hearsay evidence. Nonetheless, the absence of a strong exclusionary rule may lead to inappropriate reliance on hearsay evidence in civil cases. The Commission considers that such reforms have not had the intended effect of making civil proceedings more efficient, effective and fair, as discussed later in the chapter.
- Consolidation: one of the recommendations of this Report is that the rules of evidence be clarified and consolidated. In keeping with the Commission's goal of consolidation of the law of evidence, it considers that there should be a single *Evidence Bill* applicable, in general, to both civil and criminal law.

2.94 It is important in both civil and criminal proceedings that evidence be testable and reliable. This is best achieved using oral evidence and cross-examination. It is appropriate that the principle of requiring that evidence be given orally with the opportunity to cross-examine be retained with exceptions as necessary. There is no major evidence that this method works injustice.

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¹³⁶

Consultation Paper on Hearsay in Civil and Criminal Cases, paragraph 4-107. Articles 38.1 and 40.3.1 of Bunreacht na hEireann. The right to fair procedures has its roots in the natural law concepts of *nemo iudex in causa sua* and *audi alteram partem* but has long been recognised as having a constitutional character and foundation by virtue of Art. 40.3.1. See *McDonald v Bord na gCon* [1965] I.R. 217 at 242 per Walsh J; and Hogan and Morgan, *Administrative Law in Ireland* (4th ed. Round Hall, 2010) at 12-52.

(1) *The constitutional and human rights dimension*

- 2.95** The rules of evidence were created to ensure that evidence admitted in court is relevant. These rules, rooted in the common law, now operate within a constitutional framework. Consequently, they are subject to constitutional imperatives and restraints. Healy has recognised this “constitutionalisation” of the rules of evidence and, in examining its effect, notes that: “The constitutionalisation of Irish evidence law distinguishes it in many instances from English law precedent, which lacks the principled framework of a written Constitution and has increasingly proceeded by reference to statute and piecemeal judicial qualification to fundamental tenets of an early age.”¹³⁷
- 2.96** Evidential rules which originated in a pre-Constitution Ireland, grounded on notions of fairness and justice, now have a constitutional dimension.¹³⁸ As the rules of evidence determine the evidence that may be admitted into court, they have a direct impact on the fairness of the proceedings in question
- 2.97** The rule against hearsay developed because hearsay evidence was perceived as inherently unreliable and was therefore excluded. Now constitutional considerations also apply. The Constitution has played a huge role in the development of the law of evidence and criminal procedure across the board. For example, in *The People (Attorney General) v O'Brien*¹³⁹ the Supreme Court held that evidence obtained as a result of a deliberate and conscious violation of an individual’s constitutional rights was not admissible unless there were extraordinary excusing circumstances (such as an immediate need to preserve evidence or to protect the constitutional right of another person).¹⁴⁰
- 2.98** The rule against hearsay has long been recognised as having constitutional weight, as most recently affirmed in *Borges v Medical Council* where the Supreme Court held that a trial or tribunal conducted without the opportunity to challenge important evidence on cross-examination could constitute a breach of constitutional fair procedures.¹⁴¹
- 2.99** In the Supreme Court decision *In re Bovale Developments Ltd*¹⁴² Hardiman J emphasised in the context of civil disqualification proceedings that “the fundamental objection to the admissibility of hearsay evidence in proceedings before a court is that, to the extent that it is admitted...it deprives the applicant of his right to cross-examine.” In that case the hearsay evidence was “gravely damaging to [the respondent’s] reputation and his ability to earn

¹³⁷ Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) at 1-06.

¹³⁸ “The traditional concept of justice or fairness that has grown up in Ireland has a constitutional basis.” Fennell, *The Law of Evidence in Ireland* (3rd ed. Bloomsbury Professional 2009) at 29.

¹³⁹ *The People (Attorney General) v O'Brien* [1965] IR 142. See also *People (DPP) v Healy* [1990] 2 IR 73; *People (DPP) v Kenny* [1990] 2 IR 110.

¹⁴⁰ This has since been refined by the Supreme Court in *The People (DPP) v JC* [2015] IESC 31 such that the relevant question is now whether it was the breach of the individual’s constitutional rights that was deliberate, rather than simply the act itself.

¹⁴¹ [2004] 1 IR 103 at 115.

¹⁴² [2011] IESC 24.

a livelihood” where the right to a good name and the right to earn a livelihood are rights protected under the Constitution; therefore “[p]ersons, official or otherwise, who [make] such allegations must be prepared to stand them up in direct evidence.” Hardiman J’s argument is that the crux of the objection against hearsay, the inability to cross-examine the maker of the statement, applies equally to civil proceedings.¹⁴³

2.100 The law of evidence applies to the adjudicative decision-making of the courts under Article 34.1 of the Constitution. A number of leading Supreme Court decisions have held that other adjudicative bodies whose decisions affect or determine the rights of legal persons (bodies exercising quasi-judicial functions) must also comply with the constitutional requirement of fair procedures. Whilst they must act judicially, they are not necessarily required to comply with all the rules of evidence. The recommendations in this Report and the draft Bill apply to civil and criminal proceedings only, and not to tribunals or other adjudicative bodies, but it is important to recognise the development of the constitutional right to fair procedures which has taken place in cases concerning administrative bodies and tribunals. Appendix B to this report considers the role of evidence in bodies other than courts separately.

2.101 *Re Haughey*¹⁴⁴ emphasised the importance of cross-examination in order to vindicate the right to fair procedures guaranteed in Article 40.3.1. In the course of an inquiry before an Oireachtas Committee, affidavit, rather than oral, evidence was given and the applicant had therefore been denied an opportunity to cross-examine the witnesses. Ó Dálaigh CJ held that the role of the applicant in the inquiry was in the nature of an accused and not merely of a witness and he therefore had a right to cross-examine his accusers, subject to relevance. This principle was not limited to civil or criminal court proceedings but specifically involved any adjudicative processes where a person’s rights are at issue.

2.102 In *Kiely v Minister for Social Welfare (No 2)*, Henchy J in the Supreme Court held that:

“Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore

¹⁴³ Hardiman J was a zealous protector of the right to cross-examine throughout his judicial career and he returned to the subject in his last judgment in *Oates v Browne* [2016] IESC 7. The case concerned the inability of defendants to Road Traffic offences to independently analyse the intoxilyser evidence on which they are prosecuted, with such evidence regarded as conclusive and irrebuttable. In quashing the decision of the lower court, Hardiman J said: “The appellant was a defendant facing a criminal charge. As such, he is entitled to “test” the evidence against him and to do so by “[cross]-examination; to “contest” the reading of the intoxilyser; not to face a trial in which “the evidence furnished by the Certificate of the Bureau is incontestable”...or in which the intoxilyser “can by its own print out convict an accused without there being in reality any opportunity to rebut, notwithstanding that under the Act the presumption is rebuttable.”

¹⁴⁴ [1971] IR 217. This case is discussed at paragraph 2.85 of the Consultation Paper.

courtroom procedures and the like – but they may not act in such a way as to imperil a fair hearing or fair result.”¹⁴⁵

- 2.103** *Kiely* was an appeal against a decision made by a social welfare appeals officer. In reaching his decision, the officer required the plaintiff’s medical witnesses to appear, to give evidence under oath and to submit themselves to cross-examination. However he admitted medical evidence from the respondent in the form of a letter adverse to the plaintiff. The Supreme Court found this to be a breach of fair procedures because the two sides were treated differently. Henchy J concluded that, when “the scales of justice” were tilted in favour of one party, as they had been in this case, it could not be said that there had been a fair hearing and such a hearing was in breach of natural justice.
- 2.104** The Supreme Court also stressed the importance of fair procedures in *Borges v Medical Council*.¹⁴⁶ The applicant was a medical practitioner in Ireland and had also practised in England. Following complaints the UK General Medical Council found him guilty of serious professional misconduct and struck him off the UK register of medical professionals. On appeal, the Privy Council upheld the decision of the committee. After this, the Medical Council of Ireland informed him that that Council’s Fitness to Practise Committee would hold an inquiry into the same allegations of professional misconduct but the witnesses who had testified in the proceedings before the UK committee refused to travel to Ireland to appear before the Irish Committee. The Medical Council therefore proposed to admit in evidence the transcripts and decisions of the professional conduct committee and of the UK Privy Council. The applicant claimed that the Committee would be acting in breach of his constitutional right to cross-examine his accusers if the transcripts were admitted. The High Court and Supreme Court agreed. Keane CJ stated that:

“One must bear in mind the reasons which have led courts in this jurisdiction to hold that, in some cases at least, the right of a person to have the evidence against him given orally and tested by cross-examination before the tribunal in question may be of such importance in a particular case that to deprive the person concerned of that right would amount to a breach of the basic fairness of procedure to which he is entitled by virtue of Article 40.1 of the Constitution. It is not simply because the tribunal is in greater danger of arriving at an unfair conclusion, absent the safeguard of material evidence being given orally and tested by cross-examination. Such a departure from the normal rules of evidence might well be justifiable, as I have already noted, in the case of a tribunal of this nature. It is because, depending on the nature of the evidence, its admission in that form may offend

¹⁴⁵ *Kiely v Minister for Social Welfare (No 2)*[1977] IR 267, 281.

¹⁴⁶ *Borges v Medical Council* [2004] 1 IR 103.

against fundamental concepts of fairness, which are not simply rooted in the law of evidence, either in its statutory or common law vesture."¹⁴⁷

2.105 Keane CJ went on to quote a memorable passage of Henchy J from *Kiely*, discussed above:

"Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."¹⁴⁸

2.106 The European Court of Human Rights' jurisprudence on the rule against hearsay must also be borne in mind. While the Court has not examined the operation of the rule in civil proceedings directly, it has made it abundantly clear that an ability to cross-examine lies at the heart of the protection Article 6 affords and is the animating principle of the rule against hearsay.¹⁴⁹ Addressing this issue, the Court in the landmark judgment in *Al-Khawaja and Tahery v. United Kingdom* declared that "an adequate and proper opportunity to challenge and question a witness against him" was essential to Art. 6 protection.¹⁵⁰ This case underlines the importance given by the ECtHR to the right to cross-examine, a right which holds equally to civil and criminal proceedings.

2.107 In the Consultation Paper, the Commission noted that the possible consequences of a criminal prosecution are generally more serious than those which may result from civil proceedings¹⁵¹ due to the potential for loss of liberty and attendant rights¹⁵² resulting from a conviction. The Commission considered that the procedural differences between civil and criminal proceedings (such as the different standards of proof and the existence of a presumption of innocence in criminal proceedings) might justify different approaches.

2.108 The potential for miscarriages of justice and consequent loss of liberty where hearsay evidence is too readily admitted in criminal proceedings must of course be borne in mind. The fundamental reason for the hearsay rule's

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Ibid.

¹⁴⁸

Kiely v Minister for Social Welfare (No 2) [1977] 1 IR 267, 281.

¹⁴⁹

Article 6 ECHR applies to both civil and criminal proceedings. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." See also *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II.

¹⁵⁰

App. Nos 26766/05 and 22228/06, *Al-Khawaja and Tahery v United Kingdom* (2012) 54 E.H.R.R. 23. *Consultation Paper on Hearsay in Civil and Criminal Cases*, paragraphs 4.04 and 4.09.

¹⁵¹

For example, the right to vote in *Breathnach v Ireland* [2001] 3 IR 230; the right to raise a family in

¹⁵²

Murray v Ireland [1985] 1 IR 532; the right to privacy in *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 1.

exclusionary strictness¹⁵³ is that if out-of-court statements made by persons who were not required to attend to give evidence were freely admissible it would be easier to invent and fabricate evidence by making false out-of-court statements. This risk applies equally to hearsay evidence in civil proceedings, the consequences of which, particularly where the proceedings could cause reputational or financial ruin, may be much more severe than the many fines and disqualification orders handed down by the District Court¹⁵⁴ where the vast majority of the criminal prosecutions in the state are dealt with.¹⁵⁵ The relative impact of minor criminal convictions is also likely to be diminished by the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016*. Section 5 of the Act allows for minor convictions to be regarded as spent after a period of 7 years, subject to certain exceptions. The effect of such spent conviction is that a person with a spent conviction will no longer have to disclose it when request by any person or organisation, including a prospective employer, is made to disclose any previous convictions. This has very significant implications for the ability of convicted persons to re-enter the working world and to build a life free of crime. The Department of Justice estimates that 85% of convictions will become spent after 7 years as a result of the Act.¹⁵⁶

2.109 The stakes in civil cases can be enormous and the integrity of fair procedures in any court of law should not be taken lightly, but zealously guarded.

(2) *Practical effect of abolition in civil proceedings in the United Kingdom*

2.110 The Commission's provisional recommendations in the Consultation Paper reflected the UK *Civil Evidence Act 1995* and the *Civil Evidence (Northern Ireland) Order 1997*.¹⁵⁷ The *Civil Evidence Act 1968* already provided for extensive use of hearsay evidence in civil proceedings and the 1995 Act was designed chiefly to address some of the complications arising from the 1968 Act.

¹⁵³ Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-01.

¹⁵⁴ In 2013, the District Court handed down 74,202 fines and 12,313 disqualification orders. This makes up a total of 24.86% of the 347,998 orders made in District Court criminal cases in 2013. *Courts Service Annual Report 2013* (available at: [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/BA7D7195FC5AAD7280257D1F0030ECD4/\\$FILE/Courts%20Service%20Annual%20Report%202013.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/BA7D7195FC5AAD7280257D1F0030ECD4/$FILE/Courts%20Service%20Annual%20Report%202013.pdf)).

¹⁵⁵ In 2013, the District Court dealt with 325,317 offences by 139,128 defendants, out of 336,358 offences and 142,732 defendants who went through the criminal courts in total that year, meaning 96.72% of offences and 97.48% defendants were tried in the District Court. *Courts Service Annual Report 2013*.

¹⁵⁶ Irish Legal News, "Department of Justice announces commencement of spent convictions legislation" available at <http://www.irishlegal.com/4164/departement-of-justice-announces-commencement-of-spent-convictions-legislation/>

¹⁵⁷ While the *Civil Evidence Act 1995* applies only to England and Wales, the *Civil Evidence (Northern Ireland) Order 1997* and the *Civil Evidence (Scotland) Act 1988* similarly provide for the non-application of the rule against hearsay in civil proceedings.

(a) Key provisions of the Civil Evidence Act 1995

2.111 Section 1 of the 1995 Act provides simply that in civil proceedings evidence will not be excluded on the grounds that it is hearsay. Section 2 requires a party proposing to adduce hearsay evidence to give such notice of that fact as is reasonable and practicable in all the circumstances to enable the other party to deal with it. A failure to comply with this requirement (or with the rules of court dealing with how such notice is to be given) “does not affect the admissibility of the evidence”; rather it may be penalised in costs and taken into account in assessing weight.

2.112 Section 3 permits rules of court to provide that if the party adducing hearsay evidence does not call the maker of the statement to give evidence in person, the other party may do so and may cross-examine him as if he had been called by the party adducing the statement. Section 4 provides for the considerations relevant to assessing the weight (if any) to be given to hearsay evidence, the first of which is whether it would have been reasonable or practicable for the maker of the statement to be called as a witness and go on to include considerations such as whether the statement was made contemporaneously, whether there is multiple hearsay and evidence of a motive to fabricate.

2.113 The 1968 and 1995 Civil Evidence Acts were designed to significantly liberalise the use of hearsay evidence in civil proceedings. However, the legislation has not rendered the rule against hearsay irrelevant. The rule continues to guide English courts in civil proceedings. *Phipson on Evidence* notes that:

“The Act is not intended to provide a substitute for oral evidence. The basic principle under which the courts operate is that evidence is given orally with cross-examination of witnesses, and the admission of hearsay is, and should be, the exception to the rule.”¹⁵⁸

2.114 Despite the apparently stark declaration in Section 1 of the 1995 Act, the underlying principles of the rule against hearsay persist and, under the Act’s framework, now attach at the consideration of weight rather than admissibility. It is fully open to the court to decide that a hearsay statement, though admissible, is of little or no weight and consequently is denied any substantive impact on the trial.¹⁵⁹ As one commentator has said:

“The powers vested in judges to enforce the new notice procedure and to weigh admissible hearsay bring into focus the whole panoply of the hearsay rule: to include an item of evidence

¹⁵⁸ *Phipson on Evidence* (18th ed. Sweet and Maxwell) 952.

¹⁵⁹ One such example under the similar Scottish framework is *TSB (Scotland) Plc v. James Mills (Montrose) Ltd* [1992] S.L.T 519. See also *JW Spear & Sons Ltd v Zynga Inc* [2013] EWHC 3348. Peter Smith J said of the anonymous hearsay statements adduced “They have in my view no weight”.

or attach weight to it, they need to consider the type of hearsay and the reasons for which it was hitherto excluded or included as a recognised exception to the rule.”¹⁶⁰

- 2.115** Lady Hale, delivering the leading opinion in the House of Lords in *Polanski v Condé Nast Publications Ltd*, explicitly makes this point: “the principal safeguard is the reduced- even to vanishing- weight to be given to a statement which has not been made in court and subject to cross-examination in the ordinary way.”¹⁶¹ In this way, the values which underpin the rule against hearsay are an interpretive bulwark against an application of the *Civil Evidence Act* which would generate substantial injustice.
- 2.116** English judges have had substantial regard to the importance of the point which the hearsay evidence is adduced to prove. Whilst it may be considered fair and probative against a peripheral point, judges are less likely to view favourably reliance on hearsay for issues central to the trial. This was the case in *The Ferdinand Retzlaff* where the judge ruled that it would be wrong to try the central issues by means of unsworn documents which in many cases had been created after the commencement of litigation.¹⁶² Similarly, where hearsay evidence is contradicted by evidence given on the stand, case law suggests that little or no weight will be afforded to it.¹⁶³ This was the case in *Fresca-Judd v Golovina*.¹⁶⁴ The case concerned a landlord-tenant dispute in which the landlord sought to introduce two hearsay statements in the form of notes written by his plumber and estate agent. In the absence of any explanation why neither the estate agent nor the plumber could give *viva voce* evidence, the judge rejected the evidence in favour of the live testimony of the tenant.¹⁶⁵
- 2.117** This judicial reticence to allow statute to unduly diminish the protection the rule against hearsay provides has also been articulated by Irish judges. As mentioned in the previous chapter, Keane CJ refused to interpret the *Criminal Assets Bureau Act 1996*, which contained extremely broad evidence gathering powers, in such a way as to allow the unchecked introduction of hearsay evidence in subsequent proceedings.¹⁶⁶ Similar judicial resistance to statutory interventions which would significantly dilute the rule could also be anticipated.

¹⁶⁰ Salako, *The hearsay rule and the Civil Evidence Act 1995: where are we now?* C.J.Q. 2000,19(Oct), 371-385.

¹⁶¹ [2005] 1 W.L.R. 637, 652.

¹⁶² *The Ferdinand Retzlaff* [1972] 2 Lloyd's Rep.120.

¹⁶³ *Mulloy v Chief Constable of Humberside Police* [2002] EWCA Civ. 1851.

¹⁶⁴ [2016] EWHC 497 (QB).

¹⁶⁵ See also *Edwards v London Borough of Sutton* [2014] EWHC 4378 per Gore J: “All of these factors [absence of corroboration, cross-examination] are reasons why, pursuant to s.4 of the Civil Evidence Act 1968, I am entitled to attach less weight to this body of evidence than I would to sworn evidence or evidence supported by statements of truth.”.

¹⁶⁶ *Criminal Assets Bureau v Hunt* [2003] 2 ILRM 481, 484.

- 2.118** However, despite the encouraging line of jurisprudence that the values which underpin the rule against hearsay continue to act as an interpretive safeguard, the absence of a strong and general exclusionary rule has seen a troubling proliferation of hearsay evidence in some proceedings in England and Wales. Where the 1995 Act has seen a significant increase in the admission of hearsay evidence, it has been the subject of concern amongst academics and judges alike. *Phipson on Evidence* notes the troubling fact that immigration proceedings are classed as civil proceedings and thus an immigration judge can determine an application for asylum based solely on a piece of hearsay evidence.¹⁶⁷ Similarly, Anti-Social Behaviour Orders (ASBOs) applications have been held to be civil rather than criminal proceedings and thus the hearsay statements of various concerned residents are routinely used.¹⁶⁸ Sir James Munby, President of the Family Division of the High Court, has also noted that hearsay arguments in family proceedings have slowed down their work and led to a reduction in the quality of fact-finding.¹⁶⁹
- 2.119** The decision of the English Court of Appeal in *Smith v Stratton & Anor*¹⁷⁰ displays a concerning willingness to rely on questionable hearsay evidence. The case concerned a car accident in which the appellant, Mr Smith, was injured and sought to recover damages from the Motor Insurers Bureau (MIB) who became responsible for the claim when the driver's insurance policy was voided for reasons of prior misrepresentation. The MIB contested liability, relying on the common law maxim *ex turpi causa non oritur actio* (from an immoral cause no action shall lie), claiming that at time of the collision the four men in the car were engaged in drug dealing.
- 2.120** Mr Nicholls, a solicitor for the MIB, interviewed the driver, Mr Stratton about 6 months after the collision, and took a signed statement. However Mr Nicholls claimed that there were some things Mr Stratton had not been prepared to put to paper, namely that he had been drug dealing. Mr Nicholls made a written statement to that effect and that written statement was perhaps the most significant evidence on which Mr Smith's claim was dismissed. Affirming the judgment of the trial judge, Laws LJ said:
- "I consider that the judge was wholly entitled to attach weight to the hearsay statement made by Stratton. It is a forensic commonplace that statements against interest tend to be true."¹⁷¹
- 2.121** That a remedy as important compensation to cover the cost of healthcare bills associated with a devastating brain injury could be denied on the basis of an oral hearsay statement, reported by a party with an interest and which

¹⁶⁷ *Phipson on Evidence* (18th ed. Sweet and Maxwell) at 937.
¹⁶⁸ *R. (McCann) v Crown Court at Manchester* [2002] UKHL 39.
¹⁶⁹ Sir James Munby 'View from the President's Chambers' (2) at http://telfordchildcare.proceduresonline.com/pdfs/process_reform_plo.pdf .
¹⁷⁰ [2015] EWCA Civ 1413.
¹⁷¹ *Ibid.*

is contradicted by a written statement signed by the declarant, is remarkable. Not only that, but Mr Stratton did not even participate in the case and was not called to give evidence. The hearsay statement was also contradicted by the sworn testimony of the appellant's mother, who was conducting litigation on his behalf. While the argument has long held that juries are liable to give disproportionate weight to hearsay statements, this judgment would seem to suggest that in the absence of a generally exclusionary rule, a court can similarly lose sight of the dangers of hearsay evidence and apportion it undeserving weight.

- 2.122** The approach in England and Wales, which corresponds largely to approaches taken across the common law world, is not a silver bullet which addresses the practical problems facing hearsay in civil proceedings. The principles which underlie the hearsay rule cannot so easily be excised from civil law but the legislative retreat from the hearsay rule has had some concerning ramifications.
- 2.123** Moreover, the Commission considers that extension of the business records exception, which currently applies only to criminal proceedings, can remedy much of the mischief which wholesale abolition seeks to address. The law concerning the exception to the rule against hearsay for business records and the Commission's proposals for reform are discussed in the following section.
- 2.124** For these reasons, in addition to those arising from the constitutional right to fair procedures, the Commission has concluded that there should not be a general inclusionary approach to hearsay in civil or criminal proceedings.
- 2.125** **The Commission recommends that, having regard to the risks associated with hearsay evidence and arising from the constitutional right to fair procedures, there should not be a general inclusionary approach to hearsay in civil or criminal proceedings.**

F Business Records and Documentary Evidence in Civil Proceedings

- 2.126** Business records are possibly the most common form of hearsay evidence which presents in litigation and their legal status is therefore of particular importance. The Commission considers in detail in this Part the existing statutory exceptions which exist at present for business records and the avenues for reform.
- 2.127** The written word is generally presumed to be more trustworthy than the spoken word, and that hypothesis has informed much of the development of

inclusionary exceptions to the rule against hearsay.¹⁷² During the 19th century, the English courts found public documents to be admissible as proof of their contents based on their very high level of reliability in comparison to traditional oral hearsay.¹⁷³ In modern times, business records are increasingly allowed in evidence across the common law world for the same reason. One English judge outlined the rationale as follows:

“Business records are admissible... because in the ordinary way, they are compiled by persons who are disinterested and, in the ordinary course of events, such statements are likely to be accurate; they are therefore admissible as evidence because prima facie they are reliable.”¹⁷⁴

2.128 Documentary evidence in the form of records compiled in the course of a trade or duty are particularly reliable. They are created and compiled as a matter of routine and their accuracy is valued by the organisation for which they are compiled. The testimony of the person who made the entry will ordinarily add little value. Such a person would almost certainly not recall any individual entry and could at best identify their handwriting, testify that they were on duty at the time and that they would not have fabricated the information. The High Court (Lynch J) spoke in 1990 of the minimal value of such testimony with respect to documentary evidence in the form of clinical notes:

“I do not need the nurses to tell me that they would not have made fictitious entries in a patient’s nursing notes; that goes without saying because it would be such an extraordinary event...The notes are therefore quite reliable and probably every bit as good as if a nurse were called to verify them...”¹⁷⁵

2.129 These considerations, and the recommendations of the Commission in its 1987 *Report on Receiving Stolen Property*¹⁷⁶, motivated the Oireachtas to legislate for the admissibility of business records in criminal cases in the *Criminal Evidence Act 1992*. However this has not been extended to civil proceedings, despite the fact that civil cases rely to a far greater extent on documentary evidence than do criminal proceedings. In the great majority of cases, civil litigants will agree to admit documentary hearsay evidence in order to expedite proceedings or to spare themselves an adverse costs order if the objection proves unfounded.¹⁷⁷ However certain litigants, most notably those who would be incapable of satisfying a costs order in any event, may insist on proof of each and every document. These “noose or loose” cases

¹⁷²

See *R v Myers* [1997] 3 WLR 552.

¹⁷³

See *Sturla v Freccia* (1880) 5 App Cas 623.

¹⁷⁴

R v Horncastle [2009] EWCA Crim 964 at [15].

¹⁷⁵

Hughes v Staunton High Court, 16 February 1990.

¹⁷⁶

LR 23-1987.

¹⁷⁷

See Delany and McGrath, *Civil Procedure in the Superior Courts*, 3rd ed. (Dublin, Round Hall, 2011) p. 668, para. 20-99

have posed increasing difficulties for Irish Courts in recent years, most notably in cases involving banking records, and highlight the need for statutory intervention.¹⁷⁸

(1) **Bankers Books Evidence Acts**

2.130 The *Bankers Books Evidence Acts 1879 to 1959* provide that copies of entries into banking records are admissible to prove the truth of their contents, provided an officer of the bank can testify that the records were made in the usual and ordinary course of business. While the Act was introduced primarily as an exception to the best evidence rule, it is applied more commonly to save documents and records which would otherwise be inadmissible hearsay. The Act operates as a restricted but important business records exception to the rule against hearsay in civil proceedings but its shortcomings have become evident in a number of recent cases.

2.131 The statutory exceptions to the hearsay and original document rules created by the Bankers' Books Evidence Acts were developed to avoid inconvenience: it would halt the workings of a bank if the bankers' ledgers and account books had to be repeatedly carried into court. Correspondence formerly did not fall within the definition of "books" as its removal would not interrupt the workings of the bank.¹⁷⁹

2.132 The Act renders a copy of any entry in a banker's book *prima facie* evidence in all legal proceedings of the entry and the matters recorded.¹⁸⁰ This is subject to three conditions:¹⁸¹ the book must have been one of the ordinary books of the bank when the entry was made, the entry must have been made in the usual and ordinary course of business, and the book must be in the custody or control of the bank. Proof of this may be given by a partner or officer of the bank, and may be given orally or by affidavit.¹⁸²

2.133 "Bankers' books" is widely defined as including any records used in the ordinary course of the business of a bank (or used in the transfer department of a bank acting as a register of securities) and includes correspondence from an account holder to the bank.¹⁸³ For an entry in a banker's book to be admissible, the person seeking to admit the copy must prove that it is an original copy of a document falling within the definition of bankers' books.

¹⁷⁸ For a fuller discussion, see Tchrakian, 'Practice and Procedure: Hearsay Evidence in Creditor Claims: The Post- Dermody Lacuna Parts I & II, (2015) *I.L.T.* 33, 255-260 and 266-273.

¹⁷⁹ *J O'C v PCD* [1985] IR 265. Distinguished by Murphy J in *Volkering v Haughton* [2010] 1 IR 417 on the basis that the definition had been amended (by the *Central Bank Act 1989*) and was broader than the English equivalent.

¹⁸⁰ Section 3 of the *Bankers' Books Evidence Act 1879*.

¹⁸¹ Section 4 of the *Bankers' Books Evidence Act 1879*.

¹⁸² Section 4 of the *Bankers' Books Evidence Act 1879*.

¹⁸³ *Volkering v Haughton* [2010] 1 IR 417, 433: the definition of bankers' books in the Irish legislation included "any record" and was not constricted ejusdem generis therefore "[c]orrespondence emanating from the bank's customers which has been recorded by the bank is, by definition, a record."

- 2.134** “Bank”, “banker”, and “bankers’ books” are defined in section 9 of the 1879 Act as substituted by section 2 and the Schedule of the *Bankers’ Books Evidence (Amendment) Act 1959* and amended by subsequent legislation to include further financial institutions. “[B]ankers books” now include a wide variety of records and documents.¹⁸⁴
- 2.135** Originally, the copy admitted had to be an examined copy¹⁸⁵ but section 131 of the *Central Bank Act 1989* amended this to allow evidence that the record was reproduced in a legible form or copied from a legible form of the record and that such a copy was a correct copy (thereby facilitating computerised records). The relevant proof must be by the person examining the copy or in charge of the reproduction.
- 2.136** In the Consultation Paper the Commission recommended the retention of the bankers’ books exception. The Commission considered the operation of the *Bankers’ Books Evidence Acts* and highlighted that the phrasing of the Acts compelled the production of documentary evidence from the bank.¹⁸⁶
- 2.137** The Commission considered section 7 of the *Bankers’ Books Evidence Act 1879* which allows an individual to gain inspection of the bankers’ books upon obtaining a court order and recognised the utility of these combined provisions in the fight against money laundering and fraud offences. The Supreme Court has described section 7 as “an absolutely necessary power.”¹⁸⁷ Before coming to a final recommendation, the Commission now looks to cases which have come before the courts since the publication of the Consultation Paper where difficulties in applying the Acts’ provisions have been encountered.
- 2.138** In litigation in recent years, banks have sought to recoup debts owing to them but have failed to meet the strict requirements of the Acts. Initially the courts proved receptive to the banks’ arguments that their records could be proved otherwise than through the provisions of the *Bankers Books Evidence Acts*. In one such case, Clarke J took the view that where analysis of the banks’ electronic books is given in evidence by a bank official, there is no need to have recourse to the *Bankers Books Evidence Acts* as the evidence could be proved in the “ordinary way”.¹⁸⁸ Finlay Geoghegan J took a similar approach,

¹⁸⁴ Section 9 of the 1879 Act as amended defines “banker’s books” as “(a) includ[ing] any records used in the ordinary business of a bank, or used in the transfer department of a bank acting as registrar of securities, whether comprised in bound volumes, loose-leaf binders or other loose-leaf filing systems, loose-leaf ledger sheets, pages, folios or cards, and (b) cover[ing] documents in manuscript, documents which are typed, printed, stencilled or created by any other mechanical or partly mechanical process in use from time to time and documents which are produced by any photographic or photostatic process.”

¹⁸⁵ Section 5 of the *Bankers’ Books Evidence Act 1879*.

¹⁸⁶ This aspect of the Acts is considered in detail in Chapter 4, Part D(4) page 138 *et seq.* of the *Consultation Paper on Documentary and Electronic Evidence*.

¹⁸⁷ *Blanchfield v Hartnett* [2002] IESC 41- Speaking to section 7 the Court said; “The orders give liberty to the State to inspect banking records of an individual, an absolutely necessary power in the armoury of the legal process.”

¹⁸⁸ *Moorview Developments Ltd v First Active Plc (No. 13)* [2010] IEHC 275.

holding that electronic records of the bank were admissible and *prima facie* evidence of liability, irrespective of the provisions of act.¹⁸⁹ While a number of judgments followed this approach¹⁹⁰, the reasoning proved difficult to reconcile with both the text of the Act and the judgment of the Supreme Court in *Hunt* where Keane CJ stated:

“It is clear, that in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers Books Evidence Acts 1879–1959.”¹⁹¹

2.139 The Supreme Court authority that no common law rule permits the admission of banking records in civil cases beyond the strict requirements of the *Bankers Books Evidence Acts* was re-affirmed in *Ulster Bank Ireland Ltd v Dermody*.¹⁹² The plaintiffs sought to introduce the affidavit of an officer of Ulster Bank Ireland Ltd to prove the reliability of banking records showing a debt owing to Ulster Bank Ltd, a separate but related legal entity. O’Malley J decided that the officer was not an officer of the relevant legal entity and accordingly the bank could not avail of the provisions of the *Bankers Books Evidence Act*. Regarding herself as bound by the decision in *Hunt*, O’Malley J rejected the implication of the judgments of Clarke J and Finlay Geoghegan J that there exists any common law rule to save such banking records. The judgment in *Dermody* was cited with approval by Cregan J in a case later that year.¹⁹³ Cregan J, noting the opaque and arcane nature of much of the provisions, helpfully sets out in ordinary language the matters now required for a bank to conform to the provisions of the *Bankers Books Evidence Acts 1879-1989*.¹⁹⁴ Applying his abridged Bankers’ Books Act, Cregan J found the bank wanting and ruled the evidence inadmissible.¹⁹⁵

2.140 The strict application of existing statutory reforms, designed to mitigate the harshness of the rule against hearsay, highlights the need for new and more generally applicable statutory reform. It has been suggested that such reform is all the more pressing owing to the recent proliferation of non-bank creditors who have taken on distressed loans.¹⁹⁶ The Supreme Court sought to address the issue in *Ulster Bank Ireland Ltd v O’Brien*¹⁹⁷ but, despite bringing some clarity to the position with respect to summary proceedings, has not settled the issue with any finality. Distinguishing *Dermody* and

¹⁸⁹ *Bank of Scotland Plc v Fergus* [2012] IEHC 131.

¹⁹⁰ See *Bank of Ireland v Keehan* [2013] IEHC 631.

¹⁹¹ *Criminal Assets Bureau v Hunt* [2003] ILRM 2 481 at 501.

¹⁹² *Ulster Bank Ireland Ltd v Dermody* [2014] IEHC 140.

¹⁹³ *ACC Bank Plc v Byrne* [2014] IEHC 530.

¹⁹⁴ *ACC Bank Plc v Byrne* [2014] IEHC 530 at [51].

¹⁹⁵ *Ibid* at [72].

¹⁹⁶ Tchrakian, ‘Practice and Procedure: Hearsay Evidence in Creditor Claims: The Post- Dermody

¹⁹⁷ Lacuna Part II, (2015) *I.L.T.* 33, 266-273, 273.

[2015] IESC 96.

Stapleton, Charleton J held that on the facts of the case the debtors had not contested the affidavit of the officer of the bank and that silence could constitute an admission, a long established exception to the rule against hearsay.¹⁹⁸

- 2.141** Laffoy J, concurring in the judgment, added that in summary judgment an affidavit sworn by an officer of the bank, whether or not it met the express terms of the Act, could constitute *prima facie* evidence of the debt.¹⁹⁹ Both judgments make it clear that the *Bankers Books Evidence Acts* are no longer necessary to prove a claim brought on foot of summary summons and are likely to have a significant effect in the running of such cases but the law remains uncertain with respect to proof of banking records at full trial. In the absence of a general statutory rule allowing banking records in evidence, banks will continue to encounter serious difficulties proving their debts in court.
- 2.142** The Commission considers that a broadly defined business records exception, equally applicable to civil and criminal cases, is the best way to address these concerns. The Commission also considers that the introduction of a broad business records exception in civil cases accounts for much of the difficulties engendered by the application of the rule against hearsay in civil cases generally and renders abolition of the rule in civil cases unnecessary to meet those concerns.
- 2.143** **The Commission recommends that records compiled in the course of business, because they are generally reliable, should be admissible in both civil and criminal proceedings as an inclusionary exception to the hearsay rule, subject to specific safeguards, set out in the recommendations below.**
- 2.144** **The Commission recommends that the *Bankers' Books Evidence Act 1879* be repealed and replaced with the amended rules for business records recommended in this report, subject to the retention of section 7 of the Act.**
- 2.145** The Commission now considers the operation of the *Criminal Evidence Act 1992*, which provides for the admission of business records in criminal cases, before making proposals for a new statutory regime governing business records in all cases, civil and criminal.

¹⁹⁸ [2015] IESC 96 para. 23 per Charleton J: "The swearing of an affidavit and its service in court proceedings which make allegations that a sum is due, can be accepted in the absence of denial, where the form and the content of what is deposed to and exhibits supporting it carry sufficient indications of reliability."

¹⁹⁹ It has been argued that Laffoy J intended to allow banking records to constitute *prima facie* evidence of the debt, irrespective of the Act, at full trial as well. See Tchrakian, 'Hearsay Evidence in Creditor Claims: *Ulster Bank v Dermody* Revisited – Part II' [2016] *I.L.T* 34(4), 49-52 and Donnelly, 'Banking and Security Law Update', [2016] *C.L.P* 23(1), 28-31, 28.

(2) Criminal Evidence Act 1992

2.146 The *Criminal Evidence Act 1992*, enacted in response to the Commission's recommendations in its *Report on Receiving Stolen Property*²⁰⁰, and with the purpose of avoiding the effects of the decision of the UK House of Lords in *Myers v DPP* (assuming that it might otherwise have been followed in Ireland), allows documentary evidence compiled in the ordinary course of business to be admitted in criminal proceedings. Such information can have great probative force precisely because it was created prior to and independently of any allegation of criminality made against the accused. No similar statutory provision exists in relation to civil proceedings.

2.147 The definition of document in section 2 of the 1992 Act is technologically neutral and open-ended.²⁰¹ That said, the question has been raised with the Commission as to whether electronic recordings, such as telephone or other audio recordings, made in the course of business, need to be authorised by this statutory procedure. This reflects the broader and more complex debate as to the distinction between hearsay and real evidence. While the courts regularly admit electronic recordings as real evidence, there is scant express judicial authority for the practice. Issues surrounding the distinction between hearsay and real evidence in the context of electronic recordings are discussed in more detail in Part B of this Chapter.

2.148 The situation is clearer with respect to records automatically generated by or from a computer. *The People (DPP) v Murphy*²⁰² expressly identifies records created without human intervention as real evidence provided "authoritative evidence as to the function and operation of the computer" is adduced. With respect to CCTV footage, a particularly common piece of automatically generated evidence, the Supreme Court in *The People (DPP) v McD*²⁰³ has clarified that not only is such footage real evidence, it is so ubiquitous that no evidence as to the ordinary function of the CCTV system will generally be required. For further discussion of the status of CCTV evidence, see para. 2.52 of this Report.

(a) Section 5: Conditions of admissibility

2.149 To be admissible under the 1992 Act information must be compiled in the ordinary course of business²⁰⁴ and be such that it would be admissible in direct oral evidence.²⁰⁵ Its supplier must be someone who had personal knowledge of the matters with which it deals (or who it is reasonable to

²⁰⁰ Law Reform Commission, *Report on Receiving Stolen Property* (LRC 23-1987). The full history and background to the 1992 Act is also discussed at paragraphs 5.04ff of the Consultation Paper.

²⁰¹ Section 2(1) provides: "document" includes— (i) a map, plan, graph, drawing or photograph, or (ii) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form."

²⁰² [2005] IECCA 1.

²⁰³ [2016] IESC 71.

²⁰⁴ Section 5(1)(a). "Business" is defined in section 4.

²⁰⁵ Section 5(1).

suppose had such knowledge).²⁰⁶ It does not matter if the supplier actually compiled the information (as opposed to supplied it) and the person need not be identifiable. If the information was originally in non-legible form but was reproduced in legible form, the reproduction must have been in the course of the normal operation of the reproduction system.²⁰⁷ It does not matter whether the information was supplied directly or indirectly but if it was supplied indirectly (*i.e.* if it passed through one or more intermediaries between the original supplier and the ultimate recipient) then each person in the chain must have received it in the ordinary course of business.²⁰⁸ Again, it does not matter if one or more of the people in the chain cannot be identified.

- 2.150** While these provisions represent a significant liberalisation of the law relative to the *Myers* type position which obtained prior to their enactment, it is not the case that the 1992 Act envisages the admission of business records “willy-nilly”.²⁰⁹ *The People (DPP) v O’Mahoney* makes clear that the Act does not provide for a presumption in favour of the admission of such records. On the contrary, the party seeking to adduce hearsay evidence by way of the Act bears the onus of establishing that he or she can satisfy its requirements.²¹⁰ The Court of Appeal stated that section 5(1) set down three statutory “pre-conditions” to the admissibility of business records and that “prima facie evidence of the existence of facts satisfying those conditions is required to be adduced even where the asserted ability to satisfy those pre-conditions is not being challenged.”²¹¹ Furthermore, the Court stated that it is also necessary to adduce prima facie evidence that none of the limitations applied to admissibility under section 5(1) by subsequent subsections apply to the information in question.²¹²
- 2.151** This insistence on full proof can lead to extremely lengthy legal argument. In the case in question, the trial judge heard submissions on the admissibility of the records in *voir dire* for 3 full days in what the Court of Appeal described as “the tortuous process of identifying, document by document, the basis for the objections being made.”²¹³ It is clear from this judgment that section 5 places a very heavy burden on the adducing party to prove that each and every record comes within the scope of the statutory exception, whether or not the evidence is contested.
- 2.152** The *Criminal Justice Act 2011* extends the effect of section 5 of the 1992 Act when a prosecution concerns a “relevant offence”, as defined under the Act,

²⁰⁶ Section 5(1)(b).

²⁰⁷ Section 5(1)(c).

²⁰⁸ Section 5(2).

²⁰⁹ *The People (DPP) v O’Mahoney & Daly* [2016] IECA 111 at [55].

²¹⁰ *Ibid* at [58].

²¹¹ *Ibid* at [59].

²¹² *Ibid* at [61].

²¹³ *Ibid* at [96].

mainly theft and fraud offences. The *Criminal Justice Act 2011* was enacted to assist in investigating and proving specific “white collar” crimes and was intended primarily for complex criminal trials but its terms apply to offences of theft and fraud generally.

2.153 Section 18 of the 2011 Act establishes rebuttable presumptions in trials for relevant offences where documents are admitted as evidence under section 5 of the *Criminal Evidence Act 1992*. Where a document purports to have been created by a person (the first person) and it is reasonable to assume that it was created by that first person, statements in the document are presumed to be those of the first person unless contrary indication appears.²¹⁴ A document is presumed to have been created and sent by X if it purports to have been created by the first person in circumstances where it is reasonable to presume that it was created by the first person and is addressed and sent to a second person.²¹⁵ Any statement in the document is attributed to the first person unless contrary indication appears, and the second person’s notice of the statement is presumed.²¹⁶ A document found in the first person’s place of work or other place which gives rise to a reasonable inference that the document belongs to the first person is presumed to belong to the first person.²¹⁷ Similarly, if a document is found in the first person’s place of work, profession or other activity and it can be reasonably presumed that the document relates to the first person’s trade, profession or other activity, it is so presumed.²¹⁸ Section 18 of the 2011 Act moves business records to which it applies closer to the position of presumed authenticity enjoyed by public documents.

(b) Section 6: Certificate procedure

2.154 Section 6 allows certificate evidence (that all the requirements of the Act are met) to show that a document falls within the terms of the Act where it is “signed by a person who occupies a position in relation to the management of the business in the course of which the information was compiled or who is otherwise in a position to give the certificate..”²¹⁹ Chain of custody evidence may be given in the certificate.²²⁰ A number of difficulties with the certificate procedure in section 6 have been raised with the Commission. One practical matter is the fact that the certificate requires a lay person, a manager in the business, to certify certain legal matters. Section 6 requires that the certificate attest that the information is not privileged nor supplied by a non-compellable person. These are both questions of law which most ordinary

²¹⁴ Section 18(2). The indication can be express or implied.

²¹⁵ Section 18(3).

²¹⁶ Section 18(3).

²¹⁷ Section 18(4).

²¹⁸ Section 18(5).

²¹⁹ Section 6(1) of the 1992 Act.

²²⁰ Section 6(1)(d) provides that the certificate may state that the information was supplied directly or indirectly by a person who had personal knowledge of the matters dealt with, or who could reasonably be supposed to have had personal knowledge of the matter dealt with.

people are not in a position to answer and it is unclear why the section should require them to. The court is surely in a far better position to determine such questions. As was argued in a submission to the Commission, the simple matter that should have to be certified by the witness is the provenance of the document.

- 2.155** Another issue raised was the use of records from a business which has ceased to exist. The language of section 6 refers to “a person who occupies a position in relation to the management of the business”, suggesting that the provision only applies to existing businesses. The Commission therefore takes the view that the draft Evidence Bill should make provision for businesses which have only recently ceased to exist and whose records remain available.
- 2.156** More generally, the utility of the certificate procedure as a whole is questionable. The Commission understands that in the majority of cases, the other party will raise some objection to the certificate and the business manager is called to give oral evidence. It is therefore difficult to see the benefit of a certificate procedure when the witness will almost certainly be called to give live testimony anyway. There is also some uncertainty as to whether the challenged certifier must be cross-examined on a *voir dire* or before the jury.
- 2.157** Additionally, the certificate may be dispensed with in many different circumstances. The opposing party can issue notice to challenge the certificate at any time up to 7 days before the trial and the judge retains a discretion to require oral evidence from the supplier of the business record. It is also equally clear that the absence of certificate will not frustrate the admission of the evidence.²²¹ The proposed legislative reform of the exception for business records, discussed below, would remove the certificate procedure in favour of a simplified provision.

(c) *Print-outs and photocopies*

- 2.158** Some concern about the status of print-outs under section 5(1)(c) has been raised with the Commission. The section provides that “in the case of information in non-legible form that has been reproduced in permanent legible form”, it must be shown that it “was reproduced in the course of the normal operation of the reproduction system concerned.”
- 2.159** It has been argued that this provision is “almost unintelligible” and the uncertainty it generates occasionally requires law firms to devote huge resources a manual comparison each and every document. It has been suggested that the section should be simplified and it made clear that printouts and photocopies are absolutely admissible. The Commission takes

²²¹ *People (DPP) v Byrne* [2001] 2 ILRM 134.

the view that the draft Evidence Bill should simplify the provision and provide that all reliable copies or print-outs are admissible.

(d) *Privilege and non-compellability*

2.160 Privileged information is inadmissible under the Act²²² as is information supplied by someone who would not be a compellable witness for the party seeking to admit the business record.²²³ The compellability requirement may cause difficulty in some cases. The provision could be used to frustrate the admission of overseas documents, given that overseas persons cannot be compelled to give evidence. This would appear to conflict with Section 4 which provides that the Act applies to any business “within or outside the state.” Similarly, the accused is not compellable for the prosecution. Thus information furnished or a statement made by an accused, recorded in a document in the course of business, might be inadmissible under this scheme, unless it comes under the exception for confessions. The Commission has been asked to clarify the position with respect to each of these concerns.

2.161 In respect of the compellability of persons overseas, it is worth considering the US approach. The question of foreign records is dealt with explicitly in the US Federal Code. Rule 902(12) provides that a business record originating from a foreign jurisdiction which meets the various criteria set down in Rule 803(6)(broadly similar to those set down in s. 5(1) of the 1992 Act) may be authenticated by way of a certificate. The “custodian or another qualified person” must sign the certification “in a manner that, if falsely made, would subject the maker to a criminal sanction in the country where the certification is signed.” This dispenses with the need for the supplier to attend proceedings, though it may be argued that the requirement that falsely signing such a document would amount to a criminal offence in the country where the certification is signed is unduly limiting. The Commission takes the view that a more straightforward provision guaranteeing the admissibility of overseas documents, notwithstanding the non-compellability of the supplier, should be included in the draft Evidence Bill.

2.162 In the case of business records authored or supplied by the accused, the question arises as to whether the exception to the hearsay rule for admissions allows for the admission of documents which would otherwise be excluded by the compellability provisions. There is little case law looking at the interaction of these two exceptions to the rule against hearsay but there is some instruction to be had from English law. The *Criminal Evidence Act 1988*, the predecessor to the *Criminal Evidence Act 2003*, provided that statements which would be inadmissible under the *Police and Criminal Evidence Act 1984* (which governs the admissibility of confessions) would not be rendered

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Section 5(3)(a).
Section 5(3)(b).

admissible under the 1988 scheme for business records. Such a position would appear to suggest an equivalence in the treatment of evidence from business records authored by the accused under both the exception for admissions and for business records i.e. failure to meet the grounds for one exception means failure to meet the grounds for both exceptions. The 2003 Act omits this express provision and instead prefers a more open-ended safeguard whereby judges are invited to exclude evidence where its reliability is doubtful. It is unclear whether the rule established by the preceding legislation survives in this provision. More generally, the broad interpretation given to admissions, in both Ireland and Britain, in the case law would suggest that the exception would allow the introduction of statements that would otherwise be subject to challenge under section 5(3)(b).

2.163 The Commission recommended in its *Report on Receiving Stolen Property* in 1987 that the proposed legislative scheme for the admission of business records should expressly provide that it should not affect any rule of law that would otherwise allow for the admission of a statement contained in a document.²²⁴ The Commission reaffirms this recommendation and takes the view that such a provision would offer a satisfactory clarification of the law in relation to business documents authored by the accused.

(e) *Information compiled in contemplation of legal proceedings*

2.164 Information compiled for the purposes of, or in contemplation of, criminal,²²⁵ civil²²⁶ or disciplinary²²⁷ proceedings or a criminal²²⁸ or statutory²²⁹ investigation or inquiry is generally inadmissible but it is admissible if it falls into one of the categories in section 5(4):

- (a) Sworn information by a crime victim ordinarily resident outside the State²³⁰ (the information does not need to be sworn if the victim is dead or is out of the State and their attendance at the criminal trial is not reasonably practicable);²³¹
- (b) a map, plan, drawing or photograph and explanatory material accompany it or them;²³²
- (c) a record of a Garda direction;²³³
- (d) various records relating to the Forensic Science Laboratory;²³⁴

²²⁴ Law Reform Commission, *Report on Receiving Stolen Property* (LRC 23-1987) at p. 120 at 13(15).

²²⁵ *Criminal Evidence Act 1992*, Section 5(3)(c)(iii).

²²⁶ *Criminal Evidence Act 1992*, Section 5(3)(c)(iii).

²²⁷ *Criminal Evidence Act 1992*, Section 5(3)(c)(iv).

²²⁸ *Criminal Evidence Act 1992*, Section 5(3)(c)(i).

²²⁹ *Criminal Evidence Act 1992*, Section 5(3)(c)(ii).

²³⁰ *Criminal Evidence Act 1992*, Section 5(4)(a)(i).

²³¹ *Criminal Evidence Act 1992*, Section 5(4)(a)(ii).

²³² *Criminal Evidence Act 1992*, Section 5(4)(b)(i).

²³³ *Criminal Evidence Act 1992*, Section 5(4)(b)(ii).

²³⁴ Section 5(4)(b)(iia) inserted by section 188 of the *Criminal Justice Act 2006*.

(e) a record of the receipt, handling, transmission, examination or analysis of anything by any person acting on behalf of any party to the proceedings²³⁵ or

(f) a record of a medical examination or autopsy.²³⁶

2.165 The scope of the requirement that a document should not be prepared for the purposes of litigation came under scrutiny in *The People (DPP) v Hickey*²³⁷. The case concerned the admissibility of telephone records to prove a charge of conspiracy to defraud. The defence contended that the records adduced combined information from two separate computer systems and as such was prepared specifically for litigation. The Court of Criminal Appeal rejected this argument holding that the information was compiled in the ordinary course of business and the print-outs reproduced in the normal operation of the reproduction system. The manner in which the information was presented did not affect its admissibility.²³⁸

2.166 The Court of Appeal was again asked to consider the scope of the exclusion for documents compiled for the purpose or in contemplation of any criminal proceedings in *The People (DPP) v Bissett*.²³⁹ The case concerned an entry in the log of a Salvation Army hostel stating that Mr Bissett, a sex offender, had not shown up to take his place on a particular night. The failure to do so meant that he was in breach of the *Sex Offenders Act 2001*. The appellants argued that because the log from which this record was taken regularly made a note of violence and drug taking by residents, the hostel must have known it could be used in a criminal investigation. The Court of Appeal rejected this argument, holding that simply because a log contained information which could conceivably be used in a criminal investigation did not render it a document compiled for the purpose of or in contemplation of any criminal proceedings.²⁴⁰ The Court was satisfied that the log was maintained for the purposes of recording information relevant to the efficient running of the business, which would include absenteeism and violent disturbances.²⁴¹

2.167 The Court of Appeal also rejected a similar argument in *The People (DPP) v Smith*²⁴² where the appellant sought to have telephone records excluded. The appellant argued that as the phone company was required to maintain records in order to fulfil its obligations under the *Criminal Justice (Terrorist*

²³⁵ Section 5(4)(b)(iii).

²³⁶ Section 5(4)(b)(iv).

²³⁷ [2007] IECCA 98.

²³⁸ *Ibid* at p. 6.

²³⁹ *The People (DPP) v Bissett* [2016] IECA 175.

²⁴⁰ *Ibid* at [14].

²⁴¹ *Ibid* at [15]. It should also be noted that the trial judge was satisfied, and the Court of Appeal did not disagree, that the charity hostel was a business within the meaning of s. 5. The Commission recommends below that it be clarified in statute that the records of charitable organisations as defined in the *Charities Act 2009* are also admissible.

²⁴² [2016] IECA 154.

Offences) Act 2005. The appellant claimed that the records were therefore necessarily compiled in contemplation of legal proceedings. The Court rejected the argument pointing out that it is an inherent part of the business of a phone company that they keep records for the purpose of billing customers. As the company would certainly have still maintained the records in the absence of the statutory duty, the evidence was admissible.²⁴³

(f) *Discretion to exclude*

2.168 The 1992 Act contains a number of safeguards against abuse of documentary hearsay. Under section 8 the court is given discretion to exclude the document “in the interests of justice”. Section 8(2) provides a non-exhaustive list of factors to be considered by the court in deciding whether or not to admit (including whether or not it is a reasonable inference that the information is reliable and authentic and whether there is any risk that the admission or exclusion would result in unfairness to the accused). The court must have regard to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise when determining weight.²⁴⁴

(g) *Notice of intention adduce a business record*

2.169 Section 7 of the 1992 Act provides that, unless granted the leave of the court, at least 21 days before the trial commences, advance notice is to be given of intention to tender the evidence and a copy of the document must be served on the accused; a certificate affirming that information was compiled in the ordinary course of business is required prior to the trial, pursuant to the conditions set out in section 4B(1) or 4C(1) of the *Criminal Procedure Act 1967*, as amended by section 18(2) of the *Criminal Justice Act 1999* (which concerns the compilation of what is commonly called the book of evidence). The party on whom the notice has been served may not object to the admissibility of the evidence unless they serve a notice on each of the parties to the proceedings not later than 7 days before the commencement of the trial. Both notice requirements can be dispensed with by leave of the court. The court must require oral evidence of any certified matter where notice objecting to its admissibility in evidence is given²⁴⁵ but even if no such objection is made the court may still require such oral evidence for any reason.²⁴⁶

2.170 Healy suggests that although the certificate and the advance notice of intention to tender documentary evidence under Part 2 of the 1992 Act, comprising sections 4 to 11, appear to have been intended to function as prerequisites to admissibility under section 5 of the 1992 Act, it is implicit

²⁴³ *Ibid* at para. 10.

²⁴⁴ Section 8(3).

²⁴⁵ Section 6(3)(a).

²⁴⁶ Section 6(3)(b).

from the decision of the Court of Criminal Appeal in *The People (DPP) v Byrne*²⁴⁷ that Part II of the 1992 Act enables admissibility without these restrictions where leave is granted.²⁴⁸

(h) Pre-trial procedure

2.171 The 1992 Act does not provide for a pre-trial procedure to deal with challenges to the admissibility of documents under its provisions. A number of submissions have commented that, in a trial on indictment, this gives rise to the problem of the jury being sent away while a, sometimes lengthy, *voir dire* ("trial-within-a trial") takes place in which the admissibility of such evidence is tested before the trial judge. Reference was made to one case in which the jury was sent away for 2 weeks while the prosecution sought to prove that the admissibility conditions in the 1992 Act had been satisfied. It has been argued that provision should be made for the court to direct that arguments be heard on the admissibility of documents at a pre-trial stage in order to minimise the disruption to the flow of evidence in front of the jury. Such a pre-trial process is envisaged in the *Scheme of a Criminal Procedure Bill* which was published by the Department of Justice and Equality in 2014. The Commission agrees in principle that such a pre-trial process, assuming it is enacted, may prove beneficial in some cases, but that it is also likely that matters will arise during the course of a trial that were not, and often could not, have been anticipated at the pre-trial stage.

(i) Conclusion

2.172 Having considered the case law as well as submissions on the operation of the Act, the Commission takes the view that the current statutory regime provided for in Part II of the *Criminal Evidence Act 1992* makes overly exacting demands of the adducing party. The Commission takes the view that a simplified statutory regime is desirable and sets out the main recommended provisions below.

2.173 The Commission takes the view that the statutory framework established by Part II of the *Criminal Evidence Act 1992* should be consolidated into the draft Evidence Bill with a number of suitable amendments to clarify and simplify the process.

2.174 The primary alterations the Commission recommends be made to the framework are that the certificate procedure be removed and that business records should benefit from a presumption of admissibility.

2.175 While presumptions are a common feature of the law, particularly in evidence, their use is famously inconsistent and it is largely fruitless to

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[2001] 2 ILRM 134.
Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-38.

attempt to define a “correct” or standard usage.²⁴⁹ It has been suggested that there are as many as eight senses in which the term is used.²⁵⁰ Given this complexity and ambiguity²⁵¹, the Commission will set out briefly how it intends the recommended presumption should operate.

- 2.176** Broadly speaking, presumptions are tools of reasoning and argumentation which act to accelerate fact-finding where probability or experience indicate that a matter is very likely to be true.²⁵² They often operate so as to allow a party to prove a basic, preliminary fact in lieu of another fact, one which will usually be something much more difficult to prove. A notable example of this can be seen in the presumption of death; a person will be presumed dead where they have been missing for more than 7 years. To prove that someone is dead may prove impossible in some circumstances and so the law allows the proof of some more basic fact to presumptively establish the further, more complex one.
- 2.177** In this case, establishing the basic fact under S. 5(1) of the 1992 Act that the record is a properly constituted business record (i.e. it was compiled in the ordinary course of business and supplied by a person with personal knowledge), will render it presumptively admissible. This presumption may be rebutted where the party challenging the admission of the business record can prove that the record is inadmissible by virtue of any of the further provisions of S. 5 of the 1992 Act, including that it was generated in anticipation of litigation. The evidential burden will shift to the party challenging the admission business records to prove that they are inadmissible by virtue of any of the named conditions.
- 2.178** This reflects the Commission’s view that while it should be made easier to introduce business records in evidence, there remain categories of business records which should not be admitted, such as those generated in anticipation of litigation.
- 2.179** **The Commission recommends that the draft Evidence Bill should provide that business records should be presumed to be admissible in evidence, that the term “business records” should include those records referred to in the *Criminal Evidence Act 1992*, namely records kept by any trade, profession or other occupation carried on, for reward or otherwise, and**

²⁴⁹ See Broun, ‘The Unfulfillable Promise of One Rule for All Presumptions’ *North Carolina Law Review* 62 697 (1984).

²⁵⁰ Laughlin, ‘In Support of Thayer’s Theory of Presumptions’ 52 *Mich. L. Rev.* 196-207 (1953). More simply, McGrath proposes that presumptions should be classified into 4 groups, namely: 1. Mandatory legal presumptions, 2. Mandatory evidential presumptions, 3. Permissive presumptions and 4. Bare presumptions. See McGrath, *Evidence* (2nd e. Round Hall, 2014) p. 79 – 83.

²⁵¹ Such is the challenge they present, one author has remarked that “Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic of presumptions with a sense of hopelessness, and has left it with a feeling of despair.” Morgan, ‘Presumptions’ 12 *Washington Law Review* 255 (1937).

²⁵² For a full discussion of the role of presumptions in legal reasoning see Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) Chapter 8. See also Zuckerman, *Principles of Criminal Evidence* (Oxford, 1989) at Chapter 8.

that the term should also encompass records kept by a charitable organisation as defined in the *Charities Act 2009*.

- 2.180** The Commission recommends that a business record be accepted as admissible evidence if the document was created or received in the course of a business and where:
- (a) The information in the statement is derived from a person who had, or may reasonably be supposed to have had, direct personal knowledge of that information;
 - (b) The documentary statement has been produced for the purposes of a business; and
 - (c) The information is contained in a document kept by a business.
- 2.181** The Commission recommends that the courts should retain the discretion to refuse to admit business records where the interests of justice so require.
- 2.182** The Commission recommends that the draft Evidence Bill should provide that all reliable copies of admissible business records are also admissible in evidence.
- 2.183** The Commission also recommends that draft Evidence Bill should provide that business records from outside the State are admissible, notwithstanding the non-compellability of the manager, director or other similar officer of the business.
- 2.184** The Commission recommends that the draft Evidence Bill should clarify that the records of a business which has ceased to exist should be similarly admissible.
- 2.185** Having regard to the above recommendation that business records should be presumed admissible, the Commission recommends that the certification procedure set down in section 6 of the *Criminal Evidence Act 1992* should be repealed without replacement.
- 2.186** The Commission recommends that the provisions of the draft Evidence Bill providing for the admissibility of business records should not apply to information contained in a document which is admissible by virtue of any other enactment or rule of law as evidence of any fact stated therein.

G Summary of Conclusions

- 2.187** In conclusion, the Commission has formed the view that there are four reasons to revisit the broadly inclusionary approach to hearsay in civil cases as set out in the 1988 *Report on The Rule Against Hearsay in Civil Cases*.²⁵³
- 2.188** First, the constitutional requirement of fair procedures applies equally to civil and criminal cases and the right to confrontation should be upheld in all cases where possible. The rules of evidence already distinguish the burdens of proof required between civil and criminal cases. However it is not apparent why there should be different rules for criminal and civil cases about how facts may be proved in a court of law and how facts may not be proved. A generally inclusionary approach subject to the trial judge having a discretion to exclude hearsay where it appears to the court to be in the interests of justice involves the judge in deciding on what evidence the case is to be decided on a case by case basis without guiding rules. The Commission considers that constitutional justice requires some minimum evidentiary protections for those brought to trial, be it civil or criminal.
- 2.189** Second, while there is reason to suggest that the potential injustices of the reforms implemented in the UK by the Civil Evidence Acts have been mitigated by the judicial approach to the assessment of weight, serious concerns remain. The great influx of hearsay evidence has in some proceedings only added to confusion, slowed down the overall process and imperilled fair procedures.
- 2.190** Third, since 1988 there has been a significant change to the law of hearsay insofar as it applies to criminal cases whereby documentary business records are generally admissible as proof of their contents. This Report recommends that this rule be extended to civil cases as well. Were this done many of the difficulties with the proof of documentary evidence will be remedied. It is important to note that the admission of such records in criminal cases (and in civil cases were this to be provided for) was based on the view that the records were inherently reliable and therefore it was not necessary that the rule against hearsay apply to them. If the recommendations in this Report are adopted in legislation it will mean that in civil cases as in criminal cases all documentary business records will be admissible, that agreed hearsay will be admissible but that hearsay in dispute will be inadmissible and be required to be proved by first hand evidence.
- 2.191** Fourth, it is a goal of the Commission to provide clarity in the law, one means of achieving this is through consolidation of the common law and diverse statutory provisions. The Commission considers that the draft *Evidence Bill*

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LRC 25-1988.

which applies to civil and criminal cases alike is a more effective means of providing clarity in the law than having a different set of rules for civil and criminal cases.

CHAPTER 3

EXCEPTIONS TO THE RULE AGAINST HEARSAY

3.01 As discussed in Chapter 2, the courts favour oral evidence presented *viva voce* by witnesses physically present in the courtroom. There are various circumstances when this may not be possible and a number of exceptions to the rule against hearsay have been developed at common law and in legislation to provide for the admissibility of hearsay evidence that is nonetheless considered necessary and reliable. In this chapter, the Commission discusses the historical development, contemporary operation and justification for the various exceptions to the rule against hearsay. Some aspects of documentary hearsay and other considerations related to documentary evidence are discussed in Chapter 4.

A Consideration of the Exceptions to the Rule Against Hearsay

(1) *Admissions and confessions*

3.02 Admissions and confessions form an old and important exception to the rule against hearsay. In civil cases, an admission is a statement given in evidence that is in conflict with the claim of the party who makes it and it is widely regarded as admissible. In criminal cases, admissions and confessions are usually contrary to the accused's interests and may be sufficient to convict but they were traditionally regarded with unease. Whereas civil admissions may have been made in a neutral setting, criminal admissions or confessions often arose during police questioning; the law therefore developed many specific rules (at first common law, and later statutory) unrelated to the rule against hearsay, concerning the admissibility of admissions and confessions.¹

3.03 The Commission does not propose to explore the rules concerning the admissibility of confessions in criminal cases which do not concern the rule against hearsay. Assuming compliance with these admissibility rules, the rationale for allowing the admission of a self-incriminating statement (as an

¹ The courts developed rules of admissibility such as the rule that the admission must be voluntary and not the product of threats or inducements, and these were supplemented by administrative rules known as the Judges' Rules. These common law rules have largely been replaced by constitutional and statutory provisions, including the requirement for electronic recordings of Garda interviews and interrogations. See generally Walsh, *Criminal Procedure* (Thomson Round Hall, 2002) and O'Malley, *The Criminal Process* (Round Hall 2009).

exception to the hearsay rule) is that “it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true”.² Furthermore, no objection can be made on the basis of a lack of oath or an inability to cross-examine the declarant since he or she will be a party to the proceedings.

3.04 The Commission recommends that the draft Evidence Bill should provide that the common law exception to the rule against hearsay for admissions and confessions be retained.

(2) *Res gestae*

3.05 This exception applies in criminal cases only. The term is a Latin phrase of uncertain origin, though it has been claimed to be a corruption of the expression “*res gesta pars rei gestae*” (“what has been done is part of what has been done.”)³ For the purposes of the law of evidence *res gestae* is best defined as “[s]tatements concerning an event in issue, made in circumstances of such spontaneity or involvement in an event that the possibility of concoction, distortion or error can be disregarded, are admissible as evidence of the truth of their contents.”⁴ Put otherwise, the words are so interwoven with the event or transaction that they cannot sensibly be distinguished.⁵ The rationale is that “the declarant’s mind is so dominated by a startling or overwhelming event that the statement is a spontaneous and instinctive reaction, made without any opportunity for the declarant to devise a false statement.”⁶ The Commission discussed the law on *res gestae* in the *Consultation Paper on Hearsay in Civil and Criminal Cases*.⁷

3.06 What matters is whether the statement was made so spontaneously or with such involvement in the event that the possibility of concoction can be disregarded; the test is not just whether the statement was part of the event or transaction.⁸ Concoction or distortion can be disregarded if the event dominates the mind of the declarant such that the statement is an instinctive reaction.⁹ Contemporaneity therefore need not be exact: approximate contemporaneity suffices.¹⁰ The period elapsing between the event and the

² Grose J in *R v Lambe* (1791) 2 Leach 552, 555.

³ *Shipson on Evidence*, (18th ed. Sweet & Maxwell, 2013) p. 1033n.

⁴ McGrath, *Evidence* (Round Hall, 2nd ed. 2014), at paragraph 5-77. This summary has been approved by the Court of Criminal Appeal *The People (DPP) v Lonergan* [2009] 4 IR 175.

⁵ See *Teper v R* [1952] AC 480 at 486 per Lord Normand: “human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words...”

⁶ McGrath, *Evidence* (Round Hall, 2nd ed. 2014), at paragraph 5-77.

⁷ At paras. 3.20-3.32 of the *Consultation Paper on Hearsay in Civil and Criminal Cases*.

⁸ *R v Ratten* [1972] AC 378, 389 approved by the Court of Criminal Appeal in *The People (DPP) v Lonergan* [2009] 4 IR 175.

⁹ *R v Andrews* [1987] AC 281. In *Lonergan* the Court of Criminal Appeal commented that though Andrews elaborated on the rationale for *res gestae* it did not conflict with *Crosbie*, the trial judge therefore had not fallen into error in following *Andrews*. *Andrews* is discussed at length at paragraph 3.27 of the Consultation Paper and the Court of Criminal Appeal’s analysis of it in *Lonergan* is discussed at paragraph 3.28.

¹⁰ *Ibid.*

statement is an important factor but not determinative.¹¹ Nevertheless, if the statement describes a prior event it is not covered by the exception.

- 3.07** The requirement of contemporaneity was originally very narrowly interpreted. In the 19th century case of *R v Bedingfield*¹², a woman ran out of her house with her throat cut, just a minute or two after the accused had entered, exclaiming "see what Harry has done". The court held that the statement was not a part of the event but rather something said after the event and thus ruled it inadmissible. The decision has been much criticised and the approach to *res gestae* has become much more flexible in recent times. In a 2015 decision, the English High Court was satisfied that a statement recorded by police attending the scene at least ten minutes after an incident could form part of the *res gestae*.¹³
- 3.08** In Irish law, a hearsay statement made by a victim within a minute of being stabbed is admissible at the trial of the offence¹⁴ because the words were spoken by the victim within a sufficiently short time of the stabbing and the remarks related directly to the incident under investigation: they therefore formed "part of the thing being done and so an item or part of the real evidence and not merely a reported statement."¹⁵
- 3.09** Special considerations such as the presence of malice or a particular reason for the possibility of error go to admissibility but ordinary frailty of memory goes only to weight.¹⁶ Due weight must be given to both the requirement of contemporaneity and the possibility of concoction: This composite approach reflects the interaction of the two rationales for the exception and found favour in *The People (DPP) v Lonergan*.¹⁷ *Lonergan* concerned the trial of a man for the murder of his brother in a brawl. The prosecution sought to establish that Albie Lonergan had stabbed his brother, Michael Lonergan, twice in the chest and once in the thigh on the porch of their house. This evidence included a statement made by the deceased somewhere between 5 and 15 minutes after the event, the exact words of which were: "the bastard stabbed me, my own brother stabbed me". The court held that this delay did not render the statement outside the *res gestae*:

"Time in this context is an important factor but not a determinant. The true importance of the requirement of contemporaneity is to eliminate the possibility of concoction. Where it is clear that no such opportunity existed...it would be quite wrong to exclude statements..."

¹¹ *The People (DPP) v Lonergan* [2009] 4 IR 175.
¹² (1879) 14 Cox CC 341.

¹³ *Higgins v Crown Prosecution Service* [2015] EWHC 4129 (Admin) esp. para. 9.

¹⁴ *The People (Attorney General) v Crosbie and Meehan* [1966] IR 490, 496.
¹⁵ [1966] IR 490, 497-8.

¹⁶ *Ibid.*

¹⁷ Byrne, "Evidence and Procedure Update" (2009) 19 (3) *Irish Criminal Law Journal* 89.

- 3.10** This composite approach has also found favour in England and Wales. As noted previously, the decision in *R v Andrews* held that “exact contemporaneity” was not required and “special features” of the case may assist in determining the question of concoction or distortion.¹⁸ Recent cases have built on this analysis and moved towards a composite approach similar to that set down in *Loneragan*.
- 3.11** Decided in 2016, the case of *Ibrahim v Crown Prosecution Service*¹⁹ concerned the admission in evidence of a call to the emergency services by a woman alleging she had been assaulted by her partner. The woman later, under apparent duress, recanted her allegation and the CPS sought to introduce the telephone call in evidence against the partner. The judge accepted the submission of the appellant that the call may have been made as much as 1 hour and 25 minutes after he had left the house but nevertheless admitted the call as part of the *res gestae*, stating that other circumstances of the case must be considered.²⁰ The judge reasoned that the “hysterical tone” of the woman’s voice on the recording as well as the “still-developing” injuries and obvious distress observed by the police on attending the premises suggested that the attack was indeed recent and that her thoughts were still so dominated by the traumatic event that possibility of concoction could be disregarded.²¹
- 3.12** The exception has been often criticised.²² The Latin expression itself has been denigrated as “a respectable legal cloak for a variety of cases to which no formulae of precision can be applied”,²³ as a cover for insufficient analysis²⁴ and even as a legal “dustbin”.²⁵ The Law Commission of England and Wales contemplated abolishing the *res gestae* exception. It considered the case law on its scope to be convoluted and lacking in any clear principles.²⁶ Ultimately, it recommended that the composite test of context and contemporaneity set out in *Andrews*²⁷ (and approved here in *Loneragan*) should be retained in statutory form for criminal cases. Section 118 of the English *Criminal Justice Act 2003* reflects this.
- 3.13** **The Commission recommends that the draft Evidence Bill should provide that the common law *res gestae* exception should be retained.**

¹⁸ *R v Andrews* [1987] AC 281.

¹⁹ [2016] EWHC 1750 (Admin).

²⁰ *Ibid* at [12].

²¹ *Ibid* at [13] to [15]. The court also relied on *Barnaby v Director of Public Prosecutions* [2015] EWHC 232 (Admin), a case of similar facts.

²² For example by the Court of Criminal Appeal in *The People (DPP) v O’Callaghan* [2001] 1 IR 584, at 588.

²³ *Holmes v Newman* [1931] 2 Ch 112, 120.

²⁴ *R v Ratten* [1972] AC 378.

²⁵ Cowen and Carter, *Essays on the Law of Evidence* (1956) 4.

²⁶ *Consultation Paper on Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com CP No 138, 1996) paragraph 3.49.

²⁷ [1987] AC 281.

(3) Dying declarations

- 3.14** In *R v Woodcock*²⁸ an exception to the rule against hearsay was developed for statements made by a person at the point of death seeking to identify their killer. They may only be admitted to prove the circumstances or cause of the death of the deceased. The declaration must also be made where the person is labouring under a “settled, hopeless expectation of death.” The exception applies only in murder and manslaughter trials; it does not apply to other crimes or in any civil case.
- 3.15** The original basis for the rule was that the maker of the statement was under a religious obligation equivalent to that created by swearing a witness oath in court.²⁹ The statements were deemed trustworthy since the makers were beyond the hope of recovery and were in fear of eternal punishment if they lied; no person “who is immediately going into the presence of his Maker will do so with a lie upon his lips”.³⁰ Equally, the prospect of meeting the devil has motivated against the telling of untruth. The great sceptic Voltaire, when asked by his priest on his deathbed to renounce the devil, replied “This is not the time to be making new enemies.”³¹
- 3.16** This rationale lies behind the central test for the admissibility of such evidence, the “settled, hopeless expectation of death.” For such a motivation to tell the truth to be proved, it was necessary to show that the deceased was cognisant of the imminent judgement of God.
- 3.17** The existence and effectiveness of this kind of religious motivation is of dubious empirical validity but the premise remains that psychological pressure, owing to the solemnity and desperation of the occasion would keep a declarant from lying.³² *R v Woodcock* makes the case for the rationale persuasively, arguing that one’s deathbed is “a situation so solemn and so awful that it is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.”³³ However, even such secularised iterations of the rationale remain laden with religious overtones and indeed judges have rejected dying declarations where the court has not been satisfied that the deceased held a belief or understanding in the hereafter.³⁴ Arguably, the continued application of a rule of law with

²⁸ (1789) 168 ER 352. This case is discussed at paragraphs 3.33-3.34 of the Consultation Paper.

²⁹ *Ibid.*

³⁰ *R v Osman* (1881) 15 Cox CC 1.

³¹ The extent of Voltaire’s non-belief is contested. While his attacks on organised religion and superstition are renowned, Voltaire’s personal letters reveal complex personal beliefs. The labels “sceptic” or “deist” are those most attributed to him. See ‘Voltaire’, Stanford Encyclopaedia of Philosophy at <http://plato.stanford.edu/entries/voltaire/#Ske>.

³² *R v Woodcock* (1789) 1 Leach 500.

³³ *R v Woodcock* (1789) 1 Leach 500.

³⁴ See *R v Pike* (1829) 3 Car & P 598. Held that the dying declaration of a four year old boy must be excluded as “a child of such tender years could not have had that idea of a future state which is necessary to make such a declaration admissible.” See also *R v Madobi-Madogai* [1963] P&NGLR 252 at 253 where the Supreme Court of Papua New Guinea held dying declarations to be inapplicable to a non-Christian. Addressing the exception Ollerenshaw J stated: “I apprehend that it

such an explicitly religious basis may be considered inappropriate in a modern, secular legal system.

3.18 Academic commentary has suggested that the real rationale for admitting the evidence is to have a fair hearing when a key witness is dead³⁵ and that the exception should therefore not be confined to declarations made while dying and should even be extended to witnesses who are not dead.³⁶ This “necessity” rationale has quite openly been relied upon by English judges. In *Nembhard v R*, the court stated that “it is important in the interests of justice that a person implicated in a killing should be obliged to meet in court the dying accusation of the victim.”³⁷ This passage appears to directly contradict the principle underlying the rule against hearsay, that one should have the opportunity to face one’s accuser, and illustrates the tension between motivations of “necessity” and “reliability” this exception to the rule against hearsay generates.

3.19 The general dangers of admitting dying declarations are well summarised by one American commentator:

“Physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for a wrong to another, as well as the fact that the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination: all these considerations conspire to render such declarations a dangerous kind of evidence.”³⁸

3.20 The supposed “settled hopeless expectation of death” rationale has been criticised.³⁹ The restriction of the rule to murder and manslaughter trials is also open to criticism, as it suggests that the rule is not really concerned with

is based upon the Christian belief in a hereafter and that the “most powerful considerations to speak the truth” are those which exercise the mind of a Christian about to meet his Maker... but, what little I do know about the expectations for their illimitable future of the natives of this community here in Kiriwina does not lead me to think that they anticipate anything like a judgment upon their sins that would create a solemn sanction to speak truthfully upon the eve of such a judgment. I understand that their traditional belief was in some sort of existence, after this life, upon those uninhabited islands which may be seen from the wharf and its approaches.”

³⁵ Rose “Can a Suicide Victim be taken at her word?: The Louisiana Supreme Court Declares a Suicide Note Inadmissible Hearsay in *Garza v Delta Tau Delta Fraternity National*” 81 *Tulane Law Review* (2006-2007). This is discussed at paragraphs 3.35-3.36 of the Consultation Paper.

³⁶ *Ibid.*

³⁷ [1982] 1 All ER 183 at 185.

³⁸ Aviva Orenstein, ‘Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence’ (2010) *U. Ill. L. Rev.* 1411, 1460’.

³⁹ Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd edition Stevens and Sons, 1963) p. 200.

what is reliable, but simply what can assist the court in trying serious offences when other evidence is insufficient.

- 3.21** While it is difficult to justify the rule by reference to its original rationale, submissions received by the Commission argued that in many cases such statements will be obviously and eminently reliable. By way of example, reference was made to the infamous case of *R v Bedingfield*⁴⁰ in which a woman came screaming from a room with her throat cut, trying to identify the man who had attacked her. Reference was also made to more modern examples such as the Litvinenko poisoning and the restrictive effect any abolition of the exception might have on such a set of facts.⁴¹
- 3.22** It was also argued that even in the absence of the religious motive on which the exception was originally predicated, the seriousness of the allegation and the solemnity of the occasion make a person unlikely to lie. Thus, while dying declarations are difficult to defend from a theoretical perspective, in practice they are used relatively uncontroversially and to remove them might have an unduly restrictive effect and hamper fact-finding in the most serious of cases.
- 3.23** **The Commission recommends that the draft Evidence Bill should provide that the common law exception to the rule against hearsay for dying declarations in homicide cases should be retained subject to the requirement the trial judge issue a direction to the jury warning of the danger of attaching significant weight to such statements.**

(4) *Certain statements of persons now deceased*

- 3.24** The common law admitted certain prior statements of persons who had died before trial.⁴² There was no general rule; the exceptions were *ad hoc* and included declarations against interest, declarations in the course of duty, declarations on pedigree and declarations explaining one's will. They are rarely seen in modern cases.⁴³
- 3.25** Healy suggests that the courts prefer to assess such statements as either *res gestae* or original evidence which may account for their absence from modern case law.⁴⁴

⁴⁰ (1879) 14 Cox CC 341. Both *res gestae* and dying declarations were argued as grounds for admitting the statement in this case.

⁴¹ See BBC, Alexander Litvinenko: Profile of murdered Russian spy, available at <http://www.bbc.co.uk/news/uk-19647226>. No case has been brought in respect of the murder owing in part to the refusal of the Russian Government to extradite the main suspect.

⁴² As discussed at paragraph 3.39 of the Consultation Paper.

⁴³ Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) paragraph 9-78.

⁴⁴ *Ibid.*

(a) *Declarations by a deceased person against pecuniary or proprietary interest*

3.26 A declaration made by a deceased person which was, to his or her knowledge, against his or her pecuniary or proprietary interest is admissible to prove the facts stated. The rationale for the admission of such statements is the unlikelihood of a person making a false statement which tends to damage their own interests. The statement must be against one of the mentioned categories of interest, no other will suffice, not even an admission of criminal liability.⁴⁵ Cases brought often involve acknowledgements of debts owed⁴⁶ or monies paid.⁴⁷ The exception has been quite broadly understood in the case of proprietary interest with any statement which fetters an interest in land admissible in evidence. In *Conner v Fitzgerald* this was held to include an agreement to let certain lands to the plaintiff.⁴⁸

3.27 The Commission considers that this exception to the rule against hearsay is based on cogent indicia of reliability.

3.28 **The Commission recommends that the draft Evidence Bill should provide that the common law exception to the rule against hearsay for declarations by deceased persons against pecuniary or proprietary interest should be retained.**

(b) *Declarations by a deceased person in the course of duty*

3.29 A declaration, oral or written, made by a deceased person in the course of duty, contemporaneously with the facts stated, are admissible as proof of their contents. The rationale for the exception is identical to that of business records, namely that they are made mechanically by a disinterested person and their accuracy is valued by the person or organisation for which they are made.

3.30 This exception was applied in *Price v Earl of Torrington*,⁴⁹ an action by a brewer against the Earl of Torrington for beer sold and delivered. The practice in the brewery was for the drayman to give an account every evening to the clerk of the brewery of all the beer that had been delivered out. The clerk would write this information in the record book and the drayman would sign his name to the record. The drayman had died by the time of the action. The Court allowed the record to be admitted as evidence of the delivery to the defendant.

⁴⁵ *The Sussex Peerage* (1844) 11 C. & F 108.

⁴⁶ *R v Rogers* [1995] 1 Cr App R 374 at 379.

⁴⁷ *Taylor v Whitham* 3 Ch D 605.

⁴⁸ (1883) 4 LR IR 106.

⁴⁹ *Price v Earl of Torrington* (1703) 91 ER 252.

- 3.31** Only such facts as the declarant was under a duty to record are admissible⁵⁰ but such a duty does not need to be a duty under law.⁵¹ The requirement that the record be made contemporaneously does not seem to insist on immediate recording⁵² but it is unclear how long a gap may exist between the occurrence of an act and the record of it.
- 3.32** The information recorded must be within the personal knowledge of the declarant⁵³ and the declarant's opinion is inadmissible.⁵⁴ If the declarant had an interest in misrepresenting the information the record is inadmissible.⁵⁵ The act recorded must also have been performed by the declarant him or herself. It cannot be a record of an intended future act. In *The Henry Coxon*⁵⁶ the entries from a ship's log were held inadmissible as they documented the manoeuvres and navigation of another ship involved in a collision and not just the details relating to the declarant's ship.
- 3.33** The vast majority of cases concern written declarations with the notable exception of *R v Buckley*.⁵⁷ A police officer told his inspector that he was going to watch the movements of a man who had threatened vengeance against a police officer. The officer was subsequently found dead and the statement was admitted in evidence against the accused.
- 3.34** Oral statements in the course of duty do not appear to benefit to the same extent from the rationale that records dutifully made are *prima facie* reliable. They are not formed as part of system as a matter of routine and are closer to traditional oral hearsay than to reliable business records.
- 3.35** **The Commission recommends that, as the business records exception which this report recommends sufficiently accounts for documentary evidence falling under the exception for declarations by a deceased person in the course of duty, the draft Evidence Bill should provide that the common law exception be abolished.**

(c) *Declarations as to pedigree*

- 3.36** Perhaps the most antiquated of this category of exception, the exception for declarations as to pedigree captures statements made between blood relatives or spouses of blood relatives speaking to disputes as to succession, descent and legitimacy. The statements must be made before suit is brought

⁵⁰ In *Chambers v Bernasconi* (1834) 1 Cr M & R 347, 3 LJ Ex 373, 4 Tyr 531 a certificate outlining the fact, date and place of arrest prepared by the sheriff's office was inadmissible to prove the place of arrest as this was a matter which he was not under a duty to record.

⁵¹ In *Dillon v Tobin* (1878) 12 ILTR 32 a record in a baptism book was admissible where the clergyman was under a duty under the relevant canon law of the Roman Catholic Church to make the entry. Warren J held that the case fell within the principle of *Price v Torrington* in that the entry was made by a now deceased person in the course of his business, contemporaneous with the occurrence.

⁵² *Ryan v Ring* (1834) 1 CM & R 347.

⁵³ *Mulhern v Clery* [1930] IR 649; *Ryan v Ring* (1834) 1 CM & R 347.

⁵⁴ *R v McGuire* (1985) 81 Cr App R 323.

⁵⁵ *The Henry Coxon* (1878) 3 PD 156, 47 LJP 83.

⁵⁶ *Ibid.*

⁵⁷ (1873) 13 Cox 293.

and their claim to reliability is based on an assumption that family members speak truthfully to one another where no interest is to be gained.

- 3.37** The facts of the cases in which the exception has historically arisen are redolent of an age of titles and estates and are difficult envisage in contemporary Irish society. One case involved the question of whether a pedigree hung on the wall could be admitted in evidence, despite the person who made it being unknown.⁵⁸ Other cases have turned on unsavoury evidence as to whether one child was treated as illegitimate and the other as the proper heir.⁵⁹ The exception has arisen in very few cases since the 19th century.⁶⁰
- 3.38** The treatment of pedigree declarations has varied across the common law world. In England and Wales the exception nominally remains in force but has been superseded by the abolition of the rule against hearsay in civil proceedings⁶¹ (it has been noted that a criminal case concerning pedigree is unknown⁶²). The New South Wales Law Reform Commission has noted that the exception is “hard to defend”. The Commission went on to discuss the dangers of this type of evidence noting that in some cases it represents “a mere chain of hearsay, as weak as its weakest link.”⁶³ Oddly, the report went on to recommend the retention of the exception subject to certain requirements of reliability.⁶⁴ Rule 804 (4) of the U.S Federal Rules of Evidence expressly provide for their admission, including statements of servants or others “so intimately associated with the person’s family that the declarant’s information is likely to be accurate.”
- 3.39** The exception has been criticised, most notably in a colourful passage from Maguire:

“Perfectly plainly family tradition carried along over a century or more involves a kind of relay of hearsay, or, to put it another way, hearsay mounted tottering on hearsay in a totem-pole formation. There is a risk of cumulative deviation from actual fact in such superposition. The totem-pole may warp more and more out of true until it topples. For instance: Ancestor A, having absented himself for many years from his family, visits his brother B and tells the latter that A’s daughter married a missionary and went to Hawaii. B some years later informs his child C that A had a daughter in Hawaii. C, having a yearning for the romantic, says later still to her daughter O that old uncle A was a great traveller

⁵⁸ *Duke of Devonshire v Neill and Fenton* (1877) 2 L.R. Ir. 132 at 160.

⁵⁹ *Cf. Goodright d Stevens v Moss* (1777) 2 Cowp 591 at 594.

⁶⁰ The last Irish case to address the issue would appear to be *In Re Holmes: Beamish v Smeltzer* [1934] I.R. 693. It would appear that the English Court of Appeal last addressed the issue in 1952. *Re Jenion* [1952] 1 All E.R. 1228 and the Court of Probate in 1965. [1965] W.L.R 2 871.

⁶¹ *Civil Evidence Act 1995* ss. 1, 7(3).

⁶² *Phipson on Evidence* (15th ed. Sweet & Maxwell, 2000) p.857.

⁶³ Report on the Rule against Hearsay, *New South Wales Law Reform Commission*, p.143.

⁶⁴ *Ibid* 144.

who married in Hawaii and had a daughter there. The tale proliferates until in the mind and mouth of R, a remote relative, it runs to the effect that A was a whaling captain, perhaps a bit of a pirate, who married or at least lived with a beautiful native belle in Hawaii and that many of his descendants are still living on the island. Finally, after R's death, a claimant of mixed blood from Honolulu uses evidence of the R version to establish a profitable relationship to the A family."⁶⁵

3.40 Without the need for the extravagant imaginings of Maguire, one can quite easily contemplate a common story or understanding within a family which was false or distorted truth. Whether or not a family would or would not trade in untruths, though such a presumption may be considered naïve, is not the primary concern. Spoken, or even unspoken, understandings communicated across generations, over many decades is quite unreliable oral hearsay with little to recommend its admission in evidence.

3.41 **The Commission recommends that the draft Evidence Bill should provide that the exception to the rule against hearsay for declarations of deceased persons as to pedigree be abolished.**

(d) *Declarations by a deceased person explaining the contents of his or her will*

3.42 Declarations of a deceased testator or testatrix are admissible to explain the contents of his or her will where this proves necessary, usually owing to the loss of the will. The principle was set out by Warren J as follows: "Declarations made by a testator, both before and after the execution of his will, are in the event of its loss, admissible as secondary evidence of its contents."⁶⁶ It should be noted that the exception covers statements beyond the more commonplace scenario of judges using statements extrinsic to a will to explain any ambiguities or contradictions within it. The exception purports to admit statements of the deceased to construct the will in the absence of document itself, or where it is deficient in some aspect.

3.43 The law of New South Wales is instructive in this regard as it takes a very permissive attitude to testamentary declarations under s. 8(3) of the *Succession Act 2006*. The section as a whole allows for the court to dispense with formal requirements of the construction or revocation of wills in certain circumstances and permits statements as to testamentary intention of the deceased to assist in the process. The case of *Campton v Hedges*⁶⁷ illustrates the effect of the provision. The testator was in the process of drawing up a new will at the time of his death and although not properly executed, the executors sought to rely on the document using oral statements made by the testator to establish it as his true testamentary intention. The oral statements included were as general as "I just want you to drop over my Will. I want to

⁶⁵ Maguire, *Evidence: Common Sense and Common Law* (Foundation Press Inc. Chicago, 1947) p. 135.

⁶⁶ *In the Goods of Ball* (1890) 25 LR IR 556.

⁶⁷ [2016] NSWSC 201, see also *Yazbek v Yazbek* [2012] NSWSC 594.

make a few changes. There are a few people I want to cut out.”⁶⁸ The combination of these oral statements and the incomplete altered will convinced the judge that the testator had intended to rescind his previous will and ordered that his estate be distributed according to the new will constructed from the oral statements and the unfinished document.

- 3.44** The exception is perhaps the least commonly argued of all the exceptions to the hearsay rule with no modern Irish authorities on the subject.⁶⁹
- 3.45** It has been suggested that the underlying guarantee of reliability justifying the removal of hearsay protection is akin to that of dying declarations, that of the solemnity of making provision for others in the event of your death. In reality it lacks a clear principled basis and appears to be an *ad hoc* exception designed to meet a practical necessity.
- 3.46** The Commission consulted with expert practitioners in the area to assess the continuing utility of this exception to the rule against hearsay. Discussions indicated that the exception has a number of everyday uses for probate practitioners. One example given was that of the notes of a solicitor in which the wishes of the testator are recorded. These notes will often prove extremely useful in the construction of the will.
- 3.47** Significantly, technically hearsay statements of a testator or testatrix may be crucial to determining the question of capacity and thus the validity of the will. Statements made by a testator or testatrix indicating that he or she understood the extent of his or her assets etc. can play a vital role in such determinations. The Commission was therefore advised against abolishing this exception to the rule against hearsay.
- 3.48** **The Commission recommends that the draft Evidence Bill should provide that the exception to the rule against hearsay for declarations by a deceased person explaining the contents of his or her will should be retained.**

(5) *Testimony in former proceedings*

- 3.49** A statement made by a person while giving evidence, whether orally or by affidavit, is admissible in subsequent proceedings between the same parties concerning the same (or substantially same) subject matter if the witness is unavailable to give evidence. This hearsay evidence is admitted in the subsequent proceedings because the circumstances in which the statement was made addressed the concerns with hearsay evidence – it is considered reliable because the statement was made under oath and the party against whom the statement was made had an opportunity to cross-examine the

⁶⁸

Ibid at para. 20.

⁶⁹

McGrath, *Evidence* (2nd ed. Round Hall, 2014) p.375.

witness. The requirement of unavailability is met if the witness is dead, is too ill to attend court, has been prevented from attending by the party against whom the evidence is to be admitted, is outside of the jurisdiction and cannot conveniently/reasonably make themselves available or cannot be located following intensive enquires. This exception was not expressly considered by the Supreme Court in *Borges v Medical Council*⁷⁰ but the decision clarifies that it does not apply where the witness is unavailable simply because he or she is unwilling to testify.

3.50 The Commission recommends that the exception to the rule against hearsay for testimony in former court proceedings should be retained subject to the requirement that the witness is unavailable to attend because he or she; is dead, is too ill to attend court, has been prevented from attending by the party against whom the evidence is to be admitted, is outside of the jurisdiction or cannot be located following intensive enquires, but that such evidence is not admissible where the witness is simply unwilling to testify.

(6) *Previous statements of witnesses*

3.51 At common law, an out-of-court statement of a witness which is consistent with his or her testimony in court is inadmissible, at least as evidence of the fact(s) asserted. This is sometimes known as the rule against narrative or the rule against self-corroboration, but the true rationale for exclusion is probably that such evidence is superfluous. After all, assertions made by a witness in court are generally presumed to be true, unless there is some reason for treating them as false.⁷¹ Evidence of a previous statement might however be relevant to a witness's credibility or to show consistency between what the witness says in court and what he or she has said on a previous occasion.

3.52 A previous consistent statement may therefore be admitted in certain circumstances although, at common law, such a statement was inadmissible as evidence of the fact(s) stated. It went solely to credibility. This distinction has been criticised as having little practical meaning or effect. Indeed, in England and Wales, following a recommendation by the Law Commission, such statements, when admissible at all, may now be treated as evidence of any matter stated.⁷² The three principal exceptions to the rule rendering previous consistent statements inadmissible are: *res gestae*; rebuttal of an allegation of recent fabrication; and the recent complaint rule in sexual

⁷⁰ [2004] IESC 9; [2004] 1 IR 103.

⁷¹ Cross, *Evidence*, 5th ed. (London: Butterworths, 1979), p. 236. On the present English law, see Dennis, *The Law of Evidence*, 5th ed. (London: Sweet and Maxwell, 2013), pp. 562-574.

⁷² *Criminal Justice Act 2003*, s. 120; Law Commission of England and Wales, *Evidence in Criminal Proceedings: Hearsay and Related Topics* Law Com. No 245 (London: The Stationery Office, 1997), para. 10.17.

offence cases. *Res gestae* has already been addressed. The justification for admitting a previous statement under this heading derives from its temporal proximity to the event forming the subject matter of the case. It has long been accepted that an out-of court statement may be admitted when it is necessary to rebut a charge made to a witness during cross-examination that he or she has fabricated the evidence after the event for the purpose of testifying in court.⁷³ The most notable exception relates to evidence of recent complaint by a complainant in a sexual offence case. This is subject to some quite technical rules but, essentially, the statement or complaint must have been voluntary; it must have been made as soon as reasonably possible after the event; and a jury must be directed that evidence of the out-of-court statement is relevant to credibility only.⁷⁴ In England and Wales, the recent complaint rule can now apply to any offence, and the evidence, once admitted, may be treated as evidence of any matter stated.⁷⁵ The Commission recommends that these exceptions to the rule rendering previous consistent statements inadmissible should be retained. It makes the same recommendation in respect of any other exceptions, though they may seldom arise, existing at common law. The Commission would further recommend, however, that in any future general review of the law relating to sex offences and the trial of such offences, consideration should be given to reforming the law governing recent complaints and, in particular, to the question of whether evidence of such complaints should be substantively admissible. Indeed, it believes that there may be some merit in extending this exception to include all offences against the person.

3.53 Any previous statement inconsistent with the witness's testimony in court may be proved but such a statement may only be used to discredit the witness's sworn testimony and is not evidence of the facts asserted in it. As noted by Walsh J in *The People (Attorney General) v Taylor*,⁷⁶ "[i]t must at all times be made clear to the jury what the witness said in the written statement is not evidence of the fact referred to but is only evidence on the question of whether or not she has said something else - it is evidence going only to her credibility."⁷⁷

3.54 The common law rule was modified in respect of civil and criminal proceedings by sections 3 to 5 of the *Criminal Procedure Act 1865*, and in respect of certain criminal trials by section 16 of the *Criminal Justice Act 2006*.

73 *Flanagan v Fahy* [1918] 2 I.R. 361.

74 *R v Lillyman* [1896] 2 Q.B. 167; *The People (DPP) v M.A.* [2002] 2 I.R. 601; *The People (DPP) v Brophy* [1992] ILRM 709; *The People (DPP) v Kiernan* Court of Criminal Appeal, unreported, 11 March 1994; *The People (DPP) v D.R.* [1998] 2 I.R. 106. See also Heffernan with Ní Raifeartaigh, *Evidence in Criminal Trials* (Dublin: Bloomsbury, 2014), pp. 126-131; O'Malley, *Sexual Offences* 2nd ed. (Dublin: Round Hall, 2013), ch. 21.

75 *Criminal Justice Act 2003*, s. 120.

76 [1974] IR 97.

77 *Ibid* at 100.

3.55 The modification in sections 3 to 5 of the *Criminal Procedure Act 1865* arises where a witness, on cross-examination in a civil or criminal case, admits that he or she has made a previous oral or written previous statement that is inconsistent with his or her testimony. In such a situation, no further proof of that statement is permitted. If the witness does not admit to making the statement then, if it is relevant to the proceedings (which is a matter for the judge), it may be proved against the witness in accordance with the Act.

3.56 In its 1980 *Working Paper on The Rule Against Hearsay*,⁷⁸ the Commission observed that much of the point of the rules relating to the proof of inconsistent statements disappeared if the out-of-court statements of a witness were to be made generally admissible as evidence of the facts asserted. The Commission also stated that, in principle, there was no reason why any party should not be free to tender such a statement in evidence, and for this reason recommended that sections 3 and 4 of the Act be repealed as redundant in their purpose, while retaining section 5, subject to modifications

3.57 The Commission in its 1988 *Report on the Rule Against Hearsay in Civil Cases* confirmed the preliminary recommendations of the 1980 Working Paper in relation to civil proceedings. It recommended that the restrictions on cross-examination contained in sections 3, 4 and 5 of the *Criminal Procedure Act 1865* should be repealed insofar as they apply to civil proceedings and should be replaced by the following provisions:

“(a) Any previous statement of a witness used in cross-examination should be made available to the other party to the litigation.

(b) Notwithstanding (a), it should remain permissible to cross-examine a witness about a previous statement made by him before his attention is drawn to its exact contents or any document containing it.

(c) Where a previous statement of a witness is used in his cross-examination, he should be entitled to comment thereon and explain any discrepancy between it and his testimony in court; and evidence should then be admissible without notice of other previous statements explaining or qualifying an inconsistency.”

3.58 In *The People (DPP) v McArdle*,⁷⁹ the defendant had been charged with and convicted of manslaughter and criminal damage. On appeal, he claimed that certain previous inconsistent witness statements ought to have been admitted at the trial of the action as evidence of the truth of their contents rather than going to credibility of the witnesses alone. The Court of Criminal Appeal rejected this contention and referred to the ‘traditional view of the law’, set out by *Phipson on Evidence* (referring to section 4 of the *Criminal*

⁷⁸ *Working Paper on The Rule Against Hearsay* (LRC WP 9-1980).
⁷⁹ [2003] 4 IR 186.

Procedure Act 1865) which stated that “[a]ny inconsistency between a witness’s evidence and an earlier statement goes to credibility and the earlier statement cannot be treated as evidence of the truth of its contents”.⁸⁰ The Court further stated that had the accused wished to rely on the statements as proof of the truth of their contents at the trial of the offence, he ought to have applied to the judge in the absence of the jury for this to be done, which he had not attempted to do.

3.59 The inability of the prosecution or defence to rely upon previous witness statements as proof of the truth of their contents continued to present difficulties following *McArdle*, culminating in the collapse of the trial of Liam Keane. Six witnesses, who had previously given statements to the Gardaí, refused to testify claiming that they could not recall the events whatsoever as they had been under the influence of drugs. As a result the Director of Public Prosecutions was unable to prove a case against the accused.⁸¹ Section 16 of the *Criminal Justice Act 2006*, applicable solely to criminal proceedings, was enacted to prevent the reoccurrence of such an event. Section 16 permits the introduction of out-of court statements provided certain conditions are met. Under section 16(1) previous witness statements may be admitted, although the witness is available for cross-examination if the witness:

- (a) refuses to give evidence,
- (b) denies making the statement, or
- (c) gives evidence that is materially inconsistent with it.

3.60 Section 16(2) of the 2006 Act provides that the statement may be admitted if:

- (a) the witness confirms, or it is proved, that he or she made it, and
- (b) the court is satisfied—
 - (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,
 - (ii) that it was made voluntarily, and
 - (iii) that it is reliable⁸², and

⁸⁰ *Phipson on Evidence* (15th ed. Sweet & Maxwell 2000) para. 11-31.

⁸¹ However, one of the witnesses in the Keane trial pleaded guilty to a charge of contempt, telling gardai he would rather spend 6 months in jail than give evidence at the trial. "I can come out of prison but I can't come out of a box," Mr Murphy said.

<http://www.breakingnews.ie/ireland/keane-murder-case-collapse-community-service-orders-for-two-locals-270187.html>

⁸² Section 16(3) of the 2006 Act provides that: "In deciding whether the statement is reliable the court shall have regard to—

- (a) whether it was given on oath or affirmation or was video recorded, or
- (b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability, and shall also have regard to—
 - (i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or
 - (ii) where the witness denies making the statement, any evidence given in relation to the denial."

(c) either—

(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or

(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

3.61 Section 16 of the 2006 Act provides the Court with the discretion to exclude the evidence if there is a risk that its admission would be unfair to the accused or would not be in the interests of justice⁸³ or that its admission is unnecessary, having regard to other evidence given in the proceedings.⁸⁴ However, the overriding duty of a court to ensure that an accused person receives a fair trial remains intact, and that general right will ordinarily include a right to cross-examine adverse witnesses (which is, also, of course, specifically guaranteed by Article 6 of the European Convention on Human Rights). The importance of this fundamental principle is reflected in the judgment of the Court of Appeal in *The People (DPP) v Kelleher*.⁸⁵ In that case, the appellant had been convicted of assault causing harm to his wife for which he received a sentence of eight years' imprisonment. The person against whom the offence was allegedly committed refused to testify (and was not therefore available for cross-examination). One previous statement which she had made, in unrelated District Court proceedings, was inconsistent with a statement she had made to the gardai. In these circumstances it had been submitted by the defence at trial that there were insufficient grounds for treating as reliable the statement she had made to the Gardaí in which she claimed that her husband, the appellant, had seriously assaulted her. The Court of Appeal held that the trial judge had failed to engage sufficiently with this important and far-reaching submission. It further held that decision to admit the complainant's statement to the Gardaí without there having been such engagement by the trial judge was "inappropriate and unsafe, and this, in itself, rendered the trial unfair." The Court placed particular emphasis on the right to cross-examine a prosecution witness as an essential element of fair trial and one which should not be dispensed with except for good reason. The conviction was therefore quashed.

3.62 In *The People (DPP) v Rattigan*⁸⁶ the applicant sought leave to appeal a decision admitting hearsay evidence under section 16 on alternative grounds of retrospectivity and unfairness. The Court of Criminal Appeal dismissed the

⁸³ Section 16(3)(4)(a) *Criminal Justice Act 2006*.

⁸⁴ Section 16(3)(4)(b) *Criminal Justice Act 2006*.

⁸⁵ [2016] IECA 277.

⁸⁶ *The People (DPP) v Rattigan* [2013] IECCA 13.

appeal and endorsed the following five propositions. The absence of a provision such as section 16 could be seen as a defect in the law⁸⁷ and it was useful in cases of witness intimidation or inducement.⁸⁸ The use of the section was not *per se* unfair or prejudicial.⁸⁹ The section remained applicable where the evidence admitted under it was “effective and even powerful”.⁹⁰ The presumption against retrospectivity in statutes does not apply to procedural and evidential changes and accordingly does not apply to changes in the rule against hearsay.⁹¹ Significantly, the Court ruled that the term “materially inconsistent” in section 16 includes cases where the witness denies any recollection of the event or of giving the statement. To rule otherwise might have seemed perverse, given the facts of the Keane case which gave rise to the provision, though it does require a somewhat strained reading of s.16.⁹² The circumstances of its enactment also gave rise to an argument that its effect was limited to so-called “gangland” crime, where intimidation of witnesses was a real danger. This has been rejected.⁹³

3.63 A number of cases have considered the application of the various safeguards provided by section 16 of the 2006 Act. The courts have by and large been wary of applying the safeguards too strictly and a flexible and discretionary approach is evident. In *The People (DPP) v O'Brien* the Court of Criminal Appeal merely advised that the judge have regard to the surrounding circumstances and factors “to ensure this is a reliable statement in the sense that it is one which can be relied upon, rather than...in the sense that it is true.”⁹⁴ In *The People (DPP) v Campion*, the Court of Appeal took the view that an assessment of reliability was a matter for the jury to determine, subject to the appropriate direction:

“No case where s. 16 is invoked is likely to be straightforward... It is quintessentially a matter for the jury to decide whether they can identify where the truth lies, and, if the view is that the truth is to be found in the earlier statement sought to be relied on by the prosecution, whether they can be sufficiently confident that that is the case and that they can proceed to return a verdict of guilty beyond reasonable doubt. Section 16(3) provides guidance to a court considering whether a statement is reliable by directing attention to whether it was given on oath or affirmation, or was video-recorded...”⁹⁵

⁸⁷ *The People (DPP) v Rattigan* [2013] IECCA 13 at [17].
⁸⁸ *The People (DPP) v Rattigan* [2013] IECCA 13 at [9].
⁸⁹ *The People (DPP) v Rattigan* [2013] IECCA 13 at [17].
⁹⁰ *Ibid* at [9].
⁹¹ *Ibid* at [15]-[16].
⁹² *Ibid* at [10].
⁹³ *The People (DPP) v Murphy* [2013] IECCA 1 at [22].
⁹⁴ [2011] 1 IR 273 at [62].
⁹⁵ *The People (DPP) v Campion* [2015] IECA 274 at [35].

