

**THE LAW COMMISSION**

**EVIDENCE IN CRIMINAL PROCEEDINGS:  
HEARSAY AND RELATED TOPICS**

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# ABBREVIATIONS

In this paper we use the following abbreviations:

the 1988 Act: the Criminal Justice Act 1988

the 1995 Act: the Criminal Procedure (Scotland) Act 1995

the 1996 Act: the Criminal Procedure and Investigations Act 1996

*Archbold*: *Archbold Criminal Pleading, Evidence and Practice* (1997 ed, ed P J Richardson)

the ALRC: the Australian Law Reform Commission

*Blackstone*: *Blackstone's Criminal Practice* (1997 ed, ed P Murphy)

the CLRC: the Criminal Law Revision Committee

the CLRC Evidence Report: CLRC, Eleventh Report: Evidence (General) (1972) Cmnd 4991

the consultation paper: *Evidence in Criminal Proceedings: Hearsay and Related Topics*, Law Commission Consultation Paper No 138 (1995)

the Convention: the European Convention on Human Rights

*Cross and Tapper*: *Cross & Tapper on Evidence* (8th ed 1995, ed Colin Tapper)

the draft Bill: the draft Criminal Evidence Bill annexed to this report as Appendix A

the February seminar: the seminar on hearsay organised by the Law Commission and held at the New Connaught Rooms, London, on 10 February 1996

*Keane*: Keane, *The Modern Law of Evidence* (4th ed 1996)

the NZLC: the New Zealand Law Commission

*Phipson*: *Phipson on Evidence* (14th ed 1990, eds M N Howard, Peter Crane and Daniel A Hochberg)

PACE: the Police and Criminal Evidence Act 1984

the Roskill Committee: the Fraud Trials Committee (Chairman: the Right Honourable the Lord Roskill PC)

the Royal Commission: the Royal Commission on Criminal Justice (Chairman: Viscount Runciman of Doxford CBE FBA)

the Report of the Royal Commission: (1993) Cm 2263

the SLC Report: the Scottish Law Commission – Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149

the Strasbourg Commission: the European Commission of Human Rights

the Strasbourg Court: the European Court of Human Rights

*Wigmore on Evidence*: JWigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd revised ed 1940)

# THE LAW COMMISSION

## EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

*To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain*

### PART I INTRODUCTION AND SUMMARY OF PRINCIPAL RECOMMENDATIONS

#### THE BACKGROUND TO THIS PROJECT

- 1.1 On 28 April 1994 the Secretary of State for Home Affairs made a reference to the Commission in the following terms:

to consider the law of England and Wales relating to hearsay evidence<sup>1</sup> and evidence of previous misconduct<sup>2</sup> in criminal proceedings; and to make appropriate recommendations, including, if they appear to be necessary in consequence of changes proposed to the law of evidence, changes to the trial process.

- 1.2 This reference was made pursuant to a recommendation by the Royal Commission on Criminal Justice, which considered the law on hearsay in criminal cases to be “exceptionally complex and difficult to interpret”.<sup>3</sup> The Royal Commission advocated major reform when it concluded that

in general, the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place. We believe that the probative value of relevant evidence should in principle be decided by the jury for themselves, and we therefore recommend that hearsay evidence should be admitted to a greater extent than at present. ... We think that before the present rules are relaxed in the way that we would like

<sup>1</sup> The hearsay rule is expressed in *Cross and Tapper* at p 46 in the following terms:

[A]n assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. (Italics omitted)

This wording was approved by the House of Lords in *Sharp* [1988] 1 WLR 7, 11F. See also paras 2.2 – 2.5 below.

<sup>2</sup> See Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1995) Consultation Paper No 141.

<sup>3</sup> Report of the Royal Commission, ch 8, para 26.

to see, the issues need thorough and expeditious exploration by the Law Commission.<sup>4</sup>

- 1.3 We welcomed this reference because there has been much criticism of the law of hearsay. Indeed, in a leading case, Lord Reid said that it was “difficult to make any general statement about the law of hearsay evidence which is entirely accurate”.<sup>5</sup> In that case, the majority of the House of Lords<sup>6</sup> put an end to piecemeal changes to the law of hearsay when they held that no further judicial development of the exceptions to the law of hearsay was permissible and that further correction was to be left to the legislature, partly on constitutional grounds and partly on the pragmatic ground that any change should be comprehensive.<sup>7</sup>

#### **OUR APPROACH**

- 1.4 The Scottish Law Commission has said that the following principles should underlie any reform of the hearsay rule:
- (1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.<sup>8</sup>
  - (2) As a general rule all [relevant] evidence should be admissible unless there is a *good reason* for it to be treated as inadmissible.<sup>9</sup>

- 1.5 We agree; we would add that we take “relevant” to mean “logically probative of some matter requiring to be proved”.<sup>10</sup> In addition, we believe that evidence should not be admitted if a jury or magistrates cannot be given an effective warning about the weight that can be given to it. As we shall show, there are difficulties in deciding whether an item of hearsay evidence is probative and, above all, whether juries and magistrates are capable of safely appraising hearsay evidence in the light of its limitations.

#### **THE NEED FOR CODIFICATION OF THE LAW OF EVIDENCE**

- 1.6 This Commission has a statutory duty to keep the whole of the law under review “with a view to its systematic development and reform, including ... generally the simplification and modernisation of the law”.<sup>11</sup> We believe<sup>12</sup> that codification of the

<sup>4</sup> *Ibid*, and Recommendation 189.

<sup>5</sup> *Myers v DPP* [1965] AC 1001, 1019G–1020A. See Part IV below for other criticisms of the present law.

<sup>6</sup> Lord Reid, Lord Morris of Borth-y-Gest and Lord Hodson.

<sup>7</sup> Notwithstanding *Myers*, some exceptions have developed judicially: see A Ashworth and R Pattenden, “Reliability, Hearsay Evidence and the English Criminal Trial” (1986) 102 LQR 292, para 7.9 of the consultation paper and para 4.37, n 80 below.

<sup>8</sup> SLC Report, para 2.3.

<sup>9</sup> *Ibid*, para 2.30, amplifying para 2.3.

<sup>10</sup> J B Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898) p 530.

<sup>11</sup> Law Commissions Act 1965, s 3(1).

<sup>12</sup> We have expressed these views more than once before: see our Twenty-Seventh Annual Report (1993) Law Com No 210, para 2.15, and our Twenty-Eighth Annual Report (1994)

law in criminal proceedings is important for two reasons. The law controls the exercise of state power against citizens, and provides protection for citizens from unfair convictions, and it is important that its rules should be determined by Parliament and not by the sometimes haphazard methods of the common law. Secondly, if the law is stated in clear and accessible terms, then not only will justice be administered more efficiently and consistently, but it will be comprehensible to citizens, whether witnesses, victims, fact-finders or defendants.

- 1.7 In 1985 the Code team<sup>13</sup> proposed that there should be a Criminal Code which would eventually embrace as much as is practicable of the whole of the law relating to the criminal process.<sup>14</sup> They envisaged that Part III of the Code would cover evidence and procedure. In a report published in 1989 the Commission recommended that there should be such a Code.<sup>15</sup> The Bill appended to that report, although it could be enacted on its own, could be the first step towards Part III of the Code.
- 1.8 There are at least four reasons why it is particularly desirable to simplify and modernise the law relating to the admissibility of hearsay evidence in the criminal courts.
- 1.9 First, an objection to a questionable piece of evidence may have to be taken by an advocate on the spot and without prior notice; it will then have to be argued by the opposing advocate before being immediately ruled upon by the judge or magistrates, without in many cases any real opportunity to consider the authorities. Secondly, unlike in civil cases, no interlocutory appeal<sup>16</sup> on issues relating to the admissibility of hearsay evidence is generally available,<sup>17</sup> so if a judge's ruling is wrong this may lead to the quashing of a conviction,<sup>18</sup> and possibly an order for a new trial,<sup>19</sup> with the potential loss of liberty and the additional expense that this may involve.<sup>20</sup>
- 1.10 Thirdly, if it is not certain what evidence would be admissible at trial, then cases may be pursued by the prosecution only to collapse after a ruling on the evidence, or advocates may advise their clients to plead not guilty, whereas if the law were

Law Com No 223, para 2.27. Our views are supported by Professor Andrew Ashworth, *Principles of Criminal Law* (2nd ed 1995) p 5.

<sup>13</sup> Consisting of Professor Sir John Smith, Professor Edward Griew and Professor Ian Dennis.

<sup>14</sup> Codification of the Criminal Law: A Report to the Law Commission (1985) Law Com No 143.

<sup>15</sup> A Criminal Code for England and Wales: Report and Draft Criminal Code Bill (1989) Law Com No 177, para 2.28.

<sup>16</sup> Ie, before the conclusion of the trial.

<sup>17</sup> There are exceptions, such as from rulings in preparatory hearings in serious fraud trials: see Criminal Justice Act 1987, s 9(3)(b), (c) and (11).

<sup>18</sup> As in *Kearley* [1992] 2 AC 228 and *Beckford and Daley* [1991] Crim LR 833.

<sup>19</sup> Criminal Appeal Act 1968, s 7(1).

<sup>20</sup> The cost of a criminal trial in the Crown Court was between £1,311 and £1,382 per day, in the financial year 1995–96 (data provided by the Lord Chancellor's Department, Court Services Department).

clear they would not have given such advice. Finally, judges ought to be able to give directions about the rules of evidence to be applied in terms which juries can readily understand and accept as reasonable.<sup>21</sup> By the same token the law must also be easy for magistrates to understand and apply, and, as far as possible, for all lay people involved in the criminal justice process to understand.

- 1.11 We therefore believe that if a comprehensive and comprehensible law of hearsay were to be brought into force, there would be far less scope for argument at trial. It would also make it much easier for the law to be explained to the fact-finders – whether lay magistrates or juries – who play such a large part in the criminal justice system, and for them to apply it. This point is significant as a large proportion of the judiciary appointed to hear criminal cases fulfil that function only on a part-time basis.<sup>22</sup>
- 1.12 The law of hearsay should be comprehensive, and this means that the extent of the rule, as well as all exceptions to it, should be embodied in the relevant statutory provisions. At present there are numerous common law exceptions<sup>23</sup> and we believe that, as far as possible, they should be clearly set out within one statute.
- 1.13 The same reasoning applies to the use of previous statements made by a person who is called to give evidence in criminal proceedings. There are defects in the common law rules,<sup>24</sup> and we seek not only to reform those rules but also to state clearly their extent.
- 1.14 Our aim has been to produce a single Bill which contains the rules on the admissibility of hearsay evidence (including previous statements of witnesses) and all exceptions, whether arising originally at common law or by statute; but, where we have concluded that existing common law or statutory exceptions should be retained without amendment, we have not sought to restate them in the Bill, but merely to preserve them.

#### **THE PROVISIONAL PROPOSALS IN THE CONSULTATION PAPER**

- 1.15 In 1995, the consultation paper *Evidence in Criminal Proceedings: Hearsay and Related Topics*,<sup>25</sup> referred to in this report as “the consultation paper”, was published. In that paper we provisionally proposed a new formulation of the hearsay rule to include all that is presently within its ambit, except “implied assertions”.<sup>26</sup> We provisionally concluded that there should be categories of automatically admissible hearsay evidence which would cover cases where the

<sup>21</sup> CLRC Evidence Report, para 25. See also the dictum of Lord Mackay of Clashfern LC in *Sharp* [1988] 1 WLR 7, 9C.

<sup>22</sup> The percentage of trials dealt with in the Crown Court by recorders and assistant recorders in 1996 was 13.6% and 6.5% respectively (data provided by the Lord Chancellor’s Department, Court Services Department).

<sup>23</sup> See, eg, para 3.7 of the consultation paper.

<sup>24</sup> See paras 10.16 – 10.26 below.

<sup>25</sup> (1995) Consultation Paper No 138.

<sup>26</sup> For the meaning of this phrase, see paras 7.5 – 7.9 below.

witness is dead or too ill to attend court, or cannot be found,<sup>27</sup> and where the witness refuses to give or to continue giving evidence though physically present in court.<sup>28</sup> We also provisionally proposed that certain statutory provisions should be preserved, albeit with amendments.<sup>29</sup>

- 1.16 Experience has shown that it is quite likely that some unforeseeable cases of cogent hearsay evidence might fall outside the categories of automatic admissibility, however carefully drafted they were. We therefore provisionally proposed that there should be an additional limited inclusionary discretion (with the discretion clearly defined), so as to avert possible injustice, and we referred to this as the “safety-valve”.<sup>30</sup>
- 1.17 Our provisional view was that the party against whom the hearsay evidence was being adduced should be adequately protected by a series of safeguards. The first safeguard was that the automatically admissible categories could not be used where the person tendering the statement had caused the unavailability of the witness.<sup>31</sup> Secondly, we were anxious to ensure that the person against whom the hearsay evidence would be admissible has as much notice as possible: our provisional view was that where possible, the application to admit such a statement should be made before trial and, where this is not possible, at the start of a trial.<sup>32</sup> We also provisionally proposed that the burden of proof should rest on the party that tenders the evidence.<sup>33</sup> Thirdly, we believed that if a hearsay statement is admitted, the person against whom it is used should be entitled to show that it is inaccurate or to cast doubt on the reliability of the maker of the statement.<sup>34</sup>
- 1.18 We provisionally proposed that, in order to ensure compliance with the European Convention on Human Rights (“the Convention”), where the evidence of a particular element of the offence included hearsay, that element should not be regarded as proved unless the hearsay was supported by direct evidence.<sup>35</sup> This provisional view was criticised by our consultees and, as we shall explain, we are now satisfied that this requirement is unnecessary.<sup>36</sup>

<sup>27</sup> More precisely, where such steps have been taken as are reasonably practicable to secure the attendance of the witness, but without success, and the witness (i) is outside the United Kingdom or (ii) cannot be found: see paras 11.15 – 11.21 of the consultation paper.

<sup>28</sup> Paras 11.22 – 11.27 of the consultation paper.

<sup>29</sup> Section 24 of the 1988 Act, s 9 of the Criminal Justice Act 1967, ss 3 and 4 of the Bankers’ Books Evidence Act 1879 (as amended), s 46(1) of the Criminal Justice Act 1972, and paras 1 and 1A of Schedule 2 to the Criminal Appeal Act 1968: see paras 11.59 – 11.60 of the consultation paper.

<sup>30</sup> Paras 10.73 – 10.76 and 11.36 – 11.38 of the consultation paper.

<sup>31</sup> Paras 11.30 – 11.33 of the consultation paper.

<sup>32</sup> Paras 11.42 – 11.44 of the consultation paper.

<sup>33</sup> Para 11.46 of the consultation paper.

<sup>34</sup> Paras 11.47 – 11.50 of the consultation paper.

<sup>35</sup> Paras 5.35 – 5.36 of the consultation paper.

<sup>36</sup> See para 5.40 below.



- 1.19 We provisionally proposed that where previous statements of witnesses are admitted, they should be treated as evidence of their truth, and not just as bearing on credibility.<sup>37</sup>
- 1.20 With regard to computer evidence, we proposed the repeal of section 69 of PACE which, in essence, provides that a document produced by a computer may not be adduced as evidence of any fact stated in the document unless it is shown that the computer was properly operating and was not being improperly used.<sup>38</sup>
- 1.21 Finally, we proposed that information relied upon by an expert should be admissible not only where it is admissible at present, or would be admissible under any of the hearsay exceptions we proposed, but also where it is provided by a person who cannot be expected to have any recollection of the matters stated.<sup>39</sup>

### **THE CONSULTATION PROCESS**

- 1.22 We received a very large number of responses and we are particularly grateful for the assistance and efforts of our consultees. This is a subject where the practical experience of the judiciary and practitioners has been particularly valuable. We have benefited greatly from their views. A list of the respondents appears in Appendix C.
- 1.23 We organised a seminar (“the February seminar”) which was held at the New Connaught Rooms, London, on 10 February 1996, at which a number of difficult issues thrown up on consultation were considered. Brooke LJ, our former chairman, kindly chaired the seminar. A list of those attending appears in Appendix D. The Criminal Law Committee of the Judicial Studies Board allowed the Commissioner with special responsibility for criminal law to lead very useful discussions on certain problematic areas at its seminars for the Crown Court Judiciary held at Creton in March 1996 and at Cheltenham in April 1996. We are grateful to all who participated in these seminars for their help.
- 1.24 The responses to the consultation paper supported most of our provisional conclusions. The general view was that the current regime is unnecessarily complex, arbitrary in its effects and indiscriminating in nature. It was accepted that the exceptions to the rule are unclear in their scope, and the statutory rules too dependent on discretion in their operation.
- 1.25 Many judges and practitioners were concerned that many witnesses are understandably confused by and dissatisfied with the present regime, particularly when it operates to prevent them from giving evidence which they rightly regard as relevant and cogent. In the context of hearsay, the Court of Appeal<sup>40</sup> recently pointed out that if rules of evidence are difficult for non-lawyers to understand or accept, this will eventually lead to a loss of public confidence in the criminal justice

<sup>37</sup> Paras 13.42 – 13.55 of the consultation paper.

