Summary of the Law Reform Commission report on consolidation and reform of aspects of the Law of Evidence

On Wednesday 18 January 2017, the Law Reform Commission’s (“LRC”) latest report was published.

This report considers certain aspects of the Law of Evidence namely expert evidence, documentary and electronic evidence and hearsay evidence and puts forward recommendations in this regard. The report also recommends consolidation of the existing Evidence Acts. The report is available on the Law Reform website (www.lawreform.ie).

This article will provide a brief synopsis of the suggested reforms in relation to the various aspects of the Law of Evidence.

Recommendations on Expert Evidence

The LRC recommends codifying the following four main duties of an expert witness when giving evidence, both in civil and criminal law matters;

1. an overriding duty to the Court to provide truthful, independent and impartial expert evidence;
2. a duty to state the facts and assumptions (and, where relevant, any underlying scientific methodology) on which his or her evidence is based and to fully inform himself or herself of any fact that could detract from his or her evidence;
3. a duty to confine his or her evidence to matters within the scope of his or her expertise; and
4. a duty to his or her instructing party to act with due care, skill and diligence, including a duty to take reasonable care in drafting any written report.
The Report suggests that the credibility of experts’ evidence will not be called into question. The Report recommends that if an expert fails to adhere to their duties then the Court may rule inadmissible any evidence given by that expert.

Perhaps one of the most significant recommendations made by the LRC in their latest report is the recommendation to abolish the immunity from suit currently enjoyed by experts. The LRC recommends replacing this immunity with a statutory provision whereby an expert may only be sued if the evidence is found to have been given in a grossly negligent manner.

The Report also recommends that the Minister for Justice and Equality publish statutory codes of practice for expert witnesses and these codes must be adhered to.

Tara Cosgrove and Stephen O’Connor have published a more detailed article relating to the possible abolishment or retention of expert’s immunity which is available here.

**Recommendations on Hearsay Evidence (including business records)**

The longstanding rule of the inadmissibility of hearsay evidence is also subject to recommended reform.

Currently, hearsay evidence, subject to limited exceptions, is not admissible as the maker of the statement (be it verbally or in documentary form) cannot be cross examined. The LRC recommends that hearsay evidence should only be admissible under these exceptions or under reforms relating to business records. The LRC recommends that business records (whether in electronic or hard copy form) should be presumed admissible in both civil and criminal cases with procedural requirements being put in place thereby ensuring the authenticity and reliability of these records.

It should be noted that business records have been admissible in criminal cases since the enactment of the Criminal Evidence Act 1992, however, the proposition of such records having a presumption of admissibility would reduce the need for Gardai to be on stand by during a trial to confirm a record has complied with requirements for business records. The proposed change would also ensure uniformity in relation to the treatment of business records in both civil and criminal matters.
Recommendations on documentary and electronic evidence

The Report highlights the challenges faced in both civil and criminal matters where the documents admitted into evidence are voluminous. The Commission suggests, subject to procedural safeguards being in place, that a written summary of such documents may be used to prove their existence in place of the documents themselves. The LRC looked at other jurisdictions such as Australia and New Zealand in which this has been utilised successfully.

Other recommendations put forward in relation to electronic evidence include electronic signatures. The LRC suggests electronic signatures which adhere to the 2014 EU Regulation on Electronic Identification and Trust Services for Electronic Transactions (the e-IDAS Regulation) should have the same legal effect as that of a handwritten signature and therefore be admissible on the same basis. The LRC also recommends there be no general requirement to use an advanced electronic signature based on Public Key Infrastructure (KPI), this requirement should be determined on a case by case basis.

Recommendations to consolidate and reform Evidence Acts, including giving evidence by affirmation

The Report also examines eighteen Evidence Acts, fifteen of which precede the foundation of the State in 1922. The Commission recommends the abolition of some of these Acts and the updating of others. The Report considers The Oaths Acts 1888 and 1909, which provide that evidence must be given either by swearing on oath to tell the truth on a religious text or by swearing to tell the truth by affirmation, both having the same legal effect.

Under the current legislation a person who swears to tell the truth by affirmation must state that he or she does not have any religious belief. The Report recommends retaining the swearing on oath on a religious text or by affirmation but proposes that a person who chooses to give evidence by affirmation should no longer be required to state that he or she does not have a religious belief.

The latest report published by the LRC provides fruit for thought as a total of eight seven recommendations are made. This article outlines the more significant reforms suggested in relation to various aspects of the Law of Evidence.

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