- 3.64** In *Campion*, the Court also noted that the broad safeguard that the judge can refuse to admit a previous statement where he considers it would be unfair to the accused is perhaps the most important. The Court was nonetheless of the view that the totality of the statutory safeguards had to be considered.⁹⁶ In relation to voluntariness, the Court in *The People (DPP) v Murphy* approved the flexible approach of the Court in its previous case law: “In reaching the decision as to voluntariness and reliability, the [Court] in *O’Brien* did not draw on any authorities, believing that the trial judge correctly determined the issue by viewing the videotapes which was sufficient for this purpose.”⁹⁷
- 3.65** The Court noted in *Rattigan* that an accused against whom evidence is admitted under section 16 is in a better position than those against whom evidence is admitted by some other exception to the hearsay rule because under section 16 the witness must be available for cross-examination and the accused can therefore exploit the witness’s uncertainty or professed lack of memory.⁹⁸
- 3.66** In furtherance of the general purpose of consolidation of the law of evidence with a view to its eventual codification, as set out in Chapter 9, the Commission has concluded, that it would be appropriate to include in the draft *Evidence Bill* the specific rules on prior inconsistent statements applicable to certain criminal trials that have been enacted by the Oireachtas in section 16 of the *Criminal Justice Act 2006*. In consultation on the subject of section 16, some criminal practitioners raised the question of slimming down and simplifying the provision. At present the section contains extensive criteria by which admissibility is to be determined as well as a further provision dealing with the weight to be attached to the evidence should it be ruled admissible.
- 3.67** The Commission sought views on the continuing utility of sections 3 to 5 of the *Criminal Procedure Act 1865* in light of section 16. The view was expressed that the 1865 Act can still be used by a party to cross-examine its own witness on her original statement, treating her as hostile, without admitting the original in evidence. It was also argued that the 1865 Act should be retained for circumstances in which the relatively strict terms of section 16 cannot be met.
- 3.68** **The Commission recommends that the draft Evidence Bill include the specific rules on prior inconsistent statements applicable to certain criminal trials that have been enacted by the Oireachtas in section 16 of the *Criminal Justice Act 2006*.**

⁹⁶

Ibid at [38].

⁹⁷

The People (DPP) v Murphy [2013] IECCA 1 at [31].

⁹⁸

The People (DPP) v Rattigan [2013] IECCA 13 at [9].

- 3.69** The Commission recommends that the provisions in section 16 of the *Criminal Justice Act 2006*, suitably amended, be extended to civil proceedings.
- 3.70** The Commission recommends that sections 3 to 5 of the *Criminal Procedure 1865* (which apply to both civil and criminal proceedings) be retained.

B Hearsay and Sentencing

- 3.71** The rule against hearsay is significantly relaxed at the sentencing phase of a criminal trial.⁹⁹ In fact, it will often be to the offender's advantage that such evidence should be admitted.¹⁰⁰ In *The People (DPP) v McDonnell*,¹⁰¹ the leading modern Irish authority on the matter, the Court of Criminal Appeal said that the admission of hearsay evidence at sentencing can be "a valuable relaxation of the strict rules of evidence which operates for the benefit of the accused." It further said that such evidence is often necessary to enable the trial judge to construct a sentence which properly accounts for the offender's personal circumstances. However, this does not mean that all evidence of a hearsay nature is automatically admissible at sentencing. For example, such evidence should be excluded if it contains an express or implied allegation that the offender has been involved in other criminal activity in respect of which he or she has been neither charged nor convicted.¹⁰² It is, after all, a fundamental principle of sentencing, and of justice, that a convicted person should not be punished in respect of any offence other than one of which he or she has been convicted or to which he or she has pleaded guilty or which he or she has asked to be taken into account.¹⁰³ Aside from this, a judge is always empowered to exclude hearsay evidence which would be unduly prejudicial to the offender.
- 3.72** Any facts adduced at sentencing, unless agreed or uncontested, must be adequately proved. In many common-law jurisdictions the general rule is that facts adverse to the offender must be proved beyond a reasonable doubt, whereas those favourable to the offender need be proved only to the civil standard – on the balance of probabilities.¹⁰⁴ However, it is accepted that it is not always possible to draw a bright line between factors that tell in the offender's favour and those which have the opposite effect. The important consideration is that a court should satisfy itself adequately of any contested

⁹⁹ *People (DPP) v McDonnell* [2009] IECCA 16; [2009] 4 I.R. 105.

¹⁰⁰ *R v Marquis* (1951) 35 Cr. App. R. 33.

¹⁰¹ [2009] IECCA 16; [2009] 4 I.R. 105, para. 26.

¹⁰² *People (DPP) v McDonnell* [2009] IECCA 16; [2009] 4 I.R. 105; *People (DPP) v O'Neill* [2012] IECCA 37.

¹⁰³ *R v Canavan* [1998] 1 W.L.R. 604; *People (DPP) v Gilligan* [2004] 3 I.R. 87.

¹⁰⁴ See, for example, *R v Storey* [1998] 1 V.R. 359; *R v Olbrich* [1999] HCA 54; (1999) 199 C.L.R. 270. See generally, Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Sydney: Law Book Co, 2014), pp. 133-135.

facts, and it seems right that a clear aggravating factor should be proved by the prosecution to the criminal standard.

3.73 Irish courts have recently turned their attention to the role of the prosecution at sentencing. Traditionally, lawyers for the prosecution did not see themselves as having any role at sentencing beyond, perhaps, being in a position to inform the court of the relevant maximum sentence and matters of that nature. With the introduction of prosecution appeals against leniency of sentence for serious offences (under the *Criminal Justice Act 1993*), prosecuting counsel are now expected to play a more active role. This matter was addressed in some detail by the Court of Criminal Appeal in *The People (DPP) v Z*¹⁰⁵ and *The People (DPP) v Fitzgibbon*¹⁰⁶ and by the Court of Appeal in *The People (DPP) v Hussain*.¹⁰⁷ This topic is not particularly germane to the present Report, save that it should be noted that, as a matter of law, both defence and prosecution must be ready to assist a court in relation to sentence.¹⁰⁸ Perhaps the most relevant aspect of the principles developed by the appeal courts in these authorities for present purposes is that the prosecution should be alert in respect of mitigating factors advanced by the defence. This matter is also addressed in the *Guidelines for Prosecutors* issued by the Director of Public Prosecutions.¹⁰⁹ In addition, it appears that prosecution counsel must be prepared to challenge a defence submission that a particular mitigating factor should be taken into account if the prosecution is of the view that the factor is not legally recognised or the defence appears to be attributing to it a greater weight than it deserves in the circumstances.

3.74 The Commission recommends that in any future general sentencing statute or in general sentencing guidelines the law governing the admissibility of hearsay evidence at sentencing should be restated and, if necessary, further clarified.

3.75 For the present, however, the Commission recommends that hearsay evidence should be admissible at the sentencing phase of a criminal trial subject always to the discretion of the trial judge to exclude such evidence where its admission would be unduly prejudicial or unfair to the offender.

¹⁰⁵ [2014] IECCA 13; [2014] 2 I.L.R.M. 132

¹⁰⁶ [2014] IECCA 25; [2014] 2 I.L.R.M. 424.

¹⁰⁷ [2015] IECA 187.

¹⁰⁸ For a more detailed analysis, see O'Malley, *Sentencing Law and Practice* 3rd ed (Dublin; Round Hall, 2016), pp. 804-812.

¹⁰⁹ *Guidelines for Prosecutors*, 4th ed. (October 2016), pp. 30-31.

C Evidence of Previous Criminal Convictions as Hearsay: *Nevin v Nevin*

- 3.76** The issue of the admissibility of evidence of criminal convictions in subsequent civil proceedings, in particular inheritance proceedings, was considered by the Commission in the *Issues Paper on Review of section 120 of the Succession Act 1965 and Admissibility of criminal convictions in civil proceedings*.¹¹⁰ The Commission noted the serious problem with the wording of section 120(1) adverted to by the High Court (Kearns P) in *Nevin v Nevin*¹¹¹ and the continuing uncertainty as to the admissibility of evidence of criminal convictions in subsequent civil proceedings.¹¹² The question was also raised about the hearsay status of previous criminal convictions where they are sought to be relied upon as truth of their contents in subsequent civil proceedings. It being a question of evidence, the Commission has undertaken to address the subject in this report rather than in the *Report on Prevention of Benefit from Homicide*¹¹³ which concluded the Commission's consideration of the various other issues raised in that Issues Paper.
- 3.77** In *Nevin*, the defendant had been convicted of the murder of her husband and the appeal of the conviction was refused. The deceased's next of kin (the plaintiff) commenced civil proceedings seeking declarations that the defendant was precluded both at common law and by virtue of section 120 of the *Succession Act 1965* from taking any share in her husband's estate. In this context, the Court was asked to consider the admissibility in the civil proceedings of the evidence of the defendant's trial and conviction. The plaintiff submitted that the Court should follow the law as set out in *In re Estate of Crippen decd*¹¹⁴ in which the English High Court held that a criminal conviction is admissible in evidence as proof of the conviction and also as presumptive proof of the commission of the crime. However the defendant contended that the Court should follow the rule established by the Court of Appeal in *Hollington v F. Hewthorn & Co. Ltd*¹¹⁵ which provides that a criminal conviction following trial is not admissible in civil proceedings as evidence of the material facts upon which the conviction is based.
- 3.78** The case turned on the peculiar drafting of section 120(1) of the 1965 Act. Section 120(1) provides that:

“A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising

¹¹⁰ LRC IP 7-2014.
¹¹¹ *Nevin v Nevin* [2013] IEHC 80.
¹¹² LRC IP 7-2014 at 31.
¹¹³ LRC 114-2015.
¹¹⁴ *In Re Crippen, decd* [1911] P.108.
¹¹⁵ [1943] 1 K.B. 587.

under a will made after the act constituting the offence, and shall not be entitled to make an application under section 117.”

- 3.79** The crux of the issue was the failure of the section to specify that a person be *found* guilty of a relevant offence rather than simply that they must *be* guilty. This raises particular ambiguity given that section 120(4), which specifies the consequence of certain lesser offences, provides that a person must be “found guilty” of the relevant offences. While such an anomaly might be characterised at first blush as minor or technical, Kearns P in the High Court held that he was compelled to give the section a strict construction and to resolve any ambiguity in favour of the defendant in light of its punitive consequences.¹¹⁶ As a result of this “extraordinary omission” as he put it, Kearns P felt he was unable to rely on statutory authority for the admission of evidence of the conviction and so turned to consider the common law.¹¹⁷
- 3.80** Kearns P first adverted to the decision in *Re Crippen*, a case of similar facts to the dispute before the court and relied on by the plaintiff in support of the admission of the evidence. The judge in that case found that evidence of a conviction was “presumptive proof of the commission of the crime” in any subsequent proceedings.¹¹⁸ The decision did not address the hearsay question and appears to have been primarily driven by considerations of public policy rather than specific legal questions of issue estoppel or abuse of process.
- 3.81** However *Re Crippen* was overruled by the Court of Appeal in *Hollington v Hewthorn* which found that such evidence was not admissible and the facts would have to be retried. The Court took this view for a number of reasons. The Court considered the judgment of the criminal court to be an “irrelevant opinion”, owing to the fact that the present (civil) court could not know the evidence presented to the criminal court, the arguments advanced or what ultimately persuaded the judges.¹¹⁹ The court decided that it could not base presumptive proof of a legal offence on the bare face of a previous judgment in a different legal action.¹²⁰ This fact, that it was a separate legal action, also influenced the Court in *Hollington*, with the doctrine of *res inter alios acta* cited a number of times. This doctrine, which translates as “a matter between others is not our business”, is more commonly a doctrine which prevents contracts from affecting the interests of third parties not a party to the agreement, but was relied on by the court in this case as authority for the irrelevance of the evidence of a decision of a previous court involving the same party to a new cause of action.¹²¹

¹¹⁶ *Nevin v Nevin* [2013] IEHC 80 at 85-86.

¹¹⁷ *Ibid.*

¹¹⁸ *In Re Crippen, decd* [1911] P.108 at p. 115.

¹¹⁹ [1943] 1 K.B. 587 at 594-595.

¹²⁰ *Ibid.*

¹²¹ *Ibid* at 595.

3.82 Of particular importance to this Report, the Court also took the view that evidence of the conviction was in breach of the hearsay and best evidence rules, it being adduced to prove the truth of its contents in the absence of the declarant.¹²² The Court held that it did not come within the scope of any of the contemporary exceptions to the hearsay rule and held that this was yet another ground for excluding the evidence of the previous conviction.

3.83 As Kearns P stated in *Nevin*, few decisions have been subject to as much criticism, most notably by Lord Denning who, as counsel for the plaintiff in *Hollington v Hewthorn*, had argued unsuccessfully for its admission. In *McIlkenny v Chief Constable West Midlands Police Force* he stated that:

“Beyond doubt, *Hollington v. Hewthorn* was wrongly decided. It was done in ignorance of previous authorities. It was done per incuriam. If it were necessary to depart from it today, I would do so without hesitation. But it is unnecessary. It has been replaced by s. 11 of the Civil Evidence Act 1968.”¹²³

3.84 The section of the English *Civil Evidence Act 1968* adverted to by Lord Denning M.R. in *McIlkenny* provides for the admissibility of evidence of previous convictions in all subsequent civil proceedings, stating that where such evidence is adduced, the person “shall be taken to have committed that offence unless the contrary is proved.”¹²⁴ The section was enacted on foot of a report of the English Law Reform Committee.¹²⁵ The report was extremely critical of the *Hollington* decision, perhaps even more so than Lord Denning:

“Rationalise it how one will, the decision in this case offends one’s sense of justice. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil: the degree of carelessness required to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to *prima facie* evidence of his negligent driving at that time and place. It is not easy to escape the implication in the rule in *Hollington v. Hewthorn* that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right.”¹²⁶

¹²²

Ibid.

¹²³

McIlkenny v Chief Constable West Midlands Police Force [1980] 2 All E.R. 227 at 237.

¹²⁴

Section 11 provides that “In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or of a service offence (anywhere) shall (subject to subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.”

¹²⁵

Law Reform Committee, *Fifteenth Report (The Rule in Hollington v Hewthorn)*, 1967.

¹²⁶

Ibid at p. 3.

3.85 The Committee continued:

“Any layman would, we think, regard the fact of such conviction as a firm foundation for the belief that the accused had conducted himself in such a manner as to constitute the criminal offence of which he was convicted and, if such criminal offence would also constitute a civil wrong, that the accused had committed a civil wrong also. We, too, share this commonsense view. We consider that such a conviction has high probative value in establishing the cause of action in a subsequent civil action founded upon the same conduct, in which the onus of proof is lower. We have no doubt in principle that evidence of the conviction should be admissible.”¹²⁷

3.86 Kearns P quoted this passage in his judgment in *Nevin* as well as various other decisions and academic commentary offering similar criticisms of the judgment in *Hollington*, placing particular reliance on the decision of the New Zealand Court of Appeal in *Jorgenson v News Media (Auckland) Ltd.*¹²⁸ Kearns P held that he preferred the reasoning of the English Law Reform Committee and of the New Zealand Court of Appeal before offering particular consideration of the hearsay question raised in *Hollington*. Concluding his judgment he stated:

“In circumstances where several legal principles can be invoked in aid, I prefer to base my view ultimately on the proposition that the admissibility of the murder conviction is either authorised on foot of the decision in Crippen’s case or comes within an exception to the hearsay rule as suggested and found by the Court of Appeal in New Zealand in Jorgensen’s case. The reasons for so holding were set out with particular clarity in the judgment of Turner J. in that case and they are (a) that there can be no real doubt that a certificate of conviction constitutes unimpeachable evidence not only of the fact that a person was convicted, but also that the court did in fact consider the person guilty of the crime (in other words any of the usual objections to hearsay – that the version given in court may be unsatisfactory as false, unreliable, biased, untested by cross-examination etc – simply do not arise) and (b) any objection that the court may have been wrong is more than addressed by the requirement that the court before convicting must be satisfied beyond all reasonable doubt that the person was guilty of the crime charged.”¹²⁹

3.87 Kearns P appears to carve out an individual exception to the hearsay rule based on the inherent reliability of the particular evidence, an approach to limiting the hearsay rule which, while favoured in some common law¹²⁷*Ibid* at p. 6.¹²⁸

[1969] NZLR 961.

¹²⁹*Nevin v Nevin* [2013] IEHC 80 at 104 (final page).

jurisdictions¹³⁰, is unusual in Irish law. A revised interpretation of the public document exception, or indeed of the exception permitting the adduction of testimony from previous proceedings, would have provided a more established common law basis for the admission of this technically hearsay evidence.

(1) Reform

3.88 Judges and commentators alike have stated that the *Nevin* case demonstrates a clear need for legislation in the area to clarify the legal position, including the hearsay status of such evidence. It is unsatisfactory that Kearns P should have had to engage in such an exhaustive and detailed examination of a wealth of common law precedent from across the globe to decide what ought to be a simple, straightforward and commonsense rule of law.

3.89 In the Issues Paper in 2014, the Commission posited a number of questions concerning possible reform of this issue in the Issues Paper. The questions were as follows:

“ Question 8

8(a): Should the conclusion reached by Kearns J in *Nevin v Nevin* (i.e. a conviction is admissible in civil proceedings as prima facie evidence that the person committed the offence) be put in statutory form?

8(b): If so, should a conviction in a criminal trial be admitted in a related civil action:

as conclusive proof that the person committed the offence or

as proof that the person committed the offence unless the contrary is proved?

8(c): Should a conviction on a plea of guilty be admissible?

8(d): Should a conviction be admissible in civil proceedings in which the convicted person is not a party?

8(e): What documents should be admissible to identify the facts on which the conviction was based?

8(f): In defamation proceedings, should:

a conviction be conclusive evidence that the person committed the offence and;

¹³⁰

See discussion of Australian and Canadian jurisprudence in Part D below.

an acquittal be conclusive evidence that the person did not commit the offence?

The Commission will consider the submissions comments in respect of the various questions in turn before coming to a final conclusion on recommendations for reform. “

(a) Question 8(a):

3.90 All of the submissions received by the Commission which addressed this point took the view that evidence of a criminal conviction should be admissible. While most argued for a statutory provision to give effect to this, one submission argued that the decision in *Nevin v Nevin* is a satisfactory clarification of the law which renders statutory intervention unnecessary. Submissions had regard to the far higher standard of proof demanded in criminal proceedings and the fact that such convictions are a matter of public record. There was some divergence of views as to whether s. 120 should simply be amended to provide that a person be “found” guilty of the relevant criminal offence, thus addressing the ambiguity identified by Kearns P, or if a more broad statutory provision allowing evidence of criminal conviction in evidence in subsequent civil proceedings should be introduced.

3.91 The Commission considers that evidence of previous convictions constitutes highly probative and reliable evidence in subsequent civil proceedings. The judgment of a court of law, arrived at in observance and application of the established rules of evidence and constitutional fair procedures and certain beyond a reasonable doubt is of quite a different character to a mere “opinion”, as it was characterised in *Hollington*.

3.92 With respect to the hearsay question, it is plain that such evidence is highly reliable and probative and while *Nevin* appears to establish their admissibility as a matter of common law, the Commission considers that a statutory provision should be introduced providing express authority for their admission, notwithstanding their technically hearsay character. The Commission shares the view of the submissions made on this question, as well as the Law Reform Committee in its report on *The Rule in Hollington v Hewthorn*¹³¹, that such evidence should be admissible in all subsequent civil proceedings.

(b) Question 8(b)

3.93 Submissions were broadly in favour of option (i); that a previous conviction should be admissible as conclusive proof that the person committed the

¹³¹ Law Reform Committee, *Fifteenth Report (The Rule in Hollington v Hewthorn)*, 1967.

offence. The submissions once again had regard to the standard of proof required in criminal proceedings as rendering further argument of the merits of the conviction moot. One submission argued that it should only be regarded as conclusive where the process of criminal appeal has been exhausted.

3.94 The Commission agrees with the view expressed in the submissions that the standard of proof required in criminal proceedings, particularly when set against the civil standard in which the conviction would be disputed, will generally render the question of guilt moot. However the Commission considers that a criminal conviction, however reliable and probative, should not be presented as infallible or unimpeachable. The Law Reform Committee in considering this question pointed to the fact that persons may plead guilty or decline to appeal minor offences to spare themselves huge time and expense, unaware of the consequences it may have in subsequent civil proceedings. There is also the possibility that evidence undermining the conviction may subsequently come to light.

3.95 The Commission considers that while ordinarily evidence of a criminal conviction will be considered dispositive of the question of the guilt of that offence, it is inappropriate for legislation to prescribe as much. The Commission recommends that where evidence of a previous conviction is adduced in subsequent civil proceedings, the convicted person will be deemed to have committed that offence unless the contrary is proven.

(c) *Question 8(c)*

3.96 The submissions which addressed this point all took the view that convictions on a plea of guilty should be admissible. One submission did suggest that some form of appeal or objection be allowed where the convicted person claims they were not advised of the implication of their plea on subsequent civil proceedings.

3.97 The Commission agrees with the view expressed in the majority of the submissions that a plea of guilty should make no material difference to the admissibility of the conviction. A conviction based on a plea of guilty is not and should not be regarded as less reliable or of less probative value than one based on contested evidence. If the convicted person wishes to assert that their plea of guilty was involuntary or otherwise flawed, under the Commission's proposed framework, the onus is on that party to prove it in the subsequent civil proceedings. The Commission considers that convictions on a plea of guilty should be admissible in subsequent civil proceedings.

(d) *Question 8(d)*

3.98 The submissions all took the view that evidence of convictions, where relevant, should also be admissible in civil proceedings to which the convicted person is not a party. The Commission agrees with the submissions

and takes the view that the same justification supporting the admissibility of criminal convictions in proceedings to which the convicted person is a party applies here. The determination has been made by properly constituted court of law to a standard of beyond a reasonable doubt and this determination is a matter of public record. The absence of the convicted person from the proceedings does not affect the reliability of the evidence of the conviction.

3.99 The Commission considers that evidence of previous convictions, where relevant, should be admissible in civil proceedings to which the convicted person is not a party.

(e) *Question 8(e)*

3.100 A number of different views were expressed in the submissions as to what documents should be admissible as evidence of the previous conviction. One submission stated that an official copy of the conviction and the order of the court ought to be adduced, while another said the transcript of the trial would suffice. More liberally again, one submission argued that the legislation should simply provide that the judgment and any other such documents as the court may think relevant.

3.101 The Commission takes the view that any of: (a) a copy of the judgment; (b) a transcript of the proceedings or (c) an official copy of the conviction or (d) any other relevant documents should be admissible in evidence.

(f) *Question 8(f)*

3.102 The background to this question lies in the recommendations of the Commission's 1991 Report on the Civil Law of Defamation. Section 43 of the *Defamation Act 2009* provides for the admission of the fact of conviction or acquittal, as well as any findings of fact made during the course of proceedings for the offence concerned, as evidence in defamation actions. This provision implements, in part, the Commission's recommendation in its 1991 Report on the Civil Law of Defamation. The proposal in the 1991 Report that proof of conviction in defamation actions be treated as conclusive evidence that the person convicted committed the offence was not implemented in the 2009 Act.

3.103 The submissions which addressed this question all agreed that a conviction should be conclusive evidence that the person committed the offence in defamation proceedings. There was some disagreement as to whether an acquittal should be conclusive evidence that the person did not commit the offence.

3.104 In light of the Commission's present view that evidence of a previous conviction should not constitute conclusive evidence of the commission of that offence, and of the Oireachtas' consideration of the issue in the *Defamation Act 2009*, the Commission does not propose that evidence of a

previous conviction, or of a previous acquittal, should constitute conclusive evidence in defamation proceedings.

- 3.105** The Commission also takes the view that the proposed legislative provision allowing evidence of previous convictions in evidence should be limited to previous convictions handed down by Irish courts. The rationale for this limitation is that the justification for the admissibility of such evidence is the very high common standard by which all courts in this jurisdiction abide. The same does not necessarily apply in all other jurisdictions and in the absence of certainty as to the process by which the finding of guilt was made, it is inappropriate to admit such evidence.
- 3.106** **The Commission recommends that the draft Evidence Bill should provide that evidence of a criminal conviction in an Irish court should be admissible in all subsequent civil proceedings, where it is relevant to the proceedings, as evidence that a person committed that offence. Such evidence should be taken as proof the person committed that offence unless the contrary is proven.**

D Judicial Reform of the Hearsay Rule

- 3.107** As can be seen from the above discussion, many of the early exceptions to the rule against hearsay were developed at common law, while some later reforms have been achieved through legislation. In this Part, the Commission considers the extent to which judicial reform of the rule should continue. The courts in different common law countries diverge sharply on this. The UK House of Lords effectively rejected judicial development of the rule in *Myers*¹³² whereas the Supreme Court of Canada has very actively developed it.

(1) Ireland

- 3.108** The Irish courts have not ruled out the possibility of further judicial development of the hearsay rule. In *Eastern Health Board v MK*,¹³³ Denham J noted that notwithstanding the enactment of statutory exceptions the court retains the ability to develop the law on the use of hearsay evidence. Keane J, reflecting a view he has applied consistently,¹³⁴ was more sympathetic to the argument that any significant changes to the hearsay rule would be best

¹³² [1965] AC 1001.

¹³³ [1999] 2 IR 99.

¹³⁴ In *The People (DPP) v Marley* [1985] ILRM 176, discussed at paragraphs 5.19-5.20, the Court of Criminal Appeal (whose judgment was delivered by Keane J) indicated that further reform of the hearsay rule was primarily a matter for the Oireachtas, and the Court referred to the proposals for reform made by the Commission in its 1980 *Working Paper on the Rule Against Hearsay* (LRC WP 9-1980). By the time the Commission published its *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988), discussed in Chapter 3 above, Keane J had been appointed President of the Commission.

effected by the Oireachtas but did not discount the possibility of further judicial development of the rule based on reliability, which he identified as the fundamental underlying principle of the exceptions to the rule. He took the view that necessity is an impermissible factor to use in making a decision whether to admit evidence. He noted that in a case where it is argued necessary to adduce second hand evidence owing to a child's difficulty in attending court, the question arises: "How [can the court] admit a second hand version of a child's evidence if his or her own testimony is incapable of being regarded as reliable." Nonetheless he took the view that injustice and inconvenience would flow from an unyielding adherence to the rule and left open the door to the development of further exceptions.

3.109 In *Borges v The Medical Council*¹³⁵ Keane CJ left open the question as to whether the Canadian approach of developing exceptions to the hearsay rule based on the requirements of necessity and reliability (discussed below) would be followed by the Irish courts. However, he concluded that the circumstances of that case did not justify creating an exception admitting the hearsay evidence that would have deprived the applicant of his right to fair procedures under the Constitution.

3.110 McGrath argues that the decisions in *Eastern Health Board v MK*¹³⁶ and *Borges v The Medical Council*¹³⁷ "indicate a consistent view on the part of the Supreme Court that the hearsay rule is not merely a rule of evidence but has a constitutional foundation as a requirement of fair procedures and an ingredient of a fair trial."¹³⁸ He expressed the opinion that it is unlikely the Supreme Court will favour relaxing the hearsay rule to the extent that has occurred in Canada:¹³⁹

"Instead, any new exceptions to the hearsay rule, whether specific or of a general residual nature, are likely to have carefully and narrowly drawn parameters with a focus on the two crucial criteria of necessity and reliability."

3.111 The Commission, in its *Working Paper on the Rule Against Hearsay*¹⁴⁰ stated that the Irish courts could reject the rigid position adopted by the House of Lords in *Myers v DPP*¹⁴¹ and expand the exceptions to the hearsay rule piecemeal. This could cover other categories of case where hearsay evidence is considered particularly reliable. The Commission considered, however, that even if this were done there would be a long period of uncertainty while new exceptions were being evolved judicially.¹⁴² The

¹³⁵ [2004] IESC 9; [2004] 1 IR 103.

¹³⁶ [1999] 2 IR 99.

¹³⁷ [2004] IESC 9; [2004] 1 IR 103.

¹³⁸ McGrath *Evidence* (2nd ed. Roundhall 2014) at 5.354.

¹³⁹ *Ibid.*

¹⁴⁰ Law Reform Commission *Working Paper on the Rule Against Hearsay* (WP No.9-1980).

¹⁴¹ [1965] AC 1001.

¹⁴² Law Reform Commission *Working Paper on the Rule Against Hearsay* (WP No.9-1980) at 12.

Commission considers that this view remains valid. The courts may of course decide, in appropriate cases, that a more inclusionary approach should be taken, but the Commission considers that, given the limited number of occasions when such situations arise (especially in a small jurisdiction), it is preferable that parties engaged in civil litigation or criminal trials should have a clear basis on which the rules of evidence are applied and a list of exceptions should be contained in legislation. The Commission considers that the courts should nonetheless continue to exercise a discretion to develop new exceptions to the rule against hearsay where changing circumstances so demand.

(2) *England*

3.112 As already discussed, since *Myers v DPP*¹⁴³ the UK courts have resisted the notion of a general residual judicial discretion to develop inclusionary exceptions to the hearsay rule, despite, as Healy describes “the implausible specificity of many of the exceptions”.¹⁴⁴ In *Myers* the House of Lords insisted that any further exceptions could only be created by Parliament. The approach in *Myers* was applied by the Privy Council in *Patel v Comptroller of Customs*.¹⁴⁵

3.113 Nonetheless, at a narrower level, in 1987 the House of Lords radically redesigned the *res gestae* exception in *R v Andrews*,¹⁴⁶ and this limited judicial development was approved by the Irish Court of Criminal Appeal in *The People (DPP) v Lonergan*.¹⁴⁷ To that extent, at least, the courts in England and Ireland appear prepared to engage in judicial development of the existing inclusionary exceptions.

(3) *Scotland*

3.114 In Scotland¹⁴⁸ the courts have been noticeably more willing than the English courts to create new exceptions to the rule against hearsay. In *Lord Advocate’s Reference (No 1 of 1992)*,¹⁴⁹ the prosecution sought to introduce evidence that had been generated by a health authority’s computer. The evidence was similar to that which had been sought to be introduced in *Myers v DPP*,¹⁵⁰ as it was not possible to trace the particular staff member responsible for certain entries.¹⁵¹ The *Civil Evidence (Scotland) Act 1988*

¹⁴³

[1965] AC 1001.

¹⁴⁴

Healy *Irish Laws of Evidence* (Thomson Round Hall 2004) para. 9-62.

¹⁴⁵

[1965] 3 All ER 593.

¹⁴⁶

[1987] AC 281.

¹⁴⁷

[2009] IECCA 52.

¹⁴⁸

Discussed in greater detail at paras. 3.60-3.64 of the Consultation Paper.

¹⁴⁹

[1992] SCCR 724.

¹⁵⁰

[1965] AC 1001.

¹⁵¹

[1965] AC 1001.

contained a general “business records” inclusionary exception (thus, in general, reversing the effect of *Myers*), however, as a health authority did not come within the definition of a “business”, the evidence was ruled inadmissible hearsay.

- 3.115** On appeal, the Scottish High Court took a different view. Delivering the Court’s judgment, Lord Hope stated that it was open to a court to “take account of changing circumstances which may render the continued application of the rule against hearsay unacceptable.”
- 3.116** An even greater departure from the rule against hearsay in an inclusionary direction occurred in *Smith v HMA*.¹⁵² Here the witness, who was unable to make a definitive identification in the courtroom, claimed that at the identification parade she had said “I think it is No.2” but the police claimed that she had said “it is No.2” and it was held that the police evidence could be used to establish that she had identified the accused despite the fact that the witness did not accept the police testimony.
- 3.117** This style of police evidence of prior identification by a witness is recognised to be hearsay evidence¹⁵³ but it appears to form a new exception to the hearsay rule. In its 1995 *Report on Hearsay Evidence in Criminal Cases*, the Scottish Law Commission referred to the admissibility of such prior identification as “a well-recognised exception to the general rule”¹⁵⁴ and in *Muldoon*¹⁵⁵ it was generally accepted as a new exception created by the court. Ultimately, on foot of the Scottish Law Commission’s 1995 Report, the matter is now dealt with in legislative form in sections 17 to 20 of the *Criminal Justice (Scotland) Act 1995*, which deal with hearsay generally in criminal proceedings in Scotland.

(4) Canada

- 3.118** The Supreme Court of Canada has also taken a broad approach to extending inclusionary exceptions to the hearsay rule. The Supreme Court of Canada does not provide an exhaustive definition of hearsay, instead preferring to define hearsay by reference to its key characteristics. An out-of-court statement is therefore treated as hearsay if it is introduced as proof of the truth of its contents and it was obtained in the absence of contemporaneous

¹⁵² (1986) SCCR 135.

¹⁵³ In *Frew v Jessop* [1990] SLT 396, 398 Lord Justice Clerk Ross accepted that there was “[n]o doubt [such] evidence is hearsay evidence but it is hearsay evidence which forms an exception to the general rule that hearsay is inadmissible”.

¹⁵⁴ Scottish Law Commission Evidence: *Report on Hearsay Evidence in Criminal Cases* (No.149, 1995) at paragraph 7.3.

¹⁵⁵ *Muldoon v Herron* (1970) JC 30.

cross-examination.¹⁵⁶ This appears to correspond, broadly, with the approach taken in Irish law by the Supreme Court in *Cullen v Clarke*.¹⁵⁷

- 3.119** In what is regarded as a landmark decision in Canadian law, *R v Khan*,¹⁵⁸ the Supreme Court of Canada did not follow the approach taken in *Myers*, preferring to continue allowing judicial development of hearsay exceptions. It held that evidence of what a four year old girl said to her mother about a sexual assault on her should have been admitted because in the specific circumstances the evidence was reasonably necessary and reliable. The Court took this approach even though several Canadian legislatures had already enacted legislation to ensure that the outcome arrived at in *Myers* would not be followed in Canada.
- 3.120** *Khan* created uncertainty as to whether legislative or judicial reform was definitive. Nonetheless, the approach in *Khan* has been affirmed by the Court in *R v Smith*,¹⁵⁹ *R v O'Brien*¹⁶⁰ and *R v Khelawon*.¹⁶¹ There has been some controversy about whether the approach adopted in these decisions has replaced or merely supplemented a category-based approach to hearsay exceptions, but the general view is that the scope of admissible evidence has been considerably broadened.¹⁶²
- 3.121** The stance adopted by the Canadian courts to the rule against hearsay and its exceptions involves a principle-based approach, i.e. the judging of cases with respect to general principles such as “necessity” and “reliability” rather than precise and pre-existing rules.¹⁶³ The effect of these decisions by the Supreme Court of Canada is that hearsay evidence is admissible if the evidence meets two criteria: that the evidence is necessary and reliable; and that the probative value of the evidence is not outweighed by its prejudicial effect. Case law establishes that the necessity criteria will be satisfied if the hearsay evidence is reasonably necessary to prove a fact in issue, the relevant direct evidence is not available, and that evidence of the same quality cannot be obtained from another source.¹⁶⁴ The rationale for the new

¹⁵⁶ *R v Starr* [2000] SCR 144.

¹⁵⁷ [1963] IR 368: see the discussion in Part B of Chapter 2.

¹⁵⁸ [1990] 2 SCR 531.

¹⁵⁹ (1992) 94 DLR (4th) 590. The court made it clear that the approach in *Kahn* should not be restricted to child abuse cases.

¹⁶⁰ [1978] 1 SCR 591.

¹⁶¹ [2006] 2 SCR 787, 2006 SCC 57.

¹⁶² See Carter “Hearsay: Whether and Whither” (1993) 109 *LQR* 573.

¹⁶³ This follows Wigmore, whose approach relates to legal relevance as a legal concept extended beyond the ordinary meaning of logical common sense relevance. He proposed two hurdles for admissibility on the basis of relevance. First, the court must be satisfied that the evidence bears a logical relationship to an issue in the case and, secondly, that in light of the other evidence in the case, it justifies the time and cost of its reception. In other words, the evidence must have a probative value related to the facts at issue. The requirement that the probative value of the evidence must relate to an issue before the court is sometimes referred to as the requirement of materiality. See Rowsell, “Necessity and Reliability: What is the Impact of Khan on the Admissibility of Hearsay in Canada?” (1991) Vol. 49 2 *University of Toronto Faculty of Law Review*.

¹⁶⁴ *R v Khan* [1990] 2 SCR 531 at 29 and *R v Smith* [1992] 2 SCR 915 at 34-36.

approach, as noted by Lamer CJC in *R v Smith*,¹⁶⁵ is that reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. However, he qualified this by stating that the trial judge should have a residual discretion to exclude the evidence where its probative value is slight and it would thus be unfairly prejudicial to the accused for it to be admitted.

3.122 In *R v Starr*¹⁶⁶ the Supreme Court of Canada held that the principled approach preferred by the Court could be used not only to reform the existing exceptions but also to exclude hearsay falling within an otherwise valid exception if there were insufficient indicia of necessity and reliability in the particular circumstances of the case.¹⁶⁷

(5) *United States*

3.123 At federal level in the United States, Rule 807 of the *Federal Rules of Evidence* precludes the judicial development of new inclusionary exceptions by providing extremely broad and discretionary factors which may permit the admission of hearsay, notwithstanding the failure to come within any of the formal exceptions. One such residual exception is for evidence with a “circumstantial guarantee of trustworthiness”. This is best characterised as a discretion rather than a rule of law. The US approach has been criticised on the grounds that the wording of the rule is problematic; in particular, that the requirement of equivalent circumstantial guarantee is incoherent since the very fact that it has not fitted into any of the other exceptions may indicate that there is no such guarantee.

(6) *Australia*

3.124 A new inclusionary exception based on a test of “inherent reliability” was first articulated by Mason CJ in *Walton v R*¹⁶⁸ in the Australian High Court. The test extended the spontaneity test used in the UK Privy Council in *R v Ratten*¹⁶⁹ for the *res gestae*, applying this to all evidence whether part of the “transaction” or not.¹⁷⁰ This exception appears to aim to strike a balance between the stance taken by the House of Lords in the *Myers* case, that any reform of the hearsay rule would need to come from the legislature, and the flexible

¹⁶⁵ (1992) 94 DLR (4th) 590.

¹⁶⁶ [2000] SCR 144.

¹⁶⁷ *Ibid* at 214.

¹⁶⁸ (1989) 166 CLR 283 at 342.

¹⁶⁹ [1972] AC 378.

¹⁷⁰ Collins, “New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule” (2003) 10 (4) *Murdoch University Electronic Journal of Law*.

approach taken by, for example, the Supreme Court of Canada in *R v Khan*.¹⁷¹ Collins has stated:

“The exception is formulated as a discretion rather than a criterion-based categorical exception. It is expressed in terms of weighing up the competing factors of reliability (such as spontaneity, non-concoction) against various dangers (such as the lack of cross examination, motive for fabrication). The legal significance of the exception's characterisation as a discretion is that it would be much more difficult for appellate courts to overturn a decision regarding an issue of admissibility.”¹⁷²

While there was some support for Mason CJ's approach, McHugh J supported it only insofar as it was limited to the admission of evidence where there appeared to be a high degree of reliability and Brennan J explicitly rejected a flexible approach to the hearsay rule.

- 3.125** In *Pollitt v R*¹⁷³ the Court returned to the issue and developed an exception for implied assertions of the identity of the caller made in social telephone conversations, but there was no clear agreement as to whether a flexible approach to the hearsay rule should be adopted generally. The rationale for the telephone exception is that statements identifying the other party to the telephone conversation possess a minimal risk of fabrication and are generally of high probative value. It only extends to statements which identify the other party to the telephone conversation and is not a general ‘catch-all’ exception for any statement overheard in a telephone conversation merely because they were made through the medium of a telephone.¹⁷⁴
- 3.126** Brennan J restated his opposition to a flexible approach to the hearsay rule in *Bannon v R*¹⁷⁵ where he criticised the reliability exception on the grounds that it is not based on any specific criteria. In addition McHugh J, despite indicating support for the inherent reliability exception in *Pollitt*, expressed reluctance in *Bannon* to support any new changes to the hearsay rule.
- 3.127** Following a review of the law by the Australian Law Reform Commission, the *Evidence Act 1995* now provides for circumstances in which the rule against hearsay does not apply, with prescribed conditions that are intended to promote reliability, including partial statutory effect for the telephone exception. However, Collins argues that the fact that the 1995 Act only

¹⁷¹ [1990] 2 SCR 531.

¹⁷² Collins “New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule” (2003) 10 (4) *Murdoch University Electronic Journal of Law*.

¹⁷³ (1992) 174 CLR 558.

¹⁷⁴ It also appears that the exception should only be available when there is no significant possibility of fabrication: *Pollitt v R* (1992) 174 CLR 558, at 629 (Deane J); and is limited to ordinary social and business calls, and thus excludes conversations made in pursuance of a criminal venture: (1992) 174 CLR 558, at 640 (McHugh J).

¹⁷⁵ (1995) 70 ALR 25.

applies to federal and territorial courts has contributed to judicial ambiguity regarding hearsay reforms.¹⁷⁶ In 2004, the ALRC began a review of the operation of the 1995 Act. In that review a concern was raised as to whether the threshold reliability of a hearsay statement should continue to be assessed with regard only to the circumstances in which the statement was made, or whether the 1995 Act should be amended so that other evidence could be considered in evaluating the threshold reliability of a statement. The ALRC declined to propose such an amendment on the ground that an enquiry into broader circumstances “is likely to require the trial judge to consider the whole of the prosecution case and determine guilt before admitting the representation as reliable. This would sit uncomfortably with safeguards designed to afford the defendant a fair trial”.¹⁷⁷

- 3.128** Following the decision of *Papakosmas v R*¹⁷⁸ it is apparent that the reliability exception has lost favour with the Court, even as a broad guiding principle, and in that case both Kirby and Gaudron JJ noted that no new common law exceptions to the hearsay rule had been developed since *Myers v DPP*.

(7) New Zealand

- 3.129** Commentators have remarked on the tendency of the New Zealand criminal courts to approach hearsay problems in an overly-technical and rule-based fashion.¹⁷⁹ In 2007, the New Zealand Court of Appeal distanced itself from creating a reliability-based exception to the hearsay rule and in *R v Manase*¹⁸⁰ it was critical of what it perceived to be the low and imprecise standard of “necessity” in Canada. It criticised the Canadian standard as allowing hearsay to be introduced in circumstances which depend on little more than the trial judge’s subjective opinion that, given relevance and a sufficient degree of reliability, it would be desirable to admit it. The Court recognised, however, a “general residual exception” based on the requirements of relevance, inability to testify and threshold reliability. This is subject to an overarching safeguard of a residual discretion to exclude evidence where its prejudicial effect outweighs its probative value.

¹⁷⁶ Collins “New Exceptions or Principled Determinations: The Unreliable Response of the Australian High Court to the Reform of the Hearsay Rule” (2003) 10 (4) *Murdoch University Electronic Journal of Law*.

¹⁷⁷ Australian Law Reform Commission, *Report on Uniform Evidence Law* (Report 102, 2005) at paras. 8.52-8.58.

¹⁷⁸ (1999) 164 ALR 548.

¹⁷⁹ Optican “Hearsay and Hard Case” (1994) *NZLJ* 48 at 49.

¹⁸⁰ [2007] 2 NZLR 197. Collins notes that the exception created by the New Zealand court is more limited than the approach of the Canadian courts. The court in *R v Manase* was critical of the scope of the Canadian exception which they claimed diluted the admission of hearsay “to little more than relevance coupled with a sufficient degree of reliability”.

(8) European Court of Human Rights

3.130 Article 6(3)(d) of the Convention guarantees a person charged with a criminal offence the right:

“to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

3.131 While case law has long established that this protection is not absolute, with many cases having allowed the admission of out-of-court statements in exceptional circumstances¹⁸¹, in recent years the Court has accelerated its dilution. Much of this dilution has been born out of a conflict between the European Court of Human Rights (ECtHR) and the English judiciary on the application of the comparatively permissive *Criminal Justice Act 2003*.

3.132 The ECtHR developed over time a strand of evidence jurisprudence based on the principle that a conviction could not rest “solely or decisively” on an out-of-court statement of an absent witness.¹⁸² In 2009, the ECtHR’s Fourth Section ruled in *Al-Khawaja and Tahery v United Kingdom* that the “sole or decisive” rule was absolute and found a violation in respect of each applicant.¹⁸³ The UK Supreme Court responded to the ruling in *R v Horncastle* and robustly defended the procedural safeguards contained in the 2003 Act and asserted that they provided sufficient counterbalancing factors to satisfy Art. 6(3)(d) of the Convention, despite the fact that the conviction was based to a decisive extent on an out-of-court statement.¹⁸⁴

3.133 In the meantime the UK had appealed the Fourth Section’s decision in *Al-Khawaja and Tahery* to the Grand Chamber of the ECtHR which largely yielded its jurisprudential ground to the UK Supreme Court, adopting a “flexible” interpretation of the “sole or decisive” rule. This permitted the procedural safeguards provided in the 2003 Act to be weighed as counterbalancing factors, even where the statement was the sole or decisive basis for the conviction.¹⁸⁵

3.134 However, while the ECtHR Grand Chamber was willing to allow overall procedural fairness to counterbalance the sole and decisive rule, it maintained that the absence of the relevant witness must be independently justified; it could not be offset by reference to other procedural safeguards.

¹⁸¹ *Van Mechelen v Netherlands* 1997-III; 25 EHRR 647.

¹⁸² *Kostovski v Netherlands* A 166 (1989); 12 EHRR 434 para 41 PC and *Doorson v Netherlands* 1996-II; 22 EHRR 330 para 76 “a conviction should not be based either solely or to a decisive extent on anonymous statements”.

¹⁸³ (2009) 49 EHRR 1.

¹⁸⁴ *R v Horncastle & Others* [2009] UKSC 14.

¹⁸⁵ The *Horncastle* and *Al-Khawaja* decisions have been characterised more favourably by some UK commentators as an example of productive judicial dialogue between the two courts, in keeping with the model of rights review envisaged by the *Human Rights Act 1998*. See Young, ‘Is dialogue working under the Human Rights Act 1998?’ [2011] *P.L.* 773 and Clayton, ‘Smoke and mirrors: the Human Rights Act and the impact of Strasbourg case law’ [2012] *P.L.* 639. For a comprehensive analysis of the decision of the Grand Chamber see Heffernan, ‘Hearsay in Criminal Trials: The Strasbourg Perspective’ (2013) *The Irish Jurist* 49(1), 132-160.

Where fear is the purported justification, the Court will demand “objective ground” for it “supported by evidence”.¹⁸⁶

3.135 The Court was asked to revisit this ring-fenced non-attendance justification in *Seton v United Kingdom*.¹⁸⁷ The case turned on certain recorded telephone conversations from another suspect to various family members which recorded him strongly denying any implication in the offence. The calls were made from a prison facility and both parties to the call would have been aware that their conversation was being recorded. These recordings were put in evidence and no attempt was made to call the declarant to give testimony. The UK submitted that it would be pointless to bring him to court as he had made clear on many occasions that he would not co-operate and the privilege against self-incrimination would allow him to stonewall any questions on the stand. The ECtHR rejected these justifications, reasoning that reluctance does not amount to unavailability. The witness was in custody and could very easily have been brought to court, whereupon the jury could at the very least assess his demeanour. However the Court continued saying “this is not the end of the matter...this is a consideration which is not of itself conclusive of the fairness of a criminal trial, although it constitutes a very important factor to be weighed in the overall balance...”¹⁸⁸ The position with respect to reasons for non-attendance would now appear to be the same as decisiveness of the evidence; it is an abridgement of the right which may be offset by sufficient counter-balancing factors.

3.136 The decision has been criticised as misunderstanding the relationship between the three elements at play: the reasons for non-attendance, whether the evidence was “sole or decisive” and whether there were sufficient counterbalancing factors.¹⁸⁹ One commentator has argued that while it makes sense to balance the decisiveness of the evidence against other counterbalancing factors affecting the fairness of the trial, there is no such logical relationship between procedural safeguards and the justification for the non-attendance of a witness.¹⁹⁰ It has been argued that it is difficult to justify the limitation of a human right where no good reasons are offered to do so.¹⁹¹ Notwithstanding such criticism, the First Section of the Court recently ruled in favour of the UK, for substantially similar reasons, on a case of similar facts in *Price v United Kingdom*.¹⁹²

¹⁸⁶ *Al Khawaja and Tahery v United Kingdom*, Applications nos. 26766/05 and 22228/06, 15 December 2011 at para. 124.

¹⁸⁷ *Seton v. United Kingdom*, Application no. 55287/10, 31 March 2016.

¹⁸⁸ *Seton v. United Kingdom*, Application no. 55287/10, 31 March 2016 p.19. The Court referenced its previous decision in *Schatschaschwili v Germany*, no. 9154/10, 15th December 2015 in which they favoured such a flexible approach but nonetheless found a violation of Art. 6.

¹⁸⁹ Nicholas Clapham, “Hearsay Evidence and the Demise of Absolute Rules: *Seton v United Kingdom*” [2016] ECHR 55287/10’ (2016) *JCL* 80 (220).

¹⁹⁰ *Ibid* at 221.

¹⁹¹ *Ibid*.

¹⁹² *Simon Price v the United Kingdom* (Application no. 15602/07) 15th September 2016.

3.137 The ECtHR has moved from a relatively robust exclusionary rule to a position whereby hearsay and out-of-court statements are simply to be factored into an overall calculus of fairness in less than 5 years. The Court has moved from enforcing particular rights enjoyed by accused persons in Europe to a more holistic appraisal of the overall fairness of the trial process. Arguably this dramatic climb-down is a product of the particular dynamic which exists between the ECtHR and the English courts and the ECtHR may prove more assertive in hearsay cases involving a less recalcitrant contracting state.¹⁹³

(9) Conclusions

3.138 The Commission notes that the Irish courts have regularly commented that, bearing in mind the importance of the right to fair procedures under the Constitution, the rule against hearsay should not exclude evidence in such a rigid manner that it operates to work injustice.¹⁹⁴ At the same time, they have emphasised that the right to cross-examine in criminal trials prohibits any development which would make hearsay generally admissible. By contrast with other countries, the Irish courts have studiously avoided any move towards the kind of general “inherent reliability” test developed in, for example, Australia or Canada.¹⁹⁵ The Commission has, accordingly, come to the view that any reform of the law in this area should be based on retaining the existing exceptions.

3.139 The Irish courts favour a generally exclusionary approach subject to a case by case development of inclusionary exceptions by the courts where required. The Commission has already provisionally concluded that it does not propose to recommend either a completely inclusionary approach to reform or a completely exclusionary one. In that light, the Commission recommends that the courts continue to have a generally exclusionary approach subject to a residual discretion to develop new inclusionary exceptions where developments in technology or changing circumstances may require it.

3.140 **The Commission recommends that nothing in this report or in the draft Bill should be taken to preclude the judicial development of the rule against hearsay.**

¹⁹³ While the preponderance of case law on this point has involved the United Kingdom, the court has also adopted this “holistic” approach in cases involving other contracting states. E.g. *Schatschaschwili v Germany*, no. 9154/10, 15th December 2015.

¹⁹⁴ *DPP v McGinley* [1998] 2 IR 408 at 413 per Keane J: “[the rule against hearsay] is capable of producing injustice in individual cases, particularly if applied in a rigid and unyielding manner.”

¹⁹⁵ For Australia see *Walton v R* (1989) 166 CLR 283 and Canada *R v Khan* [1990] 2 SCR 531.

CHAPTER 4

DOCUMENTARY AND ELECTRONIC EVIDENCE

A Definition of document and writing

(1) *Definition of document*

4.01 The *Consultation Paper on Documentary and Electronic Evidence*¹ recognised the need to update the legal concept of a document to accommodate information which is electronically generated and stored. The term “document” is used in this Report to encompass written information contained on paper as well as information in other forms such as maps, plans, inscriptions, signposts, electronic recordings and automated systems.

4.02 The Supreme Court in *McCarthy v O’Flynn*² held that a document should be defined as “something which teaches or gives information or a lesson or an example of construction”. The traditional definition of a document, from the English case *R v Daye*³ was “any written thing capable of being evidence.” In *McCarthy* the Supreme Court found this definition to be insufficient as it did not refer to a document being a thing that gives information.

4.03 Some statutory definitions of “document” have contained non-exhaustive examples of things to be included and have encompassed a wider range of things than in the common law definition. For example, section 2 of the *Offences Against the State Act 1939* (as amended) defines document by reference to a number of forms of media and electronic information. The definition states:

“the word “document” includes a book and also a newspaper, magazine, or other periodical publication, and also a pamphlet, leaflet, circular, or advertisement, and also—

(a) any map, plan, graph or drawing,

(b) any photograph,

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom, and

¹ *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57 - 2009) (this is referred to as the Consultation Paper for the remainder of this Part of this Report).

² *McCarthy v O’Flynn* [1979] IR 127.

³ *R v Daye* [1908] 2 KB 333.

(d) any film, microfilm, negative, tape or other device in which one or more visual images are embodied (whether with or without sounds or other data) so as to be capable (as aforesaid) of being reproduced therefrom and a reproduction or still reproduction of the image or images embodied therein whether enlarged or not and whether with or without sounds or other data.”

4.04 Similarly, section 2 of the *Criminal Evidence Act 1992* defines a document as “including”:

“(i) a map, plan, graph, drawing or photograph, or

(ii) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.”

4.05 By contrast, a more concise though at the same time extensive and inclusive definition (not unlike the common law definition in *McCarthy*)⁴ is found in the *Criminal Justice Act 2011* which defines a document as “including”:

“information recorded in any form and anything on or in which information is recorded and from which information can be extracted.”⁴

(2) *The definition of writing*

4.06 The *Interpretation Act 2005* provides that in any legislation, the word “writing”:

“includes printing, typewriting, lithography, photography, and other modes of representing or reproducing words in visible form and any information kept in a non-legible form, whether stored electronically or otherwise, which is capable by any means of being reproduced in a legible form.”

4.07 Therefore the contents of electronic documents are “writing” within the meaning of the 2005 Act. There is no general legislative definition of “signature” or “signing” but the essential factors have been established by case law. The Commission recommends a statutory definition of “signature” in Chapter 5.

(3) *Reforming the definition of a “document”*

4.08 In the *Consultation Paper* the Commission highlighted the need to define “document” for both civil and criminal proceedings in a non-prescriptive and technology-neutral manner that would be capable of adapting to new

⁴ Section 2, *Criminal Justice Act 2011*.

technologies as they emerge. This is consistent with the statutory examples given above, but which apply in the criminal law context only. The Commission concluded that a single definition of a document could include electronic and automated documents without the need for a separate term dealing with this type of evidence.⁵

- 4.09** The *Consultation Paper* reviewed the concept of a document found in other jurisdictions and identified the approach taken in England and Wales as the preferred model.⁶ Section 134 of the English *Criminal Justice Act 2003* states that a document is defined as “anything in which information of any description is recorded”. Section 13 of the English *Civil Evidence Act 1995* contains the same definition. The *Criminal Justice Act 2011*, referenced above, follows this approach, defining a document as including “information recorded in any form and anything on or in which information is recorded and from which information can be extracted.”⁷
- 4.10** The Commission considers that a generally applicable definition along the lines of the *Criminal Justice Act 2011* should be adopted for both civil and criminal proceedings and that a document should be defined as “anything in which information of any description is recorded”. The definition of a document should contain this general clause outlining in general terms what a document is, followed by a specific clause, modelled on the existing statutory definitions, outlining examples of those materials included within the definition.
- 4.11** **The Commission recommends that “document” should be defined in the draft Evidence Bill, for the purposes of both civil and criminal proceedings, as “anything in which information of any description is recorded”; that this should apply to hard copy traditional documents as well as to electronic documents and documents generated automatically; and that this definition should include the following list of non-exclusive examples:**
- (a) any thing on which there is writing,**
 - (b) any map, plan, graph, drawing or photograph,**
 - (c) any disc, tape, sound track, film, microfilm, negative or other device from which sounds, images or other data can be reproduced with or without the aid of some other equipment,**
- and,**

⁵ Paragraph 1.29 of the *Consultation Paper on Documentary and Electronic Evidence*. This conclusion is supported by the approach taken in the New Zealand *Evidence Act 2006*, as discussed at paragraph 1.26 of the *Consultation Paper on Documentary and Electronic Evidence*.

⁶ Para.1.31 of the *Consultation Paper*. An in-depth discussion of statutory definitions of “document” in Ireland and elsewhere can be found at paras. 1.07-1.27 of the *Consultation Paper*.

⁷ Section 2, *Criminal Justice Act 2011*.

(d) any reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.

B Admissibility and Authentication of Documentary Evidence

4.12 A document may be admitted in court as evidence in three different contexts and for different purposes;

(1) Where it is introduced as “real evidence” or “physical evidence”, that is, where it is introduced for some purpose other than to prove the contents of the statement contained in the document;

(2) Where it is introduced as an admissible exception to the hearsay rule to prove the truth of the contents of the statement contained in the document; and

(3) Where it falls into a specific category of documents, such as public documents or business records, the admissibility of which is authorised at common law or by legislation.

4.13 Documentary evidence must pass an additional hurdle in order to be admissible: the contents of the document must be authenticated. Authentication is the process of showing that evidence is what it is claimed to be; that it is genuine and not a forgery. Authentication is not concerned with the truth of the contents of the document but is necessary to determine whether evidence is admissible and it assists in determining what weight should be attached to the evidence. In some circumstances it must also be shown that a document was duly executed. This will arise where there are legal requirements such as signing to make a particular document valid and legally enforceable.

4.14 The contents of a document may be proved by secondary evidence in a number of situations as outlined below in the discussion of the exceptions to the original document rule.

(1) *Producing the original best evidence rule and the original document rule*

4.15 One way in which a document can be proved is to present the original of the document in court. This original can then be examined for any evidence of tampering or amendment to the contents of the document. Electronic evidence must be proved and authenticated using the appropriate technological methods.

- 4.16** Two rules of evidence are relevant to the process of proving a document by producing the original; these are the best evidence rule and the original document rule. The Commission reviewed the historical development of these rules in the *Consultation Paper on Documentary and Electronic Evidence*.⁸ The courts have traditionally regarded original documents as the core of reliable documentary evidence and have required documents which are copied in any way to be subject to certain rules of authentication. This is the basis of the best evidence and original document rules.
- 4.17** The best evidence rule states that only the best evidence of a thing can be produced in court.⁹ The Supreme Court suggested in *Martin v Quinn* that the rule no longer applies with anything like the rigidity it once did and indeed is in the normal case merely “a counsel of prudence which may be departed from if the inferior evidence tendered has regularity and verisimilitude on its face.”¹⁰
- 4.18** The original document rule requires that where a document is introduced in evidence the original of that document must be produced in court.¹¹
- 4.19** In the past, the best evidence rule and the original document rule have sometimes been confused,¹² but the position regarding documentary evidence now is: (a) where an original document is available that it should be produced; (b) if the original is not available, a copy can be presented as evidence.¹³ If a copy is produced, there may be a question about the weight to be attached to that copy. If a copy cannot be produced, then some other evidence should be produced, for example, from a witness present at the time the document was made.¹⁴ If a witness made a statement and is not available to give evidence, then the rule against hearsay may apply.
- 4.20** A number of exceptions to the original document rule have developed. McGrath¹⁵ observes that the common thread running through the various exceptions is that the person seeking to adduce the evidence cannot produce the original through no fault of their own.
- (a) *Exceptions to the original document rule***
- (i) Failure to comply with a notice to produce*
- 4.21** Where the original of a document is in the possession of the opposing party, a notice to produce should be served on them. If the opposing party fails to supply the document in response to the notice, the person who requested the

8

Paras. 2.24 - 2.214 of the Consultation Paper.

9

Ford v Hopkins (1700) 1 Salk 283; *Omychund v Barker* (1745) 1 Atk, 21. A full discussion of the best evidence rule can be found at paragraphs 2.24-2.88 of the Consultation Paper.

10

Martin v Quinn [1980] IR 244 at 249.

11

Phillips on Evidence (17th ed. Sweet & Maxwell, 2010), para. 41-03.

12

Phillips on Evidence (17th ed. Sweet & Maxwell, 2010), para. 41-03.

13

Primor plc v Stokes Kennedy Crowley [1996] 2 IR 459.

14

Weir v DPP, High Court (O'Neill J) 29th July 2008.

15

McGrath, *Evidence* (2nd ed. Roundhall, 2014) para. 12-16.

document can provide secondary evidence (generally a copy) of the contents of that document.

(ii) Document lost or destroyed

4.22 Where a document is lost or destroyed, and the court is satisfied that this is the case, it is possible to rely on secondary evidence of the contents of the document. This will require demonstrating to the court that a thorough search was conducted for the document and it could not be located.

(iii) Production of the original is impossible or inconvenient

4.23 As evidenced by the discussion above, the definition of a document covers a wide range of materials. Occasionally such materials cannot be easily brought to court. In the English case *Owner v Bee Hive Spinning Co Ltd*¹⁶ the document in question was a statutory notice setting out mealtimes in a factory, and the relevant legislation required that this notice had to remain fixed to a wall in the factory premises. In such circumstances, where production of the notice would have involved a breach of the relevant legislation, the court allowed secondary evidence of the notice to be admitted.

(iv) Refusal of a third party

4.24 Where the original document is in the possession of a third party who lawfully refuses to produce it, secondary evidence may be received. The term “lawful” here is important given that procedures exist to compel the production of evidence held by a third party.

(v) Copies of enrolled documents

4.25 In some circumstances the law requires that certain documents be filed in a particular office, which will then hold the original filed documents and issue copies for use as evidence in proceedings. Such documents are referred to as enrolled documents; an example is the probated copy of a will. The court receiving the enrolled document may insist on the production of the original where such production is necessary to resolve any issue which cannot be resolved from the copy, such as where there is a latent ambiguity in the probated copy of the will.¹⁷

(vi) Public documents

4.26 The exception in relation to public documents is discussed in greater detail in Part C of this Chapter. Secondary evidence of public documents is admitted under common law and a number of statutory provisions. It would clearly cause serious disruption to the operation of public bodies if the originals of these types of documents had to be produced in every civil or criminal proceeding.

¹⁶

[1914] 1 KB 105.

¹⁷

Cecil v Battie-Wrightson [1920] 2 Ch. 330.

(vii) Statutory exceptions

4.27 The original document rule has been largely abrogated in criminal proceedings as a result of section 30 of the *Criminal Evidence Act 1992* which states that, where information contained in a document is admissible in evidence, such evidence may be given by the production of a copy of that document. The copy may be authenticated in a manner approved by the courts. Section 30 of the 1992 Act applies whether or not the original is still in existence. In addition, it does not matter how many removes there are between the original document and the copy.

4.28 Many other statutory provisions also allow for the admission in evidence of copies of documents, including certain documents in extradition proceedings.¹⁸

(b) *Reform of the original document rule*

4.29 The original document rule developed at a time when copies of documents were made in writing by copyists and mistakes in those copies were frequent. The advent of modern copying technologies has meant that copies can more reliably be regarded as exact replicas of the original. In relation to electronic evidence it may even be difficult to determine what is the "original" because, for example, unreadable computer-held data must be converted into a legible form and a new original is created each time a legible form is produced. In light of the approach of the Supreme Court to the best evidence rule and the growing number of exceptions to the original document rule, the Commission considers that a review of the continued potential benefit of these rules must be undertaken. The Commission is supported in this view by the approach taken to this matter¹⁹ in other jurisdictions and *Phipson* notes that, "...the Divisional Court has described it as having gone by the board long ago, and one modern text refers to it as an "evidentiary ghost"."²⁰

4.30 As already discussed, the original document rule has been largely abrogated in criminal proceedings in Ireland by section 30 of the *Criminal Evidence Act 1992*. Section 30 was considered by in *Carey v Hussey*²¹. Kearns J noted:

"It is quite apparent that modern technology has completely superseded methods of replication and authentication which were appropriate to the [19th] century. The Criminal Evidence Act, 1992, seems to me to confer on a judge a very wide discretion to

¹⁸ Section 55 of the *Extradition Act 1965*. Other statutory provisions include Section 7 of the *Protection Of Children (Hague Convention) Act 2000*, Section 25 of the *Criminal Justice (Illicit Traffic By Sea) Act 2003*, Section 47 of the *Health And Social Care Professionals Act 2005*, Sections 9 and 45 of the *Registration Of Deeds And Title Act 2006*, Section 14 of the *Criminal Justice (Surveillance) Act 2009*, and Section 38 of the *Public Transport Regulation Act 2009*.

¹⁹ In Chapter 2, Part D of the Consultation Paper the Commission highlighted that the best evidence rule and the original document rule have been abolished in a number of other jurisdictions.

²⁰ *Phipson on Evidence* (18th ed. Sweet & Maxwell, 2013), at para. 7-37.
²¹ *Carey v Hussey* [1999] IEHC 71.

accept copies, be they photocopies or facsimile copies as admissible evidence in criminal proceedings.”

4.31 The Commission notes that section 30 of the *Criminal Evidence Act 1992* has operated effectively and without difficulty since its enactment and considers that in light of modern methods of replication and authentication a similar provision should be introduced in relation to civil proceedings.

4.32 The Commission also considers that this is necessary to simplify the current legal framework in relation to the admissibility of documents.

(c) *Conclusion*

4.33 **The Commission recommends that, to the extent that they still apply in Irish law, the best evidence rule and the original document rule should be abolished; and that, in their place, the draft Evidence Bill should provide that a copy of an original document is admissible in civil and criminal proceedings where the court is satisfied as to its relevance and reliability.**

(2) *Other means of authenticating a document*

4.34 The means of authenticating a document discussed above operate by way of exception to the original document and best evidence rules. In the Consultation Paper²² the Commission considered three other means of authentication. First, chain of custody; secondly, expert witness; thirdly, judicial notice. .

(a) *Chain of custody*

4.35 Chain of custody evidence proves the path taken by an item of real evidence from its creation or seizure to its production in court. This is to show that the item presented in court is the item that was created or seized and to show that the item was not tampered with before production in court or being tested at a forensic laboratory.

4.36 The same process applies to documentary evidence. It may be necessary for a court to hear evidence from every person who had custody of the document. Detailing the chain of custody of documentary evidence is potentially time-consuming and costly. In some circumstances it is unrealistic to expect the relevant parties to have any recollection of the path of a particular document (and provision is made for that in criminal trials in the *Criminal Evidence Act 1992*).²³

(b) *Expert witness*

4.37 An expert witness may give oral testimony about the authenticity of evidence. For example, they may identify handwriting as that of a specific individual, set

²² Paragraph 5.212 of the Consultation Paper (LRC CP 57-2009).
²³ Section 6(1)(f).

out the processes involved in creating and storing an electronic document or explain voice recognition methods or forensic analysis procedures that identify whether or not a document either in physical form or electronic form has been tampered with. The law relating to expert witnesses is considered in detail in Chapters 6, 7 and 8.

4.38 A non-expert witness may also give evidence identifying a document. A person who is familiar with the writing or signature of the creator of a document may be called as a witness for this purpose and may give evidence that the document produced contains the handwriting or signature of the person in question.²⁴ It is for the court to determine the weight to be attached to this evidence.

4.39 As we can see, authentication procedures can be time-consuming and complex. However, where judicial notice is taken of a matter there is no need for authentication or proof of that matter.

(c) *Judicial notice*

4.40 A court is said to take judicial notice when it deems a matter to have been established without requiring the production of any evidence. There are a number of rationales for judicial notice; some relate to the time and cost, others to consistency on matters of common knowledge. Courts take judicial notice of three categories of facts and matters:

- Facts that are so well known (notorious) and well established that they cannot be reasonably disputed;
- Facts which are capable of immediate and accurate demonstration by having resort to readily accessible sources of indisputable accuracy;
- Matters subject to judicial notice under statute (examples of which include section 13 of the *Interpretation Act 2005*,²⁵ which states that Acts are public documents and shall be judicially noticed, section 4 of the *European Convention on Human Rights Act 2003, which makes the Convention and related documents judicially noticed*; and the *European Communities (Judicial Notice and Documentary Evidence) Regulations 1972*).

4.41 It is then for the court to consider what weight to attribute to the evidence. The constitutional requirement of fair procedures requires the court to inform the parties if it intends to take judicial notice of any matter.

4.42 Judicial notice speeds up trials. Courts have taken judicial notice of some statutory instruments where they are well established in a certain area of

²⁴ *Attorney General v Kyle* [1933] IR 15.
²⁵ Replacing section 6(1) of the *Interpretation Act 1937*.

practice²⁶ and of facts which can be ascertained from sources to which a judge can refer, such as authoritative texts.²⁷

(3) *Reform of rules on authentication*

4.43 As already noted, the current rules on authentication in Ireland are contained in a range of different pieces of legislation and common law rules. The federal systems in the US and Australia have outlined the rules for authentication for a range of documents in one statutory enactment.

4.44 The Australian *Evidence Act 1995* makes extensive provision for the rules of authentication for documentary evidence. The Act abolishes all common law rules relating to the authentication of evidence and consolidates them on a statutory footing. Sections 143 and 144 provide for the rules surrounding judicial notice and common knowledge. Section 146 provides for the admissibility of documents produced by certain automated machines and devices, providing that where a device ordinarily produces a certain outcome, it will be presumed to have produced that outcome. Section 152 relates to documents produced from proper custody and sections 156- 158 deal with public documents. The original document rule is expressly abolished in favour of these provisions.²⁸

4.45 England and Wales has taken a contrasting approach in opting to leave it to the courts to determine the manner in which documents may be authenticated rather than provide an extensive codification of the various common law rules. Section 133 of the *Criminal Evidence Act 2003* provides that a copy of a document may be “authenticated in whatever way the court may approve.” Section 133 reflects the position of the Commission that it should remain a matter for the courts to determine what constitutes sufficient authentication, subject to the specific recommendations contained in this report.

4.46 **The Commission recommends that the draft Evidence Bill provide that the authentication of documents should remain a matter for the courts to determine subject to the specific recommendations set out below.**

C Hearsay and Documentary Evidence

4.47 The rule against hearsay prohibits the admission in evidence of an out of court statement to prove the truth of the contents of that statement. Documentary evidence is by its nature an out of court statement and therefore the hearsay rule is of great significance for documentary evidence -

²⁶ *State (Taylor) v Circuit Judge of Wicklow* [1951] IR 311; *DPP v Collins* [1981] ILRM 447.
²⁷ McGrath, *Evidence* (2nd ed. Round Hall 2014) at para. 13-09.
²⁸ Section 51 *Evidence Act 1995*.

in order to be admissible the evidence must fall under one of the many exceptions to the hearsay rule. A number of exceptions have developed which have a particular relevance to documentary evidence.

(1) *Public documents*

4.48 The important and frequently used public documents exception comes from English common law²⁹ and is now regulated through a combination of common law rules and statutory provisions. Public documents include Acts, Statutory Instruments, judicial records, Ordnance Survey Ireland maps and a range of public records including the registers of births, marriages and deaths.

4.49 A document made by a public officer for the purpose of the public making use of it and being able to refer to it was admissible even though it was hearsay.³⁰ The rule developed because public documents compiled by public officials (like birth, marriage and death certificates and ordnance survey maps) can be rebuttably³¹ presumed accurate because they have been generated in conditions where their accuracy is highly reliable, primarily because there is a high probability that the persons who made the entry have no reason to have made, for example, inaccurate entries or maps. Additionally, the relevant officials may be dead or unable to remember compiling specific documents.³²

4.50 Copies of public documents are also admissible as a common law exception to the original document rule because of the inconvenience which would be suffered if the originals of such documents had constantly to be produced in court. Statute allows the use of Stationary Office copies (for Acts and statutory instruments), court seals, certified copies and examined copies.³³

(a) *Defining a “public document”*

4.51 In Chapter 9 the Commission lists the *Evidence Acts* directly relevant to this Report (many involving the admissibility of public documents)³⁴ and notes that some provisions of these Acts have been superseded by later legislation but also recommends that to the extent they remain relevant they should be consolidated into the draft Evidence Bill appended to this Report.

4.52 The case law sets out four criteria which must be present in order for a document to be classified as a public document:

²⁹ Its development was discussed at paragraph 3.40 of the Consultation Paper.

³⁰ *Sturla v Freccia* (1880) 5 App Cas 623.

³¹ See Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) para. 9-85.

³² This is discussed at paragraph 5.214 of the Consultation Paper (LRC CP 57 - 2009).

³³ *Documentary Evidence Act 1925*.

³⁴ Including the *Documentary Evidence Act 1868*, the *County Boundaries (Ireland) Act 1872*, the *Documentary Evidence Act 1882*, the *Evidence (Colonial Statutes) Act 1907*, the *Documentary Evidence Act 1925*, and the *Statute Law Revision Act 2007*.

(a) There must be a public duty to inquire into the matter and to record the findings.³⁵

(b) The document must relate to a public matter.³⁶ A public matter has been defined in broad terms to include a section of society who may have an interest in the matter.

(c) There must be an intention to retain the document. This means that the document must be the final record and not simply a draft.³⁷

(d) The document must be available for public inspection.³⁸

4.53 The Commission considers that these criteria should be included in the proposed statutory framework.

4.54 **The Commission recommends that the draft Evidence Bill should define a “public document” as “a document retained in a depository or register relating to a matter of public interest whether of concern to sectional interests or to the community as a whole, compiled under a public duty and which is amenable to public inspection.”**

(b) *Specific statutory provisions regarding admissibility*

4.55 An important example of legislation providing for the admission of public documents is the *Civil Registration Act 2004* which introduced a unified system of registration for life events such as birth, marriage and death through the Civil Registration Service. Section 13 of the 2004 Act³⁹ details the various registers that shall be kept by An tArd-Chláraitheoir (the Registrar-General).⁴⁰ Evidence of an entry in a register or of the facts stated in that entry can be given by the production of a document which is presented as a legible copy of the entry and is certified by An tArd-Chláraitheoir, or other listed individuals, to be a true copy of that entry.⁴¹ An entry in the relevant register and purporting to be signed by the relevant person⁴² can be evidence of a birth, still birth or death if the entry was made in accordance with the provisions of the Act.⁴³ A written decision or revision on appeal under the Act can be proved by producing the document purporting to be such a decision or revision if signed by the person who made the decision or revision.⁴⁴ Section

³⁵ *Doe d France v Andrews* (1850) 15 QB 756; *Mulhearn v Clery* [1930] IR 649.

³⁶ *Sturla v Freccia* (1880) 5 App Cas 623; *R v Halpin* [1975] QB 907.

³⁷ *Heyne v Fischel & Co* (1913) 30 TLR 190, *Mercer v Dunne* [1905] 2 CH 538, *White v Taylor* [1969] 1 Ch 150.

³⁸ *Sturla v Freccia* (1880) 5 App Cas 623; *Lilley v Pettit* [1946] KB 401. The document need not be of relevance to the whole world and “public inspection” does not mean availability to the entire public as opposed to those who have an interest in it (*R v Sealby* [1965] 1 All ER 701).

³⁹ As amended, by section 9 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

⁴⁰ The English text of the legislation uses the Irish term exclusively.

⁴¹ Section 13(4) of the 2004 Act.

⁴² A person who at the time the entry was made was required to provide information on the event to a registrar.

⁴³ Section 68 of the 2004 Act.

⁴⁴ Section 60 of the 2004 Act.

71 also allows for the admission of documentary evidence of the date upon which certain evidence came to the attention of An tArd-Chláraitheoir or a person authorised by him or her.

- 4.56** This approach (whereby legislation provides that a document is evidence of the details stated in that document) is also used for criminal proceedings where certificates can stand in the place of oral testimony.⁴⁵ Such “certificate evidence” provisions generally allow for oral testimony to be required by a court where deemed necessary or prudent.
- 4.57** Given the wide range of these specific legislative provisions which allow for the admission and proof of various documents the Commission has concluded that the draft *Evidence Bill* appended to this Report should incorporate the most significant legislative provisions in the various *Evidence Acts* listed in Chapter 9 of the Report. These include the admissibility of public documents such as Acts, statutory instruments, EU law and Ordnance Survey Ireland maps.

(c) *Proving public documents*

- 4.58** The common law allows copies of public documents as evidence, and simplified methods have developed to ensure that the court is satisfied that the copy produced is a true copy. These allow a document to be proved and authenticated in one process. Legislation permits the following alternatives to the original:

1. An examined copy (a copy proved to correspond to the original by the oral evidence of a person who has examined the original);⁴⁶
2. A certified copy (a copy certified by an official with custody of the original to be an accurate copy);⁴⁷
3. A sealed copy (a judicial or ministerial seal may be applied to a document for example, an office copy is a copy of a judicial document prepared by a court official with custody of the original, and authenticated with the seal of the court);⁴⁸
4. A signed copy (in some instances the signature of the appropriate person is sufficient to authenticate a document and this signature will be presumed valid);

⁴⁵ For example section 6(1) of the *Criminal Justice (Miscellaneous Provisions) Act 1997* which states that a certificate purporting to be signed by a member of An Garda Síochána stating that he or she arrested a named person for a specified offence and charged and cautioned that person for the specified offence is admissible in evidence of the matters stated in the certificate.

⁴⁶ See section 14 of the *Evidence Act 1851*.

⁴⁷ See section 14 of the *Evidence Act 1851*.

⁴⁸ Section 15 of the *Ministers and Secretaries Act 1924* as amended by section 7 of the *Documentary Evidence Act 1925* provides that an instrument issued by a Government Minister shall be received in evidence without further proof where it has been sealed with the seal of the Minister and signed by the Minister or any person authorised by the Minister to authenticate the seal with their signature.

5. A Stationery Office copy (a copy printed under the superintendence or authority of and published by the Stationery Office).

4.59 The *Documentary Evidence Act 1925* governs the authentication of documents published by the Stationery Office and copies of the *Iris Oifigiúil*, the Official Gazette. There are three relevant sections; all are in force though section 3 is obsolete. Section 2 allows the production of Stationery Office copies of Acts of the Oireachtas or journals of Dáil or Senate proceedings as *prima facie* evidence of those Acts or journals.⁴⁹ Section 4 allows a wide variety of rules, orders, regulations, or byelaws to be proved (*prima facie*) by the production of a copy of the *Iris Oifigiúil* purporting to contain the relevant document.⁵⁰ Documents purporting to be published by or on the authority of the Stationery Office are rebuttably presumed to have been so published.⁵¹

4.60 A modern state generates a large number of public documents of the type covered by the 1925 Act. Such documents are very important in many contexts, whether in a court or in other quasi-judicial settings such as social welfare adjudications or professional disciplinary bodies. The provisions of the 1925 Act overlap with and replicate comparable *Evidence Acts*, such as the *Evidence Act 1851*, enacted prior to the establishment of the Irish Free State in 1922. For clarity and consistency the Commission is strongly of the view that a single piece of legislation should replace these many existing and overlapping statutory provisions.

4.61 The Commission has already recommended that public documents be presumed admissible subject to any contrary evidence as to authenticity. The Commission considers that the draft Evidence Bill contain presumptions of authenticity applying to public documents.

4.62 **The Commission recommends that the following existing arrangements for the proof and authentication of public documents be incorporated into the draft Evidence Bill:**

1. Examination: an examined copy is a copy proved to correspond to the original by the oral evidence of a person who has examined the original;

⁴⁹ "Prima facie evidence of this or any other Act of the Oireachtas whether public or private, and whether passed before or after the passing of this Act, or of the Journal of the Proceedings of either House of the Oireachtas, may be given in all Courts of Justice and in all legal proceedings by the production of a copy of such Act or Journal printed under the superintendence or authority of and published by the Stationery Office."

⁵⁰ "(1) Prima facie evidence of any rules, orders, regulations, or byelaws to which this section applies, may be given in all Courts of Justice and in all legal proceedings by the production of a copy of the *Iris Oifigiúil* purporting to contain such rules, orders, regulations, or byelaws or by the production of a copy of such rules, orders, regulations, or byelaws printed under the superintendence or authority of and published by the Stationery Office".

⁵¹ Section 5(1) of the 1925 Act. In the 2013 case of *Mitchell v Member in Charge Terenure* [2013] IEHC 221 Hogan J held that the online version of resolutions of the Houses of the Oireachtas are admissible as public documents. See further below.

2. **Certification: a certified copy is a copy certified by an official with custody of the original to be an accurate copy;**
3. **Sealing: a judicial or ministerial seal may be applied to a document to aid its future authentication;**
4. **Signed copies: where the signature of the appropriate person may be sufficient to authenticate a document and where this signature is presumed valid.**
5. **Stationery Office copy: a Stationery Office copy is a copy printed under the superintendence or authority of and published by the Stationery Office.**

(d) *Public documents of the Institutions of the European Union*

- 4.63** The *European Communities (Judicial Notice and Documentary Evidence) Regulations 1972* govern this area. Judicial notice must be taken of the Treaties of the European Union, the Official Journal of the European Union and any decision or opinion of the European Court of Justice.⁵² The production of a copy of a Treaty printed under the superintendence or authority of the Stationery Office or of the Official Publications Office of the European Union is *prima facie* evidence of the Treaty in all courts.⁵³ *Prima facie* evidence of any act adopted by an institution of the European Union, any judgment or order of the European Union, any document in the custody of an institution of the European Union or any entry in or extract from such a document are *prima facie* in all courts and in all legal proceedings. Such documents are therefore rebuttably presumed to have been printed under the superintendence and authority of the Stationery Office or the Official Publications Office where such document purports documents are rebuttably presumed to have been printed under the superintendence to have been so published.⁵⁴
- 4.64** A copy of the Official Journal of the European Union published prior to 1st July 2013 is *prima facie* evidence in all courts of any act adopted by an institution of the European Union where the Official Journal purports to contain such act.⁵⁵ For acts done after that date, only the electronic version of the Official Journal “shall be authentic and produce legal effect”.⁵⁶

⁵² Regulation 4 of the 1972 Regulations.
⁵³ Regulation 5 of the 1972 Regulations.
⁵⁴ Regulation 8 of the 1972 Regulations.
⁵⁵ Regulation 7 of the 1972 Regulations.
⁵⁶ Council Regulation (EU) No 216/2013 of 7 March 2013.

(2) Private documents

4.65 The same presumptions of admissibility do not exist for private documents. Private documents are documents created without the element of public record or public interest. In general they concern private dealings, such as commercial contracts or communications, or personal agreements or communications. While no general inclusionary approach can be taken towards private documents, a number of statutory provisions have provided for their admissibility where the circumstances of their creation indicate a high degree of reliability. Such statutory provisions include the *Bankers' Books Evidence Act 1859* (as amended) and the more general "business records" provisions in section 5 of the *Criminal Evidence Act 1992*, which are discussed in detail in Chapter 2. Where private documents, such as business records, are admissible in evidence they must be fully authenticated.

4.66 The distinction between private and public documents is necessary and should be maintained. In keeping with the broader aim of this Report the Commission recommends that such a distinction should be placed on a statutory footing.

4.67 **The Commission recommends that the draft Evidence Bill should maintain the well-established distinction between private and public documents, including the presumption of due execution of public documents.**

(3) Business records

4.68 The *Bankers Books Evidence Acts*, the *Criminal Evidence Act 1992* and the law relating to business records generally are discussed in detail in Chapter 2.⁵⁷

(4) Documents generated in anticipation of litigation

4.69 In the *Consultation Paper on Documentary Evidence* the Commission considered the approach taken to documents generated in anticipation of litigation⁵⁸ and the business records provisions in section 5 of the *Criminal Evidence Act 1992*.

4.70 Section 5(3)(c) of the *Criminal Evidence Act 1992* provides that documents generated in anticipation of litigation are not admissible under that statutory regime. The Commission considers that the draft Evidence Bill should contain a provision clarifying that such documents are generally inadmissible and not solely under that legislative framework. Nevertheless, the Commission considers that a facility should be included to allow certain types

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⁵⁸

Para 2.130 to 2.186.
Chapter 4 Section B of the Consultation Paper.

of such documents to be admitted. The Commission considers that certain records generated, for example, for the purposes of compliance with occupational safety and health legislation (notably, the *Safety, Health and Welfare at Work Act 2005*) are, by their nature, produced and generated with the dual aim of regulatory compliance and with a view to possible future litigation. This dual purpose was recognised by the UK House of Lords in *Waugh v British Railways Board*⁵⁹, in which it was held that the compliance element prevented such records from being subject to legal professional privilege, even though they may have been prepared with litigation partly in mind, a view which has been followed by the Irish courts.⁶⁰

4.71 The Commission recommends that the draft Evidence Bill should provide that documents produced in anticipation of litigation remain inadmissible as evidence of matters which they contain, except where express statutory provisions otherwise provide.

4.72 The process of document exchange operates under very different principles in criminal cases as the Commission has discussed in its *Report on Disclosure and Discovery in Criminal Cases*.⁶¹

4.73 In the Consultation Paper, the Commission discussed the provisions of the *Criminal Justice Act 1994*, since repealed by the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*, which required specified information for 5 years to be stored. Section 32 of the 1994 Act was enacted to ensure that this information would be available for admission in evidence in future investigations and it stated that such information should be kept for use as evidence in any investigation into money laundering. The equivalent section in the 2010 Act, section 55, does not refer to the retention as being for use as evidence in future investigations and is instead silent as to the use to which such records may be put. Section 55(7) of the 2010 Act also makes specific provision for electronic records, and requires that a person designated to keep the necessary records may keep such records which are wholly or partly in electronic, mechanical or other non-written form only if such records are capable of being reproduced in a written form. The 2010 Act is silent as to admissibility of such records in evidence.

4.74 The Commission recommends that the draft Evidence Bill provide that documents generated during the investigation of criminal offences shall remain subject to the rules and principles relating to disclosure in criminal cases.

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[1980] AC 521.

⁶⁰

See, for example, *Silver Hill Duckling Ltd v Minister for Agriculture* [1987] ILRM 516.

⁶¹

LRC 112-2014.

(5) Record made in the course of duty by a person now deceased

4.75 A common law exception to the rule against hearsay allows the admission of statements of a deceased person which were created “in the course of duty”. Such evidence was admissible because the dead cannot testify and the document’s creation “in the course of duty” made the statements therein more reliable. The exception is subject to many conditions. The declaration must be a declaration of fact and not opinion; the declarant must have been under a duty to make the record; the duty must have been to a person other than the declarant; the declaration must have been made contemporaneously with the performance of the act in question and finally; the declarant must have had no reason to misstate the information. This exception is discussed in detail in Chapter 3.⁶²

4.76 As previously discussed, the Commission notes that this exception has fallen into disuse and the rationale for its original creation can now adequately be met by the business records exception which this report recommends. The Commission therefore recommends that the common law exception for records made in the course of duty by a person now deceased be abolished.

(6) Ancient documents**(a) Ancient documents in Irish law**

4.77 The term “ancient document” appears in several 19th century cases concerning land and rights associated with land (*eg* fishing, hunting and turf cutting). The cases refer to specific time periods which appear short (20 to 40 years) but in some instances documents were excluded on the basis that they did not have a character of sufficient antiquity, which suggests a period of a much longer duration than 20 years. One such case justified the exception as follows: “Time has removed the witnesses who could speak to acts of ownership of their own personal knowledge, and resort must necessarily be had to written evidence.”⁶³

4.78 McGrath⁶⁴ refers to “ancient documents affecting an interest in land” as an inclusionary exception to the rule against hearsay. The *Vendor and Purchaser Act 1874* provided that certain statements in a deed, instrument, Act of Parliament or statutory declaration 20 years old at the date of contract were “sufficient evidence” of the truth of such facts, matters and descriptions.⁶⁵ The 1874 Act has since been repealed and replaced with a

⁶² See para. 3.29.

⁶³ *Malcomson v O’Dea* (1863) 10 HL Cas 593 at 614.

⁶⁴ McGrath, *Evidence* (2nd ed. Roundhall 2014) at para. 5-319.

⁶⁵ Section 2, Rule 2 of the *Vendor and Purchaser Act 1874*.

similar provision in the *Land and Conveyancing Law Reform Act 2009* providing for the admissibility of such documents after a 15 year period.⁶⁶

(b) *Ancient documents in England*

4.79 Written documents proved or purporting to be not less than 20 years old and produced from proper custody are presumed to have been duly signed, sealed, attested, delivered or published according to their purport unless there is reason for suspicion.⁶⁷ The period at common law was 30 years; this was reduced to 20 years by section 4 of the *Evidence Act 1938*.

(c) *Conclusion*

4.80 The rule on ancient documents in Ireland has had two applications: proof of title and admissibility of public documents. The reference in the English legislation to “proper custody” implies that in general this rule may have developed with regard to official documents. In this regard section 14 of the *Evidence Act 1851* is relevant in that it refers to documents being of such a public nature as to be admissible on their mere production from proper custody.

4.81 **The Commission recommends that the draft Evidence Bill should provide for a simplified method of authentication for the admissibility of an ancient document, to the effect that such a document is admissible where it is shown to have been retrieved from its place of “proper custody”, that is, the place where the ancient document would reasonably be expected to be stored if it was what it purported to be.**

D Documents Originating from or Intended for Use in another Jurisdiction

(1) *Notarisation, apostille and legalisation*

4.82 Public documents are now often used outside the country in which they originated.⁶⁸ Irish law presumes Irish public documents authentic. No such presumption applies to documents created outside Ireland (“foreign documents”) aside from those created by the institutions of the European Union. For example Irish law does not presume that an adoption order made by a public authority in another State is proof either that the document has been made (real evidence) or that it is proof of its contents (that, for example, a child had been abandoned and was eligible for adoption in that other

⁶⁶ *Land and Conveyancing Law Reform Act 2009*, s.8(3), sch. 2. See also sections 56-58 of the 2009 Act.
⁶⁷ *Halsbury’s Laws of England* (5th edition, 2009) Volume 11, Civil Procedure, paragraph 869.
⁶⁸ Para. 5.217 of the *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009).

State)⁶⁹ and such a document would therefore need to be proved authentic. Courts must also consider private documents from other countries.

- 4.83** In this Part a state from which a document originates is called an “originating state” and a state in which a document is put to use (for example by presentation to a court) is called a “destination State”.
- 4.84** Traditional authentication procedures for foreign documents are cumbersome. It may not be possible to secure the attendance of the necessary witnesses and there may be difficulties of translation where another language is involved. Consequently, procedures have been developed to allow for the authentication of documents created in one country and needed for use in another.
- 4.85** Before certain documents can be used outside their originating State, prior authentication of the document may be necessary. This is often the case where overseas officials are not able to determine the authenticity of a document. There are several stages to the process of ensuring that a document will be recognised abroad, and the exact number and nature of the stages depends on the requirements in the particular destination State.
- 4.86** The first is often notarisation.⁷⁰ Notaries reduce fraud by attesting that the person identified as having signed a document did in fact sign it. Notaries authenticate both public and private documents.⁷¹ They do not legalise⁷² or apostille⁷³ documents but documents are often notarised in the originating state prior to being apostilled or legalised.
- 4.87** Neither the notarial nor the apostille process verify the document’s contents. The notary’s role is limited to attesting to that it is genuine, not that what it says is true. The notary must satisfy himself or herself that the person producing the document understands the document. Following this the document is stamped with a statement to the effect that “[t]he notarial act is limited to the verification of the identity, legal capacity, name and signature of the Appearer, unless otherwise expressly stated in the English Language.”⁷⁴

(2) *Proof of public documents under the Apostille Convention*

- 4.88** An apostille is a pre-printed form issued by the originating state and attached to the public document to be used in the destination state. The *1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public*

⁶⁹ See, for example, *Dowse v An Bord Uchtala* [2006] IEHC 64; [2006] 2 IR 507, discussed in the Commission’s *Report on Aspects of Intercountry Adoption* (LRC 89-2008).
⁷⁰ On the use of notaries in Ireland see generally www.publicnotary.ie. Notaries are discussed at paragraph 5.221 of the Consultation Paper.
⁷¹ This is discussed at paragraph 5.223 of the Consultation Paper.
⁷² See para. 4.88 below.
⁷³ See para. 4.92 below.
⁷⁴ See further www.notarypublic.ie.

Documents (the “Apostille Convention”), discussed in another Report,⁷⁵ tackles the lack of harmonisation in legalisation systems in Convention states but covers only public documents. In this Part (and in the *Convention*), the term “apostille” refers to the document issued by the originating State; an “Apostille State” is a state-party to the Apostille Convention and a “non-Apostille State” is a state that is not party to the Apostille Convention.

(3) *Specific requirements of the Apostille Convention*

4.89 The Apostille Convention ensures that a destination State will recognise a public document from the originating State provided the document bears an apostille issued by the originating State.⁷⁶ It simplifies procedures for recognition of public documents by bypassing the need for a continuous chain of verification signatures and seals and removing requirements for diplomatic or consular legalisation for public documents originating in one Apostille State and intended for use in another.⁷⁷ An apostilled document is entitled to recognition in any other Apostille State without any further authentication

4.90 Apostilling is intended to prevent fraud but the formalities leave open the possibility of deception and fraud given the loose association of signatures and the impossibility of comparison with an unavailable original, and they remain dependent on the mutual trust and administrative cooperation of states-party. Apostilling a document does not certify the reliability or otherwise of the contents or claims in the documents; it merely certifies that the document is genuine, *i.e.* that it was issued by the purported source.

(4) *Irish legislation implementing the Apostille Convention*

4.91 Ireland ratified the Apostille Convention in 1999. Since then, legislation and rules of court have made provision for the recognition of foreign documents authenticated by apostille.⁷⁸

⁷⁵ See *Report on the Hague Convention abolishing the requirement of Legalisation for Foreign Public Documents* (LRC 48-1995) in which the Commission recommended ratification of the 1961 Convention.

⁷⁶ There is some terminological variation in the verb, with apostille and apostillise both being in use: this Report use “apostille” and its derived forms “apostilled” and “apostilling” in preference to “apostillised” and “apostillising”.

⁷⁷ The specific requirements of the Apostille Convention are discussed at paragraphs 5.224-5.229 of the Consultation Paper.

⁷⁸ This is discussed at paragraphs 5.230-5.231 of the Consultation Paper.

(5) *Legalisation - authenticating documents for use in non-Apostille States*

4.92 If a party seeks to have a foreign document recognised as authentic in Ireland or seeks to have an Irish document recognised as authentic in a non-apostille state it must generally be legalised. Legalisation is “the process which certifies the authenticity of the signature which the document bears, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.”⁷⁹ Prior to this, they may need to be notarised by a notary public and/or authenticated by the Department of Foreign Affairs and Trade. They are then generally sent to the relevant consulate or embassy for further certification, the applicable standards and processes being a matter for that mission.⁸⁰ The procedures for legalisation differ from country to country and sometimes the document must be subjected to authentication procedures in both the originating State and the destination State. It is effected by arms of the State itself such as embassies, consulates and foreign ministries.

(6) *Reform of the apostille process: 2016 EU Regulation*

4.93 Significant changes to the apostille system within the European Union are due to come into force in 2019 under Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union. The European Commission made this proposal to introduce a new regulation to do away with the requirement of legalisation and apostille for a significant number of public documents exchanged between Member States.⁸¹ The Regulation removes the requirement for legalisation and apostille from a tranche of documents which affect in a significant way the ability of EU citizens to live and work in Member States other than their own. These include civil status records (birth, death and marriage certificates), documents relating to residence, nationality and citizenship, real estate documents and documents proving the absence of a criminal record, among others.⁸²

4.94 Prior to the Regulation the arrangements complicated the exercise of the EU citizen’s right to free movement and businesses’ single market freedoms, particularly those of the 12.6 million EU citizens who live in a Member State

⁷⁹ *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (LRC 48 -1995), paragraph 1.2.

⁸⁰ This is discussed at paragraph 5.233 of the Consultation Paper.

⁸¹ European Commission, ‘Memo: Frequently Asked Questions: European Commission acts to slash red tape in all Member States’ available at http://europa.eu/rapid/press-release_MEMO-13-370_en.htm.

⁸² European Commission, ‘Certifying your public documents when moving around in the Union? Not for much longer!’ available at http://ec.europa.eu/justice/civil/files/fact_sheet_public_docs_en.pdf. The full list is available at p. 3.

other than their own and the 7 million small and medium sized enterprises involved in cross-border trade.⁸³ The European Commission gave the simple example of a Spanish citizen seeking to marry a Belgian in Spain. The Belgian citizen would need to get both his or her birth certificate and a translation apostilled before being certified by the Spanish authorities. Additionally, they may face a problem getting their Spanish marriage recognised in Belgium where they may have to send all their documents back to Spain to be apostilled.⁸⁴ The 2016 Regulation does away with such cumbersome and difficult procedures.

- 4.95** The Regulation deals with concerns over the potential for fraud using the administrative cooperation between Member States provided for by the Internal Market Information System (IMI).⁸⁵ IMI is an IT-based network that allows a relevant authority or department to communicate directly with its counterpart in another Member State using a built-in translation service. It also allows for documents to be securely sent to and from. A national authority who has reason to doubt the authenticity of a particular document can verify it quickly and effectively using IMI.⁸⁶

E Voluminous and Electronic Documents

(1) *Voluminous documents*

- 4.96** As discussed above, the *Criminal Justice Act 2011* deals with the disclosure of large bundles of documents in investigations concerning certain serious offences, such as complex theft or fraud cases (commonly referred to as “white collar crimes”, although as already mentioned this is not a term used in the 2011 Act and has no specific status). Discussing these provisions during the Oireachtas debate on the 2011 Act, the Minister for Justice and Equality stated:

“This provision should help to reduce the delays associated with the disclosure of large volumes of poorly ordered and uncategoryed documents to the Garda in the course of its investigations.”⁸⁷

- 4.97** Other countries have introduced statutory provisions dealing with the admission and proof of voluminous bundles of documents.

⁸³ European Commission, ‘Memo: Frequently Asked Questions: European Commission acts to slash red tape in all Member States’ available at http://europa.eu/rapid/press-release_MEMO-13-370_en.htm.

⁸⁴ *Ibid.*

⁸⁵ European Commission, ‘Free circulation of public documents’ available at http://ec.europa.eu/justice/civil/judicial-cooperation/document-circulation/index_en.htm.

⁸⁶ *Ibid.*

⁸⁷ Dáil Debates, Criminal Justice Bill 2011 Second Stage, 18th May 2011, Vol. 732No 4, 684.

(a) Australia

4.98 Section 50 of the *Australian Evidence Act 1995*, entitled 'Proof of voluminous or complex documents', provides:

"(1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

(2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:

(a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and

(b) given each other party a reasonable opportunity to examine or copy the documents in question.

(3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section."

4.99 Following the recommendation of the Australian Law Reform Commission (ALRC), section 50 was amended to remove the requirement that an application under section 50 had to be taken "before the hearing concerned". This amendment was suggested in response to a submission by the Commonwealth Director of Public Prosecutions that such an amendment was necessary. In their review of the operation of the Uniform Evidence Acts, the ALRC said the following:

"The Commissions commented in [Review of the Uniform Evidence Acts] DP 69 that the provision to the other party of summaries of documents has been a useful tool in settling the issues early on and reducing hearing time. This advantage is lost if an application is made late in proceedings. Hence, it is likely that most applications will continue to be made prior to the hearing, along with other preparatory steps such as discovery, interrogatories, serving of documents and so forth. A party that delays in making an application runs the risk that an objecting party can demonstrate prejudice and the application will be refused. However, although a late application may hold up proceedings while the other party is given the opportunity to examine or copy documents, proceedings may ultimately be expedited by not having to go through voluminous or complex

documents laboriously. A summary can also assist counsel and a trial judge summarising the case to a jury.”⁸⁸

(b) New Zealand

4.100 There is a similar provision in section 133 of the *New Zealand Evidence Act 2006*, which provides:

“(1) A party may, if notice is given to all other parties in sufficient time before the hearing and with the permission of the Judge, give evidence of the contents of a voluminous document or a voluminous compilation of documents by means of a summary or chart.

(2) A party offering evidence by means of a summary or chart must, if the Judge so directs on the request of another party or on the Judge’s own initiative, either—

(a) produce the voluminous document or voluminous compilation of documents for examination in court during the hearing; or

(b) make it available for examination and copying by other parties at a reasonable time and place.”

4.101 The Law Commission of New Zealand stated that this section encouraged the continuation of an efficient practice that already occurred by consent, and was strongly supported by commentators.⁸⁹ The Law Commission of New Zealand outlined that the first draft of this section was modelled on Rule 1006 of the US *Federal Rules of Evidence* and was designed to meet a “practical need”.⁹⁰

(c) Conclusions

4.102 The Commission understands from consultation with expert practitioners that while the *Criminal Justice Act 2011* has proved useful and effective in the context of serious fraud cases, it is an extremely expensive process and may not be a model well suited to civil cases. The Commission also notes the positive report of the Australian Law Reform Commission on the application and effect of section 50 of the *Evidence Act 1995*.⁹¹ The Commission considers that the Australian and New Zealand model provides a simple and

⁸⁸ *Uniform Evidence Law Report*, December 2005, ALRC Report 102, at paras. 6.13-6.14, available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC102.pdf>.

⁸⁹ New Zealand Law Commission, *Report on Evidence*. Volume 1: Reform of the Law, NZLC PP 55, paragraph 521.

⁹⁰ New Zealand Law Commission, *Evidence Law: Documentary Evidence and Judicial Notice*, Preliminary Paper, NZLC PP 22, Commentary on the Draft Bill, C43.

Rule 1006 of the *Federal Rules of Evidence*, “The proponent may use a summary, chart or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.”

⁹¹ *Uniform Evidence Law Report*, December 2005, ALRC Report 102, at p. 169, available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC102.pdf>

effective means of facilitating discovery in complex cases involving voluminous documents.

4.103 The Commission recommends that the draft Evidence Bill should provide that, in the case of voluminous documents, a written summary of such documents may be used to prove such documents in place of the documents themselves.

(2) *Electronic evidence*

(a) *Retention of paper copies in an electronic setting*

4.104 In the *Consultation Paper on Documentary Evidence* the Commission reviewed changes in the way documents are retained. The traditional practice is to keep the paper originals or paper copies. This is now regarded as more expensive and inconvenient than keeping electronic originals or electronic copies. The traditional means of storing documents has environmental implications⁹² and this has prompted emphasis on the environmental benefits of “paperless offices”. However, creating or retaining originals or copies in electronic form only has implications for the best evidence rule and the original document rule. Whether a particular electronic document or the original is the best evidence could potentially arise in litigation, although section 22 of the *Electronic Commerce Act 2000* seems designed to avoid this scenario. Section 22 provides that:

“In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility in evidence of -

(a) an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form—

(i) on the sole ground that it is an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form, or

(ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form...”

4.105 A dispute might also arise where, as is increasingly common, the document is solely electronic and a hard copy ‘original’ is never generated. The original of the electronic document could be unreadable material contained within a

⁹² The UK Minister for Justice is quoted as saying “Every year the courts and Crown Prosecution Service use roughly 160 million sheets of paper. Stacked up this would be the same as 15 Mount Snowdons – literally mountains of paper.” See Baksi, “Ministers find £160m for Wi-Fi transformation of justice” *The Law Society Gazette* (28 June 2013) available at <http://www.lawgazette.co.uk/news/ministers-find-160m-wi-fi-transformation-justice>.

computer storage system. This is further support for the Commission's recommendation that the original document rule should be abolished. The approach taken under the Australian *Evidence Act 1995* is instructive. Section 48(1)(b)-(d) allow for proving the contents of electronic documents, stating:

“(1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

(b) tendering a document that:

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;

(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;

(d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device”

4.106 In the *Consultation Paper on Documentary Evidence* the Commission highlighted that in the United States the courts have recognised that the destruction of the electronic form of a document in preference for retention of the paper copy can cause the loss of “essential transmittal information relevant to a fuller understanding of the context and import of an electronic communication”.⁹³ Where, for instance, A seeks to establish that B sent him an email and B denies this, there is a possibility that a third party C may have used a fake address to send the email. This could be established if the electronic original was saved and the transmittal information extracted. Equally, where the best evidence rule applies it would not be permissible to destroy a paper original and retain only a scanned electronic version. The form in which documents must be supplied in the process of discovery must be considered.

4.107 In 2013 the English Ministry of Justice unveiled plans for paperless courts and “digital courtrooms” by 2016.⁹⁴ While the High Court of England and

⁹³ *Armstrong v Executive Office of the President*, 1 F 3d 1274 [DC Cir 1993].

⁹⁴ See “‘Digital courtrooms’ to be rolled out nationally”, Ministry of Justice Press Release (28 June 2013) <https://www.gov.uk/government/news/damian-green-digital-courtrooms-to-be-rolled-out-nationally>. See also Ministry of Justice Transforming the CJS: A Strategy and

Wales is not yet a paperless court, the Commercial Court subdivision of its Queen's Bench Division heard at least one major "paperless trial"⁹⁵ in 2012, *Berezovsky v Abramovich*.⁹⁶ The speed of progress has begun to increase with 50% of magistrates' court rooms now fitted with digital presentation technology and the UK Government believes it will meet its deadline for full roll-out in 2016.⁹⁷ In Crown Courts, the 'Digital Case System' which allows for paperless presentation of documents and case materials has been rolled out in nearly all Crown Courts.⁹⁸

4.108 The prospect of a "paperless trial" is coming closer to reality in this jurisdiction as well. In June 2016 the first Supreme Court trial of a new paperless litigation system known as "eCourt" was conducted successfully.⁹⁹ Under the system, all court documents are uploaded in PDF form to each user's device. "Mirroring technology" then allows the person presenting to the court to bring up the page he or she is referring to on all user's devices.¹⁰⁰ The technology aims to improve the efficiency of trials involving large volumes of documents and paperwork, as well as reducing litigation costs.

Action Plan to Reform the Criminal Justice System (TSO, June 2013, Cmd 8658) at 11: "The first thing that strikes anyone who visits a court is the mountain of paper files that should have disappeared a generation ago." Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/tranforming-cjs-2013.pdf.