<sup>38</sup> Paras 14.27 – 14.32 of the consultation paper.

<sup>39</sup> Paras 15.25 – 15.26 of the consultation paper.

<sup>40</sup> *Gilfoyle* [1996] 1 Cr App R 302.

system. The great importance of maintaining that confidence is another reason to re-examine the rule and its operation in practice.

- 1.26 We are greatly indebted to Professor Diane Birch, Professor of Criminal Justice and Evidence at the University of Nottingham, who acted as our consultant for this report. We also benefited from exchanges of information and ideas with Sheriff Iain MacPhail QC, who was until 1 January 1995 the Criminal Law Commissioner at the Scottish Law Commission, from whose report on hearsay<sup>41</sup> we have learnt much.

#### **DEVELOPMENTS SINCE THE PUBLICATION OF THE CONSULTATION PAPER**

- 1.27 There have been two major developments since the consultation paper was published. First, an important new statutory exception to the hearsay rule was created in Schedule 2 to the Criminal Procedure and Investigations Act 1996, which permits evidence of depositions and written statements used in committal proceedings to be adduced at the subsequent trial if that is “in the interests of justice”, against the objection of the opposing party. This exception gives a wide and apparently unfettered discretion to the trial judge, but no governing principles are set out in the 1996 Act. We recommend the repeal of this new exception.<sup>42</sup>
- 1.28 The second development has been the resolution by the Court of Appeal in *Myers*<sup>43</sup> of the conflict of authority between *Beckford and Daley*<sup>44</sup> and *Campbell and Williams*.<sup>45</sup> The court preferred the latter. The particular point at issue, namely whether one co-defendant’s confession may be adduced by another, has therefore been settled;<sup>46</sup> but the problem illustrated by *Beckford and Daley* persists. Where the hearsay rule and its exceptions operate to exclude cogent evidence which tends to show that the accused is not guilty, there is still the danger of a miscarriage of justice which only the Court of Appeal can remedy, and then only after the defendant might have been deprived of his or her liberty and much public money wasted.<sup>47</sup>

#### **SUMMARY OF PRINCIPAL RECOMMENDATIONS**

- 1.29 Our basic philosophy is that oral evidence is preferable to hearsay, principally because in the former case the witness can be cross-examined. First-hand hearsay is, in turn, preferable to multiple hearsay, because of the risk of manufacture and the errors that may be introduced by repetition. We are satisfied that the discretion provisions in the Criminal Justice Act 1988 have not worked satisfactorily: for

<sup>41</sup> Evidence: Report on Hearsay Evidence in Criminal Proceedings (1995) Scot Law Com No 149.

<sup>42</sup> See para 8.113 below.

<sup>43</sup> [1996] 2 Cr App R 335. See, further, para 8.93 below.

<sup>44</sup> [1991] Crim LR 833.

<sup>45</sup> [1993] Crim LR 448. In *Beckford and Daley* the Court of Appeal upheld the judge’s ruling that the admission of one accused could not be adduced by the co-accused, but in *Campbell and Williams* a contrary decision was reached.

<sup>46</sup> Although leave to appeal to the House of Lords has been granted.

<sup>47</sup> See paras 7.48, 10.69 and 10.76 of the consultation paper.

example, many judges are consistently refusing to exercise their discretion to admit evidence under that Act. Uncertainty as to the admissibility of evidence means that the prosecution cannot confidently assess the prospects of a conviction in deciding whether to prosecute, and if so on what charges; and those acting for the defendant cannot confidently advise on the plea or on the conduct of the defence. Our concerns on this issue were confirmed on consultation.

- 1.30 We therefore recommend that there should continue to be an exclusionary hearsay rule, to which there would be specified exceptions, plus a discretion to admit hearsay evidence which would otherwise be inadmissible where this is in the interests of justice.<sup>48</sup>
- 1.31 Hearsay adduced by the prosecution would continue to be subject to the general power to exclude prosecution evidence, either at common law or under section 78 of the Police and Criminal Evidence Act 1984 (“PACE”).<sup>49</sup> Evidence of *no* probative value would, as now, be excluded as irrelevant; but we have also been concerned about the possibility of a party seeking to adduce hearsay of *very low* probative value which would lead to a substantial waste of court time.<sup>50</sup> We believe that the court should have power to refuse to admit such evidence where it is satisfied that the probative value of the evidence is substantially outweighed by the danger that it would result in undue waste of time if admitted.

#### **The rule against hearsay**

- 1.32 We recommend a statutory formulation of the rule against hearsay.<sup>51</sup> Our formulation would mean that any statement not made in oral evidence in the proceedings is inadmissible if it is adduced as evidence of any matter stated; but a matter is “stated” only if it appears to the court that the purpose, or one of the purposes, of the person making the statement was to cause another person to believe the matter, or to cause another person to act, or a machine to operate, on the basis that the matter is as stated. Thus the rule would not preclude evidence of “implied assertions” by persons whose words or conduct are not intended to communicate any information at all.
- 1.33 We believe that it is also necessary to have a rule governing statements which are not made by a person but depend for their accuracy on information supplied by a person, and that such a statement should not be admissible as evidence of any fact

<sup>48</sup> See para 6.53 below.

<sup>49</sup> At common law, the court may refuse to admit prosecution evidence if its likely prejudicial effect outweighs its probative value: *Collins* (1938) 26 Cr App R 177; *Sang* [1980] AC 402; *Blithing* (1983) 77 Cr App R 86; *Scott v R* [1989] AC 1242; *Henriques v R* (1991) 93 Cr App R 237. Section 78(1) of PACE provides that the court may refuse to admit prosecution evidence if the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

<sup>50</sup> If, for example, one party seeks to adduce statements by absent or deceased declarants which set out at vast length some of the background to the issues in the case, this evidence might have very little probative value but lead to a substantial increase in the length of the hearing.

<sup>51</sup> See para 7.40 below.

contained in it unless the information on which it is based is proved to have been accurate.<sup>52</sup>

### **Automatically admissible hearsay**

- 1.34 We believe that there should be three separate categories of automatic admissibility.

### ***Unavailability of declarant***

- 1.35 The first category of automatically admissible hearsay is hearsay which is the best evidence available, because the declarant is not available to give oral evidence. This category includes a *first-hand* hearsay statement made by an *identifiable* person who is unavailable to give oral evidence because he or she
- (1) is dead, or too ill to be a witness;<sup>53</sup>
  - (2) is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance;<sup>54</sup> or
  - (3) cannot be found, although such steps as it is reasonably practicable to take to find him or her have been taken.<sup>55</sup>

A party would not be allowed to adduce hearsay evidence in any of the above cases where that party had *deliberately* caused the unavailability of the declarant in order to prevent him or her from testifying.<sup>56</sup>

### ***Reliable hearsay***

- 1.36 The second category of automatic admissibility would apply where the hearsay material has come into being in such circumstances that it is sufficiently *reliable* to be admissible. An example is “business documents”, namely documents created or received by a person in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office.<sup>57</sup> This recommendation would amount to an improved version of s 24 of the 1988 Act, but would make the admission of the evidence automatic and not dependent on judicial discretion. However, we recommend that the court should have a power to direct that a document is not to be admissible as a business document where, although it would otherwise qualify as a business document, it does not appear to be reliable as evidence of its contents.<sup>58</sup>

<sup>52</sup> See paras 7.46 – 7.50 below.

<sup>53</sup> See paras 8.35 – 8.36 below.

<sup>54</sup> See paras 8.37 – 8.39 below.

<sup>55</sup> See paras 8.40 – 8.43 below.

<sup>56</sup> See paras 8.27 – 8.30 below.

<sup>57</sup> The person who supplied the information must have had, or be reasonably supposed to have had, personal knowledge of the matters dealt with.

<sup>58</sup> See paras 8.74 – 8.77 below.

- 1.37 An additional instance of this category is that branch of the res gestae exception under which a statement made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded is admissible.<sup>59</sup> Apart from these, there are the other branches of the res gestae exception (namely where an act is accompanied by a statement in such circumstances that the act can be properly evaluated as evidence only if considered in conjunction with the statement,<sup>60</sup> and where the statement relates to a physical sensation or mental state),<sup>61</sup> and various other common law exceptions which can conveniently be preserved.<sup>62</sup>

### ***Admissions and confessions***

- 1.38 The final category of automatic admissibility is admissions and confessions, subject to the existing statutory safeguards.<sup>63</sup> Such evidence would continue to be admitted on the general assumption that what a person says against his or her own interests is likely to be true.

### **Hearsay admissible at the discretion of the court**

#### ***The safety-valve***

- 1.39 We are conscious that however much thought goes into defining the limits of the automatic categories, some unforeseeable instances of very cogent hearsay will fall outside them. We therefore recommend a limited inclusionary discretion (a “safety-valve”) to admit hearsay where the court is satisfied that, despite the difficulties in challenging the statement, its probative value is such that the interests of justice require it to be admissible.<sup>64</sup>

#### ***Frightened witnesses***

- 1.40 The second category of hearsay admissible at the court’s discretion is that of frightened witnesses. It was clear from the responses to the consultation paper that the reluctance of witnesses to testify, because they are frightened of what will happen to them if they do, is a significant problem. We decided that there should be an exception where the witness does not give (or stops giving) evidence through fear. We did not think that an automatic exception was appropriate, as it might enable dishonest witnesses to give a statement and then claim to be frightened so as to avoid being cross-examined; we therefore recommend that the leave of the court must be obtained before the statement of a frightened witness is

<sup>59</sup> See paras 8.115 – 8.121 below.

<sup>60</sup> See paras 8.122 – 8.124 below.

<sup>61</sup> See paras 8.125 – 8.129 below.

<sup>62</sup> See paras 8.130 – 8.132 below.

<sup>63</sup> See paras 8.84 – 8.92 below.

<sup>64</sup> See paras 6.49 – 6.53 and 8.133 – 8.149 below.

admissible.<sup>65</sup> The court would consider the relevant circumstances, and admit the statement only if satisfied that it ought to be admitted in the interests of justice.<sup>66</sup>

- 1.41 After much discussion, we decided not to specify in the legislation all the kinds of fear that would suffice, but instead to make it clear that “fear” is to be widely construed and includes, for example, fear of injury to another, or of financial loss. Obviously the nature of the fear would be one of the factors that the court would take into consideration when deciding whether to grant leave. A statement would not need to have been made to a police officer<sup>67</sup> to be admissible.

### ***Experts’ assistants***

- 1.42 The Royal Commission was concerned that

because of the rules on hearsay evidence, an expert witness may not, strictly speaking, be permitted to give an opinion in court based on scientific tests run by assistants unless all those assistants are called upon to give supporting evidence in court. It seems to us that this rule is badly in need of change.<sup>68</sup>

- 1.43 In order to reduce the problem of experts’ assistants being required to attend court for cross-examination where the other party has nothing to put to them that could not equally have been put to the expert, we recommend that the rules on the giving of advance notice of an intention to adduce expert evidence should be extended so as to require advance notice of the names of any persons who have supplied information on which the expert will rely, and the nature of that information in each case.<sup>69</sup> We further recommend that, where such notice has been given, a new hearsay exception should enable the expert witness to base any opinion or inference on any information supplied by any such person of which that person could have given direct oral evidence, and that any information so relied upon should be admissible as evidence of its truth, *unless* the court directs otherwise on application by any other party to the proceedings.<sup>70</sup> The onus would thus be on the party seeking to cross-examine the assistant to persuade the court that the assistant’s attendance is necessary.

<sup>65</sup> See paras 8.58 – 8.62 below.

<sup>66</sup> In coming to a decision on this, the court would have to consider (a) the statement’s contents, (b) any risk that its admission or its exclusion will result in unfairness to any party to the proceedings (and in particular as to how likely it is that the statement can be controverted if the declarant does not give oral evidence), (c) where appropriate, the possibility of making special arrangements for the declarant to give evidence otherwise than in the ordinary way (eg via a television link or from behind a screen), and (d) any other relevant circumstances.

<sup>67</sup> Or some other person charged with the duty of investigating offences or charging offenders: cf 1988 Act, s 23(3)(a).

<sup>68</sup> Report of the Royal Commission, ch 9, para 78.

<sup>69</sup> See para 9.24 below.

<sup>70</sup> See paras 9.25 – 9.29 below.

### **Previous statements of witnesses**

1.44 We now turn to the case where witnesses are present at court and can be cross-examined. This fact offers greater scope for the admission of a witness's previous statements, although they are technically hearsay, than where the maker of the hearsay statement is absent and cannot be cross-examined. We believe that a previous statement of a witness should be admitted either where it falls within one of the above exceptions to the hearsay rule (for example, *res gestae*) or

- (1) to rebut an allegation of recent invention;<sup>71</sup>
- (2) as evidence of a previous identification or description of a person, object or place;<sup>72</sup> or
- (3) as evidence of recent complaint.<sup>73</sup>

In each of these cases the statement would be evidence of the matters stated in it.

1.45 Such statements would frequently be in written form, and, if admissible, would therefore be exhibits. Normally this would mean that the jury would take the statements with them when they retire, and they might attach greater weight to these written statements than to the evidence given orally. We believe that this would be undesirable, because the emphasis on the oral evidence might be weakened. We therefore recommend that the written statements should not accompany the jury when they retire to consider their verdict, unless all the parties agree or the court considers it appropriate.<sup>74</sup>

1.46 We believe that a previous statement by a witness should also be admissible where the witness does not, and cannot reasonably be expected to, remember the matters stated well enough to give oral evidence of them, provided that it was made when the events were fresh in his or her memory and the witness testifies that to the best of his or her belief that statement was true.<sup>75</sup> The previous statement could be proved by oral evidence from someone who heard it being made, or, where it was recorded, by producing the record (or a copy of it). The statement would then be admissible as evidence of its truth.

### ***Previous inconsistent statements***

1.47 When previous inconsistent statements by witnesses are admitted, we believe that they should be treated as evidence of the facts stated in them, provided that oral evidence of those facts by the witness would be admissible.<sup>76</sup>

<sup>71</sup> See paras 10.41 – 10.45 below.

<sup>72</sup> See paras 10.46 – 10.52 below.

<sup>73</sup> See paras 10.53 – 10.60 below.

<sup>74</sup> See para 10.62 below.

<sup>75</sup> See paras 10.73 – 10.80 below.

<sup>76</sup> See paras 10.91 – 10.101 below.

### **Safeguards for the party against whom hearsay is adduced**

- 1.48 We believe it is important that certain additional<sup>77</sup> safeguards should be given to the party against whom the hearsay evidence is admitted or is to be admitted. These safeguards are as follows. First, the nature of our exceptions means that there is built-in protection: hearsay would not be permitted where the declarant's oral evidence was *available*, or where the declarant was *unidentified*, except in the case of business documents, *res gestae*, and evidence admitted under the safety-valve.
- 1.49 Our recommendations include the following further safeguards.
- (1) Where possible, advance notice would be given that hearsay evidence is to be adduced.<sup>78</sup>
  - (2) A party against whom hearsay evidence is admitted would be allowed to adduce evidence challenging the credibility of the absent declarant as if the declarant were present.<sup>79</sup>
  - (3) The judge would have a duty to direct the jury to acquit, and the magistrates would have a duty to dismiss an information, if the case against the accused depends wholly or partly on hearsay evidence which is so unconvincing that, considering its importance to the case, a conviction would be unsafe.<sup>80</sup>
  - (4) In a trial on indictment the jury would be warned in the summing-up of the weaknesses of the hearsay evidence.<sup>81</sup>
- 1.50 However, we have concluded that (contrary to the view expressed in the consultation paper) there is no need, under the Convention or otherwise, to introduce a rule that an essential element of an offence cannot be proved by uncorroborated hearsay.

### **Computer evidence**

- 1.51 We recommend the repeal of section 69 of PACE, which in essence provides that a document produced by a computer may not be adduced as evidence of any fact

<sup>77</sup> That is, in addition to the discretion at common law and the discretion under PACE, s 78(1). See n 49 above.

<sup>78</sup> See paras 11.6 – 11.7 below.

<sup>79</sup> See paras 11.19 – 11.22 below. Where the declarant's credibility is attacked, the judge or magistrates would have power to permit a party to adduce additional evidence for the purpose of denying or answering the allegation made: see paras 11.24 – 11.25 below.