⁹⁵ See Shahid, "Paper trail – are paperless trials the way forward for UK courts?" 08 March 2013 available at <http://www.legalweek.com/legal-week/analysis/2251829/paper-trail-are-paperless-court-cases-the-way-forward-for-handling-trials-in-the-uk>

⁹⁶ [2012] EWHC 2463 (Comm). See paragraph [94] of Gloster J's Executive Summary of her judgment, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/berezovsky-abramovich-summary.pdf> (last accessed 04 July 2013). She makes similar remarks in her full judgment at paragraph [1250] available here <http://www.bailii.org/ew/cases/EWHC/Comm/2012/2463.html>: "Perhaps most importantly, the extensive documentation and daily transcripts were presented in a highly organised and easily accessible web-based electronic format, with the result that, apart from reliance on hardcopy versions of the written arguments, and, to a limited extent, the expert statements, I was able to conduct what, at least so far as I was concerned, was a paperless trial. There can be no doubt that this enabled the trial to be concluded within the allotted timetable, and with the maximum efficiency. It also provided the inestimable advantage, from my perspective, of being able to access my notes made during trial, and the full galaxy of the trial bundles, from wherever I was and at whatever time of day (or night)."

⁹⁷ See 'Crime news: hi-tech courtrooms win provider praise' Gov.uk announcements (5th February 2015) <https://www.gov.uk/government/news/crime-news-hi-tech-courtrooms-win-provider-praise>.

⁹⁸ Gallagher, 'A speech on modernising the justice system by the Digital Director for HM Courts and Tribunal Service.' Available at <https://www.gov.uk/government/speeches/modernisation-of-justice-through-technology-and-innovation>.

⁹⁹ See *Lanigan v Barry* [2016] IESC 46 at 46 per Clarke J "While, doubtless, as will always be the case with a new experiment, improvements can and will be made, I should record my own view that the experiment must be regarded as a success." See also Irish Legal News, 'eCourt trial goes off without a glitch' available at <http://www.irishlegal.com/4529/ecourt-trial-goes-off-without-a-glitch/>.

¹⁰⁰ See www.ecourt.ie.

4.109 Issues concerning the authentication of electronic evidence by way of digital signatures are discussed in greater in Chapter 5, however in 2013, in *Mitchell v Member in Charge Terenure*,¹⁰¹ the High Court (Hogan J) held that the website of the Houses of the Oireachtas was admissible in evidence, and stated:

“In the present case, I consulted the website of the Houses of the Oireachtas and saw that the requisite resolutions for the purposes of s.18(1) of the [Offences Against the State Act] 1998 had been passed. This was a public document in the sense enunciated by Henchy J in *Buckley*.¹⁰²

The material on the website is published in the public interest under the superintendence of the Houses of the Oireachtas and this material is intrinsically authentic and accurate.”

4.110 It follows, therefore, that when the Court consulted the website for this purpose, it was as if it had inspected a public document. The Court could accordingly be satisfied that this constituted *prima facie* evidence that the resolutions had been passed in much the same manner as if the Court had read a parliamentary notice to this effect in *Iris Oifigiúil* or an official from the Oireachtas had been summoned to give evidence for this purpose.

(3) *Issues regarding electronic and automated evidence*

(a) *Alteration or destruction*

4.111 Digital records contained in electronic documents can be altered or destroyed and it is difficult to establish with any degree of certainty if they have been changed.¹⁰³ They are, in one sense, easier to destroy than paper documents but a shadow of the document from a computer hard drive can often be retrieved, in particular if the document has not been overwritten with new data. Using the ordinary delete command on most consumer operating systems deletes the reference to the file and displays the storage space formerly occupied by the file as available but does not erase the underlying data. While it may not be readily visible, the information may persist on the drive until overwritten, and even after overwriting may remain retrievable.¹⁰⁴ Nevertheless, retrieval of a complete document or a document as it existed at

¹⁰¹ [2013] IEHC 221, at paras. 22-23.

¹⁰² *Minster for Defence v. Buckley* [1978] I.R. 314, 321

¹⁰³ This is discussed at paragraphs 5.238-5.240 of the Consultation Paper.

¹⁰⁴ See further: <http://www.hardwaresecrets.com/article/How-to-Really-Delete-your-Files/138>; <http://www.extremetech.com/computing/125619-how-to-wipe-a-hard-drive>. While even overwriting the 1s and 0s on a HDD or SSD may not erase all trace of the previous state, repeated multiple overwrites (some commercially available software will overwrite 37 times) can, it seems, effectively obliterate the original data, making it impossible or probably impossible even for specialised forensic methods to recover. Ordinary secure erase methods can be enough to defeat normal attempts at recovery.

a particular stage in editing generally cannot be guaranteed unless specific measures have been put in place to this end.

4.112 Single electronic documents are often edited, added to, subtracted from or deleted. Although there is a dearth of empirical evidence to suggest that electronic documents are more frequently altered, they may be manipulated in ways that paper files cannot and where alteration or manipulation cannot be discounted, then their status as reliable evidence may be called into question. Where authentication procedures are put in place it is arguable that electronic documents are just as, or more, reliable than traditional paper documents.

4.113 The classification of electronic and automated evidence may also cause confusion, and in certain circumstances the evidence may be classified as real rather than documentary evidence, particularly in the case of video recordings.¹⁰⁵

(b) *Analogue video, audio and photographic records*

4.114 There is a significant difference between analogue video, audio and photographic recordings and digital video, audio and image reproductions. Analogue audio, video or photographic records are usually admitted as real evidence. A copy of an analogue recording may be of a lesser quality than the original and copies of the copy (and so on) may lead to degraded and ultimately unusable results (as with photocopies). A digital image or a digital video or audio recording, however, consists of a series of binary digits that can be copied an unlimited number of times with a miniscule risk of affecting the quality and with no degradation of the images, audio, or video as compared to the original. The derivatives are indistinguishable from the original (although, provided the metadata-generating properties of the relevant software function correctly, the metadata should change with each copy and the document should be identifiable as a derivative unless and until this data is tampered with).

4.115 Recordings and documents may contain garbled signals and poor sound quality but this goes to weight rather than admissibility. *The People (DPP) v Prunty*¹⁰⁶ concerned telephone calls with poor sound quality. The Court of Criminal Appeal noted the problem but refused to rule the evidence inadmissible. Defects in audio quality and disputes as to the identity of the speakers did not render the evidence inadmissible and were matters for the trier of fact, but the trial judge should always direct the jury as to the sound or image quality of evidence and any effects on weight.¹⁰⁷ The Commission

¹⁰⁵ See consideration of the distinction between hearsay and original evidence in electronic evidence in Chapter 2.

¹⁰⁶ [1986] ILRM 716.

¹⁰⁷ This case is discussed at paragraph 6.25 and 6.28-6.30 of the Consultation Paper.

considers that the approach in *Prunty* should be adopted for both civil and criminal proceedings.

4.116 The Commission recommends that the draft Evidence Bill should provide that an electronic [or digital] recording shall be admissible in evidence where it has been established that it is an authentic recording; and that any dispute as to the quality of the recording, including the identity of any person speaking on the recording, shall go to the weight of the recording rather than its admissibility.

(c) *Transcripts of audio recordings*

4.117 A transcript is a textual representation of an audio-recording. It is not a copy of the tape; it is a copy of what can be heard on the tape. The admissibility of transcripts arises principally in two situations: where the audio alone is of inadequate quality¹⁰⁸ or where it is in a foreign language and a translation is required.¹⁰⁹ However, the Central Criminal Court has been willing to examine transcripts of a video recording even where neither of these considerations seemed to apply and the Court of Criminal Appeal took no exception to this.¹¹⁰

4.118 Transcripts are problematic. Errors may be made in transcribing what was said in the audio¹¹¹ or a transcript might not faithfully represent what was said.¹¹² Where the transcript is a translated version of audio in a foreign language, the translation might not be entirely accurate or even correct.¹¹³ Existing legislation does not provide for a presumption of accuracy in translations.

4.119 The probative value of audio evidence was shown in *Fyffes Plc v DCC Plc*.¹¹⁴ The plaintiff sought a declaratory order that certain sales involving the defendant were unlawful dealings under the *Companies Act 1990* and offered audio tape recordings in evidence. The High Court appeared to distrust transcripts of these tapes¹¹⁵ but accepted the recordings themselves as they offered an insight into what transpired during the course of the telephone calls, recorded other information and “shed light on what went on before and in the intervals between the calls.”¹¹⁶

¹⁰⁸ For example *The People (DPP) v Prunty*, discussed above.

¹⁰⁹ For example the Australian case of *Butera v DPP* (1987) 146 CLR 180.

¹¹⁰ *The People (DPP) v O'Brien* [2011] 1 IR 273, 292 at [53].

¹¹¹ Two versions of a transcript of a trial were put before the Court of Criminal Appeal in *The People (DPP) v Kenny* [2003] 4 IR 162, 170, differing on whether there had been a statement that the accused had struck an alleged victim.

¹¹² In *O'Callaghan v Mahon* [2008] 2 IR 514 it seems that a remark made by a member of a Tribunal was not reproduced in the transcript of the relevant hearing and in *Murphy v Flood* [2010] 3 IR 136 a Tribunal of Inquiry redacted a transcript so that it no longer disclosed relevant material.

¹¹³ See, for several examples of these problems, Grabau and Gibbons “Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation” (1996) 30 *New England Law Review* 227. [2005] IEHC 477.

¹¹⁴ “...the transcripts of the tapes should be approached with caution and... in-depth scrutiny of particular words and phrases used in the course of telephone conversations can be apt to mislead.” [2005] IEHC 477.

¹¹⁵

¹¹⁶

4.120 If a transcript is to be admitted it might be admitted either simply as an aid to understanding the true evidence or as a true copy of the original. The tendency has been to admit the transcript as an aid to understanding rather than as a true copy.¹¹⁷

(d) Telephone records

4.121 Mobile telephone records might contain valuable data that may be useful in proving that a call was made, its duration, the numbers involved, the location of a telephone and so on.¹¹⁸

4.122 Modern smartphones typically incorporate sophisticated location technology; individual smartphone applications may prove a treasure-trove of information on the course or fine-grained location of the phone and its use patterns. As noted by Maus, Hoefken and Schuba, despite “a lot of problems”, from “a digital forensics’ point of view, smartphones offer great opportunities” and “[g]eodata that is logged in the phone can be forensically extracted and used to provide a (graphical) location history of the phone (the user)”.¹¹⁹

(e) Digital Photographic Images

4.123 The ease with which digital images can be copied, retransmitted and modified appears to make a cautious approach to admitting electronic images advisable. A party adducing such evidence must describe its origin and history so as to satisfy the judge that the evidence is authentic. A court is then likely to admit the evidence but the judge will direct the jury on the weight they should consider attaching to it. This weight will depend on whether any authentication methods such as encryption or watermarking were used or on the availability of an audit trail connecting the initial image with the computer record which is to be adduced in evidence and which documents any alterations to the image data.

4.124 If a digital photographic image is altered, associated metadata¹²⁰ generally record the change and should reveal the manipulation, unless the metadata itself has been compromised. Indeed, the existence of metadata, provided the court can be satisfied that it is reliable, might be thought to offer reassurance additional to that available in the case of traditional photographs where manipulation may pass unnoticed as the primary investigative tool is

¹¹⁷ See paragraphs 6.63 and 6.65 of the Consultation Paper.

¹¹⁸ This is discussed, along with the technical means of retrieval, at paragraphs 6.22-6.24 of the Consultation Paper. Examples from caselaw are discussed at length in paragraphs 6.32-6.42 of the Consultation Paper.

¹¹⁹ Maus, Höfken, Schuba “Forensic Analysis of Geodata in Android Smartphones” (University of Applied Sciences, Aachen), at 2 (available at <http://www.schuba.fh-aachen.de/papers/11-cyberforensics.pdf>).

¹²⁰ Metadata is “data about data.” It is information which records how, when and sometimes where, the data was formed or subsequently altered. See <http://www.merriam-webster.com/dictionary/metadata>. See also, ‘A Guardian Guide to Your Metadata’, *The Guardian*, <http://www.theguardian.com/technology/interactive/2013/jun/12/what-is-metadata-nsa-surveillance#meta=0000000>.

visual inspection. The fallibility of visual inspection has been recognised since the development of photography:

“either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skilful manipulation, a photograph may not only be inaccurate but dangerously misleading.”¹²¹

4.125 The Commission therefore considers that electronic imaging does not create new legal problems. It provides new technology to distort images but it also provides new means to potentially detect fraudulent manipulation.

(f) *Challenges posed to notaries by electronic documents*

4.126 Documentary authentication has long been made possible through notarisational but now fully automated devices can produce documents, and a law of evidence traditionally focused on interactions involving at least some human input must develop an approach to them. Traditional notarisational techniques can be adapted to transactions executed by an autonomous process rather than directly by the human parties. Electronic signatures, where authenticated by a certification authority, perform a similar function in providing assurance that the document was in fact signed by the person to whom the signature is attributed. Electronic signatures are considered in detail in the following chapter.¹²²

4.127 Under section 30 of the *Criminal Evidence Act 1992*, copies of documents are admissible in criminal proceedings “whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the Court may approve” and it is irrelevant how many degrees separate the copy from the original or what the means of reproduction is. Where the authenticity of the copy can be established to the satisfaction of the court, any true replica of a document can be adduced regardless of form.

4.128 **The Commission recommends that notarised documents should be admissible in civil proceedings on conditions comparable to those in section 30 of the *Criminal Evidence Act 1992*.**

(g) *Cloud computing*

4.129 Cloud computing has a bearing on the law of evidence. “Cloud computing” is a general term for anything that involves delivering hosted services over the Internet. A cloud service has three distinct characteristics that differentiate it from traditional hosting. It is sold on demand, typically by the minute or the hour; it is elastic - a user can have as much or as little of a service as they want at any given time; and the service is fully managed by the provider (the

¹²¹

¹²²

Cunningham v Fair Haven & Westville R Co (1899) 72 Conn 244 at 250, 43 A 1047, 1049. See also discussion at paragraph 5.237 of the Consultation Paper.

consumer needs nothing but a personal computer and Internet access).¹²³ Thus, the data is held by another party. It can also involve the provision of IT services off-site. Any statutory framework that encompasses electronic evidence should take account of cloud computing.

4.130 It is predicted that many organisations will adopt cloud computing technology in the future. In addition to challenges for the law of evidence it raises data protection issues. Subject to certain conditions, EU law restricts the transfer of personal data out of the EU. The fact that the data is held by another party may make it difficult to recover the information. Some service providers include contractual conditions, including payment of outstanding fees (which may be in dispute) as a condition of access to encoding information on the termination of a business relationship.¹²⁴ There may also be privacy issues associated with this method of storage. Commentators have recognised that some of the access and privacy issues with cloud computing also exist in the context of traditional off-site storage mechanisms.

(4) Reform proposals

4.131 The draft Evidence Bill could explicitly require that parties adducing electronic evidence (whether images or audio or audio-visual recordings, or electronic documents made using a computer) prove the authenticity of the document, the reliability or integrity of the process by which it was created, and that neither the document nor the process have been tampered with.

4.132 With respect to certain tools for measuring the authenticity of document such as electronic seals, signatures and time stamps, the law is now governed by the new “EU Regulation on electronic identification and trust services for electronic transactions in the internal market” (910/2014/EU). The Regulation and its implementing legislation provide detailed criteria by which the reliability of electronic signatures, seals, time stamps and website authentications may be measured. These provisions are discussed in detail in the following chapter.

4.133 Thus, while Irish courts retain the power to admit any signature, seal or other indicia of reliability in evidence, any document which purports to be guaranteed by advanced or qualified means must be assessed with reference to the criteria set down in the Regulation.

4.134 The current arrangement is that the accreditation of an external third party, the Certification Authority, is generally given decisive weight in disputes as to the integrity of the documents. In the case of documents which do not

¹²³ TechTarget.com, ‘Cloud Computing’ available at

<http://searchcloudcomputing.techtarget.com/definition/cloud-computing>.

¹²⁴ This was one of the issues that arose in *Health Service Executive v Keogh* [2009] IEHC 419, discussed in the Commission’s *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010), at paragraph 4.04.

purport to be guaranteed by advanced or qualified means, the court can itself assess the reliability of electronic documents by reference to certain criteria, such as the ability to demonstrate who has interacted with the records, and in what manner, to the satisfaction of the court. Techniques may also include the use of audit logs or metadata to show who has accessed, altered or updated records, when, and to what extent. Information and/or testimony may be required detailing whether adequate security measures have been employed in the maintenance and generation of the data records. This can accompany, in respect of documents encrypted by PKI (Public Key Infrastructure) or otherwise, digital signatures and other authentication technologies to form a comprehensive means of establishing the lineage and integrity of the documents. While such criteria should guide the authentication of electronic documents, in light of the Commission's view that the law should be technologically neutral, the Commission does not consider that a special evidential regime should be introduced to govern the admissibility of computer generated documents.

4.135 The Commission recommends that, in light of the Commission's view that the law should be technologically neutral, no special evidential regime should be introduced to govern the admissibility of computer-generated documents.

CHAPTER 5

SIGNATURES AND IDENTIFICATION

- 5.01** The law has long recognised the importance of providing a means of reliably linking a person to an act or document, identifying the act or document as having been made by, or as binding on, the person so identified. The ability to identify legal actors and authenticate documents in this way is essential in any modern economy. It is essential to prevent fraud and to provide certainty in business, commerce and government. For most of our legal history, the handwritten signature has been the most common and widespread means of binding persons in this way.¹ The signature has been described as a “fundamental legal act”.²
- 5.02** What we mean when we use the term “signature” is evolving rapidly with the advent of electronic signatures. Electronic signatures may be extremely similar to a handwritten signature, taking the form of a typed name at the foot of an email, or they may bear little resemblance to a traditional signature as in the case of some advanced or qualified electronic signatures, where the term is sometimes used almost by way of analogy. The task of confirming “who you are” is evolving as society moves online and increasingly states across Europe require some form of electronic identification or eID in order to access vital state services. This has significant consequences for the law of evidence as increasingly documents sought to be relied upon in court are electronic and must be authenticated by electronic means, including by way of signature. Indeed, as previously noted in this report, the Supreme Court recently completed its first “paperless trial”.³
- 5.03** This chapter therefore looks at the question of authenticating documents, contracts and other legal acts as a matter of evidence in a broader context than traditional signatures, focussing primarily on the subject of electronic signatures but also addressing electronic identification, seals and time stamps.

¹ In England, an early record of a handwritten signature is that of Edward III who signed a document with his name in 1362. the *Statute of Frauds 1677* and the *Statute of Frauds (Ireland) Act 1695* made a signature a pre-condition of legally enforceable contracts, consolidating the signature’s place as a crucial legal instrument. See Mason, *Electronic Signatures in Law* (3rd ed. Cambridge University Press, 2012) Ch. 1.

² Reed, “What is a signature?” (2000) 3 *Journal of Information, Law and Technology* [section 1.1] http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/reed.

³ See para. 4.108.

A The Legal Significance of Signatures and Signing

- 5.04** The general principle at common law is that writing is not required for the validity of legal obligations such as contracts or for the purpose of proving facts to a court. Contracts can be made orally and the vast majority of everyday contracts are made in this way. One of the “cardinal principles” of common law trials is the principle of orality⁴ whereby witnesses give evidence in open court. Additionally, written documents do not in principle need to be signed in order to be admissible.
- 5.05** In practice however, documents such as wills, contracts and letters are often signed. A signature is generally intended to allow the signatory to associate him or herself with the content of the document. The basic function of any signature, paper or electronic, is to link a person with a text or document. Among other functions, it may show that a signatory has considered and approved something (as in a signed agreement) or that he or she guarantees that something is or is not the case (as in a signed certificate). Perhaps one of its most important functions is to signal acknowledgment or acceptance of one or more’s obligations (as in a signed contract or undertaking) and to lend the signatory’s authority to a claim which might otherwise be contested (for example the signatures of witnesses to a document that must be witnessed or the signature of a testator).
- 5.06** In all of these examples the signature fulfils the functions of (1) indicating who the signatory is, (2) linking the signatory personally to the document and (3) showing the signatory’s intention with regard to that document. It is only in regard to intention that the purpose of the signature varies: the intention might be to claim the document, approve it, agree that it is true, undertake to be bound by it, and so on.
- 5.07** The general principle that neither written form nor signature is required is subject to statutory exceptions. For example, section 51 of the *Land and Conveyancing Law Reform Act 2009* states that proceedings to enforce a contract for the sale of land can only be brought where the contract, “or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person’s authorised agent.”⁵ Conversely, statute has provided that specified public documents signed by certain public

⁴ This is discussed in Chapter 1.

⁵ Section 51 of the 2009 Act replaced the similar long-standing requirement in section 2 of the *Statute of Frauds (Ireland) 1695*. Section 2 of the 1695 Act continues to require a written note and signature for contracts of indemnity and other legislation requires, for example, that a will be “signed.” See generally Clark, *Contract Law in Ireland* 8th ed. (Round Hall 2015). In a similar vein, the *Terms of Employment (Information) Act 1994*, as amended, requires that the essential terms of most contracts of employment be put in writing by the employer. Section 3(4) of the 1994 Act states that the written statement of terms “shall be signed and dated by or on behalf of the employer.”

officials are self-authenticating and may be admitted without proof beyond that of the signature.⁶

(1) *The meaning of a “signature” for traditional documents*

- 5.08** A traditional signature usually involves a person writing his or her own name or mark on a document with the intention of authenticating it, whether to indicate that it is theirs (e.g. a will) or that it is legally binding on them (e.g. a contract) or simply linking themselves to the document (e.g. witnessing a will).
- 5.09** The uniqueness of a handwritten signature is particularly useful in minimising the risk of the signatory claiming that the signature is not theirs and thereby repudiate the document or obligation; a witnessed handwritten signature may reduce this risk as not only will the document bear the handwriting of the signatory but there will be witnesses who can testify that the signatory signed the document. Nevertheless, in the absence of specific statutory requirements to the contrary, a signature need not meet these demanding standards to be legally effective.
- 5.10** Written signatures need not be legible so long as the identity of the person signing can be established.⁷ Marking a will with a mere cross remains an acceptable means of “signing” it provided that it can be established that “the testator fully appreciated what was going on and that the terms of the document upon which he placed his mark fully represented what he wanted done with regard to his property”.⁸
- 5.11** The signatory need not himself or herself engage in the physical act of marking the document; it is sufficient that it be done on his or her authority. Finnegan J in the High Court approved⁹ the following passage from *Stroud’s Judicial Dictionary*:¹⁰

“Speaking generally, a signature is the writing, or otherwise affixing, a person’s name, or a mark to represent his name, by himself, or by his authority...¹¹ with the intention of authenticating

⁶ For example section 23 of the *Pharmacy Act 2007*, which makes certain documents signed by the registrar (an employee of the Council of the Pharmaceutical Society of Ireland) proof of the matters stated. A signature appearing to be the registrar’s is rebuttably presumed to be that of the registrar.

⁷ See *McMullen v Farrell (No 2)* [2004] 2 IR 328 where the Supreme Court characterised the signature as “difficult to decipher”.

⁸ See *Glynn v Glynn* [1990] 2 IR 326, 341, where a bedridden testator incapable of writing or speaking owing to a “massive stroke” signed his will with an ‘X’. A majority of the Supreme Court upheld the will. Walsh J dissented but on the basis that the testator’s intention had not been established by the evidence and not on the basis that an ‘X’ could not constitute a valid signature.

⁹ *Dundalk AFC Interim Co Ltd v FAI National League* [2001] 1 IR 434. The decision is discussed at paragraphs 7.14-7.17 of the *Consultation Paper on Documentary and Electronic Evidence*.

¹⁰ *Stroud’s Judicial Dictionary of Words and Phrases* 6th ed (Sweet & Maxwell, 2000) Vol 3 at 2449.

¹¹ Finnegan J omitted the reference here in *Stroud’s Judicial Dictionary* to *R v Justices of Kent* (1874) LR 8 QB 305 in support of this summary of the law. As noted in the text, Finnegan J went on to refer with approval to a passage from the judgment of Blackburn J in the *Justices of Kent* case.

a document as being that of, or as binding on, the person whose name or mark is so written or affixed.”

- 5.12** The High Court held in *Dundalk AFC Interim Co Ltd v FAI National League*¹² that a football player had been properly registered, despite having not signed the registration form which the club’s rules required for formal registration. The Court held on the evidence that he had authorised the club’s manager to do so and the manager had signed it on this basis. Finnegan J quoted with approval the following passage from *R v Justices of Kent*: “No doubt at common law, where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it.”¹³ This form of signature by an agent is also useful in the context of corporate signing where a name or a company seal may be affixed by an authorised officer of the company such as a company secretary.
- 5.13** It is not necessary physically to write out a signature to “sign” a document in Ireland: a rubber stamp is sufficient provided it is applied by the person whose authority is invoked by the stamp¹⁴ and a typed letter on headed note-paper but which was not personally signed was acceptable in *Casey v Intercontinental Bank*.¹⁵
- 5.14** Taken together, the proposition that an agent’s signature is valid as that of the principal where the agent signs on the instructions and authority of the principal (*Dundalk AFC*) and the proposition that a stamp applied by the person whose signature is required is an adequate substitute for that person’s signature (*Casey*) might seem to lend support to the derived proposition that an agent may stamp for a principal. However the Supreme Court in *McCormack* strongly implied that a stamped signature must be applied by the principal, not by an agent.¹⁶
- 5.15** It can therefore be said that traditional signatures encompass a wide range of types of embossing including handwritten manual signatures, typewritten signatures and stamps so long as the signature fulfils the functions of identifying the signatory and evidences his or her intention to link themselves to the contents of the document.¹⁷

¹² [2001] 1 IR 434.

¹³ (1874) LR 8 QB 305 at 307.

¹⁴ See *The State (McKay Bruce) v Judge Shannon* Supreme Court 10 May 1948, *The People (DPP) v McCormack* [1984] 1 IR 177, *Healy v Governor of Cork Prison* [1998] 2 IR 93, [1979] IR 364.

¹⁵ *The People (DPP) v McCormack* [1984] 1 IR 177, at 181-182: “the rubber-stamp signature of the District Justice ... should be deemed a good signature *unless and until it is shown that it was not affixed by him.*” (Emphasis added.) See also *Healy v Governor of Cork County Prison* [1998] 2 IR 93, at 105: “[T]here is no distinction in principle between using a pen or pencil and using a stamp where the impression is put upon the paper by the proper hand of the party signing.”

¹⁷ McDonagh and White, “Electronic signatures: the legal framework and the market reality in Ireland” (2003) 10(8) *CLP* 228.

- 5.16** The Commission therefore recommends that a definition of signature, based on a passage from *Stroud's Judicial Dictionary*¹⁸ and approved by the High Court in *Dundalk AFC v FAI National League*¹⁹, be enacted.
- 5.17** **The Commission recommends that a “signature” should be defined as “a writing, or otherwise affixing, of a person’s name, or a mark to represent his or her name, by himself or herself; or a writing on his or her behalf by an agent acting under his or her authority; with the intention of authenticating a document as being that of, or as binding on, or as being witnessed by, the person whose name or mark is so written or affixed.**
- 5.18** **The Commission recommends that the draft Evidence Bill should define “signature” to describe both a handwritten signature and electronic/digital signature but that for the purposes of authentication different definitions should be used for each.**
- (2) *Traditional signatures in an electronic age: problems in the “virtual” execution of documents***
- 5.19** The application of traditional legal rules in respect of signatures and the execution of documents have caused difficulty in the context of “virtually executed” documents. So called “virtual” execution is a relatively common practice whereby multiple parties to a given contract are not present either physically or represented by attorney at a meeting to close or complete the deal. Getting all the parties to a given transaction to meet at once in the same place may prove seriously impractical in many commercial transactions. Where a physical meeting is not possible, parties often arrange for signatures to be executed in advance of the closing then transferred to the final documents when the agreement is finalised. They may also email signature pages to be executed by the parties remotely who may then scan and return them.
- 5.20** Some doubt has been cast on the position of such “virtually executed” documents by the decision of the English High Court in *R (Mercury Tax Group and Another) v HM Revenue Commissioners*. In *Mercury*, the signature pages from a previous agreement which was never executed were transferred to a new but substantially similar agreement. HMRC sought to rely on the improperly executed deed as evidence of tax fraud. The claimants brought judicial review proceedings seeking a declaration that the decision of HMRC to seek a warrant for the search of their premises was unlawful on the grounds that, *inter alia*, the substitution of the signature pages was a question of formality and did not affect the validity of the contract.²⁰ HMRC

¹⁸ *Stroud's Judicial Dictionary of Words and Phrases* 6th ed. (Sweet & Maxwell, 2000) Vol 3 at 2449.

¹⁹ *Dundalk AFC Interim Co Ltd v FAI National League* [2001] 1 IR 434.

²⁰ *R (Mercury Tax Group and Another) v HM Revenue Commissioners* [2008] EWHC 2721, para. 2.

argued that the attaching of the signature pages with their signatures to the new agreement could not authorise the new agreement.

- 5.21** The claimants argued that *Koenigsblatt v Sweet*²¹ was authority for the proposition that signatures could authorise subsequent amendments where such amendments were purely technical or were subsequently ratified by the signatory. That case concerned a number of blanks left to be filled in by an agent after the signing of the document. The agent also crossed out the name of Mr Sweet’s wife, thus rendering it a contract solely between Mr Koenigsblatt and Mr Sweet. The Court found that as Mr Sweet had signalled to his agent that he agreed with the alterations he thereby “recognised” his previous signature as attached to the document containing the alterations.²²
- 5.22** Underhill J took a different approach in *Mercury*. He relied in part on section 1(3) of the *Law of Property (Miscellaneous Provisions) Act 1989*, which provides that a deed must be signed in the presence of two witnesses.²³ Underhill J interpreted the section as mandating that the document itself be signed and witnessed, rather than some note to be attached to it.²⁴ He also took the view that changes to the contract were sufficiently material that they could not be allowed as merely technical or insignificant amendments to the document.²⁵
- 5.23** The decision prompted the Law Society of England and Wales, and later the Law Society of Ireland, to produce a guidance document indicating to practitioners how best to meet the challenges posed by the decision.²⁶ The Law Society of England and Wales prefaced their practice note by saying that in their view the decision in *Koenigsblatt* remained “the leading authority on the applicability of the principles of authority and ratification to the creation of legally binding agreements.”²⁷ In their view, the decision in *Mercury* should be viewed as limited to its particular facts and that the decision in *Koenigsblatt* should prevail where an inconsistency arose between the two.
- 5.24** The note is therefore intended as a manual to be adopted by those who nevertheless wish to adopt a cautious approach. The Law Society of England and Wales sets down 3 options which a party may choose from in completing

²¹ [1923] 2 Ch 314.

²² *Ibid* at 320 – 321.

²³ “An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed.”

²⁴ *R (on the application of Mercury Tax Group and Another) v HM Revenue Commissioners* [2008] EWHC 2721, para. 40.

²⁵ *Ibid* at para. 42.

²⁶ Law Society of England and Wales, ‘Execution of documents by virtual means’ available at <https://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-documents-by-virtual-means/>.

²⁷ *Ibid*.

a virtual execution of a document. Options 1 – 3 are on a scale of descending legal formalism, with the detailed prescriptions of Option 1 recommended for deeds and real estate contracts while Option 3 is recommended only for simple contracts or guarantees. The steps in Option 1 include ensuring that final execution copies of the documents are emailed as a PDF or Word attachment, though the signature page may be attached separately for convenience. Each absent signatory should then print that page, sign, scan and email it back along with the final execution copy.

- 5.25** By contrast, Option 3 allows for the party who is to be absent from the closing to sign and execute the signature page of the contract in advance. The law firm coordinating the closing must then email the final version of the document to the absent signatory to be subsequently authorised. The Law Society advises that the level of formality required for such authorisation will depend on the circumstances.
- 5.26** The Law Society of Ireland broadly endorses the guidance of their English and Welsh counterparts with the one point of difference being that the Law Society of Ireland considers that real-estate contracts may also be executed using options 2 and 3, with option 1 reserved solely for deeds.²⁸ The Law Society of Ireland does however preface its comments by advising that the suggested procedure remains that the parties should be physically present at the execution/closing or alternatively their attorneys. Virtual execution should only be used when this standard course is impractical.
- 5.27** It is naturally unsatisfactory that digital and online commercial transactions should be subject to such cumbersome procedures. Electronic signatures, and particularly advanced and qualified electronic signatures, are an effective means of simplifying and expediting this out-dated process. Under eIDAS, the EU Regulation discussed in detail in Part C, an advanced electronic signature must be “linked to the data signed therewith in such a way that any subsequent change in the data is detectable.” This by definition precludes the possibility of signatures coming loosed from the document they are intended to execute. While this also precludes the possibility of pre-signing documents, the fact that one can sign a document electronically from any part of the world in a matter of minutes obviates any consequent inconvenience. In addition, Section 14(1)(a) of the *Electronic Commerce Act 2000* also provides that a signature required to be witnessed may be taken to have been so witnessed where the document is signed using a qualified electronic signature. While upfront costs of retaining the services of an electronic signature provider may still render virtual execution a more popular method for smaller businesses, larger businesses are likely to reap the long term

²⁸

Law Society of Ireland, 'Guidance on the 'virtual' execution of documents', available at <https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Guidance-on-the-virtual-execution-of-documents/#.V73leehTG70>.

benefits of closing deals more swiftly via the use of advanced electronic signatures.

- 5.28** The difficulties that have arisen in the context of virtually executed documents highlight the enormous utility of electronic signatures in contrast to traditional means of execution and the potential for electronic signatures to increasingly define commercial transactions and proof of such transactions in court. The Commission now considers electronic signatures in detail.

B Electronic Signatures

- 5.29** Electronic signatures come in different forms and afford different levels of security.²⁹ Very simple kinds include typing one's name (or typing it in a particular way) at the end of a document or inserting a digitised image of one's normal signature. More sophisticated kinds involve writing a normal signature on touch-sensitive hardware which records data (about the shape of the signature, the pressure applied, and the duration of pen-strokes etc.) and attaches this to the electronic document to be signed. However an electronic signature need not look anything like a handwritten signature. The most sophisticated of all electronic signatures are those based on public key cryptography and digital certificates.³⁰ The expression "digital signature" applies most often to this kind of electronic signature.
- 5.30** Electronic signatures are widely used in Ireland. A rudimentary example of this is where a person includes his or her name at the end of an email message or pasting an image of one's handwritten signature into an electronic copy of a document or contract. More sophisticated examples of electronic signatures include secure email, which is offered for example by Post Trust,³¹ eBanking services which are available from banks in the State, the Revenue Online Service (ROS) which allows for the filing of tax returns online,³² and the Companies Registration Office (CRO) which allows for the electronic filing of annual returns by companies.³³ Increasingly web-based e-signature platforms such as DocuSign are used to attach electronic signatures of varying levels of security to commercial documents.³⁴

²⁹ For example, speaking generally about electronic transactions, Blythe identifies four different levels of security that can be attained. Blythe "A Critique of Argentine E-Commerce Law and Recommendations For Improvement" Vol. XVII *Annual Survey of International and Comparative Law* 75, at 79.

³⁰ This is discussed in detail at para 5.40.

³¹ See www.post.trust.ie.

³² See www.revenue.ie/services/ros/main.html.

³³ See www.cro.ie.

³⁴ DocuSign cited its growing consumer base in Ireland as the reason for establishing its European Hub in Dublin in 2015. See RTE News, 'DocuSign to create 100 Dublin jobs' available at <http://www.rte.ie/news/business/2015/0324/689254-docusign-jobs/>.

(1) How electronic signatures differ from traditional signatures

5.31 As previously discussed, signing a document is a “fundamental legal act”³⁵ meant chiefly to ensure that any subsequent document purporting to be the original can easily be shown to be a fraud if necessary (authentication) and to verify that the signatory has turned his attention to the document and signifies his agreement either to be bound by it or to lend his authority to what is stated in it. Certain requirements or formalities may sometimes prescribe the style of signature to be used based on the security it provides or other characteristic(s) suitable to a particular transaction.³⁶

5.32 An electronic signature is an attempt to attribute a verifiable characteristic to an electronic document akin to the characteristic imparted to a paper document by a traditional signature. Legally useful electronic signatures also authenticate³⁷ the electronic document to which they relate. This means that they allow the recipient to be sure that the owner of the signature is adopting or approving the contents of the document. However, because of the way in which electronic documents are made, modified and used (i.e. on computers) those who use them often fear that such documents are particularly susceptible to fraudulent alteration and amendment compared with the physical manipulation necessary for paper documents.³⁸ The most useful kind of electronic signature will therefore not just mark the electronic document but make any post-signature modification detectable.³⁹

5.33 For an authentication to be of any use, there must be a means of ensuring that the electronic document received is the same as the electronic document

³⁵ Reed “What is a signature?” (2000) 3 *Journal of Information, Law and Technology* [section 1.1] (there are no page numbers or paragraph numbers, only section numbers): http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/reed.

³⁶ This is true both of traditional and electronic signatures. Some signatures must be witnessed, for example, as in the signature of a will. Similarly, an electronic signature that is to perform a function for which a traditional signature must be witnessed must also satisfy particularly onerous conditions (i.e. it must be an “advanced electronic signature” within the meaning of the 2000 Act).
³⁷ The word “authenticate” is used throughout this chapter and in various pieces of legislation including the 2000 Act and the 2014 Regulation. Confusingly, it is widely used to mean different things. To say of a person that they authenticate a document appears to mean that they confirm that the document emanates from them and they adopt or approve the document’s contents as being their own or representative of their views or wishes. As used in relation to electronic signatures specifically, “data origin authentication” means confirmation that data has come from an identifiable source and “entity authentication” means confirmation that a particular entity is who or what it claims to be. It is therefore sometimes used to mean exclusively that the data can be traced to a particular source or that a particular entity is who it claims to be without any element of conveying approval. Thus, for example, Staughton J in *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* (at p. 554) expressly contrasted mere authentication of a document with approval of its contents.

³⁸ Such manipulation is possible and practised, however. See, for example, *Intrum Justitia BV v Legal Trade Financial Services Ltd* [2009] 4 IR 417, 428 [37], *Igoe v Ireland* [1989] 1 IR 386 and *Trustee Savings Bank v The Incorporated Law Society of Ireland* [1989] 1 IR 234. The Employment Appeals Tribunal regularly hears and sometimes accepts allegations of the forgery of traditional signatures and post-signature modification of paper documents. See, for example, *KT Business Skills Ltd v Forde* [2012] (Case No. PW162/2010), *Olga Lech v Hulex Ltd* [2012] (Case No. UD363/2011) and *Kwiecien v Nationwide Controlled Parking Systems* [2012] (Case No. TE40/2011). See Workplace Relations Commission website for decisions.

³⁹ See Wright “Eggs in baskets: distributing the risks of electronic signatures” (1997) 15 *J Marshall Journal of Computer & Information Law* 189.

that was signed and sent and that it has not been modified after signature (as the signatory did not intend to approve or agree to the modified content) i.e. to ensure the integrity of the document.⁴⁰ If a signature that meets the above requirements is reliably and uniquely associated with an identifiable or specified person or undertaking that person or undertaking will find it difficult to repudiate the transaction on spurious grounds. This is because the sender cannot credibly say that he or she did not sign the digital document in question provided the signature system works properly.⁴¹

5.34 At common law a rebuttable presumption exists that the “owner” of a handwritten signature (the person whose signature it is) applied it to the document and intended to sign the document by applying it. This is sometimes called the “presumption of attribution”. To rebut this presumption the party claiming that the purported signatory did in fact sign it will have to adduce evidence to prove this.⁴² Evidence rebutting the presumption or challenging the evidence that the signatory was the person who signed the document may, of course, also be put before the court. No such presumption applies to electronic signatures in Irish law.⁴³ However a practice note published by the Law Society in England and Wales suggests that in practice the courts will accept a document bearing an electronic signature as prima facie evidence of its authenticity, unless evidence to the contrary is adduced.⁴⁴

5.35 For an electronic signature to parallel a traditional signature it must therefore be such that it can either (a) support a presumption of attribution (so that the court will presume that the person who used X’s electronic signature to sign was in fact X) or (b) constitute, or provide a basis for gathering, evidence that that the person who used X’s electronic signature to sign was in fact X. The extent to which an electronic signature can achieve this depends on its technical characteristics. For example, a signature consisting of a typed name can be reproduced by any person with access to a computer and the ability to type; it is far easier to reproduce than a handwritten signature and is therefore worse evidence than a handwritten signature that a particular person is linked with, or has even seen, a document. Conversely, digital signatures of the type discussed below may be

⁴⁰ This is made possible where modifications can be observed by referencing the hash function and message digest (components of public key infrastructure are discussed below at para. 5.44.
⁴¹ As discussed below the person with whom the signature is uniquely associated may, however, credibly deny being the sender of a particular signed document; he or she cannot merely deny that he or she owns the key used to sign it.
⁴² *Brown v National Westminster Bank* [1964] 2 Lloyd’s Reports 187. The Bank admitted to paying out on a number of forged cheques but challenged Mrs Brown to prove that she did not sign the majority of them. Mrs Brown was unable to do so.
⁴³ Neither the 2000 Act nor the 2014 Regulation provide for a presumption of attribution.
⁴⁴ The Law Society, ‘Execution of a document using an electronic signature’ available at <http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/>.

as good as or better than a handwritten signature as evidence of sight and approval of a document.

- 5.36** Paper signatures can also carry potentially widely varying levels of evidentiary weight, depending on the characteristics of the signature in question. For example, if a Court's objective is to ascertain whether a specific person has in fact read and approved the content of a specific document, that Court is likely to find an 'X' or similar ambiguous mark on a page less convincing as evidence of the intention of that specific person to verify that he has read and approved the document than, for example, a handwritten signature and date. A handwritten signature and date may, in turn, be less convincing than a signature witnessed by a notary, and so on. This scale of reliability is paralleled by the various kinds of electronic signatures.
- 5.37** Cases involving handwritten signatures on paper traditionally involve two parties: a signatory and a party relying on the signature. Electronic signatures involve the same classes of party (the signatory and the relying party) but sometimes also involve a third person or corporation who acts as an intermediary to establish the identity of a party or the parties. This trusted third party is authorised to certify to the relying party that the data⁴⁵ which makes up the electronic signature is in fact the signature of a particular person. This allows the relying party to be more confident that the document upon which that party intends to rely has in fact been signed by the other party (i.e. the trusted third party's role is to allow those relying on the third party to be sure, insofar as possible, of the validity of the document in question). The law of electronic signatures is therefore strongly concerned with the position of this trusted third party. As these third parties "certify" the identity of the signatory, they are called "certification authorities" (in this Report "CAs").⁴⁶
- 5.38** Given the ease with which documents can be altered, be they traditional paper documents or electronic documents, a reliable means by which to establish whether the evidence has been tampered with must be identified. This applies to both civil and criminal cases. For electronic documentary evidence this usually involves file interrogation procedures (often called electronic forensics) which tend to focus on establishing a verifiable chain of custody. For example, there may be a very large number of versions of a document, one version of which is eventually used to form a contract between two businesses. It will be necessary to establish that the particular electronic document placed before the court is the version or an exact copy of

⁴⁵ The question of whether "data" is a plural countable noun (which is how it is treated by the 1999 Directive and which is what it would be in Latin: data is plural for the Latin datum) or a singular uncountable noun like "information" (which is how it is treated by section 2(1) of the 2000 Act) is a live one and provokes considerable debate. This Report follows the usage of the Oireachtas in treating it as singular.

⁴⁶ They are discussed at paragraphs 6.167, 7.34-7.35 and 7.205-7.217 of the Consultation Paper.

the version used for the contract and not a preparatory or post-contract version.⁴⁷

- 5.39** Transactions over the internet seem particularly susceptible to fraudulent communication under false identities. The issue of proving the identity of a party engaged in an on-line transaction arose in a 2002 case in Germany concerning a contract to purchase a watch through an internet auction.⁴⁸ It may caution against an overly broad presumption of attribution for those electronic signatures that incorporate few, weak or no security checks.

(2) *Digital signatures v electronic signatures*

- 5.40** The terminology relating to electronic and digital signatures is notoriously inconsistent.⁴⁹ However the most basic distinction that is usually made between them is that digital signatures are a more specialised or advanced form of electronic signatures and are guaranteed by superior levels of security and authentication.
- 5.41** This Report uses the expression “digital signature” to refer to the particular type of electronic signature based on public key cryptography and the issuing of certificates by Certificate Authorities (the PKI model, discussed in detail below) unless otherwise indicated. The basic distinction on which much non-legal literature seems to be coalescing is between “electronic” and “digital” signatures with the latter a sophisticated subset of the generic former. The basic distinction drawn in the relevant Irish and EU legislation is between an “electronic signature” and an “advanced electronic signature”. The terminology in the legislation is discussed in greater detail below.⁵⁰ While these distinctions may seem semantic at first blush, in an area laden with complex technical terminology, it is essential to have clarity on the most basic concepts.⁵¹
- 5.42** Digital signature technology serves a more specialised market than other electronic signatures and has specific legal issues associated with it. A digital signature is not a signature in the traditional sense. It is called a signature by way of analogy because it fulfils a similar function. It is intended

⁴⁷ Sections 17 and 18 of the 2000 Act sought to address this by specifying that the “integrity” of an electronic document be assured by reliable technical means as a condition precedent of granting that electronic document equal legal status to paper originals or paper documents required to be stored or produced.

⁴⁸ CaseNo 19 U 16/02, Oberlandesgericht Köln, 6 September 2002. This is discussed at paragraph 7.31 of the Consultation Paper. A similar approach was approved in the Regional Court of Konstanz in Case No 2 o 141/01.

⁴⁹ Aalberts and Van Der Hof complain of a “terminological shambles” and consequent “legislative chaos”, Aalberts and Van Der Hof, “Digital Signature Blindness: Analysis of legislative approaches toward electronic authentication” (Tilburg November 1999) 9 (available at <http://arno.uvt.nl/show.cgi?fid=4855>).

⁵⁰ See Part C of this Chapter.

⁵¹ Mason has made the point that clarity on this distinction is necessary for reform to be effective. See Mason, ‘Revising the EU e-Signature Directive’ (2012) *Comms. L.* 56 at 57.

to provide an assurance that the document is linked to the person signing it and to prevent him or her from repudiating the content. The digital signature described below offers the additional benefit, absent from other kinds of electronic signature and from paper signatures, of ensuring that the document has not been tampered with since signing.

- 5.43** The dominant digital signature technology in use is based on PKI (a technology developed in the 1970s). PKI stands for “public key infrastructure” and has two components: public key cryptography (a system for encrypting and decrypting data) and a system of Certificate Authorities that issue certificates which “bind” specified individuals or corporations to particular digital signatures. The Commission now sets out how public key cryptography works and how it enables advanced electronic signature technology. Space and technological complexity compel a degree of simplification.

(3) *The operation of public key cryptography*

- 5.44** Encrypting data such as an electronic document means changing it from ordinary readable data (called “plaintext”) to scrambled data (called “cyphertext”)⁵² through a reversible process (called “encryption”). The reverse process (changing cyphertext to plaintext) is “decryption”. Computers encrypt and decrypt documents using encryption algorithms⁵³ called “cyphers” and “keys”.⁵⁴ One function of encryption is to make data confidential while sending it from one computer to another. In the following paragraphs “S” stands for sender and “R” stands for recipient.
- 5.45** In the simplest type of encryption, S uses a key to encrypt the plaintext in his or her computer and then sends it as cyphertext. R then uses the same key to decrypt the cyphertext back to plaintext in R’s computer. This is called symmetric encryption because both S and R share the same key. Either they must both already have it or some secure way must be found for the one who has it to send it to the one who has not.
- 5.46** Asymmetric encryption (on which PKI is based) uses two different but mathematically-related keys (called a “key pair”): the public key and the private key. One key is used for encryption and the other key is used for decryption. S and R may both have their own key pair so that there are four keys. Typically, where S wishes to send data to R then R’s keys are used. S

⁵² The spellings cyphertext and ciphertext both exist, paralleling the twin terms “cypher” and “cipher”. There is no difference in meaning. The form “ciphertext” is dominant, particularly in American sources, but not exclusive.

⁵³ An algorithm is a series of mathematical operations performed on input data to produce different output data. An encryption algorithm is one type of algorithm, for which the input data is plaintext and the output data is cyphertext.

⁵⁴ A key is a piece of information that determines what the cyphertext will be (i.e. the key controls the output of the cypher); the cypher uses the key to generate the cyphertext.

encrypts the data using R's public key and sends it to R as cyphertext. R then uses a different key (R's own private key) to decrypt the cyphertext back into plaintext. S knows R's public key as this is generally available. Any person who knows R's public key can encrypt data using it and send that data to R but only someone who possesses R's private key (presumably R alone) can decrypt it. The data cannot be decrypted using R's public key and it is computationally infeasible to figure out R's private key from R's public key. Only R's private key will decrypt data encrypted with R's public key (hence "asymmetric"). Keeping the private key secret is R's responsibility; any person with access to the encrypted data *and* R's private key will be able to decrypt the data.

5.47 Asymmetric encryption's most obvious application is in maintaining confidentiality but the same technology is applied in a different way to allow digital signatures. Two concerns arise: verifying the authenticity and integrity of electronic documents (data-origin authentication) and verifying the identity of the party sending it (entity authentication). Asymmetric encryption is a means to achieve the first; certification is a means to achieve the second. The two parties are the signatory of the document ("N")⁵⁵ and recipient of the signed document ("R").

5.48 Asymmetric encryption allows both the origin of the data (data-origin authentication) and the integrity of the data received to be verified. R will generally wish to be sure that a document signed by N has not been altered or tampered with in some way. R therefore needs some means of ensuring that the document signed is the same as the document received. This is the purpose of the digital signature. It allows N to "sign" the document and send it and R to receive the same document and to know from the signature not only that N has signed it but that it (the document) is what N actually signed and not a compromised version.

5.49 Digital signatures therefore allow the integrity of electronic documents sent over the internet (or other potentially insecure means of transmission) to be verified. Certification allows the identity of the party whose public key is used to generate the digital signature to be verified (subject to the quality of the certifier's verification procedures). The security of digital signatures depends on keeping the private key used to sign (sometimes called the "signing key") secret. The security of digital certificates depends on the CA's verification

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For the avoidance of confusion the Commission avoids using the same letter "S" for "party signing the document" and "sender". This is because the party that actually sends a document is not necessarily the same as the party that applies the digital signature to it. Person 1 might digitally sign a document and not send it. If person 2 has access to the place where that document is stored, person 2 might send it to the eventual recipient. Signing and sending are separate processes for both electronic and paper documents and therefore the signatory is not necessarily the same person as the sender, nor is the signatory necessarily even aware that the document was sent. The letter "R" can be reused as the recipient is simply the person who receives the signed document.

procedures. There are therefore two potential weaknesses in the system: the secrecy of the private key⁵⁶ and the CA's verification process.⁵⁷

5.50 To help preserve their secrecy private keys are sometimes embedded on dedicated hardware rather than being placed on general purpose computers. Some digital signature implementations therefore involve the use of a smartcard and a corresponding card-reader. These smart cards contain the private key or a microprocessor capable of generating key pairs (including a private key). Provided the private key is not extracted from the card (for example by the duplication of the card or the contents or the physical loss of the card) it remains secret. In such implementations, in order to "sign" with the private key N must insert the smart card into a dedicated reader and enter a PIN, password or other code. Requiring a second factor (the addition of a requirement that N know something like a PIN to the requirement that a card containing a private key be present) increases security because the card cannot generate the key without the addition of the second factor.⁵⁸

5.51 For example, some banks⁵⁹ provide card-readers to be used with cards and PINs for internet banking. Upon the insertion of the card (a debit card or ATM card) the machine generates security codes (private and public keys) and for use in transacting with the bank. If the cards and card-readers are not tied to one another N can use N's card in any compatible card-reader (much as N may use it in any compatible ATM).⁶⁰ Therefore, if N's card is stolen it might be used by a fraudster to access N's account. (Indeed, even if N has a card and card-reader that are tied, problems could still arise were the fraudster to acquire both). In requiring a PIN to be used in addition to the card, two layers

⁵⁶ If this is lost then anyone who steals it and has the ability to use it (for example by knowing the password (if any) used to protect it) can use it and until the CA finds out and takes action by revoking the certificate, the imposter will be certified to unsuspecting users.

⁵⁷ Prominent CAs have erred in the past, sometimes quite seriously. For example, a major authority once notoriously issued two digital certificates in the name of Microsoft to persons who were not, and did not represent, Microsoft: <http://support.microsoft.com/kb/293818>; more recently a Turkish CA wrongly granted the power to issue certificates to two entities, one of which proceeded to issue a certificate for the domain ".google.com" to an entity other than Google, such that the certificate assured users that Google was the party with whom they were communicating when this was not the case: <http://uk.reuters.com/article/2013/01/04/us-turkey-web-interception-idUKBRE90301120130104> and <http://technet.microsoft.com/en-us/security/advisory/2798897>.

⁵⁸ On the concept of multifactor authentication generally, see Chapter 4 of Adams and Lloyd, *Understanding Public-Key Infrastructure: Concepts, Standards, and Deployment Considerations* (1999 Macmillan Technical Publishing) available from Microsoft at <http://technet.microsoft.com/en-us/library/cc700808.aspx>. The authors identify four categories of identification mechanism: "something you have" (like a smartcard), "something you know" (like a PIN), "something you are, or... intrinsic to yo[u]" (like a fingerprint) or "something you do" (like a handwriting style).

⁵⁹ For example, in Ireland, AIB and Ulster Bank offer these card readers: http://www.aib.ie/servlet/Satellite?c=SC_Content&cid=1291806113056&pagename=SecurityCentre/sc_main§ion=S003#Q6 and <http://www.ulsterbank.com/microsites/card-reader-user-guide-ri/default.asp>.

⁶⁰ For example, AIB's appears not be tied: "Can I use someone else's AIB Card Reader? Yes. The AIB Card Reader is not unique to each user and can be shared with someone you trust. The AIB Card Reader uses the chip on your AIB Debit Card to generate codes unique to you.". Nor is Ulster Bank's, "Can I use someone else's Card Reader, even one from another bank or building society?" "Yes, but of course you can only use your own bank card and PIN. You should only use a Card Reader from a source you trust." <http://www.ulsterbank.ie/roi/personal/safe-secure/anytime-card-reader/common-questions.ashx#21>.

of security are provided. The card-reader will only work with the card if the correct PIN is entered so the card is useless without the PIN and the PIN useless unless N also holds the card and the (or a) compatible card-reader. This is an example of two-factor authentication: in order to authenticate and proceed to transact, N must both know information (the PIN) and possess a physical token (the card).⁶¹ The theft of the card alone or the PIN alone is inadequate for successful falsification of identity.

(4) *The benefits and limits of digital signatures*

- 5.52** The benefits of advanced electronic signatures are those identified above: they allow a recipient to be sure that the purported signatory did in fact sign the document (or at least that the key used to sign belongs to that signatory) and that the document has not been modified since it was signed. They provide data-origin authentication and integrity.
- 5.53** From the perspective of a court seeking to determine the weight of electronic signature evidence, digital signatures offer security and transparency absent from other kinds of electronic signature such as bitmap signatures or simple typed signatures. Digital signatures cannot easily be forged unless the signatory loses control of his or her private key.⁶²
- 5.54** Adding a digital certificate from a Certification Authority (CA)⁶³ renders entity authentication possible too. N can include with each digitally-signed document a copy of the certificate from the CA. R can be sure that a document signed with N's digital signature was signed with N's key and was not modified after signature. The inclusion of the CA's guarantee of N's identity allows R to be conditionally sure that N is who he or she claims to be (entity authentication). There are nevertheless limits to what even a digital signature can guarantee.
- 5.55** First, the fact of digitally signing a document does not of itself make the document confidential. Confidentiality and signature are mutually independent.⁶⁴ In order to be sure that a digitally-signed document remains

⁶¹ Ulster Bank explain the logic of two-factor identification: "The online banking card reader provides an extra layer of protection when carrying out certain transactions via Anytime Banking. It works by relying not just on something you know, but something you actually possess - your debit card."

⁶² Importantly, the signatory may not know that he has lost control of his private key, particularly if that key is not contained on or generated by a single dedicated physical object like a smart card. There may be no indication that data, including a private key, has been compromised until a damaging act has already been perpetrated.

⁶³ A certification authority (CA) is the term granted to a trusted third party in the context of e-commerce. CAs issue certificates to purchasers (persons or corporations) linking public keys with the purchasers by declaring that the purchaser is the owner of a particular public key. They are discussed in more detail at para. 5.110.

⁶⁴ A parallel can be drawn with paper documents. Applying a digital signature does not make the signed document confidential any more than signing a postcard and putting it into a post box makes the postcard confidential. Only the digest has been encrypted by the signing process. Furthermore, the digital signature will only show if a document has been modified, not if it has been viewed or copied. A digital signature does not guarantee that the document remained confidential any more than a real signature can ensure that someone has not temporarily diverted the postcard to a

confidential it is necessary to encrypt the entire package (document plus digital signature plus such other documents as the sender wishes to send, for example a digital certificate) before sending it. This process is completely separate from the process of encrypting the message digest that forms the digital signature. In principle any method can be used to encrypt the package, symmetric or asymmetric, though symmetric is more common.

5.56 Second, R can be sure that the document was signed using N's key but cannot be sure of any more than that. R can never know for certain whether N actually signed it or not. Normally, N should be the only person who can do this but if someone else has gained access to N's key by stealing it or copying it then that person will be able to sign documents with N's key and R has no way of knowing if this has happened. Indeed, N himself might not know that his key has been compromised. In this, a private key is like a unique rubber stamp. If R receives a letter purporting to be from N and it has an impression from N's rubber stamp on it then R can be sure that N's stamp has been applied but he does not know who applied it. R also does not know whether the stamp has been copied so that there are now two or more identical stamps. This problem cannot be solved by legislation (although legislation can provide, for example, that the application of N's stamp is *prima facie* evidence that N applied the stamp). This does not solve the problem but it transfers the risk from R to N by presuming that N approved or agreed to documents stamped using N's stamp and holding N to their contents unless N can rebut the presumption.

5.57 This problem afflicts the "qualified electronic signature"⁶⁵ no less than other digital signatures. The CA merely guarantees that N is, to the best of the CA's knowledge, who N claims to be. If N's key is stolen or copied, the problem has nothing to do with the identity of N; the problem is that people other than N can now use N's signature. Again, the rubber stamp is a sound analogy. There may be no doubt in R's mind that the rubber stamp in question genuinely does belong to N and that N genuinely is who N claims to be. The problem is not that the stamp really belongs to someone other than N; the problem is that the stamp may be under the control of someone else when it is applied. The CA certifies ownership of a key (that the key belongs to N); the CA cannot guarantee that N is the only person who is using it. This problem cannot be solved by legislation either, although again legislation can determine who suffers the financial or other consequences of the theft of a key: N, R or the CA.

photocopier, duplicated it, and then returned it to the postal system. It is possible to ensure that the communication is kept confidential but this is not the role of digital signatures.
See Article 28, e-IDAS Regulation (EU) No. 910/2014. For discussion see para 5.84.

⁶⁵

- 5.58** Third, digital signatures do not show that a document is safe to rely on in any sense beyond assuring R of the authenticity and integrity of the document. A digitally signed document is not *ipso facto* guaranteed to be free of viruses or malware, or to be correct or true or in any way reliable. A digital signature has no sanitising or ameliorative effect on an electronic document. In this, a digital signature is akin to a traditional signature: a paper document may carry an infectious disease, contain factual or legal errors or dishonest or misleading information, be out of date, be void or suffer from one of any number of defects. A traditional signature does not cure any of these defects. Similarly, an electronic document may suffer from corresponding (in some cases identical) problems and an electronic signature cures none of them, irrespective of whether or not it is an “advanced electronic signature”.
- 5.59** Finally, digital signatures rely on this core assumption: that it is not possible to modify code (corresponding to the content of an electronic document) without changing the hash function (which determines the document’s “signature”). The assumption may usually hold but it is, strictly speaking, false. It is possible (though very difficult) to modify the code in a file without changing the hash value. If anyone devises a means of changing the code without changing the signature, the digital signature no longer shows that the document has not been modified.
- 5.60** This exact problem occurred in February 2013 when a security firm broke the digital signature used by Google to ensure the authenticity of applications downloaded from its Play Store to devices running most versions of its Android operating system.⁶⁶ Google uses a digital signature system to ensure that the applications on people’s devices ‘match’ the version on the Play Store so that users are not at risk from fake versions of official applications.⁶⁷ If a user downloads a version of an application that does not match the official version, the digital signatures should not match. By engineering a means whereby a fake version of an application had an identical digital signature to the true version, the security firm demonstrated the fallibility of the digital signature. The problem is serious, potentially affecting nearly one billion devices.

⁶⁶ See Forristal “Uncovering Android Master Key That Makes 99% of Devices Vulnerable” (03 July 2013) Bluebox Security Corporate Blog available at <http://bluebox.com/corporate-blog/bluebox-uncovers-android-master-key/>. The firm says that it disclosed the security breach (Android security bug 8219321) to Google in February 2013 but the breach does not appear to have become public knowledge until July 2013: see Lutz “Bluebox reveals Android security hole, may affect 99 percent of devices” (04 July 2013) Engadget available at <http://www.engadget.com/2013/07/04/bluebox-reveals-android-security-vulnerability/> (last accessed 05 July 2013); “‘Master key’ to Android phones uncovered” (04 July 2013) BBC News available at <http://www.bbc.co.uk/news/technology-23179522>; and Lomas “Android ‘Master Key’ Security Hole Puts 99% Of Devices At Risk Of Exploitation” TechCrunch (04 July 2013) available at <http://techcrunch.com/2013/07/04/android-security-hole/>.

⁶⁷ See Google’s information for developers explaining why they need to digitally sign their applications, available here <http://developer.android.com/tools/publishing/app-signing.html>.

5.61 Digital signatures can therefore go *some* way towards guaranteeing security over open networks and strengthening consumer trust in electronic commerce but cannot conclusively establish the identity of those who are engaging in a transaction. They can, however, indicate a high likelihood that a particular party was the one that signed or sent the message.

(5) *The potential for fraud and non-repudiation*

5.62 Making electronic signatures viable alternatives to paper signatures involves taking measures to guard against fraud and abuse. While advanced electronic signatures based on a qualified certificate (issued by Certification Authorities which are discussed below) are not necessarily an infallible means of establishing entity authentication, they are more secure than the earlier techniques of password and/or physical tokens.⁶⁸

5.63 Testing the integrity of an electronic signature requires establishing a reasonable belief that any file electronically signed on a system cannot be and has not been tampered with by anyone or anything. In the context of a paper document discrepancies might be detected upon visual examination but with electronic records it may be more difficult to tell by visual inspection if the file has been altered and therefore technical means of assuring integrity are required.

5.64 For a court, digital signatures can be a valuable source of evidence of the provenance of a document where the private key in question has been randomly generated and kept securely and there is nothing to suggest that it has been compromised. Digitally signing a particular document using a private key and sending it is one way of “freezing” that particular copy while it is in transit. If the key remains unbroken, it allows the recipient to be sure that it is the same as the document that was sent and it allows a later adjudicator to see if the recipient or sender edited their version of the document that they are adducing in evidence. The digital signature should make it easier to detect fraudulent or innocent reliance on modified copies of documents.

5.65 The possibility of fraud exists for all documents and signatures irrespective of medium. PKI furnishes a fallible but strong basis for a secure system of transacting. The secrecy of the private key and the reliability both of Certification Authorities and of the software are paramount considerations.

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Garfinkel and Spafford have suggested that electronic signatures are a “substantially more secure way of having people identify themselves on the Internet than the alternative: usernames and passwords.” Garfinkel and Spafford *Web Security and Commerce* (1997, O’Reilly and Associates Inc, Cambridge, USA) 133.

- 5.66** In the *Consultation Paper on Documentary and Electronic Evidence*, the Commission invited submissions as to whether it should be provided in the proposed legislative framework that an electronic signature based on a Public Key Infrastructure (PKI) or a similarly tested or testable technology should be required for certain designated transactions.
- 5.67** **The Commission recommends that the draft Evidence Bill should not include a general requirement for the use of an advanced electronic signature based on Public Key Infrastructure for authentication purposes, and that such a requirement should only be prescribed on a case-by-case basis.**

C Electronic Signatures and the Law

(1) *The Electronic Signatures Directive 1999/93/EC*

- 5.68** Until the entry into force of the EU Regulation (No. 910/2014) on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation) on July 1st 2016, the regulation of electronic signatures was defined by the Electronic Signatures Directive 1999/93/EC. While no longer in force, it is important to understand the influence of the Directive on the Irish and European legal landscape as well as the shortcomings in its framework which precipitated the introduction of the 2014 Regulation. The Commission therefore briefly sets out the fundamental provisions of the Directive.
- 5.69** The *Electronic Commerce Act 2000* gave domestic effect to the Directive. The Directive ensured that signatures could be valid despite their electronic form. It was not prescriptive in its operation and granted a large amount of discretion to member states. The Directive recognised two types of electronic signature: the electronic signature and the advanced electronic signature. With respect to the former the Directive provided that signatures not be denied legal effect solely on the basis that they are in electronic form and in the case of the latter setting down certain criteria which a signature must meet to be classed as an advanced electronic signature.
- 5.70** The Directive further laid down extensive provisions dealing with the issuing of qualified certificates to such advanced electronic signatures such that they can be guaranteed legal equivalence with handwritten signatures. The Directive has been superseded by the eIDAS Regulation of 2014 which, while retaining the core concepts of the Directive, is of direct legal effect across the member states in the European Union.
- 5.71** The 1999 Directive sought to pre-empt inconsistent law between member states to ensure a harmonised system within the EU but the European Commission has taken the view that the 1999 Directive has failed to achieve

this.⁶⁹ The European Commission stated in 2012 that purpose of the new Regulation is to “creat[e] an internal market for e-Signatures and related online trust services across borders, by ensuring these services will work across borders and have the same legal status as traditional paper based processes”.⁷⁰ Under the current regime there is an absence of mutual recognition of e-Authentication methods of all stripes including e-identification and electronic signatures. This disharmonious interaction of various legal standards across the European Union is an obstacle to the development of the digital economy in the common market. The Commission outlined this concern in a 2012 press release:

“The approach to eSignatures, which builds on the current eSignature Directive (*Directive 1999/93/EC*), has brought a degree of harmonisation to practices across Europe. All countries in the EU have legal frameworks for eSignatures, however these diverge and make it de facto impossible to conduct cross border electronic transactions. The same holds true for trust services like time stamping, electronic seals and delivery, and website authentication, which lack European interoperability”.⁷¹

(2) *Electronic Commerce Act 2000*

(a) *Introduction*

5.72 The 2000 Act, gave effect to the 1999 EU Directive discussed above. As the Directive has been repealed and replaced by the 2014 eIDAS Regulation, which is discussed below, any provisions of the Act which are inconsistent with the Regulation are no longer of any effect.⁷²

5.73 The provisions relating to electronic signatures equate, in a limited way, electronic signatures with traditional paper signatures, albeit with certain exceptions pertaining to legislation requiring a specific form of signing (*e.g.* a will, a codicil, or any other testamentary instrument, a trust or a power of attorney). Certain types of electronic signatures are therefore to have the same legal effect as conventional signatures; misuse of electronic signatures or any fraud connected with these signatures are offences under section 25 of the 2000 Act.

⁶⁹ See European Commission Press Release IP/12/558 “Digital Agenda: new Regulation to enable cross-border electronic signatures and to get more value out of electronic identification in Digital Single Market” dated 04 June 2012 available at http://europa.eu/rapid/press-release_IP-12-558_en.htm?locale=en.

⁷⁰ http://europa.eu/rapid/press-release_IP-12-558_en.htm?locale=en.

⁷¹ European Commission, ‘Digital Agenda: new Regulation to enable cross-border electronic signatures and to get more value out of electronic identification in Digital Single Market’, available at http://europa.eu/rapid/press-release_IP-12-558_en.htm?locale=en.

⁷² For example, s. 29(1) – The 2014 Regulation now requires that qualified Trust Service Providers seek and obtain prior approval before carrying out certification services.

5.74 The 2000 Act provides for the activities of persons who certify the identity of signatories of electronic documents and it sets up a voluntary accreditation scheme for this. It did not go so far as to require mandatory adherence to recognised standards for reliable technology in this area.

(b) *Substantive provisions of the Electronic Commerce Act 2000*

5.75 The substantive provisions of the 2000 Act are discussed in detail in the Consultation Paper.⁷³ Part 2 of the 2000 Act equates electronic and paper documents as regards writing, signatures, documents under seal, originals and contracts. Section 2(1) of the 2000 Act defines “electronic signature” and “advanced electronic signature” in terms very similar to those used in the Directive and defines “electronic” broadly.⁷⁴

5.76 The principles of non-discrimination and legal equivalence and recognition of electronic signatures mandated by the Directive are provided for in sections 9, 13 and 22 of the 2000 Act. Section 9 contains the fundamental principle that information cannot be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. Section 13 provides more particularly that where the use of a signature is required an electronic signature may be used provided the other party consents to using an electronic signature and (if one party is a public body) technical or procedural requirements imposed by the public body are adhered to. Section 22 authorises the admission of electronic communications or documents and electronic signatures in legal proceedings. Therefore, electronic evidence is admissible in legal proceedings and will be afforded the same evidential value as traditional forms of paper evidence.

5.77 The Act compels the courts to accept all things falling within the definition of electronic signature as signatures and prohibits them from denying effect to these signatures simply because they are electronic.⁷⁵ It also implies, without expressly stating, that signatures that meet the requirements for advanced electronic signatures and which are also supported by a qualified certificate are more reliable than electronic signatures *simpliciter*. This implication flows from the stipulation that the courts accept such signatures as meeting requirements for witnessed signatures and documents under seal.⁷⁶ All types of electronic signatures, whether advanced or otherwise, are in principle admissible as are the electronic documents to which they relate. Beyond this, however, the legislation does not categorise signatures and it does not specify the level of weight to be accorded to any particular type of signature by the court. This is the same as the approach to traditional signatures, the weight of which is a matter for the court.

⁷³ At paras. 7.186–7.191.

⁷⁴ As including “electrical, digital, magnetic, optical, electromagnetic, biometric, photonic and any other form of related technology.”

⁷⁵ Section 22(b)(i).

⁷⁶ Section 14(1)(a).

- 5.78** There is no requirement in the 2000 Act that an electronic signature pass a reliability test of its integrity; it is in principle admissible even if it does not.
- (c) *Issue of consent in the Electronic Commerce Act 2000***
- 5.79** Section 12 of the Act requires the consent of the parties for all substitutions of electronic documents,⁷⁷ signatures,⁷⁸ and seals⁷⁹ for their paper equivalents, whether the parties are public bodies or private persons or corporations. It therefore cannot be used as a vehicle for forcing electronic transacting onto parties who do not want it.⁸⁰ Similarly, section 24 makes clear that it creates no obligation to transact electronically as opposed to otherwise. Parties remain free to prescribe their own terms as to how to verify and conclude electronic transactions.⁸¹ The Irish regime is not unusual in requiring consent.⁸²
- 5.80** As a result of the consent provision in section 12(2)(c) of the 2000 Act⁸³ the fact that an electronic signature satisfies the legal requirement for a signature does not make that signature effective against someone who does not want to deal electronically at all. The 2014 Regulation, insofar as it applies to electronic signatures, imposes mandatory requirements only in respect of the recognition and authentication of advanced and qualified electronic signatures and of trust service providers. It is still up to the individual Member State to define when electronic transactions are required.⁸⁴ The question of consent is therefore very much still a live issue.
- 5.81** Consent is not blanket or rolling by default (although there is nothing in the Act that suggests that a party cannot itself explicitly consent on such a basis at some point in a transaction or series of transactions). One may accept some kinds of information in electronic form and reject others, or accept it for some purposes, or accept electronic documents but not electronic signatures and so on.
- 5.82** This preserves maximum freedom of choice although it might stall transactions if consent must be sought repeatedly. It may be that tacit consent could be inferred from a previous course of conduct to prevent a party that generally transacts electronically from suddenly and without warning claiming that it did not consent to a particular transaction, document

⁷⁷ Section 12(2)(b) and (c) for writing generally and 17(2)(d) and (e) for originals in particular.

⁷⁸ Section 13(2)(a) and (b) for signatures generally and 14(2)(a) and (b) for signatures that must be witnessed.

⁷⁹ Section 16(2)(a) and (b).

⁸⁰ *Electronic Commerce Act 2000*, section 24.

⁸¹ Sections 19, 20 and 21.

⁸² Canadian and American legislation also require the consent of the parties to the use of electronic documents. This is discussed in paragraph 7.201 of the Consultation Paper.

⁸³ "Information may be given [in electronic form] only... where the information is required or permitted to be given to a person who is neither a public body nor acting on behalf of a public body—if the person to whom the information is required or permitted to be given consents to the information being given in that form."

⁸⁴ See Recital 49 of the eIDAS Regulation.

or signature being in electronic form in circumstances where it was reasonable and proper for the other party to believe that such consent continued to exist in respect of the transaction, document or signature.

- 5.83** A permissive rather than mandatory approach to electronic transacting may be appropriate and prudent for as long as technological literacy is not a basic social expectation, but as market participants' comfort with electronic means of transacting grows a case may be made for removing the requirement for specific consent.

(3) *eIDAS Regulation 910/2014*

- 5.84** The 2014 EU Regulation on the mutual recognition of electronic identification and signatures 910/2014/EU, the eIDAS Regulation, is in force as of 1st July 2016. The Regulation, which repeals and replaces the 1999 Directive (1999/93/EC), is one of 12 policy initiatives proposed in the Single Market Act and is designed to secure confidence in trans-national electronic transactions within the European Union. The Act states that the new framework will improve on the 1999 Directive in order to "clarify its concepts, simplify the use of e-signatures and remove interoperability barriers."⁸⁵ More broadly the Regulation forms a part of the European Commission's policy objective of advancing the Digital Single Market. The Commission states that "the Digital Single Market strategy wants to allow better access for consumers and business to online goods and services across Europe. This will remove the key differences between online and offline worlds, to break down barriers to cross-border online activity."⁸⁶

(a) *Electronic identification*

- 5.85** The Regulation is broader in scope than just electronic signatures and seals. The primary focus of much of the regulation is on e-identification in the use of public services online and the interoperability of online state services such that EU citizens can engage with the government of any member state using the same eID. Validating and protecting your identity online is hugely important as an ever increasing amount of our interaction with government takes place online. It is therefore essential to provide for robust e-identification services such that citizens can digitally manage their business with the state while protecting themselves against identity fraud.⁸⁷ The

⁸⁵ European Commission, 'Single Market Act: Twelve levers to boost growth and strengthen confidence' s. 2.7, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0206&from=EN>.

⁸⁶ European Commission, 'Digital Single Market' available at <https://ec.europa.eu/digital-single-market/node/78515>

⁸⁷ The UK Government has published a Q & A about its online identity verification system GOV.UK Verify, and is also useful in answering questions about e-identification more generally. <https://qdsengagement.blog.gov.uk/wp-content/uploads/sites/78/2015/10/GOV.UKVerifyQA-Sept2015.pdf>.

Regulation as a whole seeks to address the problem of verifying “who you are” in a digital world.

- 5.86** In the case of e-identification, the Regulation is designed to allow citizens of one member state to engage with a state body of another member state online using his or her eID as issued in their own member state. The Regulation defines electronic identification as “the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person”.⁸⁸ An eID often takes the form of a physical identity card with a chip embedded, similar to a chip in a biometric passport, which enables a citizen to verify who they are both online and in person. Electronic identification and eID cards may seem somewhat alien to Irish society but they are increasingly being utilised across Europe and the world. One study suggests that the number of eIDs in circulation globally is likely to double by 2018 to an estimated 3.5 billion.⁸⁹ Indeed the UK and Ireland are the only two countries in the EU without a national identity card scheme.⁹⁰
- 5.87** Students studying and accessing services at universities in different member states is an obvious example of where interoperability is vital. A student in Belgium looking to enrol or register at a University in Italy should not have to travel to that University simply to verify their identity for the purposes of registration.⁹¹ Electronic identification has already been used in this sector at a cross-border level in the Erasmus programme and it is envisaged that the Regulation will only increase student mobility across Europe.⁹² It will also prove an important tool in allowing EU citizens to access prescription-only medications while in another member state.⁹³ At present contrasting rules on data protection and confidentiality stymies the mutual recognition of e-prescriptions across the EU.⁹⁴ In the private sphere, the harmonisation of eID standards and regulations will allow EU citizens to open bank accounts in different member states.

⁸⁸ Art. 3(1) eIDAS.

⁸⁹ ‘National e-ID card holders to top 3.5 billion by 2018’ (July 10 2014) <http://www.securitydocumentworld.com/article-details/i/11633/>.

⁹⁰ Siddhartha Arora, ‘National e-ID card schemes: A European overview’ (2008) 13 *Information Security Technical Report* 46.

⁹¹ The European Commission uses this as a case study in a press release for the Regulation. European Commission Memo, ‘Electronic identification, signatures and trust services: Questions & Answers’, available at http://europa.eu/rapid/press-release_MEMO-12-403_en.htm?locale=en.

⁹² Marion Rosenberg cites the use of the Secure Identity Across Borders Linked (STORK) project in relation to Erasmus among other programmes in Rosenberg, ‘And you are...? Will the new Regulation on electronic identification help universities when registering overseas students? Part 2’ (2015) *Computer and Telecommunications Law Review* 59, 62. It should be noted that Rosenberg raises doubts as to the utility of the Regulation in this context in the absence of widespread uptake of eID use in the general population.

⁹³ This possibility was adverted to in a promotional video for the e-IDAS Regulation produced by the European Commission available at <https://ec.europa.eu/digital-single-market/en/blog/back-e-future-accelerating-implementation-and-uptake-eid-and-trust-services>.

⁹⁴ See Kierkegaard, ‘E-Prescription across Europe’ *Health and Technology* 3(3):205-219.

5.88 A number of pieces of implementing legislation have laid out the technical specifications for the operation of eID schemes.⁹⁵ The European Commission has also published a sample implementation document laying out in precise detail how a member state could set up a Regulation-compliant scheme.⁹⁶ This version is not binding but member states may make reference to it when designing their own schemes.

5.89 The absence of a national eID card scheme in Ireland renders these provisions of limited immediate relevance. However they reflect the increasingly complex picture of e-authentication in Europe and the wider world and indicate the broader policy objectives of the Digital Single Market.

(b) *Electronic signatures*

5.90 With respect to electronic signatures, the Regulation responds to deficiencies in the legal framework created by the 1999 Directive, most notably an absence of mutual recognition of qualified electronic signature and trust certificate criteria between member states. This makes verification of documents a protracted and drawn-out process and is an obstacle to the expansion of the digital economy in the EU. The European Commission gave the hypothetical example of a French company who wished to electronically sign contracts with a counterpart in Latvia but was stymied by the existence of contrasting legal requirements. The French company would have to set aside time and resources to determine whether it was legally possible to conclude the transaction by electronic means.⁹⁷ The new Regulation cures this defect by requiring member states to recognise authentication and certification of electronic identification and electronic signatures under another state's national law, provided the law is compliant with the criteria set out in the regulation.

5.91 The 2014 Regulation changes the form of the European legislation from a Directive to a Regulation, stripping national parliaments of the discretion they had in transposing the 1999 Directive. It continues to seek to achieve the same objective of permitting electronic documents and electronic signatures to perform the role of their paper equivalents as successfully as possible. It retains with slight modification the definitions of electronic signature and advanced electronic signature, but envisages a greatly expanded role for "qualified electronic signatures", the only category of digital signature which can be guaranteed equivalence with handwritten signatures as per Art. 25(2).

⁹⁵ On cooperation: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1441782671426&uri=CELEX:32015D0296> , On levels of assurance: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1441782671426&uri=CELEX:32015D0296> , On interoperability: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1441782373783&uri=OJ:JOL_2015_235_R_0001 , On notification: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2015_289_R_0007 .

⁹⁶ Available at https://joinup.ec.europa.eu/software/cefid/asset_release/cef-eid-ms-integration-package-v10.

⁹⁷ European Commission Memo, 'Electronic identification, signatures and trust services: Questions & Answers', available at http://europa.eu/rapid/press-release_MEMO-12-403_en.htm?locale=en.

5.92 The Regulation therefore contemplates three types of electronic signature; basic, advanced and qualified. These are on a continuum of security and reliability; basic electronic signatures may still have legal effect but are of a lesser order of reliability while advanced electronic signatures will likely benefit from a strong presumption of reliability owing to the various standards it must meet to be so categorised.⁹⁸ At the uppermost end of the continuum are qualified electronic signatures which must be certified by a qualified Trust Service Provider (TSP), a certification authority which certifies the conformity of a given electronic signature to the relevant legal requirements. The operation of TSPs is discussed in detail in Part D below. Parties to a given agreement can choose which of these is best suited to their authentication requirements.

5.93 The Regulation identifies qualified electronic signatures and electronic signature creation devices as properly defined legal concepts and sets out the requirements they must meet. It also gives notice of further technical criteria to come in the form of implementing legislation. The legal effect of the Regulation, combined with its more prescriptive provisions, make it a far more forceful intervention in the law of electronic signatures than its predecessor.

(c) *The standards of electronic signatures under Articles 25-34 of the eIDAS Regulation*

5.94 An “electronic signature” is defined in the 2014 Regulation as:

“[d]ata in electronic form which are attached to or logically associated with other data in electronic form and which is used by the signatory to sign.”

5.95 The Regulation’s definition is nearly identical to the one contained in the Directive, a definition which was considered broad enough to cover basic electronic signatures which may consist of no more than “a name or initials typed at the end of an email; a scanned image of a handwritten signature that is attached to an electronic document; and a PIN used to access a bank account”.⁹⁹ The minimalist core of the Directive is retained in Article 25(1) of the Regulation which directs that Member states are to ensure that an electronic signature is not denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in “an electronic form or that it does not meet the requirements for qualified electronic signatures.” This guarantees the legal effect and admissibility of basic electronic signatures which, although lacking in strong guarantees of authenticity, play a very important role in authenticating transactions on a daily basis.

⁹⁸
⁹⁹

Article 26.
McDonagh and White, “Electronic signatures: the legal framework and the market reality in Ireland” (2003) 10(8) *CLP* 228.

- 5.96** The Regulation's second named form of electronic signature, advanced electronic signatures, are addressed in Article 26 and must meet four requirements: they must be uniquely linked to the signatory, they must be capable of identifying the signatory, they must be created using means that the signatory can maintain under his or her sole control, and they must be linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. Commentary suggests that these new definitions will allow the signer to use the latest signing technologies, particularly on mobile devices.¹⁰⁰ Commission Implementing Decision 2015/1506 sets down certain types of advanced electronic signatures which must be recognised by Member States.¹⁰¹ It also provides criteria by which other types of advanced electronic signatures may be validated.
- 5.97** A third and yet higher category of effective electronic signature is the qualified electronic signature, an advanced electronic signature which meets further requirements such as being certified by a qualified trust service provider. Mere conformity with the requirements of an advanced electronic signature does not guarantee the same legal effect as a handwritten signature under the new Regulation. Under Article 25(2), only "qualified electronic signatures" shall have the equivalent legal effect as a handwritten signature and member states must treat them accordingly.
- 5.98** Previously the terminology "qualified signature" was used only as a matter of convenience to describe an advanced electronic signature meeting the additional requirements; it was not a legal term under the Directive.
- 5.99** The 2014 Regulation includes the defined term "qualified electronic signature" in Article 3(12) and specifies that it is an advanced electronic signature (defined in Article 3(11) and almost unchanged from the 1999 Directive) that meets the additional requirements of having been "created by a qualified electronic signature creation device" and "based on a qualified certificate for electronic signatures". The new Regulation therefore retains the concepts of electronic signatures and advanced electronic signatures and adds the named concept of qualified signature, which existed in similar form under the 1999 Directive but which did not have a specific name.
- 5.100** Under the Regulation, to constitute a qualified signature and therefore be guaranteed equivalence with handwritten signatures, an advanced electronic signature must be based on a qualified certificate that satisfies the minimum content set out in Annex I of the Regulation. Annex I specifies, *inter alia*, that the certificate must issue as a qualified certificate and identify the qualified trust service provider issuing the certificate and indicate the State in which the provider is established. The certificate must also contain electronic

¹⁰⁰ Michael McKee, 'New EU Regulation for Electronic Signatures', Martindale- Hubbell, available at [http://www.martindale.com/intellectual-property-law/article_DLA-Piper-\(Canada\)-LLP_2215466.htm](http://www.martindale.com/intellectual-property-law/article_DLA-Piper-(Canada)-LLP_2215466.htm).

¹⁰¹ Commission Implementing Decision (EU) 2015/1506 of 8 September 2015.

signature validation data that corresponds to the electronic signature creation data and the advanced electronic signature or seal of the qualified TSP. Trust Service Providers (TSPs) authenticate electronic signatures, seals or time stamps and issue certificates affirming their conformity to standards prescribed by law. TSPs are essential to the function of the framework established by eIDAS and they are discussed in detail in the following section.

- 5.101** Article 29 and its corresponding Annex (Annex II) stipulate the requirements for qualified electronic signature creation devices. Annex II requires that the confidentiality of the creation data is reasonably assured, that the data used for electronic signature creation can practically occur only once and that it's reliably protected against forgery and use by others. The devices must also not alter in any way the data which is to be signed or prevent such data from being presented to the signatory. Article 29 further stipulates that "the Commission may, by means of implementing legislation prescribe further reference numbers of standards for qualified electronic signature creation devices." To date, only one piece of implementing legislation has touched on electronic signature creation devices, Commission Implementing Decision (2015/1506) of September 2015 which requires that the use of a qualified electronic signature creation device be indicated to the relying party.¹⁰²
- 5.102** Article 30 prescribes that conformity with the requirements set down in Annex II is to be certified by an appropriate national body and that the names and addresses of such public bodies be made known to the Commission. The Article further stipulates the security assessment process by which conformity with Annex II must be established and reserves the power to make further regulations for security assessment by way of implementing legislation.
- 5.103** Article 31 then provides that the Commission be notified of any new certified qualified electronic signature creation devices within one month of their certification and that a list of certified devices be maintained and published. Article 31(3) reserves a power to the Commission to define formats and procedures for the publication of these lists by way of implementing legislation.
- 5.104** Article 32 provides for the process by which electronic signatures which purport to be qualified may be validated. The requirements are quite straightforward and include that the certificate have been valid at the time of signing and that various other requirements found elsewhere in the Regulation are complied with. Article 33 specifies that only qualified TSPs may perform a validation service. Once again both of these provisions are

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Commission Implementing Decision (EU) 2015/1506 of 8 September 2015 laying down specifications relating to formats of advanced electronic signatures and advanced seals to be recognised by public sector bodies pursuant to Articles 27(5) and 37(5) of Regulation (EU) No 910/2014 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1506>.

subject to a reserved power of the Commission to introduce further implementing legislation.

(d) *Electronic Seals*

5.105 The provisions of the Regulation dealing with electronic signatures apply only to natural persons. Articles 35-40 establish the separate concept of the electronic seal which applies solely to legal persons, though it operates in essentially the same fashion and the provisions are substantially similar. The European Commission's Impact Assessment suggested that "[t]he current e-signature Directive only covers e-signatures for natural persons and not for legal persons" and accordingly sought "to fill this gap by providing the same instrument to legal entities" by including provision for "electronic seals".¹⁰³

5.106 Article 3(25) defines electronic seals as "data in electronic form, which is attached or logically associated with other data in electronic form to secure the latter's origin and integrity". Article 35 requires that electronic seals not be denied legal effect solely on the grounds that they are in electronic form and directs that a qualified electronic seal enjoy a presumption of integrity and be recognised across all member states. Article 36 sets out requirements for an advanced electronic seal that mirror almost exactly those required of an advanced electronic signature. These requirements have been supplemented by Commission Implementing Decision 2015/1506 which requires the recognition of certain types of advanced electronic seal and lays down further technical specifications.¹⁰⁴ Articles 39 and 40 direct that the relevant provisions dealing with qualified electronic signature creation devices and those dealing with the validation of electronic signatures apply "*mutatis mutandis*" to electronic seals.

(e) *Electronic time stamps*

5.107 Electronic time stamps provide a "snapshot" of a document or other electronic content at a specific point-in-time. A person inspecting a document which has been "timestamped", particularly one which meets the requirements for a qualified electronic time stamp, can see that the contents of the document have not been altered since the time stamp was affixed. Article 3(33) of the Regulation defines electronic time stamp as "data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time". Electronic time stamps can serve an extremely useful function in the verification of documents in business, commerce and government.

¹⁰³ European Commission Commission Staff Working Paper: Impact Assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market (Brussels SWD(2012) 135 {COM (2012) 238 & SWD (2012) 136} at 83 available at http://ec.europa.eu/information_society/policy/esignature/docs/regulation/ia_en.pdf.

¹⁰⁴ *Ibid.*

5.108 Time stamps are addressed in Articles 41 and 42 and simply provide that electronic time stamps will not be denied legal effect on the basis of their electronic form and that a qualified electronic time stamp shall enjoy a presumption of accuracy of the date and time indicated and of the integrity of the data to which the stamp is affixed. Unlike the other authentication tools dealt with in the Regulation, a qualified electronic time stamp does not have to be certified as such by a qualified TSP. Article 42 provides that a qualified electronic time stamp must bind the date and time to the data in such a manner as to reasonably preclude the data being changed undetectably, it must be based on an accurate time source and it must be signed using an advanced electronic signature or seal. These requirements are considerably less onerous than the requirements made of qualified electronic signatures and seals.

D Trust Service Providers and their Liability

5.109 The area of most significant alteration from the previous legislative scheme is that of Trust Service Providers. In the following section the Commission considers the role and practical operations of Certification Authorities, of which TSPs are a breed, and the changes implemented by the Regulation.

(a) *Certification authorities explained*

5.110 A certification authority (CA) is the term granted to a trusted third party in the context of e-commerce. CAs issue electronic signatures to facilitate the transactions of parties with which they have no relationship and in whose communications they play no part. CAs issue certificates to purchasers (persons or corporations) linking public keys with the purchasers by declaring that the purchaser is the owner of a particular public key. Other services might include registration services, time-stamping services, directory services and computing services. Certification Authority is a generic term for trusted third parties which perform this function. A Trust Service Provider is a form of Certification Authority specified under the eIDAS Regulation. A Certification Service Provider (CSP)¹⁰⁵ was the term previously used for a CA under the 1999 Directive and the 2000 Act.

(b) *Trust Service Providers (TSP)*

5.111 Under eIDAS, a Trust Service Provider is defined as “a natural or a legal person who provides one or more trust services either as a qualified or as a non-qualified trust service provider.” These authorities or “providers” certify that an electronic signature, seal or time stamp and issue certificates affirming their conformity to certain standards prescribed by law. A TSP is an entity who issues certificates or provides other services related to

¹⁰⁵

CAs are discussed in paragraph 7.214 of the Consultation Paper.

electronic signatures, seals, time stamps and other means of electronic authentication.

- 5.112** Both qualified and non-qualified trust service providers are subject to certain security requirements provided for in the Regulation. Under Article 19 they are required to take appropriate technical and organisational measures to manage the risks posed to the services they provide, and having regard to the latest technological developments, ensure that the level of security is commensurate to the degree of risk. They must also notify the relevant supervisory body of any breach in security within 24 hours of such breach. The Commission reserves a power to enact implementing legislation to further specify the requirements Article 19 imposes.
- 5.113** Under the 2014 Regulation if a TSP issues qualified certificates to the public then the TSP has to fulfil certain further requirements specified in Article 24. These requirements are of a prudential nature and include employing personnel who possess sufficient knowledge and skills, operating with transparency and employing secure and unbiased systems and processes. They must protect against forgery and theft of data and are required to maintain liability insurance and/or sufficient financial resources to cover any liability for damages.¹⁰⁶
- 5.114** Trust services are defined broadly,¹⁰⁷ and a TSP is a person (including a corporation) that provides a trust service. Broadly speaking a trust service involves creating and verifying electronic signatures, seals, time stamps and website authentication and issuing of certificates to that effect. A qualified TSP is a TSP that meets the stipulations for such providers in the Regulation and a qualified trust service is one that meets the stipulations for such services. Qualified Trust Service Providers are named on the EU Trust List which entitles the TSP to the use of the EU Trust Mark.¹⁰⁸ The EU Trust Mark is a logo which appears on the website or other documents of the TSP which indicates to the customer that the TSP issues qualified certificates and is a member of the EU Trust List. It is designed as a tool to guarantee consumer confidence and to foster a more transparent digital market.¹⁰⁹

¹⁰⁶ Article 24.

¹⁰⁷ “[A]ny electronic service consisting in the creation, verification, validation, handling and preservation of electronic signatures, electronic seals, electronic timestamps, electronic documents, electronic delivery services, website authentication, and electronic certificates, including certificates for electronic signature and for electronic seals”.

¹⁰⁸ Article 23.

¹⁰⁹ European Commission, ‘EU Trust Mark’ available at <https://ec.europa.eu/digital-single-market/en/eu-trust-mark>.

(c) *Supervision*

5.115 The Regulation subjects all TSPs to supervision¹¹⁰ and to binding instructions,¹¹¹ whether or not they issue qualified certificates. Unlike the Directive, the Regulation in Article 19 explicitly stipulates that TSPs, without reference to whether or not they issue qualified certificates, are subject to certain security and supervision requirements. A TSP is required to notify the relevant supervisory body of any breach of security or the integrity of its data within 24 hours of becoming aware of such breach.¹¹² They may also be required to inform a customer of a security breach where the breach is likely to adversely affect that customer. Supervisory authorities are empowered to direct a TSP to disclose a security breach publicly, or to disclose it themselves, where it is in the public interest.¹¹³

5.116 Previously, Ireland regulated CSPs under section 29 of the 2000 Act. There was no requirement for any CSP wishing to enter the market to obtain prior authorisation from any central regulating authority before providing certification or other services relating to electronic signatures and issuing certificates under section 29(1).¹¹⁴ Under the 2014 Regulation, ordinary TSPs are still not under any obligation to seek prior approval although supervisory bodies would exist in member States under Article 17. Qualified TSPs, however, will be subject, under Article 21, to prior approval which is quite onerous in requiring not just notification but the submission of a security audit *prior* to commencing operations. Similarly, the Minister's authority to prescribe a scheme to supervise CAs in section 29(3) of the 2000 Act applied only to those providers that issue qualified certificates. The Regulation differs from the Directive in that it provides for supervision of all TSPs, including those that do not issue qualified certificates.

(d) *Liability*

5.117 Rather than allowing the existing law of tort and contract to determine liability, the *Electronic Commerce Act 2000* imposed specific statutory liability in certain circumstances. Nevertheless, the provisions do not depart radically from what would be expected at common law. The 1999 Directive established a set of minimum requirements with regard to liability for CSPs that were required to be implemented by member states and allowed member states to impose additional requirements. CSPs that issued qualified certificates to the public or that guaranteed such certificates to the public were liable for damage caused to any entity or legal or natural person who reasonably relies on that certificate.

¹¹⁰

Ibid.

¹¹¹

Ibid.

¹¹²

Art. 19(2).

¹¹³

Ibid.

- 5.118** The 2014 Regulation regulates TSPs in substantially the same way as before. The liability of TSPs is dealt with in Article 13 of the Regulation. TSPs will be liable for direct damage caused due to failure to comply with Article 13(1) unless they can prove that they were not negligent. Qualified TSPs however face a reverse burden of proof and are presumed to have acted intentionally or negligently when a breach occurs. To rebut this they are required to prove that they have not acted intentionally or negligently, whereas the burden of proof for non-qualified TSPs lies with the claimant. This has been the subject of some controversy with one commentator noting that the extent of such an obligation, rather than encourage the development of trust services, “may serve to diminish the appetite of private sector businesses, and those that insure them, from entering or remaining in the market of these services.”¹¹⁵
- 5.119** Article 13(2) of the Regulation places some limits on the exposure of TSPs, both qualified and unqualified, providing that where TSPs have informed customers in advance of the limitations of a particular service, no liability shall arise for damages arising for use of the service in excess of such limitation.
- 5.120** Under Article 19 of the Regulation, trust service providers, both qualified and unqualified, have to take appropriate measures to ensure the security of the trusts services they provide; a requirement which broadly mirrors existing requirements under data protection law. Further to that duty, TSPs must take measures to minimise the impact of such “security incidents” when they do happen. They must also notify the national supervisory body, the relevant data protection authority and, if it affects their interests, the person to whom the service has been provided. These are extensive duties which far exceed those laid down by the Directive. They are designed to inspire consumer confidence in what for most people is an unfamiliar service. However, it remains to be seen whether they may be too exacting and deter businesses from entering the market of providing trust services.

(e) *Types of certification*

- 5.121** The various types of digital certificates are discussed briefly in the Consultation Paper.¹¹⁶ CAs issue certificates to purchasers (persons or corporations) linking public keys with the purchasers by declaring that the purchaser is the owner of a particular public key. Certificates can be classified in various ways, for example according to their recipient or their purpose or according to the level of verification performed by the CA. Classification according to recipient generates categories such as “CA certificate”, “server certificate” and “personal certificate”. Classification

¹¹⁵ Barrett, ‘Europe’s e-ID Regulation is finalised, but concerns remain’, *E-Commerce Law and Policy* 2014, 16(10), 3-5, 4.

¹¹⁶ At paras. 7.208-7.210

according to purpose leads to categories such as “TSL certificate” or “SSL certificate” (these are the certificates that allow secure web-browsing).

- 5.122** Classification may also be on the basis of the thoroughness of the verification procedure undertaken by the CA. This often corresponds to price: more extensive verification procedures result in more expensive certificates. CAs may engage in a minimal verification procedure (for example simply checking that a purchaser is in fact listed¹¹⁷ as owning a domain name that it purports to own and then certifying that the purchaser owns the domain).¹¹⁸ CAs also offer more expensive certificates for the issue of which they require the supply of business documents to demonstrate that the purchaser is a real company, etc. More expensive certificates still (“extended validation certificates”) can be issued following a more extensive, time-consuming process whereby the CA performs more rigorous checks on the existence and identity of the purchaser.¹¹⁹

E Summary of Reforms Implemented by the eIDAS Regulation

- 5.123** The primary motivating concern behind the adoption of the new Regulation lay in the differing standards and legal frameworks for electronic identification and signatures across Member States engendered by the legal effect of the Directive.¹²⁰ By allowing states to implement the legislation independently, the effect of the Directive was to allow dozens of separate legal frameworks and requirements for electronic signatures to develop. This absence of a harmonised legal environment has stymied the development of a borderless digital market, a key objective of the European Union in the 21st Century. Neelie Kroes, former Vice-President of the Commission, put it as follows: “People and businesses should be able to transact within a borderless Digital Single Market, that is the value of the internet”.¹²¹

¹¹⁷ To register a domain name (like a website address) with a registrar, a registrant must provide various items of personal information to the registrar who is obliged by the Internet Corporation for Assigned Names and Numbers (ICANN) to add that data to a database called a “whois” (pronounced “who is”) database. ICANN, in a limited, technical sense, is a company that “runs” aspects of the internet: <http://www.icann.org/en/about/welcome> It is discussed in the Consultation Paper at paras. 6.165-6.166.

¹¹⁸ Certificates issued on this basis are called “domain name only” certificates.

¹¹⁹ See, for criticism of the proposition that extended validation certificates are immune from the market pressures that rendered ordinary certificates less trustworthy as time passed, Hagai Bar-El “The Inevitable Collapse of the Certificate Model” (22 October 2010) at <http://www.hbarel.com/index.php/the-inevitable-collapse-of-the>.

¹²⁰ See European Commission Press Release IP/12/558 “Digital Agenda: new Regulation to enable cross-border electronic signatures and to get more value out of electronic identification in Digital Single Market” dated 04 June 2012 available at http://europa.eu/rapid/press-release_IP-12-558_en.htm?locale=en.

¹²¹ Quoted in Farmer, ‘If at first you don’t succeed...European Commission proposal for a Regulation on e-identification, e-signatures and trust services’ *C.T.L.R* 2012, 18(7), 209-210, 210.

- 5.124** As a directly effective piece of EU legislation, the eIDAS Regulation by its very nature overcomes these interoperability and harmonisation problems, with the law applying equally across Europe. The original proposal in which the eIDAS Regulation originated argued that “a Regulation is considered to be the most appropriate legal instrument. The direct applicability of a Regulation pursuant to Article 288 TFEU will reduce legal fragmentation and provide greater legal certainty by introducing a set of core rules contributing to the functioning of the internal market.”¹²²
- 5.125** The 2014 Regulation marks a real shift in the direction of EU law on this subject. The changes to the voluntary nature of accreditation and supervision are dramatic, with extensive powers granted to supervisory bodies to invigilate and enforce the exacting requirements pertaining to both qualified electronic signatures and qualified TSPs. The Regulation is also wider in scope, covering all manner of services and products involving electronic transacting. The Regulation encompasses a suite of electronic equivalents to traditional concepts (signatures, seals, time stamps, and document delivery services) and establishes two variants on each: the electronic version *simpliciter* which might have varying levels of security and which may, in some cases, be based on certificates issued by one or more TSPs and the electronic version made secure to a particular regulator-satisfying standard by certification, vetted and closely-supervised by qualified TSPs. The division between qualified and other-than-qualified extends both to the services and the providers. The Regulation retains some concepts from the current scheme such as electronic signatures and advanced electronic signatures but introduces several new requirements that have no counterpart in the Directive. While the Regulation retains the basic hybrid structure of the Directive, it greatly expands the scope of advanced or regulator-satisfying standards and moves the law closer to a prescriptive model than minimalist one and its significance should not be underestimated.
- 5.126** The Regulation aims to allow electronic signatures to fulfil the requirements of identification, authentication and non-repudiation, but the technology does not permit this for all electronic signatures, only for those incorporating specific features. The legislative categories of advanced electronic signatures and advanced electronic signatures based on a qualified certificate are recognitions that there are different grades of electronic signature and different levels of reliability apply. The legislation carries into effect policies for facilitating confidence in what might otherwise be seen as a dubiously secure means of conducting transactions by attempting to ensure that admissible documentary evidence can be extracted from such transactions and communications for litigation purposes.

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See page 3, section 3.1 of the 2012 Proposal.

- 5.127** The 2000 Act operated a system of self-regulation and voluntary accreditation with the exception of the statutory scheme in place under the auspices of the Irish National Accreditation Board (INAB) since 2010 for Certified Service Providers.
- 5.128** The merits and difficulties of greater state intervention and the risk of a ‘race to the bottom’ in the rigour with which CAs verify the identity of the certified party as a result of competitive pressures are discussed in the Consultation Paper.¹²³ The eIDAS Regulation deals comprehensively with the supervision of certification and certification authorities. As discussed previously, the Regulation introduces detailed and broad-ranging standards both for advanced and qualified electronic signatures themselves and for the bodies which certify them, TSPs. Part III of the *Electronic Commerce Act 2000*, dealing with Certification Services, is therefore inconsistent with the new scheme of supervision of qualified TSPs, specifically the establishment of a dedicated statutory body to supervise and certify qualified TSPs. Additionally, the power of the Minister to make regulations pursuant to the Directive outlined in the Act is plainly inconsistent with the eIDAS Regulation.

F Conclusion and Recommendation

- 5.129** It stands to reason that as individuals and businesses grow more and more comfortable with electronic signatures and other instruments of electronic authentication, their uptake will only increase. Wider use will increase the importance of legal and commercial certainty. Ensuring such certainty requires that courts across the EU apply common standards in a consistent fashion so that the rights of parties to electronic transactions can be protected against fraud, abuse and human error.
- 5.130** The 2014 Regulation and indeed the 2000 Act, set out a functional and well-defined legal environment for electronic transactions. Electronic identification and electronic signatures as a technology are in their infancy and many aspects need to be worked out in conjunction with the needs of users and the market. However digital signatures like the eIDAS Regulation’s advanced and qualified electronic signatures have a vital role in authenticating electronic transactions and documents and thereby in promoting electronic commerce, particularly in European cross-border transactions, by providing safety and reliability in electronic transactions.
- 5.131** The Regulation only prescribes the legal effect of electronic signatures in so far as it requires that they not be denied legal effect solely on the basis of their electronic form and that qualified electronic signatures be given equal effect as a handwritten signature. Advanced electronic signatures, while

¹²³

At paras. 7.246-7.248.

extensively defined and subject to various standards, both in the Regulation and implementing legislation, do not have any defined legal effect.

- 5.132** The Commission considers that electronic signatures which meet the standards set down for advanced electronic signatures in Art. 26 should benefit from a presumption of attribution and be given the same legal effect of a handwritten signature. The Regulation only prescribes such equivalent treatment for qualified electronic signatures but the Commission takes the view that advanced electronic signatures have sufficient guarantees of reliability to be accepted in court on an equal footing with traditional, handwritten signatures.
- 5.133** It is important that the law should not prefer handwritten signatures over electronic signatures which benefit from these kinds of guarantees of reliability solely on the grounds that they are more familiar. While the great ease with which basic electronic signatures may be forged or misattributed militates against extending the benefit of the presumption of attribution to them, there is no such rationale for treating advanced electronic signatures any differently
- 5.134** Handwritten signatures arguably come with far fewer guarantees of reliability than advanced electronic signatures which, as has been discussed, must be uniquely linked to the signatory, must be capable of identifying the signatory, must be created using electronic signature creation data that the signatory can, with a high degree of confidence, use under his or her own control and must be created in such a way that any change is detectable.
- 5.135** The Regulation sets out certain minimum recognition Member States must give to electronic signatures and seals and it is fully open to Member States to more fully close the gap between traditional and electronic signatures. The Commission takes the view that guaranteeing both advanced electronic signatures and qualified electronic signatures legal equivalence with handwritten signatures is the best way to achieve this aim.
- 5.136** **The Commission recommends that that the draft Evidence Bill should provide that, in determining the authentication of digital signatures in criminal and civil proceedings, signatures that meet the requirements of an advanced electronic signature under Article 26 of Regulation (EU) No.910/2014 on Electronic Identification and Trust Services for Electronic Transactions (the eIDAS Regulation) should be given the same legal effect as handwritten signatures.**

CHAPTER 6

EXPERT EVIDENCE

A Introduction

6.01 Before analysing the current position of the law on expert evidence in this jurisdiction, this introduction will briefly set out the development of the role of the expert witness at common law and illustrate the benefits and shortcomings of the service they provide to the administration of justice. A fuller discussion of the history of the expert witness can be found in the Consultation Paper.¹

(1) *The development of expert evidence*

6.02 It stands to reason and is universally accepted that expertise and specialist knowledge can assist in effectively determining legal disputes. Since the Middle Ages the law has recognised and provided for such a role in various different ways. However the practice of calling skilled persons as witnesses is relatively new. Before the 15th century, the use of experts was largely confined to expert juries or special juries, reflecting the prevailing wisdom at the time that jurors should have personal knowledge of the events requiring their judgment and deliberation.² Expert juries included members of the trade or profession that was the subject of the dispute and hence deemed better placed to judge the issue at hand. This practice was commonplace at least as far back as the 14th century, with one author citing a great number of cases where such juries were impanelled to determine trade disputes in the city of London.³ The oldest case cited is from 1313 where the jury was asked to determine if fishing nets meshes were smaller than those required by the trade ordinance.⁴

6.03 Alternatively, a judge would summon an expert to assist them personally before giving direction to the jury. These were regarded, according to one source, as “expert assistants to the court” rather than as witnesses in any sense.⁵ In 1345, in a trial for mayhem⁶, the court called surgeons from

¹ Law Reform Commission, *Consultation Paper on Expert Evidence* CP 52-2008, Chapter 1.

² See Devlin, *Trial by Jury* (1956), Chapter 1.

³ Hand, ‘Historical and Practical Considerations Regarding Expert Testimony’ (1901) 15 *Harvard LR* 40.

⁴ *Ibid.*

⁵ Holdsworth, *A History of English Law* (1926) at 212.

⁶ Mayhem is an ancient common law offence which prohibits the intentional removal of another person’s limb or eye such that the person is unable to defend themselves in combat. According to Coke’s *Institutes of the Laws of England* (First published 1644) the punishment for mayhem was the loss of the limb that the assailant had deprived his victim of: “he that maimed any man, whereby he lost any part of his body, the delinquent should lose the like part...”

London to assist it in determining if the wound was fresh. In 1494, an English court called certain “masters of grammar” to assist them in construing a bond⁷ and again in 1555, a court called on grammarians to assist them in the correct interpretation of some particularly difficult Latin. That judgment also provides us with the earliest judicial pronouncement on the need for expert assistance:

“If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honourable and commendable thing in our law.”⁸

- 6.04** By the 17th century, oral evidence delivered by lay witnesses came to be the central feature of the criminal trial. Testimony came to be the main medium by which expert knowledge was imparted to the court. At the same time, the courts began to formalise the distinction between evidence of fact and evidence of opinion or inference. The rule is now commonly known as the Opinion Evidence rule.⁹ The rationale is to prevent the witness usurping the role of the finder of fact whose job is to make inferences and reach conclusions on the basis of facts placed before it. One of the earliest statements of this essential principle is found in *Bushell's Case*:

“The Verdict of a Jury and Evidence of a witness are very different things, in the truth and falsehood of them; a witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Juryman swears to what he can infer and conclude.”¹⁰

- 6.05** This development, in conjunction with the decline of the special jury, laid the foundations of the modern law of expert evidence. From the 18th century onwards, experts largely provided their expertise as witnesses in the trial and expert evidence was classified as an exception to the opinion rule which restricts ordinary witnesses to testifying only on matters of fact which they personally perceived. This rule of law was affirmed by Lord Mansfield in the case of *Folkes v Chadd*.¹¹ Lord Mansfield rejected outright the suggestion that the expert’s evidence should have been excluded because it was opinion and the jury’s verdict “was to be built entirely on facts, and not on opinions”.¹² Lord Mansfield affirmed that the opinion evidence rule would not operate to exclude expert evidence.

⁷ 1493, Y.B.9.H.VI.16, 8. Cited in *Buckley v Rice Thomas* and in Hand ‘Historical and Practical Considerations Regarding Expert Testimony’ (1901) 15 *Harvard LR* 40.

⁸ *Buckley v Rice Thomas* per Saunders J, quoted in Henry Thomas Riley’s *Memorials of London and London Life in the 13th, 14th and 15th Centuries* (1868) p. 107

⁹ The rule has been expressed in Irish case law as: “[W]ith certain exceptions, a witness may not express an opinion as to a fact in issue... It is for the tribunal of fact – judge or jury as the case may be – to draw inferences of fact, form opinions and come to conclusions.” *AG (Ruddy) v Kenny* (1960) 94 ILTR 185, 190.

¹⁰ *Bushell's Case* (1670) Vaug. 135 at 142, per Vaughan C.J.

¹¹ (1782) 3 Doug. 157.

¹² *Folkes v Chadd* (1782) 3 Douglas 157, 159.

“The question then depends on the evidence of those who understand such matters... I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received.”¹³

6.06 Thus, despite the centrality of expert testimony to the modern trial, the giving of expert evidence is considered an exception to the most basic rules of evidence.¹⁴

(2) *Emerging concerns in expert evidence*

6.07 No sooner had this mode of receiving expert evidence been established than serious concerns about the practice began to emerge.¹⁵ Reframing the provision of expertise to the court as a matter to be provided by witnesses allowed the parties directly to employ whomever might advance their respective cases. One commentator observes that “as the court assumed a neutral position, free rein was increasingly given in the courtroom to partisan views.”¹⁶

6.08 In the 19th century, the proliferation of expert witnesses testifying in a great number of different disciplines gave rise to increasing concerns among the judiciary as to the integrity and validity of such evidence. The issue of “expert shopping” quickly became apparent, a practice which is memorably described by Jessel LJ in a passage which rewards reading in full:

“A man may go, and does sometimes, to a half-a-dozen experts... He takes their honest opinions, he finds three in favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone: the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, they went to sixty-eight people before they found one.”¹⁷

6.09 The underlying unease felt by both judges and commentators was that the great sums paid to expert witnesses made objective and fair testimony impossible. Learned Hand, writing in 1901, observed the “natural bias of one called in such matters to represent a single side and liberally paid to defend it. Human nature is too weak for that.”¹⁸ In a case decided in 1889, a U.S judge

¹³ *Ibid* at 159.

¹⁴ Expert evidence is also usually admitted by way of exception to the rule against hearsay. This is discussed in detail in Chapter 7.

¹⁵ For greater discussion of concerns around expert testimony in the 19th century see Golan, ‘The History of Scientific Expert Testimony in the English Courtroom’ (1999) 12 *Science in Context* 7

¹⁶ Golan, ‘The History of Scientific Expert Testimony in the English Courtroom’ (1999) 12 *Science in Context* 7 at 10

¹⁷ *Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415

¹⁸ Hand, ‘Historical and Practical Considerations Regarding Expert Testimony’ (1901) 15 *Harvard LR* 40 at 53.

went further, announcing, “If there is any kind of testimony that is not only of no value, but even worse than that, it is... that of medical experts.”¹⁹ Biased expert evidence continues to this day to present serious challenges to the administration of justice.

- 6.10** In more recent times, concerns other than endemic bias have come to be recognised. These include the danger of “trial by expert” and the phenomenon of junk science.
- 6.11** The phrase “trial by expert” reflects a concern that jurors are ill-equipped to weigh the evidence on matter of great technical complexity and are liable to defer to whichever expert commands the most authority on the stand, a question which may not necessarily turn on the objective quality of his or her evidence.²⁰ This issue has long been adverted to, with Hand famously observing: “But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.”²¹
- 6.12** It has been suggested that in the absence of the wherewithal to assess expert evidence in a scientific way, juries are prone to preferring experts on the basis of their superior credentials or personal charisma.²² This may result in a battle of the experts, with a “trial by expert”. This concern is particularly evident where expert witnesses hold forth on an extended range of issues before the court, which may not require any expert judgment, but are led as such in order to lend to the conclusions the imprimatur of expert opinion. These concerns have motivated a number of exclusionary rules in the law of expert evidence, most prominently the common knowledge and ultimate issue rules, which are discussed in Chapter 7.
- 6.13** Relatedly, in recent years much controversy and debate has surrounded the perceived proliferation of so-called “junk-science”. The last half-century has seen an exponential growth in new science and technology, the pace of which has far out-stripped the ability of ordinary citizens, judges included, to stay fully informed. The courts can struggle to identify sound and reliable scientific evidence from the speculative and unreliable. This has been a

¹⁹ Cited in Murrie and Boccaccini, ‘Adversarial Allegiance among Expert Witnesses’ (2015) *Annual Review of Law and Social Science* 37 at 38

²⁰ Research has suggested that gender plays a significant role in how jurors weigh expert evidence. Jurors are especially likely to prefer the evidence of an expert where the content of that evidence matches a pre-established gender role i.e. a man’s expert’s evidence will often be preferred against a woman where the evidence concerns, say, a commercial price-fixing agreement in the context of a business engaged in rock crushing. See Freckleton & Ors, *Expert Evidence and Criminal Jury Trials* (Oxford, 2016) p. 99

²¹ Hand, ‘Historical and Practical Considerations Regarding Expert Testimony’ (1901) 15 *Harvard LR* 40, 54.

²² See Heffernan with Ni Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014), p. 273 and Sanders, ‘The Merits of Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence’ (2003) 33 *Seton Hall Law Review* 881, 930-931.

contributing factor to recent miscarriages of justice, most notably *R v Clark*.²³ The defendant was convicted of the murder, allegedly by shaking them, of her two sons on the basis of statistical speculation based on unpublished data on the part of the expert paediatrician as to the probability of two cot-deaths in a single family. Professor Roy Meadows gave evidence that the chance of two cases of Sudden Infant Death Syndrome in one family as 1 in 73 million, or the equivalent of backing the winning horse at the Grand National four years in a row,²⁴ a calculation which was subsequently condemned by the Royal Statistical Society.²⁵

- 6.14** Professor Meadows gave evidence that the deaths were in all likelihood a result of “shaken baby syndrome.” Shaken baby syndrome (SBS), or Non-Accidental Head Injury, is the theory that a triad of symptoms, namely subdural hematoma, retinal bleeding and brain-swelling may be used to strongly infer abusive shaking of an infant. While the theory is well established, the accuracy of SBS in identifying abusive shaking has been challenged and is a matter of continuing controversy.²⁶
- 6.15** The conviction in *R v Clark* was shown to be based on highly speculative and unreliable statistical evidence and was ultimately overturned, but the terrible injustice done to her continues to cast a shadow over the law of expert evidence in England. The issue of junk science and reliability is discussed in Chapter 7.
- 6.16** The forgoing history of expert evidence indicates the kind of difficulties inherent in this form of evidence and endeavours to provide the context to the Commission’s discussion of the various avenues of reform.

(3) *Basic rules of admissibility for expert evidence*

- 6.17** An Irish court will admit expert evidence only if it meets two conditions. First, the expert evidence must be both relevant (the evidence must have probative value) and necessary (the particular issue to which the expert evidence relates must be outside the knowledge of the court). Second, the court must be satisfied that the person has sufficient expertise to give evidence on the particular issue. This does not necessarily mean that the expert must have a formal qualification or be certified by a professional body; it is sometimes

²³ *R v Clark* [2003] EWCA Crim 1020.

²⁴ *Ibid.*

²⁵ Royal Statistical Society, Letter from the President to the Lord Chancellor regarding the use of statistical evidence in court cases, January 23rd 2002 available at <http://www.rss.org.uk/Images/PDF/influencing-change/rss-use-statistical-evidence-court-cases-2002.pdf>.

²⁶ A leading expert in the field of paediatric neuropathology was recently struck off in the UK for denying the existence of SDS, a decision which has provoked huge controversy. See <https://www.theguardian.com/uk-news/2016/mar/21/doctor-waney-squier-denies-shaken-baby-syndrome-struck-off-misleading-courts>. She has since been reinstated to the register after the High Court ruled that her evidence, while biased, was not dishonest or deliberately misleading. See *Squier v General Medical Council* [2016] EWHC 2739 (Admin).

enough to have practical experience or amateur expertise. The parameters of this are discussed further in Part C of this Chapter.

- 6.18** Admissibility is also subject to compliance with the common knowledge and ultimate issue rules which are discussed in Chapter 7.

B The Expert

(1) *The definition of an expert*

- 6.19** Expert evidence may be given in respect of an ever increasing number of topics²⁷ and once the adducing party has satisfied the judge that expert evidence is both necessary and relevant, the judge must determine whether the proposed witness can properly be considered an expert in the relevant subject. Any proposed reform of the law relating to expert evidence should provide a workable definition of an “expert”. This mirrors the approach proposed in the Consultation Paper.²⁸
- 6.20** In the consultation paper, the Commission provisionally recommended the adoption of a definition of the term “expert” for the purposes of giving expert testimony and invited submissions on the form of wording that would be appropriate for such a definition.
- 6.21** Submissions were broadly supportive of defining ‘expert’ in legislation with professional expert witnesses expressing the view that such a move would bring clarity and certainty to their role. Some however cautioned against a prescriptive definition that may serve to exclude some witnesses. Under the proposed definition of an ‘expert witness’, it would not be mandatory for a person to hold formal qualifications. This follows the existing law; expert knowledge acquired through experience, independent study or even a hobby may be considered sufficient.²⁹ This would allow the practice of admitting evidence from “ad hoc” or “connoisseur” experts to continue.³⁰
- 6.22** The question of the length of time the witness has spent studying or practising in the particular area as well as, in the case of retired persons and others no longer practising, the length of time they have spent away from the field is a matter for the court to consider when weighing the evidence.

²⁷ In *The People (DPP) v Fox* (Special Criminal Court, 23 January 2002), a Garda Commissioner was considered an expert in drug-trafficking.

²⁸ Provisional recommendation 7.13.

²⁹ *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185 at 190.

³⁰ See, for more discussion of these concepts, paragraphs 3.34-3.47 of the *Consultation Paper on Expert Evidence*.

(a) Current position in Ireland

(i) Case law

6.23 It is difficult to define “expert” in narrow and conclusive terms but some matters such as “art, science, medicine, engineering and so forth”³¹ which require special study and experience before one may form an opinion are regularly cited as standard examples of subjects on which an expert opinion may be offered.

6.24 Irish courts have adopted a broad and flexible approach to what constitutes an expert. In *McFadden v Murdock* the court allowed a shopkeeper to give evidence on how much wastage was reasonable in a grocery business. Pigot CB referred to expert witnesses as “persons of peculiar skills and knowledge on the particular subject” whose testimony is admissible to “enable the jury to come to the correct conclusion.”³²

6.25 The witness must be qualified, in the opinion of the judge, in the subject calling for his or her specialist knowledge.³³ In *The People (DPP) v Fox* the Special Criminal Court defined an expert as a person so well qualified in a field that his opinion and beliefs on matters falling within that field are admissible as evidence for the purpose of supplying information which is “outside of the range and knowledge of the Court”.³⁴ And in *Galvin v Murray* Murphy J defined an expert as, “a person whose qualifications or expertise give an added authority to opinions or statements given or made by him within his area of expertise.”³⁵

(ii) Statutory definition of an expert

6.26 Section 34 of the *Criminal Procedure Act 2010* provides the first statutory definition in Ireland of an expert, defining expert evidence as “evidence of fact or opinion given by an expert witness” and an “expert witness” as:

“a person who appears to the court to possess the appropriate qualifications or experience about the matter to which the witness’s evidence relates”.

6.27 Prior to the 2010 Act some guidance could be found in the *Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998*. The RSC, as amended, apply to a wide range of expert reports and list a number of categories of professionals whose reports may be admitted as expert evidence.³⁶ The 1998 Rules also apply to reports from “any other expert

³¹ *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185, 186.
³² (1867) Exchequer IR 1 CL 211, 217.

³³ Though this need not be a formal qualification, as discussed below. It is sometimes enough to have practical experience or amateur expertise. See paragraphs 3.34-3.47 of the Consultation Paper.
³⁴ Unreported, Special Criminal Court, 23 January 2002. See LRC CP 52-2008 para. 3.12.

³⁵ Murphy J. in *Galvin v Murray* [2000] IESC 78 at [85].

³⁶ The 1998 Rules list the following professions: accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists and scientists but add a general “any other expert whatsoever” category.

whatsoever”: the class of “expert” is therefore not closed by the enumerated list and the residual category leaves room for judicial discretion to admit reports from unenumerated classes of person.

6.28 There is also legislative guidance on the concept of an expert in the *Criminal Justice (Amendment) Act 2009* and the *Safety, Health and Welfare at Work Act 2005*. Evidence of a current or former member of the Garda Síochána who appears to the court to “possess the appropriate expertise” to give evidence on the existence or composition of a criminal organisation may give his or her opinion as admissible expert evidence.³⁷ Expertise means “experience, special knowledge or qualifications.”³⁸ The *Safety, Health and Welfare at Work Act 2005* defines “competent person” as a person who has “sufficient training, experience and knowledge appropriate to the nature of the work to be undertaken.”³⁹ An interpreter of the statute must take account of the framework of qualifications in the *Qualifications and Quality Assurance (Education and Training) Act 2012* in applying the above definition.⁴⁰ The 2005 Act emphasises both skills and knowledge.

(b) *The Approach in other Jurisdictions*

(i) England

(I) Case law

6.29 English courts have adopted an approach largely similar to that of their Irish counterparts. They have resisted a formal definition of an expert, allowing the trial judge to determine whether a witness is an expert. In *R v Silverlock*⁴¹ Vaughan-Williams J held that:

“No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people.”⁴²

(II) Statutory definition of expert

6.30 The definition of expert is similar in civil and criminal proceedings in England and Wales. The Civil Procedure Rules (CPR) and Criminal Procedure Rules (CrPR) set down the relevant definitions. CPR 35.2 defines an expert as a person “who has been instructed to give or prepare evidence for the purpose of court proceedings” and CrPR 33.1⁴³ states that any reference to an expert in that Part “is a reference to a person who is required to give or prepare

³⁷ Section 7 of the 2009 Act.

³⁸ Section 71B(2) of the *Criminal Justice Act 2006* as inserted by the *Criminal Justice (Amendment) Act 2009*.

³⁹ Section 2(2)(a) of the 2005 Act. The definition is task-dependent. One may be a “competent person” in respect of one task and not in respect of another.

⁴⁰ Section 2(2) of the 2005 Act

⁴¹ [1894] 2 QB 766.

⁴² [1894] 2 QB 766, 768.

⁴³ Part 33, Rule 1 of the *Criminal Procedure Rules 2014*.

expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.”

(ii) Australia

6.31 In the Consultation Paper the Commission discussed the Australian approach to expert evidence.⁴⁴ It is broadly similar to the Irish common law approach in that the role of the expert witness is to shed light on areas that would not otherwise be adequately appreciated or understood by the finder of fact.⁴⁵

6.32 The legislatures in the various Australian jurisdictions have all adopted their own definitions of an “expert” and an “expert witness”. Most involve minor variations on a general definition to the effect that an expert witness is someone who is competent and qualified, based on their specialist knowledge, to give an opinion to the court. The definitions also emphasise the independence of an expert who is instructed to give or prepare independent evidence for the purpose of a case.⁴⁶

6.33 For example, the New South Wales *Civil Procedure Rules 2005* draw a distinction between an “expert” and an “expert witness.” An expert is defined as a “person who has such knowledge or experience of, or in connection with, that issue, or issues of the character of that issue, that his or her opinion on that issue would be admissible in evidence.” An expert witness is defined separately as “an expert engaged or appointed for the purpose of: (a) providing an expert’s report for use as evidence in proceedings or proposed proceedings, or (b) giving opinion evidence in proceedings or proposed proceedings.”⁴⁷

(c) *Submissions and Recommendations*

6.34 The Commission received a number of submissions on the form of wording that would be appropriate for the definition of an expert. The submissions received were broadly supportive of defining “expert” in legislation. One submission recommended that an expert be defined as “an independent specialist with a duty to give an impartial opinion on particular aspects of matters in dispute”. Another submission recommended that the definition of “expert” should be of a standard higher than, for instance, the “competent person” in the *Safety, Health and Welfare at Work Act 2005*, discussed above.

6.35 Some submissions cautioned against a prescriptive definition that might unnecessarily exclude some persons. One submission warned that formally defining an expert could prove restrictive as “there are circumstances

⁴⁴ At paras. 3.16-3.25.

⁴⁵ Freckelton, Reddy & Selby “Australian Judicial Perspectives on Expert Evidence; an Empirical Study” (*Australian Institute of Judicial Administration*, 1999) at p. 15.

⁴⁶ Two such examples are the Federal Court Rules – Statutory Rules 1979 (No 140) as amended made under the *Federal Court of Australia Act 1976* Order 34A rule 2 and the Family Law Rules 2004 (Cth) rule 15.43. For further discussion of the definition of an “expert” in the various territories see the Consultation Paper (LRC CP 52-2008) paras 3.16-3.25.

⁴⁷ Uniform Civil Procedure Rules 2005 (NSW) rule 31.18.

whereby professional judgments are exercised based on a depth and breadth of experience of knowledge which would satisfy a court of law towards accepting that evidence as expert.” Another submission agreed with the proposal to include a definition of expert in any proposed legislative framework and favoured a broad definition encompassing any person who could be of assistance to the court, and not limited by a list of categories. The view was also expressed that a prescriptive definition might not cover all experts employed by the Gardaí (for example, ballistics and fingerprint experts).

- 6.36** In order to address these concerns, any definition would have to be extremely broad. However, as argued at a Round Table which was convened on the topic, there is a danger that in order to fashion such a broad definition, it might turn out to be tautological and ultimately unhelpful i.e. “an expert is someone who has expertise.”
- 6.37** Arguably, the purpose of expert evidence is to fill a gap in the knowledge of the finder of fact such that a full and fair determination may be made. Accordingly, a definition ought not to prescribe more than that which would be “helpful to the court”. The UK Supreme Court has moved towards this minimal approach in *Kennedy v Cordia*.⁴⁸ In setting out the conditions for the admissibility of expert evidence, the Court asked simply “whether the proposed skilled [expert] evidence will assist the court in its task...[and] the witness has the necessary knowledge and experience.” This has the benefit of giving the court itself the flexibility to determine on a purely pragmatic basis what will assist it in making any given decision.
- 6.38** Naturally, what this approach gains in flexibility, it loses in clarity and certainty, a key concern for many of the professional expert witnesses with whom the Commission has consulted. While the court may benefit from such an expanded discretion, experts, and particularly those considering giving evidence for the first time, will find it difficult to know exactly what the role entails and whether they meet the appropriate standard.
- 6.39** In favour of a more prescriptive definition, it was suggested to the Commission that defining an expert witness by reference to some normative criteria, such as independence, would do much to tackle the culture of bias and unaccountability. The point was made that unless we want to use a statutory definition as a means of setting better standards, a statutory restatement of the common law position is not of much value.
- 6.40** On this analysis, there are four options open to the Commission. The first option is to refrain from recommending a statutory definition and allow the courts maximum discretion in deciding who may be considered an expert witness. The second option is to recommend an extremely broad definition,

⁴⁸

[2016] UKSC 6.

similar to that preferred by the UK Supreme Court in *Kennedy v Cordia*, which turns on what will “assist the court”. The third option is a more detailed definition which seeks to balance the need for certainty as to what the role entails and the danger of excluding valuable evidence. This definition would form a composite of existing statutory and judicial formulations in Irish law. The fourth option is to move a step beyond the common law and introduce a detailed definition which also includes normative and/or qualitative criteria such as independence. The Commission has come to the conclusion that the fourth option listed above is the appropriate one. To be useful, a definition must provide a clear statement of the role the expert witness is expected to perform. This includes the requirement that expert testimony should be independent and unbiased.

(d) Recommendation

6.41 The Commission recommends that the draft Evidence Bill provide that an “expert” is a person who appears to the court to possess the appropriate qualifications, skills or experience about the matter to which the person’s evidence relates (whether the evidence is of fact or of opinion), and who may be called upon by the court to give independent and unbiased testimony on a matter outside the knowledge and experience of the court, and that the terms “expert evidence” and “expertise” should be interpreted accordingly.

(2) Necessary experience and qualifications

(a) The existing law in Ireland

6.42 Under the proposed definition of an expert, it would not be mandatory for a person to hold formal qualifications. This follows the existing law; expert knowledge acquired through experience, independent study or even a hobby may be considered sufficient.⁴⁹ This would allow the practice of admitting evidence from “ad hoc” or “connoisseur” experts to continue.⁵⁰ For example, a Garda Commissioner was considered suitably qualified to give expert evidence on drug trafficking as he was:

“...a person with considerable experience in the field...and, in light of that experience, was in the view of the court a person with a wealth of knowledge on all aspects of [that field.]”⁵¹

6.43 The value of expert evidence will depend on “the authority, experience and qualifications of the expert.”⁵² This suggests that formal qualifications are

⁴⁹ *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185 at 190.
⁵⁰ See, for more discussion of these concepts, paras. 3.34-3.47 of the Consultation Paper.
⁵¹ *The People (DPP) v Gilligan*, Court of Criminal Appeal, 15 March 2001, discussed at paragraphs 3.32-3.33 of the Consultation Paper.

not necessarily required but the expertise must be quantifiable. Courts are concerned with the extent of the expertise rather than the manner in which this expertise was acquired.⁵³

6.44 The Consultation Paper discussed the prerequisite that experts stay abreast of current developments (in order to offer up-to-date expertise) and display a willingness to absorb new ideas and analytical methods⁵⁴ (as there is a danger that a career expert may fall out of touch with the relevant discipline or branch of knowledge). The Commission considered requiring that only persons involved academically or professionally with the subject matter at the time of being called as an expert witness could be considered an expert witness. Such a requirement could be considered too onerous and could have the effect of excluding a large number of otherwise qualified experts.

6.45 The party calling the expert bears the burden of proving the expert's qualifications and credentials by way of preliminary questions during examination-in-chief.⁵⁵ Given the small size of the jurisdiction, there is a limited pool of experts available in some disciplines in Ireland, meaning that the expertise of the witness is not often challenged (because cross-examining counsel will often be familiar with the witness and will not need to establish the expert's credentials). Unless it is rebutted, the judge will accept the witness's testimony on his qualifications or experience and will not require primary evidence of this.⁵⁶ Where the evidence is challenged it is generally in terms of weight, not admissibility.⁵⁷

(b) *The approach in other jurisdictions*

(i) England and Wales

6.46 In *R v Silverlock*⁵⁸ a solicitor was allowed give his opinion on a handwriting comparison based on knowledge acquired through independent study as a hobby. Whether he was expert, skilled and possessed adequate knowledge did not simply turn on his educational or professional qualifications. It was not for the court to indicate that he need have become an expert in "the way

⁵² *The People (DPP) v Fox* Special Criminal Court (23 January 2002).

⁵³ See LRC CP 52-2008 paragraphs 3.34 ff. It does not matter whether the expertise stems from practical experience, formal study or a mixture of the two. What matters is that the person can prove that they have acquired sufficient knowledge to give them an expertise not possessed by the ordinary person that will be of practical benefit to the court in reaching a decision.

⁵⁴ LRC CP 52-2008 see paragraph 3.52-3.57.

⁵⁵ Healy, *Irish Laws of Evidence* (2004 Thomson Roundhall) at p. 361.

⁵⁶ *Martin v Quinn* [1980] IR 244; *Minister for Agriculture v Concannon*, High Court, 14 April 1980; *DPP v O'Donoghue* [1991] 1 IR 448. Cited in McGrath, *Evidence* (2nd ed. Roundhall 2014) at p. 402.

⁵⁷ See the comments of Hardiman J in *JF v DPP* [2005] IESC 24, quoted at para. 3.123 of the Consultation Paper.

⁵⁸ [1894] 2 QB 766.

of his business or in any definite way.”⁵⁹ Nonetheless, it may be more difficult to prove that a witness is an expert if he or she lacks formal qualifications.

- 6.47** For expert evidence to be admitted the witness must be an expert in the relevant field and he or she must also have expert knowledge or considerable experience of the particular issue which is the subject matter of the case. While a person may investigate accidents in his or her professional capacity, this does not necessarily qualify the person to offer expert evidence as to why a given accident has occurred. This makes expert status a subjective concept and, although personal and professional qualification and experience are useful benchmarks, the length of experience “needs to be qualified by the professional and geographical areas in which it has been gained.”⁶⁰

(ii) Australia

- 6.48** In *Clark v Ryan*⁶¹ the High Court of Australia held that where a person seeks to act as an expert witness based on practical experience alone their testimony must be limited to matters of which they have actual experience;⁶² they must abstain from attempting to give a scientific or technical explanation.

(c) ***Submissions and recommendations***

- 6.49** The Commission invited submissions on whether knowledge based on experience alone should suffice for a witness to be entitled to give expert evidence or whether formal professional qualifications, study or training should be necessary.⁶³ One submission suggested that in certain circumstances accreditation would be a necessary element in establishing expertise and that, in any event, the courts would be the ultimate arbiters where the term expert is not defined in legislation.
- 6.50** Another submission suggested that where a person lacks demonstrable qualifications, for instance because the science in question is new, he or she should be required to demonstrate a much higher level of experience or qualification and to show why he or she lacks the formal credentials normally required, prior to offering expert witness testimony. The submission also suggested that an expert should be in practice at the time of the event on which he or she is offering an opinion, with the qualifier that ‘recently’ retired persons should not be prevented from giving evidence and that the interpretation of ‘recently’ might vary depending on the field of practice of the

⁵⁹ [1894] 2 QB 766, 771.

⁶⁰ LRC CP 52-2008 paragraph 3.51, Heald LJ.

⁶¹ *Clark v Ryan* (1960) 103 CLR 486.

⁶² The court ruled that the expert evidence in question was inadmissible as the ‘expert’ did not have practical experience of the actual machinery involved.

⁶³ LRC CP 52-2008 para. 3.59, provisional recommendation 7.14 and provisional recommendation 7.12.

expert. The Commission is of the view that this is a factor which ought to be taken into account by the court, but it should not result in the automatic exclusion of such evidence.

- 6.51** One submission took the view that an assessment of competence should take into account the time that the person spent studying the area and the time that they have been away from the area (if they have retired), but the assessment should accord equal importance to other matters, in particular relevant experience. Another submitted that experience-based knowledge should be acceptable and that the length of time spent away from the particular field was a relevant consideration. They proposed that two provisional recommendations made in the Consultation Paper⁶⁴ be combined so that an expert witness need not be actively involved in the field of expertise at the time of the giving of expert evidence, but that the length of time spent away from the relevant field be considered in tandem with the length of time spent studying or practising in the particular area.
- 6.52** One submission urged that an expert should have a minimum of 10 years' practice within the relevant field before being eligible to act as an expert witness. Such a requirement is unnecessary. Length of practice is a factor that the court may take into account when assessing the credentials of the proposed expert. It is in any case likely that such a requirement would prove unworkable in practice.
- 6.53** There may nevertheless be some profession-specific issues which require an expert witness to have attained a level of expertise within that specialisation. When it comes to certain technical questions a court might demand an expert drawn from a very specific pool and might not consider an expert in a comparable or corresponding discipline to have sufficient authority. In 2004, for example, the Illinois Supreme Court held that a doctor was not a suitably qualified expert witness to testify on the nursing profession:⁶⁵ only a member of the particular profession could adequately provide expert evidence on an issue relating to that field. This approach has not been advocated in Ireland. In the Commission's view it is more appropriate to retain the current discretionary test.
- 6.54** The Commission considers that it would be inappropriate for expertise to be determined on the basis of professional qualifications alone; it is more appropriate to allow for expertise acquired through, for instance, independent study or leisure.⁶⁶ This accords with the view expressed in *Phipson on Evidence* that:

"though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge

⁶⁴ LRC CP 52-2008 paras. 3.60 and 3.61.

⁶⁵ *O'Sullivan v Edward Hospital*, 806 NE 2d 645 [Ill 2004].

⁶⁶ See *R v Silverlock* [1894] 2 Q.B. 766 for example.

professionally goes merely to weight and not to admissibility... Equally one can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work notwithstanding that the expertise is derived from experience and not from formal training. Police officers habitually give evidence relating to matters about which they have acquired in-depth knowledge in the course of their duties, such as the value of prohibited drugs and the paraphernalia associated with using it or with dealing with drugs."⁶⁷

- 6.55 The Commission recommends that the draft Evidence Bill should provide that expertise based on experience should be considered sufficient to qualify a witness as an expert and as suitable to offer testimony on any matter of benefit to the court, regardless of how such a person has acquired this knowledge, be it through formal training or incidental study, provided that the evidence is reliable and testable.**
- 6.56 The Commission recommends that the draft Evidence Bill should provide that, when assessing the issue as to whether a witness is to be considered an expert, account is to be taken of the length of time the witness has spent studying or practising in the particular area as well as, in the case of a retired person or any person no longer studying or practising in that area, the length of time he or she has spent away from the particular area.**

C The Scope of Expert Evidence

- 6.57** The scope of expert evidence may not go beyond what is required by the trier of fact. For example, in the English Court of Appeal decision in *Hawkes v London Borough of Southwark*⁶⁸ Aldous LJ rejected the evidence of the plaintiff's expert witness because it was not necessary to have the witness's expertise to understand the issue. Similarly, Irish courts have refused to admit expert evidence where the finder of fact could readily understand the matter in the absence of such evidence.⁶⁹

⁶⁷ *Phillips on Evidence* (London, Sweet and Maxwell, 18th ed. 2013) at [33-62].
⁶⁸ [1998] EWCA Civ 310 (20 February 1998).
⁶⁹ See *The People (DPP) v Kehoe* [1992] ILRM 481.

(1) Within the field of expertise

6.58 The expert must confine his or her evidence to an opinion on issues that are within the ambit of his or her area of expertise.⁷⁰ The expert witness cannot express an opinion on the merits or any legal or technical issues raised in the case, just as he or she may not express an opinion on a matter that is within the common knowledge of the court. If the expert witness is not aware of the exact limits of admissible testimony their evidence might contain elements that are impermissible. The danger is that a jury would give weight to the expert's views on these matters and this may effectively lead to the expert trying the issues.

(a) Ireland

6.59 In *The People (DPP) v Yusuf Ali Abdi*,⁷¹ the defendant argued that the trial court had erred in permitting a psychiatrist to give opinion evidence about his motive in killing his son as this was outside the permitted scope of expert evidence. Hardiman J, on behalf of the Court of Criminal Appeal, held that material was correctly admitted and said:

"The role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision. Where there is a conflict of expert evidence it is to be resolved by the jury or by the judge, if sitting without a jury, having regard to the onus of proof and the standard of proof applicable in the particular circumstances. Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact."

6.60 This shows a readiness on behalf of the courts to ensure that the confines of expert evidence are firmly observed. The majority of the objectionable evidence is however excluded as a result of the common knowledge or ultimate issue rules, and these two rules operating together have the effect of excluding all evidence likely to result in the finder of fact's role being usurped.

(b) England

6.61 In *R v Barnes*⁷² the English Court of Appeal refused to hear evidence from a wood grain expert because it was irrelevant; he had no expertise in the interpretation or identification of wood-grain on "lifts" (copies of fingerprints made using aluminium powder and acetate tape).

6.62 In *LP v Secretary of State for the Home Department*⁷³ the UK Asylum and Immigration Tribunal acknowledged that it should "be very slow to accept opinion evidence from a person who cannot demonstrate a sufficient

⁷⁰ One of the duties of expert witnesses identified by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, discussed in detail in Chapter 8, is to clearly state when a particular issue falls outside his area of expertise.

⁷¹ [2004] IECCA 47. Discussed in the Consultation Paper at paras. 2.115-2.118.

⁷² [2005] EWCA Crim 1158, discussed in the Consultation Paper at paras. 2.113-2.114.

⁷³ [2007] UKAIT 00076 (08 August 2007).

expertise in the subject on which they are called to give evidence”⁷⁴ thus indicating that even at a Tribunal (where the rules of evidence do not necessarily apply as strictly as in the civil courts),⁷⁵ the ability to demonstrate sufficient skill and expertise remains very important.

(2) *Distinguishing between expert and non-expert testimony of fact*

6.63 An expert is called to give evidence of fact of which he or she is knowledgeable as a result of experience or study in the relevant field of expertise, while the non-expert is called to give evidence of facts which he or she has actually perceived. *Webb v Page*⁷⁶ illustrates this distinction between a person who perceives a fact and is called to prove it and one selected by a party to give an opinion on a matter “with which he is peculiarly conversant from the nature of his employment in life.”⁷⁷ The non-expert is bound as a matter of public duty to speak only to the facts while the expert is under no such duty.

6.64 The distinction between what is common and colloquial knowledge and what is specialised and expert evidence is often unclear. In *The People (DPP) v Buckley*⁷⁸ Charleton J held that “the qualities of cannabis are not now so unusual as to put it in a different category so that expert evidence of its presence is always required”⁷⁹ and the defendant’s admission that what he had in his possession was cannabis was therefore admissible.⁸⁰

6.65 In the Consultation Paper the Commission explored the differences between expert witnesses and lay non-expert witnesses in the recoverability of costs, compellability and weight.⁸¹ It is sometimes difficult to identify whether a witness is offering evidence of fact or expert opinion evidence. It appears that the courts are willing to admit such evidence as evidence of fact, given that it remains the task of the trier of fact to decide on the value to attach to such evidence. The Commission recommends in this report that expert witnesses should be required to distinguish clearly between matters of fact and matters of opinion when giving their evidence both orally and in the expert report.⁸²

⁷⁴ [2007] UKAIT 00076 (08 August 2007) at [36].

⁷⁵ [2007] UKAIT 00076 (08 August 2007) at [21], [36]. Whether or not a statutory tribunal is governed by the same rules of evidence as apply in court depends on the statutory (or SI) provisions governing that tribunal. See Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at 497, describing the position in England.

⁷⁶ (1843) 1 Car & Kir 23, 174 ER 695 discussed in the Consultation Paper at paragraph 2.245.

⁷⁷ (1843) 1 Car & Kir 23, 174 ER 695.

⁷⁸ [2007] IEHC 150, discussed in the Consultation Paper at paragraphs 2.246-2.247. Charleton J relied on the English decisions *R v Chatwood* [1980] 1 WLR 874, [1980] 1 All ER 467, 70 Cr App Rep 39 and *Bird v Adams* [1972] Crim LR 174. These are discussed at paragraphs 2.248-2.249 of the Consultation Paper.

⁷⁹ [2007] IEHC 150 at paragraph [16].

⁸⁰ Charleton J, *The People (DPP) v Buckley* [2007] IEHC 150 at para. [16].

⁸¹ LRC CP 52 – 2008, paragraph 2.244.

⁸² See Chapter 8. See also Consultation Paper Provisional recommendation 7.06.

- 6.66** This is an important requirement. Fennell observes that “the more apparently probative, conclusive and objective the expert’s opinion, the greater its potency and ability to sway the issues at trial.”⁸³ It is therefore important to ensure that the finder of fact understands the exact nature of the expert’s evidence. A finder of fact who incorrectly believes that an expert is stating a fact when he or she is actually proffering an opinion may give greater weight to what the expert says than he or she would have done if he or she had been aware of the true nature of the testimony.
- 6.67** The danger of this was highlighted in September 2014 when the UK Home Office admitted that a number of serious convictions may be at risk following the decision of the Court of Appeal in *R v Atkins*⁸⁴ which opened the path to admission of what has subsequently been termed “evaluative opinion” evidence of expert witnesses based on their professional expertise. Professor Peter Gill, a leading forensic scientist, drew the issue to the attention of the Home Office and has noted that,
- “Courts may be unable to tell the difference between “expert opinion” and “scientific evidence.”... However, it is clear that some forensic evidence provided to courts is better described as “speculation” rather than science... [T]he default position seems to follow that provided the person is recognised as an expert, then everything he/she states must be “scientific evidence.” However... this premise is incorrect.”⁸⁵
- 6.68** One of the Commission’s consultees agreed with the view in the Consultation Paper that experts should be encouraged to distinguish between matters of fact and opinion in their testimony, be that orally or in their written reports, and another agreed that such testimony should be based on relevant knowledge and experience being applied appropriately in the particular circumstances of the case. One consultee also suggested that once the distinction is brought to an expert’s attention, it becomes standard in his or her working practice.

D The Weight to be Attached to Expert Evidence

- 6.69** The Consultation Paper considered the weight to be given to the evidence of both lay and expert witnesses and the means to determine this weight. The general approach of the courts is to hold that reliability of expert evidence goes to weight rather than to admissibility. Consequently, expert evidence is more readily admitted.⁸⁶

⁸³ Fennell “Beyond Reasonable Doubt: DNA Fingerprinting on Trial?” (1990) 8 *ILT* 227 [2009] EWCA Crim 1876.

⁸⁴ Gill, *Misleading DNA Evidence - Reasons for Miscarriages of Justice* (Elsevier, 2014), paragraph 1.4.1.

⁸⁶ LRC CP 52-2008 para. 2.262.

6.70 It is for the finder of fact to accept or reject the expert evidence. Expert evidence is of persuasive effect and does not bind the finder of fact. This is also the law in Scotland. The Court of Session in *Davie v Edinburgh Magistrates*⁸⁷ held that it was not bound to accept the uncontested evidence of an expert witness.⁸⁸ It added that the value and weight to be attached to expert evidence depends upon:

“the authority, experience and qualifications of the expert and above all upon the extent to which his evidence carries conviction and not upon the possibility of producing a second person to echo the sentiments of the first expert witness.”⁸⁹

6.71 In determining the weight to be attached to expert evidence, the High Court (Davitt P) in *Attorney General (Ruddy) v Kenny*⁹⁰ stated that:

“It will depend upon the nature of the evidence, the impartiality of the witness and his freedom from bias, the facts on which he bases his opinion, and all the other relevant circumstances.”

6.72 Despite these considerations, there are concerns that greater deference may well be given to the opinion of an expert whose testimony is eloquent and impressive but not necessarily reliable. This is particularly so when the task of determining weight belongs to a lay jury, or tribunal with little legal training, regardless of warnings given by a judge in summing-up to prevent this.⁹¹

6.73 In *R v Henderson, R v Butler and R v Oyediran*,⁹² the English Court of Appeal held that deciding whether or not to admit expert evidence is “as difficult as it is important.”⁹³ The Consultation Paper highlighted this difficulty: in a 1999 survey of Australian judicial perspectives on expert testimony 70% of judges surveyed conceded that there had been occasions when they had felt that they had not understood expert evidence.⁹⁴ There is a danger that there may be error in assessing the value of evidence admitted for the sole reason that it is considered outside of the scope of knowledge of the judge or jury.

⁸⁷ (1953) SLT 54.

⁸⁸ (1953) SLT 54, 57. This is discussed in the Consultation Paper at paragraphs 2.264, 2.272 and 2.288. These comments have been cited with approval in a number of Irish cases, for example *L(P) v DPP* [2002] IEHC 25 (16 April 2002); *The People (DPP) v Murphy* [2005] IECCA 52 (5 May 2005).

⁸⁹ (1960) 94 ILTR 185.

⁹⁰ Ward, *Usurping the Role of the Jury? Expert evidence and witness credibility in English criminal trials*, *E. & P.* 2009, 13(2), 83-101 considers that this may be the case, especially where the evidence is related to a field of which the jury are likely to have limited knowledge:

“All kinds of expert evidence give rise to a risk of unjustified deference. Where, however, the evidence is of such a technical nature that the jury would have no way of independently deciding the question the expert addresses (for example, the probability of two DNA samples coming from the same source), the jury cannot be accused of

[2010] EWCA Crim 1269 [206]; [2010] All ER (D) 125 (Jun), [2010] EWCA Crim 2431.

⁹¹ *Ibid* at para. 8.

⁹² Freckelton, Reddy & Selby *Australian Judicial Perspectives on Expert Evidence; an Empirical Study* (Australian Institute of Judicial Administration, 1999) at Question 3.7. See LRC CP 52-2008 para. 2.274.

(1) *Usurpation of the role of judge or jury*

6.74 Kenny suggests that there are three ways in which experts may usurp the role of the judge or jury. They may usurp the function of the jury by giving a conclusion on the ultimate issue in the case rather than providing information to enable the jury to reach a more informed conclusion. They may usurp the role of the judge, by tacitly imposing on the jury their own interpretation of statutory terms. Finally, they may usurp the role of the legislature by giving opinions based on their own convictions about matters of general policy, for example, “that people who are sick in a certain way should not be sent to prison.”⁹⁵ The result is effectively ‘trial by expert’. To avoid this, the courts have continually reiterated the decisive role of the finder of fact.⁹⁶

6.75 A series of Irish nullity cases demonstrate that the courts are aware that, on the one hand, the evidence of psychologists, psychiatrists and social workers is of benefit, while on the other, the decision on the marital status of the parties remains the responsibility of the court. Keane J clearly outlined the division of labour between expert and court in *F (C) v C*: “it is the responsibility of the courts alone and not of psychiatrists, however eminent, to determine whether a decree of nullity should be granted”⁹⁷

6.76 Similarly, Murphy J stressed in *KWT v DAT*⁹⁸ that the court cannot abdicate its function to the experts, however distinguished, even if the experts are in agreement.⁹⁹

6.77 In practice, however, where the court is being asked to adjudicate on issues in which it is inexperienced, the danger remains that finder of fact may show considerable deference to witnesses who present themselves as experts in the field and make convincing and impressive arguments peppered with technical terminology.

6.78 The English case *Liddell v Middleton*¹⁰⁰ summarised the role and function of expert witnesses as follows

“The function of the expert is to furnish the Judge with the necessary scientific criteria and assistance based upon his special skill and experience...to enable the Judge to interpret the factual evidence.”

⁹⁵ Kenny “The Expert in Court” (1983) 99 *LQR* 197, at 208.
⁹⁶ See for example, the comments of O’Flaherty J in *The People (DPP) v Kehoe* [1992] ILRM 481 at 485, and of the Court of Criminal Appeal (Hardiman J) in *The People (DPP) v Yusuf Ali Abdi* [2004] IECCA 47. These cases are discussed in the Consultation Paper at paras. 2.286-2.287.
⁹⁷ [1991] ILRM 65 at 79. This is discussed at para. 2.289 of the Consultation Paper.
⁹⁸ [1992] 2 IR 11.
⁹⁹ [1992] 2 IR 11, 21. See to the same effect *MCG(P) v F(A)* [2000] IEHC 11 and *F(G) v B(J)* [2000] IEHC 112. These are discussed at paras. 2.290-2.291 of the Consultation Paper.
¹⁰⁰ (1996) PIQR 36.

6.79 The expert cannot, therefore, weigh all of the evidence and state unequivocally that a particular outcome was the result of a particular action as this, being the ultimate issue at trial, is for the jury to decide.

(2) *Distinguishing between the role of the expert and the trier of fact*

6.80 While it is important that the expert not usurp the role of the trier of fact, the reality is that expert evidence is admitted where the finder of fact needs the expert's help and expertise. As expert evidence is admissible only where the particular issue is outside its ordinary knowledge, the court must not dismiss the evidence given without good reason.¹⁰¹

6.81 The roles of the court and the expert witness are distinct. The distinction between the legal test and the clinical test for insanity is a good example. While a medical expert may testify that a particular defendant is clinically insane, for example, where the defendant is under the delusion that he is Napoleon Bonaparte, this does not decide whether he is legally insane. The test for legal insanity is that the defendant did not know the nature and quality of the act, did not know that what he or she was doing was wrong, or was unable to refrain from committing the act.¹⁰² The person in question might be clinically insane but legally sane. The trier of fact must consider all of the evidence including (but not only) the medical evidence. Where there is evidence from which the court may legitimately infer that the accused was legally sane at the time of the incident, it may so find.¹⁰³ In *The People (Attorney General) v Kelly*¹⁰⁴ the jury found (and were entitled to find)¹⁰⁵ the accused sane where there was conflicting medical evidence and lay evidence from people who had met the accused on the day before and the two days after the murder and did not notice anything unusual in his behaviour or conduct, which showed rationality and intelligence.

(3) *Apportioning weight to conflicting witness testimony*

6.82 The finder of fact is entitled to apportion weight as it sees fit. It may prefer lay witness evidence to expert witness evidence (and vice versa) but in apportioning weight the court must take into account all relevant facts, circumstances and evidence. Where two witnesses were advanced, one a witness of fact who had personally perceived the event and one an expert

¹⁰¹ *Murnaghan Bros. v O'Maoldomhnaigh* [1991] 1 I.R. 455.

¹⁰² Section 5(1) of the *Criminal Law (Insanity) Act 2006*.

¹⁰³ *The People (AG) v Kelly* [1962] Frewen 267.

¹⁰⁴ *Ibid.*

¹⁰⁵ [1962] Frewen 267, 271: "The jury while they were bound to give the greatest attention to the medical evidence in this matter, were entitled, and indeed bound, to give equal attention to the conduct of the accused before and after... [the murder] up to the time of his arrest in Dublin."

expressing an opinion on the sanity or otherwise of a testator, the court was entitled to prefer the evidence of the witness of fact.¹⁰⁶

- 6.83** The Supreme Court's approach in *Hanrahan v Merck, Sharpe & Dohme Ltd*¹⁰⁷ is similar. It is clear from this approach, which is also visible in *The People (Attorney General) v Kelly*¹⁰⁸ (discussed above) that the court must take into account all relevant factors and evidence. Where a lay witness who has actually perceived the event in question gives evidence this should be preferred to that of an expert who has not perceived the incident, in particular where the lay witness's evidence is similarly compelling and where his truthfulness or reliability is not called into question.
- 6.84** In *Coopers Payen Ltd v Southampton Container Terminal Ltd*,¹⁰⁹ however, the English Court of Appeal considered whether the trial judge had erred in disregarding the evidence of the single joint expert¹¹⁰ (who had been agreed under the *Civil Procedure Rules 1998*) and preferring a lay witness of fact. Clarke LJ concluded that while the trial judge was free to consider all evidence in the case she was not free to prefer the testimony of a witness of fact in isolation and without regard to the unequivocal evidence of a single joint expert witness. Lightman LJ added that the evidence of a single joint expert on an issue of fact (on which no direct evidence is called) is likely to be compelling and the trial judge can refuse to follow it "only in exceptional circumstances... and [even] then for a good reason which he must fully explain".
- 6.85** *Coopers Payen* held that if there is an issue of fact about which both the expert witness and another witness give evidence "the judge may be faced with... compelling evidence of two witnesses in favour of two opposing and conflicting conclusions". In those circumstances "there is no rule of law or practice... requiring the judge to favour or accept the evidence" of either witness. Even then the judge does not have a free hand because he "must consider whether he can reconcile the evidence" of the two. If he cannot "he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice" which to accept. The circumstances may be such that only one choice is permissible. The Court

¹⁰⁶ *Poynton v Poynton* (1903) 37 ILTR 54, discussed at paras. 2.265-2.266 of the Consultation Paper. Madden J held that "mere speculative opinion and expressions of opinion cannot reasonably be compared with the evidence of witnesses who had an opportunity of applying the ordinary facts of mental capacity."

¹⁰⁷ [1988] IESC 1; [1988] ILRM 629 (5th July, 1988), discussed at para. 2.268 of the Consultation Paper. See, in particular, page 645.

¹⁰⁸ [1962] Frewen 267. A similar conclusion was reached in the earlier case of *The People (Attorney General) v Fennell (No 1)* [1940] IR 445.

¹⁰⁹ [2003] EWCA Civ 1223; [2004] 1 Lloyd's Rep 331

¹¹⁰ A single expert agreed between the parties. Single joint experts are discussed in Part H of Chapter 8 below.

held that the judge must logically and objectively assess the evidence as a whole before refusing to accept the expert evidence.¹¹¹

- 6.86** Conflicting expert testimony can be particularly difficult for a finder of fact. O’Sullivan J suggested extra-judicially how this is likely to be resolved in practice. The task of the judge was “to apply the rules of probability to two eminently distinguished and coherent bodies of evidence which were in mutual conflict”, a task which left him feeling like “an intellectual pygmy looking up at two giants: from that vantage point one simply cannot tell which of them is taller.”¹¹² Similarly, Lord Woolf suggested that when faced with a battle between experts a judge in unfamiliar waters might prefer the testimony of the better orator even though that evidence is not necessarily more reliable.¹¹³
- 6.87** The Supreme Court in *Best v Wellcome Foundation Ltd*¹¹⁴ stressed that the court’s function where there is a conflict of evidence is not to decide which witness they prefer, but to “apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of this kind.”¹¹⁵
- 6.88** The English case *Flannery and another v Halifax Estate Agencies Ltd*¹¹⁶ recognised that where the court is faced with two equally compelling but diverse expert opinions, it is free to prefer one over the other. However, the judge must then explain the reasons for his choice.¹¹⁷ While it appears that there is no rule of law in England that a judge must explain why he cannot accept expert evidence at a technical level on its own merits, there is a developing jurisprudence which suggests that, where there are grounds upon which a judge may reject the evidence on a technical level, he or she should state reasons for not having accepted it.¹¹⁸
- 6.89** In *Sparrow v Minister for Agriculture, Fisheries and Food*¹¹⁹ the Supreme Court reiterated that it remains the court’s task to decide in light of all the evidence. In *Sparrow* the applicant sought to judicially review the trial judge’s decision to allow the case to proceed, notwithstanding medical

¹¹¹ *Lobster Group Ltd (in liquidation) v Heidelberg Graphic Equipment Ltd and another* [2009] EWHC 1919 (TCC); [2009] All ER (D) 37 (Aug) follows this approach.

¹¹² O’Sullivan, “A Hot Tub for Expert Witnesses” [2004] 4 *Judicial Studies Institute Journal* 1. In this article, he recommends adopting the Australian Competition Tribunal model which consists of a panel, or ‘hot tub’ of opposing experts who debate the issue amongst themselves without initial intervention from lawyers.

¹¹³ See Lord Woolf, *Access to Justice, Final Report* (HMSO, 1996) Chapter 13.8. This is discussed in detail at paragraphs 2.277-2.278 of the Consultation Paper.

¹¹⁴ [1993] 3 IR 421.

¹¹⁵ [1993] 3 IR 421, 462.

¹¹⁶ [2000] 1 All ER 373.

¹¹⁷ *Ibid* at 382 A-B and 383 B-C. The principle in this case was retained in later cases but modified to reduce the number of appeals brought on the basis of inadequate reasons. See further *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.

¹¹⁸ The judge’s explanation for his decision to reject the expert evidence should meet the test for the judges giving reasons for their decisions as set out in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.

¹¹⁹ [2010] IESC 6.

evidence to the effect that the proceedings would severely jeopardise the appellant's health. The Supreme Court held that the argument was based on a fundamental misconception and that the judge is never bound by medical evidence admitted.

(4) *Apportioning weight to foreign expertise*

6.90 A number of submissions to the Commission noted that the courts in Ireland are increasingly receiving the evidence of experts from outside the State. This may be either because of the lack of available experts in the State or because of a dearth of research in a given area. The question that arises is whether these foreign-based experts are sufficiently familiar with the area on which they are offering expert opinion as it operates in the State. The weight to be attached to reports and tests conducted in or based on a different national framework, for example the structure of the UK National Health Service versus the health service in this State, may be open to question.

6.91 One submission received in response to the Consultation Paper recommended that in order for the evidence of a foreign-trained expert to be admissible, their qualification must be recognised in the State, their experience must be relevant to the issue at hand and they must have experience of the field of expertise at national level and any pertinent legislation in the area in this jurisdiction. The Commission considers that the conditions suggested in this submission might prove too restrictive in practice to be applied at the admissibility stage.

6.92 Certainly, where a non-Irish expert gives evidence derived in part from knowledge and experience of systems in another state, the evidence may not be helpful. Nonetheless, all expert evidence is subject to the same qualitative strictures. These focus on the reliability and sufficiency of the expert's qualifications, expertise and knowledge. In this respect, where the expert has trained is merely one factor to be considered in apportioning weight to their testimony. The witness is also subject to cross-examination through the adversarial process and the Commission considers that this combination of hurdles will be adequate to uncover any practical differences in practice or methodologies. Any report prepared by an expert accustomed to different operating systems will likewise be subjected to rigorous scrutiny. If the pool of domestic experts is so limited that foreign expertise is the only kind available, the proposed restrictions might exclude expert evidence on some specialised or technical issues altogether and thereby deny a litigant the opportunity to adduce expert evidence.

6.93 Irrespective of where the expert comes from, the purpose of expert evidence remains the same: to fill in any gap in the court's knowledge on a specific matter. The significance of the distinction between experts with foreign experience, on the one hand, and domestic experience, on the other, will

depend on the jurisdiction-specificity of their-field. It is difficult to imagine how it could matter where a physicist testifying about the laws of physics came from, or did his training, provided the training is of satisfactory quality. However, some fields may be less universal. Where expertise consists in whole or in part of knowledge of how a particular institution or heavily-regulated industry operates or where it requires knowledge of the customs or culture of a profession, or knowledge of particular classifications or standards that vary between Ireland and the expert's jurisdiction, the country in which the expert was trained or practised will matter a great deal more. It may be that the differences are so great that foreign expertise will not be useful to the court at all. The extent of the differences and their implications can be brought to light and emphasised by comprehensive cross-examination.

- 6.94 The Commission recommends that, subject to the rules recommended in this Report concerning expert witness evidence, the draft Evidence Bill should not provide for any further test or tests concerning the evidence of an expert, including a report from an expert, obtained from outside the State.**

CHAPTER 7

ADMISSIBILITY OF EXPERT EVIDENCE

A Introduction

7.01 The admissibility of expert opinion evidence is the principal exception to the opinion evidence rule.¹ The purposes of this exception are to provide the judge or jury with the necessary specialist criteria for testing the accuracy of their conclusions and to enable them to form their own independent judgment by applying these criteria to the facts proven in evidence.² This rationale was explained by Kingsmill Moore J in *Attorney General (Ruddy) v Kenny*.³

“...the nature of the issue may be such that even if the tribunal of fact had been able to make the observations in person he or they would not have been possessed of the experience or the specialised knowledge necessary to observe the significant facts, or to evaluate the matters observed and to draw the necessary inferences of fact.”⁴

7.02 Expert evidence is now common in many civil and criminal trials. The Consultation Paper noted the recent development of a dedicated “litigation support industry” orbiting court proceedings.⁵ Certain people have developed skills geared solely towards providing expert evidence and have become professional expert witnesses.⁶ For example, much civil litigation arises from alleged personal injuries and in these proceedings it is likely that at least three expert reports will be sought to be admitted by the plaintiff alone: a report from a medical expert detailing the extent of the injuries, a report from an actuary specifying the loss of earnings and medical expenses (both past and future) as a result of the injury, and a report from an engineer examining the site of the injury and whether any relevant guidelines were adhered to by the defendant.

7.03 The Consultation Paper also noted judicial reluctance to admit opinion evidence on the basis of its inherently subjective nature and its potential to lead to inconsistencies and injustices as a result of human fallibility,

¹ See discussion in Part A of Chapter 6.

² Per Cooper LJ in *Davie v Edinburgh Magistrates* [1953] SLT 54. (1960) 94 ILTR 185.

³ *Ibid* at 190.

⁴ LRC CP 52-2008 paragraph 2.18.

⁵ The phenomenon is also well known in England. See Lord Woolf, *Access to Justice, Final Report* (HMSO, 1996) at 137.

“partiality, prejudice, self-interest and, above all, imagination and inaccuracy.”⁷

- 7.04** The court will not allow a party to adduce expert opinion evidence unless it is satisfied that the witness is a qualified expert and that the expert evidence is necessary and relevant in the circumstances, in that it has probative value.
- 7.05** The first of these requirements has already been discussed in Chapter 6. The party wishing to adduce the expert evidence must prove the expert’s expertise. The second requirement involves considering the various categories of expert evidence that have been recognised and (if the evidence falls into such a category) the scope of any such evidence that may be given.

B The Categories of Expert Evidence

- 7.06** Generally, expert evidence is admitted on matters outside the knowledge and expertise of the finder of fact. Expert evidence can be given:

“...wherever peculiar skill and judgment, applied to a particular subject, are required to explain results, and trace them to their causes.”⁸

- 7.07** Hodgkinson and James identify five categories of expert evidence:⁹
- I. Expert evidence of opinion, based on facts that have been adduced before the court;
 - II. Expert evidence to explain technical or complex subject areas or the meaning of technical terminology;
 - III. Expert evidence of fact, on an issue that requires expertise to fully comprehend, observe and describe;
 - IV. Expert evidence of fact, on an issue that does not require expertise in order to fully observe, comprehend and describe, but which is a necessary preliminary to the giving of evidence in the other four categories; and
 - V. Admissible hearsay of a specialist nature.

- 7.08** These categories overlap. Evidence may easily fit into a number of different categories.

(1) Evidence in the form of opinion based on facts given in court

- 7.09** Expert opinion evidence is admissible on a proven fact if the finder of fact needs expert assistance to observe or understand the fact, or if such

⁷ Lord Pearce, *Toohey v Metropolitan Police Commissioner* [1965] 1 All ER 506, 509-510 and 512.

⁸ Per Pigot CB in *McFadden v Murdock* (1867) 1 ICLR 211, 218.

⁹ Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at 2-001.

assistance is needed to draw the correct inferences from the fact. “[T]he opinion of scientific men upon proven facts may be given by men of science within their own science.”¹⁰

- 7.10** If the finder of fact does not need any expert assistance to observe, understand or act appropriately upon a proven fact (e.g. because it is common knowledge), the court will not admit expert evidence on the issue.
- 7.11** A very useful decision on the admissibility of expert opinion evidence comes from the Supreme Court of South Australia and *R v Bonython*.¹¹ The test is set out as follows:

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”¹²

- 7.12** *R v Bonython* is widely quoted by both judges and academics in the UK and, though there is more flexibility as to the application of the second limb in criminal proceedings¹³, it is generally considered a highly persuasive statement of the law in the UK. It was most recently quoted with approval by the UK Supreme Court in *Kennedy v Cordia*¹⁴, a significant case touching on many issues of the law of expert evidence. As an appeal from Scotland, the decision is only binding on that part of the United Kingdom but is likely to prove an extremely persuasive precedent in England and Wales and Northern Ireland.¹⁵ The Commission considers the implications of the decision with

¹⁰ *United States Shipping Board v St Albans* [1931] AC 632.

¹¹ (1984) 38 S.A.S.R. 45.

¹² *Ibid* at 46.

¹³ Hodgkinson and James express the view that the modern trend in criminal cases is to focus solely on reliability rather than how the body of knowledge was acquired. See Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015).

¹⁴ *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at paragraph 43.

¹⁵ See Section 41(2) of the *Constitutional Reform Act 2005*.

respect to the definition of an expert witness¹⁶, reliability¹⁷ and the ultimate issue rule.¹⁸

(2) *Non-opinion expert evidence*

(a) *Expert evidence to explain complex subjects or technical terminology*

7.13 Expert evidence arises especially in litigation involving technical and scientific matters¹⁹ and so is frequently called to explain complex subject matter or technical terminology. In effect the “bread and butter” of expert evidence is to explain complex, technical, or scientific topics to a judge or jury completely unacquainted with these concepts.²⁰

7.14 The amount of expert evidence adduced in both civil and criminal proceedings has grown exponentially and now covers many subjects, including forensic accounting and computer analysis, engineering, actuarial evidence, insurance, handwriting comparison and recognition, accident investigation, facial mapping and identification, DNA, blood, urine, blood-alcohol and drug-testing, educational issues, art-related matters such as antiques, and ballistics.²¹ The evidence given by most experts will encompass a mixture of expert opinion and specialised fact.

(i) Technical or scientific terminology

7.15 Where the parties dispute the meaning of a technical term and it is outside the range of ordinary knowledge, the trier of fact may need expert help (e.g. to explain complex concepts).²² Expert evidence is therefore often needed in construction, intellectual property and patent disputes.²³

7.16 In England a judge is entitled to hear expert evidence from the notional skilled person in the art when deciding the meaning of technical words because there is no presumption that where words are used that *can* have a

¹⁶ Para 6.37.

¹⁷ Para. 7.128.

¹⁸ Para. 7.86.

¹⁹ See the cases discussed in the Commission’s Report on the Establishment of a DNA Database (LRC 78-2005), including *The People (DPP) v Mark Lawlor* Central Criminal Court, 2 December 1995; *The People (DPP) v Ian Horgan* (Irish Examiner 25 June 2002); *The People (DPP) v Murphy* [2005] 4 IR 504; *R v Doheny & Adams* [1997] 1 Cr App R 369.

²⁰ Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at 2-002 – 2-006.

²¹ Hannibal & Mountford, *The Law of Civil and Criminal Evidence: Principles and Practices* (Pearson Education 2002) at 55.

²² See for example *Baldwin & Francis Ltd. v Patents Appeal Tribunal* [1959] 1 QB 105; *Cooper (Max) and Sons Pty Ltd v Sydney City Council* (1980) 54 ALJ 234 cited in Lewison *The Interpretation of Contracts* (Sweet and Maxwell 2004) at 130-132.

²³ See paragraphs 2.33-2.39 of the Consultation Paper.

technical meaning, they were *intended* to be given their technical meaning.²⁴ The English courts have a flexible definition of the skilled person and in the interpretation of technical or complex concepts or language, academic qualifications or experience will not always be necessary. This depends on the concept that needs to be interpreted.²⁵

(I) *DNA principles and terminology*

7.17 DNA evidence is increasingly adduced (particularly by the prosecution in criminal trials). Much of the general public's knowledge of DNA evidence has been imparted through print and online media as well as television and film, and public perceptions of such evidence may be inaccurate. Expert evidence therefore remains necessary in any case involving DNA evidence to explain its complexities to the jury.

(II) *Patent cases*

7.18 Experts are often called in patent cases due to the complex nature of the issues. *Phipson on Evidence* describes various ways in which they can help the court by explaining technical terms and relevant principles and by making clear the state of the art, how an invention advances this and how it differs from rival inventions.²⁶

7.19 US patent case law is illustrative of the requirements of expert evidence. In *Koito Mfg Co v Turn-Key-Tech*²⁷ and *NewRiver Inc v Newkirk Products Inc*²⁸ the US courts held that evidence which is "general and conclusory" may not be admitted. Such evidence clearly violates the ultimate issue rule and does not disclose the basis for the opinion. In *NewRiver* the expert stated that the alleged patent infringement would be clear to a person of "ordinary skill in the art" without offering a basis or an applicable example for his opinion. The appellate court criticised his testimony on this ground and ordered a new trial on the issue of obviousness.

7.20 *Kirin-Amgen Inc and Ors v Hoechst Marion Roussel Ltd & Ors*²⁹ is a UK House of Lords patent infringement case. The parties consented to the Law Lords taking a series of seminars *in camera* before the trial. The seminars were given by a professor of biochemistry at Oxford University to explain the relevant aspects of the DNA technology which was in issue. As pointed out by Lord Hope:

"This had the result of shortening the length of time that it was necessary to devote to the hearing by several days... it is a course

²⁴ Per Aldous LJ in *Hoechst Celanese Corp v BP Chemicals Ltd* [1998] EWCA Civ 1081.

²⁵ *Thorn v Dickens* is an example of non-expert opinion evidence admitted to show the meaning of a seemingly everyday term- "all for mother" to indicate the testator's wife. [1906] WN 54.

²⁶ *Phipson on Evidence* (18th ed. Sweet and Maxwell 2013) at 33-73.

²⁷ LLC, 281 F 3d 1142, 1149 (Fed Cir 2004).

²⁸ *NewRiver, Inc v Newkirk Products, Inc*, CA No 06-12146-WGY, Memorandum & Order (D Mass Dec 16, 2009).

²⁹ [2004] UKHL 46.

which might be usefully be adopted in the future in cases of this kind, where the technology is complex and undisputed and the parties are willing to consent to it.”³⁰

7.21 This involved the use of a long-established procedure where the court may appoint an assessor to assist it: the comparable procedure in Irish law is contained in section 59 of the *Supreme Court of Judicature (Ireland) Act 1877*.³¹

(ii) Customs and practices of a trade or profession

7.22 People well versed in the normal practices and procedures of a particular skill, trade or profession may give expert evidence.³² Irish case law allows such evidence to prove (for example) the general practice of solicitors and medical practitioners in certain matters, and professional holiday pay practices.³³

(iii) Foreign law

7.23 Expert evidence is admissible and is in fact required to explain issues relating to foreign law.³⁴ The normal requirement to prove the expertise of the expert applies.³⁵ Expert evidence is not admissible on Irish law.³⁶

(iv) Meaning of foreign words

7.24 Where the court does not understand a language it may receive expert evidence on the meaning of words, but the legal effect of these words remains a matter for the court.³⁷ However, while the court may invite an expert witness to testify as to the meaning of certain words or documents, the status of interpreters who directly relay the testimony of the witness into the language used by the court is less clear. Hodgkinson and James argue that court interpreters can properly be described as expert witnesses as they provide, by their testimony, expert advice to the finder of fact on matters outside its knowledge and ability. This can be challenged like any other evidence (for example by cross examination).³⁸

³⁰ [2004] UKHL 46 at 135.

³¹ See *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010), Appendix A, draft Courts (Consolidation and Reform) Bill, section 91 (page 123 of the Report) and Appendix B, Explanatory Note to section 91 (page 459 of the Report).

³² This is discussed at paragraphs 2.30-2.32 of the Consultation Paper. See also *McMullen v Farrell* [1993] 1 IR 123 approving *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1978] 3 All ER 571.

³³ See *Roche v Pielow* [1986] I.L.R.M. 189; *O'Donovan v Cork Co. Council* [1967] I.R. 409; and *O'Connell v The Gaelic Echo (1954) Ltd.* (1958) 92 I.L.T.R. 194, respectively.

³⁴ See McGrath, *Evidence* (2nd ed. Round Hall, 2014) p. 422.

³⁵ *O'Callaghan v O'Sullivan* [1925] 1 IR 90, 112; see also *Waterford Harbour Commissioners v British Railways Board* [1979] ILRM 296. This is discussed at paragraphs 2.28 and 2.29 of the Consultation Paper.

³⁶ See *Society for the Protection of Unborn Children (Ireland) Ltd. v Grogan* (No 3) [1992] 2 IR 471; *F v Ireland* [1995] 1 IR 321.

³⁷ *Di Sora v Phillips* (1863) 10 HL Cas 624; *Fothergill v Monarch Airlines Ltd* [1981] AC 251 cited in Lewison, *The Interpretation of Contracts* (Sweet and Maxwell 2004) at 128-129.

³⁸ Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at paragraph 5-024.

- 7.25** An alternative view is that interpreters cannot sensibly be described as “witnesses” as they merely act as a conduit between the actual witness and the court. The trend in the United States has moved increasingly towards adopting this approach.³⁹ Many states in their Codes of Conduct for interpreters explicitly define interpreters “officers of the court” rather than expert witnesses⁴⁰ and this is the view preferred by the National Association of Judiciary Interpreters and Translators.⁴¹
- 7.26** In *Commonwealth v Belete*⁴², a Massachusetts court outlined the rationale for declining to view interpreters as expert witnesses:
- “Interpreters are not witnesses, nor do they normally possess any knowledge of a fact or occurrence sufficient to testify in a case. Rather an interpreter is a bilingual person who has the duty to act as the medium between the court and the non-English speaking person.”⁴³
- 7.27** The Commission, while noting the serious issues facing translation services in the Irish judicial system⁴⁴, takes the view that interpreters are not expert witnesses and considers that issues surrounding them are inappropriate for consideration in this report.
- (3) *Expert evidence of fact on an issue requiring expertise to fully comprehend, observe and describe***
- 7.28** This overlaps with the technical and scientific category, particularly with regard to scientific evidence. Evidence might be needed for a number of purposes: to explain principles (e.g. scientific principles), to describe and explain the results or outcomes of empirical tests and to carry out these tests and experiments.⁴⁵
- 7.29** Hodgkinson and James give the example of a microbiologist who, in observing a microbe in a controlled scientific setting, identifies that the

³⁹

See Graban & Gibbons, ‘Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation’, *New Eng. L. Rev.* 227 (1996).

⁴⁰

They include California’s ‘Model Code of Professional Responsibility for Interpreters’ available at <http://www.courtethics.org/CA%20Interp%20Ethics%20Code.pdf> and New York’s ‘Court Interpreter Manual’ available at

⁴¹

<http://www.courtethics.org/NY%20CourtInterpreterManual.pdf>.

Framer, ‘Interpreters as Officers of the Court: Scope and Limitations of Practice’ available at <http://www.najit.org/certification/Interpreters%20as%20Officers%20of%20the%20Court.pdf>.

⁴²

37 Mass. App. Ct. 424.

⁴³

Ibid at 426.

⁴⁴

See Phelan, ‘Three Centuries On, Ireland None The Wiser in Interpreter Provision’, *Public Affairs Ireland* (December 2014) and ‘Report from the Seminar Human Rights and Interpreting: the Irish Legal System’ available at <https://www.ria.ie/news/humanities-and-social-sciences-committees-study-languages-literature-culture-and-communication> (accessed 18th February 2016). See also Waterhouse, *Ireland’s District Court: Language, immigration and consequences for justice*, (Manchester University Press 2014).

⁴⁵

This is discussed in paragraph 2.48 of the Consultation Paper.

microbe possesses more properties of microbe A than microbe B and accordingly gives evidence that the microbe is more likely microbe A.⁴⁶ While technically an opinion, it derives solely from factual observations that simply require advanced training to extract and comprehend.

- 7.30** Expert witnesses interpreting the results of factual evidence such as scientific tests may diverge on the meaning of the results. This type of evidence will often be coloured by the subjectivity typically associated with opinion rather than the objectivity expected of fact.
- 7.31** In *R v Harris & Ors*⁴⁷ the defendant was accused of the manslaughter of her baby by excessive shaking. A number of medical experts gave evidence in the proceedings. The Court of Appeal considered two neuropathologists to be the most important witnesses. The findings of the experts were based on the same brain slices and photographs taken at the post mortem but their evidence differed in certain crucial respects. One expert was of the view that the injuries had been caused by trauma, which was consistent with the prosecution case. The other neuropathologist opined that the injuries were probably not caused by trauma and pointed to other potential causes, which she believed to be consistent with the injuries as demonstrated by photographs. The Court of Appeal declared itself unable to resolve this issue and simply stated that “even on the interpretation of objective evidence there can be two views expressed by highly experienced and distinguished medical experts.” *Harris* demonstrates the difficulty which often arises in distinguishing non-opinion expert evidence of this sort from opinion expert evidence.
- 7.32** Even if experts agree about some or all of the objective facts (for example experimental results) they may still disagree about the significance or best interpretation of these facts or results.⁴⁸
- 7.33** In certain circumstances the judge may allow evidence as to the conduct and results of a particular experiment as evidence of fact, but not allow any inference or opinion on the results to be expressed to the jury.⁴⁹ In one such case, it was sought to be proved by means of a re-enactment of a police interview that an alleged confession had been fabricated. The judge allowed evidence of the re-enactment of the police interview based on the policeman’s contemporaneous notes but did not permit evidence as to the inferences drawn from those results, namely that in order for the interview to have taken place in the time recorded in the notes, the interview would have been conducted at the speed of horse racing commentary.⁵⁰

⁴⁶ Hodgkinson and James, *Expert Evidence: Law & Practice* (4th ed. Sweet & Maxwell, 2015) p. 63.

⁴⁷ [2005] EWCA Crim 1980.

⁴⁸ See, for example, *Harris* [2005] EWCA Crim 1980, [73].

⁴⁹ Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at 2-003. *R v Meads* [1996] Crim LR 519, CA, discussed in the Consultation Paper at paragraphs 2.49-2.50.

⁵⁰ *R v Meads* [1996] Crim L.R. 519 CA.

(4) *Expert evidence of fact on an issue that does not require expertise to fully observe but is a necessary preliminary to giving evidence in the other four categories.*

7.34 The type of evidence in this category was described by Hobhouse J in *The Torenia*⁵¹ as factual evidence used to support opinion evidence.⁵² In that case, the expert witness gave factual evidence of certain observations he had made of the ship whose sinking was the subject of the proceedings. The defendants argued that this constituted evidence of fact, not expert opinion. Hobhouse J rejected this contention as unrealistic, reasoning that an expert must be permitted to observe and describe factual evidence in order to sensibly apply his or her expertise to those facts.⁵³ Experts necessarily rely on their expertise and experience and refer to that experience in their evidence (for example by referring to past cases and how they apply to this case).⁵⁴ This category overlaps with the following category of admissible hearsay.

(5) *Admissible hearsay of a specialist nature*

7.35 The hearsay rule, which is discussed in Chapters 2-3, excludes out-of-court statements offered to prove the truth of their contents. In the context of expert evidence, the hearsay rule requires that the primary sources and facts upon which the expert's evidence is based be proved by admissible evidence given by either the expert himself or by other witnesses; this is known as the factual basis rule.⁵⁵ Where such facts are not proved, little weight will be attached to the opinion.⁵⁶ To side-step this requirement an expert may resort to answering a hypothetical question. The phrasing must make it clear to the finder of fact that the conclusion reached by the expert has no factual basis but assumes the existence of a number of factors which have not been proven. If the factors are not proven, the expert's opinion should be disregarded.⁵⁷

7.36 Hearsay evidence does not automatically become admissible merely because it is delivered via an expert witness's testimony.⁵⁸ Rather, materials used by

⁵¹ [1983] 2 Lloyd's Rep 210.

⁵² While not a category of expert evidence, such evidence is a necessary precursor to expert evidence proper, according to Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at 2-004. See paragraph 2.53 of the Consultation Paper.

⁵³ [1983] 2 Lloyd's Rep 210 at 233.

⁵⁴ *Ibid.*

⁵⁵ *RT v VP* [1990] 1 IR 545; *MCG(P) v F(A)* [2000] IEHC 11.

⁵⁶ Dixon J in *Ramsay v Watson* (1961) 108 CLR 642 "if the man whom the physician examines refuses to confirm in the witness box what he said in the consulting room, then the physician's opinion may have little or no value, for part of the basis of it has gone." (at 649) See also *R v Abbey* [1982] 2 SCR 24, 44 and *Wright v Doe d Tatham* (1838) 4 Bing NC 489, 589.

⁵⁷ Pattenden, "Expert Opinion Evidence Based on Hearsay" [1985] *Crim LR* 85, at 86.

⁵⁸ (1961) 108 CLR 642, 649.

experts in giving their opinion may be permitted under an existing exception to the rule against hearsay.⁵⁹

7.37 In England the admissibility of hearsay expert evidence in criminal proceedings is governed by sections 114 and 127 of the *Criminal Justice Act 2003*.⁶⁰ Section 118(1) provides that “any rule of law under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field” is to be preserved. No comparable provisions have been enacted here but the following inclusionary exceptions developed in the common law of other countries.

(a) *Reliance on materials from field of expertise*

7.38 English law allows the expert to rely on ‘non-specific hearsay’⁶¹ including prior studies, statistics and research, academic literature and works of reference in their field of expertise. Kerr LJ referred to this in *R v Abadom*⁶²:

“... in reaching their conclusion, [experts] must be entitled to draw on material produced by others in the field in which their expertise lies... once the primary facts on which their opinion is based have been proved by admissible evidence.”⁶³

7.39 Evidence on material such as this is not admissible to prove the truth of its contents. Rather, it is admissible to explain the thought processes and knowledge bases on which the expert formed his opinion. This material can also influence the weight accorded to the expert’s evidence.⁶⁴

7.40 Irish law categorises facts relied on in expert evidence as primary or secondary. Primary facts must be proved by admissible evidence but the expert can rely on secondary facts (like scientific practices and standards) without the party leading separate evidence of those. A long established exception to the hearsay rule allows the expert to refer to the general body of knowledge of his field of expertise (including, for example, works of authority and articles).⁶⁵

(b) *Reliance on general experiences from field of expertise*

7.41 An expert is entitled to assess the facts against such previous experiences as he or she may have had dealing with similar issues, as long as the comparable evidence does not amount to hearsay evidence of facts.⁶⁶ For

⁵⁹ *Foyle and Bann Fisheries Ltd v Attorney General* (1948) 83 ILTR 29.

⁶⁰ Section 114 sets out the conditions for the admissibility of hearsay generally in criminal proceedings. It does not refer specifically or exclusively to expert evidence. Section 127 allows experts to rely on hearsay statements from declarants not called as witnesses and makes the hearsay statement evidence of the truth of its contents if it is relied upon by an expert.

⁶¹ Pattenden, “Expert Opinion Evidence Based on Hearsay” [1985] *Crim LR* 85, at 93-95.

⁶² [1983] 1 WLR 126.

⁶³ [1983] 1 WLR 126, 131.

⁶⁴ *Wilband v The Queen* (1966) CanLII 3 (SCC); [1967] SCR 14.

⁶⁵ *The People (DPP) v Boyce* [2005] IECCA 143. See paragraph 2.77 of the Consultation Paper.

⁶⁶ *English Exporters Pty Ltd v Eldonwall Ltd* [1973] 1 Ch 415. This is discussed at paragraph 2.79 of the Consultation Paper

example in valuing a premises a chartered surveyor may rely on his specialist knowledge built up through past transactions. The hearsay rule still applies, however, so that the surveyor cannot give evidence that another chartered surveyor, not called as a witness, had informed him or her that a property measuring X feet had a rent of Y and base his opinion on such alleged facts.⁶⁷

(c) *Reliance on second-hand information in forming an expert opinion*

7.42 An expert who does not have first-hand knowledge of the facts upon which his opinion is based (for example a psychologist who bases his evaluation of a patient on statements or events narrated to him by the patient) may nevertheless state a hypothesis on assumed facts.⁶⁸ These statements are of course inadmissible as proof of their truth. They simply indicate the basis upon which the expert opinion was formed.⁶⁹ Thus an expert opinion based on second-hand evidence is admissible, where relevant.

7.43 In *The State (D and D) v Groarke & Ors*⁷⁰ the petitioners sought to void an order allowing the State to take custody of their child and objected to video evidence of a doctor interviewing the child with the aid of anatomical dolls. The doctor's opinion that the child had been abused was largely based on this interview. The Supreme Court admitted this evidence and found that the court should have before it the evidence grounding the doctor's opinion so that it could determine whether his conclusion was correct. In *Southern Health Board v C*⁷¹ a father objected to similar evidence claiming that it was hearsay. The Supreme Court held that the evidence was rightly admitted as it was the basis of the expert testimony that the court could accept or reject.

7.44 McGrath argues that these authorities show the potential for the rules on expert evidence to be used as a backdoor means of admitting hearsay.⁷² Neither case was a criminal prosecution nor did either involve a conclusive determination of whether the allegations were true. The approach taken in such cases might be different. For example, the Supreme Court of Canada ordered a retrial where hearsay elements in expert testimony were relied on to convict an accused.⁷³

⁶⁷ [1973] 1 Ch 415, 421.

⁶⁸ *RT v VP* [1990] 1 IR 545

⁶⁹ Richie J in *Phillion v The Queen*, [1978] 1 SCR 18, 24.

⁷⁰ [1990] 1 IR 305. This is discussed in more detail at paragraphs 2.91-2.92 of the Consultation Paper.

⁷¹ [1996] 1 IR 219. This is discussed in more detail at paragraphs 2.93-2.95 of the Consultation Paper.

⁷² McGrath, *Evidence* (2nd ed. Round Hall 2014) at 406. The admissibility of videotape evidence in civil cases involving children is now provided for in the *Children Act 1997*, and to a certain extent in criminal proceedings by the *Criminal Evidence Act 1992*. See paragraph 2.96 of the Consultation Paper.

⁷³ *R v Abbey* [1982] 2 SCR 24. See paragraph 2.85 of the Consultation Paper.

- 7.45** Several Irish nullity cases⁷⁴ considered these principles in detail. Hearsay statements in expert reports are likely to be excluded unless admissible under an exception to the rule against hearsay and statements made to a consultant psychiatrist are not evidence of the truth of their contents.⁷⁵
- 7.46** A psychiatrist's opinion on someone's mental state based on statements from a declarant whom he has neither met nor examined and on a report written by a court-appointed expert is inadmissible to prove the truth of its contents even where the declarant and the court-appointed expert are called to give evidence.⁷⁶
- 7.47** The High Court has admitted evidence from psychiatrists on the mental state of respondents where the respondents had not been examined by the experts but the limited value went only to weight.⁷⁷

C The Common Knowledge Rule

- 7.48** In civil and criminal trials, the common knowledge rule allows evidence presented by an expert witness only where the purpose is to assist the trier of fact (whether a judge or jury) in matters on which specialist knowledge is needed to draw relevant inferences or reach appropriate conclusions. Thus, expert evidence must relate to matters outside the general knowledge of the trier of fact. Such evidence can be given on an extremely broad range of matters, including whether a machine complied with standards of safety, whether wounds on a body were consistent with an assault, whether an accused exhibits signs of mental illness, or whether a DNA crime scene sample generated a profile that was consistent with the profile generated from a DNA sample from an accused.
- 7.49** Expert evidence is not required to prove facts that are well known or notorious or that can be independently verified by the trier of fact itself from its own knowledge.⁷⁸ For example, that a particular date fell on a particular day of the week can be verified by reference to a calendar. Similarly, in 2012 the Court of Criminal Appeal took judicial notice of the existence since 2008 of

⁷⁴ *F v L (Orse F)* [1990] 1 IR 348; *RT v VP (Orse VT)* [1990] 1 IR 545; *JWH (Orse W) v GW* [1998] IEHC 33; *DK v TH (Orse TK)* [1998] IEHC 34; *MCG(P) v F(A)* [2000] IEHC 11; *DW v DPP* [2003] IESC 54, discussed in the Consultation Paper at paragraphs 2.86-2.104.

⁷⁵ Barron J in *F v L (Orse F)* [1990] 1 IR 348.

⁷⁶ Lardner J in *RT v VP (Orse VT)* [1990] 1 IR 545. See paragraphs 2.87-2.89 of the Consultation Paper. McGrath argues that such evidence should not have been classified as hearsay because both the declarant (the petitioner in the case) and the court-appointed expert were called to testify. He says that the problem was a lack of probative value, a matter properly going to weight rather than admissibility. See McGrath, *Evidence* (2nd ed. Round Hall 2014) p. 404- 405.

⁷⁷ *JWH (Orse W) v GW* [1998] IEHC 33; *DK v TH (Orse TK)* [1998] IEHC 34. The two cases were decided on the same day. See paragraph 2.90 of the Consultation Paper.

⁷⁸ See McGrath, *Evidence* (2nd ed. Round Hall 2014) 313 at [6-10].

a global financial crisis which had led to a contraction in the economy in the State that was “unparalleled in living memory.”⁷⁹

(1) *The possible decline of the common knowledge rule*

7.50 The rule has been affirmed repeatedly in Ireland.⁸⁰ In the UK however, there is a growing body of case law in which the rule appears to have been relaxed, creating uncertainty about what is or is not common knowledge.

7.51 In *R v Turner*⁸¹ the accused was charged with the murder of his girlfriend after she confessed her infidelity. The court refused to admit psychiatric evidence that such an event was likely to have caused an explosion of rage in him, the reasoning was that when an expert makes a determination on an issue on which a judge or jury would be well capable of forming their own opinions and drawing their own conclusions, the judge or jury might attach too much weight to the expert’s opinion.⁸² *Turner* was approved in Ireland in *The People (DPP) v Kehoe*.⁸³ Psychiatric evidence that merely sought to articulate more fully the defence of provocation was held inadmissible. Similarly, in *McMullen v Farrell*⁸⁴ Barron J refused to admit evidence relating to the manner in which litigation is conducted: the court itself has actual knowledge of this.

7.52 The main difficulty is ascertaining whether the issue is within the range of knowledge of the finder of fact. The range of knowledge that can properly be ascribed to the finder of fact can change, particularly with developments in science and technology and the reach of these topics is increasingly broad. This makes it more difficult to tell what is and what is not within the ordinary knowledge of the court, and increases uncertainty about what will and will not be admitted.⁸⁵

7.53 Psychiatric and psychological expert evidence has generated considerable difficulties.⁸⁶ The policy in *Kehoe* was to confine it to matters such as insanity but English case law suggests that in borderline cases the court may decide to allow it.⁸⁷ The Court of Appeal has recently reaffirmed *Kehoe* and demonstrated the continuing low regard the courts have for psychological

⁷⁹ See *The People (DPP) v Murray* [2012] IECCA 60. The Court referred to this background in the context of the appropriate sentence to impose in a case involving social welfare fraud, having regard for the need to ensure that the deterrent element of a sentence would be consistent with the need to preserve social solidarity, especially in a time of economic contraction.

⁸⁰ *The People (DPP) v Kehoe* [1992] ILRM 481, *McMullen v Farrell* [1993] 1 IR 123.
⁸¹ [1975] QB 834; [1975] 1 All ER 70; 60 Cr App R 80, discussed at paragraphs 2.127-2.128 of the Consultation Paper.

⁸² See the remarks of Lawton LJ [1975] 1 All ER 70, 74, cited in paragraph 2.128 of the Consultation Paper.

⁸³ [1992] ILRM 481. See paragraph 2.130 of the Consultation Paper.

⁸⁴ [1993] 1 IR 123, 148. See paragraph 2.131 of the Consultation Paper.

⁸⁵ See further paragraphs 2.132-2.133 and 2.136-2.138 of the Consultation Paper.

⁸⁶ See *King v Lowery and R* [1974] AC 85. See LRC CP 52-2008 paragraph 2.139.

⁸⁷ *King v Lowery and R* [1974] AC 85.

expert evidence. In *The People (DPP) v Ryan*⁸⁸, the court refused to admit evidence from a psychologist for the defence seeking to demonstrate that the alleged oppressive nature of Garda questioning had overborne the free will of the accused. The Court held that “issues as to voluntariness and oppression are quintessentially matters for the judge in the case.”⁸⁹ The Court went on to quote with approval from the English case of *R v Pendleton*:

“The assessment of the truth of verbal evidence is save in a very small number of exceptional circumstances a matter for the jury. The suggestibility of some persons is well within the experience of the ordinary members of juries. To admit evidence from psychologists on such questions is not only contrary to the established rules of evidence, but it is also contrary to the principle of trial by jury and risks substituting trial by expert.”⁹⁰

7.54 Two examples may be given where new areas of legal liability may give rise to complexity. The first relates to the defence of diminished responsibility, which was introduced in Ireland by section 6(1) of the *Criminal Law (Insanity) Act 2006*. This generally corresponds to the concept of diminished responsibility in the English *Homicide Act 1957* but the 2006 Act refers to “mental disorder”⁹¹ which differs from the “abnormality of the mind” in the English 1957 Act.⁹² It might be argued that the 2006 Act has a much narrower ambit and that “mental disorder” should be equated with a recognised mental condition (about which expert testimony is admissible). Although the case law on section 4 of the 2006 Act is limited, Charleton J in *K v Moran*⁹³ noted that it is the task of the judge alone to determine the question of fitness to be tried. Prior to the 2006 Act it was for the jury to decide if the accused was not fit to be tried. It was then for the judge to determine whether the accused was to be detained for in-patient care or order that the accused should receive out-patient treatment.

7.55 The second example is whether expert testimony should be admitted on the credibility of the accused, particularly in cases of alleged abuse.⁹⁴ The

⁸⁸ [2016] IECA 147.

⁸⁹ *Ibid* at para. 43.

⁹⁰ *R v Pendleton* [2002] 1 W.L.R. 72. (Lord Hobhouse)

⁹¹ Section 1 of the 2006 Act states: “mental disorder includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication.”

⁹² Section 2(1) of the English *Homicide Act 1957* provides: “Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.” There may also be some ambiguity in the Irish legislation given that the *Mental Health Act 2001* (which governs the civil law aspects of detention in psychiatric institutions) contains with a narrower definition of “mental disorder” which may lead to ambiguity.

⁹³ [2010] IEHC 23.

⁹⁴ LRC CP 52-2008 paragraph 2.134. See for example *R v Turner* [1975] QB 834 and *R v Mackenny* (1981) 76 Cr App Rep 271. However, this decision was overturned in *R v Pinfold and Mackenny* [2003] EWCA Crim 3643 where the Court of Appeal held that the Court’s approach has developed over the years and is now more generous towards the admission of expert evidence than was once

Commission discussed this in its 1990 *Report on Child Sexual Abuse* where it recommended that expert evidence be admissible as to competence and as to children's typical behavioural and emotional reactions to sexual abuse.⁹⁵

(2) Abolition of the common knowledge rule

7.56 There has been evidence of a shift away from the strict application of the rule and some jurisdictions have abolished it.

(a) England and Wales

7.57 In civil cases, the common knowledge rule has been superseded by the statutory regime established by the English *Civil Evidence Act 1972*. Section 3 simply directs that the qualified expert give evidence "on any relevant matter." The question of relevance is thus the key consideration. The concept of relevance, however, necessarily incorporates some aspect of the common knowledge rule. As Butler-Sloss LJ said in *Re M&R (Minors)*, the evidence must be relevant in the sense that it must go "to a matter on which a layman would require instruction on the essentials of the necessary field of expertise to make a properly informed decision."⁹⁶ The English Civil Procedure Rules also require that expert evidence be restricted "to that which is reasonably required to resolve the proceedings."⁹⁷

7.58 English law now adopts a less strict approach to the rule in cases involving mental illness evidence, in particular where a party seeks to admit expert evidence about recognised mental illnesses. It seems that English courts are also readier to consider something a "mental illness" than they previously were. Evidence is now being allowed in a far wider range of cases than anticipated in *R v Turner*.⁹⁸ *R v Toner*⁹⁹ admitted expert evidence that a mild hypoglycaemic attack could have negated intent. *R v Ward* admitted expert evidence on when a personality disorder constitutes a mental disorder.¹⁰⁰ Expert evidence has also been admitted in England on battered wives' syndrome¹⁰¹ and automatism.¹⁰² Indeed, English law requires expert

the case. (See Roberts "Towards the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials (2004) 8 *E & P* 215).

⁹⁵ Law Reform Commission, *Consultation Paper on Child Sexual Abuse* LRC CP 2-1989 at 6.16; *Law Reform Commission Report on Child Sexual Abuse* LRC 32 1990 at 6.04.
⁹⁶ [1996] 4 All ER 239.
⁹⁷ CPR 35.1.

⁹⁸ [1975] QB 834; [1975] 1 All ER 70; 60 Cr App R 80.
⁹⁹ (1991) 93 Cr App R 382. See also paragraph 2.148 of the Consultation Paper.

¹⁰⁰ *R v Ward* (1993) 96 Cr App R 1. See also paragraph 2.148 of the Consultation Paper.
¹⁰¹ *R v Thornton* (No 2) [1996] 2 All ER 605; *R v Sally Lorraine Emery (And another)* (1993) 14 Cr App R (S) 394.

¹⁰² *Hill v Baxter* [1958] 1 QB 277.

psychiatric evidence when examining diminished responsibility,¹⁰³ and *R v O'Brien*¹⁰⁴ took a broad approach to the admissibility of expert psychiatric evidence

(b) Australia

- 7.59** In *Murphy v The Queen*¹⁰⁵ the High Court of Australia cast doubt on *R v Turner* and the capacity of judges and jurors to understand mental health issues. The Australian and New Zealand law reform commissions recommended abolishing the common knowledge rule and both countries have done so.¹⁰⁶
- 7.60** The ALRC's 1984 *Interim Report on Evidence* and 1987 *Final Report on Evidence* are discussed in the Consultation Paper.¹⁰⁷ The ALRC recommended that the question be whether the trier of fact could "usefully receive assistance from the expert opinion evidence."¹⁰⁸ This recommendation was implemented in section 80(b) of the uniform *Evidence Act 1995* (Cth) which abolished the common knowledge rule.¹⁰⁹
- 7.61** Apparently the effect of this was an increase in the time and money spent in determining whether (amongst other things) evidence previously excluded under the common law should now be admissible.¹¹⁰
- 7.62** Further joint reviews by the Australian law reform commissions concluded that the old rule should not be reinstated.¹¹¹ The 1995 Act included safeguards such as the requirement that the expert evidence tendered rationally affect the assessment of the probability of the existence of a fact in issue, thus reducing the possibility of an opinion excessively based on matters of common knowledge being admitted, and the requirement that the evidence be "wholly or substantially" based on expert knowledge. The trial judge has discretion to exclude evidence where it is likely to be unfairly prejudicial to a party, be misleading or confusing or cause a waste of time.¹¹²

¹⁰³ *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991*. See Dix (1981) 74 Cr App R 306, 311 Cited in Mackay & Coleman "Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience" [1991] *Crim LR* 800, 801.

¹⁰⁴ [2000] EWCA Crim 3, discussed at paragraph 2.150 of the Consultation Paper.

¹⁰⁵ [1989] 164 CLR 94, 110. See further LRC CP 52-2008 paragraph 2.151.

¹⁰⁶ Australia by section 80(b) of the *Commonwealth Evidence Act 1995* (see paragraph 2.158 of the Consultation Paper) and New Zealand by section 25(2)(b) of the *Evidence Act 2006*, discussed at paras. 10.134-10.136 below.

¹⁰⁷ See paras. 2.155-2.158.3

¹⁰⁸ Australian Law Reform Commission, Report 38 – *Evidence* (ALRC 1987) paragraph 151(c). This reflected the provisional recommendations in Australian Law Reform Commission, *Interim Report 26 – Evidence* (ALRC June 1984) at 354-355.

¹⁰⁹ *Evidence Act 1995* (Cth) section 80 provides: "[e]vidence of an opinion is not inadmissible only because it is about... (b) a matter of common knowledge."

¹¹⁰ Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at 6.52; See also *Clark v Ryan* (1960) 103 CLR 486. See also LRC CP 52-2008 paragraph 2.161

¹¹¹ This is discussed in the Consultation Paper at paragraphs 2.159-2.168.

¹¹² These safeguards are discussed in LRC CP 52-2008 paragraphs 2.165-2.168. (ALRC Report 102; NSWLRC Report 112; VLRC *Final Report: Uniform Evidence Law* (December 2005) at 9.137).

(c) *New Zealand*

7.63 The New Zealand Law Commission (NZLC) considered the rule in its discussion paper on *Expert Evidence and Opinion Evidence*¹¹³ and said that the primary justification for preventing an expert from giving evidence on a matter within the knowledge of the finder of fact was to avoid “defeat[ing] the purpose for which juries are used.”¹¹⁴ They recommended abolishing the rule because it “excludes evidence by its subject matter without regard to its reliability and value in the trial”¹¹⁵ and thereby could “operate to limit unduly the reception of evidence which would add to the understanding and knowledge of the judge or jury”.

7.64 The NZLC offered two main alternatives for reform with the same net effect and which excludes the same evidence on the same grounds:¹¹⁶ the Australian approach¹¹⁷ and the American approach.¹¹⁸

7.65 The NZLC’s final *Report on Evidence – Reform of the Law* recommended abolishing the common knowledge and ultimate issue rules and replacing them with a ‘substantial helpfulness’ test.¹¹⁹ The recommendation was implemented in section 25 of the *Evidence Act 2006* which provides:

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.

¹¹³ New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper* (Preliminary Paper 18, December 1991, NZLC).

¹¹⁴ Per McMullin J in *R v B* (an accused) [1987] 1 NZLR 362, 367 cited in New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper* (Preliminary Paper 18, December 1991, NZLC) at paragraph 39.

¹¹⁵ New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper* (Preliminary Paper 18, December 1991, NZLC) at paragraph 40.

¹¹⁶ These are discussed in more detail in paragraphs 2.172-2.174 of the Consultation Paper.

¹¹⁷ Allowing expert opinion wholly or substantially based on specialised knowledge, but subject to a general exclusionary power for quality control.

¹¹⁸ Allowing such expert opinion evidence as would “assist the trier of fact to understand the evidence or to determine a fact in issue,” subject to a general exclusionary power. Federal Rules of Evidence Rule 702 (Available at <http://www.law.cornell.edu/rules/fre/index.html>.) The word “assist” has since been replaced with the word “help”.

¹¹⁹ New Zealand Law Commission, *Evidence – Reform of the Law* (Report 55 Volume 1 August 1999, NZLC) at paragraphs 74-75.

(3) *Conclusion on necessity of reform*

- 7.66** The common knowledge rule remains applicable in Ireland but recent case law reveals an increasingly expansive interpretation of ‘matters outside the scope of knowledge of the as trier of fact’.
- 7.67** The Commission has considered a number of options. The rule could be retained and placed on a statutory footing. Alternatively, reform could follow the approach taken in jurisdictions such as Australia and introduce a rule that expert evidence will not be excluded solely on the grounds that it is based on a matter of common knowledge. Another option is to introduce a test for admissibility modelled on New Zealand’s provisions: whether the trier of fact could usefully receive assistance from the expert opinion evidence (the substantial helpfulness test).
- 7.68** Reform could couple such a test with a general judicial discretion to exclude evidence likely to be unfairly prejudicial, misleading or confusing or which would cause undue waste of time or costs. This power to exclude would reflect the varying application of the common knowledge rule identifiable from the case law and would significantly widen the scope of admissible expert evidence. This trend has also emerged in the case law in the UK and Australia, as the courts appear to be giving an increasingly broad interpretation to what is outside the scope of a fact finder’s ordinary knowledge.
- 7.69** The Commission takes the view that the rule preserves the role of the court as trier of fact and provides some definition as to the type of expert evidence that will be admitted.¹²⁰ These are important considerations and in the Consultation Paper the Commission provisionally recommended the retention of the common knowledge rule¹²¹ to aid the court in focusing the issue and the scope of the expert evidence to be admitted. The rule can also convey clearly to the expert that his or her role is to give expert evidence and not to act as an additional finder of fact. The rule therefore promotes a high standard of expert testimony. The abolition of the rule could lead to problems such as making trials longer. Without the rule parties would be free to seek to adduce expert evidence on a wider range of matters.¹²² Submissions received approve of the approach taken by the Commission in the Consultation Paper and also noted that experts should not be permitted to “dress up” common knowledge as expert testimony.

¹²⁰ The Commission so concluded in paragraphs 2.190 of the Consultation Paper.

¹²¹ Provisional recommendation 7.03 (see also paragraph 2.192).

¹²² Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at 6.52; See also *Clark v Ryan* (1960) 103 CLR 486.

- 7.70** The Commission considers that any potential difficulties that may occur with the operation of the rule, such as its ability to exclude evidence that may have strong probative value, will be resolved by the court's ability to give a flexible interpretation to what consists of matters of common knowledge and the willingness of the court to recognised new areas of expertise.
- 7.71** **The Commission recommends that the draft Evidence Bill should not abolish the common knowledge rule, and that matters of common knowledge should remain outside of the range of matters on which expert evidence can be given.**

D The Ultimate Issue Rule

- 7.72** The ultimate issue rule prevents witnesses from giving their opinion on or answering questions in relation to the ultimate issue in the proceedings. In a civil case, for example, the ultimate issue may be whether an employer is liable in negligence for an employee's injury. The trier of fact must decide this issue, albeit perhaps with the assistance of an expert witness. The expert may give evidence that a machine was not maintained to a relevant safety standard but not that the employer was, in his or her opinion, negligent. In a criminal case the ultimate issue may be whether a person is not guilty by reason of insanity. The expert can state that the accused was clinically insane at the time but not whether or not he or she was legally insane. There is a significant amount of overlap between the common knowledge and ultimate issue rules.

(1) *Rationale*

- 7.73** The rationale for this rule is likewise to prevent the expert from usurping the role of the trier of fact. The judge or jury must ultimately determine the outcome and the judge must guard against "trial by expert."¹²³ Similarly, the finder of fact must not be unduly influenced by (potentially unreliable) expert opinion on an issue which is crucial to the ultimate decision. The leading authority on the rule is *People (DPP) v Kehoe*¹²⁴, which is also the central authority for the common knowledge rule. The question in that case was whether expert evidence was necessary to explain the loss of self-control allegedly suffered by the accused after finding his girlfriend with another man. The Court of Criminal Appeal held that "these are clearly matters four-

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¹²⁴

Fennell, *The Law of Evidence in Ireland* (2nd ed LexisNexis Butterworths 2003) at 168. [1992] ILRM 481.

square within the jury's function and a witness no more than the trial judge or anyone else is not entitled to trespass on what is the jury's function."¹²⁵

7.74 McGrath regards the rule as illogical because the rationale for the admission of expert evidence is that the court lacks the necessary expertise and thus requires assistance in drawing the pertinent and relevant inferences from proven facts.¹²⁶

(2) *Application*

7.75 Like the common knowledge rule, the ultimate issue rule has generated considerable and inconsistent case law.¹²⁷ In fact, it has been argued that the rule may be obsolescent or even obsolete.¹²⁸ In *McMullen v Farrell*¹²⁹ Barron J noted that there are certain cases where professional witnesses are entitled to express their opinion on the question which the court has to decide. He did not identify particular cases but appeared to be of the view that an expert could give an opinion on the question that the court has to decide where it relates to an area of expertise which is wholly outside the knowledge and experience of the court. Case law in Australasia has moved in a similar direction.¹³⁰

7.76 It appears that the less scientific and specialised a discipline, the more probable it is that the rule will be applied with greater diligence. This was expressed in the 2009 English case of *R v Atkins and Atkins*¹³¹ discussed below.

7.77 Applying the ultimate issue rule can be difficult in nullity of marriage proceedings when the expert is testifying as to the capacity of the parties to marry because this is the very issue in dispute. This is particularly so in unopposed nullity cases where a psychiatrist "gives an opinion verging on the ultimate issue which the Court is going to have to decide".¹³² However, it can be argued that the role of the medical expert in such cases is not decisive of the ultimate issue and it remains the role of the court to decide whether or not to grant the annulment.

7.78 Furthermore, the courts are alive to their role as the finder of fact and the need to preserve this role and are careful to avoid allowing experts to make

¹²⁵ *Ibid* at 485.

¹²⁶ McGrath, *Evidence* (2nd ed. Round Hall 2014) at 399.

¹²⁷ For example in *Attorney General (Ruddy) v Kenny* (1960) 94 ILTR 185 opinion evidence that an accused was unfit to drive due to drunkenness was admitted from a member of the Garda Síochána, whereas in the later English decision *R v Davies* [1962] 3 All ER 97 evidence on the same issue was excluded. Although these decisions are from two different jurisdictions, the ultimate issue rule is a common law rule that had equal application in both jurisdictions.

¹²⁸ See, for example, McGrath's views in *Evidence* (2nd ed. Round Hall 2014) at 399. [1992] ILRM 776.

¹²⁹ This is discussed below at para. 7.88.

¹³¹ [2009] EWCA Crim 1876 .

¹³² *S(J) v S(C)* [1996] IEHC 23, [8]; [1997] 2 IR 506, 511.

overly general pronouncements of fact. The judge cannot abdicate his or her role to the expert, no matter how distinguished the expert may be.¹³³ A recent judgment of the Court of Appeal confirmed the continuing application of the ultimate issue rule in Irish law, upholding the decision of the trial judge to exclude evidence of a psychologist as to the capacity of the accused to make reasoned decisions under the pressure of Garda interrogation.¹³⁴ The trial judge quoted approvingly from *Kehoe* in describing this question as falling “four-square” within the jury’s function, and not that of the expert witness.¹³⁵

(3) *Comparative analysis*

(a) *England and Wales*

7.79 The ultimate issue rule was abolished for civil proceedings by section 3 of the *Civil Evidence Act 1972*, and replaced with a single, general requirement of relevance.¹³⁶ The 1972 Act implemented a 1970 Report of the Law Reform Committee who saw “no reason why an expert witness should not be asked a direct question as to his opinion on an issue in the action which lies within the field of his expertise.”¹³⁷

7.80 The rule continues to apply in criminal proceedings but more flexibly than before. In *DPP v A and BC Chewing Gum Ltd*¹³⁸ Parker LCJ noted that the question “do you think he was suffering from diminished responsibility” is habitually allowed without objection despite the fact that it is strictly inadmissible.¹³⁹

7.81 In *R v Stockwell*¹⁴⁰ Taylor J held the ultimate issue rule effectively abolished in criminal cases because:

“counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be...a matter of form rather than substance.”¹⁴¹

¹³³ See for example *F (Orse C) v C* [1991] 2 IR 330.