<sup>80</sup> In effect, reversing *Galbraith* [1981] 1 WLR 1039 in cases where hearsay evidence forms part of the prosecution case. The Royal Commission recommended the reversal of *Galbraith* with regard to all cases: ch 4, paras 41 and 42. See further paras 11.26 – 11.32 below.

<sup>81</sup> There is a specimen direction issued by the Judicial Studies Board which deals with this. See para 3.23 below.



stated in the document unless it is shown that the computer was operating properly and was not being used improperly.<sup>82</sup>

### **Other matters**

- 1.52 We recommend that (subject to the existing discretions to exclude prosecution evidence, and to the difference in the standard of proof) the same rules of evidence should apply to the defence and to the prosecution.<sup>83</sup>
- 1.53 We recommend that our reformed hearsay rule should apply in places where the criminal rules of evidence currently apply, including courts-martial and professional tribunals established by statute.<sup>84</sup>

### **Financial implications of our recommendations**

- 1.54 It is of course very difficult to predict precisely the financial implications of our recommendations, and we do not have the resources to carry out costings; but we believe that they would save public money in a number of different ways.
- 1.55 First, the scope for legal argument about the admissibility of hearsay evidence would be much reduced because, we believe, the demarcation between hearsay and non-hearsay would be clearer,<sup>85</sup> and because much evidence which is currently admissible only with the leave of the court would be automatically admissible.<sup>86</sup>
- 1.56 Secondly, it is likely that some cases would be resolved at an earlier stage. At present, prosecutions have to be abandoned if the judge rules, in the exercise of his or her discretion, that important prosecution evidence is inadmissible. Defendants may plead not guilty in the hope that this will occur, but if the judge rules in favour of the prosecution they have to change their pleas. If there is greater certainty about what evidence will be admitted, there should be fewer aborted trials.
- 1.57 Thirdly, our recommendation that section 69 of PACE should be repealed would mean that less time would be spent receiving evidence about the operation of a computer where there is no reason to doubt that it was working properly.<sup>87</sup>
- 1.58 Finally, our recommendations in respect of expert evidence might well lead to a reduction in the pointless cross-examination of experts' assistants.

<sup>82</sup> See Part XIII below.

<sup>83</sup> See paras 12.2 – 12.8 below.

<sup>84</sup> See paras 12.9 – 12.12 below.

<sup>85</sup> Thus avoiding disputes such as arose in *Kearley* [1992] 2 AC 228, where three days were spent in oral argument in the House of Lords on the apparently straightforward issue of whether, on a charge of possessing drugs with intent to supply, the prosecution could rely on reports of requests to buy illegal drugs from the defendant.

<sup>86</sup> Subject, in the case of prosecution evidence, to the common law discretion and PACE, s 78(1). See n 49 above.

<sup>87</sup> In *Newbury and Teal* (1995, Isleworth Crown Court), a case drawn to our attention before the consultation paper (see para 14.16), 15–20 hours of a five-week trial were spent hearing evidence about whether s 69 was satisfied.

## **THE STRUCTURE OF THIS REPORT**

- 1.59 In Part II we start with a summary of the present law. In Part III we revisit the justifications for the hearsay rule and its exceptions. In Part IV we set out the defects of the current law. In Part V we consider the effect of the Convention, and in Part VI we review the options for reform in the light of the responses on consultation.
- 1.60 In Parts VII to XIII we set out in detail our recommendations for reform. We start in Part VII with the formulation of the rule, and go on in Part VIII to the exceptions for statements made by persons who do not give oral evidence. In Part IX we consider the application of the rule to expert evidence, and recommend a further exception. In Part X we deal with previous statements by those who do testify. The safeguards for a party against whom hearsay evidence is adduced are discussed in Part XI. Part XII deals with matters of procedure, and Part XIII with computer evidence. Finally, our recommendations are collected together in Part XIV.
- 1.61 A draft Bill which would give statutory effect to our recommendations can be found at Appendix A. Existing statutory provisions to which readers may wish to refer appear at Appendix B. Appendix C contains a list of those who responded to the consultation paper, and Appendix D a list of those who attended the February seminar.

## PART II

# THE PRESENT LAW

- 2.1 In Parts II to IV of the consultation paper we examined in some detail the hearsay rule and the exceptions to it. For the purposes of this report, we intend to provide merely a summary of the present law and to refer to some important developments since the consultation paper was completed.<sup>1</sup> We must preface our comments with the warning of Lord Reid in 1963, which remains true today, that it is “difficult to make any general statement about the law of hearsay which is entirely accurate”.<sup>2</sup> So we submit our summary with appropriate diffidence.

### THE RULE ITSELF

- 2.2 Although various formulations of the hearsay rule have been debated,<sup>3</sup> the most comprehensive is that of *Cross and Tapper*:

any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.<sup>4</sup>

- 2.3 It is essential to determine the purpose for which evidence is tendered: the rule applies only

when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay ... when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.<sup>5</sup>

- 2.4 The rule covers both assertions made by persons who do not give oral evidence and previous assertions by those who do. It covers both oral statements and those contained in documents. It is also now settled that the rule extends to what are known as “implied assertions”:<sup>6</sup> this is a rather misleading shorthand term for utterances or behaviour from which a fact (including a state of mind or an intention) may be inferred, although they are not intended to communicate that fact.<sup>7</sup>

<sup>1</sup> It was completed for publication on 11 May 1995.

<sup>2</sup> *Myers v DPP* [1965] AC 1001, 1019.

<sup>3</sup> See, eg, *Phipson*, para 21-02; *Stephen’s Digest of the Law of Evidence* (12th ed 1948) art 15; *Myers* [1965] AC 1001, 1005–6.

<sup>4</sup> *Cross and Tapper*, p 565. A shorter formulation (omitting “or opinion”) now appearing at p 46 of *Cross and Tapper* was approved by the House of Lords in *Sharp* [1988] 1 WLR 7, 11, per Lord Havers, with whom Lord Mackay of Clashfern LC, Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Griffiths concurred. This formulation was also approved in *Kearley* [1992] 2 AC 228, 254H–255A, per Lord Ackner, with whom Lord Bridge of Harwich agreed.

<sup>5</sup> *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970, per Mr L M D de Silva.

<sup>6</sup> *Kearley* [1992] 2 AC 228.

<sup>7</sup> See paras 7.5 – 7.9 below.

2.5 If evidence falls within the hearsay rule, it will be inadmissible unless it falls within an exception. The main implications of the rule are as follows.

- (1) Witnesses must give oral evidence, and a written statement cannot be a substitute for their personal appearance in the witness box.
- (2) Witnesses must give evidence from first-hand knowledge, and may not repeat what other people have told them.
- (3) Records are inadmissible evidence of the matters they contain.
- (4) Where a witness gives oral evidence, only the oral evidence counts: previous statements by the witness generally do not.<sup>8</sup>

### **THE EXCEPTIONS TO THE RULE CREATED BEFORE 1988**

#### **Common law exceptions**

2.6 The common law exceptions to the hearsay rule have developed in a haphazard manner because, as Lord Reid has explained,

in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise that when 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.<sup>9</sup>

2.7 As might be expected where exceptions have been developed on a case-by-case basis, anomalies and overlaps have been created, and sometimes an exception does not seem to go far enough. However, *Phipson* classifies the cases in accordance with what appear to be their rationales:<sup>10</sup>

- (1) cases based on the assumption that what a person has said against his or her interests is likely to be true;
- (2) cases where it is recognised that where the witness is dead, it may be better to admit the witness's evidence rather than to deprive the court of all proof;
- (3) cases which recognise the force of common knowledge, where a fact is reputed amongst those who ought to know it but its source is unknown;
- (4) cases based on the intrinsic reliability of public records; and
- (5) cases where the contemporaneity of the statement itself is some guarantee of its reliability.

2.8 Applying these principles, the common law exceptions to the hearsay rule can conveniently be grouped under the following heads:

<sup>8</sup> We deal with this last implication in Part X below.

<sup>9</sup> *Myers* [1965] AC 1001, 1020B-C.

<sup>10</sup> *Phipson*, para 21-24.

- (1) admissions and confessions of parties and of their agents;
- (2) statements by deceased persons:
  - (a) declarations against interest;
  - (b) declarations in the course of duty;
  - (c) declarations as to public interests;
  - (d) dying declarations (in the case of homicide);
  - (e) declarations as to pedigree;
  - (f) declarations by testators as to their wills;
  - (g) testimony given in a previous trial;
- (3) reputation (and, in all but (a), family tradition)
  - (a) of bad character;
  - (b) of pedigree;
  - (c) of the existence of a marriage;
  - (d) of the existence or non-existence of any public or general right;
  - (e) to identify any person or object;
- (4) public documents;
- (5) statements admitted as part of the *res gestae*; and
- (6) statements made by a party to a common enterprise, admitted against another party to the enterprise as evidence of any matter stated.

### **Statutory exceptions created before 1988**

- 2.9 The House of Lords decided in 1965<sup>11</sup> that any further exceptions to the hearsay rule should be introduced by Parliament, not the judiciary;<sup>12</sup> but the legislative changes to the rule have themselves been piecemeal and anomalous.
- 2.10 Under section 9 of the Criminal Justice Act 1967, a party may tender a written statement as evidence (rather than calling the maker of the statement) to the extent that oral evidence by the maker of the statement could have been adduced, provided that certain conditions are satisfied.<sup>13</sup> This procedure is used frequently,

<sup>11</sup> *Myers v DPP* [1965] AC 1001.

<sup>12</sup> Notwithstanding this, some exceptions have developed judicially; see A Ashworth and R Pattenden, "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292, and para 4.37, n 80 below.

<sup>13</sup> Criminal Justice Act 1967, s 9(2) and (3). The basic requirements are that the statement must be signed by the person who made it and must contain a declaration that it is true to the best of his or her knowledge and belief, and that he or she made it knowing that if it were tendered in evidence, he or she would be liable to prosecution if he or she wilfully stated in it anything which he or she knew to be false or did not believe to be true. It is a further requirement that the statement should have been served on the other parties to the proceedings and that none of them have, within seven days of its being served, notified the

but only for undisputed evidence, because an objection by an opposing party means that the statement cannot be used.

- 2.11 There are other statutory exceptions.<sup>14</sup> For example, copies of entries in bankers' books may be admitted as prima facie evidence of the entries or of the matters, transactions and accounts recorded in them;<sup>15</sup> and transcripts of evidence may be admitted at retrials ordered by the Court of Appeal in circumstances governed by the Criminal Appeal Act 1968, Schedule 2, paragraph 1.

### **THE CRIMINAL JUSTICE ACT 1988**

- 2.12 In the leading case of *Myers v DPP*<sup>16</sup> Lord Reid recommended a major statutory review of the law of hearsay. In 1972 the CLRC made major recommendations for change in its Evidence Report.<sup>17</sup> Its recommendations were not accepted, but instead a series of piecemeal measures were adopted.<sup>18</sup> When the Roskill Committee further examined the issue of hearsay evidence in 1986, it recommended that, in criminal proceedings arising from alleged fraud, documents should be allowed to speak for themselves and be admissible without further proof.<sup>19</sup> Eventually Parliament passed the Criminal Justice Act 1988,<sup>20</sup> which added important new exceptions but left many old ones untouched.
- 2.13 The 1988 Act is limited to hearsay statements contained in documents; but "statement" and "document" are both widely defined, so as to include "any representation of fact, however made" and "anything in which information of any description is recorded" respectively.<sup>21</sup>

other party that they object to its being tendered in evidence. Similar provisions enable written statements made in Scotland and Northern Ireland to be admitted, on the same terms as statements made in England and Wales: Criminal Justice Act 1972, s 46(1).

<sup>14</sup> Other statutory provisions allow depositions taken before the trial to be read at the trial: eg the Merchant Shipping Act 1995, s 286 (replacing s 691 of the Merchant Shipping Act 1894) and the Children and Young Persons Act 1933, ss 42 (as substituted by the Criminal Justice and Public Order Act 1994, s 44(3), Sched 4, Pt 11, para 5) and 43. See paras 3.57 – 3.59 and Appendix C of the consultation paper for other statutory exceptions.

<sup>15</sup> See Bankers' Books Evidence Act 1879, s 3. This is considered in greater detail at paras 8.103 – 8.104 below.

<sup>16</sup> [1965] AC 1001, 1022.

<sup>17</sup> CLRC Evidence Report, paras 224 – 265. See paras 8.6 – 8.16 of the consultation paper.

<sup>18</sup> See para 4.1 of the consultation paper.

<sup>19</sup> Fraud Trials Committee Report (1986) para 5.35. See paras 4.1 and 8.20 – 8.21 of the consultation paper.

<sup>20</sup> The Bill originally applied to oral as well as written hearsay evidence. See Professor D J Birch, "The Criminal Justice Act 1988 – (2) Documentary Evidence" [1989] Crim LR 15.

<sup>21</sup> See the Civil Evidence Act 1995, Sched 1, para 12. The definitions of "statement" and "document" used to derive from s 10(1) of the Civil Evidence Act 1968 by virtue of the 1988 Act, Sched 2, para 5. The Civil Evidence Act 1995, Sched 1, para 12 substitutes a new para 5 in the 1988 Act.

### **Section 23**

- 2.14 Two significant statutory exceptions are set out in sections 23 and 24 of the 1988 Act. Section 23<sup>22</sup> relates only to *first-hand* hearsay. It provides that a statement made by a person in a document shall be *prima facie* admissible in criminal proceedings, as evidence of any fact stated, of which direct oral evidence by him or her would be admissible, if the case falls within one of certain specified categories. The categories cover four different reasons why the person who made the statement may be unavailable to give evidence in person: because he or she is dead, or by reason of his or her bodily or mental condition unfit to attend as a witness; because he or she is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance; because all reasonable steps have been taken to find him or her without success; and, if the statement was made to a police officer, because the person who made it does not give evidence through fear or because he or she is kept out of the way.

### **Section 24**

- 2.15 Section 24 of the 1988 Act<sup>23</sup> is headed “Business etc documents”: it covers documents created or received by a person in the course of a trade, business, profession or occupation, or as the holder of a paid or unpaid office. Statements admitted under section 24 may include *multiple* hearsay: in other words, the information may pass through more than one person before it is recorded in the document presented to the court. But the person who originally supplied the information must have had, or be reasonably supposed to have had, personal knowledge of the matters dealt with.

### **Admitting a statement under section 23 or section 24**

- 2.16 In deciding whether a statement is admissible under the 1988 Act, the following requirements must be satisfied:
- (1) the relevant material must be a “statement” within the meaning of the Act;<sup>24</sup>
  - (2) the statement must be contained in a “document” as defined in the Act;<sup>25</sup>
  - (3) it must be a statement of a type which is covered either by section 23 (that is, *first-hand* hearsay) or by section 24 (*business* documents);
  - (4) if the statement is of a type falling within section 23 and not section 24, the maker must be unavailable to give oral evidence for one of the reasons specified by section 23, and the judge or magistrate must not exercise the discretion to exclude the statement under section 25; and

<sup>22</sup> The text of this section is set out in Appendix B. Its defects are addressed at paras 4.41 – 4.45 below.

<sup>23</sup> The text of this section is set out in Appendix B. A problem caused by the section is discussed in para 4.39 below.

<sup>24</sup> See para 2.13 above.

<sup>25</sup> See para 2.13 above.

- (5) if the statement is in a business document but was prepared for the purpose of criminal proceedings or a criminal investigation, *either* the maker must be unavailable for one of the reasons set out in section 23 *or* it must be unreasonable to expect him or her to have any recollection of the matters dealt with, *and* the leave of the court must be obtained under section 26.<sup>26</sup>
- 2.17 Where hearsay is admitted under section 23 or section 24 of the 1988 Act, the other party is expressly permitted to lead evidence of various matters which, had the maker of the statement given evidence orally, could have been used to attack the maker's credibility.<sup>27</sup>
- 2.18 We will return to the 1988 Act; but it might be useful to point out now that the responses we have received indicate a lack of consistency in the way in which judges exercise their discretion under the Act. Some – perhaps those with a traditional hostility to hearsay – regularly exercise their discretion to prevent hearsay statements from being admitted. We discuss below the worrying consequences of the Act's reliance on this discretion.<sup>28</sup>
- 2.19 If, at modified committal proceedings, a prosecutor has reason to believe a statement would be admissible at trial under section 23 or 24 of the 1988 Act, then that statement is admissible at the committal proceedings by virtue of the Magistrates' Courts Act 1980, section 5D.<sup>29</sup>

#### **THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996**

- 2.20 Since the consultation paper was published, the Criminal Procedure and Investigations Act 1996 has been passed, which makes a significant change to the rules on the admissibility of hearsay evidence. Statements and depositions admitted in committal proceedings are now admissible at trial in the Crown Court, subject to the right of an opposing party to object.<sup>30</sup> The court may override an objection if it considers it to be “in the interests of justice so to order”.<sup>31</sup> No details are given as to how this discretion should be exercised.<sup>32</sup> An important point is its interaction with another provision, to which we now turn.