¹³⁴ *The People (DPP) v Ramzan* [2016] IECA 148.

¹³⁵ *Ibid* at [63].

¹³⁶ Section 5(3).

¹³⁷ Law Reform Committee, *Seventeenth Report – Evidence of Opinion and Expert Evidence* (1970 London HMSO) at paragraph [63].

¹³⁸ [1968] 1 QB 159, discussed in the Consultation Paper at paragraphs 2.209-2.211.

¹³⁹ One explanation for why expert evidence in diminished responsibility cases seems particularly prone to breach the ultimate issue rule is offered by Kenny in “The Expert in Court” (1983) 99 *LQR* 197, at 209. He traces it to the conflict inherent in the *Homicide Act 1957*’s expression “mental responsibility”.

¹⁴⁰ (1993) 97 Cr App R 260, discussed at paragraph 2.212 of the Consultation Paper.

¹⁴¹ *R v Stockwell* (1993) 97 Cr App R 260, 265-66.

- 7.82** The judge should still make clear to the jury that they are not bound by the expert’s opinion and that the issue is for them to decide.¹⁴²
- 7.83** In *R v Atkins and Atkins*¹⁴³ one of the ultimate issues was whether images of a person captured in CCTV footage were those of the defendant. A facial mapping expert was permitted to use a hierarchy of conventional expressions (lends no support, lends support, lends strong support etc) to express his subjective view on whether the images matched the facial profile of, or bore similarities to, the defendant, but was not permitted to tie those expressions to a numerical scale since this might lead the jury to believe that the scale was generally accepted by the scientific community rather than composed by the expert himself.
- 7.84** Evidence may still be excluded by the common knowledge rule even if it is not inadmissible under the ultimate issue rule. *DPP v A and BC Chewing Gum Ltd*¹⁴⁴ involved a question as to whether bubble gum cards were obscene under the English *Obscene Publications Act 1959* and is an example of the interaction of the two rules. The defendant had been convicted under the 1959 Act, and the English Court of Appeal distinguished between questions about the effect which the (allegedly obscene) literature would have on young children and the question of whether the literature in question was such as “to deprave and corrupt” (the legal test of obscenity at that time). The evidence of child psychologists was inadmissible because the question addressed did not fall outside the range of scope and knowledge of the ordinary person (not because it amounted to the ultimate issue). In *R v Ugoh*¹⁴⁵ the defendant was charged with rape. An expert in psychopharmacology offered evidence on the likely effects of alcohol on the complainant’s capacity to consent and how she was likely to act with the quantity of alcohol in her blood. The expert was not allowed to give evidence as to whether or not the complainant’s capacity to consent would have been evident to those who were with her at the time because this was not outside the scope of knowledge of the jury.
- 7.85** Despite uncertainty about the extent to which the ultimate issue rule applies in criminal proceedings, the courts remain wary of admitting expert evidence that may unduly encroach on the role and function of the judge or jury, whether this is based on the ultimate issue rule or the common knowledge rule. The Privy Council recently indicated in the case of *R v Pora*¹⁴⁶ that there are “dangers inherent” in experts speaking to the ultimate issue and said that

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Ibid.
[2009] EWCA Crim 1876 .
[1968] 1 QB 159.
[2001] EWCA Crim 1381.
R v Pora [2015] UKPC 9.

they should only be called upon to do so where it would provide “substantial help to the trier of fact.”¹⁴⁷

7.86 The Court of Appeal has subsequently quoted *Pora* in quashing the conviction of a medical professional for gross negligence manslaughter. In *Sellu v The Crown*¹⁴⁸ the expert witnesses for the prosecution had repeatedly used the language of “gross negligence” to describe the conduct of the appellant in their evidence and had not properly guarded against the “inherent dangers” of speaking to the ultimate issue. The Court found that as a result “the jury’s role as the ultimate decision maker may have been supplanted.”¹⁴⁹ The Court went on to find that the judge’s direction had been insufficient to remedy the failure of the expert witnesses to guard against speaking to the ultimate issue and accordingly quashed the appellant’s conviction.¹⁵⁰

7.87 In *Kennedy v Cordia*¹⁵¹ the UK Supreme Court also explores the continuing relevance of the ultimate issue rule. The case concerned a personal injuries action arising after the claimant slipped and fell at work, where the judge was sitting alone without a jury. The UK Supreme Court held that the expert should be careful not to usurp the court’s role, stating that “expert assistance does not extend to supplanting the court as the decision maker”. The expert witness in the case had at a number of times suggested that the conduct of the claimant’s employer had been in breach of its statutory obligations under health and safety legislation. The Court held that a competent judge would still apply his own mind to the ultimate issue and indeed appeared in the following passage to place the duty on the judge to disregard statements as to the ultimate issue made by the expert witness: “The fact-finding judge cannot delegate the decision making role to the expert.” This to some extent may indicate a reversal of the duty the ultimate issue rule imposes in a non-jury case. While the ultimate issue rule has been much maligned in criminal cases and formally abolished in civil cases in England and Wales, it is abundantly clear from the recent case law that the rule continues to play a vital role in directing the proper presentation of expert evidence in both civil and criminal cases.

(b) Australia

7.88 The Australian Law Reform Commission (ALRC) noted inconsistencies in the correct formulation and application of the rule in Australia:

¹⁴⁷ *R v Pora* [2015] UKPC 9 at [27].

¹⁴⁸ [2016] EWCA Crim 1716.

¹⁴⁹ *Ibid* at para. 142.

¹⁵⁰ *Ibid* at para. 155. The Court of Appeal was also dissatisfied with the judge’s direction in respect of how the jury should determine gross negligence manslaughter and quashed the conviction on those grounds also.

¹⁵¹ [2016] UKSC 6.

“the courts have departed from the most commonly understood version of the rule when they have felt it appropriate, resulting in an ad hoc development of the law.”¹⁵²

7.89 The ALRC’s criticisms are discussed in the Consultation Paper.¹⁵³ They recommended that the ultimate issue rule be abolished, in line with the recommendations of law reform commissions in Canada,¹⁵⁴ Scotland¹⁵⁵ and South Australia¹⁵⁶ (and as had occurred in the US *Federal Rules of Evidence*)¹⁵⁷. On foot of this recommendation, section 80 of the Australian Uniform *Evidence Act 1995* abolished the rule against expert evidence going to the ultimate issue.

7.90 In a later review of section 80 of the 1995 Act¹⁵⁸ the ALRC noted that the removal of the rule had led to problems but recommended against reintroducing the ultimate issue rule.¹⁵⁹

(c) *New Zealand*

7.91 In *R v Howe*¹⁶⁰ the Court of Appeal referred to the general trend of a move away from a strict application of the ultimate issue rule and held that it had “been very much eroded” for expert witness evidence.¹⁶¹

7.92 The NZLC examined the rule and possible reform in a discussion paper and final report. These are discussed in the Consultation Paper.¹⁶² It recommended assessing whether the evidence is helpful and reliable rather than whether it goes to the ultimate issue.¹⁶³ This was implemented in

¹⁵² Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at paragraph 359 referring to *Grismore v Consolidated Products Co* (1942) 232 5 NW (2d) 646, *Fisher v R* (1961) 130 CCC 20, *R v Tonkin* [1975] Qd R 1, *Grey v Australian Motorists and General Insurance Co Pty Ltd* [1976] 1 NSWLR 669, *In the Marriage of Hall and Hall* (1979) FLC 90, *R v Palmer* [1981] 1 NSWLR 209. See further LRC CP 52-2005 paragraph 2.218.

¹⁵³ Paragraphs 2.218-2.221.

¹⁵⁴ Ontario Law Reform Commission, *Report on The Law of Evidence*, 1976, 153-8; Law Reform Commission of Canada, *Report on Evidence*, 97, 98 (sections 67-71); Federal/Provincial Task Force, *Report on Uniform Rules of Evidence*, paragraphs 8-10.

¹⁵⁵ Scottish Law Commission *Memo No 46 Law of Evidence* R.01-R.06. See also Law Reform Committee, 17; Criminal Law Revision Committee, England and Wales, *Eleventh Report, Evidence (General)* HMSO, London, 1977, paragraph 266-272.

¹⁵⁶ Criminal Law and Penal Methods Reform Committee of South Australia *Third Report, Court Procedure and Evidence* (Adelaide, 1975) para. 6.

¹⁵⁷ This is the general position, as stated by Rule 704(a), however 704(b) contains an exception; “In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those are matters for the trier of fact.”

¹⁵⁸ Australian Law Reform Commission, *Review of the Evidence Act 1995* IP 28 (2004) at paragraph 6.47; ALRC Report 102; NSWLRC Report 112; VLRC *Final Report Uniform Evidence Law* (December 2005) at paragraph 9.1116. The ALRC’s review is discussed in the Consultation Paper at paragraphs 2.222-2.224.

¹⁵⁹ *Ibid.*

¹⁶⁰ [1982] 1 NZLR 618.

¹⁶¹ [1982] 1 NZLR 618, 628.

¹⁶² Paras 2.226-2.230.

¹⁶³ New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper* (Preliminary Paper 18, December 1991, NZLC) at paragraphs 42, 44.

section 25(2)(a) of the New Zealand *Evidence Act 2006* which provided that an opinion of an expert is not inadmissible because it goes to an ultimate issue to be determined in the proceedings. This applies to both criminal and civil proceedings.

(4) Conclusion - Is reform of the ultimate issue rule necessary?

7.93 Arguments for and against abolishing the rule are set out in the Consultation Paper.¹⁶⁴ First, hearing the expert's opinion evidence on the ultimate issue does not amount to the expert having the final say. The function of expert testimony is to provide the finder of fact with the necessary expert knowledge to come to an informed conclusion about the ultimate issues.

7.94 Second, refusing to admit opinion-based evidence (which may put into context facts beyond the court's common knowledge or based on methodologies or tests undertaken) could lead to the finder of fact misinterpreting the factual evidence. Sometimes the finder of fact may need to hear expert opinion evidence to understand the factual evidence even though the opinion may touch on the ultimate issue to be decided. For instance, a person's actions may be considered to be those of a clinically insane person without falling within parameters of legal insanity.

7.95 The ultimate issue rule has been criticised in several jurisdictions including the US, Canada,¹⁶⁵ Scotland¹⁶⁶ and Australia.¹⁶⁷ A key feature of these criticisms is that the rule has not been applied consistently.

7.96 In its Consultation Paper, the Commission favoured prohibiting an expert from giving an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law.¹⁶⁸ The Commission considered the advantages and disadvantages of abolishing the rule and concluded that abolishing the ultimate issue rule and replacing it with a general admissibility test (based on whether or not the evidence is of assistance to the court) would not resolve the difficulties to which the rule gives rise.¹⁶⁹

¹⁶⁴ Arguments in favour at paragraphs 2.233-2.235 and arguments against at paragraphs 2.236-2.241.

¹⁶⁵ Ontario Law Reform Commission *Report on The Law of Evidence* (1976) 153-8; Law Reform Commission of Canada *Report on Evidence* 97-98 (sections 67-71); Federal/Provincial Task Force *Report on Uniform Rules of Evidence* paragraphs 8-10.

¹⁶⁶ Scottish Law Commission Memo No 46 Law of Evidence R.01-R.06. See also Law Reform Committee, 17; Criminal Law Revision Committee, England and Wales *Eleventh Report, Evidence* (General) (HMSO, London, 1977) paragraphs 266-272.

¹⁶⁷ Criminal Law and Penal Methods Reform Committee of South Australia *Third Report, Court Procedure and Evidence* (Govt Printer, Adelaide, 1975) paragraph 6.

¹⁶⁸ This was the interpretation adopted by the Federal Court of Australia in *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 350 (Lockhart, Wilcox and Gummow JJ) quoting Eggleston *Evidence, Proof and Probability* (2nd ed, 1983), at 147-148. See provisional recommendations 7.04 (at paragraph 2.242) and 7.05 (at paragraph 2.243).

¹⁶⁹ LRC CP 52-2008 paragraphs 2.231 to 2.235.

7.97 The Commission received submissions on the ultimate issue rule to the effect that expert evidence ought to be admissible when it is deemed “helpful and reliable.”¹⁷⁰

7.98 If courts are guided by the principle behind the rule and do not adopt too strict an approach, and there is judicial discretion to admit, then the rule is valuable. It ensures that the expert witness does not usurp the role of the finder of fact by purporting to determine the issues in a case. It is also a useful benchmark for the expert witness to ensure that he or she does not step over the line in relation to the evidence that is permissible and stray outside the area of expertise for which expert testimony is being adduced.

7.99 In the Consultation Paper, the Commission provisionally recommended the retention of the ultimate issue rule as it does not create any excessive difficulties in practice. However, since the publication of the Consultation Paper, the rule has been addressed by the Supreme Court in critical terms in *Karen Millen Fashions Ltd v Dunnes Stores*. Observing that the rule is “often honoured in the breach”, O’Donnell J stated that what is important is the reason for the expert’s conclusion:

“For my own part, I can see how it is at least convenient to permit experts to give evidence in general as to their conclusions, so long as it is very clearly understood that what is important are the reasons leading the expert to that conclusion rather than the fact of the conclusion itself. Anything else is somewhat artificial. It is a matter of near certainty that the only expert witnesses called by either side will have formed an opinion favourable to that side and their evidence can often be best understood when both the reasons and conclusions are stated so long as it is understood and appreciated that the reasons leading an expert to a particular conclusion are the important matters for the court to consider.”¹⁷¹

7.100 These criticisms notwithstanding, the Court held that the trial judge was entitled to rely on the traditional rule and declined to reverse his decision.¹⁷²

7.101 Having considered these criticisms, the Commission remains of the view that the ultimate issue rule serves an important function, particularly in criminal cases due to the constitutional rights of the accused and because a concern

¹⁷⁰ As in New Zealand. See paragraph 2.225 onwards, and in particular paragraph 2.228, where the New Zealand Law Commission expressed the view that this danger is present regardless of whether the evidence is directed at an ultimate issue or not, and therefore a more appropriate approach is to assess any evidence directly “the primary issue being whether the evidence is helpful and reliable, not whether it goes to the ultimate issue.”

¹⁷¹ *Karen Millen Fashions Ltd v Dunnes Stores* [2014] IESC 23, per O’Donnell J.

¹⁷² *Ibid* at paras 23-25.

remains that a jury may be more easily influenced by the expert expressing an opinion on the ultimate issue.

- 7.102** While an expert witness will inevitably give evidence that is relevant to the ultimate issue (such as DNA evidence that may place the accused at the crime scene, engineering, or medical evidence that the person was clinically insane), this must not determine the ultimate question of criminal liability. This presence at the crime scene is separate from the issue of guilty or not guilty; and clinical insanity, which might not even be disputed, is separate from the legal issue as to whether the person is insane under the *Criminal Law (Insanity) Act 2006*.
- 7.103** The judge should still make clear to the jury that they are not bound by the expert's opinion and that the issue is for them to decide.¹⁷³ The courts should remain wary of admitting expert evidence that may unduly encroach on the role and function of the judge or jury.
- 7.104** The Commission takes the view that the rule endorses both the underlying roles of the expert witness and the judge or jury and is therefore valuable and worth retaining.
- 7.105** **The Commission recommends that the draft Evidence provide that the ultimate issue rule be retained.**
- 7.106** **The Commission also recommends that the draft Evidence Bill should provide that a court should continue to allow expert evidence to inform and educate the judge and, where relevant, the jury about the background to the ultimate issue where necessary, while also emphasising that the ultimate decision on such issues is for the court and not the expert.**

E A Reliability Test?

- 7.107** In Ireland when the reliability of expert evidence is challenged this is generally done at the point in the trial when the witness is called to give evidence. So as not to allow the jury to hear evidence that may be held inadmissible the jury is sent out and the admissibility of the evidence in question is argued and decided by the judge alone in *voir dire*.
- 7.108** A *laissez-faire* or liberal approach currently applies and expert evidence is admitted without a pre-admission or threshold test to ensure its reliability. The evidence of a particular expert witness is admissible where it is relevant and where it addresses matters outside the knowledge of the court or jury and the witness is properly qualified in the field. Thus, a doctor may give evidence on medical practice, but not on nursing practice. Under the current position, the reliability of expert evidence and testimony is tested through

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Ibid.

examination and cross-examination and the finder of fact determines whether it is reliable and persuasive.

- 7.109** In the Consultation Paper¹⁷⁴ the Commission provisionally recommended the introduction of a judicial guidance note outlining a non-exhaustive and non-binding list of factors based on empirical validation. Generally, where reliability tests have been introduced (or proposed) in other jurisdictions the question of reliability is determined as a preliminary issue in the absence of the jury (where there is one).
- 7.110** The provisional recommendation in the Consultation Paper was aimed at addressing certain issues with expert evidence, in particular the perception that it may be admitted too readily and with too little scrutiny, and that scientific or technical methods or techniques may be unreliable and require proof of their scientific basis especially where they are new or unfamiliar. There is a danger that expert witnesses can unduly influence the finder of fact (judge or jury as the case may be) giving the impression that their evidence is infallible leading to "trial by expert". This can also happen where the evidence is non-scientific. Particular concern has been raised about the reliability of some expert evidence because of the possibility of it leading to wrongful convictions on the basis of unreliable or incorrect expert scientific evidence.
- 7.111** In some jurisdictions, these concerns have led to changes in the law or proposals for change in relation to the admissibility of expert opinion evidence. The most prominent example of this can be seen in the United States decision in *Daubert v Merrel Dow Pharmaceuticals*¹⁷⁵, and more recently the Law Commission of England and Wales has recommended a threshold admissibility test along similar lines to *Daubert*. Given their similarity, the Commission considers these tests together.

(1) *Reliability tests in the United States and the United Kingdom*

- 7.112** In England and Wales concerns over miscarriages of justice (actual and potential) based on unreliable expert evidence, such as "shaken baby" cases prompted the Law Commission in 2011 to propose an additional reliability test for the admission of expert evidence in criminal cases. In the United States, what is regarded as the definitive statement on reliability is the decision of the US Supreme Court in the civil case of *Daubert v Merrell Dow Pharmaceuticals*.¹⁷⁶
- 7.113** The facts of *Daubert* concerned the anti-nausea medication for pregnant women, Bendectin, manufactured by the defendant, Merrell Dow

¹⁷⁴ See para. 2.400. (LRC CP 52-2008).

¹⁷⁵ 509 U.S. 579 (1993)

¹⁷⁶ 509 U.S. 579 (1993).

Pharmaceuticals. The plaintiffs alleged that taking the drug while pregnant had caused their children to be born with significant birth defects. While 30 published studies had failed to show any statistically significant link between the drug and birth defects, the plaintiffs had nevertheless located experts prepared to testify for them. One of the experts claimed that he had reanalysed the data from one of the published studies and had demonstrated just such a statistically significant link. This reanalysis was prepared for the purposes of the litigation and had been neither published nor peer-reviewed. The question of whether this evidence was admissible went to the US Supreme Court. The decision of the Supreme Court turned on the application and interpretation of the general admissibility test in Rule 702 of the Federal Rules of Evidence, which at that time provided:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

7.114 The court in *Daubert* interpreted rule 702 as having implicitly overruled the existing "general acceptance test" established in *Frye v. United States*¹⁷⁷ in 1923. The general acceptance test provided that evidence must be based on a scientific method that is "sufficiently established to have gained general acceptance" in a particular field.¹⁷⁸ The Frye standard deferred assessment of the scientific reliability of a particular method to the scientific community, observing only whether a significant number of that community accepted the relevant method or technique. The Supreme Court in *Daubert* took a different approach and expressly moved the focus of the enquiry to the reliability of the evidence itself. The Court stated:

"This [Rule 702] entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate."¹⁷⁹

7.115 The court then set out the following factors:

- Whether the proposition is testable empirically (and whether it has been tested)
- Whether the theory has a "known or potential rate of error".

¹⁷⁷ *Frye v. United States* (1923) 293 F. 1013.
¹⁷⁸ *Ibid* at 1014.
¹⁷⁹ 509 U.S. 579 (1993) at 593 -594.

- Whether the proposition has been subjected to peer review and publication. (although Blackmun J insisted that peer review is “not a *sine qua non* of admissibility” given the novelty or limited interest which a technique may have). Publication increases the likelihood that substantive flaws in methodology will be detected and the theory honed.
- Whether there are standards for using the methodology (which would allow for further retesting of the methodology).
- Whether the methodology is generally accepted.¹⁸⁰

7.116 *Daubert* thus introduced a more rigorous and demanding threshold standard for the introduction of expert evidence. Rule 702 was amended in 2000 and again in 2011 and now encompasses some of the *Daubert* factors. The US Supreme Court in *Kumho Tire Co. v Carmichael* made some important clarifications of the decision in *Daubert*. The Court held that the test applied to technical knowledge as well as strictly scientific evidence, significantly expanding its effect. The Court also offered further guidance on how the *Daubert* test should be understood; “*Daubert* makes clear that the factors it mentions do not constitute a “definitive checklist or test”¹⁸¹ and went on to say:

“The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence...*Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*’s general acceptance factor help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”¹⁸²

7.117 In response to the concerns noted above relating to miscarriages of justice and the perceived risk of pseudo-science unduly influencing the decisions of juries, the Law Commission of England and Wales has also proposed a

¹⁸⁰ See 509 U.S. 579 (1993) at 593-594. The factors listed in the judgment are well summarised by Imwinkelried in ‘Junk Science in the Courtroom: Will the Changes to the American Law of Expert Testimony Influence the Irish Courts?’ (2004) 26 *DULJ* 83.

¹⁸¹ *Kumho Tire v Carmichael* 526 U.S (1999) 137, 150.

¹⁸² *Ibid* at 150-151.

threshold test for criminal cases. The Commission set out its proposed reliability test in some detail.¹⁸³ The core principle is that expert opinion evidence is admissible only if sufficiently reliable. The two requirements for sufficient reliability are that the opinion be soundly based and be no stronger than the grounds on which it is based allow.

7.118 The Law Commission also considered that the following "higher-order" factors might indicate that opinion evidence is unreliable. They are broadly similar to the factors in *Daubert*:

- the opinion is based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;
- the opinion is based on an unjustifiable assumption;
- the opinion is based on flawed data;
- the opinion relies on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case;
- the opinion relies on an inference or conclusion which has not been properly reached.¹⁸⁴

7.119 The proposals of the English Law Commission for a threshold reliability test have been rejected by the UK Government as too costly.¹⁸⁵ This is also a relevant consideration for Ireland. Any perceived benefits of requiring a pre-trial admissibility test based on reliability would not necessarily outweigh the costs where reliability is already testable under present procedures. However, while the UK Parliament has not given effect to the Law Commission's recommendations, the Criminal Practice Directions issued by the English Lord Chief Justice makes explicit reference to the factors set down by the Law Commission and encourages judges to "enquire into such factors".¹⁸⁶ Lord Thomas CJ, the author of the reliability additions, has stated that the practice directions in reality amount "to a novel way of implementing

¹⁸³ Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (HMSO, 2011) at p. 60-61.

¹⁸⁴ *Ibid.*

¹⁸⁵ From the UK Government response to the Law Commission's report: "The impact assessment published with the Law Commission's recommendations indicates that application of the new test would involve additional pre-trial hearings, with the concomitant additional costs, but without sufficient reliably predictable savings to compensate for those costs. Without certainty as to the offsetting savings which might be achieved, when set against current resource constraints it is not feasible to implement the proposals in full at this time."

¹⁸⁶ Criminal Practice Directions, 19A.4 [2015] EWCA Crim 1567.

an excellent report.”¹⁸⁷ A text on expert evidence published in 2016 also observes that the practice directions:

“...incorporate the essence of the Law Commission’s recommendations and mean that England and Wales have as part of their criminal law a significant and broad-based focus on reliability as a precondition to the admissibility of expert evidence.”¹⁸⁸

7.120 A decision of the Court of Appeal in 2013 also found that in determining admissibility the court must be satisfied that there is a “sufficiently reliable scientific basis for the evidence to be admitted.”¹⁸⁹ This would appear to provide a common law basis from which the process set down in Criminal Practice Direction 19A should follow. Nevertheless there is some doubt as to the practical uptake of the means of challenging scientific evidence provided for in the Criminal Practice Directions. In a national survey of criminal barristers conducted by the Northumbria Centre for Evidence and Criminal Justice Studies one year after the introduction of PD 19A, 75% of respondents said that it had little or no effect on the way in which the admissibility of evidence was dealt with in trials.¹⁹⁰ The position of a reliability test in criminal cases is therefore still somewhat in flux in England and Wales.

7.121 The effectiveness of this form of threshold test has come under scrutiny in the context of US case law post-*Daubert*. Arguably such a threshold test requires a thorough knowledge of the scientific method (where the evidence is scientific) which judges and juries do not generally possess. A significant survey of judges and their application of *Daubert* found that:

“... [A]lthough the judges surveyed reported that they found the *Daubert* criteria useful for determining the admissibility of proffered expert evidence, the extent to which judges understand and can properly apply the criteria when assessing the validity and reliability of proffered scientific evidence was questionable at best. The survey findings strongly suggest that judges have difficulty operationalizing the *Daubert* criteria and applying them, especially with respect to falsifiability and error rate. Only a very small percentage of judges surveyed provided responses that clearly reflected an understanding of the *scientific* meaning of those two criteria. Most of the respondents talked around the concepts and offered only passing, if any, reference to their

¹⁸⁷ Thomas J (Baron Thomas of Cwmgiedd) (2014) The future of forensic science in criminal trials: 2014 Criminal Bar Association Kalisher Lecture at [17]. Available at: <http://www.judiciary.gov.uk/wp-content/uploads/2014/10/kalisher-lecture-expert-evidence-oct-14.pdf>.

¹⁸⁸ Freckleton, Goodman-Delahunty, Horan and McKimmie, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 2016). P. 43

¹⁸⁹ *R v Dlugosz (Kuba)* [2013] EWCA Crim 2.

¹⁹⁰ Davies and Piasecki, ‘No More Laissez Faire? Expert Evidence, Rule Changes and Reliability: Can More Effective Training for the Bar and the Judiciary Prevent Miscarriages of Justice?’ *JCL* 80 (327).

central meaning. This finding is also supported by case law reviews that have analyzed judicial opinions for discussions of the *Daubert* criteria.¹⁹¹

7.122 Analysing the same data, a text on expert evidence concluded that:

“*Daubert*...has posed complex challenges for United States trial judges- it cannot readily be said that the fundamental reform to the law made in *Daubert* has necessarily achieved the objective of facilitating informed exclusion of unreliable evidence, especially in criminal trials where it is the prosecution that seeks to adduce the evidence; the *Daubert* reform is not a panacea.”¹⁹²

7.123 While there has been a large volume of criticism of *Daubert* and its application, many commentators have sought to respond and reassert the value of *Daubert* and of the need for judicial “gate-keeping” of spurious pseudo-science.¹⁹³ It has been argued that while there have been clear and obvious flaws in the application of *Daubert*, such flaws do not contradict the theoretical basis of judicial gate-keeping; that judges should independently assess the reliability of scientific evidence received in court.

7.124 Proponents of judicial gate-keeping argue that the *Daubert* revolution has not faltered owing to any intrinsic absence of merit in its aims, but rather owing to the fact that judges lack the scientific knowledge and education to utilise it. The Law Commission of England and Wales argued that these judicial shortcomings represent “practical problems... which cannot be regarded as insurmountable...as the trial judge is already under a duty, and must continue to be under a duty, to screen out insufficiently reliable evidence.”¹⁹⁴ The English Law Commission, in discussing the evidence that judges in the United States do not sufficiently understand many of the *Daubert* criteria, note that the same survey found overwhelming support among judges for the gate-keeping role and that 94% of them found *Daubert* to be of value. This indicates a judicial willingness to learn from mistakes and meet the demands *Daubert* makes.¹⁹⁵

7.125 While the problem of judicial scientific education is undoubtedly a real one, it has been argued that *Daubert* asks the right questions and it is for the courts

¹⁹¹ *Gatowski et. al* in “*Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a post-Daubert World*”:2000 Richardson, Dobbin, Gatowski, Ginsburg, Merlino, Dahir, & Colton, 1998; Richardson, Ginsburg, (1995).

¹⁹² Freckleton, Goodman-Delahunty, Horan and McKimmie, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 2016).

¹⁹³ See Mueller, ‘*Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*’ (2003) 33 *Seton Hall Law Review* 987 and Sanders, ‘*The Merits of Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence*’ (2003) 33 *Seton Hall Law Review* 881.

¹⁹⁴ Consultation Paper No. 190, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*.

¹⁹⁵ *Ibid.*

to find the right answers.¹⁹⁶ Indeed the question of judicial education is arguably the crucial factor in improving how the law's approach to questions of contested scientific evidence. Commentary in the UK has highlighted the importance of continuous scientific education of both judges and barristers if the Crim PD reforms are to have any real effect.¹⁹⁷ It has also been argued that barristers likewise do not necessarily possess the skills to properly expose unreliable scientific evidence in cross-examination. Some research and consultation has suggested that when faced with scientific expert evidence, cross-examining counsel tends to prefer to attack on the lines of credibility and bias rather than concentrate on the scientific evidence itself.¹⁹⁸ It may well be the case that whatever the future direction the law of expert evidence, an increased fluency in scientific method and analysis among the legal profession as a whole is becoming an imperative.

7.126 Although there are concerns over the *Daubert* test, the Commission considers that the choice between *Daubert* and no reliability test whatsoever is a false one. Judicial developments in civil cases in the UK have favoured composite admissibility tests which incorporate a general, flexible requirement of reliability. A longstanding example is the decision *R v Bonython*¹⁹⁹. The case sets out a general admissibility test including the requirement that:

“the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience,”

7.127 This approach is much less prescriptive than *Daubert* and leaves a good deal of discretion to future judges to interpret and develop it. It may still be considered somewhat narrow in its requirement that the body of knowledge be “sufficiently organised”, language which may work to exclude emerging scientific fields whose reliability may be established by other means.

7.128 The UK Supreme Court moved this approach in a yet more permissive direction in *Kennedy v Cordia*.²⁰⁰ The judgment sets out 4 simple considerations to guide the admissibility of expert evidence in civil cases, the fourth of which addresses the question of reliability.

(a) Whether the proposed skilled [expert] evidence will assist the court in its task;

¹⁹⁶ See Mueller, 'Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers' (2003) 33 *Seton Hall Law Review* 987.

¹⁹⁷ Davies and Piasecki, 'No More Laissez Faire? Expert Evidence, Rule Changes and Reliability: Can More Effective Training for the Bar and the Judiciary Prevent Miscarriages of Justice?' (2016) *JCL* 80 (327).

¹⁹⁸ Law Commission of England and Wales, *Expert Evidence in Criminal Proceedings in England and Wales (No. 190): Summary of Responses* at 164 (quoted in Davies and Piasecki, 'No More Laissez Faire? Expert Evidence, Rule Changes and Reliability: Can More Effective Training for the Bar and the Judiciary Prevent Miscarriages of Justice?' *JCL* 80 (327).

¹⁹⁹ *R v Bonython* (1984) 38 SASR 45.

²⁰⁰ [2016] UKSC 6.

- (b) Whether the witness has the necessary knowledge and experience
- (c) Whether the witness is impartial in his or her presentation and assessment of the evidence; and
- (d) Whether there is a reliable body of knowledge or experience to underpin the expert's evidence.²⁰¹

7.129 The influence of *Bonython* is clear in the formulation of the reliability requirement, not least because the Court quotes *Bonython* on the immediately preceding page.²⁰² The test, or “consideration”, is broad and leaves it to the judge to interpret and apply according to the facts of a given case. The court goes on to say that “what amounts to a reliable body of knowledge or experience depends on the subject matter of the proposed skilled [expert] evidence.”²⁰³ The Court went on to quote with approval from a number of judgments and academic authorities on the subject, notably *Walker and Walker*.²⁰⁴ Relying on Lord Eassie’s opinion in *Mearns v Smedvig*,²⁰⁵ the authors of that work argue that where a body of knowledge is unestablished, the court must investigate “the methodology and validity of that field of knowledge or science.”²⁰⁶ However, the UK Supreme Court has largely left it open to later courts to determine what constitutes a “reliable body of knowledge or experience”.

(2) *The Irish position*

7.130 As previously stated, the Irish courts have not set down a threshold test of admissibility in the manner envisaged by *Daubert* and the English Law Commission. It is however worth exploring in more detail how Irish courts have approached the issue of unreliable scientific evidence.

7.131 The strongest judicial statement on the reliability of new scientific evidence comes from the Court of Criminal Appeal in *The People (DPP) v Kelly*.²⁰⁷ The applicant sought to have his conviction for murder overturned on the basis that a new scientific technique, known as cumulative sum analysis (CUSUM), could prove a key inculpatory statement to be inauthentic. The technique purported to be able to determine if documents were authored by more than one person. The applicant sought to use this technique to prove that the confession ostensibly extracted by police had not been authored by his hand. Under cross-examination, the witness admitted that most research in the

²⁰¹

Ibid at 14.

²⁰²

Ibid at 13.

²⁰³

Ibid at 18.

²⁰⁴

Walker and Walker, *The Law of Evidence in Scotland* (4th ed. Bloomsbury, 2015).

²⁰⁵

1999 S.C. 243

²⁰⁶

Walker and Walker, *The Law of Evidence in Scotland* (4th ed. Bloomsbury, 2015).

²⁰⁷

The People (DPP) v Kelly [2008] 3 IR 697.

area was authored by him and his wife and described it as “a minority interest”.²⁰⁸

7.132 The Court of Criminal Appeal gave extensive consideration to the academic literature in reaching the conclusion that the evidence had no established scientific validity: “The Court is not satisfied that the technique has a properly established scientific provenance of that it has achieved the requisite degree of expert peer approval.”²⁰⁹ The Court also referred to an onus on the party adducing new science to show it was sufficiently reliable to be relied upon.

7.133 While it has, until recently, been unusual for an Irish court to subject scientific evidence to such rigorous analysis, it may be worth noting that the case was an application under the *Criminal Procedure Act 1993* to quash a conviction on the basis of newly discovered evidence. The Court also had the advantage of the expert witness being tested under cross-examination before coming to its conclusion on the evidence.

7.134 The courts have on a number of other occasions taken this approach of enquiring into the scientific bases of a given expert opinion. In *The People (DPP) v Fox*, the Special Criminal Court rejected the evidence of a handwriting expert finding that the evidence “was not backed by any scientific criteria which would have enabled testing the accuracy of the conclusion to which he came.”²¹⁰ The Court also quoted with approval from the influential judgment of Lord President Cooper in the Scottish case *Davie v Edinburgh Corporation Magistrates*:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment...”²¹¹

7.135 In *The People (DPP) Ramzan* the Court of Appeal refused to admit the expert evidence of a witness on a number of grounds, including the reliability of the information on which he sought to base his opinion: “All of the evidence...that he supports his opinion on are factual records related to him by secondary evidence, documents, reports, history of the accused...”²¹² This decision is notable for the fact that the court refused to admit expert evidence owing in part to insufficient reliability, among other factors.

7.136 The Supreme Court has assessed the reliability of scientific evidence given at trial by reference to underlying methodology and reasoning on a number of occasions. In *The People (DPP) v Connolly*²¹³, the Court was satisfied that the challenged evidence emanated from an “accredited laboratory procedure”

²⁰⁸ *Ibid* at 716.

²⁰⁹ *Ibid* at 722.

²¹⁰ Unreported, Special Criminal Court, January 23rd 2002.

²¹¹ (1953) SLT 54.

²¹² *The People (DPP) v Ramzan* [2016] IECA 148.

²¹³ [2011] 1 IR 755.

and was based on a “statistical model for sampling” and upheld the decision of the trial judge.²¹⁴ In *The State (D and D) v Groarke*²¹⁵, the Supreme Court quashed an order of the District Court removing a child from the custody of its parents. The Court found that the conclusion of the Health Board doctor that the child had been sexually abused had not been shown to be reliable. The Court ruled that a tribunal of fact would require video evidence of the interview with the child and “a demonstration...of the precise use and the expert witness’s belief in the meaning of the use by the child, of the anatomical dolls.”²¹⁶

7.137 The Supreme Court in *Wright v AIB Finance and Leasing Ltd*²¹⁷ left open the question of whether some test of minimal reliability might apply at the admissibility stage.²¹⁸ The Court noted the argument of counsel that “there may be a requirement that expert evidence be of some minimal weight in order for it to be considered further by the court.”²¹⁹ Counsel, while offering the test in the language of weight, conceded that in practical terms the test might be better characterised as one of admissibility. The Court asked counsel, who was inviting the court to set down such a test, to formulate precisely what kind of test he was proposing. The Court included a portion of it in the judgment:

“The proposed evidence of an expert witness should be assessed for reliability by the Court before admitting it into evidence to determine:

1. if it is based on other admissible evidence;
2. if the opinion is supported by scientifically valid principles and criteria which enable the judge to test the accuracy of the expert's conclusions;
3. whether the proposition advanced by the expert is both capable of being empirically tested and has, if practicable, been tested by the expert (or, where appropriate, by somebody else).”²²⁰

7.138 Ultimately the Court declined to reach any conclusions on this discussion, Clarke J stating: “I am not persuaded that it is necessary to reach any conclusions on the precise current state of the law in this jurisdiction on either the admissibility of, or weight to be attached to, expert evidence on the

²¹⁴ *Ibid* at 761-2.

²¹⁵ *The State (D. and D.) v Groarke* [1990] 1 IR 305.

²¹⁶ *Ibid* at 310.

²¹⁷ *Wright v AIB Finance & Leasing Ltd* [2013] IESC 55.

²¹⁸ *Ibid*.

²¹⁹ *Ibid* at [6.9]

²²⁰ *Ibid* at [6.10].

facts of this case.”²²¹ Nevertheless the Court did appear to be open to the argument that some reliability test could apply in Irish law.

7.139 The approach of the Irish courts to assessing the reliability of scientific evidence has been inconsistent. Broadly, they have demanded that experts lay out the scientific basis for their opinion and assess its validity by reference to methodology and reasoning. However while they are prepared to assess scientific evidence on its merits rather than to simply defer to expertise, they have so far eschewed performing any “gate-keeping” role of the kind proposed in *Daubert*. Heffernan and Ní Raifeartaigh summarise the Irish position succinctly: “In Ireland, it cannot be said that any *ad hoc* judicial enquiries into scientific validity have crystallised into a settled admissibility requirement.”²²²

(3) *Conclusions*

7.140 Having considered the issues regarding the reliability of expert evidence in Ireland and the experience in the United States and England and Wales, the Commission does not propose to recommend a threshold test of reliability for expert evidence, conducted before a judge and which would have to be passed before the expert evidence could be admitted. The Commission takes this view for a number of reasons.

7.141 First, the adversarial process, through cross-examination and expert testimony from the opposing side, is designed to expose any flaws in the expert evidence. This includes both scientific (including forensics, medicine, psychiatry and engineering) and non-scientific evidence (including economics, accounting, appraisal, securities, banking, patents and trademarks and insurance). Secondly, it is argued that a judge is not well-equipped independently to assess questions of scientific merit and the application of the scientific method. The test set down in *Daubert* and those which have followed are extremely detailed and prescriptive and place a huge burden on the shoulders of judges who often have little knowledge of scientific methodology. In light of these limitations, it is all the more important that the evidence be laid before the court and subject to the scrutiny of cross-examination as well as the refutation of opposing experts. In the context of the *Daubert* test in the United States, research has shown that judges have eschewed assessing the expert’s methods in favour of the traditional approach of looking to his or her qualifications and experience which suggests that “judges may be unable to determine what factors are

²²¹

Ibid.

²²²

Heffernan with Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury, 2014) p. 273.

important in assessing scientific reliability, particularly when research is the basis for an expert opinion.”²²³

- 7.142** Thirdly, it has not been demonstrated that having a threshold test of the kind proposed in the jurisdictions mentioned above would assist in addressing effectively the issues that do arise, discussed above. The tests in those jurisdictions consist essentially of various forms of checklists for the judge that allow him or her to choose the most appropriate and none have been shown to be entirely satisfactory. For instance, there is every possibility that the evidence given by Professor Meadows in *R v Clark* would have been admitted under a *Daubert* style test since his evidence was based on the (then forthcoming) Governmental CESDI report on Sudden Unexpected Deaths in Infancy.²²⁴ The issue was not that the statistics were not reliable, but that the witness had misinterpreted them because he did not have a qualification in statistics.
- 7.143** In the absence of a developed judicial expertise in challenging scientific methodology, it is more effective to have such evidence heard, pressed and appraised by skilled counsel who may, as the market could increasingly demand, have a developed knowledge of science and scientific methodology. Those embarking on cases involving complex scientific evidence may increasingly seek out practitioners with the relevant experience and ability. This in turn will motivate practitioners to develop their knowledge of science and the scientific method.²²⁵ A threshold test has the questionable virtue of shutting out an item of debate without proper scrutiny, free and frank discussion and the refutation of other experts.
- 7.144** There is also a question as to whether such a reform is necessary to meet any compelling need. Heffernan, responding to the Consultation Paper’s proposal for reform of the Irish position in 2012, asked:

“Does the reliability of expert evidence present a difficulty in Irish law and practice and, if so, how extensive is the problem?... It may transpire that scrutinising reliability at the admissibility stage will have the salutary effect of raising standards for all types of expert evidence. However, as a solution to the specific challenge of novel or emerging scientific expertise, the proposed reform is arguably overbroad.”

²²³ Groscup, Penrod, Studebaker, Huss and O’Neill, ‘The effects of Daubert on the admissibility of expert testimony in state and federal criminal cases’ (2002) 8 *Psychology, Public Policy & Law* 339

²²⁴ The Confidential Enquiry into Stillbirths and Deaths in Infancy (CESDI) was established in 1992 to “improve understanding of how the risks of death in late fetal life and infancy from 20 weeks of pregnancy to one year after birth may be reduced.” Available at from the British Journal of Midwifery at <http://www.magonlinelibrary.com/doi/pdf/10.12968/biom.1998.6.11.692>.

²²⁵ It should be noted that questions have also been raised about the familiarity of barristers with scientific knowledge and its consequent impact on the quality of cross examination. See Davies and Piasecki, ‘No More Laissez Faire? Expert Evidence, Rule Changes and Reliability: Can More Effective Training for the Bar and the Judiciary Prevent Miscarriages of Justice?’ (2016) *JCL* 80 (327).

- 7.145** Arguably the common theme which runs through the various approaches to reforming the reception of scientific evidence in court, including those of the Irish courts, has been that there must be a shift in focus. The consideration of expert evidence should focus not on the status or position of the expert but on the validity of the methodology which underlies his or her evidence. The Commission agrees that such a shift in emphasis is of vital importance but for the reasons outlined above, considers that this kind of heightened scrutiny should not take place at a threshold stage. The Commission proposes, as discussed in Chapter 8, that expert witnesses be under a “duty to state the facts and assumptions (and, where relevant, any underlying scientific methodology) on which his or her evidence is based.”
- 7.146** The Commission considers that, in addition to encouraging best practice on the part of expert witnesses, the introduction of such a duty would consolidate the somewhat fractured judicial dicta on inquiring into the scientific basis of an opinion into a clear standard. Experts would be required to elucidate properly the scientific basis for their opinion such that the finder of fact can properly appraise its reliability. Under the Commission’s proposals, this duty would be placed on a statutory footing and where an expert fails to discharge this duty, the judge would be empowered to exclude his or her evidence.
- 7.147** More broadly, this duty would ensure that expert witnesses are suitably measured when stating their confidence in a particular technique or area of study, and ensure that they remain within their area of expertise. This approach has the advantage of allowing for the independent scrutiny of scientific evidence by a judge without prescribing a complex and exhaustive list of essential factors to be decided at a pre-trial stage. It places the onus of establishing or discrediting the scientific validity of the evidence on expert witnesses themselves as well as on counsel, both instructing and opposing. The scope of such a flexible approach allows an organic development of standards in line with developing technology and judicial familiarity with modern science.
- 7.148** The Commission considers that it is for the courts to develop any threshold test by which the reliability of expert evidence is measured. The 2016 decision of the UK Supreme Court in *Kennedy v Cordia* reflects a judge-made threshold test which is far less prescriptive than *Daubert* and leaves it for future courts to further define what constitutes reliable scientific evidence. The Commission considers that such a flexible and judge-led development of reliability criteria for expert evidence is the best avenue for the law’s development and therefore the Commission declines to set down any list of threshold or “gate-keeping” criteria.
- 7.149** In conclusion, the Commission considers that scientific expert evidence should be subject to more rigorous scrutiny and that experts must prove that a cogent scientific methodology underlies their evidence. However the

Commission takes the view that rigorous and exhaustive investigation of the kind set down by *Daubert* and the English Law Commission places onerous and unrealistic demands on the shoulders of trial judges.

7.150 The Commission also considers that it is well established that Irish judges will enquire into the scientific bases for an opinion proffered in court. Where expert witnesses are under a strict duty to set out the scientific basis for any opinion such that it can be properly tested under cross-examination and independently assessed by the finder of fact, unreliable scientific evidence can be identified and excluded. The Commission therefore takes the view that such a duty should be enshrined in statute. This recommendation is discussed in detail in Chapter 8.²²⁶

7.151 The Commission does not recommend the introduction of a threshold reliability test for the admission of expert evidence.

²²⁶

Paragraph. 8.84.

CHAPTER 8

DUTIES, IMMUNITY AND PROCEDURAL ASPECTS OF EXPERT EVIDENCE

A Introduction

8.01 In this Chapter the Commission discusses the duties and functions of the expert witness and the principle that the expert should provide impartial evidence. Part B considers the functions of an expert witness and what is required if the witness is to be effective. Part C discusses the duties of the expert witness and considers whether a definitive list of expert duties should be created and examines the approach of other jurisdictions. Part D discusses the form and content of a proposed Code of Conduct for Expert Witnesses. Part E examines the potential for bias and Part F considers the possible sanctions where expert witnesses are found to be in breach of their duties.

B Requirements for an effective expert witness

8.02 A party can adduce expert evidence only if it can satisfy the judge that the finder of fact requires such evidence and that the witness is sufficiently skilled and knowledgeable in the area of expertise. If the witness's evidence is admitted, he or she gives evidence in the same manner as other witnesses. He or she will be examined-in-chief by the party for whom the report was prepared and are then likely to face cross-examination by the opposing party. The cross-examination will test the evidence more critically and may also attempt to undermine the credibility of the witness or the evidence. The cross-examining party will often instruct its own expert witnesses and may have the benefit of material prepared by its own expert(s) when cross-examining the expert(s) for the other side. All prospective expert witnesses must therefore prepare for the realities of adversarial court proceedings.

(1) Requirements of careful preparation, strong communicative ability and capacity to undergo cross-examination

8.03 In *R v Rouse*¹ cross-examining counsel substantially undermined an expert's testimony even though the expert's professional experience more than qualified him to testify on the technical issue for which he had been engaged. This is a recurring difficulty for the expert witness. Many professionals do not fully appreciate the scale and force of the likely challenges to both their credibility and expertise.² An expert's principal duty is to the Court but the expert also owes a duty to his instructing party to prepare himself or herself fully for this role so as to accurately reflect his or her opinion on the matters on which he or she will be testifying. The expert will need to be prepared not only to describe and explain matters in examination-in-chief but also to cope with vigorous cross-examination.

8.04 An expert witness must have the knowledge and expertise necessary to give a defensible opinion as well as the explanatory skills needed to demonstrate and explain this expertise to a judge or to a judge and jury:

“Their function is to educate the court in the technology – they come as teachers.... What matters is how good they are at explaining things.”³

8.05 In the Consultation Paper the Commission discussed developments in other jurisdictions including the 2005 Guidance Protocol for Experts published under Part 35 of the English *Civil Procedure Rules 1998* (CPR).⁴ This Protocol gives guidance to experts and those who instruct them.⁵ It significantly develops the definition of an expert in CPR 35 and, with the associated Practice Direction, provides useful guidance about the full extent of the role and function of an expert. It requires, prior to appointment of experts in civil litigation, that the following be established:⁶

- That they have the appropriate expertise and experience
- That they are familiar with the general duties of an expert
- That they can produce a report, deal with questions and have discussions with other experts within a reasonable time and at a cost proportionate to the matters in issue;
- A description of the work required

¹ *The Times* 24 February 1931. See LRC CP 52-2008 para. 3.67.

² See further LRC CP 52-2008 para. 3.69.

³ Jacob LJ in *Rockwater v Technip France SA & Ors* [2004] EWCA Civ 381; [2004] RPC 46.

⁴ Civil Justice Council, *Protocol for the Instruction of Experts to Give Evidence in Civil Claims* (June 2005, amended 2009). LRC CP 52-2008 para. 3.71.

⁵ The 2005 Protocol superseded a Code of Guidance published under the CPR in 1999. The Protocol was amended in 2009.

⁶ Civil Justice Council, *Protocol for the Instruction of Experts to Give Evidence in Civil Claims* (June 2005, amended October 2009) at 7.1.

- Whether they are available to attend the trial, if attendance is required; and
- That there is no potential conflict of interest.

8.06 This Protocol seeks to prepare the expert witness in general terms, but the detail discussed in it may be especially useful in terms of possible cross-examination.

(2) *Requirement of impartiality*

8.07 While originally engaged by the courts, from the 18th century onwards⁷ parties themselves began to engage experts directly. This paved the way for bias both in the selection of experts by an interested party and in the evidence given by an expert who identifies with or feels a sense of obligation to a particular side of the dispute. This led to confusion in the courts⁸ and to 'expert shopping'.⁹ In *Thorn v Worthing Skating Rink Co*¹⁰ Jessel LJ described the practice:

“A man may go, and does sometimes, to a half-a-dozen experts... He takes their honest opinions, he finds three in favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone: the other side does the same.”¹¹

8.08 The English courts will not prevent expert shopping although they do discourage it.¹² Expert reports prepared to assist solicitors are privileged but reports that an expert prepares for trial¹³ and intends to rely on in testimony must be disclosed.¹⁴ The English courts will allow a party to discard an initial expert and report and get a second opinion but only if the first report is disclosed under CPR 35.¹⁵ Therefore although the party does not have to rely on the first report they must disclose and waive privilege over it.

⁷ See, for example, *Folkes v Chadd* (1782) 3 Douglas 157.

⁸ See *Severn, King and Company v Imperial Insurance Company*, *The Times* 14 April 1820. For a further discussion of the shift from court appointed to party appointed experts, and the problems that arose as a result see Golan, “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7, at 14.

⁹ “Expert shopping” refers to the practice of parties selecting an expert known for possessing a particular opinion, or seeking a number of preliminary opinions prior to appointing an expert who possesses an agreeable opinion. (1877) 6 Ch D 415.

¹⁰ *Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415. Jessel LJ was openly critical of the risk of selection bias in party-chosen experts in *Abinger v Ashton* L.R. 17 Eq. 358 (1873) discussed at paragraph 4.74 of the Consultation Paper.

¹¹ In *Beck v Ministry of Defence* [2003] EWCA Civ 1043, Ward LJ held at [30] that “expert shopping is to be discouraged” and Lord Phillips MR held that [35] that “to permit the possibility of expert shopping... is undesirable”.

¹² Pursuant to CPR 35.4, which deals with the court’s power to restrict expert evidence.

¹³ *Jackson v Marley Davenport* [2004] EWCA Civ 1225.

¹⁴ *Beck v the Ministry of Defence* [2003] EWCA Civ 1043 [2005] 1 WLR 2206 and *Vasilou v Hajigeorgiou* [2005] EWCA Civ 236 [2005] 1 WLR 2195.

- 8.09** England's large population of experts increases the chance that each party will be able to find an expert with an opinion that is convenient for their case. It would be counterproductive if the process of teaching the finders of fact what they need to know to make a decision (the objective of allowing expert opinion evidence at all) left the finders of fact as confused as (or more confused than) they were initially. Hearing expert opinion evidence geared towards winning for a particular side can cause exactly this problem whether as a result of biased selection by a party or biased evidence by the witness. To avoid this, courts here and abroad impose duties on expert witnesses, with many jurisdictions establishing these duties by statute or in a code of practice.
- 8.10** Impartiality is vital. The Commission considered in the Consultation Paper the many forms that bias may take, conscious and unconscious.¹⁶ The Irish courts are alive to the possibility of partisan evidence and have accordingly held that a person is not entitled to give expert evidence where he or she is a party to the case.¹⁷ However, a person can be called as an expert witness even where they have a pre-existing relationship (such as employment) with one of the parties.
- 8.11** In *Galvin v Murray*¹⁸ the Supreme Court held that if a party's expert witness happened to be an employee of that party too, this would go to weight and would not affect his status as a permissible expert witness.¹⁹ *Galvin* held that the rules on expert evidence "apply generally to independent experts, to so called 'in house' experts and to parties themselves."²⁰ The Commission takes the view that this should continue to be the law.
- 8.12** English law is the same: the mere fact of employment does not disqualify an employee from acting as an expert witness so long as he can show that he has the relevant expertise and is aware of his overriding duty to the court.²¹ The fact of his employment goes to weight.²²

¹⁶ See LRC CP 52-2008 Chapter 4.

¹⁷ Herbert J in *Sheeran v Meehan* High Court 6 February 2003.

¹⁸ [2001] 1 IR 331, 336; [2000] IESC 78. This case is discussed at length at paragraphs 3.76-3.78 of the Consultation Paper.

¹⁹ Murphy J approved *Shell & Pensions v Fell Frischmann* [1986] 2 All ER 911 which noted, at 913, that the old English rules of court (the relevant provisions of which are similar to the Irish rules) "refer to 'expert evidence' and not to 'evidence given by independent experts'."

²⁰ [2001] 1 IR 331, 336; [2000] IESC 78 at [7], citing *Shell & Pensions v Fell Frischmann* [1986] 2 All ER 911, 913.

²¹ *Field v Leeds City Council* [1999] EWCA Civ 3013 (8 December 1999), per Waller LJ at [27]. *Liverpool Roman Catholic Archdiocesan Trust v Goldberg* [2001] 1 WLR 2337; [2001] EWHC Ch 396 took the opposite approach but the Field approach was restored in *R (Factortame & Ors) v Secretary of State for Transport* [2001] 4 All ER 97; [2002] EWCA Civ 932. The Liverpool approach would automatically exclude any employee from giving evidence on behalf of an employer and *Factortame* held this undesirable. Similarly *Armchair Passenger Transport Ltd v Helical Bar plc* [2003] EWHC 367 held, at [65], that "there are fields in which only a limited number of experts are available and that those who are pre-eminent may have direct work experience in the field or with competitors which might at first sight be thought to threaten their independence." *Armchair* held that in those cases *Factortame* and *Field* applied. These four English cases are discussed at paragraphs 3.79-3.83 of the Consultation Paper.

²² May LJ at [31] [1999] EWCA Civ 3013.

- 8.13** It is desirable that an expert witness have no actual or apparent interest in the outcome of the proceedings but such an interest will not automatically exclude the witness from giving expert evidence.²³ Since the finder of fact must receive expert evidence to reach an informed decision and the pool of experts may be limited it would be impractical to require total independence from the parties. Absolutely excluding experts who have a pre-existing relationship with one of the parties would cause great difficulties in criminal trials as many of the forensic experts available will have been employed by the State.²⁴
- 8.14** An employee must give evidence independently and impartially to help the finder of fact and not to advance one party's case²⁵ but even if the witness strays into partisan advocacy, this may well go only to weight, at least in England and Wales.²⁶
- 8.15** In *Dyson Ltd v Qualtex Ltd*²⁷ 3 experts were called to offer expert testimony in an intellectual property case. The first had a close relationship with the claimant (Dyson), the second a very close relationship with the defendant and the third a relationship (albeit not very close) with the claimant. The English High Court analysed the extent of these relationships to determine their impact on the independence of the experts' evidence.
- 8.16** The first expert had been a Dyson employee but Mann J found the integrity of his testimony was not affected.²⁸ The second expert was the chairman and principal shareholder of the defendant whose views "risk[ed] imperilling his objectivity" and who "tended to don the mantle of a crusader or advocate, rather than that of an expert witness".²⁹ The court admitted his evidence but treated it with caution because the hostile bent of his (honest and factual) testimony "sometimes overlaid a certain gloss on his evidence".³⁰

C Duties of Expert Witnesses

- 8.17** Some of the key duties of expert witnesses can be gathered from a combination of Irish case law and extra-judicial comments. Several professional bodies have published guidelines for expert witnesses. Some of these derive from more extensive statements in foreign case law and from developing international guides and standards. In this Part, the Commission discusses the various duties of expert witnesses which have been identified

²³ Phillips MR at [[2001] 4 All ER 97, 118; [2002] EWCA Civ 932 (3 July 2002) at [70].
²⁴ Hodgkinson & James, *Expert Evidence: Law and Practice* (2nd ed Sweet & Maxwell 2007) at paragraph 10-015.
²⁵ See Head "A Judge's Analysis" (1996) *NLJ* 1723 and paragraph 3.85 of the Consultation Paper.
²⁶ *Field v Leeds City Council* [1999] EWCA Civ 3013 May LJ at [31].
²⁷ [2004] EWHC (Ch) 2981.
²⁸ The witness "demonstrated a genuine independence of view and [had] discharged his responsibilities as an expert witness well". [2004] EWHC (Ch) 2981, [66].
²⁹ [2004] EWHC (Ch) 2981, [68].
³⁰ [2004] EWHC (Ch) 2981, [69].

in Irish and international case law, in academic discussion and in institutional guidance. The Commission then considers the merits of a codification of the duties identified, including the form, statutory or non-statutory, it should take.

(1) Ireland

(a) Judicial and academic commentary

8.18 The expert witness owes a duty to ascertain all the surrounding facts and to give evidence about those facts irrespective of whether they support his or her side.³¹ Several sexual abuse cases contain important judicial statements about the duties of expert witnesses. In these cases, the courts have sharply criticised expert witnesses for not bringing “an independent enquiring mind” to bear on the matter,³² for failing to make proper enquiries to elicit basic facts (for example by not asking obviously appropriate questions when interviewing alleged victims of sexual abuse³³ or by inexplicably failing to interview obviously relevant people at all³⁴ or in sufficient detail³⁵) and for failing to include pertinent information in their reports.³⁶ Reports should be detailed enough to be useful to the court and therefore the interviews should be sufficiently thorough to ground such reports.³⁷ Reports must not simply

³¹ In *Fitzpatrick v Director of Public Prosecutions* [1997] IEHC 180 per McCracken J at [6]. This view was approved in *AW v Director of Public Prosecutions* [2001] IEHC 164 (Kearns J) and by the Supreme Court in *JL v DPP* [2000] 3 IR 122 where Hardiman J warned of the “need for caution and for a very full and impartial presentation of psychiatric and psychological evidence” in such cases.

³² *AW v Director of Public Prosecutions* [2001] IEHC 164 (Kearns J) at [100].

³³ *AW v Director of Public Prosecutions* [2001] IEHC 164 (Kearns J) [100]-[102]; *Fitzpatrick v Director of Public Prosecutions* [1997] IEHC 180 (McCracken J) [5]-[6];

³⁴ *J O’C v Director of Public Prosecutions* [2000] IESC 58 [169]-[170]: “the nature of the examination carried out by the Psychologist... was a gravely inadequate one. She made statements about the Complainant’s parents by way of explaining both the nondisclosure to them until the late 1980’s and the subsequent nondisclosure to the authorities, but it transpired that she had not verified these statements or interviewed the parents or the other siblings... She had made statements without verification as to the reasons why disclosure to one of her parents might have had unsatisfactory results from the Complainant’s point of view...”

³⁵ In *P C v DPP* [1999] 2 IR 25, 36 McGuinness J was “somewhat concerned that Mr. Carroll did not himself state in his Affidavit that he did not go through all the details of the Complainants history with her himself and that he was relying on a statement which appears to have been provided to him by the Gardai or by the Prosecution in advance of his interview with the Complainant. This does not strike me as the most desirable way of carrying out an in depth psychological assessment in a matter of such crucial importance both to the Complainant and to the Applicant.”

³⁶ In *J O’C v Director of Public Prosecutions* [2000] IESC 58 the Supreme Court was very critical of an expert witness psychologist where she failed in her report to suggest reasons other than sexual abuse to explain the complainant’s behaviour, although she acknowledged in cross-examination that other explanations were possible. In *RB v Director of Public Prosecutions* [2004] IEHC 424 the High Court criticised, albeit less stridently, expert witnesses’ practice of simply asserting that a delay was reasonable or understandable, rather than giving reasons for this finding. *Fitzpatrick v DPP* [1997] IEHC 180 per McCracken J at [5] is similarly critical of a failure to include relevant evidence.

³⁷ See, for example, McCracken J’s criticisms in *Fitzpatrick v Director of Public Prosecutions* [1997] IEHC 180 McCracken J at [5]: “[The expert] has annexed to his general Affidavit two separate reports, one on A.P. and one on P.P. These reports are drawn up as a result of one meeting with each of the Complainants, and I have been told that each meeting lasted between one and two hours. Each report is in fact less than two pages long and relates only to the one incident of abuse alleged against the Applicant in each case. Quite astonishingly, there is no mention whatever of the continual rape and abuse of the Complainants by members of their family, and the psychological effect which this might have had on them.”

set forth general principles without attempting to apply these principles to the facts of the case.³⁸

- 8.19** The expert witness must include all relevant information so that the finder of fact can decide the issues, for example an expert witness should not simply assert that an alleged victim’s failure to complain about alleged sexual abuse was “reasonable” or “understandable”; the expert must set out in clear language the relevant factors so that the court can decide whether or not it was reasonable.³⁹
- 8.20** These cases demonstrate the high standard of care demanded of professional witnesses. They must be thorough in their investigations, ensure that all relevant factors are taken into account, and where necessary, actively interview individuals whose information may have a considerable bearing on the opinion, in order to give a clear and detailed opinion about the relevant issues in question.⁴⁰
- 8.21** Judges have ordinarily been reluctant to make explicit accusations of bias in expert evidence from the bench, though some have issued stern reprimands which strongly imply as much. In *Waliszewski v McArthur & Co (Steel and Metal) Ltd*⁴¹, the High Court (Barton J) strongly criticised the failure of the plaintiff’s medical consultant to mention, in the pre-trial expert reports written for the plaintiff’s personal injuries claim against his employer for a work-related injury which occurred in 2007, that the plaintiff had later been injured in a road traffic accident (RTA) in 2010. The plaintiff’s medical consultant stated in his evidence that he had omitted this information from the reports in order not to confuse the Court. Barton J commented:

“In my view, not only was it proper and appropriate but it was necessary that the RTA of December 2010 and its consequences in relation to the plaintiff’s back injury should have been fully dealt with by [the plaintiff’s medical consultant] in the reports prepared by him for the purposes of these proceedings . His failure to do so is reprehensible and is to be deprecated. I reject his explanation that this was due to his desire not to cause

³⁸ In *PC v DPP* [1999] 2 IR 25, 35-36 McGuinness J in the High Court noted that some general statements in an expert’s evidence were of “only marginal relevance to the facts” but the Supreme Court’s assessment of the expert evidence in the case was far less critical. In *Fitzpatrick v Director of Public Prosecutions* [1997] IEHC 180 McCracken J held at [5] that “the Affidavit is far from satisfactory. Indeed, some of the general principles have no application whatever to the present case” and [6]. Similarly, in *AW v Director of Public Prosecutions* [2001] IEHC 164 Kearns J held at [98] that: “it is... incumbent upon a psychologist to [carry out a psychological assessment], in detail and depth, even if his brief is mainly to enquire into factors explaining delay. It is not sufficient... to set out a list of general principles relating to complaints of this nature and then attach them to a particular Complainant without some understanding of the psychological makeup of the individual in question which would suggest whether these general principles, or some of them, were particularly apt or appropriate, or perhaps even irrelevant to the particular Complainant.”

³⁹ Per Macken J in *RB v Director of Public Prosecutions* [2004] IEHC 424.

⁴⁰ *FC v DPP* High Court 7 March 2003; *TM v DPP* High Court 20 June 2001; *Fitzgerald v DPP* High Court 5 December 1997; and *PL v DPP* High Court 16 April 2002.

⁴¹ [2015] IEHC 264.

confusion. No question of confusing the court, in particular, would arise by a full and frank disclosure of the RTA."⁴²

8.22 It is arguable that a trend is emerging towards more forceful deprecation of more egregious conduct of expert witnesses. In *WL Construction Ltd v Chawke* the High Court (Noonan J) issued a very strong condemnation of the conduct of an expert witness.⁴³ The case concerned a long running contractual dispute and a claim of monies owed for construction work. The defendants sought to have the claim struck out on the grounds that many invoices and other documents were forged or otherwise altered. The Court found that the plaintiff's expert, a quantity surveyor, had been "engaged in the process of constantly altering, amending or reinventing the plaintiff's claim"⁴⁴ in response to the rejection of various items of evidence, including at one point inflating the plaintiff's claim by more than €100,000.⁴⁵ Indeed the expert conceded under cross-examination that his report simply re-stated without question the claims made by the plaintiff and did not conduct any independent verification or analysis of the claim.⁴⁶ The Court found that the expert had failed in his duty "to give an impartial and balanced view of the claim"⁴⁷ and that his evidence was "entirely lacking in credibility".⁴⁸

8.23 Judges have also attributed bias in expert evidence to a fundamental misunderstanding on the part of the expert witness as to his or her role. Speaking extra-judicially, Barr J argues that experts oftentimes see it as their role to "don the mantel of the advocate" and make a case on behalf of their client.⁴⁹ Barr J cited one case over which he had presided in which the expert witness took this approach:

"In short, he looked for the appropriate high watermark of established opinion on that side and put it forward as being a probability in the case. Such an approach constitutes a classical illustration of advocacy and is far removed from the proper function of the expert witness."⁵⁰

8.24 O'Flaherty J also speaking extra-judicially suggested that any expert seeking to give effective expert testimony should abide by this checklist of "commandments":⁵¹

⁴² *Ibid* at para 85.

⁴³ *W.L. Construction Limited v Chawke* [2016] IEHC 539.

⁴⁴ *Ibid* at para. 73.

⁴⁵ *Ibid* at para. 71.

⁴⁶ *Ibid* at para. 67.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at para. 91.

⁴⁹ Barr "Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development" (1999) 4 (4) *Bar Review* 185.

⁵⁰ *Ibid* at 185-186.

⁵¹ O'Flaherty "The Expert Witness and the Courts" (1997) 3 *MLJ* 3, at 5-7, from a speech delivered at the Conference of Advances in Forensic Science, 26 December, 1996.

- (i) The expert should be properly qualified in the field in which he purports to be an expert.
- (ii) The expert should be “a servant of justice rather than act as the hireling of one side or the other.”⁵²
- (iii) Where possible the expert should attempt to narrow contentious issues with the opposing expert prior to trial.
- (iv) The expert should have the ability to communicate his conclusions in a way that will be understandable to lay people.
- (v) The expert should be meticulous in his record keeping, ensuring that exhibits are well preserved, which will help reduce mistakes that could lead to appeals or acquittals.
- (vi) The expert should not pretend to have expertise that he does not possess.
- (vii) The expert must remain patient at all times and not lose his temper during questioning.

8.25 In addition to this list of the duties of experts, a number of professional bodies which regulate and govern certain professions have set out guidelines for their members to help explain their role and duties when called to act as an expert witness. These are discussed below.

(b) *The Expert Witness Directory of Ireland*

8.26 Ireland does not have an official accrediting body for expert witness but Round Hall (the publisher) compiles the *Expert Witness Directory of Ireland*, a reference-checked list of expert witnesses in over 1,000 areas of expertise.⁵³ To be permitted to use the associated logo “Expert Witness Directory of Ireland Irish Checked”, a witness on this Directory will have to establish that they meet the requirements of the Expert Witness Directory of Ireland Code of Conduct.⁵⁴ The stated aim of this Code (the “Code”) is to assist experts to provide reliable expert testimony.⁵⁵ The Code has 29 paragraphs organised under 12 headings and outlines the general duties and ethical obligations owed by experts and the procedural requirements for and the obligations of expert witnesses.

8.27 The Code is clearly derived from comparable guides developed in England under the *Civil Procedure Rules 1998* (CPR) and refers throughout to English

⁵² O’Flaherty “The Expert Witness and the Courts” (1997) 3 *MLJ* 3, at 6.

⁵³ LRC CP 52-2008 paragraph 3.222.

⁵⁴ See: Expert Witness Directory of Ireland Code of Practice: Expert Witnesses Engaged by Solicitors/Barristers available at: <http://www.expertwitnessireland.info/codepract.htm>. In the following paragraphs, this is called the “Code”.

⁵⁵ See discussion of the Code in the Consultation Paper at paragraphs 3.222-3.232.

legal requirements.⁵⁶ Expert witnesses appearing in courts in Ireland are clearly governed by Irish law rather than by the CPR but it is useful to discuss the contents of the Code because, as with the other guides referred to below, it contains useful reference material from which more authoritative guidance for expert witnesses here might be developed.

- 8.28** The Code's requirements are substantial. The expert should obtain clear instructions, preferably in writing,⁵⁷ and should only accept them if he or she has "knowledge, experience, expertise, academic qualifications, professional training and resources appropriate for the assignment."⁵⁸
- 8.29** The expert must provide detailed terms of business before accepting instructions⁵⁹ These cannot include a conditional fee arrangement. The expert must always act independently and with professional objectivity and impartiality and disclose any potential conflict of interest.⁶⁰ The Code gives details the standard of investigation that an expert must undertake, including giving a fully informed report.⁶¹ The Code stipulates specific requirements for the form, content and preparation of the expert report.⁶² Paragraph 25 gives guidance on meetings between experts.
- 8.30** An expert must take all reasonable steps to ensure that he or she is available to give evidence in court⁶³ and must assist the court independently of the parties.⁶⁴ This overriding duty to the court is very important and for the reasons discussed below the Commission would prefer this to be a more central part of any proposed authoritative guidance to avoid the impression that the duty to the court is limited to when giving evidence in court. The expert must understand that this duty also applies when creating the expert report.
- 8.31** Part 11 of the Code states that experts should provide a complaints resolution procedure for solicitors or barristers.⁶⁵ Experts must maintain appropriate professional indemnity cover.⁶⁶

⁵⁶ The Civil Justice Council's Guidance for the instruction of experts to give evidence in Civil claims (replacing the Civil Justice Council's Protocol for the Instruction of Experts to give Evidence in Civil Claims (June 2005, amended October 2009) which was discussed in the Consultation Paper at paragraphs 5.57-5.58, 5.69, 5.90, 5.111, 5.136, 5.186, 3.71, 3.119 and 3.177-3.180) and replaces the Code of Guidance on Expert Evidence. This has since been replaced by the "2012 Guidance" is available at <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/working-parties/guidance-instruction-experts-give-evidence-civil-claims-2012.htm>.

⁵⁷ Paragraph 1 of the Code.

⁵⁸ Paragraph 2(a).

⁵⁹ Paragraph 8 of the Expert Witness Directory of Ireland Code of Practice: Expert Witnesses Engaged by Solicitors available at: <http://www.expertwitnessireland.info/>.

⁶⁰ Paragraphs 12-14.

⁶¹ Paragraphs 15 and 16.

⁶² Paragraphs 17-23.

⁶³ Paragraph 26.

⁶⁴ Paragraph 27.

⁶⁵ Paragraph 28.

⁶⁶ Paragraph 29.

8.32 The *Expert Witness Directory of Ireland* Code of Conduct covers various professions generically. Sector-specific guidelines have also been published.

(c) *Sector-specific guidelines*

(i) Primary school teachers

8.33 The Irish National Teachers Organisation (INTO) has created a guidance direction for teachers acting as expert witnesses in cases involving such issues as family law, custody, child protection or negligence.⁶⁷

(ii) Actuaries

8.34 The Society of Actuaries in Ireland's⁶⁸ Standard of Practice Guidance Note (the "Note") is for actuaries who prepare expert reports and appear as expert witnesses.⁶⁹ The (very similar) previous version of this document (2006)⁷⁰ is discussed in detail in the Consultation Paper.⁷¹ It addresses the preparation and delivery of sound expert evidence by actuaries.⁷² The Note is similar in thrust to the *Ikarian Reefer*⁷³ principles (discussed below and in the Consultation Paper).⁷⁴ It requires experts to familiarise themselves with all relevant actuarial standards of practice,⁷⁵ to avoid potential conflicts of interest and to provide impartial evidence confined to matters within their own expertise and experience.

8.35 The actuary must be satisfied of the reasonableness of the data provided and disclose any data limitations which may affect the result. This is clearly important in ensuring that there is an objective basis for the actuary's opinion. The Note also gives guidance about the clarity of evidence offered. If a party or its lawyers suggest to the actuary an opinion designed to serve the

⁶⁷ LRC CP 52-2008 paragraph 3.233. See INTO "Teachers and Court Cases" available at: <http://www.into.ie/ROI/InfoforTeachers/ParentTeacherRelations/TeachersandCourtCases/>

⁶⁸ The Society of Actuaries in Ireland is the professional body for actuaries in Ireland. See here <https://web.actuaries.ie/about/society>.

⁶⁹ See Society of Actuaries in Ireland "Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness" (2010) available at: https://web.actuaries.ie/sites/default/files/asp/ASP_EXP-1/101101%20ASP%20EXP-1%20v1.2.pdf.

⁷⁰ Society of Actuaries in Ireland "Actuarial Standard of Practice EXP 1 - The Actuary as Expert Witness (2006), available at https://web.actuaries.ie/sites/default/files/asp/ASP_EXP-1/ASP%20EXP-1%20v1.1.pdf. The explanatory note to the new Standard explains lists the changes made. The principal one of interest is that the word "should", used extensively in the Standard, is made a defined term.

⁷¹ At paragraphs 3.234-3.242.

⁷² Society of Actuaries in Ireland "Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness"

(2010) available at: https://web.actuaries.ie/sites/default/files/asp/ASP_EXP-1/101101%20ASP%20EXP-1%20v1.2.pdf, at 2.1-2.2.

⁷³ This decision of the High Court of England and Wales is discussed below.

⁷⁴ Below at para. 8.42 and in the Consultation Paper at paragraph 3.91 and (in the context of the similarities between that case and the actuaries' guidance) at paragraph 3.238.

⁷⁵ Society of Actuaries in Ireland "Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness"

(2010) Available at: https://web.actuaries.ie/sites/default/files/asp/ASP_EXP-1/101101%20ASP%20EXP-1%20v1.2.pdf, at 3.1.

needs of the party,⁷⁶ the expert should consider advising that another expert be instructed rather than compromise their integrity and depart from the Note.

- 8.36** The Note describes cross-examiners' traps for experts and the need to ensure consistency in answers. Some actuaries may not be familiar with the adversarial nature of the legal process system or with the nature of the role of an expert witness and the Note shows that its drafters understood this. The Guidance Note explains the principal role and duties of an expert and could therefore provide a good model on which to base any proposed authoritative code of practice for experts.

(iii) Doctors

- 8.37** The Medical Council⁷⁷ has published a *Guide to Professional Conduct and Ethics* which is relevant to doctors preparing expert reports.⁷⁸ The Guide requires doctors to avoid conflicts of interest,⁷⁹ to prepare reports that rise to the normal standard of professionalism⁸⁰ and that are specific,⁸¹ up-to-date,⁸² relevant,⁸³ factual⁸⁴ and true.⁸⁵ Reports must be provided without delay⁸⁶ and their content must not be influenced by financial or other inducements or pressures.⁸⁷ The Guide prohibits charging fees based on litigation-outcome.⁸⁸

(iv) Psychologists

- 8.38** The Psychological Society of Ireland's (PSI's)⁸⁹ Code of Professional Ethics⁹⁰ concerns psychologists in their capacity as expert witnesses.⁹¹ There is no

⁷⁶ Society of Actuaries in Ireland "Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness" (2010), Guideline 4.4.2 ("The actuary acting as an expert witness should resist pressure from the client, the instructing solicitors or counsel to give evidence that is contrary to the actuary's true opinion. The actuary's own opinion should not be modified to suit the exigencies of litigation") and 4.4.3 ("If legal advisers propose that the actuary should avoid reference to particular information or, in some other way, depart from the general tenor of these guidelines, the actuary should comply only if entirely at ease with the adviser's proposal, having fully considered the implications") available at https://web.actuaries.ie/sites/default/files/asp/ASP_EXP-1/101101%20ASP%20EXP-1%20v1.2.pdf.

⁷⁷ The Medical Council is the regulator for medical doctors in the Republic of Ireland. See <http://www.medicalcouncil.ie/About-Us/>.

⁷⁸ The Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners (7th ed., 2009) at 51-52 (paragraphs [57.1]-[57.7]) available at <http://www.medicalcouncil.ie/Public-Information/Professional-Conduct-Ethics/The-Guide-to-Professional-Conduct-and-Ethics-for-Registered-Medical-Practitioners.pdf>.

⁷⁹ At paragraph [57.1]

⁸⁰ At paragraph 57.2

⁸¹ At paragraph 57.3

⁸² At paragraph 57.3

⁸³ At paragraph 57.4.

⁸⁴ At paragraph 57.4.

⁸⁵ At paragraph 57.4.

⁸⁶ At paragraph 57.6.

⁸⁷ At paragraph 57.5.

⁸⁸ At paragraph 57.7.

⁸⁹ The PSI is the professional body for psychologists in the Republic of Ireland. See <http://www.psihq.ie/overview-of-psi>.

⁹⁰ The Psychological Society of Ireland Code of Professional Ethics (2011, Revised November 2010) available at <http://www.psychologicalsociety.ie/find-a-psychologist/PSI%202011-12%20Code%20of%20Ethics.pdf>.

specific section on expert witnesses or preparing expert reports but a large number of provisions appear relevant and cohere with the spirit of the rules in the case law discussed under subheading (a) above.⁹²

(v) Engineers

8.39 The Institute of Engineers of Ireland's⁹³ Code of Ethics⁹⁴ applies to engineers acting as experts.⁹⁵ It places a number of obligations on engineers including impartiality in giving evidence,⁹⁶ remaining up-to-date,⁹⁷ carrying out work with due care, skill and diligence,⁹⁸ and refraining from doing work for which they are not qualified or competent.⁹⁹

(d) **Conclusion**

8.40 The Commission is of the view that the introduction of a clear set of guidelines applicable to all expert witnesses would greatly assist the expert in preparing for his or her appearance in court and would contribute to the expert's knowledge and awareness of what is expected. The Consultation Paper noted that expert witnesses engaged in Irish courts have often learned about their role and duties through *ad hoc* advice from previous experts, lawyers, and the general trial process. This may not lend itself to a full understanding of what the role of the expert witness entails.¹⁰⁰ Submissions received by the Commission indicate that those engaged as expert witnesses often experience difficulty in securing full and accurate instructions. This may add to the impression that experts see their role as being an advocate to the instructing party, rather than as owing a duty to the court. Barr J, writing extra-judicially, expressed similar concerns noting that while they "are rarely

⁹¹ Preamble: "In carrying out their professional activities, [psychologists] occupy a diversity of roles such as... expert witness... The Code is designed to regulate... the professional activities of psychologists".

⁹² For example paragraphs 4.2.5 ("Take care in communicating their knowledge, findings and views to clearly differentiate facts, opinions, theories, hypotheses, and ideas.") 4.2.6 ("Not suppress disconfirming evidence of their findings and views, and acknowledge alternative hypotheses and explanations."), and 4.2.10 ("Not participate in, condone, or allow themselves to be associated with dishonesty or fraud.")

⁹³ The Institute of Engineers of Ireland (operating under the name Engineers Ireland) is the professional body for engineers in Ireland. See <http://www.engineersireland.ie/About.aspx>.

⁹⁴ Engineers Ireland Code of Ethics (Last revision November 2009) available at http://www.engineersireland.ie/EngineersIreland/media/SiteMedia/about/Engineers_Ireland-Code-Of-Ethics-2010.pdf.

⁹⁵ Paragraph 1.6: "Members shall act as independent experts, conciliators, mediators or arbitrators with impartiality, uninfluenced by any personal considerations."

⁹⁶ Paragraph 1.6.

⁹⁷ Paragraph 3.6 ("Members shall be familiar with the necessary standards applicable to their field of engineering practice and continue to update themselves as those standards are revised") and paragraph 3.7 ("Members shall maintain and strive to develop their professional knowledge, skill and expertise throughout their careers...").

⁹⁸ Paragraph 3.4.

⁹⁹ Paragraph 3.3.

¹⁰⁰ LRC CP 52-2008, paragraph 3.88

dishonest or deliberately unfair... they seem to lack a true understanding of their function,” to assist the court in arriving at the truth by providing a skilled, objective expert assessment.¹⁰¹

8.41 The Commission now considers the approach of other jurisdictions in respect of the duties of the expert witness.

(2) *Other jurisdictions*

(a) *England*

(i) Civil

8.42 In the influential¹⁰² English case *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)*¹⁰³ the English High Court (Cresswell J) detailed the recognised duties and responsibilities of expert witnesses:¹⁰⁴

1. Their evidence should be, and be seen to be, independent and uninfluenced in form or content by the exigencies of litigation.¹⁰⁵
2. They should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within their expertise¹⁰⁶ and should never act as advocates.
3. They should state the facts or assumption upon which their opinion is based and consider material facts which could detract from their concluded opinion.
4. They should make it clear when a particular question or issue is outside their expertise.
5. If they consider that insufficient data is available they should say so and indicate that the opinion is provisional only (*Re J*). If the witness is not sure that their report contains the truth, the whole truth and nothing but the truth without some qualification, they should state that qualification in the report.¹⁰⁷
6. If an expert witness changes his view on a material matter, such change of view should be communicated

¹⁰¹ Barr “Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development” (1999) 4 (4) *Bar Review* 185.

¹⁰² See paragraph 3.92 of the Consultation Paper.

¹⁰³ [1993] 2 Lloyd’s Rep 68.

¹⁰⁴ These are listed in the Consultation Paper at paragraph 3.91. Cresswell J’s formulation “[t]he duties and responsibilities... include” makes it clear that the list is not exhaustive.

¹⁰⁵ Lord Wilberforce *Whitehouse v Jordan* [1981] 1 WLR 246, 256

¹⁰⁶ See *Polivitte Ltd v Commercial Union Assurance Co. Plc* [1987] 1 Lloyd’s Rep. 379, 386 Garland J and *Re J* [1990] FCR 193 Cazalet J.

¹⁰⁷ *Derby & Co Ltd and Others v Weldon and Others*, *The Times*, 9 Nov 1990 per Staughton LJ.

(through lawyers) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.¹⁰⁸

- 8.43** Several common law jurisdictions have expanded on the duties expressed in *The Ikarian Reefer*. The Commission discussed these in detail in the Consultation Paper.¹⁰⁹ Irish courts have had regard to the duties set out in *Ikarian Reefer* on a number of occasions.¹¹⁰
- 8.44** Lord Woolf’s mid-1990s review of England’s civil justice system, *Access to Justice*,¹¹¹ criticised expert evidence and discovery as the largest generators of unnecessary cost and delays. The *Civil Procedure Rules 1998* (CPR) now largely supersede *Ikarian Reefer*. They radically changed the procedure for admitting expert evidence in civil cases.
- 8.45** CPR 35 (supplemented by a detailed practice direction “PD 35”) sets out the protocol for the use of experts in civil litigation.¹¹² CPR 35 amalgamates and restates *The Ikarian Reefer* list reaffirms judicial discretion to admit or exclude expert evidence¹¹³ and restates the expert’s overriding duty to the court.¹¹⁴
- 8.46** The English Civil Justice Council¹¹⁵ has published detailed guidance on the duties of experts.¹¹⁶ The 2005 guidance reiterates the overriding duty owed by experts to the court but states that experts “owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics.”¹¹⁷
- 8.47** It provides that single joint experts are obliged to keep all instructing parties informed of any material steps taken and stresses their overriding duty to the

¹⁰⁸ See 15.5 of the Guide to Commercial Court Practice.

¹⁰⁹ LRC CP 52-2008 paragraphs 3.166 – 3.242; paragraphs 3.208 to 3.242 relate to Ireland.

¹¹⁰ See *Payne v Shovlin* [2004] IEHC 430 and *Donegal Investment Group Plc v Danbywiske & Ors* [2016] IECA 193, para 51.

¹¹¹ See: Lord Woolf, *Access to Justice: Interim Report* (HMSO London 1995) and Lord Woolf, *Access to Justice: Final Report* (HMSO London 1996).

¹¹² CPR 35 and PD 35 (and their relationship with the Woolf Reforms) are discussed in the Consultation Paper at paragraphs 3.171-3.176.

¹¹³ CPR 35.1; CPR 35.4.

¹¹⁴ Lord Woolf, *Access to Justice, Final Report* (HMSO 1996) Chapter 13.12, and CPR 35.3. See also *Mutch v Allen* [2001] 2 CPLR 24, discussed at paragraph 3.174 of the Consultation Paper.

¹¹⁵ The Civil Justice Council is an advisory body established under the *Civil Procedure Act 1997*. Their role includes advising the civil procedure rule committee and its 2005 Protocol (discussed below) is annexed to PD 35.

¹¹⁶ Civil Justice Council Guidance for the instruction of experts to give evidence in Civil claims (2012).

¹¹⁷ The Council’s 2005 Protocol for the Instruction of Experts to Give Evidence in Civil Claims remains in force and is annexed to PD 35.

¹¹⁷ Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.1.

court and to the parties to maintain independence, impartiality and transparency,¹¹⁸ and to serve their reports simultaneously on all parties.¹¹⁹

8.48 In *Anglo Group Plc v Winther Brown & Co Ltd and BML (Office Computers) Ltd*¹²⁰ the English High Court reconsidered *The Ikarian Reefer* in light of the CPR and set out the following list of duties:

- “1. An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert witness should never assume the role of an advocate.
2. The expert’s evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.
3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely areas [sic] of disagreement to be set out in the joint statement of experts ordered by the court.
4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.
5. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
6. An expert witness should make it clear when a particular question or issue falls outside his expertise.
7. Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.

¹¹⁸ Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 17.11.

¹¹⁹ Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 17.14.

¹²⁰ [2000] All ER (D) 294, 343.

8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.”

(ii) Criminal

- 8.49** The duties of expert witnesses in English criminal law have been gradually developed in the case law: *Stanton v Callaghan*¹²¹, *Franks & Faith (t/a Ground Rent Securities) v Towse*,¹²² *R v Puaca*¹²³ and *McTear v Imperial Tobacco*.¹²⁴
- 8.50** The case law has been largely replaced by specific provisions on expert evidence in the English *Criminal Procedure Rules* (CrPR).¹²⁵ The 2011 Rules largely mirror the objectives and content of the CPR, seeking to ensure that cases are heard fairly, justly and efficiently. CrPR 33 addresses expert opinion to ensure that it is unbiased (CrPR 33.2.1) and in particular, by virtue of CrPR 33.3(1) that an expert report provides evidence of relevant experience and accreditation. The development and history of the Rules are discussed in the Consultation Paper.¹²⁶
- 8.51** In 2011 the Law Commission of England and Wales recommended that CrPR 33¹²⁷ be amended to include a rule requiring an appendix to the expert’s report.¹²⁸ This appendix would set out sufficient information to show that the expertise and impartiality requirements were satisfied, a focused explanation of the reliability of the opinion evidence with reference to other cases where the expert’s evidence had been ruled admissible or inadmissible after due enquiry under the reliability test and other judicial rulings of which the expert is aware on matters underlying his evidence. The Law Commission also recommended that the Rules be amended to require an expert’s report to include a statement explaining the extent to which his evidence falls outside his scope of expertise or is based upon the opinions of other named experts and a schedule identifying the material underpinning the expert’s opinion . Where a report did not meet these conditions, the evidence would be

¹²¹ [2000] QB 75, [1999] PNLR 116, [1998] EWCA Civ 1176, [1998] 4 All ER 961, [1999] 2 WLR 745.

¹²² [2000] EWLands LRA 2 1999.

¹²³ [2005] EWCA Crim 3001.

¹²⁴ [2005] CSOH 69.

¹²⁵ The Criminal Procedure Rules were first introduced in 2005 and have been replaced twice, once in 2010 and once in 2011. The 2011 Rules are current, as amended by the Criminal Procedure Amendment Rules 2012 which came into force in April 2013. The 2010 Rules moved towards a comprehensive code of criminal procedure, as recommended by Auld LJ in 2001 in the Review of the Criminal Courts. See Auld *A Review of the Criminal Courts of England and Wales* by The Right Honourable Lord Justice Auld (September 2001) at Chapter 2.2. The English *Courts Act 2003* contains the legislative authority for making Criminal Procedure Rules (see Explanatory Memorandum to the Criminal Procedure Rules 2005 (2005No 384 L.4)).

¹²⁶ At paragraphs 3.183-3.184.

¹²⁷ The Law Commission’s 2011 Report refers to rule 33 of the *Criminal Procedure Rules 2010*, but rule 33 of the 2011 Rules is identical to rule 33 of the 2010 Rules and so the recommendation is equally applicable.

¹²⁸ The Law Commission , *Report on Expert Evidence in Criminal Proceedings in England and Wales* (London, 2011, Law Com No 325) at paragraphs 7.21 and 9.18.

inadmissible, unless both parties agreed to or the court permitted its admission.

8.52 In addition, representative bodies such as the UK Academy of Experts have developed membership codes. The Academy's 2007 code¹²⁹ is short and was made under the general auspices of the Civil Justice Council, though it does not have the formal status of the 2005 Protocol discussed above. It requires independence, impartiality, objectivity and integrity, respect for confidentiality and for the expert's duty to the court or tribunal and the maintenance of standards and reputation.¹³⁰ It prohibits conditional fee arrangements and accepting gifts.¹³¹ It requires disclosure of conflicts of interest,¹³² compliance with standards guidelines and codes of practice,¹³³ the maintenance of adequate insurance¹³⁴ and probity in advertising.¹³⁵

(b) Australia

8.53 Section 79 of the federal *Evidence Act 1995*, adopted as a model in several Australian states and territories,¹³⁶ contains a general statement on the admissibility of expert evidence¹³⁷ but not a statement of the duties of experts.¹³⁸ In 2007, the Federal Court of Australia adopted a Practice Note for expert witnesses, which mirrors the English guidelines.¹³⁹

8.54 Many Australian states and territories have established their own codes of conduct governing the duties of experts. These are also based mainly on common law and import much of the *Ikarian Reefer* principles and the CPR, including the general principles of independence and impartiality and against partisan advocacy. An example is Schedule 7 of the *New South Wales Uniform Civil Procedure Rules*.¹⁴⁰ The NSW Code regulates the contents of the expert's report but the NSW LRC has recommended incorporating these provisions in a procedural rule or practice note.¹⁴¹

¹²⁹ Available at <http://www.academy-experts.org/docs/copr2205.pdf>.

¹³⁰ Paragraph 1.

¹³¹ Paragraph 2.

¹³² Paragraph 3.

¹³³ Paragraph 6.

¹³⁴ Paragraph 4.

¹³⁵ Paragraph 5.

¹³⁶ New South Wales, Tasmania, Victoria Norfolk Island have all passed legislation mirroring the *Evidence Act 1995*.

¹³⁷ Section 79 provides: "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

¹³⁸ LRC CP 52-2008 paragraph 3.187

¹³⁹ The Federal Court of Australia Practice Note CM 7 (1 August 2011): <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm7>

¹⁴⁰ Made under section 9 of the Civil Procedure Act (NSW) 2005. The predecessor to these rules, the New South Wales Supreme Court Rules, also provided a Code of Conduct for experts engaged in providing an expert report or giving expert evidence (Supreme Court Rules 1970 (NSW) Part 36 rules 13C ff.

¹⁴¹ This is discussed in paragraph 3.192 of the Consultation Paper.

8.55 Queensland and the Australian Capital Territory have no particular codes of conduct for experts as the relevant rules are largely procedural rather than substantive provisions on duties.¹⁴²

(c) *A civil law approach: France*

8.56 The civil law approach of France is discussed at length in the Consultation Paper.¹⁴³ The court appoints experts from a set list. The main representative body for experts requires adherence to a very detailed code of conduct.

(d) *Euroexpert*

8.57 Codes or guidance relevant to expert witnesses are increasingly being developed by cross-jurisdictional bodies. Euroexpert is an organisation with eight national expert witness professional bodies as full members and two such bodies as associate members.¹⁴⁴ Euroexpert is discussed at length in the Consultation Paper.¹⁴⁵ Euroexpert's members are all from Council of Europe states and its Code was drawn up in the light of the right to a fair trial under Article 6 of the European Convention on Human Rights.

8.58 Euroexpert's Code of Practice, contains minimum standards.¹⁴⁶ Because it must accommodate several civil and common law jurisdictions it is short and general. It demands disclosure, impartiality, independence, confidentiality, a high quality of work and adequate insurance. Euroexpert's 2007 survey of expert witness practice in 12 European states unanimously supported a code of practice for expert witnesses based on objectivity, independence, impartiality and competence.¹⁴⁷

(3) *Conclusion*

8.59 In Ireland, the case law and guidance material referred to above contain some indication of the duties of expert witnesses. These fall short of the more detailed statements of such duties in other common law jurisdictions, which are mainly now contained in or derived from legislation. A more comprehensive statement of these duties in an authoritative code would

¹⁴² Queensland is discussed at paragraph 3.193 and the Australian Capital Territory at paragraphs 3.194-3.197 of the Consultation Paper.

¹⁴³ LRC CP 52-2008 paragraphs 3.203-3.207.

¹⁴⁴ The full list of members is available at http://cms.euroexpert.org/cms/front_content.php?idart=52. All of the member States are in the Council of Europe and all of the full members are also EU member states.

¹⁴⁵ At paragraphs 3.199-3.202. See Euroexpert – The Organisation for European Expert Associations Available at http://cms.euroexpert.org/cms/front_content.php?idcat=36.

¹⁴⁶ Euroexpert Code of Practice available at: http://cms.euroexpert.org/cms/upload/pdf/downloads/CodeofPractice_Stand0405.pdf. This minimalism is recognized by Euroexpert in the Code itself: "It is recognized that there are different systems of law and many jurisdictions in Europe, any of which may impose additional duties and responsibilities which must be complied with by the Expert".

¹⁴⁷ Conseil National des Compagnies d'Experts de Justice "Report: Access to Judicial Expertise in Criminal Matters Involving More Than One Member State, Especially in Serious Cases and Organised Crime" (AGIS, June 2007) Available at: <http://cms.euroexpert.org/cms/upload/pdf/downloads/Report-En-Anglais.pdf>

greatly assist in ensuring that expert evidence meets high standards and it could remove uncertainty about key issues such as the independence and impartiality of the expert. Such a code should build on the existing Irish case law and relevant guidance material, and it could also build on the principles set down in *The Ikarian Reefer*¹⁴⁸ and statutory models from other jurisdictions.

D Form and content of duties for expert witnesses

(1) *Legal status of proposed duties*

(a) *Options*

8.60 The Commission now considers the form in which the duties of expert witnesses ought to be expressed. Different approaches have been taken elsewhere and a number of options are available to the Commission including (1) a practice direction or code of conduct, (2) a statutory instrument, or (3) a specific legislative provision within the draft Evidence Bill or (4) some combination of (1), (2) and (3).

(i) A standalone code

8.61 A non-statutory Code of Conduct for Expert witnesses would clearly lay down the expert's role in proceedings and highlight the need for objectivity in circumstances where their evidence could possibly be coloured in favour of the instructing party. Its flexibility and susceptibility to easy amendment allows a code to respond efficiently and effectively to developments in law and practice and ensure that it reflects the real needs of the judicial system. Such a model could provide a comprehensive set of norms with a level of detail that would be unsuited to statute. A more comprehensive code would provide a greater level of clarity and certainty for expert witnesses, a key concern of professional expert witnesses with whom the Commission has consulted. Such a code would not however possess binding legal force or be bolstered by threat of any sanction. However, it was argued in submission to the Commission that such a code could still prescribe an oath swearing to abide by the duties therein, which could work to encourage best practice.

(ii) A statute supplemented by codes made by statutory instrument

8.62 An alternative approach would be to include a number of specific duties in the draft Evidence Bill, such as the expert's overriding duty to the court and the obligation to act impartially, but to empower the relevant Minister to create further codes of conduct containing more detailed provisions. These codes of

¹⁴⁸

National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68.

conduct could be based on recommendations of a Working Group established by the Minister for this purpose and would provide practical guidance for the purpose of giving effect to, and complying with, the provisions of the draft Evidence Bill. The Commission may consider that the proposed code of conduct could have the same status as the code of practice for mediators proposed by the Commission in its 2010 *Report on Alternative Dispute Resolution: Mediation and Conciliation*.¹⁴⁹ This would involve the publication of a statutory code of conduct, based on the work of a representative group of persons with suitable knowledge of this area and with which expert witnesses would be required to comply.

8.63 The advantage of such an approach is that it enshrines in statute certain fundamental duties, which may act as a powerful statement of principle to counteract a culture of partisanship, while equally leaving room for flexibility going forward. The duties to be placed on a statutory footing would be so general and so fundamental as to not be amenable to frequent amendment. A statutory provision also allows greater scope for a substantive sanction for non-compliance. Consultation on the specific question of a particular sanction yielded a preference for inadmissibility of expert evidence and of the expert report over any criminal or disciplinary sanction. It was argued that a legal team would be far more reluctant to lead biased expert evidence where there was a threat of its outright exclusion. As for a criminal sanction, it was argued that judges would very reluctant to apply such a harsh sanction and would therefore prove less effective than simple inadmissibility.

(iii) A standalone statutory provision

8.64 An exhaustive statutory statement of the duties owed by expert witnesses naturally holds the same advantages as the more limited statutory provision proposed above, but applicable to the full gamut of expert duties. While it loses some of the flexibility and responsiveness of the former approach, it is perhaps a yet stronger statement of intent to fight partisanship and bias. It is also arguable that some of what might be seen as lesser duties, such as a timely exchange of reports, may be highly important to the running of the case. It is also not clear that expert duties, even comparatively minor ones, are the subject of such frequent change as to demand a facility for quick and easy amendment. *The Ikarian Reefer* principles have been repeatedly reaffirmed without revision for nearly a quarter of a century now. Provided duties are not too prescriptively worded, it is arguable that a judge's interpretive power and discretion is sufficient to mould the rule to fit new cases and circumstances.

¹⁴⁹

Report on Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010). The Commission notes that this recommendation has been incorporated into the Government's Scheme of a Mediation Bill 2012. It is expected that a Mediation Bill will be published in 2017.

8.65 In the Consultation Paper the Commission provisionally recommended that a Code of Conduct for expert witnesses be developed based on the principles set down in *The Ikarian Reefer*. This would outline the duties owed by expert witnesses and would be made available to all prospective expert witnesses. The Commission invited submissions on whether the guidance should take statutory or non-statutory form.¹⁵⁰

(b) Submissions

8.66 Submissions have been received by the Commission supporting the introduction of a Code of Conduct. One consultee agrees that the *Ikarian Reefer* principles should be developed as guidelines for experts but pointed to problems in clearly identifying the requirements for expert reports: CPR 35 and Crim PD 35 both address this but do not mirror each other. The consultee also suggested that a mechanism should be built into the guidelines so as to allow these to be updated with ease as the need arises.

8.67 Another consultee considered that the requirement for objective, unbiased opinion expressed clearly and accurately should be emphasised. This would be particularly useful where the expert witness does not frequently offer expert testimony. Another agreed that a formal code of conduct should be developed but that this should not be on a statutory basis.

8.68 In 2016 the Commission engaged in further round table discussions with interested parties which strongly indicated the need for some form of sanction to bolster any recommended duty. The round table discussions led to a clear view that certain fundamental duties ought to be provided for in primary legislation and that the court ought to be empowered to exclude evidence which fails to meet such duties. The Commission has concluded that this clear view should be reflected in its recommendations.

(c) Conclusion

8.69 **The Commission recommends that the draft Evidence Bill should provide for certain key duties of the expert witness; the Commission further recommends that the Minister for Justice and Equality may publish codes of practice for expert witnesses, prepared by a representative group of persons with suitable knowledge of the relevant areas, and established by the Minister for this purpose; that expert witnesses would be required to comply with the contents of such a code of practice; and that any such code of practice shall, to the extent that it provides practical guidance for a court on an issue before the court, be admissible for that purpose.**

8.70 The Commission now considers the specific duties to be contained within the draft Evidence Bill.

¹⁵⁰

LRC CP 52-2008 Provisional recommendation 7.17 (paragraph 3.246)

(2) *Specific duties in the draft Evidence Bill*

8.71 As illustrated in the discussion above, the essential elements remain the same in countries that have adopted a definitive list of the duties owed by an expert. The Commission proposes the following the specific duties for inclusion in the draft Evidence Bill. It further proposes that the draft Evidence Bill empower a judge to exclude the evidence of a witness who breaches any of these duties.

(a) *Duties owed to the court*

(i) Overriding duty to the court to provide truthful, independent and impartial expert evidence¹⁵¹

8.72 In the Consultation Paper the Commission analysed the law in other countries.¹⁵² All foreign guidance codes expressly affirm the expert's overriding duty to the court. The Commission discussed the impact this was likely to have on the practices and culture of expert witnesses¹⁵³ and concluded it would clarify in the expert's mind that their role is to give independent, objective information to the court.¹⁵⁴ The Commission remains of this view and it is supported by the submissions received.

8.73 In England rule 35 of the *Civil Procedure Rules 1998* has also been interpreted as imposing an obligation on an expert in civil cases to attend court if called upon and to take all reasonable steps to be available.¹⁵⁵

8.74 In this jurisdiction, the *Rules of the Superior Courts (Conduct of Trials) 2016* now provide for an overriding duty to the court: "It is the duty of an expert to assist the court as to matters within his or her field of expertise. This duty overrides any obligation to the party paying the fee of the expert."¹⁵⁶ The 2016 Rules further provide that the expert report contain a statement acknowledging this duty.¹⁵⁷

8.75 In the Consultation Paper, the expert's overriding duty to the court and their duty to be truthful independent and impartial were separately set down. The Commission now considers that the concept of an overriding duty necessarily implies an obligation to give independent and impartial evidence, unfettered

¹⁵¹ *Rondel v Worsley* [1967] 1 QB 443 approving *R v O'Connell* in which Crampton J noted that the expert has a "perpetual retainer on behalf of truth and justice." (1844) 7 Irish L Rep 261 at 321. See also *Per Garland J Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379, 386; *Cazalet J in Re J* [1990] FCR 193.

¹⁵² LRC CP 52-2008 paragraph 3.301

¹⁵³ Edmond "After Objectivity: Expert Evidence and Procedural Reform" (2003) *Syd L Rev* 8.

¹⁵⁴ LRC CP 52-2008 paragraph 3.105

¹⁵⁵ Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005) at 19.1.

¹⁵⁶ *Rules of the Superior Courts (Conduct of Trials) 2016* (S.I No. 254 of 2016) Art. 2(vii).

¹⁵⁷ *Ibid.*

and uninfluenced by the interests of the instructing party and accordingly considers them as a single unified duty.¹⁵⁸

8.76 The duty to be truthful, independent and impartial is discussed in detail in the Consultation Paper.¹⁵⁹ The expert witness must not become a partisan advocate for the instructing party. Expert evidence must be unbiased and its reasoning transparent. A useful test of independence is that the expert would give the same opinion even if acting for the other side.¹⁶⁰ A willingness to consider and accept alternative views is vital: “unqualified loyalty to one’s own opinion is not acceptable.”¹⁶¹ However, the Supreme Court has stressed that the adversarial system entitles each party to instruct and call its own expert witnesses¹⁶² irrespective of whether there is any reason to doubt the independence or objectivity of the other side’s witnesses and has offered five separate rationales for the practice of party experts.¹⁶³

8.77 The duty to be truthful, independent and impartial is not only addressed to the baldly dishonest expert but also to experts who may be inclined to view their role as closer to that of an advocate. As noted above, Barr J, writing extra-judicially, has observed that in his experience expert witnesses are “rarely dishonest or deliberately unfair, but they seem to lack a true understanding of their function.”¹⁶⁴ Rather than giving a fair and independent assessment of the evidence, Barr J observes that they may see it as their function to “don the mantle of the advocate” on their client’s behalf.¹⁶⁵ Barr J, speaking in relation to a particular case he was involved with, described this approach to giving expert evidence as follows:

“In short, he looked for the appropriate high watermark of established opinion on that side and put it forward as being a probability in the case. Such an approach constitutes a classical illustration of advocacy and is far removed from the proper function of the expert witness.”¹⁶⁶

8.78 Article 6 of the European Convention of Human Rights reinforces the duty to remain independent and impartial. The English Court of Appeal in *Toth v*

¹⁵⁸ The Supreme Court Rules of Victoria also take the approach of expressing these duties as one. Supreme Court (Chapter I Expert Witness Code Amendment) Rules 2016 S.R. No. 52/2016, Rule. 2 At paras. 3.119-3.127.

¹⁵⁹ Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.3.

¹⁶⁰ Head “A Judge’s Analysis” (1996) *NLJ* 1723.

¹⁶¹ *JF v DPP* [2005] 2 IR 174.

¹⁶² *Ibid.* Hardiman J at [16]: “The employment of an expert on the other side is not posited on any doubts as to the competence or integrity of the [first side’s] expert. It is done...:

a. to ensure that everything is taken into account;

b. to counter any unconscious sympathy with one’s own patient or client;

c. to ensure that the latest techniques and interpretations are brought to bear;

d. to detect any unwarranted assumptions or conclusions; and

e. “to test and challenge the other side’s expert opinion insofar as that can properly be done”;

¹⁶⁴ Barr “Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development” (1999) 4 (4) *Bar Review* 185.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid* at 185-186.

*Jarman*¹⁶⁷ held that “expression of an independent opinion is a necessary quality of expert evidence”, but Article 6 rights are not *necessarily* violated by an expert’s non-disclosure of a potential conflict of interest. Experts need not satisfy the same independence test as judges, in the English interpretation of the ECHR. In England the content of “expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation”¹⁶⁸ but the format of the evidence will of course be influenced by its intended use. Further consideration is given to the requirement that the expert be impartial and free from bias in Part E of this Chapter.

8.79 The Commission recommends that the draft Evidence Bill should provide that the expert has an overriding duty to the court to provide truthful, independent and impartial expert evidence, irrespective of any duty owed to the instructing party.