<sup>26</sup> The court has additional discretions, at common law and under s 78(1) of PACE, to exclude prosecution evidence: see paras 4.42 and 4.43 of the consultation paper and para 1.31, n 49 above.

<sup>27</sup> 1988 Act, Sched 2.

<sup>28</sup> See paras 4.28 – 4.31 below.

<sup>29</sup> Inserted by the 1996 Act, s 47, Sched 1, para 3.

<sup>30</sup> 1996 Act, s 68 and Sched 2, paras 1 and 2. The court in its discretion may also order that the statement or deposition should not be used at the trial: Sched 2, paras 1(3)(b) and 2(3)(c).

<sup>31</sup> 1996 Act, Sched 2, paras 1(4) and 2(4).

<sup>32</sup> We consider the defects of the exception introduced by the 1996 Act at paras 4.46 – 4.50 below. We recommend amendment to the 1996 Act at paras 8.108 – 8.113 below.



2.21 Under section 97A of the Magistrates' Courts Act 1980,<sup>33</sup> a magistrate who is satisfied that a person is likely to be able to make a statement on behalf of the prosecutor containing material evidence, or to produce on behalf of the prosecutor a document likely to be material evidence, but will not voluntarily do so, may issue a summons requiring that person to have his or her evidence taken as a deposition or to produce the document before the committal hearing. Rules of court<sup>34</sup> give some guidance as to the procedure for the taking of a deposition from a reluctant witness. There is no provision in the rules for the defendant to attend, nor do they specify whether the proceedings are to take place in open court or in chambers; it is for the court to determine these matters.<sup>35</sup> It is envisaged that the prosecutor will examine the reluctant witness.<sup>36</sup> The witness's evidence will be put in writing.<sup>37</sup> The magistrates' clerk must, as soon as is reasonably practicable, send a copy of the deposition or the document produced to the prosecutor,<sup>38</sup> and the prosecutor must serve it on the defence like any other evidence. The deposition can then be used not only in the committal proceedings<sup>39</sup> but also at the trial, under the provisions set out in the previous paragraph. The net effect is that a statement on which there has been no cross-examination will be prima facie admissible at trial, even though the declarant is available to testify.

<sup>33</sup> Inserted by the 1996 Act, Sched 1, para 8.

<sup>34</sup> Rule 3 of the Magistrates' Courts (Amendment) Rules, SI 1997 No 706 (L12), inserts rule 4A into the Magistrates' Courts Rules, SI 1981 No 552.

<sup>35</sup> Home Office Circular 11/1997, Annex B.

<sup>36</sup> Rule 4A(2).

<sup>37</sup> Rule 4A(1)(a).

<sup>38</sup> Magistrates' Courts Act 1980, s 97A(9).

<sup>39</sup> *Ibid*, s 5A(3)(c), inserted by the 1996 Act, s 47, Sched 1, para 3.

# PART III

## THE JUSTIFICATIONS OF THE HEARSAY RULE

- 3.1 In Part VI of the consultation paper we analysed the alleged justifications of the rule to consider their cogency, and to determine whether, individually or cumulatively, they should render hearsay inadmissible or whether, with or without safeguards, they are instead factors to be taken into account when deciding on the weight to be given to hearsay evidence once admitted. If hearsay evidence is to be admitted, it is important to know its shortcomings, so as to be able to determine *when* it should be admitted, and what safeguards should be in place to protect the interests of those against whom it is adduced. In this Part we therefore consider a number of arguments that have been advanced in favour of the hearsay rule, and review the provisional conclusions set out in the consultation paper. As in the consultation paper, we take as our starting point Lord Normand’s summary of the weaknesses of hearsay evidence:

It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.<sup>1</sup>

### HEARSAY “IS NOT THE BEST EVIDENCE”<sup>2</sup>

- 3.2 Our provisional view in the consultation paper<sup>3</sup> was that hearsay may well be the “best evidence” in the sense that it is the best *available*, for example where the original source of the information can no longer be produced because that person is dead. And some hearsay is plainly *superior* to oral evidence: we gave the example of *Myers v DPP*,<sup>4</sup> where a contemporaneous record on which car workers had recorded the cylinder block and chassis numbers of the cars they were assembling was not admitted, even though such evidence would have been much more reliable than the workers’ oral recollection three years later (even if it had been possible to trace them).<sup>5</sup>
- 3.3 It can be deduced from the number of exceptions to the hearsay rule that the argument that hearsay is not the best evidence does not always hold true. Lord Reid explained:

The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or

<sup>1</sup> *Téper v R* [1952] AC 480, 486, cited with approval by Lord Oliver of Aylmerton in *Kearley* [1992] 2 AC 228, 259, and in *Blastland* [1986] AC 41, 54, by Lord Bridge of Harwich, with whom Lords Fraser of Tullybelton, Edmund-Davies, Brightman and Templeman agreed.

<sup>2</sup> *Per* Lord Normand in *Téper v R* [1952] AC 480, 486.

<sup>3</sup> Paras 6.3 – 6.7 of the consultation paper.

<sup>4</sup> [1965] AC 1001.

<sup>5</sup> These records would now be admissible under s 24 of the 1988 Act: see paras 2.15 – 2.16 above (and, for more detail, paras 4.28 – 4.35 of the consultation paper).

inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found discussing in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far the best evidence available.<sup>6</sup>

- 3.4 Our provisional conclusion in the consultation paper – that some hearsay evidence is the best evidence and some is not, and that, where it is, the rule operates irrationally to prevent its admission – was supported by the vast majority of those who responded on this issue. We now adopt it as our final conclusion, and will bear it in mind when we reconsider the exceptions to the rule.

**“THE DANGER THAT HEARSAY EVIDENCE MIGHT BE CONCOCTED”,<sup>7</sup> AND THE DANGER OF ERRORS IN TRANSMISSION**

- 3.5 If there were no hearsay rule a defendant could produce in evidence a letter or witness statement in which the declarant – alas, now unavailable – claims to have seen the offence being committed by someone other than the defendant, or to have seen the defendant somewhere else at the time of the offence. Such evidence, however weak, might persuade a tribunal of fact that there was a reasonable doubt about the defendant’s guilt. Arguments of this sort had a great influence on the CLRC Evidence Report, and caused the CLRC to qualify its proposal for the relaxation of the hearsay rule with a ban on statements coming into existence after the suspect knew of an impending prosecution.<sup>8</sup> The Bar Council also expressed fears about the risk of concoction in its official response to the CLRC Report.<sup>9</sup>
- 3.6 Hearsay often carries the risk of errors appearing as the evidence is repeated by different people. The person who reports the words of another may have misheard them or misinterpreted them.<sup>10</sup> This risk is all the greater if the reporter had a preconceived idea of what the other person was going to say. The more remote the source, the greater the likelihood of errors in transmission.
- 3.7 If the source of the original information is not available for cross-examination, it is more difficult for errors or lies to be exposed by the opposing party. Our approach in the consultation paper was that these dangers do not in themselves justify retaining the hearsay rule in its present form, because it excludes not only statements where both risks are present, but also statements where there can be no

<sup>6</sup> *Myers v DPP* [1965] AC 1001, 1024.

<sup>7</sup> *Per* Lord Ackner in *Kearley* [1992] 2 AC 228, 258, citing Professor Cross in the 5th edition of *Cross on Evidence*. His Lordship commented that “Some recent appeals ... regretfully demonstrate that currently that anxiety ... is fully justified”.

<sup>8</sup> CLRC Evidence Report, para 229; Draft Criminal Evidence Bill, cl 32(1).

<sup>9</sup> “Not the least of the arguments against the Committee’s proposals is the advantage that would be taken by such criminals of the opportunities afforded them by this part of the Bill”: General Council of the Bar, *Evidence in Criminal Cases; Memorandum on the 11th Report of the Criminal Law Revision Committee* (1973).

<sup>10</sup> A Trankell, *Reliability of Evidence* (1972) pp 56–64.

doubt about what was said, or where the risk of fabrication is low.<sup>11</sup> Our provisional view was that the risks of manufactured evidence and of errors in transmission were good justifications for the complete exclusion only of *multiple* hearsay and the hearsay evidence of *unidentified* witnesses. In other cases the risks could be reduced to an acceptable level by (for example) requiring advance notice of the intention to adduce hearsay, or permitting a party against whom hearsay is used to call evidence undermining the credibility of the declarant as if he or she had been present. In jury trials there could also be an appropriate judicial warning about the dangers of distortion and of manufactured evidence.<sup>12</sup>

- 3.8 Of the respondents who dealt with this point, a large majority agreed with our provisional view.<sup>13</sup> We still believe that, where there is good reason to admit the hearsay, the risks implicit in first-hand hearsay from an identified person should not affect its admissibility but only its weight. Even where the hearsay is not first-hand, or the declarant cannot be identified, it may be acceptable to admit the hearsay evidence if it is known what words the declarant used, or the risk of fabrication is low.<sup>14</sup>

**“THE LIGHT WHICH HIS Demeanour WOULD THROW ON HIS TESTIMONY IS LOST”<sup>15</sup>**

- 3.9 In the consultation paper we drew attention to the widely diverging views as to whether fact-finders are assisted, in deciding whether a witness’s evidence is true, by his or her demeanour.<sup>16</sup> The traditional view is that the effect of reading out-of-court statements is

to deprive the jury of the inestimable advantage – 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.<sup>17</sup>

- 3.10 Against this, a number of judges have doubted whether the demeanour of a witness is really much of a clue as to the witness’s veracity. One very experienced judge, whose view was endorsed by a distinguished Law Lord, doubted his own ability, “and sometimes that of other judges, to discern from a witness’s demeanour, or the tone of his voice, whether he is telling the truth”.<sup>18</sup> Similar

<sup>11</sup> Paras 6.8 – 6.18 of the consultation paper.

<sup>12</sup> See para 3.23 below.

<sup>13</sup> Some respondents thought we were too conservative in excluding multiple hearsay; others thought that the line between first-hand and more remote hearsay is irrelevant because cross-examination is impossible in both cases.

<sup>14</sup> This may arise eg in the case of a business document, or an implied assertion, or a *res gestae* statement. See paras 8.71 – 8.77, 7.17 – 7.21 and 8.114 – 8.129 below respectively.

<sup>15</sup> *Teper v R* [1952] 2 AC 480, 486, *per* Lord Normand.

<sup>16</sup> Paras 6.20 – 6.29 of the consultation paper.

<sup>17</sup> *Collins* (1938) 26 Cr App R 177, 182, *per* Humphreys J.

<sup>18</sup> Mr Justice MacKenna, “Discretion” (1974) 9 Irish Jurist (NS) 1, 10, adopted by Lord Devlin in *The Judge* (1979) p 63.

views have been expressed by other lawyers with much knowledge of the criminal justice system.<sup>19</sup>

- 3.11 Psychological evidence suggests that it is the doubters who are right.<sup>20</sup> Studies indicate that if observers are familiar with a speaker they might be better able to tell when he or she is lying; but this point is of little value in the case of fact-finders, because they will not know the witness. After reviewing the available psychological literature, J R Spencer and Rhona Flin conclude:

The most that can be said for the value of the demeanour of a witness as an indicator of the truth is that it is one factor, which must be weighed up together with everything else. It would be quite wrong to promote it to the level where we use it to accept or reject the oral testimony of a witness in the face of other weighty matters all of which point the other way.<sup>21</sup>

- 3.12 Our provisional conclusion was that, insofar as a witness's demeanour does help the fact-finder to reach an accurate verdict, it is not so significant a fact in itself as to justify the exclusion of hearsay evidence.<sup>22</sup> The jury can be expressly warned that they have not had the advantage of seeing how the witness gives evidence, nor how he or she would have stood up to cross-examination.<sup>23</sup> On consultation the majority of respondents agreed with this view, though a minority<sup>24</sup> believed that we had underestimated the value of demeanour. We are not persuaded that its significance is such as to justify the exclusion of hearsay, but we do believe that it is a matter which merits a judicial warning.<sup>25</sup>

**“IT IS NOT DELIVERED ON OATH”<sup>26</sup>**

- 3.13 The oath historically has a central place in a system of justice based on a belief that God would punish the liar. Today, the oath provides no guarantee that the witness will tell the truth, and there is widespread scepticism about its utility. In

<sup>19</sup> Eg Lord Roskill: “The picture of the lynx eyed judge who can always detect truth from falsity at a glance is not one which I would ever have claimed for myself, and I do not believe it is realistic”. *Hansard* (HL) 20 October 1987, vol 489, col 82; Henry Cecil (Judge Leon) *Just Within the Law* (1975) pp 179–180; Lord Wigoder, speaking in a House of Lords debate on the Criminal Justice and Public Order Bill 1994: “The problem is how does one decide which is the truth. It is not by looking at the witness and judging by his or her demeanour. That is no test and we all know the dangers of that”: *Hansard* (HL) 5 July 1994, vol 556, col 1261. Lord Wigoder was speaking during the debate on corroboration about witnesses who relate sexual episodes, ie complainants.

<sup>20</sup> Reviews of the literature can be found at O G Wellborn, “Demeanor” (1991) 76 Cornell LR 1075, and J A Blumenthal, “A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility” (1993) 72 Neb L Rev 1157.

<sup>21</sup> J R Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) pp 280–281.

<sup>22</sup> See para 6.30 of the consultation paper.

<sup>23</sup> These points are made in the standard direction given to a jury: see para 3.23 below.

<sup>24</sup> Including the South Eastern Circuit and Professor Peter Murphy.

<sup>25</sup> See para 3.23 below.

<sup>26</sup> *Téper v R* [1952] AC 480, 486, per Lord Normand.

1972, the CLRC pointed out that it had not prevented “an enormous amount of perjury in the courts”.<sup>27</sup> Similarly, the Court of Appeal has said: “It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised”.<sup>28</sup> We also note that many responsible organisations in England and Wales have called for the oath to be abolished.<sup>29</sup>

- 3.14 In the consultation paper we recognised that any responsible person would be more careful about the accuracy of what he or she said in court than in casual conversation. This may of course be a result of the public nature of the proceedings, or of the prospect of being closely cross-examined, rather than of the oath.<sup>30</sup> Our provisional conclusion was that there was no clear evidence that an oath or affirmation in itself promotes truthful testimony.<sup>31</sup> A large majority of those who responded on this point agreed. Those who disagreed thought the solemnity of the occasion, together with the fear of prosecution for perjury, brought home to the witness the importance of giving truthful evidence. On further consideration, we believe our provisional view to be correct.

**“THE TRUTHFULNESS AND ACCURACY OF THE PERSON WHOSE WORDS ARE SPOKEN TO BY ANOTHER WITNESS CANNOT BE TESTED BY CROSS-EXAMINATION”<sup>32</sup>**

- 3.15 The absence of any opportunity to cross-examine the maker of a hearsay statement is the objection to hearsay most strongly pressed today.<sup>33</sup> In 1987, Lord Irvine of Lairg explained in the House of Lords debate on the Criminal Justice Bill:

There is no advocate who has not experienced countless cases where a story that seemed consistent and watertight when set down on paper was destroyed by a proper and skilful cross-examination.<sup>34</sup>

- 3.16 This approach echoes the long-established view of the merits of cross-examination: for example, Sir Matthew Hale wrote in 1739 that cross-examination “beats and boulds out the Truth”.<sup>35</sup> Wigmore regarded it as “the greatest legal

<sup>27</sup> CLRC Evidence Report, para 280(vi).

<sup>28</sup> *Hayes* [1977] 1 WLR 234, 237, *per* Bridge LJ.

<sup>29</sup> Including JUSTICE, *Witnesses in the Criminal Courts* (1986) p 7, citing the Magistrates’ Association, the Justices’ Clerks’ Society and the Law Society as generally supporting this approach; and a majority of the CLRC in its Evidence Report (paras 279–281).

<sup>30</sup> *Wigmore on Evidence*, vol 5, para 1362, suggests that the oath adds little to cross-examination, which is the real test.

<sup>31</sup> Paras 6.31 – 6.35 of the consultation paper.

<sup>32</sup> *Teper v R* [1952] AC 480, 486, *per* Lord Normand.

<sup>33</sup> The Pigot Report (Report of the Advisory Group on Video Evidence, Home Office, 1989), for example, describes cross-examination as “essential”: para 2.2. Zuckerman describes it as the “most effective method for testing a witness’s evidence”: *The Principles of Criminal Evidence* (1989) p 93.

<sup>34</sup> *Hansard* (HL) 20 October 1987, vol 489, col 78. See also similar comments made in the same debate by Lord Hutchinson of Lullington: *ibid*, col 90.

<sup>35</sup> Sir Matthew Hale, *The History of the Common Law of England* (3rd ed 1739).

engine ever invented for the discovery of truth”,<sup>36</sup> and added that “cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure”.

- 3.17 In the consultation paper, we drew attention to those who have been sceptical about these claims for the value of cross-examination,<sup>37</sup> including the ALRC, which, having reviewed the available literature, concluded that “so far as obtaining accurate testimony is concerned, [cross-examination] is arguably the poorest of the techniques employed at present in the common law courts”.<sup>38</sup> We agreed that in some cases little can be gained from cross-examination,<sup>39</sup> and that some witnesses are put at a particular disadvantage by cross-examination,<sup>40</sup> but concluded that the fact that a hearsay statement cannot be tested by questions can be a serious objection to the admission of such evidence. Our provisional conclusion was that the absence of cross-examination is the most valid justification of the hearsay rule, but that even this justification is not valid for all hearsay, and in any event it does not justify the current form of the hearsay rule.<sup>41</sup>
- 3.18 On consultation, all the respondents who addressed this provisional conclusion agreed with it. For example, Professor Sir John Smith regarded the absence of cross-examination as not only the best but “probably the only justification for the hearsay rule”. We have therefore retained this provisional conclusion, and will keep it in mind when making our more detailed recommendations, not only on what hearsay should be admitted, but also on what safeguards should be given to the opposing party.

**“THE DANGER ... THAT UNTESTED HEARSAY EVIDENCE WILL BE TREATED AS HAVING A PROBATIVE FORCE WHICH IT DOES NOT DESERVE”<sup>42</sup>**

- 3.19 Lord Devlin stressed the importance of this point when he said in the Fifth Hamlyn Lecture in 1956 that

<sup>36</sup> *Wigmore on Evidence*, vol 5, para 1367.

<sup>37</sup> See paras 6.43 – 6.50 of the consultation paper.

<sup>38</sup> ALRC, Research Paper No 8, *Manner of Giving Evidence* (1982) ch 10, para 5. Other criticisms referred to in paras 6.43 – 6.60 of the consultation paper are that direct and leading questions produce less accurate answers than encouraging free report; that cross-examination does not necessarily aim to elicit the truth, but to challenge or correct what has just been heard; that aggressive questioning can confuse and frighten witnesses so that they agree with everything or become incoherent, or may be discouraged from ever testifying; and that the fact that a witness contradicts earlier evidence does not necessarily help fact-finders decide which account to believe.

<sup>39</sup> Eg *Myers v DPP* [1965] AC 1001: see para 3.2 above for the facts. Consider also the case where the witness’s observational powers and sincerity are not in issue, as in *Hovell (No 2)* [1987] 1 NZLR 610, where the New Zealand Court of Appeal held that there was nothing which the victim *could* have been asked which could have shed light on the live issue of identity.

<sup>40</sup> J R Spencer and R Flin, *The Evidence of Children – the Law and the Psychology* (2nd ed 1993) ch 10. See also “Bearing Witness”, *Community Care* w/e 30 April 1994.

<sup>41</sup> See para 6.62 of the consultation paper.

<sup>42</sup> *Blastland* [1986] AC 41, 54, *per* Lord Bridge of Harwich.

the first object of the rules [of evidence] ... was to prevent the jury from listening to material which it might not know how to value correctly. What a man is said to have said, ie hearsay, may often be of some weight even though the man is not there to be cross-examined about it and though he might, if he came, deny saying it. But the danger of hearsay is that the jurymen, unused to sifting evidence, might treat it as first-hand; so, except for limited purposes, it is not allowed.<sup>43</sup>

3.20 A contrary view was expressed by Professor Glanville Williams, who commented that juries

are credited with the ability to follow the most technical and subtle directions in dismissing evidence from consideration, while at the same time they are of such low-grade intelligence that they cannot, even with the assistance of the judge's observations, attach the proper degree of importance to hearsay.<sup>44</sup>

3.21 In coming to a view on this issue we have been hampered by our inability to carry out research into the effects of judicial warnings.<sup>45</sup> Research on actual juries is prohibited by section 8 of the Contempt of Court Act 1981, and we agree with the Royal Commission that that section should be amended to enable research to be conducted into juries' reasons for their verdicts, "so that informed debate can take place rather than argument based on surmise and anecdote".<sup>46</sup> David Pannick QC has rightly pointed out that "where a Royal Commission has to make policy proposals based on guesswork, the case for law reform is unanswerable".<sup>47</sup>

3.22 In Australia, there is some evidence which raises serious doubts as to whether juries fully understand some of the directions in law that they are given,<sup>48</sup> while other research suggests that "some juries are capable of responding appropriately to directions, although the result varies".<sup>49</sup> In the Crown Court study commissioned by the Royal Commission over 61% of jurors questioned said they had found the judge's directions on law not at all difficult, and a further 33% not very difficult.<sup>50</sup> Unfortunately, the study does not indicate the types of evidence on which directions were given. Two other studies<sup>51</sup> indicate that mock juries seem to

<sup>43</sup> Sir Patrick Devlin, *Trial by Jury* (Revised 3rd impression 1965) p 114.

<sup>44</sup> Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed 1963) p 207.

<sup>45</sup> See the argument in favour of such research set out by A Ashworth and R Pattenden, "Reliability, Hearsay and the English Criminal Trial" (1986) 102 LQR 292, 331.

<sup>46</sup> Report of the Royal Commission, ch 1, para 8; recommendation 1, p 188.

<sup>47</sup> "Juries must stand up and be counted", *The Times* 17 August 1993.

<sup>48</sup> New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (1986 No 48) para 6.30.

<sup>49</sup> ALRC, *Evidence (Interim)* (1985 ALRC 26) vol 1, para 75.

<sup>50</sup> Crown Court study (Research Study No 19) p 216.

<sup>51</sup> S Landsman and R F Rakos, "Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts" (1991) 15 *Law and Psych Rev* 65; and P Miene, R C Park and E Borgida, "Juror Decision Making and Evaluation of Hearsay Evidence" (1992) 76 *Minn LR* 683.



be able to follow judicial directions on the use of hearsay in particular, although this research has its limitations.<sup>52</sup>

3.23 The Judicial Studies Board has recently published this draft specimen direction on hearsay:

As you know, the general rule in the courts is that unless evidence is agreed it has to be given orally from the witness box. Then you have the opportunity to see the witness for yourselves and judge his/her evidence accordingly. However, there are certain circumstances where a witness is unavailable and the statement of that witness is read out. That has happened here in the case of the witness X. That statement is evidence in the case which you can consider, but as he/she did not come to court, his/her evidence has certain limitations which I must draw to your attention:

1. First, when someone's statement is read out you do not have the opportunity of seeing him/her in the witness box, and sometimes when you see a witness you get a much clearer idea of whether that evidence is honest and accurate.

2. Second, his/her evidence has not been tested under cross-examination, and therefore you have not had the opportunity of seeing how the evidence survived this form of challenge.

You must therefore consider the evidence of X in the light of these limitations. You should only act upon it, if having taken these matters into account, you are nevertheless sure that it is reliable.<sup>53</sup>

3.24 In the consultation paper we considered that, in the absence of any conclusive empirical evidence, there were two different ways of deciding whether juries and magistrates can understand the directions given to them on the weakness of hearsay evidence. The first was to consider the views of experts experienced in the workings of the criminal justice system, and the other was to examine the complexity of tasks already imposed upon fact-finders who are not legally qualified.

3.25 Starting with the views of those versed in criminal procedure, the most important is the conclusion of the CLRC:

We disagree strongly with the argument that juries and lay magistrates will be over impressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can. In any event judges will be in a position to remind juries that the former is the case with hearsay evidence, and sometimes the judge may think it advisable to mention this to the jury at the time when the statement is admitted. On the other hand there is some hearsay evidence which would rightly

<sup>52</sup> See para 6.68, n 88 of the consultation paper.

<sup>53</sup> Before this direction was issued, a judge could use the direction approved by the Court of Appeal in *Cole* [1990] 1 WLR 866, 869.

convince anybody. Moreover, juries may have to consider evidence which is admissible under the present law, and there are other kinds of evidence which they may find it more difficult to evaluate than hearsay evidence – for example, evidence of other misconduct.<sup>54</sup>

- 3.26 This raises the question how fact-finders respond to other tasks of evaluating evidence and considering directions that are given to them. We have referred to Glanville Williams' cogent point that jurors are credited with being able to follow "the most technical and subtle directions" in other areas.<sup>55</sup> In the consultation paper we gave some illustrations of potentially difficult directions given to juries, such as the directions given in the *Subramaniam*<sup>56</sup> type of case where juries have to understand that a statement is put before them to show the fact that it was made, and not the truth of what was said. Thus, where a defendant is charged with handling stolen goods, he or she may give evidence of what the supplier said was the source of the goods. The jury must then be directed that this is not proof of what the source actually was, but only of what the defendant was told. It is assumed that such a direction is comprehensible to juries and to magistrates. If this is a legitimate assumption, we wonder why it is not reasonable to assume that a hearsay direction would also be comprehensible.
- 3.27 Another difficult direction given to juries is that given where one accused is of bad character and the other of good character.<sup>57</sup> In the consultation paper we gave other examples of juries being assumed to understand directions of importance and of greater complexity than the direction on hearsay.<sup>58</sup>
- 3.28 Our provisional view was that, in the case of first-hand hearsay, juries and magistrates are capable of understanding and following a warning of the defects of hearsay evidence.<sup>59</sup> Of the respondents who dealt with this point, the vast majority

<sup>54</sup> CLRC Evidence Report, para 247.

<sup>55</sup> See para 3.20 above.

<sup>56</sup> See para 2.3 above, and paras 2.5 and 6.77 of the consultation paper.

<sup>57</sup> The judge is advised to tell the jury:

You must not assume that a defendant is guilty or that he is not telling the truth because he has previous convictions. Those convictions are not relevant at all to the likelihood of his having committed the offence. They are relevant only as to whether you can believe him. It is for you to decide the extent to which, if at all, his previous convictions help you about that.

But in relation to the defendant of good character the judge will say:

In the first place, the defendant has given evidence, and as with any man of good character it supports his credibility. Credibility simply relates to the confidence which you may have in the truthfulness of his evidence, that is whether you can believe him ... In the second place, the fact that he has not previously committed any offence ... may mean that he is less likely than otherwise might be the case to commit this crime now ...

Other judicial warnings which may be difficult if not impossible to follow are considered in Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1996) LCCP No 141.

<sup>58</sup> See, eg, paras 6.76 and 6.78 of the consultation paper.

<sup>59</sup> See para 6.80 of the consultation paper.

agreed, and we were reminded that juries act on far more complex directions. We were particularly gratified that the Justices' Clerks' Society believed that magistrates would understand, and give proper consideration to, the kind of warning that magistrates would and do receive from their clerk on hearsay evidence. Similarly, the support we received from those with knowledge of jury trials<sup>60</sup> confirmed our provisional conclusion. This is a significant conclusion, since it indicates that some exceptions to the hearsay rule may be justifiable.

**“THE RULE HAS BEEN EVOLVED AND APPLIED OVER MANY YEARS IN THE INTEREST OF FAIRNESS TO PERSONS ACCUSED OF CRIME”<sup>61</sup>**

- 3.29 The traditional reason for this view was that there was a danger of the accused being taken by surprise if hearsay evidence were given.<sup>62</sup> This is no longer an issue, as the prosecution is now obliged to disclose in advance certain items of evidence.<sup>63</sup>
- 3.30 In some jurisdictions the prosecution is allowed to use hearsay statements of *anonymous* witnesses. In the consultation paper we gave instances of this happening in Denmark, the Netherlands and Germany, and of cases which had been brought to the attention of the Strasbourg Court.<sup>64</sup> We are unhappy about this form of hearsay, and would not wish to see it used in England and Wales.
- 3.31 If there is concern that the existing hearsay rule does not in fact protect the accused from injustice, the rule could of course be changed so as to apply more strictly to prosecution evidence. We would not be in favour of this approach, because we are not in favour of different rules for prosecution and defence.<sup>65</sup>
- 3.32 We also believe that the hearsay rule can in fact operate *against* defendants, as well as in their favour. One of the most serious criticisms of the rule is that it sometimes prevents defendants from putting cogent evidence of their innocence before the court.<sup>66</sup>
- 3.33 All these factors led us to the provisional view that the hearsay rule does not always operate to protect the accused: the accused may be prevented from adducing exculpatory evidence, and, where hearsay *is* admitted, is not protected from the jury or magistrates treating it as being of equal weight to non-hearsay evidence.<sup>67</sup> This view was accepted by all but one of the respondents. The

<sup>60</sup> Including nine High Court judges and the General Council of the Bar.

<sup>61</sup> *Kearley* [1992] AC 228, 278C, *per* Lord Oliver of Aylmerton.

<sup>62</sup> M Damaška, “Of Hearsay and its Analogues” (1992) 76 *Minn LR* 425.

<sup>63</sup> The prosecution must disclose to the defence evidence on which it intends to rely, except in the case of summary offences: see para 11.2, n 5 below.

<sup>64</sup> See para 6.84 of the consultation paper.

<sup>65</sup> See paras 12.2 – 12.8 below.

<sup>66</sup> See *Sparks* [1964] AC 964 (see para 4.4 below); *Blastland* [1986] AC 41 (see paras 4.5 – 4.9 below); *Harry* (1988) 86 Cr App R 105 (see para 7.12 below); *Wallace and Short* (1978) 67 Cr App R 291 (see para 4.12 below); *Beckford and Daley* [1991] Crim LR 833 (see para 6.45 below).

<sup>67</sup> See para 6.87 of the consultation paper.

exception was the Wales and Chester Circuit, who argued: “The idea of the defendants being able to adduce exculpatory hearsay evidence is clearly open to abuse”. After considering all the responses, our final view is the same as our provisional view.

**“IT IS ALWAYS MORE DIFFICULT TO TELL A LIE ABOUT A PERSON ‘TO HIS FACE’ THAN ‘BEHIND HIS BACK’”<sup>68</sup>**

- 3.34 There is a strongly held view that it is somehow fundamental to justice that an accused person should be able to confront the accusers, and that the witness should be obliged to make his or her accusation to the accused’s face.<sup>69</sup> The “right” of confrontation has been expressed,<sup>70</sup> and put on statutory footing,<sup>71</sup> in various jurisdictions. However, this approach has not been adopted in England and Wales, where greater use is now being made of procedures to separate the witness from the accused. The witness may be permitted to give evidence from behind a screen, though not all practitioners are convinced that this practice is fair to the accused, and the courts have shown some reluctance to allow it.<sup>72</sup> Alternatively, the witness may give evidence via closed circuit television, with the leave of the court.<sup>73</sup>
- 3.35 Our provisional view was that it is desirable for witnesses to give their evidence in the presence of the accused if possible, but that there are other factors which may outweigh the need for this.<sup>74</sup> Again, there was an overwhelming majority in support of this view. Professor Sir John Smith believed that there was “nothing to say in favour of ‘confrontation’ as such”, but he thought that the defendant must have the right to see and hear the evidence given against him or her wherever possible and to cross-examine. Jowitt J asked: “What contribution does the defendant’s ability to see the witness make to getting the right answer?”. We respectfully agree that it is not clear how much confrontation actually contributes to an accurate

<sup>68</sup> *Coy v Iowa* 487 US 1012, 1018 (1988) per Scalia J.

<sup>69</sup> See, eg, Sir Matthew Hale, *The History of the Common Law of England* (3rd ed 1739).

<sup>70</sup> The right to confront an adverse witness is “basic to any civilised notion of a fair trial”: *Hughes* [1986] 2 NZLR 129, 148, per Richardson J. See also J R Spencer and R Flin, *The Evidence of Children: the Law and the Psychology* (2nd ed 1993) pp 277–279. In *Herbert v Superior Court* 117 Cal App (3d) 850 (1981) it led to the conviction being quashed where the judge had permitted the five-year-old witness to turn her chair away from the accused.

<sup>71</sup> Eg s 25 of the New Zealand Bill of Rights Act 1990: see para 3.14 in Appendix B of the consultation paper. In the United States the Sixth Amendment to the Constitution guarantees the right of a defendant “to be confronted with the witnesses against him”: see para 4.18 in Appendix B of the consultation paper. In *Chambers v Mississippi* 410 US 284 (1973) the United States Supreme Court held that this constitutional right also entailed the right to cross-examine the accuser. Article 6(3)(d) of the Convention also addresses this issue: see paras 5.9 – 5.11 below.

<sup>72</sup> In *Cooper v Schaub* [1994] Crim LR 531 the Court of Appeal held that, where the witness is an adult, screens should be used only in the most exceptional cases. However, in *Foster* [1995] Crim LR 333 the Court of Appeal confirmed that the correct test is that set out in *X, Y and Z* (1990) 91 Cr App R 36: “the court must be satisfied that no undue prejudice is caused to the defendant”.