(ii) Duty to give evidence based on properly reasoned and properly formulated opinions

8.80 This would require that experts base their opinions on all relevant facts and essential information of the case, including those facts which may detract from their opinion, so as to “furnish the trier of fact with criteria enabling evaluation of the validity of the expert’s conclusions”.¹⁶⁹ This has frequently been alluded to in Irish courts and includes the duty to create a full and informed expert report.¹⁷⁰

8.81 In *The People (DPP) v Allen*¹⁷¹ an expert witness gave incomplete evidence on DNA statistics. Given the specialised scientific nature of the question, the court held it likely that the jury would conclude that the evidence was infallible. This placed an onus on the expert to explain that this was not so.¹⁷² The Court allowed the appeal saying: “the real problem in this case is not the evidence which [the expert] gave, but rather the evidence which she did not.”¹⁷³

8.82 It is also essential that the expert witness reveal the bases on which their evidence is based so that the trier of fact can come to their own independent conclusion. It is well established that “the bare *ipse dixit*” of an expert, however eminent, should not attract substantial weight.¹⁷⁴ Such a duty was

¹⁶⁷ [2006] EWCA Civ 1028 at [103]-[105]; [2006] All ER (D) 271 (Jul).

¹⁶⁸ *Whitehouse v Jordan* [1981] 1 WLR 246, 256, Lord Wilberforce.

¹⁶⁹ Heydon J in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305. In this case, the NSW Court of Appeal rejected the expert’s opinion as he had failed to properly explain how he had reached his conclusions, and failed to outline the facts and assumptions underlying his conclusions.

¹⁷⁰ See further the views of McCracken J in *MS v DPP* High Court 5 December 1997, LRC CP 52-2008 paragraph 3.110

¹⁷¹ [2003] 4 IR 295. Discussed at paragraphs 3.111-3.113 of the Consultation Paper.

¹⁷² [2003] 4 IR 295, 299.

¹⁷³ [2003] 4 IR 295, 299.

¹⁷⁴ *Davie v Edinburgh Corporation Magistrate* [1953] SLT 54, approved in *The People (DPP) v Fox*, Special Criminal Court, 23rd January 2002.

set down in the third limb of *Ikarian Reefer*: “They should state the facts or assumption upon which their opinion is based and consider material facts which could detract from their concluded opinion.”¹⁷⁵

- 8.83** Expert opinion must be grounded in scientific reasoning (or at least have a sound basis which is testable).¹⁷⁶ The courts have rejected evidence where they are not satisfied that it has sufficient scientific foundation for the finder of fact to test the accuracy of the expert’s conclusions.¹⁷⁷ The obligation this duty imposes to set out clearly the scientific method which underlies the expert’s concluded opinion is particularly important in light of the Commission’s recommendation that no “gate-keeping” reliability test be introduced. The Commission considers that it is implicit in the expert witness’s duty to state the full facts on which their opinion is based so that a proper scientific method be evident in the reaching of their conclusions. If the court considers that the expert is unable to lay out a cogent scientific basis for their opinion, the court should be empowered to exclude the evidence because of failure on the part of the expert to observe his or her duty to the court.
- 8.84** The failure to consider and place all relevant information before the court contributed to a notorious miscarriage of justice. In *R v Clark*¹⁷⁸ the accused was convicted of the murder of her two sons. One expert witness (the doctor who had conducted the post-mortems) did not reveal important evidence that was very damaging to the Crown’s case.¹⁷⁹ Another expert witness (a paediatrician) did not properly explain the methodological basis for statistical evidence that he gave; the evidence was gravely wrong and greatly overstated the likelihood of a material event.¹⁸⁰ The verdict was unsafe.
- 8.85** **The Commission recommends that the draft Evidence Bill should provide that the expert has 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 and all surrounding facts, including those which could detract from his or her evidence and, where relevant, his or her expressed opinion.**

¹⁷⁵ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd’s Rep 68, discussed in detail above.

¹⁷⁶ *The People (DPP) v Fox*, Special Criminal Court 23 January 2002, discussed at paragraphs 3.114–3.115 of the Consultation Paper. See also para. 7.133 of this Report.

¹⁷⁷ The Court approved an extract from the Scottish case *Davie v Edinburgh Corporation Magistrate* [1953] SLT 54 that “the bare ipse dixit of a scientist, however eminent, upon the issue in controversy will normally carry little weight for it cannot be tested by cross-examination or independently appraised...” See also *Routestone v Minorities Finance* [1997] BCC 180 stating explicitly that the main concern is the reason advanced for the opinion: “If the reasons stand up, the opinion does, if not, not.”

¹⁷⁸ [2003] EWCA Crim 1020, discussed at paragraphs 3.117–3.118 of the Consultation Paper.

¹⁷⁹ See the discussion (and criticism) by the Court of Appeal at paragraphs [138] to [171] of the second appeal judgment. [2003] EWCA Crim 1020.

¹⁸⁰ See the discussion (and criticism) by the Court of Appeal at paragraph [178] of the second appeal judgment. [2003] EWCA Crim 1020 and see Hill “Reflections on the Cot Death Cases” in Kadane (ed) *Statistics in the Law: A Practitioner’s Guide, Cases, and Materials* (2008, Oxford University Press) at 400–402

(iii) Duty to keep opinion within the permitted scope

8.86 This is discussed in detail in the Consultation Paper.¹⁸¹ The Commission has noted the four main elements of the expert's duty to keep opinion within the permitted scope:

- a) confining the opinion to matters which are outside the common knowledge of the trier of fact. It may be appropriate to require that where necessary, and with the consent of the judge, the expert must take the advice of another competent expert in order to answer the question beyond his or her competence.
- b) keeping the opinion within the expert's area of expertise.
- c) giving an opinion only on the issues involved in the case.
- d) not taking the place of the trier of fact by reaching conclusions or decisions based on his or her knowledge, but merely imparting this knowledge to enable the trier of fact to reach its own conclusions.

8.87 In the Consultation Paper the Commission drew attention to miscarriages of justice arising from a failure to comply with this duty including *R v Clark*¹⁸², discussed above. The key witness for the prosecution had been a paediatrician who gave his opinion that the death had arisen from "shaken baby syndrome" and that death from natural causes was highly unlikely. On the accused's second appeal, the English Court of Appeal criticised the expert paediatrician as having "grossly overstated" the improbability that the deaths had arisen from natural causes, having strayed into the field of statistics. The court was highly critical of his actions given that he had no such experience and "should have expressly disclaimed any."¹⁸³

8.88 The *Rules of the Superior Courts (Conduct of Trials) 2016* provide that "expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings."¹⁸⁴ This provision is designed to exclude extraneous or superfluous information proffered as expertise by the expert witness. It does not explicitly address some of the other elements of the duty to keep the opinion within the permitted scope identified above. At a more general level, the fourth limb of *Ikarian Reefer* provides that the expert witness "should make it clear when a particular question or issue is outside their expertise."

¹⁸¹ At paragraphs 3.140-3.145.

¹⁸² [2003] EWCA Crim 1020, LRC CP 52-2008 paragraph 3.144

¹⁸³ *General Medical Council v Meadow* [2006] EWCA Civ 1390 (26 October 2006) at [83]. This case has been reported: [2007] 2 WLR 286, [2007] 1 All ER 1, [2007] QB 462, [2006] 3 FCR 447, [2007] Fam Law 214, [2007] 1 FLR 1398, and elsewhere.

¹⁸⁴ *Rules of the Superior Courts (Conduct of Trials) 2016*, (S.I. No. 254 of 2016) art. 2(vii).

8.89 The Commission recommends that the draft Evidence Bill should provide that the expert has a duty to confine his or her evidence (whether of fact or opinion) to matters within the scope of his or her expertise, to state clearly when a matter falls outside the scope of his or her expertise and to distinguish clearly between matters of fact and matters of opinion when giving his or her expert evidence, whether given orally or in the form of a written report.

(b) *Duty owed to the instructing party*

(i) Duty to exercise due care, skill and diligence

8.90 The expert owes the instructing party a duty to act with reasonable care, to clearly consult with the party, to take care in the preparation of the expert report, to ensure the area of expertise and the opinion sought are clarified by both parties and to be available, as far as is reasonably possible, to testify in court. This is discussed in detail in the Consultation Paper.¹⁸⁵

8.91 The failure of experts to meet their duty to their instructing party can have a serious impact on the case. In the English case *Watts v Secretary of State for Health*¹⁸⁶, an expert witness for the claimant in a case of medical negligence admitted under cross-examination that she had only consulted one textbook on the relevant area which was in print at the time of the alleged negligence.¹⁸⁷ The judge described this admission as “astonishing” and went on to relate how the expert had also demonstrated “a worrying lack of understanding of some of the basic anatomical principles” in the area.¹⁸⁸ For this reason, as well as her lack of objectivity, the judge wholly preferred the evidence of the defendant’s expert witness and dismissed the claim. The case illustrates how a failure on the part of the expert witness to properly prepare for the rigour of cross-examination can seriously undermine their instructing party’s case.

8.92 The expert is also required to set out his or her opinion in a written report prior to the court hearing and to exercise reasonable care and skill in the creation of this report (for instance by adhering to legal or stylistic formalities and declaring in writing that the report is true).

8.93 Expert witnesses at present enjoy witness immunity in Irish law and thus no action lies against them in either contract or tort for breach of duty. This immunity has been abolished in some jurisdictions. The Commission recommends in this Report that the immunity be abolished. However, irrespective of whether an action may be brought against the particular expert, he or she remains under a duty to his instructing party to act with due skill and care.

¹⁸⁵ At paragraphs 3.146-3.154.

¹⁸⁶ [2016] EWHC 2835 (QB).

¹⁸⁷ *Ibid* at para. 56.

¹⁸⁸ *Ibid* at para. 58 – 62.

8.94 The Expert Witness Directory of Ireland and EuroExpert codes require expert witnesses to maintain proper indemnity cover. The Commission recognises the importance of this requirement, particularly in light of its view that the immunity of expert witnesses should be abolished. The immunity of expert witnesses is discussed in detail later in this chapter.

8.95 **The Commission recommends that the draft Evidence Bill should provide that the expert has 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.**

(3) *Working Group to establish a Code of Conduct for expert witnesses*

8.96 The Commission considers that the duties set out in the preceding discussion constitute the fundamental bases for the giving of expert evidence and therefore recommends that they be provided for in primary legislation and bolstered by the sanction of the exclusion of offending evidence. They are, however, necessarily general in character and further provision should be made setting out in detail the steps required to conform to such higher order duties. The Commission considers that a Working Group, consisting of persons of particular experience and expertise, should be established by the Minister for Justice. The Working Group would be directed to draw up recommendations for a Code of Conduct to give effect to, and to provide guidance for compliance with, the fundamental duties set down in the Evidence Bill. Detailed rules of this nature could more appropriately be included in secondary legislation or rules of court and the Working Group would be invited to consider which of those forms the Code should take.

8.97 As previously discussed, the Commission has made similar recommendations in the past. The proposed code of practice could have the same status as the code of practice for mediators proposed by the Commission in its 2010 *Report on Alternative Dispute Resolution: Mediation and Conciliation*.¹⁸⁹

8.98 A number of procedural duties owed in the giving of expert evidence have been recently set down in new Rules of Court and provide a useful starting point for the Working Group.¹⁹⁰

(ii) Duty to avoid and disclose any conflict of interest

8.99 The duty to disclose any potential conflict of interest was discussed in the Consultation Paper.¹⁹¹ The expert must notify the parties and the court of any

¹⁸⁹ *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010). The Commission notes that this recommendation has been incorporated into the Government's Scheme of a Mediation Bill 2012. A Mediation Bill is expected to be published in 2017.

¹⁹⁰ *Rules of the Superior Courts (Conduct of Trials) 2016* (S.I. No. 254 of 2016) and *Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016* (S.I. No. 255 of 2016).

¹⁹¹ At paragraphs 3.132-3.139.

potential conflict of interest where the expert feels that he or she is not totally independent or does not appear independent. Justice should be both done and seen to be done.

- 8.100** In England a conflict of interest does not automatically disqualify an expert and the key question is whether the evidence is independent of both the parties and the pressures of the litigation.¹⁹² Admissibility and weight remain matters for the court. The instructing party must bring any potential conflict of interest to light at as early a stage in proceedings as possible¹⁹³ which the English Court of Appeal has considered to be the time when the report of the expert is first served on the other parties.¹⁹⁴
- 8.101** A prior existing relationship is relevant to the degree of independence of the expert.¹⁹⁵ In *R v Dyson*¹⁹⁶, the Court of Appeal recommended amending the expert's declaration to include a declaration that there is no conflict of interest.
- 8.102** In this jurisdiction, the *Rules of the Superior Courts (Conduct of Trials) 2016*, which came into force on October 1st 2016, impose just such a duty. The Rules provide that an expert witness is under a duty to "disclose any financial or economic interest...in any business or economic activity of the party retaining that expert."¹⁹⁷ This extends to sponsorship of or any contribution to research conducted by the expert or any University or institution connected to the expert. The Rules do not however speak to the disclosure of any personal interest or personal relationship with a particular party. This is a matter the proposed Working Group may wish to have regard to.
- (iii)* Duty to limit contentious issues
- 8.103** This is discussed in detail in the Consultation Paper.¹⁹⁸ "Long cases produce evils" and in England expert witnesses must "limit in every possible way the contentious matters of fact to be dealt with at the hearing."¹⁹⁹ Experts should identify where they do and do not agree in advance of trial because the proper administration of justice requires swift trials.²⁰⁰
- 8.104** To reduce costs and delays, expert testimony ought to be limited to what is necessary. Where the experts agree, one expert should present the evidence or the experts should prepare a joint report on these agreed areas.²⁰¹

¹⁹² *Toth v Jarman* [2006] EWCA Civ 1028 (CA); [2006] All ER (D) 271 (Jul).

¹⁹³ [2006] EWCA Civ 1028 (19 July 2006) at [102] per Potter J.

¹⁹⁴ [2006] EWCA Civ 1028 (19 July 2006) at [111].

¹⁹⁵ *Dyson Ltd v Qualtex Ltd* [2004] 2981 EWHC (Ch).

¹⁹⁶ *Ibid.*

¹⁹⁷ *Rules of the Superior Courts (Conduct of Trials) 2016*, art. 2(vii).

¹⁹⁸ At paragraphs 3.128-3.131.

¹⁹⁹ *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] 1 Ch 31, per Tomlin J.

²⁰⁰ *Stanton v Callaghan* [2000] QB 75, [1999] PNLR 116, [1998] EWCA Civ 1176 (8 July 1998), [1998] 4 All ER 961, [1999] 2 WLR 745, per Chadwick J. This case predates the *Human Rights Act 1998* but it has been approved by, for example, *Jones v Kaney* [2010] EWHC 61 (QB).

²⁰¹ LRC CP 52-2008 paragraph 3.131..

8.105 The *Rules of the Superior Courts (Conduct of Trials) 2016*, which come into force on October 1st 2016, now allow a judge to order experts to agree evidence in this way. Rule 61 of the Rules of the Superior Courts now allows the judge to require the experts to meet privately without the presence of the parties or their legal representatives to discuss the proposed evidence. Following the meeting they are to draw up a written statement, or “joint report”, identifying that evidence which is agreed and that which is not. The joint report is then lodged to the Court and copies supplied to the parties.

(iv) Duty to sign expert’s declaration

8.106 This is discussed in detail in the Consultation Paper.²⁰² The expert would sign a declaration that he or she is aware of his or her duties and would swear to his or her intention to comply.

8.107 The Consultation Paper explored this requirement in other jurisdictions where experts cannot give evidence otherwise than in accordance with the relevant code.²⁰³ In New South Wales, for example, a code of conduct for expert witnesses is embedded in the rules of court. Instructing parties are obliged to provide their experts with a copy of the code and the expert evidence is generally admissible only if the expert has declared in writing that he or she has read the code and agrees to be bound by it. Where an expert fails to do so (for example because the instructing party failed to provide the expert with the code as required) the evidence will not be admitted.²⁰⁴

8.108 A similarly strict approach to enforcing such a code here seems likely to increase the standard and quality of experts and expert testimony. Requiring an expert to make and sign a declaration of this type might be thought to bring home to the expert the need to act independently.

8.109 The *Rules of the Superior Courts (Conduct of Trials) 2016* provide for a limited form of expert’s declaration. The 2016 Rules contain a requirement that the expert report contain a statement acknowledging the overriding duty of the expert to the Court.²⁰⁵ The Commission takes the view that this should be extended to include an acknowledgement of all the expert’s statutory duties.

E Bias, partisanship and Conflicts of Interest

8.110 Experts do not always recognise their duties and even where they recognise them, they might not discharge them. An expert may sometimes see their

²⁰² At paragraphs 3.158-3.165.

²⁰³ LRC CP 52-2008 paragraph 3.160-3.166

²⁰⁴ *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980 at 9 per Einstein J.

²⁰⁵ *Rules of the Superior Courts (Conduct of Trials) 2016*, S.I. No. 254 of 2016, art. 2(vii)

role as being to support the instructing party's arguments and contradict the evidence of experts for the other side.

- 8.111** Three forms of bias or partisanship have been identified: "conscious bias", "unconscious bias" and "selection bias".²⁰⁶ In this Part the Commission examines these three types of bias in an effort to determine how best to reduce the prevalence of bias in expert testimony.
- 8.112** It is dangerous "to take the aspirational statements of neutrality at face value and assume that the evidence being put before them will, by some stroke of good intentions, be truly non-partisan."²⁰⁷
- 8.113** Concern that experts were partisan²⁰⁸ and becoming mere "weapon[s] in the parties' arsenal"²⁰⁹ was one of the major instigators of England's Woolf reforms which led to the CPR. In his 1995 Interim Report *Access to Justice* Lord Woolf summarised the difficulty:
- "[T]he expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide the independent expert evidence which the court is entitled to expect."²¹⁰
- 8.114** The Commission first discusses the three kinds of bias, then discusses how to distinguish bias from other phenomena and finally discusses the consequences of a finding that a witness was biased.

(1) *The three kinds of bias: conscious, unconscious and selection bias*

(a) *Conscious or actual bias*

- 8.115** Conscious or actual bias is that of the partisan "hired gun".
- 8.116** The threat of conscious bias is of particular concern and in the Consultation Paper the Commission investigated three categories: personal, financial and

²⁰⁶ For more discussion on the various forms of adversarial bias, see: Bernstein "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution" (February 2007). George Mason Law & Economics Research Paper No 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 4.

²⁰⁷ Morris "Getting Real About Expert Evidence" (2006) Paper delivered at the Dealing with Expert Witnesses Seminar hosted by the Victorian Planning and Environmental Law Association (16 November 2006). The author was formerly a judge and was president of the Victorian Civil and Administrative Tribunal at the time.

²⁰⁸ In *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd & Ors* (1996) EGCS 23 the court complained that "[f]or whatever reason, whether consciously or unconsciously,... expert witnesses instructed on behalf of parties to litigation often tend to espouse the cause of those instructing them... on occasion, becoming more partisan than the parties."

²⁰⁹ Woolf *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO London 1995) Chapter 23 at [5].

²¹⁰ Lord Woolf, *Access to Justice: Interim Report* (HMSO London 1995) Chapter 23 at [5].

intellectual interests.²¹¹ Each of these may exist both externally and in direct relation to the litigation in question.²¹²

(i) The three sources of bias: personal, financial and intellectual interest

(I) *Personal interest*

8.117 Expert witnesses may be swayed either consciously or unconsciously by familiarity with the parties or the issues, jeopardising their objectivity. In England a pre-existing personal and professional relationship between the parties can result in the exclusion of expert evidence on partisanship grounds.²¹³ In *Vernon v Bosley*²¹⁴ Thorpe J found that the claimant's expert witness had prepared "thoroughly partisan reports." A possible remedy for this danger is to limit the experts' attendance at trial, only permitting them to attend court when they are due to be examined.

8.118 An expert witness may be predisposed to giving a particular opinion due to his or her own beliefs or moral viewpoints.²¹⁵ In some politically charged cases, experts may be motivated to "get their man" and bend the rules accordingly. One such example arose in the English case *R v Ward*²¹⁶ where a number of forensic experts in an IRA bombing investigation and trial were found to have concealed certain results and data. The experts misled the court in interpreting the evidence presented. For instance, they failed to indicate that the chemicals found on the accused's clothes which were often used in bomb-making might also be found in shoe polish. Furthermore, it was held that they grossly exaggerated the significance of certain test results, lied to a defence expert witness about these test results, and suppressed evidence in order to further the prosecution case. Glidewell J condemned the "woefully deficient" nature of their evidence.²¹⁷ The court concluded that the forensic evidence could not be relied on and ultimately found the conviction to be unsafe. The accused's conviction was quashed.

8.119 An expert may also have formed preconceived opinions due to personal relationships, or due to an affiliation with or membership of the same organisation as one of the parties,²¹⁸ all of which may damage their independence or perceived independence.

²¹¹ LRC CP 52-2008 paragraph 4.04 . The three-fold categorisation is Dwyer's. See Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 *CJQ* 425 at 427
²¹² *Ibid* and LRC CP 52-2008 paragraph 4.05.
²¹³ *Liverpool Roman Catholic Archdiocesan Trust v Goldberg* [2001] 1 WLR 2337. See paragraph 4.07 of the Consultation Paper.
²¹⁴ [1996] EWCA Civ 1217.
²¹⁵ See *Hertzler v Hertzler* (1995) WY 206; 908 P 2d 946 where the expert was exposed under cross-examination to have religious beliefs regarding homosexuality which affected his opinions in the case. See also *Toth v Jarman* [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul).
²¹⁶ (1993) 96 Cr App R 1. See LRC CP 52-2008 paragraph 4.47-4.49.
²¹⁷ *R v Ward* (1993) 96 Cr App R 1.
²¹⁸ In *Toth v Jarman* the appellant argued that the judgment should be set aside where the expert failed to disclose the potential conflict of interest due to his membership of a committee associated with the defence. The court here did not find the expert to be biased but did emphasise the duty on the expert to disclose any potential conflict of interest at an early stage in proceedings.

8.120 Experts may feel that they owe allegiance to their profession making them reluctant to fuel an attack against a fellow practitioner: “members of professions tend to be institutionally and socially collegial.”²¹⁹

(II) *Financial interest*

8.121 In the Consultation Paper, the Commission explored the impact that a financial interest has on experts.²²⁰ The fact that the expert is paid for testimony has fuelled the view of expert evidence as a service or commodity. Even the honest witness may feel an obligation to be of use to his or her paymaster.²²¹ The expert might have an underlying financial interest in the outcome or in a party, whether that interest is pre-existing or developed at trial. Conditional and contingency fee arrangements and their tendency to bias expert testimony is under consideration by the Commission at the time of writing (December 2016).²²²

8.122 The case law dealing with financial interest is primarily English. In *Smolen v Solon Co-operative Housing*²²³ the expert appointed by the court as a single joint expert had been instructed by the defendant in previous instances. This created the impression that the expert might be inclined to prefer one view in order to preserve a lucrative relationship. The Court of Appeal concluded that the trial judge had been correct to discharge him even though there had been no specific allegation of bias. A single joint expert must be especially independent and objective - he or she must not only be impartial but must be seen to be so.

8.123 *British Nuclear Group Sellafield Ltd v Gemeinschaftskernkraftwerk Grohnde GmbH & Anor*²²⁴ investigated the ways in which an expert could counteract the perceived bias of a relationship of employment and overcome any lack of independence. The English High Court acknowledged the uneasiness of the expert’s position and the disadvantage of being an employee of the applicant.

8.124 The relationship of employment is no longer a bar in England to an expert’s offering expert witness testimony.²²⁵ Under older law,²²⁶ employment might have been sufficient in itself to render a witness’s opinions inadmissible as expert evidence. Despite this shift, the Briggs J noted in *Sellafield* that difficulties remained with these types of expert witness and the potential for

²¹⁹ Healy, *Irish Laws of Evidence* (2004 Thomson Roundhall) p. 366.

²²⁰ Paragraphs 4.17-4.31 of the Consultation Paper.

²²¹ In *Abinger v Ashton* LR 17 Eq 358, 373 (1873) Jessel MR held that however honest the expert may be, he may yet be biased in favour of the person employing him because of a natural desire “to do something serviceable for those who employ you and adequately remunerate you”.

²²² See *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10 - 2016) was published in 2016. Conditional fee arrangements are discussed at para. 6.20.

²²³ [2003] EWCA Civ 1240.

²²⁴ [2007] EWHC 2245 (Ch).

²²⁵ *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 [2002] 3 WLR 1104, [2002] EWCA Civ 932, [2002] 4 All ER 97. See the discussion of the effect of this case by Briggs J at paragraphs [63]-[64] of *Sellafield*.

²²⁶ For example *Liverpool Roman Catholic Archdiocesan Trustees v Goldberg (No 3)* [2001] 1WLR 2337.

bias remains rife. The difficulties go to weight only but are a major factor in it.²²⁷

- 8.125** An expert's thorough preparation, wide-ranging experience and "tak[ing] on board and resolv[ing] to take seriously his responsibility to the court as an expert witness" can "ma[k]e up for his lack of de facto independence".²²⁸

(III) *Intellectual interest*

- 8.126** An expert's zeal for a particular theory in their field might lead them to use court proceedings as a vehicle to promote it, neglecting competing theories.²²⁹ In *Petursson & Ors v Hutchison 3G UK Ltd*²³⁰ Kirkham J criticised an expert's lack of balance and partiality after he launched a "bold and startling" attack on the other side's experts. Similarly, in *Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd*²³¹ Laddie J castigated an expert's evidence as a "partisan tract."²³² The expert had authored an article defending a conception of the expert witness's role that allowed decidedly partisan testimony.²³³

(ii) Particular examples of bias: employment and therapeutic relationships

(I) *Employment relationship*

- 8.127** The financial aspect of a continuing employment relationship between the expert and the instructing party could jeopardise the independence of that expert. This is a contentious area in admitting expert evidence and the presence of such a relationship affects the weight given to the testimony.
- 8.128** The case of *Galvin v Murray*²³⁴ concerned the evidence of two engineers employed by the local county council and who were called to give evidence on the council's behalf. The Supreme Court noted that the council was entitled to rely on their own engineers for the purposes of litigation and that their report was indeed competent and displayed considerable expertise in the matter. However, the Court held that while such an employment relationship would not affect the status of the witnesses as experts, it would affect the weight to be apportioned to the evidence.

"The fact that an engineer is employed by one or other of the parties may affect his independence with a consequent reduction

²²⁷ [2007] EWHC 2245 (Ch) at paragraph [64].

²²⁸ Per Briggs J in *Sellafield* at paragraph [65].

²²⁹ See LRC 52-2008 paragraph 4.32-4.4.39. See also Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 *CJQ* 425, at 434.

²³⁰ [2005] EWHC 920 (TCC) (09 May 2005). See the Consultation Paper at paragraphs 4.36-4.38.

²³¹ [1995] EWHC 7 (Ch) (06 July 1995), discussed in the Consultation Paper at paragraphs 4.94-4.99.

²³² Per Laddie J *Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch) (06 July 1995).

²³³ Goodall "The Expert Witness: Partisan with a Conscience" (1990) 56(3), *Arbitration: Journal of the Chartered Institute of Arbitrators*. 159-161.

²³⁴ [2001] 2 I.L.R.M. 234.

in the weight to be attached to his evidence but it could not deprive him of his status as an expert.”²³⁵

8.129 Questions have also arisen about the independence of experts who have performed some role in the course of the investigation. In *The People (DPP) v PJ Carey (Contractors) Ltd*²³⁶, an employee of the defendant was killed on a building site and a charge under section 6(2)(d) of the *Safety, Health and Welfare at Work Act 1989* was brought against the defendant that his death had been brought about by unsafe systems of work. It would appear (the trial court did not issue a written judgment) that the prosecution called a Health and Safety inspector as its expert witness to give evidence as to the flaws in defendant’s system of work.²³⁷ A *voir dire* was held to determine whether the evidence was relevant and the witness a properly qualified expert. The trial judge agreed that evidence was relevant and that the witness was indeed a properly qualified expert but nevertheless ruled that the evidence was inadmissible. In the absence of a written judgment, the precise reasons for this ruling are unclear but it has been suggested that the direct involvement of the witness, as an inspector of the HSA in the prosecution was a factor in the trial judge’s decision.²³⁸ The point was not raised on appeal and a commentator has suggested that the decision in *Galvin v Murray*, that such appearance of bias goes to weight, is still the relevant legal authority.²³⁹

8.130 In *Mohammed v Financial Services Authority*²⁴⁰ the applicant argued before a UK tribunal²⁴¹ that the evidence of the respondent’s expert witness should not be admitted. The expert was a funds manager employed by a company. The compliance director at the same company was on the respondent’s regulatory committee, which was the body that decided to bring disciplinary proceedings against the applicant in the first place. The applicant claimed that an expert was employed by a firm that had a regulator committee-member as compliance director could not be treated as an independent witness because he would be “reluctant to depart from the findings of the senior compliance officer of his own firm”.²⁴² The tribunal held that he could not be considered to be truly independent and therefore they could not give his testimony much weight.²⁴³

²³⁵ *Ibid* at 239.

²³⁶ [2011] IECCA 63; [2012] 1 I.R. 234.

²³⁷ Byrne, *Safety and Health Acts: Annotated and Consolidated* (Round Hall, 2013) p. 155.

²³⁸ *Ibid*.

²³⁹ *Ibid* at 155-156.

²⁴⁰ [2005] UKFSM FSM012,

²⁴¹ The Financial Services and Markets Tribunal, a tribunal established by section 132(1) of the *Financial Services and Markets Act 2010* (UK). It no longer exists. Its functions were moved to the Upper Tribunal on 6 April 2010 by Article 2(2) of The *Transfer of Tribunal Functions Order 2010* (SI 2010/22).

²⁴² [2005] UKFSM FSM012 [55].

²⁴³ [2005] UKFSM FSM012 (18 January 2005) at [60].

8.131 The preferred approach taken both in this jurisdiction²⁴⁴ and in England²⁴⁵ is to take an expert witness's employment relationship into account when assessing his or her evidence's weight rather than declaring the evidence automatically inadmissible.²⁴⁶ It is desirable that an expert witness have no actual or apparent interest in the outcome of the proceedings but the English courts will not exclude an expert's evidence simply because the expert has such an interest.²⁴⁷ Automatically excluding experts who have a pre-existing relationship with a party would create difficulties, for example forensic experts are employed chiefly by the State and it may be difficult to secure forensic evidence otherwise than from State employees.²⁴⁸

8.132 In *Dyson Ltd v Qualtex Ltd*²⁴⁹ one expert witness was an employee of, and independent contractor for, the applicant and another was the defendant's founder, chairman and principal shareholder. Both of these experts' evidence was admissible and capable of bearing weight. Despite the closeness of the relationship between the applicant and the first expert witness, Mann J clearly accorded substantial weight to that expert's evidence.²⁵⁰ While he did not accord as much weight to the second expert witness's evidence, this was not because of his close association with the respondent, but because his hostility to a particular form of monopolistic practice coloured his objectivity.²⁵¹

(II) Bias of a treating medical practitioner

8.133 It has been argued that problems may arise where a therapist is treating a patient ("a treating therapist") and then is asked to act as an expert witness in a case involving the patient.²⁵² Doing both could lead to a conflict of interest, damage the therapist-patient relationship and may adversely affect the way in which the evidence is given. The Consultation Paper discussed the strains placed on expert witnesses by this.²⁵³

8.134 First-hand experience may add value to an opinion so any prohibition on treating therapists acting as expert witnesses is clearly undesirable. The best approach is to have this go to weight rather than admissibility. As one

²⁴⁴ See for example *Galvin v Murray* [2000] IESC 78, [7]: "The fact that an engineer is employed by one or other of the parties may affect his independence with a consequent reduction in the weight to be attached to his evidence but it could not deprive him of his status as an expert."

²⁴⁵ See *R (Factortame & Ors) v Secretary of State for Transport* [2002] EWCA Civ 932 (3 July 2002).

²⁴⁶ As Lord Phillips MR stated in *R (Factortame) v Secretary of State for Transport* [2002] EWCA 932 at [70]: "Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence."

²⁴⁷ Phillips MR at [70] [2002] EWCA Civ 932 (3 July 2002).

²⁴⁸ Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell 2015) at paragraph 6-015.

²⁴⁹ [2004] 2981 EWHC (Ch).

²⁵⁰ [2004] 2981 EWHC (Ch), [66].

²⁵¹ [2004] 2981 EWHC (Ch), [67]-[68].

²⁵² See Slovenko "On a Therapist Serving as a Witness" (2002) 30 *J Am Acad Psychiatric Law* 10. This is discussed at greater length at paragraphs 4.24-4.27 of the Consultation Paper.

²⁵³ LRC CP 52-2008 paragraph 4.25-4.27.

submission received noted, the court would have to be satisfied that the witness had not omitted anything relevant because of their duties in their primary profession. The case law discussed above as to the effect of various types of prior relationships on the status of expert evidence must also be borne in mind.

8.135 The Commission therefore takes the view that there should not be a prohibition on treating therapists acting as expert witnesses. More broadly, the Commission considers that the draft Evidence Bill should expressly provide that employment, current or prior, or a professional or clinical relationships should not necessarily prevent a person from acting as an expert witness. This reflects the emerging case law to that effect both in this jurisdiction and in England and Wales.²⁵⁴

8.136 **The Commission recommends that the draft Evidence Bill should provide that a prior employment or therapeutic relationship should not necessarily prevent a person from acting as an expert witness.**

(b) *Unconscious bias*

8.137 Unconscious bias occurs where an expert sways their opinion in favour of the instructing party without realising they are doing so, perhaps subconsciously feeling they owe a duty to do the best for the instructing party. One of the functions of the system of party-appointed experts is “to counter any unconscious sympathy with one’s own patient or client.”²⁵⁵ The line separating conscious from unconscious bias is not always easy to define.

8.138 Unconscious bias may result from a cognitive error on the part of the expert and is therefore difficult to identify and counteract; academic commentary has posited that there are three forms this may take.²⁵⁶ The first two, interpreter and observer effect, are both experiment-orientated and are common in, for example, forensic or medical investigations and where an expert is led to unconsciously rig an experiment to suit his theory.²⁵⁷ A third identifiable form of unconscious expert bias is known as the fallacy of verification where the expert undertakes only those experiments which will confirm his hypothesis.

8.139 Several phenomena may skew the opinions of otherwise objective expert witnesses, the most prominent being the general human predisposition to seek information consistent with their beliefs. While the theoretical base for

²⁵⁴ See, for example, discussion above of *Galvin v Murray* [2001] 2 I.L.R.M. 234.
²⁵⁵ *JF v DPP* [2005] IESC 24 (26 April 2005) per Hardiman J. See also Jessel LJ in *Abinger v Ashton* (1873) LR 17 Eq 358, 374 cited at paragraph 4.45 of the Consultation Paper.

²⁵⁶ Dwyer identifies these three forms in “The Causes and Manifestations of Bias in Civil Expert Evidence” (2007) 26 *CJQ* 425.

²⁵⁷ For instance Professor Meadows in *Clarke*. A further example of the interpreter effect is *B (a child)* (2003 EWCA Civ 11487) which concerned the MMR vaccine. The Court of Appeal was critical of an expert who let her professional opinion of vaccination overcome her duty to the court to furnish objective evidence.

the expert evidence may be sound, the unconscious pursuit of a confirmation of one's own hypothesis may undermine the process.

- 8.140** This may become apparent in the phenomenon of confirmation bias, meaning the tendency to filter information (either consciously or unconsciously) so as to support a working hypothesis. The expert witness fails to appreciate in these circumstances that it is “no part of his function to don the mantle of advocate on his client’s behalf.”²⁵⁸ The Consultation Paper investigated the prevalence of unconscious bias in the field of forensic evidence.²⁵⁹
- 8.141** There is a view that scientific and forensic experts will be unconsciously influenced by their position as the State’s central laboratory and as such will “naturally identify with the prosecutors’ goal of convicting a particular defendant,” a fact that may affect their conclusions.²⁶⁰ An example of this phenomenon is an American study in which expert fingerprint examiners were presented with fingerprints which they were told by law enforcement had to be re-examined in light of new information which suggested they had been previously mistakenly identified as a match.²⁶¹ Unbeknownst to the experts, they had examined these fingerprints 5 years previous and found them to be a match. Represented with the fingerprints, 4 out of 5 experts found that they did not match.
- 8.142** The neutrality of a forensic or scientific expert witness might not be affected by their close relationship with the State but the perception of bias may remain. Forensic Science Ireland are determined to counteract this, to ensure that forensic scientists employed by the government do not see their function as helping the police and to safeguard their objectivity.²⁶²
- 8.143** Forensic Science Ireland (FSI) remains under the auspices of the Department of Justice and Equality.²⁶³ It acknowledges a possible public perception that it is not independent from the Gardaí but points out that its mission statement does not limit the service to law enforcement agencies. FSI emphasises its continual awareness of, and its efforts to avoid, bias. The Commission recognises that FSI is independent in its activities and not subject to direction from the Gardaí.

(c) Selection bias

- 8.144** A third form of bias is selection or structural bias. As any party can “shop” for a suitable expert, the judge or jury may well be presented, not with a

²⁵⁸ Barr “Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development” (1999) 4 (4) *BR* 185.

²⁵⁹ LRC CP 52-2008 paragraph 4.43.

²⁶⁰ Bernstein, “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution” (February 2007). George Mason Law & Economics Research Paper No 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 4.

²⁶¹ See Dror & Charlton, ‘Why experts make errors’ (2006) *Journal of Forensic Identification* 56, 600-616

²⁶² Submission from the Forensic Science Laboratory at response to paragraph 4.56.

²⁶³ This is discussed further at paragraph 4.56 of the Consultation Paper.

balanced overview of mainstream expert opinion on the issue, but with slanted opinion from an expert that has been recruited specifically for his willingness to present the instructing party's favoured viewpoint. The finder of fact might remain unaware of the possible multiplicity of discarded expert opinions but appeals courts have been very critical of the practice of "expert shopping", as discussed above.²⁶⁴

8.145 Parties may consult potential witnesses and select the expert whose views most strongly support their case. Selection bias is a direct result of the current system of appointment of experts by the parties to a case. In the adversarial system, the judge's role is the neutral overseer of the dispute between the parties.

(2) *Recognising bias*

(a) *Telling bias from genuine disagreement*

8.146 It is sometimes difficult to distinguish bias from an honestly-held opinion that happens to further the instructing party's case.²⁶⁵ The courts in Ireland take a strict approach where conscious bias is detected.²⁶⁶

8.147 In the Consultation Paper the Commission discussed the difficulty in distinguishing disagreement from bias which is aggravated in "theory-rich disciplines" as well as subjects susceptible to "junk science".²⁶⁷ There may be no scientific consensus on a particular question or in a general field. Some expert witnesses may therefore be appearing to 'hedge their bets' when giving evidence on these areas.²⁶⁸ Of those who do express a firm view, some may believe that one theory is correct and others may believe that another theories or theories is or are correct. Divergent views between experts in areas where there is no consensus cannot be taken as a reliable indicator of bias. Indeed, even in an area where there is consensus, a divergent opinion might well be honestly held and even correct, if the scientific consensus at the time happens to be wrong. What is not appropriate, at least in England, is "fanciful speculation".²⁶⁹

²⁶⁴ For example in Australia Windeyer J in *Clark v Ryan* (1960) 103 CLR 486 noted at 510 that "it is often quite surprising to see with what facility, and to what an extent, [expert witnesses'] views can be made to correspond with the wishes or the interests of the parties who call them."

²⁶⁵ This is discussed in the Consultation Paper at paragraphs 4.40-4.42.

²⁶⁶ See, for example, *McG (P) v F(A)* [2000] IEHC 11 (28th January, 2000), discussed in the Consultation Paper at paragraph 4.85. See also, generally, paragraphs 4.84-46

²⁶⁷ Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 *CJQ* 425 at 438.

²⁶⁸ Thus *In Re A (non-accidental medical injury)* [2001] 2 FLR 657 Bracewell J observed that "it is undoubtedly true that the frontiers of medical science are constantly being pushed back and that the state of knowledge is increasing all the time. That is why I find that when presented with speculative theory based on an unlikely hypothetical base an expert will rarely discount it and will in effect never say never."

²⁶⁹ *In Re A (non-accidental medical injury)* [2001] 2 FLR 657 Bracewell J held that "[f]anciful speculation is not an appropriate method of inquiry. Similarly, see Lady Clark's remarks in *Smith v Lothian University Hospitals NHS Trust* [2007] CSOH 08.

(b) *Misunderstanding the role of the expert witness*

8.148 Experts may genuinely misunderstand their role by, for example, believing that it is their responsibility to put a scientific case that supports their instructing party. This is discussed in the Consultation Paper.²⁷⁰

(c) *Conflicts of interest*

8.149 A conflict of interest will not automatically disqualify an expert. The key question is whether the expert's evidence is independent. Conflicts of interest are therefore distinguished from bias. The English courts have held, however, that the party calling an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible in accordance with CPR 35.3.²⁷¹

8.150 A judgment of the English High Court, *EXP v Barker*²⁷², deprecated the failure of an expert witness to disclose a longstanding prior relationship he had with the defendant for whom he was acting. The case concerned a claim of medical negligence against a consultant radiologist resulting in a burst aneurysm as a result of which the claimant suffered a range of serious disabilities. The expert engaged by the defence, a consultant neuroradiologist, had spent a number of years working in the same department as the defendant but omitted any mention of this relationship in his expert report and the relationship was only exposed on cross-examination. The Court noted that anyone comparing the CVs of the two men "would reasonably infer" that the two men would have had "possibly significant contact" from 1984 until 1991.²⁷³ They had written at least one academic paper together and the judge also noted that at one "unguarded moment" the expert witness referred to the defendant by his first name.²⁷⁴

8.151 The Court came to the conclusion that, although it came very close to ruling the evidence inadmissible, the expertise of the witness and his importance to the defendant's case was such that it would deal with the reservations as to his independence as a matter of weight.²⁷⁵ Nevertheless the Court found that as a consequence of the extent to which its confidence in the defendant's expert was undermined, the evidence of the plaintiff's expert was to be preferred and he therefore imposed liability on the defendant.²⁷⁶

8.152 The High Court in *O'Sullivan v Dupuy International Ltd* has had regard to the *Barker* case in allowing the evidence of an expert witness notwithstanding

²⁷⁰ This is discussed at paragraphs 4.64-4.70 of the Consultation Paper.

²⁷¹ See for example *Toth v Jarman* where disclosure was deemed necessary to enable the court to decide whether to act in reliance upon it. [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul) at [102].

²⁷² *EXP v Barker* [2015] EWHC 1289 (QB).

²⁷³ *Ibid* at para. 48.

²⁷⁴ *Ibid* at paras. 52-55.

²⁷⁵ *Ibid* at para. 64.

²⁷⁶ *Ibid* at paras. 73-78.

the fact that he had a possible financial stake in the outcome of the case.²⁷⁷ The expert for the plaintiff was also a party to litigation in the United States against the same manufacturer and was set to benefit financially from those proceedings. While Cross J stated that it would have been “preferable” had the expert not been so involved in such litigation, he noted the very limited relevance of the present case to any possible financial gain and the quality of the evidence received by the Court and was consequently willing to rely on the expert’s evidence.²⁷⁸ The case law therefore suggests that while a prior relationship or other conflict of interest should be disclosed, it will not necessarily render the expert evidence inadmissible. This reflects the Commission’s recommendation, set out above, that a prior professional or clinical relationship should not necessarily render such an expert’s evidence inadmissible.

- 8.153** The Commission noted in the Consultation Paper that a mandatory requirement imposed on an expert witness to disclose any potential conflict of interest would go a long way towards reducing potential bias and any perception of bias, which is detrimental even where there may be no actual bias. It would ensure that the court was aware of potential conflict when evaluating the exact weight to accord to the evidence of a particular expert. It can also be argued that such an obligation is not excessively onerous given the wide discretion a party has in the choice of expert from the outset.
- 8.154** In the Consultation Paper the Commission considered how such a disclosure requirement would affect the operation of expert witnesses and case management in Ireland.²⁷⁹ The *Rules of the Superior Courts (Conduct of Trials) 2016* (S.I. 254 of 2016) now provide for a duty of expert witnesses to “disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert...”.²⁸⁰ This is discussed further below.²⁸¹

(3) *Consequences of a finding of bias and/or partisanship*

- 8.155** In the English case *Pearce v Ove Arup Partnership Ltd & Ors*²⁸² Jacob LJ castigated an expert witness and his lack of objectivity²⁸³ finding that the witness “failed in his duty to the court.”²⁸⁴

He then went on to consider the consequences of a finding that an expert had breached his duty. There is no rule in England

²⁷⁷ *O’Sullivan v Depuy International Ltd* [2016] IEHC 684.

²⁷⁸ *Ibid* at 7.24.

²⁷⁹ LRC CP 52-2008 paragraph 4.83.

²⁸⁰ Order 39, Rule 57(2)(b) of the *Rules of the Superior Courts 1986* (as amended by S.I. No. 254 of 2016)

²⁸¹ See Part H, Chapter 8.

²⁸² [2001] EWHC Ch 455 (2nd November, 2001).

²⁸³ [2001] EWHC Ch 455 (2nd November, 2001) at [58].

²⁸⁴ [2001] EWHC Ch 455 (2 November 2001) at [60].

providing for specific sanctions in such cases, nor does a specific accrediting body exist to whom an expert could be referred but if the expert has a professional body a judge can refer a serious breach of the expert's CPR 35 duties that body.²⁸⁵

8.156 The Commission considers that the threat of such sanctions could help to reduce the prevalence of such bias. The Commission now discusses the sanctions that may be imposed on an expert in breach of his duties. This includes where a finding of bias or partisanship has been made.

F Sanctions

8.157 If an expert fails to carry out his or her duties competently or at all this may seriously harm a party's case and may obstruct or impede the administration of justice. Accordingly, the Commission has considered how to discourage expert witness misbehaviour. Reducing the prevalence of bias and promoting high standards amongst expert witnesses is best achieved by a two-pronged approach: clear instruction for experts on the standards expected of them as expert witnesses coupled with the imposition of sanctions on experts for negligence or breach of duty.

8.158 In this Part the Commission discusses the sanctions that exist for expert witnesses now and whether such sanctions are sufficient or adequate.

(1) Existing sanctions

8.159 Several existing common law and statutory remedies may provide limited redress against an expert who has behaved wrongfully. In criminal law, an expert may be prosecuted for perjury,²⁸⁶ contempt of court²⁸⁷ or perverting the course of justice.²⁸⁸ In civil law, an expert may be found guilty of civil contempt of court,²⁸⁹ a wasted costs order may be made against them²⁹⁰ or their instructing party may withhold payment.²⁹¹

(a) Perjury

8.160 Perjury is a common law offence committed by any person lawfully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement, material in that proceedings, which he or she knows to be false or

²⁸⁵ [2001] EWHC Ch 455 (2nd November, 2001).

²⁸⁶ See the Consultation Paper at paragraphs 6.236-6.242.

²⁸⁷ See the Consultation Paper at paragraphs 6.243-6.246.

²⁸⁸ See the Consultation Paper at paragraphs 6.247-6.248.

²⁸⁹ See the Consultation Paper at paragraph 6.253.

²⁹⁰ See the Consultation Paper at paragraphs 6.249-6.250.

²⁹¹ See the Consultation Paper at paragraphs 6.251-6.252.

does not believe to be true.²⁹² It is an indictable offence but, in certain circumstances triable summarily.²⁹³

- 8.161** If an expert testifies to an opinion that he or she does not believe or makes false claims that he or she supports by reference to his or her expertise, and is subsequently revealed to have lied to the court, he or she commits perjury. Where a person claims to be an expert witness and gives evidence supported by this alleged expertise but their expertise later emerges to be fabricated, this is also perjury.²⁹⁴
- 8.162** However, the very nature of expert opinion evidence makes proving dishonesty very difficult, even impossible. False claims about expertise may be easier to identify but where very difficult or technical issues are involved the judge and jury will inevitably struggle with detecting falsities and they may depend on the testimony of an expert for the other party to challenge the veracity of the evidence given. Prosecutions of expert witnesses for perjury are therefore virtually unknown in England.²⁹⁵
- 8.163** Section 25 of the *Civil Liability and Courts Act 2004* creates an offence of dishonestly giving false evidence in personal injuries claims, which is wider than the offence of perjury. Section 25(2) specifically makes it an offence to give false evidence to a solicitor or an expert. This implies that subsection 25(1) which makes it an offence for “a person” to give false evidence should have wide application and thus it can be implied that this would apply to experts who are considered to have dishonestly given false evidence.
- (b) Contempt of court**
- 8.164** Contempt of court is also a common law offence which can be tried summarily or on indictment.²⁹⁶ Contempts may be civil or criminal. Generally, civil contempt involves disobeying a court order while criminal contempt involves interference with the administration of justice by, for example, refusing to be sworn in or to answer a relevant question.²⁹⁷ The distinction between the two is not well defined.
- 8.165** In England, if an expert witness fails to attend court to answer questions and give evidence they may be in contempt *in facie curiae*.²⁹⁸ Impersonating an

²⁹² Law Reform Commission, *Report on Oaths and Affirmations* (LRC 34-1990) at 2.28.

²⁹³ *Criminal Justice Act 1951* as amended by the *Criminal Procedure Act 1967*

²⁹⁴ See “Fraudulent Forensic Expert Jailed” BBC News 22 February 2007 available at: http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm; and see “Bogus Doctor Jailed for 10 Years” BBC News 26 January 2005 available at: http://news.bbc.co.uk/2/hi/uk_news/england/london/4209509.stm.

²⁹⁵ Dwyer “The Effective Management of Bias in Civil Expert Evidence” (2007) 26 *CJQ* 57 at 73.

²⁹⁶ Law Reform Commission, *Report on Contempt of Court* LRC 47-1994 at 3.7.

²⁹⁷ Law Reform Commission, *Report on Contempt of Court* (LRC 47-1994) and *Consultation Paper on Contempt of Court* (July 1991).

²⁹⁸ *Re N* [1999] EWCA Civ 1452 (20 May 1999). Contempt in facie curiae consists of conduct which is so direct and immediate as to be deemed to be “in the personal knowledge of the court.” (Law Reform Commission, *Consultation Paper on Contempt of Court* (LRC 47-1994) at 4.

advocate can be contempt *in facie curiae*.²⁹⁹ By analogy this it might be argued that falsely representing oneself as an expert in a particular area could lead to similar charges.

8.166 In England, expert reports must be verified by a statement of truth.³⁰⁰ It constitutes contempt of court to make false statement in a document verified by a statement of truth without an honest belief in its truth.³⁰¹

(c) *Perverting the course of justice*

8.167 An expert who agrees with the instructing party or counsel to make false or misleading statements, or suppress, fabricate or destroy evidence would probably commit this common law offence.³⁰² In England in 2007, a man who falsely misrepresented himself as a forensic psychologist in over 700 cases was convicted of 20 charges including perverting the course of justice and perjury.³⁰³

(d) *Wasted costs order*

8.168 In England, where an expert's "by his evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the court", parties can bring an action against that expert.³⁰⁴

8.169 There is no Irish case on point but Irish courts have been willing to join a non-party to proceedings solely for the purpose of holding them liable for costs³⁰⁵ where they caused costs to be incurred and stood to benefit from the litigation. A court might join an expert to the proceedings so as to hold him or her liable for costs incurred as a result of the manner in which he or she gave his or her evidence or where he or she acted in breach of his or her duties to the court.

(e) *Withhold payment*

8.170 As discussed in the Consultation Paper, expert witness misconduct might be a good defence to the witness's claim for unpaid fees.³⁰⁶

²⁹⁹ See *In the Marriage of Slender (Mr H and DM)* 29 FLR 267 (Cited in Law Reform Commission, *Consultation Paper on Contempt of Court* LRC 47-1994 at 13)

³⁰⁰ CPR 35.10, PD 35.

³⁰¹ This is provided in CPR 32.14.

³⁰² Dwyer "The Effective Management of Bias in Civil Expert Evidence" (2007) 26 CJQ 57, at 73.

³⁰³ CPR 32.14. See: "Fraudulent Forensic Expert Jailed" BBC News 22 February 2007 Available at: http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm; "Bogus' Psychologist Admits Lying to Police" Manchester Evening News 7 February 2007 Available at: http://www.manchestereveningnews.co.uk/news/s/235/235509_bogus_psychologist_admits_lying_to_police.html; Wilson "The Trouble with Experts" The Guardian 25 February 2007 Available at: http://commentisfree.guardian.co.uk/david_wilson/2007/02/bea_campbell_in_these.html.

³⁰⁴ *Phillips v Symes & Zamar* [2005] 4 All ER 519, at [95] discussed in the Consultation Paper at paragraph 6.249. This is also acknowledged in Part 4.7 of the Civil Justice Council's "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005, amended 2009)).

³⁰⁵ See *Moorview Developments v First Active plc* [2011] IEHC 117 and *Byrne v John S. O'Connor & Company* [2006] 3 IR 379.

³⁰⁶ Hodgkinson & James, *Expert Evidence: Law and Practice* (2nd ed. Sweet & Maxwell 2007) at 13-011.

8.171 It might also be possible to give the trial judge power to limit or disallow the expert's fees if there were costs wasted attributable to the expert.

(2) Reform

8.172 In addition to the existing sanctions, the Commission has been encouraged in submissions to further strengthen the courts' hand in dealing with expert witnesses who fail to meet their legal obligations.

(a) Exclusion of evidence including expert's report

8.173 As mentioned in the discussion of the duties of the expert witness above, the Commission considers that the duties set down in the draft Evidence Bill should be bolstered by the sanction of the exclusion of the expert's evidence, including their report. Discussions at the round table hosted by the Commission in 2016 noted that lawyers and expert witnesses alike would be extremely hesitant to lead biased or poorly prepared evidence when faced with the prospect of having such evidence excluded entirely. It was argued that such outright exclusion would likely prove extremely damaging to the party's case and to the reputation of the expert. The question as to whether expert evidence should be excluded rather than simply subject to diminished weight is a matter which falls within the discretion of the trial judge. As the Court of Appeal stated in *Donegal Investment Group Plc v Danbywiske & Ors*, it is inappropriate to prescribe "precise ex ante rules" as to when expert evidence should be excluded rather subject to diminished weight.³⁰⁷ Rather a trial judge should apply "principles and commonsense" in making that determination in a given case.³⁰⁸

8.174 **The Commission recommends that the draft Evidence Bill should provide that a trial judge may rule inadmissible evidence of any expert witness who fails to comply with any of the duties set out in the draft Evidence Bill.**

G Immunity of Expert Witnesses

8.175 Witnesses generally have immunity from civil suit.³⁰⁹ This includes a defence of privilege to a charge of defamation in relation to words spoken in court,³¹⁰

³⁰⁷ *Donegal Investment Group Plc v Danbywiske & Ors* [2016] IECA 193 at para. 55.

³⁰⁸ *Ibid.*

³⁰⁹ *In Re Haughey* [1971] IR 217, *Looney v Bank of Ireland* Supreme Court, 9 May 1997, *O'Keeffe v Kilcullen* [2001] IEHC 17, [2001] 3 IR 568, *WJ Prendergast & Son Ltd v Carlow County Council* [2007] IEHC 92.

³¹⁰ Section 17(1) of the *Defamation Act 2009* provides: "It shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law in force immediately before such commencement as having been made on an occasion of absolute privilege." Section 17(2) of the 2009 Act, as amended, provides: "Subject to section 18(3) or 78(2) of the *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013*, and without prejudice to the generality of subsection (1), it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought was... (e) contained

as well as immunity from claims in negligence or breach of contract. The issues of privilege and immunity are often conflated, with O'Sullivan J in *O'Keefe v Kilcullen* referring to the "absolute immunity privilege" enjoyed by witnesses.³¹¹

8.176 The justification for the privilege and the immunity is that witnesses should be free to give full and honest evidence without the fear of being sued. In *Looney v Bank of Ireland*³¹² O'Flaherty J referred to:

"the need to give witnesses (and also indeed, the judge) in court, a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course of a hearing. Such persons, either witnesses or those swearing affidavits, are given immunity from suit. Otherwise, no judge could go out on the bench and feel that he or she could render a judgment or say anything without risk of suit. Similarly witnesses would be inhibited in the way that they could give evidence. The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case, which of course this case is not, but even in a case of perjury - which would be such a case - the law says that an action cannot lie."

8.177 The privilege extends backwards to statements made in preparation for legal proceedings³¹³ and applies unless a statement made by the witness is malicious or an abuse of process.³¹⁴

8.178 In the Consultation Paper the Commission canvassed the question of abolition of immunity from suit in negligence for expert witnesses³¹⁵ and concluded:

"the Commission is inclined to the view that the present position should be retained and that the traditional immunity from civil or criminal suit for expert witnesses should be retained. In view of the differing views that are evident on this, the Commission would welcome views on this matter."³¹⁶

in a judgment of a court established by law in the State, (f) made by a judge, or other person, performing a judicial function, (g) made by a party, witness, legal representative or juror in the course of proceedings presided over by a judge, or other person, performing a judicial function..."

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O'Keefe v Kilcullen [2001] IEHC 17.

Supreme Court, 9 May 1997, at 3.

O'Keefe v Kilcullen [2001] IEHC 17, [2001] 3 IR 568.

Per O'Flaherty J in *Looney v Bank of Ireland* Supreme Court, 9 May 1997:

"If someone for a malicious purpose, or in order to abuse what he might have thought was a situation of immunity that he enjoyed in court simply used that situation to make defamatory or malicious statements against others, in a manner that had nothing to do with the particular proceedings in which he was engaged, then it might well be that he would have no answer in an action for defamation or malicious falsehood, or whatever."

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³¹⁶

(LRC CP 52 -2008) at paras 6.142-6.232.

(LRC CP 52 -2008) at para. 6.231.

8.179 One submission which responded on this question stated:

"We are not aware of any real pressures or reasons to change the present immunity for experts whilst performing their duties. The principles upon which this is based are to effectively protect the expert's independence and to enable him to fulfil his overriding duty to the court without the fear of being sued for negligence or defamation.

We believe that the court has adequate powers to deal with the errant Expert and that the possibility of disciplinary action by his professional body is an effective deterrent.

One of the major potential problems with the abolition of immunity is that the unsuccessful litigant often sees suing and or complaining about an Expert as another opportunity to succeed where he has failed in the courts. This problem appears particularly acute with litigants in person."

(1) *Immunity of experts no longer applies in UK: Jones v Kaney (2011)*

8.180 However, the Consultation Paper and the submission from the Academy preceded the removal, in English law, of the immunity for "friendly expert witnesses" by the UK Supreme Court decision in *Jones v Kaney*.³¹⁷

8.181 The claimant in *Jones v Kaney* suffered physical and psychiatric injuries as the result of a road traffic accident and claimed damages in negligence against a drunken driver. Liability was admitted and the only issue was quantum. The respondent was a clinical psychologist instructed by the claimant's solicitors to examine him and prepare a report. Her initial report stated that Jones was suffering from post-traumatic stress disorder. The opposing expert considered that Jones was exaggerating his symptoms.

8.182 The District Judge ordered both experts to prepare a joint statement. After a telephone discussion, the opposing expert prepared a statement, which Kaney signed, stating that Jones was exaggerating his symptoms and did not have any psychiatric disorder. When questioned by Jones' solicitors about the discrepancy between the two statements, Kaney said that she felt under pressure to sign the joint statement and that it did not reflect her views. The District Judge refused Jones' application to change his psychiatric expert and he was effectively forced to settle his claim for less than he would have received if able to present a more sympathetic expert report.

8.183 Jones issued proceedings against Kaney alleging that her about face caused him loss. The judge struck out the claim but, on appeal, the UK Supreme Court in a 5:2 decision abolished the immunity from suit in negligence for

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[2011] UKSC 13.

expert witnesses. The basis for the decision was twofold. First, since the immunity from suit for advocates had been abolished by the House of Lords in *Hall & Co v Simons*³¹⁸ (overruling its decision upholding the immunity in *Rondel v Worsley*³¹⁹) the removal of immunity for expert witnesses was a logical extension of this.

8.184 The Court in *Jones v Kaney* noted that the "floodgates" fear expressed in the wake of *Hall & Co v Simons*, that there would be a spate of cases against barristers following that decision, had proved to be unfounded. The second argument advanced for the removal of the immunity was the principle that that "where there is a wrong, there ought to be a remedy."

8.185 Giving the leading judgment in *Jones v Kaney*, Lord Phillips stated:

"Thus the expert witness has this in common with the advocate. Each undertakes a duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with the witness of fact."³²⁰

8.186 Lord Phillips went on to say:

"There is here, I believe, a lesson to be learnt from the position of barristers. It was always believed that it was necessary that barristers should be immune from suit in order to ensure that they were not inhibited from performing their duty to the court. Yet removal of their immunity has not in my experience resulted in any diminution of the advocate's readiness to perform that duty. It would be quite wrong to perpetuate the immunity of expert witnesses out of mere conjecture that they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty."³²¹

8.187 This approach was also reflected in the Commission's Consultation Paper:³²²

"Experts are only likely to be dissuaded from acting as expert witnesses if there were a flood of claims made against such expert witnesses. As the definition of an expert requires them to be highly skilled and knowledgeable in their area of expertise, it is unlikely – one would hope – that there would be a large volume

³¹⁸ [2002] 1 AC 615.

³¹⁹ [1969] 1 AC 191.

³²⁰ [2011] UKSC 13, at para. 50.

³²¹ [2011] UKSC 13, at para. 57.

³²² (LRC CP 52 -2008) at para 6.129.

of cases where this skill and knowledge would be found to be wanting. It could be further considered that the only 'experts' likely to be dissuaded from acting are those who are charlatans or whose expertise is questionable and thus imposing liability may have the positive effect of improving the standard and calibre of expert evidence given across the board."

8.188 In recent decades there has been a general trend against allowing immunity from suit, which has been reinforced by case law under the European Convention on Human Rights (ECHR). In *Osman v United Kingdom*³²³ the European Court of Human Rights (ECtHR) held that the immunity from suit in UK law of police officers arising from their investigation of crimes, as found by the UK House of Lords in *Hill v Chief Constable of West Yorkshire*,³²⁴ was a violation of the right to a fair trial under Article 6 of the ECHR and was a disproportionate response which denied people access to justice. The ruling on Article 6 was unanimous, with Judges De Meyer, Lopes Rocha and Casadevall holding that:³²⁵

"There was of course also a violation of the applicants' right to a court, since the Osmans were denied any possibility to have their claims concerning the failures of the police properly examined by a tribunal... It was likewise irrelevant whether the immunity of the police was or was not absolute, since the very principle of such immunity is not acceptable under the rule of law. The refusal to consider the applicants' action was therefore an obvious denial of justice."

8.189 In *Jones v Kaney*, although counsel for the claimant made an argument under Article 6 of the ECHR, which had been incorporated into UK law by the *Human Rights Act 1998*, the UK Supreme Court did not refer to this. Rather, Lord Phillips stated:

"The basis of the present decision is that where a person has suffered a wrong that person should have a remedy unless there is a sufficiently strong public policy in maintaining an immunity."³²⁶

8.190 And Lord Kerr considered that:

"In the final analysis, the only possible reason for preservation of the rule is its supposed longevity. Even if that could be established, it is in no sense an adequate justification for maintaining an immunity whose effect is to deny deserving claimants of an otherwise due remedy."³²⁷

³²³ *Osman v United Kingdom* [1998] EHRR 101

³²⁴ [1987] UKHL 12, [1989] AC 53.

³²⁵ [1998] EHRR 101, at page 56.

³²⁶ [2011] UKSC 13, at [72].

³²⁷ [2011] UKSC 13, at [94].

(2) *The dissenting view in Jones v Kaney*

8.191 In *Jones v Kaney*, Lord Hope and Baroness Hale dissented, considering that the purpose of the immunity was to uphold the public interest that justice should be done. They considered that this was achieved by:

"ensur[ing] that witnesses are not deterred from coming forward to give evidence in court and from feeling completely free to speak the truth when they do so, without facing the risk of being harassed afterwards by actions in which allegations are made against them in an attempt to make them liable in damages"³²⁸

8.192 They also considered that the longstanding status of the immunity meant that any exception should be justified.³²⁹

(3) *Whether immunity of expert witnesses from suit remains part of Irish law*

8.193 The dissenting view of Lord Hope and Baroness Hale, that an expert witness should be free to give full and honest evidence without the fear of being sued, is also reflected in the comments of O'Flaherty J in *Looney v Bank of Ireland*,³³⁰ above.

8.194 Nonetheless, there has been no decision in Ireland that has definitively held that immunity from suit for expert witnesses continues. In this respect, it is notable that there have been a number of judicial comments in Ireland to the effect that the immunity from suit of advocates, which was abolished in the UK in the decision of the UK House of Lords in *Hall & Co v Simons* (and overruling its decision in *Rondel v Worsley*), no longer applies and describing it as a "former" immunity. As noted above, the decision in *Jones v Kaney* was considered by the majority of the UK Supreme Court to have been a logical extension of the decision in *Hall & Co v Simons*. Thus, whether there is an immunity from suit for advocates in Ireland is doubtful. Thus, in *Beatty v Rent Tribunal*³³¹ the Supreme Court indicated that, should the issue arise for decision, it would follow the decision in *Hall & Co v Simons*, Fennelly J commenting that:

"Immunity from suit, where it has been held to exist, normally proceeds from overriding considerations of public interest...
Formerly, barristers enjoyed complete immunity from suit by their clients in respect of their conduct of proceedings."
(emphasis added)

³²⁸ Lord Hope, [2011] UKSC 13, at [130].

³²⁹ Lord Hope, [2011] UKSC 13, at [149], [161].

³³⁰ Supreme Court, 9 May 1997, at 3.

³³¹ *Beatty v Rent Tribunal* [2006] ILRM 164 at 183, 184.

8.195 Returning to the issue in *O'Reilly v Lee*,³³² Fennelly J, giving the leading judgment of the Supreme Court, stated:

"I am also satisfied that the invocation by the President of the High Court of the principle enunciated by Lord Denning MR in *Rondel v Worsley*... [which was overruled in *Hall & Co v Simons*], was a correct indication of the principle that, as a matter of public policy, there should not be a re-litigation of matters of the type arising in the Circuit Court matrimonial proceedings, by means of an application of this nature, notwithstanding that, in certain other respects, *most notably on the question of immunity from suit of the legal profession for negligence in the course of court proceedings, the decision in [Rondel v Worsley] is no longer good law.*" (emphasis added)

8.196 Similarly, in *Behan v McGinley* the High Court (Irvine J) stated:³³³

"[N]otwithstanding the fact that there is no definitive approval of the decision of the House of Lords in *Arthur J S Hall & Co v Simons*³³⁴ in this jurisdiction, the court for the purposes of this application will assume that barristers such as those implicated in the within proceedings *do not enjoy a blanket immunity from suit and can be sued for negligence* in relation to their management of litigation on behalf of their clients, either in respect of their preparatory work or indeed in respect of their management of the trial itself." (emphasis added)

8.197 One commentator, writing in defence of the immunity for expert witnesses but citing *Behan v McGinley*, conceded that "In Ireland it would seem that *Hall v Simons* represents the law at least for civil cases."³³⁵

8.198 The ECHR context, referred to in *Jones v Kaney*, was also discussed in the Consultation Paper:³³⁶

"In the European Court of Human Rights decision *Osman v United Kingdom* the court expressed serious dissatisfaction with the imposition of blanket immunity. In the wake of the incorporation into Irish law of the European Convention on Human Rights, the possibility remains that the continued operation of immunity in favour of expert witnesses could be considered to breach the Right to a Fair Trial as guaranteed under Article 6 of the Convention."

8.199 One commentator has noted that part of the reasoning behind *Osman* was that:

³³² [2008] IESC 21 (emphasis added).

³³³ [2008] IEHC 18, at paragraph 74 of the judgment.

³³⁴ [2002] 1 AC 615.

³³⁵ Capper "Professional Liability in the Trial Process" (2013) 29(1) *Professional Negligence* 7, at 9.

³³⁶ (LRC CP 52 -2008) at paras 6.225-6.226.

"the no-duty rule under scrutiny applied across the board, without reference either to the gravity of the harm suffered by the claimant or to the gravity of the defendant's alleged negligence. In [the Court's view in *Osman*], it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the [no-duty] rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case."³³⁷

8.200 Although it has been said that the immunity from suit of expert witnesses is the product of a balancing of constitutional rights,³³⁸ it might also be argued that it is in breach of the constitutional right of access to the courts under Article 40.3.³³⁹

(4) Discussion and conclusions

8.201 In her dissenting judgment in *Jones v Kaney*, Baroness Hale was concerned about the effect the abolition of the immunity might have on the administration of justice generally. She raised the difficult issue of distinguishing in certain cases between evidence of fact and opinion evidence given by the same witness (for example, a treating doctor),³⁴⁰ as well as the question of the liability of joint witnesses³⁴¹ and court appointed witnesses.³⁴²

8.202 As the paramount public policy justification for the immunity, this is a strong argument. It would be unfortunate if competent expert witnesses were dissuaded from appearing on behalf of parties to an action due to fear that they might be pursued by a disappointed and disgruntled litigant. The majority in *Jones* and the Commission in the Consultation Paper were not convinced, arguing that it could be considered that only "experts" who are charlatans or whose expertise is questionable are likely to be dissuaded from giving evidence on this basis. Indeed, Baroness Hale said in *Jones* that:

"The major concern, however, is not about the effect of making the exception upon expert witnesses. If they are truly expert professionals, they should not allow any of this to affect their behaviour."

³³⁷ Nolan, 'Varying the standard of care in negligence' *C.L.J.* 2013, 72(3), 651, at 681.

³³⁸ *O'Keefe v Kilcullen* [2001] IEHC 17.

³³⁹ As established in *The State (Quinn) v Ryan* [1965] IR 70 and *Tuohy v Courtney* [1994] 3 IR 1.

³⁴⁰ [2011] UKSC 13, at [182]: "A doctor who has treated the patient after an accident or for an industrial disease may be called upon, not only to give evidence of what happened at the time, but also to give an opinion as to the future. Sometimes there may be a fee involved and sometimes not. Is the proposed exception to cover all or only some of her evidence?"

³⁴¹ [2011] UKSC 13, at [182]: "In many civil cases, there are commonly now jointly instructed experts on some issues. A jointly instructed expert owes contractual duties to each of the parties who instruct her."

³⁴² [2011] UKSC 13, at [184].

8.203 This is, however, a valid concern for the administration of justice. It should be remembered that for the majority of expert witnesses, giving expert evidence is not their main employment and the real fear of reputational damage done by even an invalid claim of negligence against them might be sufficient to tip the balance in favour of refusing to appear as an expert witness, especially considering the length of time it can take for such claims to be resolved. These reservations have been expressed to the Commission since the publication of the Consultation Paper.

8.204 Something that may bring comfort to expert witnesses is that any prospective litigant would be required to make out the elements of their case, be it a claim in tort or for breach of contract. The Commission considers below whether, due to the utility of the service expert witnesses provide, a standard of gross negligence or bad faith should apply to any claim against them and whether, in common with judicial review proceedings and appeals, a requirement for leave to bring proceedings should be put in place.

8.205 The decision in *Jones v Kaney* involved a departure from precedent by the UK Supreme Court on the question of expert witness immunity, and perhaps Lord Hope and Baroness Hale were correct in holding that the court should be cautious in making such a move. However, as Lord Kerr noted in a speech in 2014:³⁴³

"[E]very rule of the common law which departs from fundamental principle must be capable of justification as rational and necessary. Furthermore, the fact that it was found to be justified in the past does not establish its immunity in perpetuity. It must be open to challenge and must be able to withstand attack at any time, however longstanding it may be."

8.206 As discussed above, the ECtHR in *Osman* held that immunities are a restriction on the right of access to the courts under Article 6 of the ECHR and as such, must be justified. On the issue of police immunity, Lord Hope himself in *Darker v Chief Constable of Mid-Westland Police*³⁴⁴ (following the decision in *Osman*) considered that:

"The immunity is a derogation from a person's right of access to the court which requires to be justified."³⁴⁵

8.207 It is difficult to take into account all of the relevant considerations when deciding such a complex issue on the facts of a single case before the court. Lord Hope lamented the absence of any intervention from a professional body with knowledge and experience in the area, such as the Academy of

³⁴³ Lord Kerr, "Reflections on Jones v Kaney" speech at the Expert Witness Institute, June 2014 available at <https://www.supremecourt.uk/docs/speech-140618.pdf>.

³⁴⁴ *Darker v Chief Constable of Mid-Westland Police* [2000] UKHL 44.

³⁴⁵ [2000] UKHL 44, at [2].

Experts³⁴⁶ and both he and Baroness Hale considered that the issue was more suitable for action by parliament after consideration and consultation by a body such as the Law Commission of England and Wales.³⁴⁷

- 8.208** The objection that the issues have not been fully thought out and the consequences considered should be allayed by the fact that the Commission has consulted widely with interested parties, both prior to and since the decision in *Jones v Kaney*, and has considered the issues and the consequences fully.
- 8.209** As Baroness Hale pointed out, there are often instances where an expert witness will give evidence both of fact and of opinion and at first glance it may appear difficult to distinguish between the two, and thus to determine what evidence will breach a duty held by the expert witness and what will not. However, on consideration it can be seen that the task is not so difficult after all. This is part of the everyday business of the court: witnesses of fact are not permitted to give opinion evidence³⁴⁸ and expert witnesses were not previously permitted to give evidence on the ultimate issue.³⁴⁹
- 8.210** The courts have ample experience of dealing with the distinction between evidence of fact and opinion evidence, and were an action in tort or for breach of contract to be taken against an expert witness, it would be for a judge alone to decide the case, there being no jury in civil actions of that nature. The effect on joint expert witnesses or court-appointed assessors is a difficult issue to deal with when considering the question of expert witness immunity. A joint witness owes contractual duties to both parties, and a court appointed expert witness may be liable in tort to all parties in the case under the neighbour principle. Both of these experts may fear that a disappointed litigant on either side of a case might pursue a claim, simply depending on the outcome.
- 8.211** Regardless of which party has engaged an expert, his or her overriding duty is to the court.³⁵⁰ Provided this duty is discharged, it is unlikely that any cause of action would lie against an expert for breach of duty to a client (or other party to proceedings). Discussing the advocate's duty in *Hall & Co v Simons*, Lord Hoffmann held that "[i]t cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action."³⁵¹ And in *Jones v Kaney*, Lord Dyson held:

³⁴⁶ [2011] UKSC 13, at [129]

³⁴⁷ [2011] UKSC 13, at [173] and [190], respectively.

³⁴⁸ See discussion of the rule against opinion evidence in the introduction to expert evidence in Chapter 6.

³⁴⁹ See discussion of the ultimate issue rule in Chapter 7.

³⁵⁰ See Parts C and D of Chapter 8 above.

³⁵¹ [2002] 1 AC 615, at 692-693.

"Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client."³⁵²

8.212 The decision in *Jones v Kaney* only removed the immunity for 'friendly' expert witnesses from actions for negligence and breach of contract. The defence of privilege against claims of defamation was expressly maintained.³⁵³

8.213 It is unfortunately the case that the defence of privilege and the immunity of witnesses from suit in negligence or for breach of contract are often confused and conflated. It is necessary to separate these issues and to consider whether it is justified to impose liability on expert witnesses for defamation, breach of contract or negligence (or some, or none of these).

8.214 As discussed above, affording participants in the judicial process a privilege against suit in defamation for words spoken in court is a longstanding rule of law. Although the venerable status of the privilege is, as demonstrated above, not a sufficient reason to retain it where it constitutes a disproportionate barrier to access to the courts, the Commission considers that its retention is justified on other grounds. Now set out in Irish law in section 17 of the *Defamation Act 2009*, the defence of privilege is intended to ensure that the parties, witnesses (both of fact and expert), advocates and judges may speak the truth in court without risk of suit.

8.215 Lord Hope, dissenting in *Jones v Kaney* (and unfortunately using the term immunity), queried whether there are grounds for retaining the privilege while abolishing the immunity:

"It is more difficult to apply the idea that where there is a wrong there must be a remedy to include some wrongs within the scope of the immunity and exclude others that fall within the same context. If it is necessary to give the protection against some claims to enable witnesses to speak freely, why should it not be given to them all? Why should a claim for a breach of duty be treated differently from a claim for defamation? If the claim is well founded, a wrong was done in either case which ought to be remedied."³⁵⁴

8.216 While this appears to be a convincing argument where one is basing an abolition of immunity on the rule that where there is a wrong there ought to be a remedy, suits for defamation and suits for breach of duty are entirely different creatures.

³⁵² [2011] UKSC 13, at [99].

³⁵³ Lord Phillips, [2011] UKSC 13, at [62].

³⁵⁴ [2011] UKSC 13, at [160].

- 8.217** In a suit for defamation, once the plaintiff shows that the statement is defamatory, there is a presumption that it is false, and the onus is on the defendant to prove that it is true.³⁵⁵ The plaintiff does not even have to prove damage.³⁵⁶ By contrast, in a suit for negligence the plaintiff must plead and prove (on the balance of probabilities) his or her own case.
- 8.218** This requires the plaintiff to prove all of the elements of the tort: the existence of duty of care, a failure to conform to the required standard, actual loss or damage, and causation. Gordon considers that this is a significant distinction between the issues of privilege and immunity since in a negligence (or breach of contract) action, "[t]he pursuer, therefore, has much more work to do to establish a relevant case and, consequently, any witness called as a defender has much less to fear."³⁵⁷
- 8.219** Further, as noted above, the privilege may be lost where the statement is made maliciously or is an abuse of process. Thus, in the Supreme Court decision *Looney v Bank of Ireland O'Flaherty J* stated:
- "If someone for a malicious purpose, or in order to abuse what he might have thought was a situation of immunity that he enjoyed in court simply used that situation to make defamatory or malicious statements against others, in a manner that had nothing to do with the particular proceedings in which he was engaged, then it might well be that he would have no answer in an action for defamation or malicious falsehood, or whatever."³⁵⁸
- 8.220** In *Jeffery v Minister for Justice and Equality*,³⁵⁹ the High Court considered an attempt by the plaintiff to circumvent the defence of privilege in section 17 of the *Defamation Act 2009*. The plaintiff did not sue for defamation because, as noted by the High Court, "such an action would undoubtedly have failed."³⁶⁰
- 8.221** Rather, he sought damages for negligence, breach of duty and negligent misrepresentation on the basis that a member of An Garda Siochana had given evidence before the District Court, where the plaintiff was sentenced for road traffic offences, that the plaintiff had a number of previous convictions for serious offences. This was not true, the mistake was corrected by the plaintiff's solicitor at the time, and the statement was not taken into account in sentencing. Unfortunately, the list of convictions was reported in local media and the plaintiff claimed to have suffered embarrassment, anxiety and distress as a result.

³⁵⁵ *Campbell v Irish Press Ltd* (1955) 90 ILTR 105, and *Defamation Act 2009*, section 16(1), which provides: "It shall be a defence (to be known and in this Act referred to as the "defence of truth") to a defamation action for the defendant to prove that the statement in respect of which the action was brought is true in all material respects."

³⁵⁶ *Defamation Act 2009*, section 6(5).

³⁵⁷ Gordon, "Immunity Wearing Off: Jones v Kaney in the Supreme Court" (2012) 16 *Edin. L. Rev.* 238, at 241.

³⁵⁸ Supreme Court, 9 May 1997.

³⁵⁹ [2014] IEHC 99.

³⁶⁰ *Ibid* at para 4.

8.222 Referring to *Looney*,³⁶¹ *Kennedy v Hilliard*³⁶² and *MacCabe . Joynt*,³⁶³ the High Court refused the plaintiff's claim, holding that the following key principles could be gleaned from these cases:

"First, any perceived damage that appears to arise for an individual as a result of what transpires at or before court proceedings must be balanced against the obligation of the courts to administer justice in cases coming before them, an obligation which requires that witnesses be free to give evidence without fear of consequences;

second, in instances of "*flagrant abuse*", to borrow from the judgment of Barrington J in *Looney*, there may be some bounds to the privilege; however, this requires malicious and wanton behaviour of a type that was not present in the *Looney* case and also does not arise in the present case;

third, whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings is generally barred by the long standing rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given."³⁶⁴

8.223 Of course, it should be noted that while the claim in *Jeffery* was for negligence, breach of duty and negligent misrepresentation, this was clearly an attempt to avoid the section 17 defence. Additionally the evidence given by the member in *Jeffery* was evidence of fact (although in error).

8.224 Were the immunity for expert witnesses removed, two questions would arise: 1. Who can sue an expert witness? 2. And on what basis? Lord Hope addressed these questions in *Jones v Kaney*, and raised a concern over the multiplicity of actions that might arise:

"The argument in favour of removing the immunity concentrated on the duties of care that arise from the contractual relationship and, in tort, from the relationship of reliance on the services of the professional. There are however other circumstances that need to be considered that might give rise to liability from which, as matters stand, experts enjoy immunity."³⁶⁵

8.225 It is instructive first to address the issue of the basis on which an expert witness might be sued, as the answer to this provides the answer to the question of who might sue an expert witness.

³⁶¹ Supreme Court, 9 May 1997
³⁶² (1859) 10 Ir. CLR 195.
³⁶³ [1901] 2 I.R. 115.
³⁶⁴ [2014] IEHC 99, paragraph 12.
³⁶⁵ [2011] UKSC 13, at [171].

- 8.226** The first and most obvious basis on which an expert witness might be sued is for breach of contract. The expert witness will have been retained by a party to litigation to prepare a report and give evidence in court in return for reward. This gives rise to an implied contractual duty to exercise reasonable care and skill in completing those tasks. In the absence of the immunity, where he or she failed to do so, he or she would be in breach of contract and would be liable to the party in damages. The purpose of an award of damages for breach of contract is to place the injured party, insofar as possible, in the same position he or she would have been in had the contract been performed.
- 8.227** In *Jones v Kaney*, in agreeing to the joint statement which alleged that Jones had exaggerated his claim and was not in fact suffering from PTSD, Kaney failed to exercise reasonable care and skill in preparing her evidence for the case and breached her contract. The consequences of the breach were that Jones had to settle the case for much less than expected. Had Kaney performed her duties under the contract, Jones would have received a larger settlement: Kaney was obliged to make up the difference and to place Jones in the position he would have been in had she properly performed under the contract.
- 8.228** Under the doctrine of privity of contract, a contract is enforceable only by (or against) a party to the contract.³⁶⁶ This means that only the person who retained the expert witness may sue for breach of contract.
- 8.229** The immunity is generally conceived of as an immunity against suit in negligence, and negligence was the basis of the claim in *Jones v Kaney*. It is under this heading that the question of who, other than the party retaining the expert, might sue if the immunity were removed. This arises due to the elements of the tort of negligence, and specifically due to Lord Atkin's classic formulation of the "neighbour principle" in *Donoghue v Stevenson*.³⁶⁷
- "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."
- 8.230** To whom then, does the expert witness owe a duty of care? Who is his or her neighbour in the context of litigation? And for what kind of damage is he or she liable? Drawing on the approach of Keane CJ in *Glencar Explorations plc*

³⁶⁶ See Clark, *Contract Law in Ireland* (8th ed. Thomson Round Hall, 2015).
³⁶⁷ *Donoghue v Stevenson* [1932] AC 562, at 580.

v Mayo County Council (No.2),³⁶⁸ Fennelly J in *Beatty v Rent Tribunal*³⁶⁹ stated that:

"The boundaries of the law of negligence will continue to be debated whenever the courts are asked to award damages in novel categories. The underlying principles are, nonetheless well established. They are:

- That there is a relationship of such proximity between the parties such as to call for the exercise of care by one party towards the other;
- That it is reasonably foreseeable that breach of the duty of care will occasion loss to the party to whom the duty is owed;
- That it is just and reasonable that the duty should be imposed."

8.231 On this basis, it appears that an expert witness, whether retained by one party or court appointed, would owe a duty of care to all parties to litigation.

8.232 As to the standard of care, the majority in *Jones v Kaney* did not address the issue of the standard of care. However, Baroness Hale considered that:

"[A]s professionals, they will only fail in their duty if they fail the Bolam test (*Bolam v Friern Hospital Management Committee*³⁷⁰); and as witnesses, they will be excused much in the hurly-burly of the trial."³⁷¹

8.233 It would be possible, as discussed below, in removing the immunity, to set the standard of care which expert witnesses must meet and there is an argument to be made, considering the social utility of the conduct of expert witnesses in testifying in court, for requiring gross negligence in order to establish liability in tort.

8.234 To succeed in a negligence action the plaintiff must have suffered loss or damage. Thus, if an expert witness were negligent in preparing his or her report or in giving evidence but the party to whom he or she owed a duty of care still won their case then there would have been no damage and there would be no cause of action.

8.235 Finally, to succeed in a negligence action, a plaintiff must prove that action of the defendant was the factual and legal cause of the damage. As McMahon and Binchy comment: "if there is no factual causal link between the

³⁶⁸ *Glencar Explorations plc v Mayo County Council (No. 2)* [2002] 1 IR 84.

³⁶⁹ [2006] 1 ILRM 164, at 173.

³⁷⁰ [1957] 1 WLR 582. *Bolam* is an influential case in medical negligence and sets down the test for deciding whether a medical professional is guilty of negligence. McNair J stated that a medical professional "is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

³⁷¹ [2011] UKSC 13, at [180]. *Bolam* finds its equivalent in Ireland in *Dunne (an Infant) v National Maternity Hospital* [1989] IR 91.

defendant's conduct and the plaintiff's injury, then the defendant cannot be liable."³⁷²

8.236 On the facts of *Jones v Kaney*, it can be seen that Kaney's signing of the joint witness statement agreeing that Jones was exaggerating his injuries and was not suffering from PTSD was the cause of Jones' lower settlement, because liability had been admitted and quantum was the only remaining issue.

8.237 It is easy to imagine other scenarios where causation would not be quite so clear-cut. It might be that a party's expert witness is negligent in preparing his or her evidence, but that the preponderance of the evidence in the case is against the party in any event and therefore the party loses the claim. In this case, the loss has not been caused by the negligence of the expert witness.

8.238 Baroness Hale raised the possibility that expert witnesses might be open to liability for other causes of action, such as the duty of confidentiality which was the subject of the proceedings against the expert in *Watson v M'Ewan*.³⁷³ She added:

"Is the immunity to be removed in cases of that kind too, where the expert agrees to give evidence for the other side or feels himself bound when giving evidence for his own side to reveal information which the court needs if it is to be told the truth but which his client maintains was confidential?"³⁷⁴

8.239 The question of breach of confidence is most likely to arise with regard to medical witnesses, and an answer is provided by the overriding duty of the expert witness to the court. As noted by Lord Hope in *Jones v Kaney*:

"Nevertheless when it comes to the content of that evidence his overriding duty is to the court, not to the party for whom he appears. His duty is to give his own unbiased opinion on matters within his expertise. It is on that basis that he must be assumed to have agreed to act for his client. It would be contrary to the public interest for him to undertake to confine himself to making points that were in the client's interest only and to refrain from saying anything to the court to which his client might take objection."³⁷⁵

(5) *What would the consequences of abolition of the immunity be?*

8.240 Removal of the immunity from suit would leave expert witnesses liable to suit in contract and tort, as discussed above. It might also leave expert witnesses open to disciplinary proceedings by their professional bodies. That expert

³⁷² Mc Mahon and Binchy, *Law of Torts* (4th ed. 2013, Bloomsbury Professional) at [2.07].

³⁷³ [1905] AC 480.

³⁷⁴ [2011] UKSC 13, at [171].

³⁷⁵ [2011] UKSC 13, at [156].

witnesses might be immune from such proceedings can be derived from the High Court decision of Laffoy J in *MP v AP (Practice: in camera)*³⁷⁶ where she held that:

"While no authority has been cited which supports the proposition that an expert witness is immune from disciplinary proceedings or investigation by a voluntary professional organisation to which he is affiliated in respect of evidence he has given or statements he has made with a view to their contents being adduced in evidence, having regard to the public policy considerations which underlie the immunity from civil proceedings - that witnesses should give their evidence fearlessly and that a multiplicity of actions in which the value or truth of their evidence would be tried over again should be avoided - in my view, such a witness or potential witness must be immune from such disciplinary proceedings or investigation."

8.241 The removal of the broader immunity, on the basis that the public policy considerations may no longer support it, may cast doubt on the immunity from professional disciplinary proceedings.

8.242 Concern has been expressed that abolition of the immunity would lead to a proliferation of litigation by disgruntled losing parties, and discourage competent expert witnesses from providing their services. The majority of the UK Supreme Court was not convinced by this argument:

"The danger of undesirable multiplicity of proceedings has been belied by the practical experience of the removal of immunity for barristers. A conscientious expert will not be deterred by the danger of civil action by a disappointed client, any more than the same expert will be deterred from providing services to any other client. It is no more (or less) credible that an expert will be deterred from giving evidence unfavourable to the client's interest by the threat of legal proceedings than the expert will be influenced by the hope of instructions in future cases. The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report. It is almost certain to be one of those reports, rather than evidence in the witness box, which will be the focus of any attack, since it is very hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case."³⁷⁷

³⁷⁶ *MP v AP (Practice: in camera)* [1996] 1 IR 144, at 155-156.
³⁷⁷ [2011] UKSC 13, at [85], per Lord Collins.

- 8.243** Speaking about the aftermath of *Jones v Kaney*, Dingemans J, at a lecture at the Academy of Experts in June 2014, noted that there has been no shortage of experts willing to provide evidence and contended that the law reports demonstrate that the floodgates have not been opened with regard to claims against experts.³⁷⁸
- 8.244** Another commentator has also suggested that the fallout has not been as feared:³⁷⁹
- "[S]ince the decision there has been little evidence of a disastrous fallout from the decision. Insurance premiums have undoubtedly quietly risen, but for those who make their business as professionals and professional witnesses this can be folded into their existing and, in many cases, compulsory insurance."
- 8.245** It should of course be noted that while the decision in *Jones v Kaney* was handed down in 2011 and at the time of writing a certain number of cases against expert witnesses might have been expected, we are at quite a short remove from the abolition of the immunity and the full effect of the decision remains to be seen.
- 8.246** In light of the above, the Commission recommends that the immunity of expert witnesses from civil suit should be abolished. The reason for this is, firstly, that such an immunity may not survive a challenge based on the constitutional right to a fair trial and, after the decision in *Osman v United Kingdom*, the right to a fair trial under Article 6 of the European Convention on Human Rights. The second rationale for abolishing is that where there is a wrong there ought to be a remedy.
- 8.247** As to whether this could affect the immunity of all witnesses, expert witnesses can be distinguished from witnesses of fact on the basis that experts can pick and choose their cases and are usually paid to prepare and give evidence.
- 8.248** With regard to the "friendly" expert witness, the duty arises by virtue of the contract between the party and the expert, under which the expert is "instructed and paid by [the] party... for his expertise and permitted on that account to give opinion evidence in the dispute"³⁸⁰ and which, in the absence of the immunity, should be subject to an implied duty to provide those services with reasonable care and skill.³⁸¹ With regard to the "adverse" or court-appointed expert, the duty arises by virtue of the neighbour principle in tort.
- 8.249** The Commission also considers that where the overriding duty of an expert witness to the court is enshrined in statute, an expert witness in compliance

³⁷⁸ Available at <https://www.academyofexperts.org/evening-meetings/liabilities-of-experts>.
³⁷⁹ McGrath, "The end of Expert Witness Immunity" (2013) 21 *European Review of Private Law* 1065, at 1079.
³⁸⁰ [2011] UKSC 13, at [64].
³⁸¹ *Sale of Goods and Supply of Services Act 1980*, s. 39.

with his or her duty will be in no danger regarding potential suit in negligence. Lord Phillips, in *Jones v Kaney* stated:

"An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty. It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty."³⁸²

8.250 Given the importance of expert witness testimony and the desirability of ensuring that expert witnesses continue to give evidence without undue fear of harassing suits by disgruntled litigants, as well as the exigencies of litigation, the Commission considers that a higher standard of care should be set for negligence actions against expert witnesses.

8.251 One commentator argues that varying the standard of care in this way is a suitable way of attaining "an appropriate balance between liability and non-liability" and uses the example the Commission's 2009 *Report on the Civil Liability of Good Samaritans and Volunteers*.³⁸³ The Report referenced McMahon and Binchy on factors to be considered in the assessment of the standard of care. Of particular note is the following:

The social utility of the defendant's conduct: where the defendant's conduct has a high social utility it will be regarded with more indulgence than where it has none.³⁸⁴

8.252 The Commission recommended that, taking into account both the risks related to and the social utility of the conduct of the Good Samaritan, the standard of care for liability should be set at gross negligence. The Commission's recommendations were implemented in sections 51A to 51G (Part IVA) of the *Civil Liability Act 1961*, inserted by section 3 of the *Civil Law (Miscellaneous Provisions) Act 2011*. Section 51D of the 1961 Act reads in part:

"(1) A good samaritan shall not be personally liable in negligence for any act done in an emergency...

(3) The protection from personal liability conferred on a good samaritan by subsection (1) shall not apply to—

(a) any act done by the good samaritan in bad faith or with gross negligence..."

³⁸² [2011] UKSC 13, at [56].

³⁸³ LRC 93 2009.

³⁸⁴ LRC 93 2009, at para. [3.14], citing McMahon and Binchy, *Law of Torts* (3rd ed. Butterworths 2000) at 154-167.

- 8.253** In a similar vein, the Commission recommends that in order for an action to lie against an expert witness, the expert must have acted with gross negligence in preparing their advices or report or in giving evidence.
- 8.254** **The Commission recommends that, to the extent (if any) that the common law immunity of an expert witness from civil liability has survived, the draft Evidence Bill should provide that it is abolished and that it is replaced with civil liability of an expert witness limited to circumstances in which it is established that the expert has acted with gross negligence in giving his or her evidence or in preparing an expert report in anticipation of civil or criminal proceedings, that is, falling far short of the standard of care expected of such an expert.**

(6) *Indemnity insurance*

- 8.255** An important issue which must be considered in light of this recommendation, should it be implemented, is whether expert witnesses should be required to carry adequate indemnity insurance to cover the costs of any award of damages against them in a subsequent action. While the UK has not legislated for any such requirement, the UK Register of Expert Witnesses takes the view that, in light of the decision in *Jones v Kaney*³⁸⁵, “adequate Professional Indemnity Insurance coverage is now more or less essential for expert witnesses.”
- 8.256** The argument in favour of such a statutory requirement is that in the absence of an indemnity requirement, those who have suffered at the hands of a grossly negligent expert witness will be unable in practice to recoup the losses they have sustained. The argument against making such indemnity insurance a legal requirement is that it is liable to work to exclude *ad hoc* or part-time experts and increasingly make expert evidence the preserve of those who operate an expert witness practice professionally. It would almost certainly prove too expensive for an expert to obtain once-off cover to act in a particular case.
- 8.257** The approach in the UK has been to allow the industry to self-regulate as far as indemnity insurance is concerned. The Expert Witness Institute requires professional indemnity insurance as a condition of membership³⁸⁶, while the Academy of Experts³⁸⁷ and the Register of Expert Witnesses, as discussed above, offer a professional indemnity service as part of their membership and strongly recommend its uptake.

³⁸⁵ [2011] UKSC 13.

³⁸⁶ Expert Witness Institute, 'Membership Categories and Requirements' available at http://www.ewi.org.uk/membership_directory_why_join_ewi/membership_categories.

³⁸⁷ The Academy of Experts, 'Benefits of Membership' available at <https://www.academyofexperts.org/membership-grades-experts/benefits>.

- 8.258** The Commission considers that internal professional regulation is the appropriate means by which this issue should be regulated. The introduction of a statutory requirement would all but exclude *ad hoc* or part-time experts to the detriment of fact-finding and dispute resolution in the judicial process. Where an expert does not have indemnity insurance, the Commission takes the view that the instructing solicitor should be under an obligation to make both his or her client and the expert witness fully aware of the possible consequences of the failure to obtain such insurance in light of the discontinuation of the immunity. The Commission is further of the view that a solicitor should be required to sign a certificate to the effect that he or she has complied with this duty. The *Family Law (Divorce) Act 1996* imposes a similar obligation on solicitors to include with the originating documents to proceedings a signed certificate to the effect that they have discussed various alternatives to divorce proceedings with their client.³⁸⁸
- 8.259** **The Commission recommends that the draft Evidence Bill provide that a solicitor engaging an expert witness or potential expert witness who is not covered by a duly licensed insurance provider is under an obligation to make his or her client and the expert witness or potential expert witness fully aware of the possible consequences of the failure to obtain such insurance in light of the removal of the immunity of expert witnesses. The Commission further recommends that a solicitor be required to sign a certificate to the effect that he or she has complied with this duty.**

H Procedural Aspects of Expert Evidence

- 8.260** While this report has primarily had regard to substantive issues affecting expert evidence such as how an expert may be defined and the duties they are under, procedural issues are also an important question to consider. These issues include the selection and appointment of experts, delay in the receipt and exchange of reports, unnecessary repetition of evidence by experts for each party, and the expense of having experts on standby and attending court.
- 8.261** In this Part, the Commission considers how these issues might be dealt with by way of pre-action protocols and case management systems.

³⁸⁸

Section 6 of the *Family Law (Divorce) Act 1996*.

(1) *England and Wales - The Woolf and Jackson Reports and the Civil Procedure Rules*

8.262 The Civil Procedure Rules (CPR) came into effect in England and Wales in April 1999 following publication of the Woolf Reports.³⁸⁹ Lord Woolf undertook extensive consultation and consideration of the defects in civil procedure as it then stood and recommended fundamental changes to the administration of civil litigation. The CPR have in many senses revolutionised litigation in England and Wales and any understanding of procedural reform must begin with a study of its successes and shortcomings.

8.263 As part of the Woolf Reforms, pre-action protocols were introduced by way of practice direction. These specify the course of action that parties should take in advance of intended litigation. There is no general pre-action protocol covering all types of action. Instead there are a number of area-specific pre-action protocols (such as the clinical disputes protocol and the professional negligence protocol).³⁹⁰ The object is to solve the dispute as early as possible, perhaps without the need to proceed to litigation at all.³⁹¹ Compliance with the pre-trial protocols is not mandatory but the court can take compliance or non-compliance into account in exercising case management powers, imposing sanctions or making orders for costs.³⁹² Failure to comply will not result in the striking out of an action or defence.³⁹³ The sanctions are procedural and financial and can only arise if proceedings actually issue.³⁹⁴

8.264 One of the major reforms to have affected the leading of expert evidence is the innovation of the Single Joint Expert (SJE). The SJE acts on behalf of both parties and is examined by each in turn. The parties may agree an SJE or, more commonly, the SJE is imposed by the court against the wishes of one or both of the parties. The rationale for the innovation is (a) that such an expert is far more likely to be impartial than a party's expert; (b) appointing an SJE is likely to save time and money; (c) appointing an SJE is likely to increase the

³⁸⁹ Lord Woolf, *Access to Justice: Final Report* HMSO (1996).

³⁹⁰ There are now thirteen pre-action protocols covering the following areas: (1) construction and engineering disputes; (2) defamation; (3) personal injury claims; (4) clinical disputes; (5) professional negligence; (6) judicial review; (7) disease and illness claims; (8) housing disrepair cases; (9) possession claims based on rent arrears; (10) possession claims based on mortgage or home purchase plan arrears in respect of residential property; (11) low value personal injury claims in road traffic accidents; (12) dilapidations; and (13) low value personal injury (employers' and public liability) claims. The Ministry of Justice maintain an up-to-date list of the current protocols here: <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

³⁹¹ Loughlin and Gerlis, *Civil Procedure* (2nd ed, 2004, Cavendish Publishing) at 77.

³⁹² *Ibid* at 78.

³⁹³ The sanctions for non-compliance are set out in PDPC 4.6.

³⁹⁴ *Ibid* at 96-99.

chances of settlement and (d) is likely to level the playing field between parties of unequal resources.³⁹⁵

8.265 In deciding when to appoint an SJE, the CPR grants the judge a wide discretion while inviting them to consider a wide range of factors. Chief among these factors is the question as to whether it is proportionate for each side to have separate experts with regard to (a) the amount in dispute; (b) the importance to the parties; and (c) the complexity of the issue. Lord Woolf, writing in his judicial capacity, has suggested that: “The starting point is: unless there is reason for not having a single expert, there should be only a single expert.”³⁹⁶ This comment, while *obiter*, demonstrates the strong preference of English judges for SJE’s where the subject of expert evidence is an established area of knowledge.³⁹⁷ Hodgkinson and James describe SJE’s as a “radical” concept in comparison with the strictly adversarial model which prevailed before.³⁹⁸

8.266 The reforms implemented on foot of the Woolf Reports have for the most part been described as a success.³⁹⁹ However in handing management of cases to the courts rather than leaving it to the lawyers, there were concerns that the success was qualified, particularly in relation to costs:

“The success of the Woolf reforms in reducing the cost of litigation, which was a major objective of the reform process, has been mixed. Complaints have been made that each potential saving in the reform is offset by other changes that require more work, or bring forward work to an early stage, for example under the pre-action protocols, so that “front-loading” costs is common in a number of cases.”⁴⁰⁰

8.267 However, commentators note that, “[t]o a very large degree the failure of the Woolf reforms lay at the door of CFAs [Conditional Fee Agreements]”,⁴⁰¹ which do not exist in Ireland. Regardless, the perceived failure to reduce costs led to further consideration of the costs of civil litigation by Sir Rupert Jackson.⁴⁰²

8.268 The Jackson Report set out 109 recommendations, the majority of which were implemented by the Legal Aid, Sentencing and Punishment of Offenders

³⁹⁵ Hodgkinson and James set out these benefits in *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell, 2015) at p. 152. See also “*Access to Justice*” *Final Report*, Lord Woolf, Ch. 13, para. 21, p. 142, HMSO (1996).

³⁹⁶ *P (A Child) v Mid-Kent Area Healthcare NHS Trust* [2002] 1 W.L.R. 210 CA at para [28].

³⁹⁷ It should be noted that Lord Woolf stated in another case that if a party is dissatisfied with the evidence of the SJE, they can seek to introduce another expert report in evidence subsequently. *Daniels v Walker* [2000] W.L.R. 1382, 1387.

³⁹⁸ *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell, 2015) at p. 152.

³⁹⁹ <http://www.allenoverly.com/publications/en-gb/Pages/The-Impact-of-the-Woolf-Reforms-in-the-U-K.aspx>.

⁴⁰⁰ *ibid.*

⁴⁰¹ Sorabji, *Prospects for Proportionality* (2013) 32(2) C.J.Q. 213.

⁴⁰² Review of Civil Litigation Costs: Final Report. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

Act 2012. The relevant changes to the CPR for the purposes of this Report involve the provision for concurrent expert witness evidence ("hot-tubbing").⁴⁰³ "Hot-tubbing"⁴⁰⁴ is a system where the experts form a panel and give their evidence together in a discussion chaired by the judge.⁴⁰⁵ Generally, panellists can be questioned by the lawyers, the judge and other panellists. The format and questioning vary from model to model.⁴⁰⁶ This procedural innovation originated in the Australian Competition Tribunal in the early 2000s and has slowly garnered support in various common law jurisdictions. It was introduced to English civil trials by amendment of PD 35⁴⁰⁷ as part of the Jackson reforms⁴⁰⁸ following a pilot scheme in the Manchester Technology and Construction Court.⁴⁰⁹

8.269 The hot-tubbing process provided for by Rule 35.12 of the CPR allows the judge to direct a discussion between the experts in court and ask them to jointly identify and discuss the expert issues in dispute and where possible come to an agreement on these issues. Following this the judge may direct the experts to draw up a joint report for the court setting out the areas on which they agree and the areas on which they disagree and the reasons for such disagreement. This joint statement has been described by one English judge as "often one of the most valuable documents in the case."⁴¹⁰

8.270 The Civil Justice Council has conducted a review of the practice of "hot-tubbing" in English courts, 3 years after its introduction.⁴¹¹ The report surveyed members of the judiciary, legal practitioners and expert witnesses to assess the success of the reforms. Among the judiciary, 83% of respondents said the process improved the quality of expert evidence and 100% of respondents said it assisted the court in determining disputed issues of expert evidence. Similarly, 84% of practitioners said it improved the quality

⁴⁰³ CPR PD 35, paras 11.1-11.4.

⁴⁰⁴ "They do not literally sit in a hot tub. Constraints of propriety and court design dictate a less exciting solution." See Heerey, "Expert Evidence: The Australian Experience" (2002) 71(3) *BR* 166 and the Consultation Paper at paragraph 5.302.

⁴⁰⁵ See Rothwell "Would judges jump in the hot-tub?" (21 November 2011) *The Law Society Gazette* available at <http://www.lawgazette.co.uk/blogs/news-blogs/would-judges-jump-hot-tub>.

⁴⁰⁶ "The process is flexible and variations can be made depending on the nature of the case." Genn, Manchester Concurrent Evidence Pilot Interim Report (UCL Judicial Institute, January 2012) at 1 available at <http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fconcurrent-evidence-interim-report.pdf>.

⁴⁰⁷ PD 35.11. The CPR calls it "[c]oncurrent expert evidence". Paragraph 11 was inserted into PD 35 by the 60th Update to the CPR. The 60th Update is available here: <http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-60-update-pd-making-document.pdf>.

⁴⁰⁸ In England, in the 2010 Review of Civil Litigation Costs: Final Report, Jackson LJ recommended that a pilot scheme be established to examine whether the process of using concurrent evidence would confer any benefits. The pilot scheme was successful and Jackson LJ's recommendation has been introduced throughout England and Wales from 1 April 2013.

⁴⁰⁹ Genn Manchester Concurrent Evidence Pilot Interim Report (UCL Judicial Institute, January 2012) at 2ff [7]ff available at <http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fconcurrent-evidence-interim-report.pdf>.

⁴¹⁰ HHJ David Grant quoted in Civil Justice Council, Concurrent Expert Evidence and 'Hot-Tubbing' in English Litigation Since the Jackson Reforms: A Legal and Empirical Study (July 2016) at p. 8.

⁴¹¹ Civil Justice Council, Concurrent Expert Evidence and 'Hot-Tubbing' in English Litigation Since the Jackson Reforms: A Legal and Empirical Study (July 2016).

of expert evidence and 94% said it assisted the court in determining disputed issues of expert evidence. Expert witnesses were somewhat more lukewarm in their support, responding positively to the questions by a margin of 60% and 71% respectively.⁴¹² This, on the whole, represents an overwhelming vote of confidence in the effectiveness of “hot-tubbing” in the resolution of disputes.