<sup>73</sup> See s 32 of the 1988 Act.

<sup>74</sup> Such as the impossibility of obtaining the evidence directly from the witness in the courtroom: see para 6.94 of the consultation paper.

verdict, but if it is avoided the accused may feel that justice has not been done. We therefore confirm our provisional conclusion.

**IF HEARSAY WERE ADMITTED, VALUABLE COURT TIME WOULD BE WASTED  
HEARING EVIDENCE OF LITTLE WEIGHT**

- 3.36 This standard justification is not supported by the experience of the English civil courts: they have not been overwhelmed with poor quality evidence since the hearsay rule was relaxed by the Civil Evidence Act 1968.<sup>75</sup> In the consultation paper we suggested that the opposite is the case, because time would be saved by courts receiving evidence quickly and cheaply if it were presented in written form.<sup>76</sup> Our provisional view was that, although the rule does lead to the exclusion of some evidence which would be of little or no assistance to the court, the time thus saved is outweighed by the time spent on legal argument made necessary by the uncertainty of the rule and the degree to which it depends on the exercise of judicial discretion.<sup>77</sup> The overwhelming view of consultees was in favour of this conclusion. The major arguments to the contrary came from those who doubted whether much time was in fact spent on legal argument about the hearsay rule,<sup>78</sup> and from those who doubted that our proposed reforms would reduce such argument. We have considered these arguments with care, but do not find that they persuade us to alter our provisional view.

**CONCLUSIONS**

- 3.37 We believe that the main, if not the sole, reason why hearsay is inferior to non-hearsay is that it is not tested by cross-examination. This in itself may justify requiring the witness to attend where possible. Hearsay which is second, third or fourth-hand carries proportionately higher risks of distortion and concoction than first-hand hearsay. Where hearsay is admitted, our view is that fact-finders should be specifically warned of its potential defects. We can have confidence that they will observe these warnings, as they are expected to understand complex warnings in other fields of evidence. We shall return to these conclusions when making our recommendations for reform.
- 3.38 In the next Part we set out the defects of the hearsay rule and its exceptions.

<sup>75</sup> Nor, we understand, have the Scottish courts since the Civil Evidence (Scotland) Act 1988 abolished the hearsay rule for civil proceedings in that jurisdiction. The Civil Evidence Act 1995, abolishing the hearsay rule in England and Wales, came into force on 31 January 1997 (except for ss 10 and 16(5)) and it is too early to assess its effect.

<sup>76</sup> See para 6.97 of the consultation paper.

<sup>77</sup> See para 6.99 of the consultation paper.

<sup>78</sup> By Jowitt J and the Wales and Chester Circuit.

## **PART IV**

# **IS THERE A NEED TO CHANGE THE PRESENT LAW?**

- 4.1 There is little to be gained from reforming any branch of the law unless it is clearly defective. In the consultation paper we examined the criticisms, both theoretical and practical, which can be made of the hearsay rule;<sup>1</sup> we now consider those criticisms in the light of the helpful responses that we have received, in order to evaluate the first option available to us – namely to retain the present law.
- 4.2 The most prominent defect of the rule is that it leads to the arbitrary exclusion of cogent evidence, and so we address this first.<sup>2</sup> Secondly, we consider the merits and disadvantages of leaving the question of admissibility to the discretion of the court.<sup>3</sup> Thirdly, we argue that the rule and its exceptions are unnecessarily complex.<sup>4</sup> Fourthly, we examine how this complexity wastes court time.<sup>5</sup> We then look at the way in which the rule confuses witnesses.<sup>6</sup> We conclude that there is a need for change.<sup>7</sup>

### **THE EXCLUSION OF COGENT EVIDENCE**

- 4.3 We now examine the cases where reliable evidence may be excluded by the hearsay rule.

#### **The exclusion of cogent evidence tendered by the defence**

- 4.4 The hearsay rule applies equally to both prosecution and defence. The result is that it sometimes makes it impossible for a defendant to put before the court credible evidence which points to his or her innocence. Thus in *Sparks v R*<sup>8</sup> it prevented a white man accused of assaulting a three-year-old girl, who was not called as a witness, from leading evidence that she had initially described her attacker as “a coloured boy”. In *Thomson*<sup>9</sup> the accused was charged with using an instrument to procure an abortion. His defence was that the woman had induced the miscarriage herself, but he was not allowed to adduce evidence that she had told others not only that she intended to do this, but also that she had done so.

<sup>1</sup> Part VII of the consultation paper.

<sup>2</sup> Paras 4.3 – 4.27.

<sup>3</sup> Paras 4.28 – 4.31.

<sup>4</sup> Paras 4.32 – 4.53.

<sup>5</sup> Paras 4.54 – 4.55.

<sup>6</sup> Paras 4.56 – 4.57.

<sup>7</sup> Paras 4.60 – 4.62.

<sup>8</sup> [1964] AC 964.

<sup>9</sup> (1912) 7 Cr App R 276.

The inadmissibility of hearsay evidence can lead to anomalous and undesirable results.<sup>10</sup>

***Confessions by a co-defendant or non-party***

- 4.5 Evidence of a confession which exonerates the accused may come from a co-accused,<sup>11</sup> or from someone not involved in the proceedings. In *Blastland*,<sup>12</sup> B was charged with the buggery and murder of a 12-year-old boy. B's defence was that he had attempted to bugger the boy but had been frightened off by the appearance of a third party, who might have been one MH. The defence sought to adduce statements made by MH which showed that he had specific knowledge of the circumstances of the offence before such information was in the public domain, and a confession made by him (which he later retracted, remade and again retracted). The trial judge allowed none of this evidence to be admitted, on the ground that it was all inadmissible hearsay.
- 4.6 The House of Lords refused to reconsider the question of the admissibility of the confession by MH, but did consider the following point of law:

Whether evidence of words spoken by a third party who is not called as a witness is hearsay evidence if it is advanced as evidence of the fact that the words were spoken and so as to indicate the state of knowledge of the person speaking the words if the inference to be drawn from such words is that the person speaking them is or may be guilty of the offence with which the defendant is charged.

- 4.7 Their Lordships held that MH's words were irrelevant to the issue of the accused's guilt. In reaching this conclusion they were swayed by the fact that MH's confession to the crime was itself inadmissible. Thus, if the fact of his knowledge were admissible, it would, as Lord Bridge said in the leading speech,

lead to the very odd result that the inference that [MH] may have himself committed the murder may be supported indirectly by what [MH] said, though if he had directly acknowledged guilt this would have been excluded.<sup>13</sup>

<sup>10</sup> For example, A confesses in writing to a murder for which B is put on trial. A is willing to give evidence for B, but dies before trial. Though not admissible under the rules relating to confessions, A's confession is (subject to judicial leave) admissible as "documentary hearsay" under s 23 of the 1988 Act. But if A comes to court, and then refuses to say anything, claiming the privilege against self-incrimination, the earlier statement is not admissible in evidence. If A had come to court and there denied making the confession, or said that it was false, it might be a sensible result that the confession should be inadmissible: the hearsay account is trumped by evidence given directly to the court. But the out-of-court confession of someone who then refuses to speak at trial is, as such, no more and no less likely to be true than the out-of-court confession of someone who cannot give evidence because he or she is dead.

<sup>11</sup> Whether or not a confession by one accused may be adduced by the other was a question recently considered by the Court of Appeal in *Myers* [1996] 2 Cr App R 335. See para 8.93 below.

<sup>12</sup> [1986] AC 41.

<sup>13</sup> *Ibid*, at p 53.

4.8 Their Lordships held that the evidence B sought to adduce was not of probative value on the issue of whether B had or had not committed the offences. Its probative value lay in the truth of MH's knowledge (which could be proved by other means), but it did not follow indisputably that MH could only have acquired this knowledge by committing the crimes himself: he could have acquired it by witnessing them. Therefore, the fact of his knowledge was not sufficiently relevant to the issue of B's guilt.<sup>14</sup>

4.9 Professor D J Birch makes the cogent point that

if only two people could have committed an offence, the fact that one of them possessed detailed knowledge about it would normally be highly relevant. However Lord Bridge seems to reason that because [the person who confessed] could have acquired his knowledge as a witness, evidence about it was irrelevant. The short answer to this is that to make such an assumption is to usurp the function of the jury.<sup>15</sup>

4.10 There is a fear that if confessions by third parties were admitted, fabricated confessions would be a regular feature of criminal trials, and acquittals would result from the introduction of unworthy evidence. It would be too easy for guilty people to introduce evidence of a fictitious confession, and the jury would have no chance of distinguishing the real ones from the false ones.

4.11 The counter-argument is that if the evidence shows that there is a possibility that someone else committed the crime alone, and the jury cannot dismiss that possibility, then they cannot be sure of the accused's guilt, and therefore should not convict. The fact that someone else has confessed to the offence is logically relevant to the issue of whether the defendant committed it: this is so whether the other person is a co-defendant who gives evidence, a co-defendant who exercises the right not to give evidence, a co-defendant who is tried separately, or a person who is never caught or never prosecuted.<sup>16</sup> Moreover, it will normally be impossible for a defendant to adduce the oral evidence of the person who has confessed, because that person could rely on the privilege against self-incrimination.<sup>17</sup>

***An appeal may be allowed on the basis of inadmissible evidence***

4.12 Cogent evidence that someone other than the accused has committed the crime may be inadmissible, but this rule can pose a worrying dilemma for an appellate

<sup>14</sup> A less strict line was taken by the Australian Supreme Court in *Van Beelen's Petition* (1974) 9 SASR 163, where the court accepted the principle that where only one person could have committed a crime, evidence tending to show that it was not the accused but someone else who committed it *is* relevant (though it may still be inadmissible if it is hearsay).

<sup>15</sup> D J Birch, "Hearsay-Logic and Hearsay-Fiddles: *Blastland* revisited", *Essays in Honour of J C Smith* (1987) p 24.

<sup>16</sup> In the Scottish case of *McLay v Her Majesty's Advocate* (1994) SCCR 397 the accused had been tried with H. H was acquitted. On appeal, the appellant wished to adduce evidence of confessions allegedly made by H which exculpated the appellant. If the appellant had known of the confession before the trial, it would have been admissible then, but it was not admissible at any rehearing of evidence after H ceased to be a party to the proceedings.

<sup>17</sup> See generally *Phipson*, paras 20-44 – 20-53.



court. The court may quash a conviction because it knows of this inadmissible evidence, although it may try to disguise the fact that this is what is being done.<sup>18</sup> On occasion it may “take into account evidence which perhaps on a strict view of the laws of evidence it ought not to take into account”.<sup>19</sup> In *Wallace and Short*<sup>20</sup> the appellants asked the Court of Appeal to adopt this course because evidence had come to light since the trial that two other people had confessed to the offences for which the appellants were serving prison sentences. The defence accepted that evidence of the alleged confessions would not have been admissible, and the appeal was rejected.<sup>21</sup>

- 4.13 The existing law leads to injustices which only the Court of Appeal can remedy, and then only after the defendant may have been deprived of his or her liberty and much public money wasted. As JUSTICE has commented:

We think that it is a powerful argument against a strict exclusionary rule that miscarriages of justice can be avoided only if the appellant is lucky enough to find a court prepared to decide his case otherwise than according to law.<sup>22</sup>

It is obviously a very serious objection if the hearsay rule makes it impossible for a defendant to have a fair trial.

#### **The exclusion of cogent evidence tendered by the prosecution**

- 4.14 If the exclusionary rule is capable of causing wrongful convictions by sometimes making it impossible for the defence to lead cogent evidence of innocence, it is no less capable of causing unjustified acquittals by making it impossible for the prosecution to lead cogent evidence of guilt. This is typically so where a key witness, such as the victim of the offence, is not in a position to come to court to give oral evidence.

<sup>18</sup> Eg *Cooper* [1969] 1 QB 267, where a person who was not charged admitted to a friend that he had been the person who committed the assault. The confessor and the accused were similar in appearance. No objection was taken at trial to the friend recounting this admission in evidence. The jury nevertheless convicted the accused. The Court of Appeal had a lurking doubt about the conviction and allowed the appeal. See also *Hails* (unreported, 6 May 1976, CA) in which a youth with a mental age of 10 was convicted of the murder of a child (to which he had made a confession), but the conviction was quashed when it became known that a man who had been a witness at the trial had himself confessed to the murder. The facts of *Hails* are summarised by Roskill LJ in *Wallace and Short* (1978) 67 Cr App R 291, 297.

<sup>19</sup> *Wallace and Short* (1978) 67 Cr App R 291, 298, per Roskill LJ.

<sup>20</sup> (1978) 67 Cr App R 291.

<sup>21</sup> The Court of Appeal held that *Cooper* (n 18 above) was “not a case of this Court acting on fresh or indeed inadmissible evidence”. Of *Hails* (*ibid*) Roskill LJ said at p 297: “The whole of that case, in our view, proceeded on the footing not that the Court was dealing with a conviction to be quashed on inadmissible evidence, but with a conviction which it thought was unsafe and unsatisfactory because the doubts which must have already existed as to the weight which could properly be attached to a confession by a youth of intellectual immaturity, were reinforced when it was known that somebody else, whether truthfully or not, had confessed”.

<sup>22</sup> JUSTICE, *Miscarriages of Justice* (1989) para 3.41, in a part of the report which considered cases such as *Cooper* (n 18 above) and *Wallace and Short* (para 4.12 above).

***It may not be possible to adduce evidence from particular categories of witness***

- 4.15 The courts' insistence on oral evidence poses particular problems for particular categories of people. For example, serious problems arise when a foreign tourist who becomes the victim of a crime has returned home by the time the case eventually comes to trial. There are also particular obstacles to adducing evidence under the present system where the witness is very young, very old, mentally vulnerable<sup>23</sup> or seriously ill, or finds giving oral evidence in public too much of an ordeal.<sup>24</sup> The existence of the hearsay rule in effect grants a measure of immunity to those who commit offences against such vulnerable people.
- 4.16 To a very limited extent it is sometimes possible to avoid these difficulties by making use of some little-known statutory provisions<sup>25</sup> (and presumably the new Magistrates Courts Act 1980, section 97A),<sup>26</sup> which enable magistrates to take depositions from such witnesses out of court. However, these provisions are rarely used. The "documentary hearsay" provisions of the 1988 Act were also intended to solve some of these problems.<sup>27</sup> The evidence that these provisions make potentially admissible, however, is usually the absent witness's statement to the police, which, unlike a deposition taken before a magistrate, means evidence given on an occasion when the defence had no opportunity to put questions to the witness. Moreover, research has shown that such a statement may not accurately reflect the witness's account of events.<sup>28</sup> For this reason, judges often feel obliged to refuse leave for such evidence to be given.

***The exclusion of high quality first-hand oral hearsay***

- 4.17 Section 23 of the 1988 Act<sup>29</sup> provides for the admission of first-hand documentary hearsay in certain cases. There is no equivalent exception for first-hand *oral* hearsay, however reliable it might be. Our view is that it is difficult to justify this distinction.<sup>30</sup>

<sup>23</sup> We use this term to cover both people who have learning difficulties and those who have mental health problems.

<sup>24</sup> As happened in a recent case where four men accused of the gang rape of a schoolgirl were acquitted on the direction of the judge because the girl was too distressed to give evidence, despite screens being erected: *The Times* 31 March 1995.

<sup>25</sup> See para 2.11, n 14 above.

<sup>26</sup> Inserted by the 1996 Act, Sched 1(8).

<sup>27</sup> See paras 2.12 – 2.16 above.

<sup>28</sup> M McLean, "Quality Investigation? Police Interviewing of Witnesses" in *A New Look at Eye-Witness Testimony* (British Academy of Forensic Sciences, 1994). This study concluded that a large amount of information provided by witnesses to officers was not noted, and sometimes the statement contradicted what the witness had said. See also D Wolchover and A Heaton-Armstrong, "A Sounder System" *The Independent* 16 April 1997.

<sup>29</sup> See Appendix A.

<sup>30</sup> This may, of course, be as much of a problem for the defence as for the prosecution: for example, a confession by a third party may be admissible under s 24 of the 1988 Act if it is written, subject to the court's discretion, but it will not be admissible at all if it is oral.

***The contemporaneous note written down by someone else***

- 4.18 There have been several cases where a witness (“W”) saw a car registration number and called it out to another person (“X”) who wrote it down, but W did not check X’s note for accuracy.<sup>31</sup> Strict application of the hearsay rule would mean that neither W nor X may give evidence of the number noted by X.<sup>32</sup> However, if W tells X a car registration number, who then writes it down in W’s presence, and W checks it, then W could use it, not as evidence of what he or she told X, but to refresh his or her memory.<sup>33</sup> We regard this state of affairs as showing, in Diplock LJ’s words, “a lack of logic”.<sup>34</sup>

***The exclusion of “implied assertions”***

- 4.19 In *Kearley*<sup>35</sup> a majority of the House of Lords held that the hearsay rule extends to “implied assertions”.<sup>36</sup> The case concerned evidence of telephone calls and visits by unidentified people to premises occupied by the accused. The callers believed that they were asking the accused to supply them with illegal drugs, but they were in fact speaking to police officers, the accused having been arrested. The relevance of the calls lay in the fact that the callers must have *believed* that the accused would supply drugs. It was the view of the House of Lords, though not of the Court of Appeal,<sup>37</sup> that the calls were implied assertions of that fact. Because the callers could not be cross-examined about this belief, the calls were hearsay and therefore inadmissible.<sup>38</sup>
- 4.20 The decision in *Kearley* has been the subject of much criticism.<sup>39</sup> Where there is an implied assertion, a fact not explicitly asserted is inferred from words or conduct which may or may not themselves be an assertion: for example, they may take the form of a question, or a greeting. In ordinary life it is common for a fact to be inferred from the fact that a person is behaving as if it were true. If this reasoning is not permitted, it follows that much relevant evidence is excluded. Indeed it could be argued that every human utterance or act contains an implied assertion of some kind, namely as to the intention, state of mind or belief of the speaker or

<sup>31</sup> Eg *Carrington* [1994] Crim LR 438. See also nn 32 and 33 below and para 10.21 below.

<sup>32</sup> *Jones v Metcalfe* [1967] 1 WLR 1286.

<sup>33</sup> *Kelsey* (1982) 74 Cr App R 213.

<sup>34</sup> *Jones v Metcalfe* [1967] 1 WLR 1286, 1291. Although s 24 of the 1988 Act may permit such evidence to be admitted, this does not prevent anomalies arising: eg *Carrington* (n 31 above), where a worker at a supermarket observed the number of a car, which she passed via an intermediary to a supervisor, who wrote it down. That written note was held to fall within s 24. Yet a note made by a friend or bystander would not have fallen within s 24, although there is no reason to think that it would have been any less useful to the court, or any less reliable.

<sup>35</sup> [1992] 2 AC 228.

<sup>36</sup> This expression is conventional, though misleading: see paras 7.7 – 7.8 below.

<sup>37</sup> (1991) 93 Cr App R 222.

<sup>38</sup> Implied hearsay may of course be admissible if it falls within one of the exceptions to the hearsay rule, for example where it is part of the *res gestae*.

<sup>39</sup> See, eg, A Rein, “The Scope of Hearsay” (1994) 110 LQR 431; J R Spencer, “Hearsay, Relevance and Implied Assertions” [1993] CLJ 40; C Tapper, “Hearsay and Implied Assertions” (1992) 108 LQR 524.

actor.<sup>40</sup> If the hearsay rule excludes evidence of any conduct which is adduced to prove any such fact, it is exceptionally wide.

- 4.21 Even if it is right in principle that implied assertions should be caught by the hearsay rule, distinguishing them from direct evidence is not always easy. *Kearley* itself is one example. Others include cases where a person *fails* to state a fact, which he or she might have been expected to state if it were true;<sup>41</sup> and cases where a person's words or conduct help to identify that person.<sup>42</sup> We are troubled by the fact that many implied assertions no doubt go unspotted because they are so much harder to recognise: express assertions are more readily detected by an advocate and excluded by the court. The result must be that the law will be applied differently in different courts.
- 4.22 The rationale for the exclusion of implied assertions is that, as a class of statements, they are generally not to be relied upon. If an out-of-court assertion is repeated in court by the person who heard it, and not by the person who made it, the other party faces difficulties in challenging the credibility of the person who is not in court. Since the hearsay rule prevents A reporting an express assertion made by B, the argument goes, it follows that an implied assertion to the same effect should also be excluded.<sup>43</sup>
- 4.23 The counter-argument is that, as a class, implied assertions are more reliable than assertions made for the purpose of communicating information. This proposition is sometimes expressed by saying they are "self-authenticating". If someone acts on a belief in a particular state of affairs, that is a guarantee of sorts that the belief is genuine. For example, one can be confident that a sea-captain genuinely believes the vessel to be seaworthy if he sets sail in it himself.
- 4.24 These factors have led *Cross and Tapper* to suggest that only statements made with the intention of asserting the facts stated should be caught by the hearsay rule.<sup>44</sup> We agree. Such a rule should be easier to administer than the present rule, since it should be relatively easy to determine what facts a speaker intended to assert, and whether non-verbal conduct was intended to assert any facts at all.
- 4.25 We have had the opportunity of ascertaining how a legal system copes with the admission of implied assertions. In Scotland, evidence of such assertions is

<sup>40</sup> SLC Report, para 5.12. Cf Lord Browne-Wilkinson, in his dissenting speech in *Kearley*, at p 280: "Any action involving human activity necessarily implies that the human being had reasons and beliefs on which his action was based."

<sup>41</sup> See paras 7.10 – 7.12 below.

<sup>42</sup> See paras 7.13 – 7.16 below. It may also be difficult to identify an implied assertion where the words narrate a fact, but are also themselves an act. For example, A sends an eviction notice addressed to B. In the body of that notice it is recited that A is the landlord and B is the tenant and A requires B to leave. Could it be used as evidence that B resides at or is the tenant of that particular address? On one view it could be an item of real evidence, which happens to be in the form of words on paper. On another view it contains an implied assertion that B lives at the address; in that case it is hearsay and inadmissible, like a label which states the origin of goods: *Patel v Comptroller of Customs* [1966] AC 356.

<sup>43</sup> *Kearley* [1992] 2 AC 228, 243C–G, *per* Lord Bridge.

<sup>44</sup> *Cross and Tapper*, p 591.

admissible.<sup>45</sup> The question whether they are hearsay does not seem to have expressly arisen, but in *Lord Advocate's Reference No 1 of 1992*<sup>46</sup> the Lord Justice-General indicated that the dissenting speeches in *Kearley*<sup>47</sup> represented Scottish practice. Our enquiries suggest that in Scotland no problems appear to have arisen as a result of the admission of implied hearsay. We find this persuasive support for its admission in England and Wales. For all these reasons we provisionally concluded<sup>48</sup> that the rule should not extend to implied assertions.

### ***Attempts to circumvent the hearsay rule***

- 4.26 If cogent evidence can sometimes be excluded by the rule, it is perhaps not surprising that parties sometimes attempt to evade inconvenient exclusions by disguising the true nature of the evidence being presented. The courts have condemned this practice. Thus Lord Devlin said in *Glinski v McIver*:

[One] device is to ask by means of "Yes" or "No" questions what was done. (Just answer "Yes" or "No". Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the grounds that counsel is asking only about what was done and not about what was said. But in truth what was done is relevant only because from it there can be inferred something about what was said.<sup>49</sup>

He added that such evidence is clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible.<sup>50</sup> Despite these admonitions, the practice remains common.

- 4.27 Lord Devlin's criticism was accepted as valid by the vast majority of the respondents, though the Judge Advocate General and the Wales and Chester Circuit pointed out that to some extent it begs the question as to whether hearsay evidence is cogent evidence. Nevertheless, upon reconsidering the examples above

<sup>45</sup> SLC Report, paras 5.11 and 5.13.

<sup>46</sup> "I consider that the views expressed by the dissenting minority in *Myers* and by Lord Griffiths in *Kearley* are more in keeping with the Scottish approach": 1992 SLT 1010, 1016–1017, *per* Lord Hope.

<sup>47</sup> By Lord Browne-Wilkinson and Lord Griffiths.

<sup>48</sup> At para 9.36 of the consultation paper.

<sup>49</sup> [1962] AC 726, 781; affirmed in *Turner* (1974) 60 Cr App R 80, 82.

<sup>50</sup> Thus in *Saunders* [1899] 1 QB 490 a conviction for obtaining by false pretences was quashed because in order to help prove that the accused had not carried on genuine business, a witness had been asked:

Q. Did you make inquiries as to whether any trade had been done by the business?

A. I did.

Q. Did you as a result of such inquiries find that any had been done?

A. I did not.

As has been pointed out in *Andrews and Hirst on Criminal Evidence* (2nd ed 1992) para 17.26, the questioning was clearly intended to circumvent the hearsay rule, which prevented the question: "What was said in answer to your inquiries?"

we remain clearly of the view that some hearsay evidence is cogent and is excluded by the rule. The only ways to remedy this are to abolish the rule altogether, to ensure that the categories of exceptions are so wide as to include *all* cogent hearsay, or to create an inclusionary discretion. We consider these possibilities below.<sup>51</sup>

#### JUDICIAL DISCRETION

- 4.28 In the consultation paper we set out in some detail what we perceived to be the advantages and disadvantages of judicial discretion.<sup>52</sup> The prime advantage is that it enables the court to tailor decisions to the individual case. The major disadvantage is that, where discretions are available, they will be exercised differently by different judges and magistrates. Not only will there be inconsistent decisions from one case to another, but it will be hard for the parties to predict what evidence will be admissible. This is all the more important as the existence of a right to appeal against a judge's or magistrate's decision is of limited value. The prosecution has no right of appeal,<sup>53</sup> while, when the defence seeks to challenge a ruling on appeal, the Court of Appeal or Divisional Court cannot simply substitute its own decision for that of the judge or magistrate. The appellate court cannot interfere unless the judicial discretion has not been lawfully exercised, because the decision was one which no reasonable tribunal could reach, or irrelevant factors have been taken into account, or relevant factors have either been left out of account or not given enough weight.<sup>54</sup>
- 4.29 The legislative structure adopted by Parliament has been to create new and important exceptions to the hearsay rule but to make them subject to the discretion of the court. For example, in the case of "documentary hearsay",<sup>55</sup> not only does the court have a general discretion to exclude a statement which is otherwise admissible, but, if the statement was made for use in criminal proceedings, it is admissible only if the court gives leave. Similarly, when Parliament made videotapes of interviews with children admissible as evidence in criminal proceedings,<sup>56</sup> it gave judges a discretion to exclude them. The 1996 Act also places the question of admissibility entirely in the hands of the court.<sup>57</sup> These discretions are in addition to the general discretions to exclude prosecution evidence.<sup>58</sup> We were very critical of the use of unfettered discretion because our inquiries indicated that the way in which the discretionary powers conferred by the 1988 Act are in fact exercised varies greatly.

<sup>51</sup> See Part VI below.

<sup>52</sup> At paras 9.11 – 9.18.

<sup>53</sup> Save in preparatory hearings in serious fraud cases: Criminal Justice Act 1987, s 9.

<sup>54</sup> *Ward v James* [1966] 1 QB 273, 293, *per* Lord Denning MR; R Pattenden, *The Judge, Discretion and the Criminal Trial* (1982) p 24.

<sup>55</sup> See paras 4.40 – 4.62 of the consultation paper and paras 2.13 – 2.17 above.

<sup>56</sup> See s 32A of the 1988 Act, which is set out in Appendix B and is described in greater detail in paras 13.20 – 13.24 of the consultation paper.

<sup>57</sup> See paras 2.20 – 2.21 above and 4.46 – 4.50 below.

<sup>58</sup> See para 1.31, n 49 above and paras 4.42 – 4.43 of the consultation paper.

- 4.30 As we said in the consultation paper,<sup>59</sup> the fact that admissibility depends on the court's discretion lays it open to a further criticism, namely that it is arbitrary. The arbitrariness is not always apparent on the face of the legislation: for example, the 1988 Act sets out the factors that the court must take into account. But the appearance of certainty is illusory because the factors to be taken into account pull in opposite directions, so leaving the judge or magistrate more or less free to admit or exclude the evidence according to his or her own judgment, so long as the relevant factors are taken into account. In the case of the 1996 Act, no factors are set out for the court to take into account: according to Baroness Blatch, the Minister of State for the Home Office,<sup>60</sup> it is simply assumed and hoped that the court will turn to the 1988 Act for guidance.
- 4.31 We stated in the consultation paper that different judges reach different conclusions about whether or not untested evidence should be admitted in a particular case.<sup>61</sup> Our research has also shown that a small minority of judges disapprove of the use of videotapes, and use their discretionary power to see that such evidence is routinely excluded.<sup>62</sup> These criticisms were widely supported on consultation, and the Serious Fraud Office considered that the most serious fault of the present law on hearsay is its uncertainty. The problem of arbitrary justice is a very real one. We will bear this in mind when we consider to what degree the court should have a discretion to exclude or include hearsay evidence.<sup>63</sup>

#### **THE COMPLEXITY OF THE RULE AND THE EXCEPTIONS**

- 4.32 "The rule against hearsay is one of the oldest, most complex and most confusing of the exclusionary rules of evidence. ... One of the reasons is that its definition and the ambit of exceptions to it are both unclear". So begins chapter XIII of the current edition of *Cross and Tapper*, which devotes over 90 pages to explaining the complexity of the hearsay rule. Practitioners' books also devote much attention to the hearsay rule – it takes up over 80 pages of the current edition of *Blackstone*, for example.
- 4.33 The complexity of the hearsay law has several aspects to it. First, there is uncertainty about the dividing lines between hearsay and direct evidence, and between statements that fall foul of the hearsay rule and those that are not hearsay because they are adduced merely to show the fact that they were made.<sup>64</sup> Second, the application of the rule is difficult. As we pointed out in the consultation

<sup>59</sup> See para 7.77 of the consultation paper.

<sup>60</sup> *Hansard* (HL) 26 June 1996, vol 573, col 952.

<sup>61</sup> See paras 4.60 and 7.78 of the consultation paper. For example, in a case in 1993, a girl of 16 died of serious injuries deliberately inflicted on her. Before her death, she named the people who had caused them in taped interviews. Whether these tapes were admissible at the trial depended on the discretion of the judge. The tapes were admitted, and the defendants were convicted of murder and sentenced to life imprisonment: *Dudson and others*, *The Times* November and December 1993 (conviction reported 18 December).

<sup>62</sup> For the Court of Appeal's attitude to a comparable approach by a judge to sentencing powers he disliked, see *Scott* (1989) 11 Cr App R (S) 249, 252, *per* Brooke J.

<sup>63</sup> See Part VI, and paras 6.2 and 6.48 in particular.

<sup>64</sup> See para 2.3 above and paras 2.5 – 2.7 and 2.13 – 2.19 of the consultation paper.

paper,<sup>65</sup> one consequence is that directions have to be given to the lay tribunal that are complex and difficult to apply. For example, “disregard the evidence of X insofar as it points to guilt; you may regard it only as evidence of consistency”; or “you must ignore the evidence of Z when you consider Y’s guilt but you must take account of it when you consider Z’s guilt”. In the absence of research, it is not known whether juries or lay magistrates are able or willing to follow such directions; but it cannot be easy for them to do so.

4.34 It is not only lay people who find the law confusing. *Kearley*<sup>66</sup> is an example of the intricacies of the hearsay rule taxing very experienced judges. In that case, three days in the House of Lords were occupied by oral argument on the apparently straightforward issue of whether, on a charge of possessing drugs with intent to supply, a prosecutor could rely on evidence by the police that they had been to the home of the defendant when he was not there, and had there received telephone calls and personal calls from people (who were not called as witnesses) asking about drugs that the defendant had for sale. After reserving judgment, three of the Law Lords<sup>67</sup> held that the hearsay rule led to the exclusion of this evidence, whereas the trial judge,<sup>68</sup> three judges in the Court of Appeal<sup>69</sup> and two dissenting members of the House of Lords<sup>70</sup> would have admitted it. The speeches in the House of Lords on this point occupied 51 pages.

4.35 During our work on this project we have been impressed by constant judicial criticism of the hearsay rule.<sup>71</sup> Lord Griffiths said in *Kearley* that

most laymen if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply “Then the law is an ass”.<sup>72</sup>

As we have seen, the majority held that the law did indeed forbid the jury to consider the evidence.<sup>73</sup> Clearly the rule can help to cause miscarriages of justice, particularly when it leads to the exclusion of cogent evidence. Since we produced the consultation paper, Beldam LJ has said that “relevant evidence ..., dubbed as ‘hearsay’ and thus excluded, is hardly likely to enhance public esteem of the criminal process”.<sup>74</sup>

<sup>65</sup> See para 7.4 of the consultation paper.

<sup>66</sup> [1992] 2 AC 228.

<sup>67</sup> Lord Bridge of Harwich, Lord Ackner and Lord Oliver of Aylmerton.

<sup>68</sup> Judge Best.

<sup>69</sup> Lloyd LJ and Schiemann and Jowitt JJ in *Kearley* (1991) 93 Cr App R 222.

<sup>70</sup> Lord Griffiths and Lord Browne-Wilkinson.