- 8.271** The report does not however suggest that the procedure is without difficulties. Consultation suggested that barristers are often very reluctant to agree to hot-tubbing (though the judge may impose it anyhow) as they are loath to surrender control of the evidence and the manner in which it is presented.⁴¹³ Such concerns are not unfounded. The dialogue in the hot-tub is primarily judge-led with some respondents suggesting counsel is rendered a “mere passenger”, though the extent of their role varies significantly case to case.⁴¹⁴ The report acknowledges that “there is a potential danger to the administration of justice for either party, if counsel is not given sufficient opportunity to test the opposing expert’s view.”⁴¹⁵ The report therefore recommends that the Practice Direction be amended to more fully set out the process of questioning in the hot-tub including an opportunity for counsel to properly test the expert’s view.⁴¹⁶
- 8.272** Relatedly, the report notes that the hands-on role of the judge in the procedure demands that he or she devote considerable time to preparation and familiarising himself or herself with the issues.⁴¹⁷ A number of respondents noted that the better prepared the judge, the better the process worked.⁴¹⁸ The report therefore recommends that a proposed new guidance note on the reception of concurrent expert evidence should advise judges to only direct that expert evidence be heard in the hot-tub where they consider they have time to do the adequate preparation.⁴¹⁹
- 8.273** The report also recommends that the Practice Direction be amended to reflect the varied forms concurrent expert evidence can take. The suggested re-draft makes provision for sequential expert evidence (where experts are heard “back to back”, rather than in the hot-tub *per se*) as well as for a “teach-in” conference whereby the judge may invite the parties’ experts or an additional expert to meet with the judge in private session to explain the issues.⁴²⁰

⁴¹² *Ibid* at 58-60.

⁴¹³ Civil Justice Council, *Concurrent Expert Evidence and ‘Hot-Tubbing’ in English Litigation Since the Jackson Reforms: A Legal and Empirical Study* (July 2016) at p. 18 – 21.

⁴¹⁴ *Ibid*.

⁴¹⁵ *Ibid* at 21.

⁴¹⁶ *Ibid* at 27.

⁴¹⁷ *Ibid* at 40.

⁴¹⁸ *Ibid*.

⁴¹⁹ *Ibid* at 38.

⁴²⁰ *Ibid* at 27-29.

(2) *Procedural reform in Ireland*

8.274 Historically, few formal arrangements have existed in Ireland for communication between experts before or during the trial (meetings, negotiations, etc). Such arrangements can avoid or reduce litigation and save time and money by providing experts with a chance to identify non-contentious issues and shared ground. In civil cases, expert witnesses may be unwilling to concede ground at trial and this “dispute between the experts generates a trial within a trial at the expense of the litigants”.⁴²¹ Pre-action protocols and case management procedures allow less combative communication, and consequently a narrower range of issues might remain for trial.

8.275 In the Consultation Paper the Commission discussed the need for reform of procedures governing the introduction of expert evidence⁴²² and provisionally recommended that the court should be empowered to encourage pre-trial meetings,⁴²³ and that both parties be required to answer questions about the contents of their expert reports prior to the trial when these are put by the other party.⁴²⁴ The Commission invited submissions on the extension of a requirement to exchange expert reports, currently confined to personal injuries actions, to all categories of civil claims.⁴²⁵

8.276 Since the publication of the Consultation Paper, the Superior Courts Rules Committee has drawn up new provisions addressing pre-trial case management in the Superior Courts. Two statutory instruments, the *Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016* and the *Rules of the Superior Courts (Conduct of Trials) 2016* make provision for pre-trial procedures and case-management generally as well as some very important reforms to expert evidence in particular.

8.277 The *Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016* insert a new Order 63C into the Rules of the Superior Courts 1986 and make extensive provision for the use of pre-trial preparation and case management. The rules empower

⁴²¹ Williams “Accreditation and Accountability of Experts” Paper presented at the Medico-Legal Conference (Gold Coast 5 August 2000).

⁴²² LRC CP 52-2008, Chapter 5, part B.

⁴²³ *Ibid*, paragraph 5.116. See also *Anglo Group Plc v Winther Brown & Co Ltd and BML (Office Computers) Ltd* [2000] All ER (D) 294. Toulmin J held that without-prejudice meetings between experts, joint statements detailing areas of agreement and disagreement and early neutral evaluation were elements of good case management.

⁴²⁴ *Ibid*, paragraph 5.120.

⁴²⁵ *Ibid*, paragraph 5.175.

the list judge to make a range of pre-trial orders designed to render proceedings more expeditious and cost-effective, including orders requiring delivery of interrogatories, defining issues between the parties and requiring the exchange or filing of documentation. The Rules further provide that in the case of particularly complex proceedings a judge may order a case management conference, the purpose of which, among other things, is to ensure that “all written statements and expert reports” have been or are served.⁴²⁶

- 8.278** At the conclusion of the case management conference, the judge may fix a timetable for the completion of preparation of the case for trial.⁴²⁷ The rules provide that case management proceedings shall only be concluded on issuance of a “certificate of readiness” for trial or other final order of the judge.⁴²⁸
- 8.279** Rule 17 provides that unless the list judge orders otherwise, the expert report of a witness the party intends to produce must be served on the other party not later than 30 days before trial. Similarly the written statements of witnesses of fact must be served by this deadline. This is an important reform. The last minute exchange of reports, and the subsequent lost opportunity to properly scrutinise the expert evidence, is an issue which has been of great concern among professional expert witnesses with whom the Commission has consulted. The Supreme Court has also criticised the existing procedure in a case in which reports were exchanged just two days before trial.⁴²⁹ Clarke J stated that it is “highly unsatisfactory for a trial judge to be invited to resolve questions arising from different expert testimony where the experts themselves have had little or no advance knowledge of the points on which they might differ.”⁴³⁰
- 8.280** These 2016 Rules formally came into force on 1 October 2016. However, on 22nd September the President of the High Court issued a Practice Direction⁴³¹ stating that, in the absence of provision for further resources necessary to give effect to the reforms in the Rules, the High Court was not in a position to appoint the List Judge or Registrar envisaged in the Rules. The effect of this is, therefore, that at the time of writing (December 2016), the Rules are not currently in operation. The Commission notes that dedicated resources are required to give practical effect to the significant and welcome reforms in the 2016 Rules. The Commission hopes that, as has been the case with the dedicated resources applied since 2004 to the High Court Commercial List

⁴²⁶ *Rules of the Superior Courts 1986* (S.I. No. 15 of 1986) Order 63C, Rule 6(8) as inserted by *Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016* (S.I. No. 255 of 2016) sch. 1.

⁴²⁷ *Ibid* at Rule 7(a).

⁴²⁸ *Ibid* at Rule 8.

⁴²⁹ *Wright v AIB Finance & Leasing Ltd* [2013] IESC 55.

⁴³⁰ *Ibid* at para 6.5.

⁴³¹ See notice on Courts Service website available at <http://courts.ie/Courts.ie/Library3.nsf/pagecurrent/3E33803598D813AF8025803700520F83?opendocument>.

Rules⁴³² to ensure their success in practice, suitable resources are made available to give practical effect to the 2016 Rules.

8.281 The *Rules of the Superior Courts (Conduct of Trials) 2016* contain the most significant reforms with respect to expert evidence. The rules direct that parties must indicate in the statement of claim their intention to produce an expert witness, state succinctly the expert's field of expertise and the matters on which the evidence is to be offered.⁴³³ This places a significant obligation on the party intending to adduce expert evidence to establish at an early stage the precise issue on which expert evidence will be required and identify the expert witness who will provide it. The judge may also fix a date by which a report setting out the key elements of the expert evidence to be adduced must be delivered to the opposing party. A procedure is also set down through which the parties may put "concise written questions" on the content of the report to the other party's expert.⁴³⁴ The expert is not required to answer any such question if it is "disproportionate, unnecessary for the determination of any matter at issue in the proceedings or not within the expert's field of expertise."⁴³⁵

8.282 Significantly, rule 58 seeks to reduce the volume of expert evidence being presented in two important ways. First, rule 58(1) directs that "expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings." This is designed to prevent the use of needlessly reduplicative expert evidence, a matter which the High Court has ruled to be necessary to protect the Constitution's guarantee of a fair trial. In *Condron v ACC Bank plc*, Charleton J stated that:

"For the benefit of the constitutional right of access, to the courts may exclude repetition and take such steps as are necessary to render hearings a fair contest. Such control serves to establish a balance between those who may be rich enough to engage several experts and those who have limited funds. Hearings are very expensive. Long hearings made repetitive by multiple experts addressing the same issue for the same party are prohibitively expensive. The courts are entitled to control their own procedures in the interests of fairness. That is what the Constitution predicates by establishing an entitlement to fair trials."⁴³⁶

8.283 Secondly, under rule 58(2), where two or more parties wish to offer expert evidence on a particular issue the judge may direct that the evidence be given by a single-joint expert (SJE). Where the parties cannot agree on an SJE, the judge may either select one from a list drawn up by the parties or direct that

⁴³² Order 63A of the *Rules of the Superior Courts 1986*.

⁴³³ Order 20, Rule 11.

⁴³⁴ Order 39, Rule 59.

⁴³⁵ Order 39, Rule 59(2).

⁴³⁶ [2012] IEHC 399, para. 19.

some other expert be selected. As has been discussed, Single joint experts were introduced in England and Wales on foot of the Woolf Report, discussed above, which argued that single joint experts were much more likely to be impartial and were likely to save time and money.⁴³⁷ Lord Woolf CJ, the author of the Woolf reforms, has suggested that in England and Wales the giving of expert evidence by Single Joint Expert is the default position and separate experts should only be appointed when there is reason to do so.⁴³⁸ The Civil Procedure Rules offer guidance to judges as to when SJE's should be used rather than the traditional model.⁴³⁹ The criteria include the complexity of the point at issue and its importance to the respective parties.⁴⁴⁰

8.284 Rules 60 and 61 provide a framework for resolving disputes in expert evidence where such dispute is evident in the text of the expert reports. Where such disagreement is evident in the reports, the judge is now empowered to order the experts to meet privately without the presence of the parties or their legal representatives to discuss their proposed evidence.⁴⁴¹ Following the meeting the experts will be required to draw up a written statement, a "joint-report", identifying the evidence which is agreed and that which is not. Upon consideration of the joint-report, the judge may direct that the experts be examined and cross-examined sequentially or order a "debate among experts" procedure, or an expert "hot-tub".⁴⁴² As discussed in the previous section, under this procedure the two or more contradicting experts are sworn jointly and asked to debate the points of disagreement between them under the supervision of the judge.⁴⁴³ Following the debate, they may both be subject to examination in chief and cross examination.

8.285 As has been discussed⁴⁴⁴, hot-tubbing has been generally regarded as a success in England, particularly among judges. The provision in Rule 61(5) of an explicit role for counsel in the hot-tub process is an important one as it addresses some of the concerns in England that barristers are unable to challenge expert witnesses as effectively in the hot-tub. Nonetheless, hot-tubbing is necessarily a more fluid and informal means of receiving evidence and much will depend on how the procedure develops in practice.

8.286 The amended Superior Court rules now also make provision for the use of assessors. An assessor is "a person to assist the court in understanding a matter or evidence in relation to a matter, in respect of which that

⁴³⁷ Lord Woolf, *Access to Justice Final Report*, Ch. 13, para. 21, p.142, HMSO (1996).

⁴³⁸ *P (A Child) v Mid-Kent Are Healthcare NHS Trust* at [29].

⁴³⁹ See CPR 35PD 7.

⁴⁴⁰ See discussion at para. 8.265.

⁴⁴¹ Order 39, Rule 61 of the *Rules of the Superior Courts 1986* (S.I. No. 15 of 1986) as amended by art. 2(vii) of S.I. No. 254 of 2016.

⁴⁴² See O'Sullivan, 'A Hot Tub for Expert Witnesses' [2004] 4 *Judicial Studies Institute Journal* 1.

⁴⁴³ Order 39, Rule 61(4) of the *Rules of the Superior Courts 1986* (S.I. No. 15 of 1986) as amended by art. 2(vii) of S.I. No. 254 of 2016.

⁴⁴⁴ See paras. 8.269-8.274.

person...has skill and experience.”⁴⁴⁵ Assessors are appointed either on application of the parties or of the court’s own motion to assist the judge in understanding technical or scientific evidence. The advice of assessors is not evidence but is rather information or assistance designed to help the judge understand and process the evidence. They have been described as “expert guides to the court”.⁴⁴⁶ The distinction between an assessor and expert witness was considered by the UK House of Lords in *Richardson v Redpath*:

“To treat ... any assessor, as though he were an unsworn witness in a special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of assessors are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness’s view or to making plain his meaning. The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field.”⁴⁴⁷

- 8.287** Where an assessor is directed by the court to prepare a report, as the court is empowered to do by Order 36 Rule 41(6), a copy of the report must be sent to the parties and either party may make use of that report at the trial.
- 8.288** Some concerns have been raised about the influence of assessors on the independence of judges.⁴⁴⁸ There is arguably a concern that a judge might simply defer to the opinion of a particularly experienced expert as to the ultimate issue before the court, particularly in complex disputes and where the judge’s consultations with the assessor are in private. The English courts have set down appropriate procedures to be followed to guarantee the procedural fairness of the process.⁴⁴⁹
- 8.289** Assessors have not been widely utilised other than in Admiralty proceedings in the UK⁴⁵⁰ and so there is reason to think that they will be similarly sparingly used in this jurisdiction.
- 8.290** The High Court (Kelly J) has welcomed the new Conduct of Trials rules warmly as providing “a measure of badly needed statutory control to the

⁴⁴⁵ Order 36 Rule 41(1) of the *Rules of the Superior Courts 1986* (S.I. No. 15 of 1986) as amended by S.I. No. 254 of 2016.

⁴⁴⁶ *Owners of SS Melanie v Owners of SS San Onofre* [1927] AC 162 (quoted in Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell, 2015) at p. 161).
⁴⁴⁷ [1944] AC 62.

⁴⁴⁸ Lord Woolf noted the voicing of such concerns in his *Access to Justice Final Report* (1996) Ch. 13.

⁴⁴⁹ *Global Mariner v Atlantic Crusader* [2005] EWHC (Admlty) 380.

⁴⁵⁰ Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed. Sweet & Maxwell, 2015) p. 160-161..

Court in respect of expert evidence.”⁴⁵¹ Kelly J reserved particular praise for Order 39 Rule 58(1) which provides that expert evidence be restricted to that “which is reasonably required to enable the court to determine the proceedings.” Kelly J said of this rule:

“No longer are parties free to call expert witnesses willy nilly. The court can determine what is needed and restrict expert testimony accordingly.”⁴⁵²

8.291 The Commission commends the provision for comprehensive case management in civil cases in the Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016 (S.I. No. 255 of 2016).

8.292 The Commission now considers specific pre-action protocols in certain proceedings in this jurisdiction.

(3) *Pre-action protocols in particular proceedings*

8.293 As part of the Woolf Reforms, pre-action protocols were introduced by way of practice direction. These specify the course of action that parties should take in advance of intended litigation. These reforms introduced a number of area-specific pre-action protocols (such as the clinical disputes protocol and the professional negligence protocol).⁴⁵³ The object is to solve the dispute as early as possible, perhaps without the need to proceed to litigation at all.⁴⁵⁴ Compliance with the pre-trial protocols is not mandatory but the court can take compliance or non-compliance into account in exercising case management powers, imposing sanctions or making orders for costs.⁴⁵⁵ Failure to comply will not result in the striking out of an action or defence.⁴⁵⁶ The sanctions are procedural and financial and can only arise if proceedings actually issue.⁴⁵⁷

8.294 The system of pre-action protocols in England is based on the Practice Direction on Pre-Action Conduct (the “PDPC”).⁴⁵⁸ The PDPC also provides that

⁴⁵¹ *O'Brien v The Clerk of Dáil Éireann & ors* [2016] IEHC 597 at para. 36.

⁴⁵² *Ibid.*

⁴⁵³ There are now thirteen pre-action protocols covering the following areas: (1) construction and engineering disputes; (2) defamation; (3) personal injury claims; (4) clinical disputes; (5) professional negligence; (6) judicial review; (7) disease and illness claims; (8) housing disrepair cases; (9) possession claims based on rent arrears; (10) possession claims based on mortgage or home purchase plan arrears in respect of residential property; (11) low value personal injury claims in road traffic accidents; (12) dilapidations; and (13) low value personal injury (employers' and public liability) claims. The Ministry of Justice maintain an up-to-date list of the current protocols here: <http://www.justice.gov.uk/courts/procedure-rules/civil/protocol>.

⁴⁵⁴ Loughlin and Gertis, *Civil Procedure* (2nd ed, 2004, Cavendish Publishing) at 77.

⁴⁵⁵ *Ibid* at 78.

⁴⁵⁶ The sanctions for non-compliance are set out in PDPC 4.6.

⁴⁵⁷ *Ibid* at 96-99.

⁴⁵⁸ This practice direction, which does not have a number, is available here http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.

where there is no specific protocol, similar principles should apply.⁴⁵⁹ There is no system of pre-action protocols in place in Ireland and there is no equivalent of the PDPC. However, solicitors usually send a letter of claim to the defendant before initiating legal action. If the claimant in a personal injury action does not notify the defendant in writing of the wrong alleged to have been committed within two months of the cause of action accruing, the court may take this failure into account when adjudicating on costs.⁴⁶⁰

8.295 In *R v Henderson, R v Butler and R v Oyediran*⁴⁶¹ (a series of joined appeals involving medical evidence like *Harris*) the Court of Appeal noted that where the only evidence available is expert witness evidence, and the case depends entirely on expert evidence, the court should use “proper and robust pre-trial management” to identify the real issues and thereby prevent experts “wandering into unnecessary, complicated and confusing detail”.⁴⁶²

8.296 In its 2010 *Report on Personal Debt Management and Debt Enforcement*⁴⁶³ (the “Debt Report”), the Commission recommended that a pre-action protocol be introduced for bankruptcy proceedings to oblige both creditors and debtors to consider attempting to reach a Debt Settlement Arrangement or to negotiate a voluntary debt management plan in advance of petitioning for bankruptcy.⁴⁶⁴ The Commission proposed that this be modelled on the pre-action protocol for consumer debt claims suggested in the *Interim Report on Personal Debt Management and Debt Enforcement*.⁴⁶⁵ The objective of both of these mechanisms was to encourage the speedy resolution of so much as possible before trial or even to allow disputes to be settled before formal legal proceedings commence.⁴⁶⁶

(b) *The Working Group on Medical Negligence and Periodic Payments*

8.297 The Working Group on Medical Negligence Litigation and Periodic Payments was established by the President of the High Court in 2010. Module 1 of its report considered periodic payments in relation to medical negligence litigation, while modules 2 and 3 considered pre-action protocols and case management. In recommending pre-action protocols, the group considered that the introduction of a pre-action protocol would secure earlier disclosure of patient records, thus facilitating an informed consideration by the parties of any potential claim or defence and affording an opportunity for parties to settle the dispute or to explore alternative dispute resolution, reducing the number of claims which ultimately proceed to litigation. The Group also

⁴⁵⁹ See PDPC 6 and PDPC Annex A.

⁴⁶⁰ *Rules of the Superior Courts*, Ord. 99.

⁴⁶¹ [2010] EWCA Crim 1269; [2010] All ER (D) 125 (Jun); [2010] 2 Cr App R 24.

⁴⁶² [2010] EWCA Crim 1269, at paragraph 205.

⁴⁶³ (LRC 100 – 2010) at paragraphs 3.28-3.29. See also the corresponding Interim Report (LRC 96-2010) at paragraphs 2.59 to 2.65 and Appendix C.

⁴⁶⁴ *Ibid* at paragraph 3.28.

⁴⁶⁵ *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.59 to 2.65.

⁴⁶⁶ *Ibid* at paragraph 2.65.

considered that where a claim did proceed to litigation, a pre-action protocol would identify at a much earlier stage the issues which should ultimately be in dispute; and would provide an appropriate context for a patient to seek, and in appropriate circumstances obtain, a suitable apology.⁴⁶⁷

8.298 The Group recommended comprehensive pre-action protocols and specific steps to be taken prior to the initiation of a medical negligence claim are set out in Appendix 1 to Module 2 of the Group's report. Some of the broader recommendations are particularly relevant to procedural issues with expert witnesses with which the Commission is concerned:

The protocol should regulate and prescribe time limits for the stages of request for records, response to request for records, notification of claim, letter of claim and response to claim.

The protocol should enable time limits to be extended by agreement of the parties.

Provision should be made by statute for the rule-making authority of the court rules committees to be expanded to enable the making of rules of court to provide for the prescribing of pre-action protocols.

Non-compliance by a prospective party with an obligation under the protocol should, provided it is substantial in nature, operate to relieve the other party of the requirement to comply with that party's obligations under the protocol.

Furthermore, non-compliance with the protocol should be a factor which the court may take into account when determining liability for costs in the event that proceedings are issued.⁴⁶⁸

8.299 In Module 3 of its report, the Working Group on Medical Negligence and Periodic Payments set out extensive recommendations regarding case management of clinical negligence proceedings.⁴⁶⁹ The proposals encompass the management of all aspects of the case, however the Group considered that since, "[t]he time expended in the giving of expert evidence is without question the single most significant factor contributing to the current length of clinical negligence trials"⁴⁷⁰ it should make a number of specific proposals in relation to expert witnesses:

1. Expert evidence should be exchanged between the parties in the form of reports on an agreed date not later than twelve weeks from the delivery of the defence. Opportunities to

⁴⁶⁷ *Report of the Working Group on Medical Negligence and Periodic Payments* (Module 2) (March 2012).
⁴⁶⁸ *Ibid* at pp. 7-8.

⁴⁶⁹ *Report of the Working Group on Medical Negligence and Periodic Payments* (Module 3) (April 2013), Chapter 3.

⁴⁷⁰ *Ibid.*, page 16.

exchange additional witness statements within specified time limits should also be afforded.

2. Following delivery of the expert reports, including any supplemental reports, the parties would be obliged, within four weeks from the time limited for furnishing of any supplemental expert's report, to arrange for the experts in the same field of expertise to discuss in the absence of the legal representatives of the parties but without prejudice to the parties, the issues on which those experts are to give evidence and, without recourse to the parties or their legal representatives, prepare a memorandum for the Court identifying the areas on which they have agreed and those on which they have not.
3. A majority of the Working Group were of the view that, unless permitted by the court for special reason, each party should be limited to adducing evidence from one expert only in a particular field of expertise on a specific issue, and where there are two or more defendants, the co-defendants should be confined to offering jointly evidence from one expert only on any issue relating to quantum, the plaintiff's physical condition, the plaintiff's mental or psychological condition and the prognosis as to those conditions.

8.300 The Group also set out draft rules of court for case management of clinical negligence proceedings.⁴⁷¹ Rules 15 to 18 relate to expert evidence and provide (among other things) that, the parties must furnish all necessary information to their expert witnesses in good time to allow for preparation of the report, the expert witness may furnish a supplemental report in reply to the report of the other party, and where time limits are not complied with the evidence may be excluded.

8.301 The Commission considers that the proposals made by the Group address many of the concerns expressed in this Report regarding the cost and time expended on expert evidence.

8.302 The Oireachtas has implemented the recommendations of the Working Group in Module 2 of its Report. Part 15 (sections 219 to 221) of the *Legal Services Regulation Act 2015* provides a statutory basis for the introduction of a pre-action protocol in clinical negligence claims. Section 219 of the Act inserts a new Part 2A (S. 32A- 32D) into the *Civil Liability and Courts Act 2004*. At the time of writing (December 2016), this section has not yet been commenced by the Minister.

⁴⁷¹

Ibid, Appendix.

8.303 The 2004 Act, as amended by the 2015 Act empowers the Minister for Justice to set out the terms of a pre-action protocol for clinical negligence actions.

Further sections set out what this protocol shall contain, including:

- a) the disclosure of medical and other records relating to persons enquiring into or alleging possible clinical negligence (including charges for disclosure),
- b) the giving of notifications of enquiries into, and allegations of, possible clinical negligence, the acknowledgement of notifications of enquiries and the giving of responses to notifications of allegations,
- c) the specification of the time at or within which records shall be disclosed and notifications given and acknowledged or responded to
- d) the form of, and particulars to be included with, requests for disclosure or notifications of enquiries or allegations and acknowledgements of and responses to such notifications,
- e) the disclosure of material relevant to allegations and responses, and
- f) agreements to submit issues for resolution otherwise than by a court.⁴⁷²

8.304 If the various steps directed by the pre-action protocol are not taken, section 32C gives the court a number of powers it may exercise. The court may:

- “(a) direct that the action shall not proceed any further until steps which are required by the pre-action protocol to have been taken by any of the parties have been taken;
- (b) order that a party who has not complied with a requirement of the pre-action protocol pay the costs, or part of the costs, of the other party or parties (including, where appropriate, on an indemnity basis);
- (c) if an award of damages is made in favour of the plaintiff but the plaintiff either has not complied with a requirement of the pre-action protocol or has rejected an offer to settle made in accordance with the pre-action protocol for an amount equal to or greater than that awarded, order that the plaintiff shall be deprived of interest on all or part of the award or that all or part

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S. 32B(6), *Civil Liability and Courts Act 2004*.

of the award shall carry interest at a lower rate than it otherwise would;

(d) if an award of damages is made against a defendant but the defendant either has not complied with a requirement of the pre-action protocol or has rejected an offer to settle made in accordance with the pre-action protocol for an amount equal to or less than that awarded, order that the defendant pay interest on all or part of the award at a rate higher by no more than 10 percentage points than the rate for the time being standing specified under section 26 of the *Debtors (Ireland) Act 1840*."

- 8.305** Section 32D provides that an apology made in connection with an allegation of clinical negligence shall not constitute an express or implied admission of fault or liability and shall not invalidate or otherwise affect any insurance coverage held by the person making the apology. The Commission considers that these provisions are a welcome addition to the arrangements for medical negligence claims and anticipates their implementation as soon as possible.
- 8.306** The Commission commends the provision for pre-action protocols for clinical negligence claims in the Legal Services Regulation Act 2015, and the availability of pre-action protocols for other civil claims on application by one or both parties in the Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016 (S.I. No. 255 of 2016)

CHAPTER 9

CONSOLIDATION OF EVIDENCE LEGISLATION

A. Consolidating and Reforming the Law of Evidence with a View to Codification

- 9.01** The three aspects of the law of evidence discussed in this Report – hearsay, documentary (including electronic) evidence and expert evidence – derive from a combination of common law (judge-made law) and legislation. Some rules were developed or enacted in the 19th Century and overlap.¹ Given the importance and wide scope of the three aspects of the law of evidence dealt with in this Report, the Commission is conscious that the draft Evidence Bill in the Appendix would constitute a significant step towards achieving the long-standing and widely endorsed aspiration to move towards a complete legislative framework or code on the law of evidence.² The purpose of codification of the law of evidence, is to introduce a law of evidence that is clear, simple and as accessible as possible and “to facilitate the fair, just and speedy judicial resolution of disputes.”³
- 9.02** The Commission notes that codification in its true form would require not merely a statement in legislative form of the law of evidence (derived from the common law and the relevant existing Acts) but also the drafting of a generally applicable template that sets out the rules of evidence in an agreed format.⁴ The draft Evidence Bill, appended to this Report, is not that sort of

¹ On Irish law see Fennell, *Law of Evidence in Ireland* 3rd ed (Bloomsbury Professional 2009), Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) and McGrath *Evidence* (2nd ed. Round Hall 2014). A leading English text is Tapper, *Cross and Tapper on Evidence* (11th ed Oxford UP 2007). The leading American text, *Wigmore on Evidence* (4th ed, in 14 volumes and supplements, Wolters Kluwer Law 2005), was originally published as *Wigmore Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little Brown 1904). The analysis in various editions of both Cross and Wigmore have been cited by courts in many common law countries, including Ireland.

² See the Minister for Justice’s Programme of Law Reform (Pr. 6379, 1962), paragraph 26 (13-14) (desirability of a comprehensive code); Law Reform Commission First Programme of Law Reform (1977), paragraph 11 (8-9) (similar aspiration); and Law Reform Commission *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988) 1 (noting general agreement on the desirability of a code, pending which reform proposals for particular areas should be developed).

³ New Zealand Law Commission *Report on Evidence*. Volume 1: Reform of the Law NZLC PP 55 at xviii.

⁴ See Codifying the Criminal Law, the 2004 *Report of the Expert Group on the Codification of the Criminal Law* (Department of Justice, Equality and Law Reform, 2004), available at www.justice.ie. Arising from the 2004 Report, the Criminal Law Codification Advisory Committee was established under Part 14 of the *Criminal Justice Act 2006*. In 2011, the Department of Justice and Equality

codification of the law of evidence. Rather, it is a consolidation and reform of specific areas of the existing law of evidence. In preparing this Report and the draft Evidence Bill, the Commission has nonetheless had as much regard as possible to relevant principles of codification and to the approach taken by comparable law reform bodies where similar wide-ranging projects on the law of evidence were undertaken in recent years.

9.03 The Commission has also taken into account its own approach to recent comparable projects, particularly where these involved a combination of statutory consolidation of existing common law rules as well as textual updating of statutory rules. These have included the Commission’s work on the consolidation and reform of the *Courts Acts*⁵ and on consolidation and reform of substantive criminal law⁶ and reform and modernisation of land and conveyancing law⁷ and of trust law.⁸ In each area the Commission has developed a statutory framework that combines reform with consolidation, where appropriate. Those consolidations integrated existing common law and statute into a single legislative framework. The Commission has applied the same approach in the development of the draft Evidence Bill in the Appendix.

9.04 In its 2013 *Issues Paper on Consolidation of Evidence Legislation*⁹ the Commission considered the question of consolidating existing legislation on the law of evidence, both pre-1922 and post-1922. The Commission sought views on whether existing legislation should be consolidated into a single Bill together with the reforms proposed in this project 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.

9.05 In approaching this task, the Commission found that some provisions in existing legislation, many of which are in pre-1922 Acts, are obsolete or have been superseded and the Commission considers that those should be repealed without replacement. Some provisions are still relevant and are in

published the Advisory Committee’s inaugural Draft Criminal Code Bill and Commentary, available at www.justice.ie and www.criminalcode.ie.

⁵ *Report on Consolidation and Reform of the Courts Acts* (LRC 97 – 2010).

⁶ *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87 – 2008), *Report on Defences in Criminal Law* (LRC 95 – 2009) and *Report on Inchoate Offences* (LRC 101 – 2010). These Reports have been incorporated into the work of the Criminal Law Codification Advisory Committee.

⁷ *Report on Modernisation and Reform of Land Law and Conveyancing Law* (LRC 74-2005), which led to the enactment of the *Land and Conveyancing Law Reform Act 2009*.

⁸ *Report on Trust Law: General Proposals* (LRC 92-2008).

⁹ LRC IP 3-2013.

keeping with the Commission's recommendations for reform made in this Report and the Commission recommends that these provisions be retained by setting them out in consolidated form (subject to minor drafting changes) in the draft Evidence Bill. This would facilitate the repeal of the Acts in which they are currently found.

9.06 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.

B. Legislation Excluded from Scope of Consolidation

9.07 In the Issues Paper the Commission excluded from consideration a number of Acts which govern ancillary matters of civil or criminal procedure rather than set out substantive rules of evidence and which were dealt with in its *Report on Consolidation and Reform of the Courts Acts* (the "Courts Report")¹⁰ and incorporated into the Draft Courts (Consolidation and Reform) Bill appended to that Report.¹¹

9.08 The Commission also excluded 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.

9.09 The Acts listed below at Part C contain the main generally applicable statutory changes to the law of evidence with which the Report is concerned but there are many other Acts that affect the law of evidence both directly and tangentially.¹² The Commission adverts to some specific provisions in various parts of the Report but does not list all the statutes that include provisions connected with the law of evidence. 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.

¹⁰ LRC 97-2010 at 271.
¹¹ LRC IP 3-2013.
¹² See LRC IP 3-2013 at p. 3.

- 9.10** The Commission does not consider those aspects of the law of evidence that require separate and detailed consideration in their own right, an example being the law governing confessions and admissions and associated legislation. Nor does the Commission deal with the statutes that set out the rules of evidence applicable to statutory tribunals.
- 9.11** 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 these is relevant to the Report. The Commission therefore does not recommend the repeal of any of these Acts.

C Legislation Subject to Re-enactment or Outright Repeal

- 9.12** 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. In the Issues Paper the Commission discussed the content of these Acts in chronological order beginning with the *Witnesses Act 1806*.
- 9.13** The Commission recommends that some Acts be repealed without replacement and that some Acts be repealed but re-enacted as part of the consolidated legislative scheme in the draft Evidence Bill. Some of the Acts that the Commission recommends re-enacting need to be updated or amended rather than simply re-enacted and the Commission discussed this for each affected Act in the Issues Paper. For some Acts, the Commission takes a provision-specific approach. In the case of these Acts, the Commission recommends 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 amendments or updated provisions in the draft Bill.

(1) *Witnesses Act 1806*

- 9.14** The *Witnesses Act 1806* clarifies the scope of witness privilege. This Act, consisting of a single provision, remains in force unamended in the State (and in the UK).¹³ It makes clear that a witness cannot refuse to answer a question

¹³ See *Archbold's Criminal Law and Procedure* (2013) at [§12-3] at 1486.

on the sole ground that answering would expose the witness to civil proceedings.

9.15 The Commission recommends 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*¹⁴

9.16 A series of 19th 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*¹⁵ abolished both of these rules.

9.17 The Commission recommends that the provision in the *Evidence Act 1843* on the ability of persons with a criminal conviction or an interest in the civil proceedings to testify be consolidated into the draft Evidence Bill. The Commission also recommends 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*¹⁶

9.18 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.

9.19 The Commission recommends 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 recommends that the 1845 Act then be repealed in its entirety.

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See LRC IP 3-2013 at p. 6

Confusingly, at least three major 19th century Evidence Acts are commonly referred to as “*Lord Denman’s Act*”. (Lord Denman initiated each Bill as private members’ Bills). 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.

¹⁶

See LRC IP 3-2013 at p. 6

(4) *Treasury Instruments (Signature) Act 1849*

9.20 The *Treasury Instruments Signature Act 1849* was introduced to reduce the legal quorum of signatures necessary to authenticate formal documents from three signatures to two. The Commission's consultations since the publication of the Issues Paper has led it to conclude that the 1849 Act is obsolete and serves no continuing purpose and can therefore be repealed without replacement.

9.21 **The Commission recommends that since the *Treasury Instruments (Signature) Act 1849* is obsolete and serves no continuing purpose it should therefore be repealed without replacement.**

(5) *Evidence Act 1851*¹⁷

9.22 There are several important provisions in the *Evidence Act 1851*, discussed in full in the Issues Paper. Briefly, section 2 of the 1851 Act makes it a general rule subject to some specified exceptions (notably section 3, discussed below) 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. It applies to viva voce evidence and evidence by deposition.

9.23 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 preserves the common law regarding the competence and compellability of defendants and accused persons.

9.24 Second, section 3 provides that nothing in the Act makes a person compellable to answer any question tending to incriminate himself or herself. 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.

9.25 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*

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See LRC IP 3-2013 at p. 7

1853 below). The current law (now in the *Criminal Justice (Evidence) Act 1924* 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.

- 9.26 The Commission recommends 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 also recommends that section 8 of the *Evidence Act 1851* be repealed without replacement (this concerns the admission of certificates of qualification of pharmacists). The Commission recommends 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*¹⁸

- 9.27** 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).
- 9.28 The Commission recommends 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 recommends that the draft Evidence Bill should include clear provisions regarding the competence and compellability of spouses in civil and criminal proceedings. The Commission further recommends that the *Evidence Amendment Act 1853* should then be repealed in its entirety.**

(7) *Documentary Evidence Act 1868*¹⁹

- 9.29** 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. There is no need to prove the authenticity of the handwriting or official position of the person certifying.

¹⁸ See LRC IP 3-2013 at p. 10
¹⁹ See LRC IP 3-2013 at p. 10

- 9.30** The remaining sections extend the Act to the colonies,²⁰ create forgery offences,²¹ define terms²² and preserve existing means of proof.²³ 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.
- 9.31** **The Commission recommends 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 recommends that the 1868 Act then be repealed in its entirety.**

(8) *Evidence Further Amendment Act 1869*²⁴

- 9.32** The 1869 Act deals with competence to give evidence in certain family law disputes. The Commission recommended in its 1981 *Report on Family Law*²⁵ 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. In relation to section 3, the Commission had also recommended in the 1981 Report 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 therefore recommends the repeal of the remaining elements of section 3 of the 1869 Act. Section 4 of the 1869 Act was repealed by section 6 of the *Oaths Act 1888*.
- 9.33** **The Commission recommends 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*²⁶

- 9.34** The *County Boundaries (Ireland) Act 1872* gives power to the government to amend county boundaries. It also provides that every order (or a copy thereof or map referred to therein) made under the Act or any Act listed in the

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Section 3.

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Section 4.

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Section 5.

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Section 8.

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See LRC IP 3-2013 at p. 12. 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*.

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Law Reform Commission *Report on Family Law* (LRC 1-1981).

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See LRC IP 3-2013 at p. 12

Schedule²⁷ 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.²⁸

- 9.35** In preparing this Report, the Commission has noted that the 1872 Act forms part of a number of connected pieces of legislation that govern county and administrative boundaries in the State. The Schedule to the 1872 Act refers to a number of these, the *Boundary Survey (Ireland) Act 1854*²⁹, the *Boundary Survey (Ireland) Act 1857*³⁰, the *Boundary Survey (Ireland) Act 1859*³¹ and the *Detached Portions of Counties (Ireland) Act 1871*³².
- 9.36** As noted in the Issues Paper, all these Acts remain in force at the time of writing. In addition, these Acts are directly related to the connected roles of local authorities (under the *Local Government Act 2001*) and of Ordnance Survey Ireland (established under the *Ordnance Survey Ireland Act 2001*) in preparing and publishing maps that describe the county and administrative boundaries of the State. These roles are related to significant aspects of electoral law and to the question of whether, for example a person has committed an offence within a particular county or within the State.
- 9.37** In light of the complex legislative framework within which the 1872 Act exists, post-pre-1922 and post-1922, the Commission has therefore concluded that it would not be appropriate to incorporate the 1872 Act into the draft Evidence Bill in this Report. Any review of the 1872 Act would require a broader consideration of all the legislation governing county and administrative boundaries in Ireland. Such research falls outside the scope of this Report and the Commission has therefore concluded that the *County Boundaries, Ireland, Act 1872* should not be incorporated into the draft Evidence Bill."
- 9.38** **The Commission recommends that the provisions in the *County Boundaries, Ireland, Act 1872* on the evidential effects of maps should not be incorporated into the draft Evidence Bill because the 1872 Act forms part of a number of connected pieces of legislation that govern county and administrative boundaries in the State and a review of this legislation falls outside the scope of this Report.**

²⁷ 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.

²⁸ See *Brown v Donegal County Council* [1980] IR 132.

²⁹ (17 & 18 Vict, c. 17)

³⁰ (20 & 21 Vict, c.45)

³¹ (22 & 23 Vict, c.8)

³² (34 & 35 Vict, c.106)

(10) *Bankers' Books Evidence Acts 1879 and 1959*³³

- 9.39** 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.
- 9.40** 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.
- 9.41** Section 7 and 7A of the *Bankers' Books Act 1879* allows persons to gain inspection of the bankers' books upon obtaining a court order. These provisions serve an important purpose in the fight against money laundering and fraud offences.
- 9.42** **The Commission recommends, having reviewed the approach taken in other jurisdictions, that the *Bankers' Books Evidence Act 1879* should be repealed and replaced by comparable and suitably updated provisions within the overall context of provisions dealing with business records generally. This includes a suitably updated replacement for sections 7 and 7A.**

(11) *Documentary Evidence Act 1882*³⁴

- 9.43** The *Documentary Evidence Act 1882* deals with how to prove an Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette or document and sets out the penalties for forgery (of purported Stationery Office documents). 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.
- 9.44** **The Commission recommends that the provisions in the *Documentary Evidence Act 1882* on proving certain public documents be consolidated into the draft Evidence Bill. The Commission also recommends that the 1882 Act then be repealed in its entirety.**

(12) *Oaths Acts 1888 and 1909*³⁵

- 9.45** 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. The 1888 and 1909 Acts require that if a person wishes to affirm he or she must

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See LRC IP 3-2013 at p. 14

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See LRC IP 3-2013 at p. 14.

³⁵

See LRC IP 3-2013 at p. 15.

indicate that they do not have any religious belief that would ground an oath which they Acts require to be made using appropriate religious text.

- 9.46** In its 1990 *Report on Oaths and Affirmations*³⁶ the Commission recommended abolishing the obligation to swear an oath and instead requiring a witness to make a solemn statutory affirmation before giving evidence. The recommendations in the 1990 Report have not been implemented. The Commission has again considered the *Oaths Acts* in particular because in 2016 the President of the High Court reiterated the current law that affidavits must be sworn on the Bible or other appropriate text unless the deponent has a stated objection to swearing the oath.³⁷ The Commission considers that it should continue to be the case that a person should be permitted to testify either on oath or by affirmation, but that he or she should not be required, if giving evidence by affirmation, to indicate that he or she does not have any religious belief.
- 9.47** **The Commission recommends that the provisions in the *Oaths Acts 1888 and 1909* concerning the taking of oaths and affirmations should be replaced by provisions in the draft Evidence Bill that a person may give sworn testimony on oath or affirmation without the need when testifying by affirmation to indicate religious belief. The Commission also recommends that the 1888 and 1909 Acts then be repealed in their entirety.**
- (13) *Documentary Evidence Act 1895***³⁸
- 9.48** 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 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.
- 9.49** **The Commission recommends that the *Documentary Evidence Act 1895* should be repealed in its entirety as its provisions are obsolete.**

³⁶ *Report on Oaths and Affirmations* (LRC 34-1990) at p. 43.

³⁷ *In re Hennessy and Davidson*, High Court (ex tempore), 4 April 2016: see Burke-Murphy, “Affidavits Must Be Administered on Religious Text” (2016) 34 ILT 126.

³⁸ See LRC IP 3-2013 at p. 15.

(14) *Evidence (Colonial Statutes) Act 1907*³⁹

- 9.50** Briefly, the *Evidence (Colonial Statutes) Act 1907* compels all courts in the United Kingdom to receive in evidence copies of 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 that purport to be printed by the Government printer without proof that the copies were so printed and creates corresponding offences of forgery and tendering a forgery in evidence.
- 9.51** **The Commission recommends that the provisions in the *Evidence (Colonial Statutes) Act 1907* concerning the proof of certain Acts should be retained for the present but its continuing relevance may need to be considered separately.**

(15) *Criminal Justice (Evidence) Act 1924*⁴⁰

- 9.52** The *Criminal Justice (Evidence) Act 1924* was the first Act of the Oireachtas to make important changes to the law of evidence.⁴¹
- 9.53** Section 1 of the 1924 Act makes the accused a competent witness for the defence and sets out rules for the giving of evidence by the accused and others.
- 9.54** 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.
- 9.55** 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.
- 9.56** Section 3 dealt with the order of closing speeches and was repealed and replaced by section 24 of the *Criminal Justice Act 1984*.⁴²
- 9.57** 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*.

³⁹ See LRC IP 3-2013 at p. 16.

⁴⁰ See LRC IP 3-2013 at p. 16.

⁴¹ 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)(iia) was inserted by section 33(a) the *Criminal Procedure Act 2010*.

⁴² The Commission addressed section 24 of the 1984 Act in its *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.

- 9.58** Section 5 applies the 1924 Act to all criminal proceedings notwithstanding any enactment in force at the commencement of the Act.
- 9.59** **The Commission recommends 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 also recommends that the 1924 Act then be repealed in its entirety.**
- (16) *Documentary Evidence Act 1925*⁴³**
- 9.60** The *Documentary Evidence Act 1925* deals with methods for proving public documents including Acts of the Oireachtas, proclamations, orders, other official documents, rules, regulations and bye-laws. It 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 and allows for the authentication of official documents by Ministers.
- 9.61** **The Commission recommends 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 also recommends that the 1925 Act then be repealed in its entirety.**
- (17) *Criminal Evidence Act 1992*⁴⁴**
- 9.62** 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).
- 9.63** Part II of the *Criminal Evidence Act 1992* concerns the admissibility of business records. There is no equivalent provision for civil proceedings, and this matter is discussed in Chapter 2.
- 9.64** 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.⁴⁵
- 9.65** Part IV of the 1992 Act concerns the competence and compellability of spouses and former spouses of the accused.
- 9.66** At the time of writing (December 2016), the *Criminal Law (Sexual Offences) Bill 2015* and the *Criminal Justice (Victims of Crime) Bill 2016* are before the

⁴³ See LRC IP 3-2013 at p. 18.

⁴⁴ See LRC IP 3-2013 at p. 19.

⁴⁵ Section 4 of the *Criminal Law (Human Trafficking)(Amendment) Act 2013* amends sections 15 and 16 of the 1992 Act 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*.

Oireachtas. Assuming they are enacted, they will make further amendments to the 1992 Act, in particular Part III of the 1992 Act. These proposed amendments have not been incorporated into the draft Evidence Bill but, assuming their enactment, they would need to be taken into account if this Report was implemented and if the draft Evidence Bill was enacted.

9.67 The Commission recommends that the provisions of the *Criminal Evidence Act 1992*, together with recommendations for reform in this Report, be consolidated into the draft Evidence Bill. The Commission also recommends that the 1992 Act then be repealed in its entirety.

(18) *Sections 15 to 19 of Criminal Justice Act 2006*⁴⁶

9.68 At common law, previous witness statements are not admissible to prove the truth of their contents. Sections 15 to 19 of the *Criminal Justice Act 2006* introduced statutory provisions on the admissibility of certain witness statements.

9.69 The Commission recommends that sections 15 to 19 of the *Criminal Justice Act 2006* concerning the admissibility of certain witness statements be consolidated into the draft Evidence Bill. The Commission also recommends that sections 15 to 19 of the 2006 Act then be repealed.

(19) *Section 8 of Statute Law Revision Act 2007*⁴⁷

9.70 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.

9.71 The Commission recommends that the provisions relating to the modes of giving “prima facie evidence of a statute” and the admission of copies of certain specified 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.

⁴⁶ See LRC IP 3-2013 at p. 21.
⁴⁷ See LRC IP 3-2013 at p. 21.

CHAPTER 10

SUMMARY OF RECOMMENDATIONS

Introduction

- 10.01** The Commission recommends that the recommendations in this Report should be incorporated into an Evidence Bill which should also include a consolidation of existing Evidence Acts; and a draft Evidence Bill to this effect is therefore appended to this Report. [Para. 7, Introduction]
- 10.02** The Commission recommends that, subject to specific exceptions discussed in the Report, the recommendations in the Report and the draft Evidence Bill shall apply to both civil and criminal proceedings. [Para. 9, Introduction]

Chapter 1 – General Rules of Evidence: Relevance and Admissibility

- 10.03** The Commission recommends that in civil cases, the draft Evidence Bill should provide that relevant evidence which would otherwise be ruled inadmissible may be admitted where the parties involved have consented to its admission. The Commission also recommends that, in criminal cases, the draft Evidence Bill should provide that relevant evidence which would otherwise be ruled inadmissible may be admitted where the parties involved have consented to its admission and the Court is satisfied that to do so would not prejudice the right of the accused to a trial in due course of law. [Para. 1.21]
- 10.04** The Commission recommends that the recommendations in this Report should not be construed as altering or affecting general common law rules or any enactment concerning the admissibility of evidence. They are also intended to be without prejudice to the discretion to exclude evidence on the grounds that its prejudicial effect outweighs its probative value. [Para. 1.32]

Chapter 2 – The Rule Against Hearsay

- 10.05** The Commission recommends that the draft Evidence Bill should define hearsay as: “any statement, whether made verbally, by conduct, or contained in a document, which is made out of court by a person who is not called as a witness and is presented in court as testimony to prove the truth of the fact or facts asserted.” [Para 2.32]

- 10.06** The Commission recommends that implied assertions be allowed in evidence, save where it can reasonably be supposed that the purpose of making the statement was to cause another person to believe the matter implied. [Para. 2.48]
- 10.07** The Commission recommends that the draft Evidence Bill provide a presumption in favour of the admissibility of children's out of court statements in public and private proceedings involving the welfare of a child, or in any family law proceedings, subject to safeguards as to weight and a residual discretion to exclude where the interests of justice so require. [Para. 2.83]
- 10.08** The Commission recommends that, having regard to the risks associated with hearsay evidence and arising from the constitutional right to fair procedures, there should not be a general inclusionary approach to hearsay in civil or criminal proceedings. [Para 2.125]
- 10.09** The Commission recommends that records compiled in the course of business, because they are generally reliable, should be admissible in both civil and criminal proceedings as an inclusionary exception to the hearsay rule, subject to specific safeguards, set out in the recommendations below. [Para. 2.143]
- 10.10** The Commission recommends that the *Bankers' Books Evidence Act 1879* be repealed and replaced with the amended rules for business records recommended in this report, subject to the retention of section 7 of the Act. [Para. 2.144]
- 10.11** The Commission recommends that the draft Evidence Bill should provide that business records should be presumed to be admissible in evidence, that the term "business records" should include those records referred to in the *Criminal Evidence Act 1992*, namely records kept by any trade, profession or other occupation carried on, for reward or otherwise, and that the term should also encompass records kept by a charitable organisation as defined in the *Charities Act 2009*. [Para. 2.179]
- 10.12** The Commission recommends that a business record be accepted as admissible evidence if the document was created or received in the course of a business and where:
- (a) The information in the statement is derived from a person who had, or may reasonably be supposed to have had, direct personal knowledge of that information;
 - (b) The documentary statement has been produced for the purposes of a business; and

- (c) The information is contained in a document kept by a business. [Para. 2.180]

- 10.13** The Commission recommends that the courts should retain the discretion to refuse to admit business records where the interests of justice so require. [Para. 2.181]
- 10.14** The Commission recommends that the draft Evidence Bill should provide that all reliable copies of admissible business records are also admissible in evidence. [Para. 2.182]
- 10.15** The Commission also recommends that draft Evidence Bill should provide that business records from outside the State are admissible, notwithstanding the non-compellability of the manager, director or other similar officer of the business. [Para. 2.183]
- 10.16** The Commission recommends that the draft Evidence Bill should clarify that the records of a business which has ceased to exist should be similarly admissible. [Para. 2. 184]
- 10.17** Having regard to the above recommendation that business records should be presumed admissible, the Commission recommends that the certification procedure set down in section 6 of the *Criminal Evidence Act 1992* should be repealed without replacement. [Para. 2. 185]
- 10.18** The Commission recommends that the provisions of the draft Evidence Bill providing for the admissibility of business records should not apply to information contained in a document which is admissible by virtue of any other enactment or rule of law as evidence of any fact stated therein. [Para. 2. 186]

Chapter 3 – Exceptions To The Rule Against Hearsay

- 10.19** The Commission recommends that the draft Evidence Bill should provide that the common law exception to the rule against hearsay for admissions and confessions be retained. [Para. 3.04]
- 10.20** The Commission recommends that the draft Evidence Bill should provide that the common law *res gestae* exception should be retained. [Para. 3.13]
- 10.21** The Commission recommends that the draft Evidence Bill should provide that the common law exception to the rule against hearsay for dying declarations in homicide cases should be retained subject to the requirement the trial judge issue a direction to the jury warning of the danger of attaching significant weight to such statements. [Para. 3.23]
- 10.22** The Commission recommends that the draft Evidence Bill should provide that the common law exception to the rule against hearsay for declarations by

deceased persons against pecuniary or proprietary interest should be retained. [Para. 3.28]

- 10.23** The Commission recommends that, as the business records exception which this report recommends sufficiently accounts for documentary evidence falling under the exception for declarations by a deceased person in the course of duty, the draft Evidence Bill should provide that the common law exception be abolished. [Para. 3.35]
- 10.24** The Commission recommends that the draft Evidence Bill should provide that the exception to the rule against hearsay for declarations of deceased persons as to pedigree be abolished. [Para. 3.41]
- 10.25** The Commission recommends that the draft Evidence Bill should provide that the exception to the rule against hearsay for declarations by a deceased person explaining the contents of his or her will should be retained. [Para. 3.48]
- 10.26** The Commission recommends that the exception to the rule against hearsay for testimony in former court proceedings should be retained subject to the requirement that the witness is unavailable to attend because he or she; is dead, is too ill to attend court, has been prevented from attending by the party against whom the evidence is to be admitted, is outside of the jurisdiction or cannot be located following intensive enquires, but that such evidence is not admissible where the witness is simply unwilling to testify. [Para. 3.50]
- 10.27** The Commission recommends that the draft Evidence Bill include the specific rules on prior inconsistent statements applicable to certain criminal trials that have been enacted by the Oireachtas in section 16 of the *Criminal Justice Act 2006*. [Para. 3.68]
- 10.28** The Commission recommends that the provisions in section 16 of the *Criminal Justice Act 2006*, suitably amended, be extended to civil proceedings. [Para. 3.69]
- 10.29** The Commission recommends that sections 3 to 5 of the *Criminal Procedure 1865* (which apply to both civil and criminal proceedings) be retained. [Para. 3.70]
- 10.30** The Commission recommends that in any future general sentencing statute or in general sentencing guidelines the law governing the admissibility of hearsay evidence at sentencing should be restated and, if necessary, further clarified. [Para. 3.74]
- 10.31** For the present, however, the Commission recommends that hearsay evidence should be admissible at the sentencing phase of a criminal trial subject always to the discretion of the trial judge to exclude such evidence

where its admission would be unduly prejudicial or unfair to the offender. [Para. 3.75]

- 10.32** The Commission recommends that the draft Evidence Bill should provide that evidence of a criminal conviction in an Irish court should be admissible in all subsequent civil proceedings, where it is relevant to the proceedings, as evidence that a person committed that offence. Such evidence should be taken as proof the person committed that offence unless the contrary is proven. [Para. 3.106]
- 10.33** The Commission recommends that nothing in this report or in the draft Bill should be taken to preclude the judicial development of the rule against hearsay. [Para. 3.140]

Chapter 4 – Documentary and Electronic Evidence

- 10.34** The Commission recommends that “document” should be defined in the draft Evidence Bill, for the purposes of both civil and criminal proceedings, as “anything in which information of any description is recorded”; that this should apply to hard copy traditional documents as well as to electronic documents and documents generated automatically; and that this definition should include the following list of non-exclusive examples:
- (a) any thing on which there is writing,
 - (b) any map, plan, graph, drawing or photograph,
 - (c) any disc, tape, sound track, film, microfilm, negative or other device from which sounds, images or other data can be reproduced with or without the aid of some other equipment and
 - (d) any reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form. [Para. 4.11]
- 10.35** The Commission recommends that, to the extent that they still apply in Irish law, the best evidence rule and the original document rule should be abolished; and that, in their place, the draft Evidence Bill should provide that a copy of an original document is admissible in civil and criminal proceedings where the court is satisfied as to its relevance and reliability.[Para. 4.33]
- 10.36** The Commission recommends that the draft Evidence Bill provide that the authentication of documents should remain a matter for the courts to determine, subject to specific recommendations set out below. [Para. 4.46]

- 10.37** The Commission recommends that the draft Evidence Bill should define a “public document” as “a document retained in a depository or register relating to a matter of public interest whether of concern to sectional interests or to the community as a whole, compiled under a public duty and which is amenable to public inspection.”[Para. 4.54]
- 10.38** The Commission recommends that the draft Evidence Bill should include the following existing arrangements for the proof and authentication of public documents:
1. Examination: an examined copy is a copy proved to correspond to the original by the oral evidence of a person who has examined the original;
 2. Certification: a certified copy is a copy certified by an official with custody of the original to be an accurate copy;
 3. Sealing: a judicial or ministerial seal may be applied to a document to aid its future authentication;
 4. Signed copy: where the signature of the appropriate person may be sufficient to authenticate a document and where this signature is presumed valid.
 5. Stationery Office copy: a Stationery Office copy is a copy printed under the superintendence or authority of and published by the Stationery Office. [Para. 4.62]
- 10.39** The Commission recommends that the draft Evidence Bill should maintain the well-established distinction between private and public documents, including the presumption of due execution of public documents.[Para. 4.67]
- 10.40** The Commission recommends that the draft Evidence Bill should provide that documents produced in anticipation of litigation remain inadmissible as evidence of matters which they contain, except where express statutory provisions otherwise provide. [Para. 4.71]
- 10.41** The Commission recommends that the draft Evidence Bill provide that documents generated during the investigation of criminal offences shall remain subject to the rules and principles relating to disclosure in criminal cases. [Para. 4.74]
- 10.42** The Commission recommends that the the draft Evidence Bill should provide for a simplified method of authentication for the admissibility of an ancient document, to the effect that such a document is admissible where it is shown to have been retrieved from its place of “proper custody”, that is, the place

where the ancient document would reasonably be expected to be stored if it was what it purported to be.[Para. 4.81]

- 10.43** The Commission recommends that the draft Evidence Bill should provide that, in the case of voluminous documents, a written summary of such documents may be used to prove such documents in place of the documents themselves. [Para. 4.103]
- 10.44** The Commission recommends that the draft Evidence Bill should provide that an electronic [or digital] recording shall be admissible in evidence where it has been established that it is an authentic recording; and that any dispute as to the quality of the recording, including the identity of any person speaking on the recording, shall go to the weight of the recording rather than its admissibility. [Para. 4.116]
- 10.45** The Commission recommends that the draft Evidence Bill should provide that notarised documents should be admissible in civil proceedings on conditions comparable to those in section 30 of the *Criminal Evidence Act 1992*. [Para. 4.128]
- 10.46** The Commission recommends that, in light of the Commission’s view that the law should be technologically neutral, no special evidential regime should be introduced to govern the admissibility of computer-generated documents. [Para. 4.135]

Chapter 5 – Signatures and Identification

- 10.47** The Commission recommends that the draft Evidence Bill should define “signature” as “a writing, or otherwise affixing, of a person’s name, or a mark to represent his or her name, by himself or herself; or a writing on his or her behalf by an agent acting under his or her authority; with the intention of authenticating a document as being that of, or as binding on, or as being witnessed by, the person whose name or mark is so written or affixed.” [Para. 5.17]
- 10.48** The Commission recommends that the draft Evidence Bill should define “signature” to describe both a handwritten signature and electronic/digital signature but that for the purposes of authentication different definitions should be used for each. [Para. 5.18]
- 10.49** The Commission recommends that the draft Evidence Bill should not include a general requirement for the use of an advanced electronic signature based on Public Key Infrastructure for authentication purposes, and that such a requirement should only be prescribed on a case-by-case basis. [Para. 5.67]
- 10.50** The Commission recommends that that the draft Evidence Bill should provide that, in determining the authentication of digital signatures in criminal and civil proceedings, signatures that meet the requirements of an advanced

electronic signature under Article 26 of Regulation (EU) No. 910/2014 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. [Para. 5.136]

Chapter 6 – Expert Evidence

- 10.51** The Commission that the draft Evidence Bill should provide that an “expert” is a person who appears to the court to possess the appropriate qualifications, skills or experience about the matter to which the person’s evidence relates (whether the evidence is of fact or of opinion), and who may be called upon by the court to give independent and unbiased testimony on a matter outside the knowledge and experience of the court, and that the terms “expert evidence” and “expertise” should be interpreted accordingly. [Para. 6.41]
- 10.52** The Commission recommends that the draft Evidence Bill should provide that expertise based on experience should be considered sufficient to qualify a witness as an expert and as suitable to offer testimony on any matter of benefit to the court, regardless of how such a person has acquired this knowledge, be it through formal training or incidental study, provided that the evidence is reliable and testable. [Para. 6.55]
- 10.53** The Commission recommends that the draft Evidence Bill should provide that, when assessing the issue as to whether a witness is to be considered an expert, account is to be taken of the length of time the witness has spent studying or practising in the particular area as well as, in the case of a retired person or any person no longer studying or practising in that area, the length of time he or she has spent away from the particular area. [Para. 6.56]
- 10.54** The Commission recommends that, subject to the rules recommended in this Report concerning expert witness evidence, the draft Evidence Bill should not provide for any further test or tests concerning the evidence of an expert, including a report from an expert, obtained from outside the State. [Para. 6.94]

Chapter 7 – Admissibility of Expert Evidence

- 10.55 The Commission recommends that the draft Evidence Bill should not abolish the common knowledge rule, and that matters of common knowledge should remain outside of the range of matters on which expert evidence can be given. [Para. 7.71]
- 10.55** The Commission recommends that the draft Evidence Bill provide that the ultimate issue rule should be retained. [Para. 7.105]

- 10.56** The Commission also recommends that the draft Evidence Bill should provide that a court should continue to allow expert evidence to inform and educate the judge and, where relevant, the jury about the background to the ultimate issue where necessary, while also emphasising that the ultimate decision on such issues is for the court and not the expert. [Para. 7.106]
- 10.57** The Commission does not recommend the introduction of a threshold reliability test for the admission of expert evidence. [Para. 7.150]

Chapter 8 – Duties, Immunity and Procedural Aspects of Expert Evidence

- 10.58** The Commission recommends that the draft Evidence Bill should provide for certain key duties of the expert witness; the Commission further recommends that the Minister for Justice and Equality may publish codes of practice for expert witnesses, prepared by a representative group of persons with suitable knowledge of the relevant areas, and established by the Minister for this purpose; that expert witnesses would be required to comply with the contents of such a code of practice; and that any such code of practice shall, to the extent that it provides practical guidance for a court on an issue before the court, be admissible for that purpose. [Para. 8.69]
- 10.59** The Commission recommends that the draft Evidence Bill should provide that the expert has an overriding duty to the court to provide truthful, independent and impartial expert evidence, irrespective of any duty owed to the instructing party.[Para. 8.79]
- 10.60** The Commission recommends that the draft Evidence Bill should provide that the expert has 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 and all surrounding facts, including those which could detract from his or her evidence and, where relevant, his or her expressed opinion. [Para. 8.85]
- 10.61** The Commission recommends that the draft Evidence Bill should provide that the expert has a duty to confine his or her evidence (whether of fact or opinion) to matters within the scope of his or her expertise, to state clearly when a matter falls outside the scope of his or her expertise and to distinguish clearly between matters of fact and matters of opinion when giving his or her expert evidence, whether given orally or in the form of a written report. [Para. 8.89]
- 10.62** The Commission recommends that the draft Evidence Bill should provide that the expert has 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. [Para. 8.95]

- 10.63** The Commission recommends that the draft Evidence Bill should provide that a prior professional or clinical relationship should not necessarily prevent a person from acting as an expert witness. [Para. 8.136]
- 10.64** The Commission recommends that the draft Evidence Bill should provide that a trial judge may rule inadmissible the evidence of any expert witness who fails to comply with any of the duties set out in the draft Evidence Bill. [Para. 8.174]
- 10.65** The Commission recommends that, to the extent (if any) that the common law immunity of an expert witness from civil liability has survived, the draft Evidence Bill should provide that it is abolished and that it is replaced with civil liability of an expert witness limited to circumstances in which it is established that the expert has acted with gross negligence in giving his or her evidence, or in the preparation of an expert report in anticipation of civil or criminal proceedings, that is, falling far short of the standard of care expected of such an expert. [Para. 8.254]
- 10.66** The Commission recommends that the draft Evidence Bill provide that a solicitor instructing an expert witness who is not covered by indemnity insurance is under an obligation to make his or her client and the expert witness fully aware of the possible consequences of the failure to obtain such insurance. The Commission further recommends that a solicitor be required to sign a certificate to the effect that he or she has complied with this duty. [Para. 8.259]
- 10.67** The Commission commends the provision for comprehensive case management in civil cases in the *Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016* (S.I. No. 255 of 2016). [Para. 8.291]
- 10.68** The Commission commends the provision for pre-action protocols for clinical negligence claims in the Legal Services Regulation Act 2015, and the availability of pre-action protocols for other civil claims on application by one or both parties in the *Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016* (S.I. No. 255 of 2016) [Para. 8.306]

Chapter 9 – Consolidation of Evidence Legislation

- 10.69** The Commission recommends 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. [Para. 9.15]
- 10.70** The Commission recommends that the provision in the *Evidence Act 1843* on the ability of persons with a criminal conviction or an interest in the civil

proceedings to testify be consolidated into the draft Evidence Bill. The Commission also recommends 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.[Para. 9.17]

- 10.71** The Commission recommends 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 recommends that the 1845 Act then be repealed in its entirety.[Para. 9.19]
- 10.72** The Commission recommends that since the *Treasury Instruments (Signature) Act 1849* is obsolete and serves no continuing purpose it should therefore be repealed without replacement. [Para. 9.21]
- 10.73** The Commission recommends 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 also recommends that section 8 of the *Evidence Act 1851* be repealed without replacement (this concerns the admission of certificates of qualification of pharmacists). The Commission recommends 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.[Para. 9.26]
- 10.74** The Commission recommends 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 recommends that the draft Evidence Bill should include clear provisions regarding the competence and compellability of spouses in civil and criminal proceedings. The Commission further recommends that the *Evidence Amendment Act 1853* should then be repealed in its entirety.[Para. 9.28]
- 10.75** The Commission recommends 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 recommends that the 1868 Act then be repealed in its entirety.[Para. 9.31]
- 10.76** The Commission recommends 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.[Para. 9.33]
- 10.77** The Commission recommends that the provisions in the *County Boundaries, Ireland, Act 1872* on the evidential effects of maps should not be incorporated into the draft Evidence Bill because the 1872 Act forms part of a number of connected pieces of legislation that govern county and administrative

boundaries in the State and a review of this legislation falls outside the scope of this Report. [Para. 9.38]

- 10.78** The Commission recommends, having reviewed the approach taken in other jurisdictions, that the *Bankers' Books Evidence Act 1879* should be repealed and replaced by comparable and suitably updated provisions within the overall context of provisions dealing with business records generally. This includes a suitably updated replacement for section 7. [Para. 9.42]
- 10.79** The Commission recommends that the provisions in *the Documentary Evidence Act 1882* on proving certain public documents be consolidated into the draft Evidence Bill. The Commission also recommends that the 1882 Act then be repealed in its entirety.[Para. 9.44]
- 10.80** The Commission recommends that the provisions in the *Oaths Acts 1888 and 1909* concerning the taking of oaths and affirmations should be replaced by provisions in the draft Evidence Bill that a person may give sworn testimony on oath or affirmation without the need when testifying by affirmation to indicate religious belief. The Commission also recommends that the 1888 and 1909 Acts then be repealed in their entirety.[Para. 9.47]
- 10.81** The Commission recommends that the *Documentary Evidence Act 1895* should be repealed in its entirety as its provisions are obsolete.[Para. 9. 49]
- 10.82** The Commission recommends that the provisions in the *Evidence (Colonial Statutes) Act 1907* concerning the proof of certain Acts should be retained for the present but its continuing relevance may need to be considered separately.[Para. 9.51]
- 10.83** The Commission recommends 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 also recommends that the 1924 Act then be repealed in its entirety.[Para. 9.59]
- 10.84** The Commission recommends 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 also recommends that the 1925 Act then be repealed in its entirety.[Para. 9.61]
- 10.85** The Commission recommends that the provisions of the *Criminal Evidence Act 1992*, together with recommendations for reform in this Report, be consolidated into the draft Evidence Bill. The Commission also recommends that the 1992 Act then be repealed in its entirety. [Para. 9.66]
- 10.86** The Commission recommends that sections 15 to 19 of the *Criminal Justice Act 2006* concerning the admissibility of certain witness statements be consolidated into the draft Evidence Bill. The Commission also recommends that sections 15 to 19 of the 2006 Act then be repealed.[Para. 9.68]

10.87 The Commission recommends that the provisions relating to the modes of giving “prima facie evidence of a statute” and the admission of copies of certain specified 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. [Para. 9.70]

APPENDIX A

DRAFT EVIDENCE (CONSOLIDATION AND REFORM) BILL

DRAFT EVIDENCE (CONSOLIDATION AND REFORM) BILL 2016

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Children Act 1997 (No.40 of 1997)
Child Trafficking and Pornography Act 1998 (No.22 of 1998)
Civil Registration Act 2004 (No.3 of 2004)
Common Law Procedure Amendment Act (Ireland) 1856 (19 & 20 Vict, c.102)
Constitution (Consequential Provisions) Act 1937 (No.40 of 1937)
County Boundaries, Ireland, Act 1872 (35 & 36 Vict, c.48)
Criminal Evidence Act 1992 (No.12 of 1992)
Criminal Justice Act 1984 (No.22 of 1984)
Criminal Justice Act 1993 (No.6 of 1993)
Criminal Justice Act 2006 (No.26 of 2006)
Criminal Justice (Evidence) Act 1924 (No.37 of 1924)
Criminal Law Amendment Act 1885 (48 & 49 Vict, c.69)
Criminal Law Amendment Act 1935 (No.6 of 1935)
Criminal Law (Human Trafficking) Act 2008 (No.8 of 2008)
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Criminal Law (Sexual Offences) Act 1993 (No.20 of 1993)
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Evidence (Colonial Statutes) Act 1907 (7 Edw 7, c.16)
Evidence Further Amendment Act 1869 (32 & 33 Vict, c.68)
Extradition Acts 1965 to 2001
Family Law (Divorce) Act 1996 (No.33 of 1996)
Harbours Act 1946 (No.9 of 1946)
Immigration Act 2004 (No.1 of 2004)
Interpretation Act 2005 (No.23 of 2005)
Local Government Act 2001 (No.37 of 2001)
Ministers and Secretaries Act 1924 (No. 16 of 1924)
Oaths Acts 1888 (51 & 52 Vict, c.46)
Oaths Acts 1909 (9 Edw 7, c.39)
Punishment of Incest Act 1908 (8 Edw 7, c.45)
Qualifications and Quality Assurance (Education and Training) Act 2012 (No.28 of 2012)

Statute Law Revision Act 2007 (No.28 of 2007)
Statutory Declarations Act 1938 (No.37 of 1938)
Treasury Instruments (Signature) Act 1849 (12 & 13 Vict, c.89)
Witnesses Act 1806 (46 Geo 3, c. 37)

DRAFT
EVIDENCE (CONSOLIDATION AND REFORM) BILL 2016

BILL

entitled

An Act to consolidate and reform aspects of the law of evidence in civil and criminal proceedings, to provide for the consolidation of enactments that contain general provisions concerning the law of evidence, to provide for the repeal of enactments concerning the law of evidence that are obsolete or unnecessary, to provide for reform of the hearsay rule, reform of the law on documentary evidence and electronic evidence and reform of the law on expert evidence, and to provide for related matters.

Be it enacted by the Oireachtas as follows:

PART 1
Preliminary and General

Short title and commencement

1. (1) This Act may be cited as the Evidence (Consolidation and Reform) Act 2016.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory Note

Section 1 contains standard provisions on the Short Title of the Bill and commencement arrangements.

Definitions

[1992, No.12, s.2(1)]

2. In this Act —

“the Act of 1935” means the Criminal Law Amendment Act 1935;¹

¹ This definition is from section 2(1) of the *Criminal Evidence Act 1992*.

“court” means (a) a court established by law in accordance with the Constitution and (b) a court-martial;²

“criminal proceedings” includes proceedings before a court-martial and proceedings on appeal;³

“document” means anything in which information of any description is recorded, including any electronic document or document generated automatically and, without prejudice to the generality of this definition, includes—

(a) any thing on which there is writing,

(b) any map, plan, graph, drawing or photograph,

(c) any disc, tape, sound track, film, microfilm, negative or other device from which sounds, images or other data can be reproduced with or without the aid of some other equipment and

(d) any reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form;

“enactment” has the same meaning as in the Interpretation Act 2005;

“information” includes any representation of fact, whether in words or otherwise;⁴

“information in non-legible form” includes information on microfilm, microfiche, magnetic tape or disk;⁵

“Minister” means the Minister for Justice and Equality;

“sexual offence” means rape, an offence under section 3 of the Criminal Law (Sexual Offences) Act 1993, sexual assault (within the meaning of section 2 of the Criminal Law (Rape) (Amendment) Act 1990), aggravated sexual assault (within the meaning of section 3 of that Act), rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990 or an offence under—

(a) section 3 (as amended by section 8 of the Act of 1935) or 6 (as amended by section 9 of the Act of 1935) of the Criminal Law Amendment Act 1885,

² Section 2(1) of the *Criminal Evidence Act 1992* contains the following definition: “‘court’ includes a court-martial”.

³ This definition is from section 2(1) of the *Criminal Evidence Act 1992*.

⁴ This definition is from section 2(1) of the *Criminal Evidence Act 1992*.

⁵ This definition is from section 2(1) of the *Criminal Evidence Act 1992*.

(b) section 6 (inserted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007) of the Criminal Law (Sexual Offences) Act 1993;

(c) section 4 of the Criminal Law (Sexual Offences) Act 1993,

(d) section 1 (as amended by section 12 of the Criminal Justice Act 1993 and section 5 of the Criminal Law (Incest Proceedings) Act 1995) or 2 (as amended by section 12 of the Act of 1935) of the Punishment of Incest Act 1908,

(e) section 17 (as amended by section 11 of the Act of 1935) of the Children Act 1908,

(f) the Criminal Law (Sexual Offences) Act 2006;

(g) section 5 of the Criminal Law (Sexual Offences) Act 1993,

excluding an attempt to commit any such offence;⁶

“video recording” means any recording, on any medium, from which a moving image may by any means be produced and includes the accompanying soundtrack (if any), and cognate words shall be construed accordingly.⁷

Explanatory Note

Section 2 contains a number of definitions for the purposes of the Bill. Many of the definitions reflect those in section 2(1) of the *Criminal Evidence Act 1992*, as amended.

The definition of “document” in *section 2* is more detailed than the definition of “document” in section 2(1) of the 1992 Act; and it implements the recommendation in **paragraph 4.11** that “document” should be defined to mean anything in which information of any description is recorded, including any electronic document or document generated automatically; and that it should include the following non-exhaustive examples: (a) any thing on which there is writing, (b) any map, plan, graph, drawing or photograph, (c) any disc, tape, sound track, film, microfilm, negative or other device from which sounds, images or other data can be reproduced with or without the aid of some other equipment and (d) any reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.

⁶ This definition is from section 2(1) of the *Criminal Evidence Act 1992*, as amended.

⁷ This definition is from section 2(1) of the *Criminal Evidence Act 1992*.

Repeals

3. The enactments specified in column (1) of the Schedule are repealed to the extent specified in column (2) of the Schedule.

Explanatory Note

Section 3 implements the recommendation in **paragraph 7** of the Introduction to the Report that, together with the detailed recommendations in Chapter 9, this Bill should comprise a consolidation of the *Evidence Acts*, whether pre-1922 or post-1922, that remain relevant, together with reforms arising from the recommendations in the Report concerning hearsay, documentary and electronic evidence and expert evidence. In addition, the recommendations in Chapter 9 of the Report provide for the repeal without replacement of those provisions in the *Evidence Acts* that are obsolete. Arising from this combination of consolidation and reform, *section 3* and the *Schedule* to the Bill therefore allow for the consequential repeal in full of 18 Acts — 15 pre-1922 Acts and 3 post-1922 Acts— and for the repeal of 7 sections in 3 other post-1922 Acts.

PART 2

General Scope and Effect of Act

General scope: except where otherwise provided, Act applies to civil and criminal proceedings

[New]

4. Except where otherwise provided, the provisions of this Act apply to civil proceedings and to criminal proceedings.

Explanatory Note

Section 4 implements the recommendation in **paragraph 9** of the Introduction to the Report that, except where otherwise provided, this Bill applies to both civil proceedings and to criminal proceedings. In a number of instances, the Commission has recommended that the same rules apply in both civil and criminal proceedings, while in others different approaches are needed as between civil and criminal proceedings. Three examples of this differential approach are: (a) *section 5* of the Bill provides for a different approach in civil and criminal proceedings to the admissibility of relevant evidence on consent; (b) *section 48* of the Bill provides that the reforms recommended to the business records inclusionary exception should apply to both civil and criminal proceedings; and (c) *section 58(c)* of the Bill provides that the current inclusionary exception for dying declarations should continue to be limited to homicide offences only.

Relevant but otherwise inadmissible evidence may be admitted by court on consent in civil and criminal proceedings

[New]

5. (1) In civil proceedings, relevant evidence that would otherwise be inadmissible may be admitted in evidence by a court where the parties involved have consented to its admission.

(2) In criminal proceedings, relevant evidence that would otherwise be inadmissible may be admitted in evidence by a court where the parties involved have consented to its admission and where the court is satisfied that to do so would not prejudice the right of the accused to a trial in due course of law.

Explanatory Note

Section 5(1) implements the recommendation in **paragraph 1.21** that, in civil cases, relevant evidence that would otherwise be ruled inadmissible may be admitted in evidence by a court where the parties involved have consented to its admission.

Section 5(2) implements the recommendation in **paragraph 1.21** that, in criminal cases, relevant evidence that would otherwise be ruled inadmissible may be admitted where the parties involved have consented to its admission and where the court is satisfied that to do so would not prejudice the right of the accused to a trial in due course of law.

General effect of Act on common law and other enactments concerning evidence

[New]

6. (1) (a) Except where otherwise provided, the provisions of this Act shall not be interpreted as altering or affecting any general common law principle or rule concerning the admissibility of evidence.

(b) Without prejudice to the generality of *paragraph (a)*, except where otherwise provided the provisions of this Act shall not be interpreted as altering or affecting the general common law discretion of a court to exclude evidence on the grounds that its prejudicial effect outweighs its probative value.

(2) Except where otherwise provided, the provisions of this Act shall not be interpreted as altering or affecting any provision in any other enactment concerning the admissibility of evidence.

Explanatory Note

Section 6 reinforces the general recommendation in **paragraph 1.32** that although this Bill involves (a) significant reform of aspects of the law of evidence concerning hearsay, documentary, electronic and expert evidence, and (b) consolidation, with reforms, of existing *Evidence Acts* (both pre-1922 and post-1922), it nonetheless does not involve a complete statement or codification of the law of evidence. It is

therefore important to provide in *section 6* that, except where otherwise provided, the Bill does not alter or affect other principles or rules of evidence contained in common law or in legislation.

Section 6(1) therefore implements the recommendation in **paragraph 1.32** that the specific reforms recommended in the Report are not to be interpreted as altering or affecting any general common law principle or rule concerning the admissibility of evidence, including, without prejudice, the general common law discretion of a court to exclude evidence on the grounds that its prejudicial effect outweighs its probative value.

Similarly, *section 6(2)* implements the complementary recommendation in **paragraph 1.32** that the specific reforms recommended in the Report are not to be interpreted as altering or affecting any provision in any other enactment (defined in the *Interpretation Act 2005* as including an Act or a statutory instrument: see *section 2* of the Bill, above) concerning the admissibility of evidence.

Presumption of age and admissibility of documents generally [1992, No.12, s.2(2)-(3)]

7. (1) Without prejudice to *section 6*, where in any civil or criminal proceedings the age of a person at any time is material for the purposes of any provision of this Act, his or her age at that time shall for the purposes of that provision be deemed, unless the contrary is proved, to be or to have been that which appears to the court to be or to have been his or her age at that time.

(2) Without prejudice to *section 6*, nothing in this Act shall prejudice the admissibility in evidence in any civil or criminal proceedings of information contained in a document that is otherwise so admissible.

Explanatory Note

Section 7 complements *section 6* of the Bill because it contains some specific provisions that take account of the interaction between the reforms in the Bill and the general law of evidence. These are largely based on provisions in existing legislation.

Thus, *section 7(1)* largely replicates the presumption as to age in section 2(2) of the *Criminal Evidence Act 1992* but, bearing in mind that this Bill applies, in general, to civil and criminal proceedings, it has been extended to provide that the presumption as to age applies to both civil and criminal proceedings.

Similarly, *section 7(2)* largely replicates section 2(3) of the *Criminal Evidence Act 1992* but, bearing in mind that this Bill applies, in general, to civil and criminal proceedings, it has been extended to provide that nothing in this Bill shall

prejudice the admissibility in evidence in any civil or criminal proceedings of information contained in a document that is otherwise so admissible.

PART 3
Adducing Evidence

Chapter 1
Competence and Compellability of Witnesses: General⁸

Competent witnesses: general

[6 & 7 Vict, c.85, s.1; 14 & 15 Vict, c.99, s.2]

8. (1) In civil proceedings, any party, and any person with an interest in, the proceedings or in whose behalf any proceedings may be brought or defended, is a competent witness for such proceedings.

(2) In civil or criminal proceedings, a person shall not lack competence to be a witness merely on the basis that he or she has been convicted of an offence.

Explanatory Note

Section 8(1) implements the recommendations in **paragraphs 9.17 and 9.26** that the provisions in section 1 of the *Evidence Act 1843* as to the competence as a witness of persons with an interest in civil proceedings, and in section 2 of the *Evidence Act 1851* as to the competence of a party to civil proceedings or in whose behalf any civil proceedings may be brought or defended, should be consolidated into the Bill.

Section 8(2) implements the recommendation in **paragraph 9.17** that the provisions in section 1 of the *Evidence Act 1843*, that a criminal conviction does not preclude a person from giving evidence, should be consolidated into the Bill.

The Commission also recommended that the 1843 Act could then be repealed, as its other provisions are obsolete. The Commission also recommended that the other provisions in the 1851 Act that remain of relevance should also be consolidated into the Bill (see *sections 10 and 70* of the Bill), and that it could then be repealed.

Witness in civil proceedings not entitled to refuse to answer question that may establish existence of civil claim or debt

⁸

Part 3, Chapter 1, of the Bill (sections 8 to 10) largely replicates provisions in pre-1922 *Evidence Acts* concerning the competence of witnesses generally in civil and criminal proceedings. It therefore implements in part the recommendation in **paragraphs 9.17 and 9.26** that the provisions of those Acts that remain relevant and not obsolete should be consolidated into this Bill, together with any related reforms made in the Report. Part 3, Chapter 1 does not involve any reform, but is limited to incorporating amendments made since these Acts were enacted.

[46 Geo 3, c. 37]

9. A witness in civil proceedings shall not be entitled to refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to incriminate himself or herself or to expose him or her to penalty or forfeiture of any nature, by reason only that the answering of such a question may establish, or tend to establish, that he or she is subject to a civil claim at the instance of any other person (including the State) or that the witness owes a debt.

Explanatory Note

Section 9 implements the recommendation in **paragraph 9.15** that the sole provision of the *Witnesses Act 1806*, that a witness in civil proceedings cannot refuse to answer a question that may establish the existence of a civil claim or a debt (and which does not involve any tendency to incriminate himself or herself), should be consolidated into the Bill, subject to updating. The Commission also recommended that the 1806 Act could then be repealed.

**Person charged with offence not competent or compellable to incriminate self
[14 & 15 Vict, c.99, s.3 (part)]**

10. Nothing in this Act shall render any person who is charged with the commission of any offence competent or compellable to answer any question in any criminal proceedings tending to incriminate himself or herself.

Explanatory Note

Section 10 implements the recommendation in **paragraph 9.26** that the element of section 3 of the *Evidence Act 1851* that prohibits an accused in a criminal trial from incriminating himself or herself (and which complements the reference to incrimination in *section 9* of the Bill, above) should be consolidated into the Bill, and that the remainder of section 3 of the 1851 Act should be repealed without replacement.

Chapter 2

Competence of Witnesses in Criminal Proceedings⁹

Competence of witnesses in criminal cases: in general and when bad character evidence may be adduced

[1924, No.37, s.1]

11. (1) Subject to *subsection (2)*, every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

⁹

Part 3, Chapter 2, of the Bill (sections 11 to 14) largely replicates provisions in the *Criminal Justice (Evidence) Act 1924*, as amended, concerning the competence of witnesses in criminal proceedings. It therefore implements the recommendation in **paragraph 9.59** that the provisions of the 1924 Act should be consolidated into this Bill. Part 3, Chapter 2 does not involve any reform, but is limited to incorporating amendments made since the 1924 Act was enacted.

(2) *Subsection (1)* is subject to the following—

(a) a person so charged shall not be called as a witness in pursuance of this Chapter except upon his or her own application;

(b) the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(c) a person charged and being a witness in pursuance of this Chapter may be asked any question in cross-examination notwithstanding that it would tend to incriminate him or her as to the offence charged;

(d) a person charged and called as a witness in pursuance of this Chapter shall not be asked, and if asked shall not be required to answer, any question tending to show that he or she has committed or been convicted of or been charged with any offence other than that with which he or she is then charged, or is of bad character, unless—

(i) the proof that he or she has committed or been convicted of such other offence is admissible evidence to show that he or she is guilty of the offence with which he or she is then charged; or

(ii) he or she has personally or by his or her advocate asked questions of any witness, with a view to establish his or her own good character, or has given evidence of his or her good character, or the nature or conduct of the defence is such as to involve imputations on the character of the person in respect of whom the offence was alleged to have been committed, or the witnesses for the prosecution; or

(iii) he or she has given evidence against any other person charged with the same offence; or

(iv) the person has personally or by the person'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 a person in respect of whom the offence was alleged to have been committed and who is deceased or is so incapacitated as to be unable to give evidence;

(e) every person called as a witness in pursuance of this Chapter shall, unless otherwise ordered by the court, give his or her evidence from the witness box or other place from which the other witnesses give their evidence.

Evidence of character

[1924, No.37, s.1A]

12. Where a person charged with an offence intends to adduce evidence, personally or by the person's advocate, of a witness, including the person, that would involve imputations on the character of a prosecution witness or a person in respect of whom the offence is alleged to have been committed and who is either deceased or so incapacitated as to be unable to give evidence, or evidence of the good character of the person—

(a) the person may do so only if he or she—

(i) has given, either personally or by his or her advocate, at least 7 days' notice to the prosecution of that intention, or

(ii) has applied to the court, citing the reasons why it is not possible to give the notice, and been granted leave to do so,

and

(b) notwithstanding *section 11(2)(d)*, the person may be called as a witness and be asked, and the prosecution may ask any other witness, questions that—

(i) would show that the person has been convicted of any offence other than the one with which he or she is then charged, or is of bad character, or

(ii) would show that the person in respect of whom the offence was alleged to have been committed is of good character.

Evidence of person charged

[1924, No.37, s.3]

13. Where the only witness to the facts of the case called by the defence is the person charged, he or she shall be called as a witness immediately after the close of the evidence for the prosecution.

Calling of spouse in certain cases

[1924, No.37, s.4]

14. Nothing in this Chapter shall affect a case where the spouse of a person charged with an offence may at common law or pursuant to an enactment (including this Act) be called as a witness without the consent of that person.

Chapter 3
Competence and Compellability of Spouse and Former Spouse as Witness in Civil Proceedings¹⁰

Definitions for Part 3, Chapter 3

[1992, No.12, s.20]

15. In this Chapter—

“decree of divorce” means a decree under section 5 of the Family Law (Divorce) Act 1996 or any decree that was granted under the law of a country or jurisdiction other than the State and is recognised in the State;

“decree of judicial separation” includes a decree of divorce *a mensa et thoro* or any decree made by a court outside the State and recognised in the State as having the like effect;

“former spouse” includes a person who, in respect of his or her marriage to an accused—

(a) has been granted a decree of judicial separation, or

(b) has entered into a separation agreement, or

(c) has been granted a decree of divorce;

“separation agreement” means an agreement in writing which provides for the spouses concerned living separately and apart from each other.

Competence and compellability of spouse and former spouse to give evidence in civil proceedings

[16 & 17 Vict, c.83, s.1]

16. In any civil proceedings, the spouse or a former spouse of any party to the proceedings shall be competent and compellable to give evidence at the instance of any other party to the proceedings.

Right to marital privacy not affected

¹⁰

Section 16 of the Bill implements the recommendation in **paragraph 9.28** that section 1 of the *Evidence Amendment Act 1853*, which provides that spouses and former spouses of parties to civil proceedings are competent and compellable to give evidence at the instance of any other party to the proceedings, should be consolidated into this Bill, subject to suitable updating. Sections 15 and 17 (the other 2 sections in Part 3, Chapter 3 of the Bill) contain, respectively, definitions and a saver for the right to family privacy, which replicate *sections 20 and 26* of the *Criminal Evidence Act 1992* (see now *sections 18 and 24* of this Bill).

[1992, No.12, s.20]

17. Nothing in this Chapter shall affect any right of a spouse or former spouse in respect of marital privacy.

Chapter 4
Competence and Compellability of Spouse and Former Spouse as Witness in
Criminal Cases¹¹

Definitions for Part 3, Chapter 4

[1992, No.12, s.20]

18. In this Chapter—

“decree of divorce” means a decree under section 5 of the Family Law (Divorce) Act 1996 or any decree that was granted under the law of a country or jurisdiction other than the State and is recognised in the State;

“decree of judicial separation” includes a decree of divorce *a mensa et thoro* or any decree made by a court outside the State and recognised in the State as having the like effect;

“former spouse” includes a person who, in respect of his or her marriage to an accused—

- (a) has been granted a decree of judicial separation, or
- (b) has entered into a separation agreement, or
- (c) has been granted a decree of divorce;

“separation agreement” means an agreement in writing which provides for the spouses concerned living separately and apart from each other.

Competence of spouse and former spouse to give evidence in criminal proceedings

[1992, No.12, s.21]

19. In any criminal proceedings the spouse or a former spouse of an accused shall be competent to give evidence at the instance—

¹¹

Part 3, Chapter 4, of the Bill (sections 18 to 24) largely replicates Part 4 (sections 20 to 26) of the *Criminal Evidence Act 1992*. It therefore implements in part the recommendation in **paragraph 9.66** that the provisions of the 1992 Act should be consolidated into this Bill, together with any related reforms made in the Report. It does not involve any reform, but is limited to incorporating amendments made since it was enacted.

- (a) subject to *section 23*, of the prosecution, and
- (b) of the accused or any person charged with him or her in the same proceedings.

Compellability of spouse and former spouse to give evidence at instance of prosecution

[1992, No.12, s.22]

20. (1) In any criminal proceedings the spouse of an accused shall, subject to *section 23*, be compellable to give evidence at the instance of the prosecution only in the case of an offence which—
- (a) involves violence, or the threat of violence, to—
 - (i) the spouse,
 - (ii) a child of the spouse or of the accused, or
 - (iii) any person who was at the material time under the age of 18 years,
 - (b) is a sexual offence alleged to have been committed in relation to a person referred to in subparagraph (ii) or (iii) of paragraph (a), or
 - (c) consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b).
- (2) In any criminal proceedings a former spouse of an accused shall, subject to *section 23*, be compellable to give evidence at the instance of the prosecution unless—
- (a) 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
 - (b) it is not an offence mentioned in subsection (1).
- (3) The reference in subsection (1) to a child of the spouse or the accused shall include a reference to—
- (a) a child who has been adopted by the spouse or the accused under the Adoption Acts 1952 to 1991, or under the Adoption Act 2010, or, in the case of a child whose adoption by the spouse or the accused has been

effected outside the State, whose adoption is recognised in the State by virtue of those Acts or any of them, and

(b) a person in relation to whom the spouse or the accused is *in loco parentis*.

Compellability of spouse and former spouse to give evidence at instance of accused

[1992, No.12, s.23]

21. Subject to *section 23*, in any criminal proceedings the spouse or a former spouse of an accused shall be compellable to give evidence at the instance of the accused.

Compellability of spouse and former spouse to give evidence at instance of co-accused

[1992, No.12, s.24]

22. (1) Subject to *section 23*, in any criminal proceedings—

(a) the spouse of an accused shall be compellable to give evidence at the instance of any person charged with the accused in the same proceedings only in the case of an offence mentioned in *section 20(1)*,

(b) a former spouse of an accused shall be compellable to give evidence at the instance of any person charged with the accused in the same proceedings unless—

(i) 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

(ii) it is not an offence mentioned in *section 20(1)*.

(2) Subsection (1) is without prejudice to the power of a court to order separate trials of persons charged in the same proceedings if it appears to it to be desirable in the interests of justice to do so.

Saver where spouses or former spouses are charged in same criminal proceedings

[1992, No.12, s.25]

23. Where persons (being either spouses of each other or persons who were formerly spouses of each other) are charged in the same proceedings, neither shall at the trial be competent by virtue of *section 19(a)* to give evidence at the instance of the prosecution, or be compellable by virtue of *section 20, 21 or 22* 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 or for any other reason.

Right to marital privacy not affected

[1992, No.12, s.26]

24. Nothing in this Chapter shall affect any right of a spouse or former spouse in respect of marital privacy.

Chapter 5
Oaths and Affirmations¹²

Oath and affirmation have same effect in law

[New, in part; 51 & 52 Vict, c.46, s.2, in part]

25. (1) Where, immediately prior to the coming into force of this section, a person is required to take an oath in civil or criminal proceedings, that person may instead either take an oath or make an affirmation in the form and manner prescribed for an oath in *section 26* or for an affirmation in *section 27*.

(2) An oath or affirmation made in the form and manner prescribed in *section 26* or *section 27* shall have the same force and effect in law, and if any person making such an oath or affirmation shall knowingly, intentionally or recklessly swear or affirm any matter or thing which, if deposed on oath immediately prior to the coming into force of this section would have amounted to perjury, he or she shall be liable to prosecution in all respects as if he or she had committed perjury.

Manner of administration of oath

[9 Edw 7, c.39, s.2]

26. (1) Any oath may be administered and taken in the following form and manner—

The person taking the oath shall hold a religious text suitable to that person in his or her uplifted hand, and shall say or repeat after the officer administering the oath (which includes any and every person duly authorised to administer oaths or affirmations) the words “I, A.B., swear

¹²

Part 3, Chapter 5, of the Bill (sections 25 to 30) implements the recommendation in **paragraph 9.47** that the provisions of the *Oaths Acts 1888 and 1909* should be consolidated into this Bill, subject to the repeal of the requirement in the 1888 and 1909 Acts that a person swearing by affirmation must disclose that he or she does not profess a religious belief. Sections 29 and 30 of the Bill largely mirror sections 27 and 28 of the *Criminal Evidence Act 1992* concerning evidence by a person under the age of 18, and by any relevant person within the meaning of the *Assisted Decision-Making (Capacity) Act 2015*. Bearing in mind that this Bill applies, in general, to civil and criminal proceedings, sections 27 and 28 of the 1992 Act have been extended, where relevant, to both civil and criminal proceedings.

that the evidence I shall give shall be the truth, the whole truth and nothing but the truth. I am aware that if I knowingly give false evidence I may be prosecuted for perjury.”

(2) The officer shall (unless the person about to take the oath voluntarily objects to this, or is physically incapable of so taking the oath) administer the oath in the form and manner set out in subsection (1) without question.

Manner of administration of affirmation

[51 & 52 Vict, c.46, s.2]

27. (1) Any affirmation may be administered and made in the following form and manner—

The person making the affirmation shall say or repeat after the officer administering the affirmation (which includes any and every person duly authorised to administer oaths or affirmations) the words “I, A.B., do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth. I am aware that if I knowingly give false evidence I may be prosecuted for perjury.”

(2) The officer shall (unless the person about to make the affirmation voluntarily objects to this, or is physically incapable of so making the affirmation) administer the affirmation in the form and manner set out in subsection (1) without question.

Form of affirmation in writing

[51 & 52 Vict, c.46, s.4]

28. Every affirmation in writing shall commence “I, _____, of _____, do solemnly and sincerely affirm,” and the form in place of the jurat shall be “Affirmed at _____, this _____ day of _____, 20____. Before me.”

Oath or affirmation not necessary for person under 14 or other relevant person

[1992, No.12, s.27]

29. (1) Notwithstanding any enactment, in any civil or criminal proceedings the evidence of a person under 14 years of age, or of a relevant person within the meaning of the Assisted Decision-Making (Capacity) Act 2015, may be received otherwise than on oath or affirmation if the court is satisfied that he or she is capable of giving an intelligible account of events which are relevant to those proceedings.

(2) If any person whose evidence is received as aforesaid makes a statement material in the proceedings concerned which he or she knows to be false or does

not believe to be true, he or she shall be guilty of an offence and on conviction shall be liable to be dealt with as if he or she had been guilty of perjury.

Abolition of requirement of corroboration for unsworn evidence of child in criminal proceedings

[1992, No.12, s.28]

30. (1)(a) Any requirement that at a trial on indictment the jury be given a warning by the judge about convicting the accused on the uncorroborated evidence of a child is hereby abolished in relation to cases where such a warning is required by reason only that the evidence is the evidence of a child and it shall be for the judge to decide, in his or her discretion, having regard to all the evidence given, whether the jury should be given the warning.

(b) If a judge decides, in his or her discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of words to do so.

(2) In criminal proceedings, unsworn evidence received by virtue of *section 29* may corroborate evidence (sworn or unsworn) given by any other person.

Explanatory Note

Section 30 reflects section 28(2) and (3) of the *Criminal Evidence Act 1992*. Section 30(1) of the 1992 Act, which abolished the requirement in section 30 of the *Children Act 1908* of corroboration of unsworn evidence of a child given under that section, is not reproduced. This is because the 1908 Act was repealed in its entirety by the *Children Act 2001*. In addition, section 255(4) and (5) of the 2001 Act mirror section 27 of the 1992 Act, which is consolidated in section 29 of the Bill.

Chapter 6
Admissibility of Certain Witness Statements¹³

Definitions for Part 3, Chapter 6

[2006, No.26, s.15]

31. In this Chapter—

¹³

Part 3, Chapter 6, of the Bill (sections 31 to 40) implements the recommendations in **paragraphs 3.68, 3.69 and 3.70** that the following should be consolidated into this Bill: (a) sections 3 to 6 of the *Criminal Procedure Act 1865* (which, despite its Short Title, applies to civil and criminal proceedings) (see *sections 32-35* of the Bill); (b) the related sections 15 to 19 of the *Criminal Justice Act 2006* (which apply to criminal proceedings tried on indictment only) (see *section 31* and *sections 37-40* of the Bill); and (c) new provisions, for civil proceedings, comparable to those in section 16 of the 2006 Act (see *section 36* of the Bill).

“audio-recording” includes a recording, on any medium, from which sound may by any means be produced, and cognate words shall be construed accordingly;

“criminal proceedings” includes proceedings under section 4E (application by accused for dismissal of charge) of the Criminal Procedure Act 1967 where oral evidence (within the meaning of subsection (5) of that section) is given;

“statement ” means a statement the making of which is duly proved and includes—

- (a) any representation of fact, whether in words or otherwise,
- (b) a statement which has been video-recorded or audio-recorded, and
- (c) part of a statement;

“statutory declaration” includes a statutory declaration made under *section 33 or 34*;

“video-recording” includes a recording, on any medium, from which a moving image may by any means be produced, together with the accompanying sound-recording, and cognate words shall be construed accordingly.

Party’s own witness may not be discredited by bad character evidence in civil or criminal proceedings, except where proved to be adverse witness

[28 & 29 Vict, c.18, s.3]

32. (1) Subject to subsection (2), a party producing a witness in civil or criminal proceedings shall not be allowed to impeach his or her credit by general evidence of bad character.

(2) (a) Where a witness shall, in the opinion of the court, prove adverse to the party producing the witness, that party may contradict him or her by other evidence, or, by leave of the court, prove that he or she has made at other times a statement inconsistent with his or her present testimony.

(b) Before such previous inconsistent statement of the adverse witness can be given in proof, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he or she must be asked whether or not he or she has made such statement.

Proof of contradictory statements of adverse witness in civil or criminal proceedings

[28 & 29 Vict, c.18, s.4, in part; new, in part]

33. (1) If a witness, upon cross-examination as to a former statement made by him or her relative to the subject matter of the civil or criminal proceedings in question, and inconsistent with his or her present testimony, does not distinctly admit that he or she has made such statement, proof may be given that he or she did in fact make it.

(2) Before such previous inconsistent statement of the adverse witness can be given in proof, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he or she must be asked whether or not he or she has made such statement.

Cross-examinations as to previous statements in writing in civil or criminal proceedings

[28 & 29 Vict, c.18, s.5]

34. (1) A witness may be cross-examined as to previous statements made by him or her in writing, or reduced to writing, relative to the subject matter of the civil or criminal proceedings in question, without such writing being shown to him or her, but if it is intended to contradict such witness by the writing, his or attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him or her.

(2) Without prejudice to subsection (1), it shall be competent for the court, at any time during civil or criminal trial proceedings, to require the production of the writing for the inspection of the court, and the court may then make such use of it for the purposes of the trial as the court may think fit.

Comparison of disputed writing with writing proved to be genuine: civil and criminal proceedings

[28 & 29 Vict, c.18, s.8]

35. (1) A witness in civil or criminal proceedings may be permitted to make a comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine.

(2) Such writings, and the evidence of witnesses respecting such writings, may be submitted to the court as evidence of the genuineness or otherwise of the writing in dispute.

Admissibility of certain witness statements in civil proceedings: supplemental

[New, based on 2006, No.26, s.16]

36. (1) Without prejudice to *sections 32 to 34*, in civil proceedings a statement relevant to the proceedings made by a witness (in this section referred to as “the statement”) may, with the leave of the court, be admitted in accordance with this

section as evidence of any fact mentioned in it if the witness, although available for cross-examination—

- (a) refuses to give evidence,
- (b) denies making the statement, or
- (c) gives evidence which is materially inconsistent with it.

(2) The statement may be so admitted if—

- (a) the witness confirms, or it is proved, that he or she made it,
- (b) the court is satisfied—
 - (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,
 - (ii) that it was made voluntarily, and
 - (iii) that it is reliable,

and

(c) either—

(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or

(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

(3) In deciding whether the statement is reliable the court shall have regard to—

- (a) whether it was given on oath or affirmation or was video-recorded, or
- (b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,

and shall also have regard to—

(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or

(ii) where the witness denies making the statement, any evidence given in relation to the denial.

(4) The statement shall not be admitted in evidence under this section if the court is of opinion—

(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the other party to the proceedings or, if there are more than one other party, to any of them, that in the interests of justice it ought not to be so admitted, or

(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.

(5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

Admissibility of certain witness statements in trial on indictment for arrestable offence

[2006, No.26, s.16]

37. (1) Without prejudice to *sections 32 to 34* and section 21 (proof by written statement) of the Criminal Justice Act 1984, where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as “the statement”) may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—

(a) refuses to give evidence,

(b) denies making the statement, or

(c) gives evidence which is materially inconsistent with it.

(2) The statement may be so admitted if—

(a) the witness confirms, or it is proved, that he or she made it,

(b) the court is satisfied—

(i) that direct oral evidence of the fact concerned would be admissible in the proceedings,

(ii) that it was made voluntarily, and

(iii) that it is reliable,

and

(c) either—

(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or

(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

(3) In deciding whether the statement is reliable the court shall have regard to—

(a) whether it was given on oath or affirmation or was video-recorded, or

(b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,

and shall also have regard to—

(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or

(ii) where the witness denies making the statement, any evidence given in relation to the denial.

(4) The statement shall not be admitted in evidence under this section if the court is of opinion—

(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or

(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.

(5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

Witness statements made to members of Garda Síochána in connection with arrestable offence

[2006, No.26, s.17]

38. (1) A person who makes a statement to a member of the Garda Síochána during the investigation of an arrestable offence (not being a person who is at that time suspected by any such member of having committed it) may make a statutory declaration that the statement is true to the best of the person's knowledge and belief.

(2) For the purposes of section 1(1)(d) of the Statutory Declarations Act 1938 a member of the Garda Síochána may take and receive a statutory declaration made under subsection (1).

(3) Instead of taking and receiving such a statutory declaration the member may take the person's statement on oath or affirmation and for that purpose may administer the oath or affirmation to him or her.

Other witness statements made to person in course of performance of person's official duties

[2006, No.26, s.18]

39. (1) In this section—

“competent person” means a person employed by a public authority and includes an immigration officer who is deemed to have been appointed as such an officer under section 3 of the Immigration Act 2004;

“public authority” means—

- (a) a Minister of the Government,
- (b) the Commissioners of Public Works in Ireland,
- (c) a local authority within the meaning of the Local Government Act 2001,
- (d) the Health Service Executive,
- (e) a harbour authority within the meaning of the Harbours Act 1946,
- (f) a board or other body (not being a company) established by or under statute,
- (g) a company in which all the shares are held by, or on behalf of, or by directors appointed by, a Minister of the Government, or

(h) a company in which all the shares are held by a board or other body referred to in paragraph (f), or by a company referred to in paragraph (g).

(2) A person who makes a statement to a competent person in the course of the performance of the competent person's official duties may make a statutory declaration that the statement is true to the best of the person's knowledge and belief.

(3) For the purposes of section 1(1)(d) of the Statutory Declarations Act 1938 a competent person may take and receive a statutory declaration made under subsection (2).

Regulations concerning certain witness statements which are recorded
[2006, No.26, s.19]

40. (1) The Minister may, in relation to any statements of witnesses that may be video-recorded or audio-recorded by members of the Garda Síochána while investigating offences, make provision in regulations for—

(a) the manner in which any such recordings are to be made and preserved, and

(b) the period for which they are to be retained.

(2) Any failure by a member of the Garda Síochána to comply with a provision of the regulations shall not of itself—

(a) render the member liable to civil or criminal proceedings, or

(b) without prejudice to the power of a court to exclude evidence at its discretion, render inadmissible in evidence anything said during the recording concerned.

Chapter 7

Summing Up of Evidence and Order of Speeches in Civil and Criminal Proceedings¹⁴

Summing up of evidence in civil and criminal proceedings

¹⁴ Part 3, Chapter 7 (sections 41 and 42) does not involve any reform. Section 41 consolidates section 21 of the *Common Law Procedure Amendment Act (Ireland) 1856* and section 2 of the *Criminal Procedure Act 1865* (the only section in the 1865 Act that applies to criminal proceedings only) into the Bill. Section 42 of the Bill is derived from section 214 of the *draft Courts (Consolidation and Reform) Bill* in Appendix A to the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010), which in turn was derived from a combination of section 21 of the 1856 Act and section 24 of the *Criminal Justice Act 1984*. It is included here, because of the overlap with the provisions in *section 41* of the Bill, for the sake of completeness.

[19 & 20 Vict, c.102, s.21; 28 & 29 Vict, c.18, s.2]

41. (1) In civil proceedings—

(a) if at the close of the case for the plaintiff none of the other parties announces his or her intention to adduce evidence, the plaintiff shall be allowed to address the court (or, as the case maybe, the jury) a second time for the purpose of summing up the evidence in support of his or her case; and

(b) any other party shall be allowed to open his or her case, and also to sum up the evidence (if any).

(2) In criminal proceedings, where an accused is defended by a legal representative, the trial judge shall, at the close of the case for the prosecution, ask the legal representative for each accused whether he or she or they intend to adduce evidence.

(3) In criminal proceedings tried with a jury where none of the legal representatives for the accused announces his or her intention to adduce evidence, the prosecution shall be allowed to address the jury a second time in support of its case, for the purpose of summing up the evidence against such accused.

(4) (a) In every criminal trial, whether the accused is or are defended by a legal representative or not, each accused, or his or her or their legal representative respectively, shall be allowed, if the legal representative so thinks fit, to open his or her or their case or cases respectively.

(b) After the conclusion of such opening or of all such openings, if more than one, such accused, or their legal representative, shall be entitled to examine such witnesses as he or she or they may think fit, and when all the evidence is concluded to sum up the evidence respectively.

(5) The right of reply, and practice and course of proceedings, except as altered in this section, shall be as was the case immediately prior to the coming into force of this section.

Order of speeches in civil and criminal proceedings

[19 & 20 Vict, c.102, s.21; 1984, No.22, s.24]

42. (1) Notwithstanding any rule of law or practice, and notwithstanding anything contained in *section 41*, in criminal proceedings tried with a jury, the prosecution has the right to make an opening speech to the jury.

(2) Where, at the close of the prosecution case, on inquiry by the court, the accused (or his or her legal representative) indicates that he or she intends to

adduce evidence of fact (other than the evidence of the accused or evidence of any witness as to character), the accused has the right to make an opening speech to the jury.

(3) The prosecution has the right to make a closing speech to the jury in all cases, except where the accused is not represented by a legal representative and does not call any witness (other than a witness to character only).

(4) The accused has the right to make a closing speech to the jury in all cases.

(5) The closing speech for the accused shall in every case be made after that for the prosecution.

(6) In civil proceedings, whether tried with or without a jury, the plaintiff has, subject to this section, the same rights as has the prosecutor in criminal proceedings to make an opening speech and a closing speech to the court (or, as the case may be, to the jury), and any other party has, subject to this section, the same rights as has the accused in criminal proceedings to make an opening speech and a closing speech to the court (or, as the case may be, to the jury).

(7) Where two or more parties (other than the plaintiff) in civil proceedings are represented by the same legal representative, that legal representative may make only one closing speech.

(8) The court in any civil proceedings may dispense with any opening or closing speech which, in the circumstances of the case, the court considers unnecessary.

Chapter 8

Proof of and evidential effect of conviction in civil and criminal proceedings

Proof of conviction of witness may be given in civil or criminal proceedings

[28 & 29 Vict, c.18, s.6]

43. (1) In civil or criminal proceedings, a witness may be questioned as to whether he or she has been convicted of any offence, and upon being questioned, if he or she either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.

(2) A certificate containing the substance and effect of the indictment, where relevant, and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the convicted person, or by the deputy of such clerk or officer shall, upon proof of the identity of the person, be sufficient evidence of the conviction,

without proof of the signature or official character of the person appearing to have signed the certificate.

Explanatory Note

Section 43 implements, in part, the recommendation in **paragraph 3.70** that section 8 of the *Criminal Procedure Act 1865* (which, despite its Short Title, applies to civil and criminal proceedings) should be consolidated into the Bill. For section 2 of the 1865 Act, see now *section 41* (in part) of the Bill; and for sections 3 to 6 of the 1865 Act, see now *sections 32 to 35* of the Bill.

Evidential effect of conviction in civil proceedings

[New]

44. Evidence of the criminal conviction by a court of a person (including a certificate obtained under *section 43*) shall be admissible in any subsequent civil proceedings, where it is relevant to any issue in such proceedings, as evidence that the person committed the offence, unless the contrary is proved.

Explanatory Note

Section 44 implements the recommendation in **paragraph 3.106** that evidence of the criminal conviction of a person shall be admissible in any subsequent civil proceedings, where it is relevant to any issue in such proceedings, as evidence that the person committed the offence, unless the contrary is proved.

PART 4
Hearsay Evidence

Chapter 1
General

Definitions: hearsay and business

[New, in part; 1992, No.12, s.4]

45. In this Act —

“hearsay” means any statement, whether made verbally, by conduct, or contained in a document, which is made out of court by a person who is not called as a witness and is presented in court as testimony to prove the truth of the fact or facts asserted;

“business” includes any trade, profession or other occupation carried on, whether for profit or otherwise, either within or outside the State and includes also the performance of functions by or on behalf of—

- (a) any person or body remunerated or financed wholly or partly out of moneys provided by the Oireachtas,
- (b) a charity within the meaning of the Charities Act 2009,
- (c) any institution of the European Union,
- (d) any national or local authority in a jurisdiction outside the State, or
- (e) any international organisation.

Explanatory Note

The definition of “hearsay” in *section 45* implements the recommendation in **paragraph 2.32** that hearsay should be defined as any statement, whether made verbally, by conduct, or contained in a document, which is made out of court by a person who is not called as a witness and is presented in court as testimony to prove the truth of the fact or facts asserted.

The definition of “business” in *section 45* implements the recommendation in **paragraph 2.179** that the term should include those business records referred to in section 4 of the *Criminal Evidence Act 1992*, namely records kept by any trade, profession or other occupation carried on, for reward or otherwise, and that the term should also encompass records kept by a charitable organisation as defined in the *Charities Act 2009*.

Hearsay evidence not admissible in civil or criminal proceedings, except where otherwise provided

[New]

46. Hearsay evidence shall not be admissible in civil or criminal proceedings, except where otherwise provided by virtue of any rule of law or by virtue of any enactment (including this Act).

Explanatory Note

Section 46 implements the recommendation in **paragraph 2.125** that, having regard to the risks associated with hearsay evidence and arising from the constitutional right to fair procedures, there should not be a general inclusionary approach to hearsay in civil or criminal proceedings.

Implied assertions

[New]

47. Implied assertions shall be admissible in evidence, except where it can reasonably be supposed that the purpose of making the statement was to cause another person to believe the matter implied.

Explanatory Note

Section 47 implements the recommendation in **paragraph 2.48** that implied assertions shall be admissible in evidence, except where it can reasonably be supposed that the purpose of making the statement was to cause another person to believe the matter implied.

Chapter 2
Business Records¹⁵

Business records in document form presumed to be admissible

[new]

48. Notwithstanding *section 46* and subject to this Part, in civil and criminal proceedings any record in document form compiled in the ordinary course of business shall be presumed to be admissible as evidence of the truth of the fact or facts asserted in such a document where such a document complies with the requirements of this Chapter.

Explanatory Note

Section 48 implements the recommendations in **paragraphs 2.143 and 2.179** that records compiled in the ordinary course of business shall be presumed to be admissible in evidence in civil and criminal proceedings as an inclusionary exception to the hearsay rule, subject to the specific safeguards contained in other recommendations in the Report on business records. One of the consequential effects of this presumptive rule of admissibility for business records is the Commission's recommendation in **paragraph 2.185** that section 6 of the *Criminal Evidence Act 1992*, which provides for certificates concerning business records, would therefore be redundant and should be repealed without replacement (and that no equivalent provision should apply to civil proceedings, bearing in mind the Commission's recommendation that the inclusionary approach to business records in the 1992 Act should be extended to civil proceedings).

Admissibility of business records: general

[1992, No.12, s.5, in part; new, in part]

49. (1) Subject to this Chapter, information contained in a document shall be admissible in any civil or criminal proceedings as evidence of any fact in the document of which direct oral evidence would be admissible if the information—

¹⁵ Part 4, Chapter 2 of the Bill (sections 48 to 56) is, broadly, based on Part 2 (sections 4 to 11) of the *Criminal Evidence Act 1992*, which deals with the inclusionary exception to the hearsay rule for business records; but it also implements the general recommendation in **paragraph 2.143** of the Report that Part 2 of the 1992 Act should be extended to civil proceedings, and the recommendation in **paragraph 2.179** that such business records should be presumed to be admissible: see *section 48*.

(a) was compiled in the ordinary course of a business and

(b) was supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Subsection (1) shall apply whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he or she is identifiable) through whom it was supplied received it in the ordinary course of a business.

(3) Subsection (1) shall not apply to—

(a) information that is privileged from disclosure in civil proceedings or, as the case may be, criminal proceedings,

(b) subject to subsection (7), information supplied by a person who would not be compellable to give evidence at the instance of the party wishing to give the information in evidence by virtue of this section, or

(c) subject to subsection (4), information compiled for the purposes or in contemplation of any—

(i) criminal investigation,

(ii) investigation or inquiry carried out pursuant to or under any enactment,

(iii) civil or criminal proceedings (subject to *section 66*), or

(iv) proceedings of a disciplinary nature.

(4) Subsection (3)(c) shall not apply where—

(a) (i) the information contained in the document was compiled in the presence of a judge of the District Court and supplied on oath by a person in respect of whom an offence was alleged to have been committed and who is ordinarily resident outside the State,

(ii) either section 4F (which deals with the taking of a deposition in the presence of such a judge and the accused) of the Criminal Procedure Act 1967 could not be invoked or it was not practicable to do so, and

(iii) the person in respect of whom the offence was alleged to have been committed either has died or is outside the State and it is not

reasonably practicable to secure his or her attendance at the criminal proceedings concerned,

or

(b) the document containing the information is—

(i) a map, plan, drawing or photograph (including any explanatory material in or accompanying the document concerned),

(ii) a record of a direction given by a member of the Garda Síochána pursuant to any enactment,

(iii) a record of the receipt, handling, transmission or storage of anything by Forensic Science Ireland in connection with the performance of its functions to examine and analyse things or samples of things for the purposes of criminal investigations or proceedings or both,

(iv) a record of the receipt, handling, transmission, examination or analysis of any thing by any person acting on behalf of any party to the proceedings, or

(v) a record by a registered medical practitioner of an examination of a living or dead person.

(5) Without prejudice to subsection (1)—

(a) where a document purports to be a birth certificate issued in pursuance of either the Births and Deaths Registration Acts 1863 to 1987 or of the Civil Registration Act 2004, and

(b) a person is named therein as father or mother of the person to whose birth the certificate relates,

the document shall be admissible in any criminal proceedings as evidence of the relationship indicated therein.

(6) Where information is admissible in evidence by virtue of this section but is expressed in terms that are not intelligible to the average person without explanation, an explanation of the information shall also be admissible in evidence if either—

(a) it is given orally by a person who is competent to do so, or

(b) it is contained in a document and the document purports to be signed by such a person.

(7) (a) This section and Chapter shall apply to business records in document form that originate from outside the State, and such records are therefore admissible in accordance with this section and Chapter notwithstanding that any person who may act on behalf of such a business (whether a director, manager or other similar officer of the business) is not compellable to give evidence in a court in the State.

(b) Paragraph (a) shall apply notwithstanding the reference to compellability in subsection 3(b).

(8) For the avoidance of doubt, records of a business that has ceased to exist shall be admissible in accordance with this section.

(9) For the avoidance of doubt, nothing in this Chapter shall be interpreted as altering or affecting the admissibility of any document that would otherwise be admissible under any rule of law or enactment (including his Act) to prove the truth of any fact or facts asserted in it.

Explanatory Note

Section 49 largely replicates, subject to the exceptions discussed below, section 5 of the *Criminal Evidence Act 1992*. *Section 49* also reflects the general recommendation in **paragraph 2.143** that the 1992 Act should be extended to civil proceedings.

Section 49(1) does not replicate section 5(1)(c) of the 1992 Act, which provides that, in the case of information in non-legible form that has been reproduced in permanent legible form (for example, a computer-generated record), it is admissible subject to the requirement that it must be “reproduced in the course of the normal operation of the reproduction system concerned.” This requirement is redundant having regard to the recommendation in **paragraph 2.182** concerning the admissibility of copies, as to which see *section 53*, below.

Section 49(3)(c)(iii) contains an additional cross-reference to *section 66* of the Bill to reflect the recommendation in **paragraph 4.72** that documents generated in anticipation of litigation remain inadmissible as documentary hearsay, that is, to prove the truth of any fact or facts in them, except where express statutory provisions otherwise provide.

Section 49(7) does not correspond with any provision in section 5 of the 1992 Act: it implements the recommendation in **paragraph 2.183** that business records from outside the State should also be admissible, notwithstanding the non-compellability of the manager, director or other similar officer of such a business.

Section 49(8) does not correspond with any provision in section 5 of the 1992 Act: it implements the recommendation in **paragraph 2.184** that, to avoid any doubt, the Bill should expressly provide that records of a business that has ceased to exist shall be admissible in accordance with the section.

Section 49(9) does not correspond with any provision in section 5 of the 1992 Act: it implements the recommendation in **paragraph 2.186** that, to avoid any doubt, the Bill should expressly provide that nothing in the Bill should be interpreted as altering or affecting the admissibility of any document that would otherwise be admissible under any rule of law or enactment (including this Bill) to prove the truth of any fact or facts asserted in it. Thus, although *section 58* of the Bill confirms that a number of common law inclusionary exceptions (such for example in respect of admissions and confessions) are being retained, it may be preferable to have an express general saver in this respect (bearing in mind in particular that that the Bill does not involve a complete codification of the law of evidence).

Notice of business records evidence

[1992, No.12, s.7]

50. (1) Information in a document shall not, without the leave of the court, be admissible in evidence by virtue of *section 49* at a civil or criminal trial unless—

(a) a copy of the document has been served on the other party or parties (or, in the case of a trial on indictment, served on the accused pursuant to section 4B(1) or 4C(1) of the Criminal Procedure Act 1967), or

(b) not later than 21 days before the commencement of the civil or criminal trial, a notice of intention so to give the information in evidence, together with a copy of the document, is served by or on behalf of the party proposing to give it in evidence on each of the other parties to the proceedings.

(2) A party to the proceedings on whom a notice has been served pursuant to subsection (1) shall not, without the leave of the court, object to the admissibility in evidence of the whole or any specified part of the information concerned unless, not later than 7 days before the commencement of the civil or criminal trial, a notice objecting to its admissibility is served by or on behalf of that party on each of the other parties to the proceedings.

(3) A document required by this section to be served on any person may, subject to subsection (4), be served—

(a) by delivering it to him or her or to his or her solicitor,

(b) by addressing it to him or her and leaving it at his or her usual or last known residence or place of business or by addressing it to his or her solicitor and leaving it at the solicitor's office,

(c) by sending it by registered post to him or her at his or her usual or last known residence or place of business or to his or her solicitor at the solicitor's office, or

(d) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it by registered post to the secretary or clerk of that body at that office.

(4) A document required by this section to be served on a person who is an accused in a criminal trial shall be served personally on him or her if he or she is not represented by a solicitor.

(5) This section is without prejudice to provisions concerning the power to produce evidential material in any other enactment.¹⁶

Admission and weight of business records evidence

[1992, No.12, s.8]

51. (1) Subject to *section 48*, in any civil or criminal proceedings, information or any part thereof that is admissible in evidence by virtue of *section 49* shall not be admitted if the court is of opinion that in the interests of justice the information or that part ought not to be admitted.

(2) In considering whether in the interests of justice all or any part of such information ought not to be admitted in evidence the court shall have regard to all the circumstances, including—

(a) whether or not, having regard to the contents and source of the information and the circumstances in which it was compiled, it is a reasonable inference that the information is reliable,

(b) whether or not, having regard to the nature and source of the document containing the information and to any other circumstances that appear to the court to be relevant, it is a reasonable inference that the document is authentic, and

(c) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not

¹⁶ A comparable subsection is not found in section 7 of the *Criminal Evidence Act 1992*, but reflects the enactment since 1992 of provisions concerning the power to produce evidential material, including in section 908D of the *Taxes Consolidation Act 1997* and section 52 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to any other party to the civil or criminal proceedings or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to information given in evidence by virtue of this Chapter, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) This section is without prejudice to provisions concerning the admission and weight of business records in any other enactment.¹⁷

Explanatory Note

Section 51 implements the recommendation in **paragraph 2.181** that a court should continue to retain the discretion to refuse to admit business records where the interests of justice so require. The text of *section 51* is based on section 8 of the *Criminal Evidence Act 1992*, but *section 51* applies to both civil and criminal proceedings and is also subject to the recommendation in **paragraph 2.179** that there should be a presumption of admissibility of business records: see *section 48* of the Bill.

Evidence as to credibility of supplier of information

[1992, No.12, s.9]

52. (1) Where information is given in evidence by virtue of this Chapter—

(a) any evidence which, if the person who originally supplied the information had been called as a witness, would have been admissible as relevant to his or her credibility as a witness shall be admissible for that purpose,

(b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him or her in cross-examination as relevant to his or her credibility as a witness but of which evidence could not have been adduced by the cross-examining party, and

(c) evidence tending to prove that that person, whether before or after supplying the information, made (whether orally or not) a statement which is inconsistent with it shall, if not already admissible by virtue of *section 49*, be admissible for the purpose of showing that he or she has contradicted himself or herself.

¹⁷ A comparable subsection is not found in section 8 of the *Criminal Evidence Act 1992*, but reflects the enactment since 1992 of provisions concerning the power to produce evidential material, including in section 908D of the *Taxes Consolidation Act 1997* and section 52 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

(2) This section is without prejudice to provisions concerning evidence as to the credibility of the supplier of information in business records in any other enactment.¹⁸

Copies of business records admissible

[1992, No.12, s.30]

53. (1) Where, in accordance with this Chapter, information contained in a business record in document form is admissible in evidence in civil or criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve, including as to its reliability.

(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission or other means of electronic communication) the copy produced or any intermediate copy was made.

Explanatory Note

Section 53, the text of which is largely based on section 30 of the *Criminal Evidence Act 1992*, implements the recommendation in **paragraph 2.182** that all reliable copies of admissible business records should also be admissible in evidence. See also *section 62* of the Bill, which concerns the admissibility of copies generally.

Evidence of resolution of Dáil or Seanad

[1992, No.12, s.11]

54. In any civil or criminal proceedings, evidence of the passing of a resolution by either House of the Oireachtas, whether before or after the commencement of this section, may be given by the production of a copy of the Journal of the proceedings of that House relating to the resolution and purporting to have been published by the Stationery Office.

Court may order inspection of bankers' books in civil proceedings

[42 & 43 Vict, c.11, s.7]

55. (1) Without prejudice to any other provision in this Chapter, on the application of any party to civil proceedings, a court may order that such party be

¹⁸ A comparable subsection is not found in section 9 of the *Criminal Evidence Act 1992*, but reflects the enactment since 1992 of provisions concerning the power to produce evidential material, including in section 908D of the *Taxes Consolidation Act 1997* and section 52 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank 3 clear days before the order is to be obeyed, unless the court otherwise directs.

Explanatory Note

Sections 55 and 56 implement the recommendation in **paragraph 2.144** that, while the *Bankers' Books Evidence Act 1879* should be repealed, and replaced by the amended rules on the admissibility of business records recommended in the Report and set out in the preceding sections of this Chapter of the Bill, this is subject to the retention of sections 7 and 7A of the 1879 Act, as amended.

Court may order inspection of bankers' books in criminal proceedings

[42 & 43 Vict, c.11, s.7A]

56. (1) Without prejudice to any other provision in this Chapter, if, on an application made by a member of the Garda Síochána not below the rank of Superintendent or the Director of Corporate Enforcement, a court is satisfied that there are reasonable grounds for believing—

(a) that an indictable offence has been committed, and

(b) that there is material in the possession of a bank specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence,

a court may make an order that the applicant or another member of the Garda Síochána designated by him or her, or officer of the Director of Corporate Enforcement nominated by the Director, as the case may be, be at liberty to inspect and take copies of any entries in a banker's book, or inspect and take copies of any documentation associated with or relating to an entry in such book, or the purposes of investigation of the offence.

(2) In this section "documentation" includes information kept on microfilm, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form.

Explanatory Note

Sections 55 and 56 implement the recommendation in **paragraph 2.144** that, while the *Bankers' Books Evidence Act 1879* should be repealed, and replaced by the amended rules on the admissibility of business records recommended in the Report and set out in the preceding sections of this Chapter of the Bill, this is subject to the retention of sections 7 and 7A of the 1879 Act, as amended.

Chapter 3
Effect of Act on common law concerning hearsay

Effect of Act on common law concerning hearsay evidence: general
[new]

57. Subject to the other provisions of this Part, nothing in this Act shall be interpreted as precluding the courts from restricting, applying or developing the common law concerning the admissibility or inadmissibility of hearsay evidence.

Explanatory Note

Section 57 implements the recommendation in **paragraph 3.140** that nothing in the Report or in the draft Bill should be taken to preclude the judicial development of the rule against hearsay.

Retention of certain common law inclusionary exceptions to the hearsay rule
[new]

- 58.** Without prejudice to *section 57*, the following common law inclusionary exceptions to the hearsay rule are retained—
- (a) the common law rule for admissions and confessions,
 - (b) the common law *res gestae* rule,
 - (c) the common law rule for dying declarations in criminal proceedings for homicide, subject to the requirement that the trial judge shall issue a direction to the jury warning of the danger of attaching significant weight to such statements,
 - (d) the common law rule for declarations by deceased persons against pecuniary or proprietary interest,
 - (e) the common law rule for declarations by a deceased person explaining the contents of his or her will, and
 - (f) the common law rule for testimony in former court proceedings—
 - (i) subject to the requirement that the witness must be unavailable to attend because he or she is dead, is too ill to attend court, has been prevented from attending by the party against whom the evidence is to be admitted, is outside of the jurisdiction or cannot be located following intensive enquires, but
 - (ii) that such evidence is not admissible where the witness is simply unwilling to testify.

Explanatory Note

Section 58 implements 6 recommendations concerning the retention of certain common law inclusionary exceptions to the hearsay rule.

Section 58(a) implements the recommendation in **paragraph 3.04** that the common law exception to the rule against hearsay for admissions and confessions be retained.

Section 58(b) implements the recommendation in **paragraph 3.12** that the common law *res gestae* exception should be retained.

Section 58(c) implements the recommendation in **paragraph 3.22** that the common law exception to the rule against hearsay for dying declarations should be retained, subject to the requirement that the trial judge must issue a direction to the jury warning of the danger of attaching significant weight to such statements.

Section 58(d) implements the recommendation in **paragraph 3.27** that the common law exception to the hearsay rule for declarations by deceased persons against pecuniary or proprietary interest should be retained.

Section 58(e) implements the recommendation in **paragraph 3.47** that the exception to the rule against hearsay for declarations by a deceased person explaining the contents of his or her will should be retained.

Section 58(f) implements the recommendation in **paragraph 3.49** that the exception to the rule against hearsay for testimony in former court proceedings should be retained subject to the requirement that the witness is unavailable to attend because he or she is dead, is too ill to attend court, has been prevented from attending by the party against whom the evidence is to be admitted, is outside of the jurisdiction or cannot be located following intensive enquires, but that such evidence is not admissible where the witness is simply unwilling to testify.

Abolition of certain common law inclusionary exceptions to the hearsay rule
[new]

59. Without prejudice to *section 57*, the following common law inclusionary exceptions to the hearsay rule are abolished—

(a) the common law rule for declarations by a deceased person in the course of duty, and

(b) the common law rule for declarations of deceased persons as to pedigree.

Explanatory Note

Section 59 implements 2 recommendations concerning the abolition of certain common law inclusionary exceptions to the hearsay rule.

Section 59(a) implements the recommendation in **paragraph 3.34** that, since the business records exception included in Part 4, Chapter 3, of the Bill (above) sufficiently accounts for documentary evidence falling under the exception for declarations by a deceased person in the course of duty, the Bill should provide that that common law exception should be abolished.

Section 59(b) implements the recommendation in **paragraph 3.40** that the common law exception to the rule against hearsay for declarations of deceased persons as to pedigree should be abolished.

Chapter 4

Hearsay evidence by children and hearsay in sentencing

Hearsay evidence by children in civil proceedings presumed to be admissible

[New]

60. (1) Without prejudice to any rule of law or enactment, hearsay evidence by any child, that is any person under the age of 18 years, shall be presumed to be admissible in proceedings—

(a) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

(b) concerning the adoption, guardianship or custody of, or access to, any child, or

(c) without prejudice to paragraphs (a) or (b), in any proceedings under any family law enactment.¹⁹

(2) Evidence to which subsection (1) applies shall not be admitted if the court is of opinion that in the interests of justice the evidence ought not to be admitted.

¹⁹ This refers to the general definition of “family law enactment” (which includes both public law and private law proceedings) in section 5 of the *draft Courts (Consolidation and Reform) Bill* in Appendix A to the Commission’s *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

(3) In estimating the weight, if any, to be attached to evidence to which subsection (1) applies, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

Explanatory Note

Section 60(1) implements the recommendation in **paragraph 2.83** that there should be a presumption in favour of the admissibility of children’s hearsay statements in all civil proceedings concerning the welfare of a child, whether public law or private law. *Section 60(1)* is based in part on Article 42A of the Constitution on the rights of children and in part on the general definition of “family law enactment” (which includes both public law and private law proceedings) in section 5 of the *draft Courts (Consolidation and Reform) Bill* in Appendix A to the Commission’s *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

Section 60(2) and (3) implement the recommendation in **paragraph 2.83** that this presumption is subject to a residual discretion to exclude where the interests of justice so require, and subject to safeguards as to weight.

Hearsay evidence at sentencing

[New]

61. Without prejudice to any rule of law or enactment, hearsay evidence may be admissible at the sentencing stage of a criminal trial at the discretion of the court, if the court is satisfied that its admission would not be unduly prejudicial to, or result in unfairness to, the defendant.

Explanatory Note

Section 61 implements the recommendation in **paragraph 3.75** that hearsay evidence may be admissible at the sentencing phase of the trial at the discretion of the court, if the court is satisfied that its admission would not be unduly prejudicial or result in unfairness to the defendant.

PART 5

Documentary and Electronic Evidence

Chapter 1

Admissibility of documents: general

Copies of documents admissible

[1992, No.12, s.30]

62. (1) Where information contained in a document is admissible in evidence in civil or criminal proceedings on the basis of its relevance, the information may be given in evidence, whether or not the document is still in existence, by

producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve, including as to reliability.

(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission or other means of electronic communication) the copy produced or any intermediate copy was made.

(3) To the extent, if any, that the common law best evidence rule and the common law original document rule continue to apply, they are hereby abolished.

Explanatory Note

Section 62 implements the recommendations in: **paragraph 4.33** that, to the extent that they still apply in Irish law, the best evidence rule and the original document rule should be abolished; and that, in their place, the Bill should provide that a copy of an original document is admissible in civil and criminal proceedings where the court is satisfied as to its relevance and reliability; and the recommendation in **paragraph 4.46** on the authentication of copies. *Section 62* is, broadly, based on the text of section 30 of the *Criminal Evidence Act 1992*; it also complements *section 53* of the Bill, which concerns the admissibility of copies of hearsay business records.

Admissibility of voluminous documents

[new]

63. (1) Where 2 or more documents are sought to be admitted in evidence in civil or criminal proceedings and the documents are voluminous in nature, the court may admit in evidence a written summary of such documents to prove such documents in place of the documents themselves.

(2) (a) In civil or criminal proceedings, before admitting such a summary the court shall be satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

(b) Without prejudice to paragraph (a), in criminal proceedings, before admitting such a summary the court shall be satisfied that it would not prejudice the right of the accused to a trial in due course of law.

Explanatory Note

Section 63 implements the recommendation in **paragraph 4.103** that, in the case of voluminous documents, a written summary of such documents may be used to prove such documents in place of the documents themselves, subject to the procedural safeguards in *section 63(2)*.

Admissibility of electronic recordings

[new]

64. (1) An electronic recording shall be admissible in evidence in civil or criminal proceedings where the court is satisfied that it is an authentic recording.

(2) Any dispute as to the quality of the recording, including the identity of any person speaking on the recording, shall go to the weight of the recording rather than its admissibility.

(3) In this section “recording” includes—

(a) any disc, tape, sound track, film, microfilm, negative or other device from which sounds, images or other data can be reproduced with or without the aid of some other equipment and

(b) any reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.

Explanatory Note

Section 64 implements the recommendation in **paragraph 4.116** that an electronic recording shall be admissible in evidence where it has been established that it is an authentic recording; and that any dispute as to the quality of the recording, including the identity of any person speaking on the recording, shall go to the weight of the recording rather than its admissibility. The definition of “recording” is taken from the relevant part of the general definition of “document” in *section 2* of the Bill.

Admissibility of notarised documents

[new]

65. Subject to any other requirements in a rule of law or enactment, notarised documents shall be admissible in civil and criminal proceedings where they comply with *section 62*.

Explanatory Note

Section 65 implements the recommendation in **paragraph 4.128** that notarised documents shall be admissible on conditions comparable to those in *section 30* of the *Criminal Evidence Act 1992*: *section 30* of the 1992 Act is now consolidated in *section 62* of the Bill.

Chapter 2 Documentary Hearsay

Documents generated in anticipation of litigation

[new]

66. Without prejudice to *section 49(3)(c)(iii)*, documents generated in anticipation of civil or criminal proceedings are not admissible in evidence to prove the truth of any fact or facts which they contain, except where otherwise expressly provided in an enactment.

Explanatory Note

Section 66 implements the recommendation in **paragraph 4.71** that documents generated in anticipation of litigation remain inadmissible as documentary hearsay, that is, to prove the truth of any fact or facts in them, except where express statutory provisions otherwise provide.

Documents generated in course of investigation of criminal offence

[new]

67. Documents generated during the course of the investigation of a criminal offence shall continue to remain subject to the requirements of disclosure in criminal cases.

Explanatory Note

Section 67 implements the recommendation in **paragraph 4.74** that documents generated during the investigation of criminal offences shall remain subject to the principles of disclosure in criminal cases.

Admissibility of ancient documents

[new]

68. An ancient document, that is, a document that is dated 20 years or more, may be admissible in evidence where it is established that the document has been retrieved from its place of proper custody, that is, the place where the document would reasonably be expected to be stored if it is what it purports to be.

Explanatory Note

Section 68 implements the recommendation in **paragraph 4.81** that an ancient document, that is, a document that is dated 20 years or more, may be admissible in evidence where it is established that the document has been retrieved from its place of proper custody, that is, the place where the document would reasonably be expected to be stored if it is what it purports to be.

Chapter 3
Admissibility of public documents

Public document: definition

[new]

69. In this Part—

“public document” means a document retained in a depository or register relating to a matter of public interest whether of concern to sectional interests or to the community as a whole, compiled under a public duty and which is amenable to public inspection.

Explanatory Note

Section 69 implements the recommendation in **paragraph 4.54** that the Bill should define a “public document” as “a document retained in a depository or register relating to a matter of public interest whether of concern to sectional interests or to the community as a whole, compiled under a public duty and which is amenable to public inspection.”

Public document: methods of proof and authentication

[new in part; 14 & 15 Vict, c.99, s.14]

70. (1) Without prejudice to any rule of law or enactment, a public document may be proved and authenticated by any of the following means —

(a) examination, that is, an examined copy proved to correspond to the original by the evidence of a person who has examined the original,

(b) certification, that is, a certified copy certified by an official with custody of the original to be an accurate copy,

(c) sealing, that is, where a judicial or ministerial seal may be applied to a document to aid its future authentication,

(d) signed copy, that is, where the signature of the appropriate person may be sufficient to authenticate a document and where this signature is presumed valid,

(e) Stationery Office copy, that is, a copy printed under the superintendence or authority of and published by the Stationery Office.

(2) (a) Without prejudice to the generality of *subsection (1)*, whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the place of proper custody, and no enactment exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence.

(b) Paragraph (a) is subject to the requirement that the copy is proved to be an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish

such certified copy or extract to any person applying at a reasonable time for the same upon payment of a reasonable charge or charges for the purpose of covering the costs incurred by the officer in providing under this section such copy, including costs relating to retrieving, copying, checking and certifying the copy.

Explanatory Note

Section 70(1) implements the recommendation in **paragraph 4.62** that the Bill should include the following existing arrangements for the proof and authentication of public documents: (a) examination, that is, an examined copy proved to correspond to the original by the evidence of a person who has examined the original; (b) certification, that is, a certified copy certified by an official with custody of the original to be an accurate copy; (c) sealing, that is, where a judicial or ministerial seal may be applied to a document to aid its future authentication; (d) signed copy, that is, where the signature of the appropriate person may be sufficient to authenticate a document and where this signature is presumed valid; (e) Stationery Office copy, that is, a copy printed under the superintendence or authority of and published by the Stationery Office.

Section 70(2), which corresponds to section 14 of the *Evidence Act 1851*, implements in part the recommendation in **paragraph 9.26** that the *Evidence Act 1851* be consolidated into the Bill.

Public document: presumption of due execution

[new]

71. It shall be presumed, unless the contrary is proved, that a public document has been duly executed.

Explanatory Note

Section 71 implements the recommendation in **paragraph 4.67** that the Bill should maintain the well-established distinction between private and public documents, including the presumption of due execution of public documents.

Chapter 4

Admissibility of Acts of the Oireachtas and other official documents²⁰

²⁰

Part 5, Chapter 3, of the Bill (sections 72 to 79) largely replicates the provisions of the *Documentary Evidence Act 1925*, which concerns the admissibility of Acts of the Oireachtas and other official documents. It therefore implements the recommendation in **paragraph 9.61** that the provisions of the 1925 Act should be consolidated into this Bill. The text of the 1925 Act has been amended to take account of its application to the State since the coming into force of the Constitution of Ireland in 1937, as well as to Saorstát Éireann, which existed between 1922 and 1937. The 1925 Act only applied to Saorstát Éireann, but the *Constitution (Consequential Provisions) Act 1937* enacted generally applicable provisions to ensure that no adverse effects would arise from the enactment of the Constitution of Ireland in respect of the effect of the Constitution on any pre-1937 Acts, such as the 1925 Act. See also *section 73* of the Bill, which has been included in the Bill to indicate that the

Meaning of “Stationery Office”

[1925, No.24, s.1]

72. (1) In this Act and in every other Act of the Oireachtas, the expression “the Stationery Office” means and, in the case of an Act passed before this Act, shall be deemed always to have meant the Stationery Office established and maintained by the Government.

(2) In any Saorstát Éireann statute, the expression “the Stationery Office” means and shall be deemed always to have meant the Stationery Office established and maintained by the Government of Saorstát Éireann.

Proof of Acts of the Oireachtas

[1925, No.24, s.2]

73. *Prima facie* evidence of this or any other Act of the Oireachtas or of any Saorstát Éireann statute, whether public or private, and whether passed before or after the passing of this Act, or of the Journal of the Proceedings of either House of the Oireachtas, may be given in all courts and in all legal proceedings by the production of a copy of such Act or Journal printed under the superintendence or authority of and published by the Stationery Office.

Proof of proclamations and certain orders

[1925, No.24, s.3]

74. *Prima facie* evidence of any proclamation, order or other official document issued or made by the Government (or of any such proclamation, order or other official document issued or made in Saorstát Éireann by the Governor-General on the advice of the Executive Council of Saorstát Éireann and of any proclamation issued by the Executive Council of Saorstát Éireann) may be given in all courts and in all legal proceedings in all or any of the following ways—

(a) by the production of a copy of the *Iris Oifigiúil* purporting to contain such proclamation, order, or other official document; or

(b) by the production of a copy of such proclamation, order or other official document printed under the superintendence or authority of and published by the Stationery Office; or

consolidation of the *Documentary Evidence Act 1925* into this Bill should not in any way affect the general application of the 1937 Act.

(c) by the production of a copy of or extract from such proclamation, order or other official document purporting to be certified to be true by the Secretary to the Government or by some other officer of the Government authorised in that behalf by the Taoiseach (including in respect of any proclamation, order or other official document issued or made in Saorstát Éireann by the Governor-General on the advice of the Executive Council of Saorstát Éireann and of any proclamation issued by the Executive Council of Saorstát Éireann).

Proof of rules, regulations and byelaws
[1925, No.24, s.4]

75. (1) *Prima facie* evidence of any rules, orders, regulations, or byelaws to which this section applies, may be given in all courts and in all legal proceedings by the production of a copy of the *Iris Oifigiúil* purporting to contain such rules, orders, regulations, or byelaws or by the production of a copy of such rules, orders, regulations, or byelaws printed under the superintendence or authority of and published by the Stationery Office.

(2) This section applies to all rules, orders, regulations and byelaws made under the authority of any British Statute, any Saorstát Éireann statute, or any Act of the Oireachtas by—

(a) the Taoiseach (or in Saorstát Éireann by the Governor-General on the advice of the Executive Council of Saorstát Éireann), or

(b) the Government (or in Saorstát Éireann by the Executive Council), or

(c) a Minister (including a Minister in Saorstát Éireann), or

(d) any statutory body, incorporated or unincorporated, exercising throughout the whole of the State (or, as the case may be, Saorstát Éireann) any function of government or discharging throughout the whole of the State (or, as the case may be, Saorstát Éireann) any public duties in relation to public administration.

Presumption of printing and publication by the Stationery Office
[1925, No.24, s.5]

76. (1) Every copy of an Act of the Oireachtas, Saorstát Éireann statute, proclamation, order, rule, regulation, byelaw, or other official document which purports to be published by the Stationery Office or to be published by the authority of the Stationery Office shall, until the contrary is proved, be presumed to have been printed under the superintendence and authority of and to have been published by the Stationery Office.

(2) Where an Act of the Oireachtas or a Saorstát Éireann statute, whether passed before or after the passing of this Act, provides that a copy of any proclamation, order, rule, regulation, byelaw, or other official document shall be conclusive evidence or be *prima facie* evidence, or be evidence, or have any other effect when purporting to be printed under the superintendence and authority, or the superintendence, or the authority, of the Stationery Office, such copy shall also be conclusive evidence or *prima facie* evidence or evidence or have the said effect (as the case may require) if it purports to be published by the Stationery Office or to be published by the authority of the Stationery Office.

Offences and penalties²¹

[1925, No.24, s.6]

77. (1) Any person who shall print or publish any copy of an Act of the Oireachtas or a Saorstát Éireann statute or any copy of a proclamation, order, rule, regulation, byelaw, or other official document made or issued—
- (a) by the Government (or in Saorstát Éireann by the Executive Council), or
 - (b) by the Taoiseach (or in Saorstát Éireann by the Governor-General on the advice of the Executive Council of Saorstát Éireann), or
 - (c) by any Minister (including a Minister in Saorstát Éireann) who is the head of a Department of State established by the Ministers and Secretaries Act 1924, or
 - (d) the Labour Court, or
 - (e) the Commissioner of An Garda Síochána, or
 - (f) the National Transport Authority, or
 - (g) by any body, incorporated or unincorporated, exercising throughout the whole of the State (or, as the case may be, Saorstát Éireann) any function of government or discharging throughout the whole of the State (or, as the case may be, Saorstát Éireann) any public duties in relation to public administration,

which copy shall falsely purport to have been printed under the superintendence or the authority of the Stationery Office or to have been

²¹ These offences may overlap with forgery offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001*, and may therefore require separate review as to whether they should be repealed, but are included here for the sake of completeness.

published by or by the authority of the Stationery Office shall be guilty of an offence and shall be liable on conviction on indictment to a Class A fine or to imprisonment not exceeding 5 years or both.

(2) Any person who shall print or publish any document which purports to be a copy of an Act of the Oireachtas or a Saorstát Éireann statute or of any such proclamation, order, rule, regulation, byelaw or other official document as is mentioned in the foregoing sub-section and which is in any material respect (whether by addition, omission, or otherwise) not a true copy of such Act or document shall be guilty of an offence and shall be liable on conviction on indictment to a Class A fine or to imprisonment not exceeding 5 years or both.

(3) If any person shall tender in evidence in any court or any legal proceedings a copy of any Act of the Oireachtas or a Saorstát Éireann statute or of any such order, rule, regulation, byelaw, or other official document as is mentioned in sub-section (1) of this section which copy purports and is represented by such person to have been printed under the superintendence or the authority of the Stationery Office or to have been published by or by the authority of the Stationery Office and was to the knowledge of such person not so printed or not so published, such person shall be guilty of an offence and shall be liable on summary conviction to a Class B fine or to imprisonment not exceeding 6 months or both.

(4) If any person shall tender in evidence in any court or in any legal proceedings a document which purports and is represented by such person to be a copy of an Act of the Oireachtas or a Saorstát Éireann statute or of any such proclamation, order, rule, regulation, byelaw, or other official document as is mentioned in subsection (1) and is to the knowledge of such person in any material respect (whether by addition, omission, or otherwise) not a true copy of such Act or statute or document, such person shall be guilty of an offence and shall be liable on summary conviction to a Class B fine or to imprisonment not exceeding 6 months or both.

Authentication of official documents under Ministers and Secretaries Act 1924 [1925, No.24, s.7]

78. (1) A Minister (including a Minister in Saorstát Éireann) who is head of a Department of State established under the Ministers and Secretaries Act 1924 (in this section referred to as “the Act of 1924”) may at any time or times authorise more than one person to authenticate by his or her signature the seal of such Minister, and where more than one person is so authorised by any such Minister the seal of such Minister shall be sufficiently authenticated for the purposes of section 15(1) of the Act of 1924 if it is authenticated by the signature of one of the persons who are for the time being so authorised.

(2) Any such Minister as is mentioned in subsection (1) may at any time or times authorise more than one officer of his or her Department of State to authenticate orders and instruments under section 15(4) of the Act of 1924, and where more than one such officer is so authorised any order or instrument which can under that sub-section be authenticated by the signature of such Minister shall be sufficiently authenticated by the signature of any one of the officers who are for the time being so authorised.

(3) This section shall be deemed to have had effect as from the commencement of the Act of 1924.

Saver for application of Constitution (Consequential Provisions) Act 1937

[new]

79. Nothing in this Chapter shall be interpreted as altering or affecting the application of the Constitution (Consequential Provisions) Act 1937.

Explanatory Note

The *Constitution (Consequential Provisions) Act 1937* enacted generally applicable provisions to ensure that no adverse effects would arise from the enactment of the Constitution of Ireland in respect of the effect of the Constitution on any pre-1937 Acts. *Section 79* has been included in the Bill to indicate that the consolidation of the *Documentary Evidence Act 1925* into this Bill should not in any way affect the general application of the 1937 Act.

Chapter 5

Proof and admissibility of pre-1922 official documents and pre-1922 statutes and Acts²²

Certain pre-1922 official documents purporting to be sealed and signed to be received in evidence where the original record could have been received

[8 & 9 Vict, c.113, s.1]

80. (1) Whenever by any Act in force prior to the coming into force of the Evidence Act 1845 (8 & 9 Vict, c.113), or by any Act in force thereafter but enacted prior to the establishment of Saorstát Éireann, any certificate, official or public document, or document or proceeding of any corporation of joint stock or other company, or any certified copy of any document, bye law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either

²²

Part 5, Chapter 4, of the Bill (sections 80 to 87) largely replicates provisions in the *Evidence Act 1845*, the *Documentary Evidence Act 1868*, the *Documentary Evidence Act 1882* and the *Statute Law Revision Act 2007* which concern the admissibility of pre-1922 Acts and other pre-1922 official documents. It therefore implements the recommendation in **paragraphs 9.19, 9.31, 9.44 and 9.70** that the provisions of these Acts should be consolidated into this Bill.

House of the Oireachtas, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, subject to the conditions in subsection (2).

(2) The conditions are that they respectively purport to be sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts referred to above, without any proof of the seal or stamp, where a seal or stamp in necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

Courts to take judicial notice of signatures of pre-1922 equity or common law judges attached to decrees

[8 & 9 Vict, c.113, s.2]

81. All courts and court officers, all commissioners judicially acting and other judicial officers shall take judicial notice of the signature of any of the equity or common law judges of the superior courts that exercised jurisdiction within the geographical extent of the State prior to the establishment of Saorstát Éireann, provided such signature is attached or appended to any decree, order, certificate, or other judicial or official document.

Copies of Queen’s and King’s printers of pre-1922 Private, Local and Personal Acts admissible

[8 & 9 Vict, c.113, s.3]

82. All copies of private and local and personal Acts of Parliament not public Acts that were enacted prior to the establishment of Saorstát Éireann, if purporting to be printed by the Queen’s printers or, as the case may be the King’s printers, and all copies of the journals of either House of Parliament at Westminster prior to the establishment of Saorstát Éireann, and of royal proclamations prior to the establishment of Saorstát Éireann, purporting to be printed by the printers to the crown or by the printers to either House of Parliament at Westminster, or by any or either of them, shall be admitted as evidence thereof by all courts and others without any proof being given that such copies were so printed.

Offences and penalties under sections 80 to 82

[8 & 9 Vict, c.113, s.4]²³

83. (1) A person commits an offence if he or she —

²³ These offences may overlap with forgery offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001*, and may therefore require separate review as to whether they should be repealed, but are included here for the sake of completeness.

(a) forges any certificate, official or public document as is mentioned in *section 80 or 81*, or

(b) forges the seal, stamp, or signature of any such certificate, official or public document, or

(c) tenders in evidence any such seal, stamp, signature of any such certificate, official or public document knowing it to be a forgery, or

(d) forges any Act referred to in *section 82*, or

(e) tenders in evidence any such Act, knowing that the Act was not printed by the person or persons by whom it so purports to have been printed.

(2) A person guilty of an offence under subsection (1) shall be liable on conviction on indictment to a Class A fine or to imprisonment not exceeding 5 years or both.

Mode of proving pre-1922 proclamations, orders and regulations

[31 & 32 Vict, c.37, s.2]

84. (1) *Prima facie* evidence of —

(a) any proclamation, order, or regulation issued before or after the coming into force of the Documentary Evidence Act 1868 (31 & 32 Vict, c.37) (in this section referred to as “the Act of 1868”) but prior to the establishment of Saorstát Éireann, by the King or, as the case may be the Queen, in respect of the geographical extent of the State prior to the establishment of Saorstát Éireann, or by the Privy Council, and

(b) of any proclamation, order, or regulation issued before the coming into force of the Act of 1868 or after that but prior to the establishment of Saorstát Éireann by or under the authority of any such department of the Government or officer as was authorised by the first column of the schedule to the Act of 1868,

may be given in any court and in any proceedings whatsoever, in all or any of modes mentioned in subsection (2).

(2) The modes of proof for the purposes of subsection (1) are—

(a) by the production of a copy of the London Gazette, the Belfast Gazette or the Dublin Gazette purporting to contain such proclamation, order, or regulation,

(b) by the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession,

(c) by the production, in the case of any proclamation, order, or regulation issued by the King or, as the case may be, the Queen or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

(3) Any copy or extract made in pursuance of this section may be in print or in writing, or partly in print and partly in writing.

(4) No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this section, to the truth of any copy of or extract from any proclamation, order, or regulation.

Copies of pre-1922 Acts and other documents printed under superintendence of pre-1922 Stationery Office receivable in evidence
[45 & 46 Vict, c.9, s.2]

85. Where any enactment, whether passed before or after the coming into force of the Documentary Evidence Act 1882 (45 & 46 Vict, c.9) but prior to the establishment of Saorstát Éireann, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the Government Printer, or the Queen's Printer or, as the case may be the King's Printer, or a printer authorised by Her Majesty or as the case may be His Majesty, or otherwise under Her Majesty's authority or as the case may be His Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of Her Majesty's Stationery Office or, as the case may be His Majesty's Stationery Office, that is, the Stationary Office that was in existence immediately prior to the establishment of Saorstát Éireann.

Proof of pre-1922 statutes of British possessions²⁴

[7 Edw 7, c.16, s.1]

86. (1) Copies of Acts, ordinances, and statutes enacted, whether before or after the coming into force of the Evidence (Colonial Statutes) Act 1907 (7 Edw 7, c.16) (in this section referred to as “the Act of 1907”) but prior to the establishment of Saorstát Éireann, by the legislature of any British possession, and of orders, regulations, and other instruments issued or made, whether before or after the coming into force of the Act of 1907 but prior to the establishment of Saorstát Éireann, under the authority of any such Act, ordinance, or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts without any proof being given that the copies were so printed.

(2) If any person prints any copy or pretended copy of any such Act, ordinance, statute, order, regulation, or instrument which, falsely purports to have been printed by the Government printer, or tenders in evidence any such copy or pretended copy which falsely purports to have been so printed, knowing that it was not so printed, he or she shall be guilty of an offence and shall be liable on conviction on indictment to a Class A fine or to imprisonment not exceeding 5 years or both.²⁵

(3) In this section—

“British possession” means any part of the dominions of the United Kingdom within the meaning of the Act of 1907 (including any possession to which the Act of 1907 was applied by Order made under the Act of 1907) exclusive of the United Kingdom, and, where parts of those dominions were under both a central and a local legislature, include both all parts under the central legislature and each part under a local legislature,

“Government printer” means, as respects any British possession, the printer purporting to be the printer authorised to print the Acts, ordinances, or statutes of the legislature of that possession, or otherwise to be the Government printer of that possession.

Evidence of certain early pre-1922 statutes, etc

[2007 No.28, s.8]

87. (1) In addition to the other provisions of this Chapter (in so far as they relate to the following publications), *prima facie* evidence of a statute may be given in all courts and in all legal proceedings—

²⁴ The Commission has recommended in **paragraph 9.51** that the provisions of the *Evidence (Colonial Statutes) Act 1907* be consolidated into the Bill, subject to a further review as to whether the 1907 Act is obsolete and should be repealed without replacement.

²⁵ These offences may overlap with forgery offences in the *Criminal Justice (Theft and Fraud Offences) Act 2001*, and may therefore require separate review as to whether they should be repealed, but are included here for the sake of completeness.

(a) by producing a copy of the statute as published in one of the following publications:

- (i) the Historic and Municipal Documents of Ireland, 1172 to 1320, published in 1870 by the authority of the Lords Commissioners of Her Majesty's Treasury, under the direction of the Master of the Rolls (in the Schedules to the Act of 2007 referred to as "H.M.D.I.");
- (ii) the Calendar of Documents relating to Ireland, 1171 to 1251, published in 1875 by the authority of the Lords Commissioners of Her Majesty's Treasury, under the direction of the Master of the Rolls (in the Schedules to the Act of 2007 referred to as "C.D.I. vol. 1");
- (iii) the Calendar of Documents relating to Ireland, 1252 to 1284, published in 1877 by the authority of the Lords Commissioners of Her Majesty's Treasury, under the direction of the Master of the Rolls (in the Schedules to the Act of 2007 referred to as "C.D.I. vol. 2");
- (iv) the Calendar of Documents relating to Ireland, 1285 to 1292, published in 1879 by the authority of the Lords Commissioners of Her Majesty's Treasury, under the direction of the Master of the Rolls (in the Schedules to the Act of 2007 referred to as "C.D.I. vol. 3");
- (v) the Calendar of Documents relating to Ireland, 1293 to 1301, published in 1881 by the authority of the Lords Commissioners of Her Majesty's Treasury, under the direction of the Master of the Rolls (in the Schedules to the Act of 2007 referred to as "C.D.I. vol. 4");
- (vi) the Calendar of Documents relating to Ireland, 1302 to 1307, published in 1886 by the authority of the Lords Commissioners of Her Majesty's Treasury, under the direction of the Master of the Rolls (in the Schedules to the Act of 2007 referred to as "C.D.I. vol. 5");
- (vii) the Statutes and ordinances, and acts of the Parliament of Ireland, King John to Henry V (being the first volume of the Irish Record Office Series of Early Statutes) published in 1907 under the authority of the Lords Commissioners of His Majesty's Treasury and under the direction of the Master of the Rolls in Ireland (in the Schedules to the Act of 2007 referred to as "P.R.O. vol. 1");
- (viii) the Statute rolls of the Parliament of Ireland, reign of Henry the Sixth (being the second volume of the Irish Record Office Series of Early Statutes) published in 1910 under the authority of the Lords Commissioners of His Majesty's Treasury and under the direction of the Master of the Rolls in Ireland (in the Schedules to the Act of 2007 referred to as "P.R.O. vol. 2");

(ix) the Statute rolls of the Parliament of Ireland, 1st to 12th years of the reign of King Edward IV (being the third volume of the Irish Record Office Series of Early Statutes) published in 1914 under the authority of the Lords Commissioners of His Majesty's Treasury and under the direction of the Master of the Rolls in Ireland (in the Schedules to the Act of 2007 referred to as "P.R.O. vol. 3");

(x) the Statute rolls of the Parliament of Ireland, 12th and 13th to the 21st and 22nd years of the reign of King Edward IV (being the fourth volume of the series of the Irish Record Office Series of Early Statutes) published in 1939 under the authority of the Minister for Finance and under the direction of the Minister for Justice (in the Schedules to the Act of 2007 referred to as "P.R.O. vol. 4");

(xi) the Statute rolls of the Irish Parliament, Richard III to Henry VIII (being the fifth volume in the series of early Irish statutes) published in 2002 by the National Archives of Ireland (in the Schedules to the Act of 2007 referred to as "P.R.O. vol. 5");

or

(b) by producing a copy taken from the copy of the statute as published in any publication referred to in paragraph (a), where the copy so taken is certified by an official of a specified institution to be a true and accurate copy of the statute as appears in the publication concerned; and any document purporting to be a copy so taken (however expressed) shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his or her authority to do so.

(2) (a) In subsection (1)(b) "specified institution" means the National Library of Ireland, or such other library or archive as may be designated in writing by the Minister for Public Expenditure and Reform under paragraph (b).

(b) The Minister for Public Expenditure and Reform may designate a library or archive for the purposes of this section and, except where otherwise provided for by the designation, the designation shall be deemed to be made in respect of all of the publications referred to in subsection (1)(a). A designation under this paragraph may be revoked.

(c) Notice of the making of a designation under paragraph (b) or a revocation under that paragraph, shall be published in the *Iris Oifigiúil* as soon as practicable after it has been made.

(3) A specified institution may impose a charge or charges for the purpose of covering the costs incurred by it in providing under this section a copy of a statute, including costs relating to retrieving and copying from the publication concerned and checking and certifying the copy of the statute.

(4) In this section, “Act of 2007” means the Statute Law Revision Act 2007.

PART 6 Signatures and Authentication

Definition of signature

[new]

88. In this Act —

“signature” means a writing, or otherwise affixing, of a person’s name, or a mark to represent his or her name, by himself or herself, or a writing on his or her behalf by an agent acting under his or her authority, with the intention of authenticating a document as being that of, or as binding on, or as being witnessed by, the person whose name or mark is so written or affixed; and includes both a handwritten signature and an electronic or digital signature.

Explanatory Note

Section 88 implements the recommendation in **paragraph 5.17** that the Bill should define a signature as a writing, or otherwise affixing, of a person’s name, or a mark to represent his or her name, by himself or herself, or a writing on his or her behalf by an agent acting under his or her authority with the intention of authenticating a document as being that of, or as binding on, or as being witnessed by, the person whose name or mark is so written or affixed.

Section 88 also implements the recommendation in **paragraph 5.18** that the Bill should define signature to describe both a handwritten signature and electronic or digital signature. The Report also recommends in **paragraph 5.18** that, for the purposes of authentication of electronic or digital signatures, a different definition should be used: see *section 91* of the Bill.

Proof of instrument of which attestation is not necessary

[28 & 29 Vict, c.18, s.7]

89. In civil and criminal proceedings, it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness to the instrument.

Explanatory Note

Section 89 implements in part the recommendation in **paragraph 3.70** that the Bill should consolidate the provisions of the *Criminal Procedure Act 1865*, in this instance, section 7 of the 1865 Act, which (despite the Short Title of the 1865 Act) applies to both civil and criminal proceedings.

Advanced electronic signature based on Public Key Infrastructure not required for authentication except where expressly prescribed

[new]

90. For the avoidance of doubt, an advanced electronic signature based on Public Key Infrastructure shall not be required for authentication purposes except where such a requirement is expressly prescribed by an enactment.

Explanatory Note

Section 90 implements the recommendation in **paragraph 5.67** that the Bill should not include a general requirement for the use of an advanced electronic signature based on Public Key Infrastructure for authentication purposes, and that such a requirement should only be prescribed on a case-by-case basis.

Admissibility of advanced electronic signature that complies with Regulation (EU) No. 910/2014 on Electronic Identification and Trust Services for Electronic Transactions (e-IDAS)

[new]

91. In civil and criminal proceedings, a court shall, in determining the authentication of a digital signature, give the same legal effect to a signature that complies with the requirements of an advanced electronic signature under Article 26 of Regulation (EU) No. 910/2014 on Electronic Identification and Trust Services for Electronic Transactions as the court would give to a handwritten signature and such an advanced electronic signature shall therefore be admissible on the same basis as a handwritten signature.

Explanatory Note

Section 91 implements the recommendation in **paragraph 5.136** that the Bill should provide that, in determining the authentication of digital signatures in civil and criminal proceedings, signatures that meet the requirements of an advanced electronic signature under Article 26 of Regulation (EU) No. 910/2014 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: General

Definition of expert

[new]

92. In this Act —

“expert” means a person who appears to the court to possess the appropriate qualifications, skills or experience about the matter to which the person’s evidence relates (whether the evidence is of fact or of opinion), and who may be called upon by the court to give independent and unbiased testimony on a matter outside the knowledge and experience of the court, and the terms “expert evidence” and “expertise” shall be interpreted accordingly.

Explanatory Note

Section 92 implements the recommendation in **paragraph 6.41** that the Bill should define “expert” as a person who appears to the court to possess the appropriate qualifications, skills or experience about the matter to which the person’s evidence relates (whether the evidence is of fact or of opinion), and who may be called upon by the court to give independent and unbiased testimony on a matter outside the knowledge and experience of the court; and that the terms “expert evidence” and “expertise” should be interpreted accordingly. As recommended in **paragraph 6.94**, the Bill does not contain any additional requirements concerning experts from outside the State; similarly, as recommended in **paragraph 7.150**, the Bill does not contain any general requirement of reliability for the admissibility of expert evidence.

Person may be expert based on experience

[new]

93. (1) (a) Without prejudice to *section 92*, a person may be regarded by a court as being qualified to give evidence as an expert in civil or criminal proceedings by virtue of his or her knowledge or experience in the matter to which the person’s evidence relates.

(b) Accordingly, it shall not be a necessary requirement that the person has acquired this knowledge or experience through any formal training or qualification, whether within the meaning of the Qualifications and Quality Assurance (Education and Training) Act 2012 or otherwise, provided that the court is satisfied that the evidence is reliable and testable and otherwise complies with the requirements of this Part.

(2) When assessing whether a witness is to be considered an expert, a court shall take account of the length of time the person has spent studying or practising in the particular area and, in the case of a retired person or any person no longer studying or practising in that area, the length of time he or she has spent away from the particular area.

Explanatory Note

Section 93(1) implements the recommendation in **paragraph 6.55** that the Bill should provide that expertise based on experience should be considered sufficient to qualify a witness as an expert and as suitable to offer testimony on any matter of benefit to the court, regardless of how they have acquired this knowledge, be it through formal training or incidental study, provided that the evidence is reliable and testable.

Section 93(2) implements the recommendation in **paragraph 6.56** that the Bill should provide that, when assessing the issue as to whether a witness is to be considered an expert, account is to be taken of the length of time the witness has spent studying or practising in the particular area as well as, in the case of a retired person or any person no longer studying or practising in that area, the length of time he or she has spent away from the particular area.

Common knowledge rule

[new]

94. Matters of common knowledge shall continue to remain outside the scope of matters on which expert evidence may be given in civil or criminal proceedings, and accordingly the rule known as the common knowledge rule is retained.

Explanatory Note

Section 94 implements the recommendation in **paragraph 7.71** that the Bill should not abolish the common knowledge rule, and that matters of common knowledge should remain outside of the scope of matters on which expert evidence can be given.

Ultimate issue rule

[new]

95. (1) Subject to subsection (2), an expert shall continue to be prevented from giving evidence, whether of fact or opinion, on a fact in issue or on an ultimate issue, and accordingly the rule known as the ultimate issue rule is hereby retained for civil and criminal proceedings.

(2) A court may allow an expert to give evidence to inform and educate the court, including where relevant a jury, about the background to the ultimate issue where the court is satisfied that this is required, without prejudice to the generality of the ultimate issue rule in subsection (1) that the decision in law on any such issue is for the court, including where relevant a jury, and not the expert.

Explanatory Note

Section 95(1) implements the recommendation in **paragraph 7.105** that the Bill should provide that the ultimate issue rule, which prevents an expert from expressing a view on a fact in issue or an ultimate issue that would be dispositive of the case, should not be abolished.

Section 95(2) implements the recommendation in **paragraph 7.106** that the Bill should provide that a court should continue to allow expert evidence to inform and educate the judge, and where relevant the jury, about the background to the ultimate issue where required, while also emphasising that the ultimate decision on such issues is for the court and not the expert.

Chapter 2

Duties of expert witness and civil liability

General duties of expert witness

[new]

- 96.** In civil and criminal proceedings, an expert witness has, and shall comply with, the following duties—
- (a) an overriding duty to the court to provide truthful, independent and impartial expert evidence, irrespective of any duty owed to the instructing party,
 - (b) 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 and all surrounding facts, including those which could detract from his or her evidence and, where relevant, his or her expressed opinion,
 - (c) a duty to confine his or her evidence (whether of fact or opinion) to matter that is within the scope of his or her expertise, to state clearly when a matter falls outside the scope of his or her expertise and to distinguish clearly between matters of fact and matters of opinion when giving his or her expert evidence, whether given orally or in the form of a written report, and
 - (d) 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.

Explanatory Note

Section 96 implements the general recommendation in **paragraph 8.69** that the Bill should contain certain key duties of the expert witness.

Section 96(a) implements the recommendation in **paragraph 8.79** that the Bill should provide that the expert has an overriding duty to the court to provide truthful, independent and impartial expert evidence, irrespective of any duty owed to the instructing party.

Section 96(b) implements the recommendation in **paragraph 8.85** that the Bill should provide that the expert has 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 and all surrounding facts, including those which could detract from his or her evidence and, where relevant, his or her expressed opinion.

Section 96(c) implements the recommendation in **paragraph 8.89** that the Bill should provide that the expert has a duty to confine his or her evidence (whether of fact or opinion) to matter that is within the scope of his or her expertise, to state clearly when a matter falls outside the scope of his or her expertise and to distinguish clearly between matters of fact and matters of opinion when giving his or her expert evidence, whether given orally or in the form of a written report.

Section 96(d) implements the recommendation in **paragraph 8.95** that the Bill should provide that the expert has 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.

Person not precluded from being expert witness because of employment or therapeutic relationship

[new]

97. (1) A person shall not be precluded from giving expert evidence in civil or criminal proceedings solely on the ground that he or she is, or was in the past, an employee of a party (including, in criminal proceedings, a person or body with prosecutorial authority) who intends to call him or her as an expert witness.

(2) Where it is intended to call a person to give expert evidence in respect of —

(a) a party or a witness in civil proceedings, or

(b) the accused or a witness in criminal proceedings,

the person so called shall not be precluded from giving expert evidence solely on the ground that he or she is, or was in the past, providing health care or any other therapy in a professional capacity to any such party or witness or, in the case of criminal proceedings, the accused.

Explanatory Note

Section 97 implements the recommendation in **paragraph 8.136** that the Bill should provide that a person should not be precluded from giving expert evidence in civil or criminal proceedings solely on the ground that he or she is, or was in the past, an employee of a party (including, in criminal proceedings, a person or body with prosecutorial authority) who intends to call him or her as an expert witness, or solely on the ground that he or she had provided professional health care or other therapy to the person in respect of whom the expert is to give evidence.

Court may determine evidence inadmissible if in breach of general duties of expert witness

[new]

98. A court may determine that the evidence of any witness who fails to comply with any of the duties of an expert witness in *section 96* is inadmissible.

Explanatory Note

Section 98 implements the recommendation in **paragraph 8.174** that the Bill should provide that a court may determine that the evidence of any witness who fails to comply with any of the general duties of an expert witness recommended in the Report, and set out in *section 96* of the Bill, is inadmissible.

Civil liability of expert witness only where gross negligence established

[new]

99. (1) To the extent (if any) that the common law immunity of an expert witness from civil liability in respect of the testimony he or she gives in court has survived, it is hereby abolished.

(2) An expert witness shall not be personally liable for breach of any duty in contract or breach of any duty in tort except where it is established that the expert acted with gross negligence in giving his or her evidence in court in civil or criminal proceedings or in preparing a report, including a report prepared in contemplation of civil or criminal proceedings.

Explanatory Note

Section 99 implements the recommendation in **paragraph 8.254** that the Bill should provide that, to the extent (if any) that the common law immunity of an expert witness from civil liability in respect of the evidence he or she gives in court has survived, the Bill should provide that it is abolished and that it is replaced with civil liability of an expert witness limited to circumstances in which it is established that the expert acted with gross negligence (that is, falling far short of the standard of care expected of such an expert) in giving evidence in court, including a report prepared for civil or criminal proceedings.

Duty of instructing solicitor to client and expert witness

[new]

100. (1) A solicitor who instructs any person to appear as an expert witness in civil or criminal proceedings shall be under a duty to inform both that person and the solicitor's client of the consequences, including the possible consequences in civil liability, of the failure of the person to obtain indemnity insurance.

(2) (a) In civil proceedings, a solicitor who instructs an expert witness for any party shall ensure that the originating document by which the proceedings are instituted shall be accompanied by a certificate signed by the solicitor indicating that he or she has complied with subsection (1).

(b) In criminal proceedings, a solicitor who instructs an expert witness for any party shall ensure that, prior to the commencement of the trial, the solicitor shall lodge with the trial court a certificate signed by the solicitor indicating that he or she has complied with subsection (1).

Explanatory Note

Section 100 implements the recommendation in **paragraph 8.259** that the Bill should provide that a solicitor instructing an expert witness who is not covered by indemnity insurance is under an obligation to make his or her client and the expert witness fully aware of the possible consequences of the failure to obtain such insurance. The text of *section 100(2)* is based on the text of sections 6 and 7 of the *Family Law (Divorce) Act 1996*, which impose duties on solicitors to inform clients of certain matters in advance of instituting divorce proceedings.

Codes of Practice on Expert Evidence and Expert Witnesses

[new]

101. (1) The Minister shall, as soon as practicable after the coming into force of this Part, publish in a form that is easily accessible (including through the internet) codes of practice on expert evidence and expert witnesses.

(2) Each such code of practice shall be prepared by a representative group of persons, established by the Minister for this purpose, with suitable knowledge of expert evidence and expert witnesses.

(3) (a) Each such code of practice shall provide practical guidance on the requirements of this Part, including on the general duties of expert witnesses and the consequences of not complying with those duties.

(b) A code of practice under this section may provide practical guidance of general application concerning expert evidence and expert witnesses, or practical guidance concerning expert evidence and expert witnesses in specific types of civil or criminal proceedings.

(c) A code of practice under this section may provide practical guidance concerning expert evidence and expert witnesses prepared for or given in proceedings or hearings that are not civil proceedings or criminal proceedings.

(4) An expert shall comply with the contents of a code of practice prepared and published under this section.

(5) Any code of practice prepared and published under this section shall, to the extent that it provides practical guidance for a court on an issue before the court, be admissible for that purpose.

Explanatory Note

Section 101 implements the recommendation in **paragraph 8.69** that the Bill should provide that the Minister for Justice and Equality may publish codes of practice for expert witnesses, prepared by a representative group of persons with suitable knowledge of this area established by the Minister for this purpose; that expert witnesses would be required to comply with the contents of such a code of practice; and that any such code of practice shall, to the extent that it provides practical guidance for a court on an issue before the court, be admissible for that purpose.

PART 8

Evidence of vulnerable witnesses in certain criminal cases²⁶

Offences to which Part 8 applies
[1992, No.12, s.12]

102. This Part applies to—

- (a) a sexual offence,
- (b) an offence involving violence or the threat of violence to a person,
- (c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998,

²⁶

Part 8 of the Bill (sections 102 to 110) largely replicates Part 3 (sections 12 to 19) and section 29 of the *Criminal Evidence Act 1992*. It therefore implements in part the recommendation in **paragraph 9.66** that the provisions of the 1992 Act should be consolidated into this Bill, together with any related reforms made in the Report. Part 8 of the Bill does not involve any reforms, other than incorporating amendments to the 1992 Act since it was enacted. The question as to whether comparable provisions should be made for vulnerable witnesses in other criminal proceedings, and in civil proceedings, would require a separate review, which is outside the scope of this Report. At the time of writing (December 2016) the *Criminal Law (Sexual Offences) Bill 2015* and the *Criminal Justice (Victims of Crime) Bill 2016* are before the Oireachtas and, if enacted, would make a number of amendments to Part 3 of the 1992 Act.

(d) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008, or

(e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d).

Evidence through television link

[1992, No.12, s.13]

103. (1) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act 1967) for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link—

(a) if the person is under 18 years of age, unless the court sees good reason to the contrary,

(b) in any other case, with the leave of the court.

(2) Evidence given under subsection (1) shall be video-recorded.

(3) While evidence is being given through a live television link pursuant to subsection (1) (except through an intermediary pursuant to *section 104(1)*), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.

Evidence through intermediary

[1992, No.12, s.14]

104. (1) Where—

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 18 years of age is giving, or is to give, evidence through a live television link,

the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the

witness in a way which is appropriate to his or her age, maturity and decision-making capacity the meaning of the questions being asked.

(3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

Procedure in relation to certain offences

[1992, No.12, s.15]

105. (1) Where—

(a) under Part IA of the Criminal Procedure Act 1967, the prosecutor consents to the sending forward for trial of an accused person who is charged with an offence to which this Part applies,

(b) the person in respect of whom the offence is alleged to have been committed, or a person who has made a video-recording under *section 106(1)(b)(ii)*, is under 18 years of age on the date consent is given to the accused being sent forward for trial, and

(c) it is proposed that a video-recording of a statement made by the person concerned during an interview as mentioned in *section 106(1)(b)* shall be given in evidence pursuant to that section,

the prosecutor shall, in addition to causing the documents mentioned in section 4B(1) of that Act to be served on the accused—

(i) notify the accused that it is proposed so to give evidence, and

(ii) give the accused an opportunity of seeing the video-recording of the interview.

(2) The judge hearing an application under section 4E of the Criminal Procedure Act 1967 may consider any statement made, in relation to an offence, by a person in a video-recording mentioned in *section 106(1)(b)* if the person is available for cross-examination at the hearing of the application.

(3) If the accused consents, an edited version of the video-recording of an interview mentioned in *section 106(1)(b)*, may, with leave of the judge hearing an application referred to in subsection (2) of this section, be shown at the hearing of the application, and, in that event, subsection (2) and *section 106(1)(b)* shall apply in relation to that version as it applies in relation to the original video-recording.

Video-recording as evidence at trial

[1992, No.12, s.16]

106. (1) Subject to subsection (2)—

(a) a video-recording of any evidence given, in relation to an offence to which this Part applies, by a person under 18 years of age through a live television link in proceedings under Part IA of the Criminal Procedure Act 1967, and

(b) a video-recording of any statement made during an interview with a member of the Garda Síochána or any other person who is competent for the purpose—

(i) by a person under 14 years of age (being a person in respect of whom such an offence is alleged to have been committed), or

(ii) by a person under 18 years of age (being a person other than the accused) in relation to an offence under—

(I) section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998, or

(II) section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008,

shall be admissible at the trial of the offence as evidence of any fact stated therein of which direct oral evidence by him would be admissible:

Provided that, in the case of a video-recording mentioned in paragraph (b), the person whose statement was video-recorded is available at the trial for cross-examination.

(2) (a) Any such video-recording or any part thereof shall not be admitted in evidence as aforesaid if the court is of opinion that in the interests of justice the video-recording concerned or that part ought not to be so admitted.

(b) In considering whether in the interests of justice such video-recording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them.

(3) In estimating the weight, if any, to be attached to any statement contained in such a video-recording regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

(4) In this section “statement” includes any representation of fact, whether in words or otherwise.

Transfer of proceedings

[1992, No.12, s.17]

107. In any proceedings for an offence to which this Part applies in any circuit or district court district in relation to which any of the provisions of *sections 103 to 106* or *section 110* is not in operation the court concerned may, if in its opinion it is desirable that evidence be given in the proceedings through a live television link or by means of a video-recording, by order transfer the proceedings to a circuit or district court district in relation to which those provisions are in operation and, where such an order is made, the jurisdiction of the court to which the proceedings have been transferred may be exercised—

(a) in the case of the Circuit Court, by the judge of the circuit concerned, and

(b) in the case of the District Court, by the judge of that court for the time being assigned to the district court district concerned.

Identification evidence

[1992, No.12, s.18]

108. Where—

(a) a person is accused of an offence to which this Part applies, and

(b) evidence is given by a person (in this section referred to as “the witness”) through a live television link pursuant to *section 103(1)*,

then—

(i) in case evidence is given that the accused was known to the witness before the date on which the offence is alleged to have been committed, the witness shall not be required to identify the accused at the trial of the offence, unless the court in the interests of justice directs otherwise, and

(ii) in any other case, evidence by a person other than the witness that the witness identified the accused at an identification parade as being the offender shall be admissible as evidence that the accused was so identified.

Application of Part 8 to persons whose decision-making capacity may require assistance

[1992, No.12, s.19]

109. The references in *sections 103(1)(a), 104(1)(b), 105(1)(b) and 106(1)(a) and (b)(ii)* to a person under 18 years of age and the reference in *section 106(1)(b)(i)* to a person under 14 years of age shall include references to a person who has reached the age concerned but whose decision-making capacity is in question and who may require assistance, within the meaning of the Assisted Decision-Making (Capacity) Act 2015.

Evidence through television link by persons outside State in extradition or European Arrest Warrant proceedings

[1992, No.12, s.29]

110. (1) Without prejudice to *section 103(1)*, in any criminal proceedings or proceedings under the Extradition Acts 1965 to 2001 or the European Arrest Warrant Act 2003, a person other than the accused or the person whose extradition is being sought, as the case may be, may, with the leave of the court, give evidence through a live television link.

(2) Evidence given under subsection (1) shall be video-recorded.

(3) Any person who while giving evidence pursuant to subsection (1) makes a statement material in the proceedings which he or she knows to be false or does not believe to be true shall, whatever his or her nationality, be guilty of perjury.

(4) Proceedings for an offence under subsection (3) may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State.

SCHEDULE
Enactments Repealed

Section 3

Column (1)	Column (2)
Short Title and Citation of Act	Extent of Repeal
Witnesses Act 1806 (46 Geo 3, c. 37)	The whole Act
Evidence Act 1843 (6 & 7 Vict, c.85)	The whole Act
Evidence Act 1845 (8 & 9 Vict, c.113)	The whole Act
Treasury Instruments (Signature) Act 1849 (12 & 13 Vict, c.89)	The whole Act
Evidence Act 1851 (14 & 15 Vict, c.99)	The whole Act
Evidence Amendment Act 1853 (16 & 17 Vict, c.83)	The whole Act
Criminal Procedure Act 1865 (28 & 29 Vict, c.18)	The whole Act

Documentary Evidence Act 1868 (31 & 32 Vict, c.37)	The whole Act
Evidence Further Amendment Act 1869 (32 & 33 Vict, c.68)	The whole Act
Bankers' Books Evidence Act 1879 (42 & 43 Vict, c.11)	The whole Act
Documentary Evidence Act 1882 (45 & 46 Vict, c.9)	The whole Act
Oaths Acts 1888 (51 & 52 Vict, c.46)	The whole Act
Documentary Evidence Act 1895 (58 & 59 Vict, c.XX)	The whole Act
Evidence (Colonial Statutes) Act 1907 (7 Edw 7, c.16)	The whole Act
Oaths Acts 1909 (9 Edw 7, c.39)	The whole Act
Criminal Justice (Evidence) Act 1924 (No.37 of 1924)	The whole Act
Documentary Evidence Act 1925 (No.24 of 1925)	The whole Act
Criminal Justice Act 1984 (No.22 of 1984)	Section 24
Criminal Evidence Act 1992 (No.12 of 1992)	The whole Act
Criminal Justice Act 2006 (No.26 of 2006)	Sections 15 to 19
Statute Law Revision Act 2007 (No.28 of 2007)	Section 8

Explanatory Note

As recommended in the Report, this Bill comprises a consolidation of the *Evidence Acts*, whether pre-1922 or post-1922, that remain relevant, together with reforms arising from the recommendations in the Report concerning hearsay, documentary and electronic evidence and expert evidence. In addition, the Report recommends repeal without replacement of those provisions in the *Evidence Acts* that are obsolete. Arising from this combination of consolidation and reform, *section 3* and the *Schedule* to the Bill therefore allow for the consequential repeal in full of 18 Acts — 15 pre-1922 Acts and 3 post-1922 Acts— and for the repeal of 7 sections in 3 other post-1922 Acts.

APPENDIX B

Evidence in Bodies Other than Courts

This appendix takes a closer look at the rules of evidence and fair procedures in certain non-court adjudicative bodies. This research has been prompted by concerns raised with the Commission about certain important proceedings acting in a quasi-judicial capacity without the scrutiny or proper standards of established rules of evidence. This appendix analyses the decisions on fair procedures in public inquiries and public adjudicative bodies before setting out the proliferation of statutory regimes which establish powers to hear and receive evidence which mirror those of the courts. The purpose of this is to raise the question of whether evidential rules in certain bodies with this kind of quasi-judicial character ought to be more closely scrutinised.

The textbooks on the law of evidence do not address the subject of the rules surrounding the reception of evidence in non-court settings such as public inquiries or other administrative proceedings, because the courts have been very reluctant to outline precise or pre-existing rules in such contexts. Non-court adjudicative proceedings have been considered almost exclusively through the prism of constitutional fair procedures rather than the rules of evidence and accordingly the standards these bodies must meet are shifting and context-dependent. Constitutional fair procedures is founded on the twin principles of *nemo iudex in causa sua* (the decision maker must not be biased) and *audi alteram partem* (both sides must be given a fair hearing), though it is well-established that constitutional fair procedures goes well beyond these.¹

The Supreme Court outlined the general principles of constitutional fair procedures relating to non-court proceedings in *East Donegal Co-Operative v Attorney General*:

“[it must be presumed] that proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice.”²

The *MacPharhlain*³ case held that even minimal interference with rights or interests will ground a requirement for the provision of constitutional justice but it is a good deal less clear exactly what constitutional justice will require. In *Lawlor v Members for the Tribunal of Inquiry into Certain Planning Matters and Payments*⁴, Murray CJ

¹ See Walsh J in *McDonald v Bord na gCon* [1965] I.R. 217 at 242, “...constitutional justice ... must be understood to import more than the two well-established principles that no man shall be judge in his own cause, and *audi alteram partem*”.

² *East Donegal Co-Operative v Attorney General* [1970] I.R. 317 at 341.

³ *MacPharthalain v Commissioners for Public Works* [1992] 1 I.R. 111 (HC); [1994] 3 I.R. 353.

⁴ [2009] IESC 50.

held that neither the civil nor the criminal standard of proof applies generally to public inquiries but rather “evidential requirements must vary depending upon the gravity of the particular allegation.” Thus the courts have been satisfied to require little more specification than a general duty of fairness and fair procedures in non-court proceedings. The courts have held that, where relying on constitutional justice, the applicant must prove that a real injustice would result from the denial of a right or privilege available at trial, most notably a right to cross-examine as was considered in *Kiely v Minister for Social Welfare*⁵. Hogan and Morgan comment:

“In other words, the cash value difference lies in the fact that the common law rule operates inflexibly; whereas, where an applicant is relying on the constitutional justice principle, they must be able to demonstrate that, in the circumstances, the lack of an opportunity to cross-examine would produce unfairness.”⁶

The application of rules of evidence in non-court proceedings is therefore contingent and context dependent. While the same principles apply, the form and rigour of their application is markedly different. Thus while court proceedings are governed inflexibly by the strict laws of evidence, non-court adjudicators are subject to the more *laissez-faire* invigilation of constitutional justice.

While this line of case law would suggest that the rules for the receipt of evidence in court and non-court proceedings run along parallel but sharply distinct lines, a significant number of statutory provisions appear to merge the streams. One such provision is contained in s. 16 of the *Evidence Act 1851* which provides that a court “or other person” who has authority either by law or by consent of parties “to hear, receive, and examine evidence” is empowered to administer an oath to all such witnesses as are legally called before them.

Section 16 indicates a connection between bodies empowered to administer oaths and the formal taking of evidence from witnesses. The formal taking of evidence does not necessarily require that the entirety of the rules of evidence that apply in courts also apply to such adjudicative bodies, but the formality associated with giving evidence under oath suggests a more rigid application of procedural rules. The intent to draw upon the more formal and rigid procedures of the courts has become more explicit in recent legislation. Set out below are a number of examples of certain quasi-judicial bodies established in legislation in recent years.

⁵ [1977] I.R 267 at 281 per Henchy J.
⁶ Hogan and Morgan, *Administrative Law in Ireland* (4th ed. Round Hall, 2010) p. 658.

The Medical Council's Fitness to Practice Committee

Section 66 of the *Medical Practitioners Act 2007* makes extensive provision for how evidence is to be given in inquiry hearings by the Medical Council's Fitness to Practice Committee. Section 66(1) to (4) provide:

"(1) For the purposes of an inquiry, the Fitness to Practise Committee has all the powers, rights and privileges that are vested in the [High] Court or a judge of the Court on the occasion of an action and that relate to—

- (a) enforcing the attendance of witnesses,
- (b) examining witnesses on oath or otherwise, and
- (c) compelling the production (including discovery) of records.

(2) Without prejudice to the generality of subsection (1), a summons issued by the chairperson of the Fitness to Practise Committee or by such other member of that Committee as is authorised by it for the purpose of the inquiry may be substituted for and is the equivalent of any formal process capable of being issued in an action for enforcing the attendance of witnesses and compelling the production of records.

(3) Subject to any rules in force under section 11 [of the 2007 Act] and to the necessity of observing fair procedures, the Fitness to Practise Committee may receive evidence given—

- (a) orally before the committee,
- (b) by affidavit, or
- (c) as otherwise allowed by those rules, including by means of a live video link, a video recording, a sound recording or any other mode of transmission.

(4) A witness before the Fitness to Practise Committee is entitled to the same immunities and privileges as a witness before the [High] Court."

Section 66(1) of the 2007 Act thus confers the powers of the High Court on the Fitness to Practice Committee so far as the following are concerned: enforcing the attendance of witnesses, examining witnesses on oath or otherwise, and compelling the production (including discovery) of records. However, as discussed by the Supreme Court in *Borges*⁷, the effect of section 66(3) is that although the formal rules of evidence do not apply to Fitness to Practice hearings, nonetheless such hearings must observe fair procedures. Thus, in a specific case the Committee may be prohibited from acting on hearsay evidence where the rules of evidence that apply in court proceedings render it inadmissible. To that extent the rules of evidence that apply in court proceedings, including the rules that provide for the admissibility of

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[2004] 1 IR 103.

hearsay and other evidence in court proceedings, remain highly significant for Fitness to Practice hearings. For this reason, the Medical Council has stated in its guidance on the admissibility of evidence:⁸

“The Committee is not bound by the strict rules of evidence that may apply in the Courts and when departing from same shall attach the appropriate weight to evidence that breaches such a rule. When deciding whether to admit evidence that is not in accordance with the strict rules of evidence, the Committee will take into account the extent to which the admission of that evidence may represent a fundamental breach of the medical practitioner’s entitlement to fair procedures and natural justice.”

The Health and Social Care Professionals Council’s Committee of Inquiry

The *Health and Social Care Professionals Act 2005* provides for similar powers in the conduct of a disciplinary hearing before a committee of inquiry. The committee of inquiry has the power to suspend or remove a health or social care professional from the register. A committee of inquiry has “all the powers, rights and privileges that are vested in the Court or a judge of the Court on the occasion of an action and that relate to—

- (a) enforcing the attendance of witnesses,
- (b) examining witnesses on oath or otherwise, and
- (c) compelling the production of records.”⁹

Section 58 requires that, in general, the hearing be held in public and guarantees “a full right to cross examine” witnesses. This “full right” has been conditioned somewhat by the introduction of the *Health and Social Care Professionals Council Rule Regarding the Receiving and Recording of Evidence by a Committee of Inquiry 2016* (S.I. No. 371 of 2016) which allows for the giving of evidence via live video link, video recording, sound recording or any other mode of transmission. Art. 2(3) leaves it open to the parties to challenge the appropriateness of receiving evidence via video link or recording.

Pensions Ombudsman

A trend is emerging towards more rigid procedures in non-court adjudicative bodies where significant rights or interests are in issue. The Pensions Ombudsman is another organisation whose parent legislation, the *Pensions (Amendment) Act 2002*,

⁸ Medical Council, *Procedures in Respect of Part 8 of the Medical Practitioners Act 2007*, paragraph 8, available at www.medicalcouncil.ie.

⁹ Section 59, *Health and Social Care Professionals Act 2005*.

specifies that it shall be deemed to have all the powers of a judge of the High Court in matters such as the examination of witnesses under oath. The Ombudsman may require any person to produce certain documents or to otherwise furnish information or to attend before him or her. In addition, s. 137(4) provides that a person shall not do anything which would “if the Ombudsman were a court having power to commit for contempt of court, be contempt of such court.”

The section further provides that any person who to whom a requirement is addressed under the section is “entitled to the same immunities and privileges as if he were a witness before the High Court.” These provisions have a strongly judicial character and contrast with the flexible and laissez-faire pronouncements of judges in the central fair procedures cases.

Financial Services Ombudsman

The Financial Services Ombudsman (FSO) perhaps best illustrates the parallel evidential and fair procedures regimes governing the courts and other public bodies. The Financial Services Ombudsman was set up by the *Central Bank and Financial Services Authority of Ireland Act 2004* with very similar powers to those of the Pensions Ombudsman. The principal functions of the Financial Services Ombudsman’s Bureau are to mediate, and, where necessary, investigate and adjudicate on complaints made by eligible consumers about the conduct of regulated financial services providers.¹⁰

The definition of consumer the regulations have given is extremely broad and includes all natural persons and non-incorporated bodies as well as incorporated bodies with an annual turnover of €3 million or less.¹¹ As Hogan J has pointed out, this radically expands the scope of jurisdiction of the FSO and means that loans negotiated by a syndicate of businessmen running to hundreds of millions of euro will find themselves being determined by the FSO rather than in the courts.¹² FSO investigations can thus determine very significant disputes in the banking and insurance industry without the need for the judgment of the courts.

With respect to evidentiary issues, the Act has almost identical provisions to the Pensions Ombudsman, granting the FSO the same power as a judge of the High Court, though specifying the powers of a High Court judge “in civil proceedings”. Its powers for gathering evidence are provided as:

¹⁰ Section 57BK of the *Central Bank Act 1942* (as inserted by s. 16 of *Central Bank and Financial Services Authority of Ireland Act 2004*).

¹¹ *Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005* (S.I. No. 190 of 2005).

¹² *Lyons v Financial Services Ombudsman* [2011] IEHC 454, para. 12.

“For the purpose of obtaining information relevant to investigating or adjudicating a complaint about the conduct of a regulated financial service provider, the Financial Services Ombudsman may—

(a) summon any officer, member, agent or employee of the financial service provider to attend before that Ombudsman, and

(b) examine on oath any such officer, member, agent or employee in relation to any matter that appears to that Ombudsman to be relevant to the investigation or adjudication”¹³

In addition the FSO has strong investigatory powers and can enter any business premises used by the financial service provider and “inspect any document or thing on the premises.”¹⁴ The FSO is further empowered to require that any document which is kept in a non-legible form be reproduced in legible format for its inspection. These powers reflect the hybrid adversarial and inquisitorial nature of many non-court adjudicative proceedings. Section 57CH also provides that obstruction of an FSO investigation is a criminal offence and attracts a fine not exceeding €2,000 and a term of imprisonment not exceeding three months.

However, despite extensive provisions detailing the strongly judicial character of the FSO, s. 57BK directs that the FSO “is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.” It appears that the Act is seeking to lay down a relatively rigid evidentiary and procedural structure but equally trying to preempt appeals to the High Court demanding the full gamut of procedural entitlements in a civil or criminal trial. In the aforementioned judgment in *Lyons v Financial Services Ombudsman*, Hogan J accepted this statutory mandate for the expeditious handling of disputes, noting that the FSO could not be expected to act as “a miniature version of the Commercial Court”.¹⁵

However, Hogan J found on the facts that the FSO was required to hold an oral hearing, and while he noted that this would have significant consequences for the Ombudsman office, he felt it justified in the hope that “perhaps such cases as the present one will prompt a review of the proper scope and role of the Ombudsman vis-à-vis the court system.”¹⁶ In another more recent judgment, Hogan J held that a matter which had been determined before the FSO was *res judicata* and that any subsequent collateral legal proceedings were barred in the absence of special circumstances.¹⁷

¹³ Section 57CE(4) of the *Central Bank Act 1942* (as inserted by s. 16 of *Central Bank and Financial Services Authority of Ireland Act 2004*).

¹⁴ Section 57CF of the *Central Bank Act 1942* (as inserted by s. 16 of *Central Bank and Financial Services Authority of Ireland Act 2004*).

¹⁵ [2011] IEHC 454, paragraph 21.

¹⁶ *Ibid*, para. 36.

¹⁷ *Florence Crowley v Zurich Life Assurance Plc* [2015] IEHC 197.

The strongly judicial character of the FSO as well as the significance of the adjudications it is empowered to make highlight the need to consider the application of rules of evidence to certain non-court proceedings who assume a judicial role in this way. Hogan J himself pondered this “existential question” in his *Lyons* judgment, asking: “What after all is the function of the FSO and, perhaps, more specifically, how do its functions differ from those of the courts?”¹⁸

Coroners

Section 50 of the *Coroners Bill 2007*, which proposes to repeal the 1962 Act and provide for a national Coroner Service, would if enacted provide for evidentiary rules for inquests that mirror those in the Medical Practitioners, Pensions and FSO Acts.

Section 50(1) and (2) of the 2007 Bill provide:

“(1) The Coroner Service shall, having regard to the need to observe fair procedures in the conduct of an inquest, adopt rules and procedures for—

(a) receiving, taking and recording evidence, and (b) receiving submissions.

(2) The rules and procedures adopted under subsection (1) may, among other things, specify—

(a) the form in which and the means by which evidence or submissions may be received by the inquest, (b) the conditions subject to which evidence or submissions may be received by the inquest by means of a live video link, a video recording, a sound recording or any other mode of transmission, (c) without prejudice to section 51 the cases, if any, in which evidence must be given orally before the inquest.”

Section 51(1) of the 2007 Bill provides that evidence at an inquest may be tendered in written form, whether by affidavit, submission, report or otherwise, including by electronic means or any other means capable of being produced in legible form.

Section 64(1) of the 2007 Bill provides that if a coroner considers it necessary for the purposes of the proper conduct of an inquest, the coroner may:

“(a) direct the taking of an oath or affirmation by any witness, (b) direct a witness to answer questions, (c) direct the production by any person of any document, article, substance or thing in their possession or under their power or control, (d) inspect, copy and keep for such period as the coroner considers necessary any document, article, substance or thing produced at the inquest, and (e) give any other direction and do anything else the coroner considers necessary.”

Section 64(3) of the 2007 Bill provides that a witness at an inquest shall be entitled to the same immunities and privileges as if he or she were a witness before the High

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[2011] IEHC 454, paragraph 13.

Court. Section 64(3) of the 2007 Bill provides that if a coroner considers that it is necessary for the purposes of an inquest, he or she may be assisted by such expert persons as the coroner may determine.

The formality of and comparability of such powers and procedures with those that apply in court proceedings indicate that many of the rules of evidence that apply in court proceedings are also likely to be applied, whether in whole or in part, in coroner inquests.

Tribunals of Inquiry

Public Inquiries are empowered to investigate certain matters of exceptional public importance and are usually set up in the aftermath of some scandal or public controversy. The most well-known public inquiries are Tribunals of Inquiry. These types of tribunals have been previously described by the Commission as “the Rolls Royce of tribunals”¹⁹ and derive their considerable statutory powers from the *Tribunals of Inquiry (Evidence) Acts 1921-2004*. Section 4 of the Act of 1979 provides that a Tribunal of Inquiry “shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders.”

While intended as purely investigatory rather than adjudicative, the implication of the right to a good name of those under investigation has necessitated the provision of extensive fair procedures. This has seen such tribunals become significantly adversarial, with both sides represented by counsel and subject to relatively stringent procedural rules.

Tribunals of Inquiry take place in public and have the power to order the production of documents and to hold oral hearings. Where the personal rights of the witness are implicated, such as their good name, property or person, they are entitled to the fuller protection of “Re Haughey Rights”. Re Haughey Rights, named for the case in which they were identified, direct that a person before the public inquiry be:

- (a) Furnished with a copy of the evidence which reflected on his good name;
- (b) Be allowed to cross-examine, by counsel, his accuser or accuser;
- (c) Be allowed to give rebutting evidence;
- (d) Be permitted to address, by counsel, the Committee in his own defence.²⁰

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Consultation Paper on Public Inquiries Including Tribunals of Inquiry LRC CP 22-2003,, p. 2
Re Haughey [1971] IR 217, 263-264

While no punitive sanction attaches to an adverse finding of a tribunal, the profile and authority they possess render its pronouncements of profound public importance and may be devastating to a person's good name or ability to earn a livelihood. Tribunals of Inquiry often attract similar media coverage and commentary to that of a high profile criminal case.

The Supreme Court has nonetheless rejected arguments that such powers constitute "an administration of justice" within the meaning of Art. 34.1 of the Constitution, reserving such administration to the courts. The fact that Tribunals of Inquiry do not settle legal rights, per se, militates against any strictly judicial characterisation.

The Commission has previously recommended that no special code of rules or evidential procedures equivalent to those of the courts be set down to govern all public inquiries.²¹ The Commission considered that the "well-known and sophisticated rules of constitutional justice" were sufficient to police the activities of public inquiries.²² The Commission further reasoned that "inflexible rules could unreasonably thwart an inquiry" and feared important public investigations being derailed by technical arguments.²³ While some doubt has been cast upon the ability of public adjudicative and investigative bodies to understand their precise role and requirements simply by reference to constitutional justice²⁴, there can be no doubt that any codification involves a trade-off between predictability and flexibility.

Commissions of Investigation

Commissions of Investigation perform a similar function to Tribunals of Inquiry, investigating matters of significant public concern. The *Commissions of Investigation Act 2004* has its origins in the child sex abuse scandals in the Catholic Church. The extremely serious and sensitive nature of the investigation to be conducted was considered inappropriate for Tribunals of Inquiry which are very adversarial and public. The Act of 2004 directs that the Commission sit in private except in exceptional cases; where either the witness requests it or the commission is satisfied that it is in the interests of both the investigation and fair procedures.²⁵ There have thus far been ten Commissions of Investigation set up under s. 3(1) of the Act, looking into issues as diverse as the Dublin/Monaghan bombings, child sex abuse and the banking crisis.²⁶

The Act of 2004 prescribes extensive rules of evidence including the power direct a witness to attend²⁷, to examine them under oath or affirmation²⁸, to cross-examine²⁹

²¹ *Report on Public Inquiries Including Tribunal of Inquiry*, LRC 73-2005, [5.08] – [5.11].

²² *Consultation Paper on Public Inquiries Including Tribunals of Inquiry*, LRC CP 22-2003, [7.63].

²³ *Ibid.*

²⁴ See address made by Clarke J to Engineers Ireland, discussed below.

²⁵ S. 11.

²⁶ A full list of the commissions established is available at http://www.irishstatutebook.ie/eli/isbc/2004_23.html under amendments to s. 3(1).

²⁷ Section 16(a) *Commissions of Investigation Act 2004*.

and to demand the witness produce any document in their possession.³⁰ The Act also prescribes a duty of disclosure of “the substance of any evidence in the possession of the Commission”³¹ and directs that any witness shall have the same privileges and immunities as a witness in court.³² A commission is also empowered to establish any further rules of evidence it sees fit, having regard to the requirements of fair procedures.³³ Failure to comply with any of these rules is an offence and attracts a maximum sentence of 5 years imprisonment and/or a €300,000 fine when tried on indictment.³⁴ A failure to comply may also result in costs being awarded against the guilty party.³⁵

These rules of evidence are extensive and detailed; they envisage a formalised process subject to stringent legal requirements. In this way, commissions can behave in a manner similar to a court, even if it does not decide legal rights *per se*. However, as in the case of Tribunals of Inquiry they can make public findings extremely damaging to the good name of an individual citizen. Nevertheless the investigatory rather than adjudicative objective of such commissions, coupled with the fact that they do not determine legal rights in any strict sense, militate against strongly judicial characterisation.

Competition and Consumer Protection Commission

The CCPC, established by the *Competition and Consumer Protection Act 2014*, has the power to conduct investigations into possible breaches of competition and consumer protection law. This includes the power to summon witnesses to give evidence under oath, to produce any relevant document or record. It further provides that a witness before such an investigation is “entitled to the same immunities and privileges as if he or she were a witness before the High Court.”³⁶ There are also significant penalties for failure to cooperate with an investigation including a fine of up to €250,000 and a prison sentence of up to five years.³⁷ However the Commission does not have the power to make a determination or issue a sanction in respect of the substantive issues and, where it thinks a civil or criminal offence is made out, must either bring a summary case in the District Court or in more serious cases, refer it to the DPP for trial on indictment.³⁸

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Section 16(c) *Commissions of Investigation Act 2004*.
 Section 16(d) *Commissions of Investigation Act 2004*.
 Section 16(e) *Commissions of Investigation Act 2004*.
 Section 12 *Commissions of Investigation Act 2004*.
 Section 20 *Commissions of Investigation Act 2004*.
 Section 15 *Commissions of Investigation Act 2004*.
 Section 50 *Commissions of Investigation Act 2004*.
 Section 24 *Commissions of Investigation Act 2004*.
 Section 18, *Competition and Consumer Protection Act 2014*.
Ibid.
 See *Competition Law | Competition and Consumer Protection Commission*

Solicitor Disciplinary Proceedings

One short but notable provision of this nature is section 18 of the *Solicitors (Amendment) Act 1960* which provides that an application to or an inquiry or other proceeding before the Disciplinary Committee of the Law Society of Ireland:

“shall be a legal proceeding within the meaning of that expression as used in the Bankers’ Books Evidence Acts 1879 and 1959.”

Tax Appeals Commission

An example of something of a retreat from the casting of adjudicative bodies in such an explicitly judicial light may be seen in respect of hearings in the Tax Appeals Commission, established by the *Finance (Tax Appeals) Act 2015*.³⁹ Section 949AC of the *Taxes Consolidation Act 1997* (inserted by the 2015 Act) provides that the Tax Appeals Commission may (a) allow evidence to be given orally or in writing and (b) to admit evidence:

“whether or not the evidence would be admissible in proceedings in a court in the State.”

This permissive approach replaced the stricter approach that applied to appeals to the Appeal Commissioners, which the Tax Appeals Commission replaced. In appeals to the Appeals Commissioners, section 934 of the *Taxes Consolidation Act 1997* (repealed by the 2015 Act) provided that the Appeals Commissioners were required to act on “lawful evidence” in making their decisions, that is, only evidence that would be admissible in a court. While the 2015 Act is more permissive, it remains the position, as set out in decisions such as *Kiely*⁴⁰ and *Borges*⁴¹, that the Tax Appeals Commission is required to act judicially and to comply with the constitutional requirement of fair procedures. Thus, if (as occurred in *Kiely*) it acts on hearsay evidence provided by one party but rejects comparable hearsay from the other party, such a decision is liable to be quashed. Indeed, if it proposes to act on hearsay and one of the parties objects to its admission, it may be that (as in *Borges*), this would also breach the constitutional requirement of fair procedures. Thus, while the 2015 Act provides for a relaxation of the rules of evidence, they are likely to have a continuing influence by virtue of the overriding obligation to act judicially and to comply with fair procedures.

Expert Reports

³⁹ The 2015 Act came into force on 21 March 2016: *Finance (Tax Appeals) Act 2015 (Commencement) Order 2016* (SI No. 110 of 2016).

⁴⁰ *Kiely v Minister for Social Welfare (No. 2)* [1977] 1 IR 267.

⁴¹ *Borges v Medical Council* [2004] 1 IR 103.

Non-court adjudicators are less likely to be presented with expert evidence than a court. In proceedings designed to be streamlined, efficient and low-cost, an expert's fees may well be considered disproportionate. Nevertheless, some adjudication will require expert assistance and that expert assistance must reach certain standards.

Issues surrounding the independence and competence of expert witnesses and expert reports have been raised. In *Nurendale Ltd (t/a Panada Waste Services) v Dublin City Council*⁴² the High Court quashed an order of the respondent council which would have effectively excluded the applicant company from carrying out domestic waste collection in the area. The Order had been made after a public consultation process which included the preparation of expert reports commissioned by the councils. These reports indicated that private provision of household waste collection would be inimical to good environmental planning and would not be beneficial to consumers. The applicant, a private company providing waste collection services, challenged the Order on the grounds that the council had prejudged the consultation process. The applicants also challenged the expert reports which, it was revealed, had been significantly "massaged" by the council to support their position. The Court commented that:

"The drafts [of the expert reports] ... contained comments written by the respondents indicating which parts of earlier drafts were acceptable to them, and either deleting or re-wording those parts which would not have supported their position. There were also e-mail references to meetings with the authors of these reports as well as notes of some meetings (including 31/01/07) which would indicate that the findings of the reports were a foregone conclusion. Whether or not the City Managers [of the respondent Councils] were aware of this fact is, in my opinion, immaterial: [the senior Council official] certainly was. Such massaging of reports, which were later, in their edited versions, released publicly, is a strong indicator, to me, of unacceptable influence in a process, supposedly carried out in the public interest, and further elucidates a high level of prejudgment in the decision to vary the [Waste Management Plan]."⁴³

While these expert reports were drafted in the context of a consultation process rather than an adjudicative one, it does establish that certain basic duties of expert witnesses apply in non-court contexts.

Construction Contracts Act 2013

Section 9 of the *Construction Contracts Act 2013* provides that a code of practice for the adjudication procedure for payment disputes be drawn up by the Minister. A code of practice has now been prepared by the Minister of State at the Department of Jobs,

⁴² [2009] IEHC 588.
⁴³ *Ibid* at para. 175.

Enterprise and Innovation.⁴⁴ The code, while not stipulating powers co-extensive to those of the High Court, provides for important powers to hear and receive evidence, to appoint expert witnesses and to conduct site visits and inspections. The Act has provoked some discussion on the role of such adjudicative bodies, most notably a speech made by Mr Justice Clarke to Engineers Ireland in which he called for more detailed guidance as to what exactly constitutional justice requires in real terms in non-court adjudicative proceedings. He argued that

“...greater guidance on what is meant in practice by the obligation to comply with “natural justice could, perhaps, be useful because the problem any adjudicator is likely to be faced with is the question – “what process am I to follow”?...I would have thought that...some more detailed guidance rather than generalities might be helpful.”

He went on:

“...perhaps there might be some merit in trying to work out, by reference to the established jurisprudence of the courts in other similar areas, what kind of process is to be carried out by the inquisitorial adjudicator, would be sufficient to meet the constitutional requirements of fair process.”⁴⁵

Conclusions

On the evidence of the various statutory regimes discussed, Clarke J’s concerns about the absence of a guide to proper procedures in the adjudication of significant disputes are well-founded. Particularly where a body holds itself out as possessing all the powers of a judge of the High Court, and indeed confers all the privileges and immunities of a witness before that court, there is an argument to be made that the normal rules of evidence of a court should apply equally and in the same way. It is therefore worth considering whether the ordinary rules of evidence ought to apply certain adjudicative bodies which are either (a) deemed to be legal proceedings or else (b) are required to apply rules of evidence, whether in whole or in part, to their proceedings.

However it remains the case that such an approach would be a serious departure for Irish law. The courts have long recognised that adjudication of this kind is necessarily expedited and shorn of the procedural rigours of the courts. Adjudication is such a varied practice that one set of rules, even in the limited context mentioned above, may be considered inappropriate. Indeed Mr Justice Clarke, in the same speech mentioned above, made a point of this cause for caution.

⁴⁴ Available from <https://www.djei.ie/en/Construction-Contracts-Adjudication-Service/Code-of-Practice-Conduct-of-Adjudications/>.

⁴⁵ Public Lecture at Engineers Ireland on Adjudication – The Role of the Courts by Mr Justice Frank Clarke 29 January 2014; available at <http://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/dispute-resolution/The-Role-of-the-Courts-by-Justice-Frank-Clarke-29-01-14.pdf>.

“So, I think it is important to remember that constitutional justice is a slightly moveable feast. It does not necessarily mean the same thing in every type of situation and what is regarded as adequate to deliver a fair process in one type of situation may not be necessary in another. A case, for example, where someone is going to be dismissed from the Civil Service on the grounds of an allegation of corruption may involve a different level of process than a question of whether there should be a designation of an area in a particular way under a statute.”⁴⁶

The principle which has traditionally motivated the establishment of non-court adjudicative bodies must also be borne in mind. State mechanisms other than the courts for the resolution of disputes are inspired by the policy objective of enhancing access to justice.⁴⁷ The access to justice movement, which took hold in the latter half of the 20th century, invites us to reconfigure the focus of our study of law away from simply looking at what norms and procedures apply and towards a more contextual conception in which the costs and time and real world impact of legal processes are the subject of equal concern among legal scholars.⁴⁸ The access to justice movement reminds us that a given set of rules and procedures which reflect a perfect model of justice will lack any substantial value if they cannot be availed of by the ordinary citizen. The work of lawyers, and especially of law reform bodies, must therefore be cognisant of the value of easy and open access to legal dispute resolution, even at the cost of optimum procedures.

Accordingly the Commission takes the view that simply transposing the rules of evidence established in the courts onto lesser adjudicative bodies is not desirable, even in the case of those bodies which hold many of the characteristics of a court of law. However, the proliferation of the kind of quasi-judicial bodies discussed in this appendix and the significance of the decisions and determinations they are empowered to make necessitate a more rigorous examination of the procedures they apply. One commentator has noted the fact that whereas the Financial Services Ombudsman has never been the subject of any independent assessment or review, its UK counterpart has been the subject of two such reviews in roughly the same period.⁴⁹

The increasing prevalence and importance of regimes such as the FSO and the often inconsistent decisions on what procedures they are required to follow further militate in favour of closer review and scrutiny. The Commission invites quasi-judicial bodies of the kind discussed in this appendix to consider the recommendations and

⁴⁶ *Ibid.*

⁴⁷ This point is made in relation to the FSO by Donnelly in ‘The Financial Services Ombudsman: Asking the Existential Question’ (2012) *DULJ* 35(1), 229. This paragraph as a whole borrows from her analysis.

⁴⁸ See Cappelletti, ‘Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement’ (1993) 56 *Modern Law Review*, 282

⁴⁹ See Donnelly, ‘The Financial Services Ombudsman: Asking the Existential Question’ (2012) *DULJ* 35(1), 229, 258

analysis in this report and to consider developing codes of practice governing their adjudicative process.



The Law Reform Commission is an independent statutory body established by the Law Reform Commission Act 1975. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its Fourth Programme of Law Reform was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in October 2013 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation project makes legislation more accessible online to the public. This includes the Legislation Directory (an electronically searchable index of amendments to Acts and statutory instruments), a selection of Revised Acts (Acts in their amended form rather than as enacted) and the Classified List of Legislation in Ireland (a list of Acts in force organised under 36 subject-matter headings).

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