<sup>71</sup> Eg by Diplock LJ in *Jones v Metcalfe* [1967] 1 WLR 1286, 1290–1291 and Lord Reid in *Myers v DPP* [1965] AC 1001, 1019–1020.

<sup>72</sup> [1992] 2 AC 228, 236–237.

<sup>73</sup> See para 4.19 above.

<sup>74</sup> *Gilfoyle* [1996] 1 Cr App R 302.



4.36 Practitioners<sup>75</sup> and the Government<sup>76</sup> have called for changes to the rule. There has also been stringent criticism from *Cross and Tapper*<sup>77</sup> and other academic sources.<sup>78</sup> These criticisms were reinforced by our consultees. Curtis J thought the 1988 Act needed repeal and a total redraft, while Professor Sir John Smith thought that the exceptions to the rule were unnecessarily complex. JUSTICE disagreed, arguing that the problems said to be presented by the rule are overblown and overrated. Having taken note of these responses, we (like the substantial majority of our consultees) are still of the view that the present rule is too complex.

### **The exceptions to the rule**

4.37 The cause of the difficulties and complexities of the hearsay rule is probably the haphazard and erratic way in which the exceptions have arisen and have been developed: as Lord Reid explained, “when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently to meet that case and without regard to any question of principle”.<sup>79</sup> Despite the ruling in *Myers*,<sup>80</sup> where the House of Lords held that there was to be no further judicial development of exceptions to the rule, the courts have significantly extended the scope of existing exceptions on the basis of reliability, with the effect that (as Professors Ashworth and Pattenden pointed out 11 years ago)<sup>81</sup> evidence is now admissible which would formerly have been excluded.

4.38 We now set out some examples of the anomalies engendered by the present exceptions to the rule.

<sup>75</sup> The CLRC observed that there was “little doubt that the majority of lawyers now favour substantial relaxation” of the rule: CLRC Evidence Report, para 234.

<sup>76</sup> In its evidence to the Royal Commission, the Home Office said that “the hearsay rule has significance for potential miscarriages of justice”: Home Office Memoranda (1991) para 3.57.

<sup>77</sup> The rule and its exceptions are described as “a morass of authority and example, quite devoid of clear and consistent holding”: p 571.

<sup>78</sup> Eg RW Baker writes in *The Hearsay Rule* (1950) p 168 that because of the rule “often valuable testimony is excluded: and injustice is caused”.

<sup>79</sup> *Myers* [1965] AC 1001, 1020C.

<sup>80</sup> [1965] AC 1001. For the facts of the case see para 3.2 above.

<sup>81</sup> A Ashworth and R Pattenden, “Reliability, Hearsay Evidence and the Criminal Trial” (1986) 102 LQR 292. In *Halpin* (1975) 61 Cr App R 97, for example, the Court of Appeal decided that it was no longer necessary for a public document to be prepared by a public official from personal knowledge or in pursuance of a public duty to ascertain the accuracy of the facts; *Kelsey* (1981) 74 Cr App R 213 allowed the fiction of a memory-refreshing document to extend to a note which the witness had not personally checked, except by having it read back to him; *Abadom* (1982) 76 Cr App R 48 permitted facts which form the basis of an expert opinion to be used for the opinion without their being proved by anyone with direct knowledge of them; *Muir* (1983) 79 Cr App R 153 approved the practice where a manager repeated what his staff had claimed about the non-appearance of an entry on a record as evidence that something had not happened.

## ***Difficulties arising out of the Criminal Justice Act 1988***<sup>82</sup>

### THE “MAKER” OF THE STATEMENT IN SECTION 24

- 4.39 Where there are two people, one who provides the information and another who records it, the “maker” of the statement – the one who must be unavailable or unable to remember, if the statement was prepared for the purpose of criminal proceedings or a criminal investigation – has been defined as the person who did the recording, not the person who supplied the information.<sup>83</sup> The effect is that, where an oral statement is made by one person to another person who records it in the course of business for the purpose of criminal proceedings or a criminal investigation, the record is admissible if the person recording it cannot remember the matters stated – even if the person who made the oral statement can. This appears to be a drafting oversight and cannot have been the intention of Parliament.<sup>84</sup>

### THE DISCRETION FAILS TO TAKE ACCOUNT OF THE INTERESTS OF THE PROSECUTION

- 4.40 The principles to be followed by the court in exercising its discretion under section 25 of the 1988 Act, when deciding whether to admit statements under sections 23 and 24 of that Act, appear to assume that such evidence will be adduced by the prosecution and not by the defence. Thus one of the matters that the court is bound to take into account is any risk,

having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not intend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness *to the accused or, if there is more than one, to any of them.*<sup>85</sup>

<sup>82</sup> See the consultation paper (and in particular Part IV) for commentary on, and Appendix B of this report for the text of, these statutory provisions.

<sup>83</sup> This is the effect of the present wording of section 24(1)(ii) which, when setting out the kind of document which comes within the general scope of section, stipulates that “the information contained in the document was supplied by a person (whether or not the maker of the statement) who had ... personal knowledge of the matters dealt with”.

<sup>84</sup> P Plowden, “The Curate’s Egg – Recollection and Hearsay” (1995) 59 J Crim L 62, 63. The question should be whether the original source of the information is unavailable to testify, or unable to remember, and it is wrong that the issue of admissibility should turn on the availability or powers of memory of the person to whom the original source reported the information rather than the original source itself. Neither the draftsman nor Parliament appears to have realised the incidental effect the drafting has on the identity of the person who must be unavailable or unable to remember. Professor Sir John Smith suggests that the phrase which is the cause of all the trouble – “whether or not the maker of the statement” – should be replaced by the phrase “whether or not the creator of the document”:  
“Sections 23 and 24 of the Criminal Justice Act 1988: (1) Some Problems” [1994] Crim LR 426, 428.

<sup>85</sup> Section 25(2)(d) (emphasis supplied).

The omission to refer to the interests of the prosecution seems strange, given that it may be the defence that is seeking to adduce the hearsay evidence.<sup>86</sup>

#### FRIGHTENED WITNESSES: SECTION 23(3)(b)

- 4.41 This subsection permits the admission of statements by witnesses who have been intimidated by the accused, or by others on behalf of the accused. Such admission is not automatic, as the decision is left to the discretion of the judge or magistrates.<sup>87</sup> Proving that intimidation has taken place can be difficult.
- 4.42 The wording of the subsection is also wide enough to include statements by witnesses who are so traumatised by the offence, or so fearful of the experience of giving evidence, that they cannot or will not give oral testimony. Again, the decision on admissibility will rest with the court, and any part played by a party to the proceedings in intimidating the witness will no doubt be a factor taken into account in the exercise of the discretion. If the witness's fear has no connection with the accused, it may not be just to allow the statement to be admitted without cross-examination of the witness.<sup>88</sup>
- 4.43 Section 23 is wide enough to cover not only witnesses who, through fear, fail to attend court at all, but also those who come to court but refuse to be sworn, or who enter the witness-box but become incoherent through fear. However, the section requires that the witness "does not give oral evidence". In the consultation paper<sup>89</sup> we noted that it is not clear from the statutory wording whether this covers a witness who has given *some* evidence.<sup>90</sup> The Court of Appeal has recently given some guidance on the point, holding that

what matters is whether or not there is, at the time when the section is invoked, any relevant evidence which the witness is still expected to give, because if there is such evidence, then it can properly be said that the witness is in the position where he does not give oral evidence.<sup>91</sup>

But this construction is not easy to reconcile with the wording of the section.

<sup>86</sup> An illustration of this was the application by the defence to rely on the interviews of Fred West in the trial of Rosemary West at Winchester Crown Court in 1995.

<sup>87</sup> Under s 25 of the 1988 Act; see para 2.16 above.

<sup>88</sup> There is certainly no explicit requirement that the accused (or one of them) be connected in any direct way with the fear. The Divisional Court held in *R v Tower Bridge Justices, ex p Lawlor* (1991) 92 Cr App R 98 that it is sufficient to prove "that the witness is in fear as a consequence of the commission of the material offence or of something said or done subsequently in relation to that offence and the possibility of the witness testifying as to it": pp 105–6, *per* Watkins LJ.

<sup>89</sup> At para 7.23.

<sup>90</sup> In *R v Ashford Justices, ex p Hilden* [1993] QB 555 McCowan LJ's interpretation was that a witness has not given oral evidence where he or she has not given evidence "of significant relevance" or "in no real sense did the evidence ... placed before the court go to decide the issues of fact in the case". Popplewell J, at p 562, preferred the interpretation that a witness who does not give *further* oral evidence through fear is a witness who does not give oral evidence through fear.

<sup>91</sup> *Waters* (1997) 161 JP 249.

- 4.44 A further complication arising out of this provision is that if a witness is too frightened to give evidence at all, or enters the witness box but refuses to answer questions,<sup>92</sup> section 23 will apparently cover the situation; but a witness who is intimidated into telling a *false* story will be deemed hostile.<sup>93</sup> A previous statement inconsistent with the witness's oral evidence may then be put to the witness, and if necessary proved; but it will go only to the witness's credit, and will not be evidence of the truth of its contents. By contrast, where a statement is admitted under section 23 of the 1988 Act, it *is* evidence of the truth of its contents. Thus, whether or not the fact-finders are allowed to have regard to the contents of the previous statement on the issue of guilt may depend on how the individual reacts to intimidation. Our provisional view was that this is not satisfactory.

#### THE LIMITS OF THE "UNAVAILABILITY" CATEGORIES IN SECTION 23

- 4.45 The provisions of the 1988 Act do not assist in every case where it is impossible to call a witness – for example if the witness has diplomatic immunity,<sup>94</sup> or attends court but claims the privilege against self-incrimination.<sup>95</sup> Such witnesses are just as unavailable as an ill witness, whose evidence will be admissible under section 23. In the consultation paper we suggested that some additional categories of "unavailability" might be added to section 23.<sup>96</sup> We consider below whether a witness's statement should be admissible where he or she attends court but refuses to testify.<sup>97</sup> We did not propose that a statement should be admissible where a witness cannot be compelled to attend because he or she has diplomatic immunity, and only one respondent suggested that it should.<sup>98</sup> We therefore do not pursue the point in this report.

#### ***The wide powers under the Criminal Procedure and Investigations Act 1996***

- 4.46 As we have seen,<sup>99</sup> the 1996 Act enables statements admitted at committal proceedings, or depositions taken by magistrates, to be admitted at trial.<sup>100</sup> They are inadmissible if any party to the proceedings objects,<sup>101</sup> but this objection may

<sup>92</sup> Although *Thompson* (1976) 64 Cr App R 96 (CA) indicates that a witness who refused to answer questions could be treated as hostile under the common law, the better view probably is that the Criminal Procedure Act 1865, s 3, does not apply, and the 1988 Act, s 23, now does.

<sup>93</sup> Criminal Procedure Act 1865, s 3. A hostile witness is one who does not appear to want to tell the truth.

<sup>94</sup> *Jiminez-Paez* (1994) 98 Cr App R 239.

<sup>95</sup> *Garbett* (1847) 2 C & K 474; 175 ER 196.

<sup>96</sup> At para 7.20.

<sup>97</sup> Paras 8.44 – 8.45 below.

<sup>98</sup> Professor Peter Murphy suggested that a statement be admitted where the attendance of the declarant "cannot be procured by compulsory process or other means which the court considers reasonable".

<sup>99</sup> See para 2.20 above.

<sup>100</sup> 1996 Act, s 68; Sched 2, paras 1(1), (2) and 2(1), (2).

<sup>101</sup> Sched 2, paras 1(3)(c), 2(3)(c).

be overridden “if the court considers it to be in the interests of justice so to order”.<sup>102</sup> Thus, the trial judge has a discretion to prevent the statement or deposition from being used,<sup>103</sup> but no indication is given as to how this discretion should be exercised. These provisions were introduced after our consultation process had finished, but some of the points raised by respondents are relevant to their evaluation.

4.47 We have set out above our concerns about admissibility depending on judicial discretion.<sup>104</sup> We are therefore very concerned by the new provisions, which appear to give almost unfettered scope for the exercise of discretion. What is worse, it is quite feasible that statements or depositions will be adduced where there has been no cross-examination of a witness, even where the witness is not unavailable. Lord Williams of Mostyn, who has extensive experience of the criminal law,<sup>105</sup> said:

These provisions are too draconian. They take away from the defendant the right to cross-examine; they take away from the jury the possibility of assessing a witness’s demeanour. They may be necessary in some circumstances but ... one needs careful safeguards and one ought to limit that to specific and designated circumstances.<sup>106</sup>

4.48 Baroness Blatch, the Minister of State at the Home Office, responded by pointing out that “the interests of justice” was not a new test and was in no way different from the provisions of the Criminal Justice Acts 1925 and 1988.<sup>107</sup> She also said that the courts would turn for guidance to section 26 of the 1988 Act for assistance in applying the provision.<sup>108</sup>

4.49 Thus a new and major exception has been created to the hearsay rule. In spite of what the Minister said, there are no clear principles upon which the discretion should be exercised. Although it was suggested by the Minister that the exercise of the discretion could be reviewed by an appellate court, we do not believe this to be the case; as we have said,<sup>109</sup> the prosecution does not have the right of appeal, while the defence can challenge the exercise of discretion only in very limited circumstances.

4.50 We believe that these provisions have three major defects. First, they permit hearsay evidence even if the maker of the statement is able to give evidence. Second, there are no safeguards given to the opposing party, such as the right to challenge the statement or to seek to discredit its maker. Finally, there is total

<sup>102</sup> Sched 2, paras 1(4), 2(4).

<sup>103</sup> Sched 2, paras 1(3)(b), 2(3)(b).

<sup>104</sup> See paras 4.28 – 4.31 above.

<sup>105</sup> A former Chairman of the Bar and a practising QC.

<sup>106</sup> *Hansard* (HL) 26 June 1996, vol 573, col 948.

<sup>107</sup> *Ibid*, col 949.

<sup>108</sup> *Ibid*, col 952. Lord Williams of Mostyn and Lord McIntosh of Haringey appeared dissatisfied and the latter invited the Government to reconsider the matter when it was remitted to the Commons: see cols 950 and 952.

<sup>109</sup> See para 4.28 above.

uncertainty as to how the courts will exercise their discretion. We will consider below how to deal with these provisions.<sup>110</sup> For present purposes we have to conclude that they constitute a major defect of the present law.

### ***Statements of deceased persons***

- 4.51 A number of different common law and statutory exceptions are available for the statements of deceased persons. A statement might be admissible under more than one exception (such as a written statement against pecuniary interest),<sup>111</sup> or none (such as an oral confession),<sup>112</sup> but there is no coherent rationale behind this collection of exceptions, and reliable evidence may be inadmissible.

### DYING DECLARATIONS

- 4.52 The rationale for this common law exception was that no man “who is imminently going into the presence of his Maker, will do so with a lie on his lips”.<sup>113</sup> Thus, “impending death acted as a substitute for the oath”.<sup>114</sup> The narrow limits of the exception have been criticised extra-judicially by the former Lord Chancellor Lord Maugham,<sup>115</sup> who called for a substantial relaxation of the rule.
- 4.53 Apart from the dubious psychological foundation for the exception, and the difficulty of proving that the deceased had a settled hopeless expectation of death, the principal illogicality of this exception is its restriction to murder and manslaughter.<sup>116</sup> It does not apply to rape or armed robbery, but there is no logical justification for such a restriction. It is also out of step with the modern approach to *res gestae*, in which the emphasis is rightly on probative value.<sup>117</sup>

### **THE RULE LEADS TO A WASTE OF COURT TIME**

- 4.54 This contention follows from the argument that the rule and its exceptions are unnecessarily complex. Much unnecessary time is spent deciding whether the rule applies and whether there are any relevant exceptions. If a party wishes to rely on section 23 or section 24 of the 1988 Act, much time has to be spent in deciding how the court should exercise its discretion under the provisions of sections 25 and 26.<sup>118</sup> As we said in the consultation paper, it may be that some laws have to be complicated in order to be just; but we did not believe this to be so in the case of

<sup>110</sup> See paras 8.108 – 8.113 below.

<sup>111</sup> Admissible at common law (*Rogers* [1995] 1 Cr App R 374) or under s 23 of the 1988 Act.

<sup>112</sup> Statements against penal interest are outside the common law exception of statements against interest (*Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034), and if the statement is oral s 23 of the 1988 Act will not apply.

<sup>113</sup> *Osman* (1881) 15 Cox CC 1, 3.

<sup>114</sup> *Mills* [1995] 1 WLR 511, 521F, *per* Lord Steyn.

<sup>115</sup> “Observations on the Law of Evidence with Special Reference to Documentary Evidence” (1939) 17 Can Bar Rev 469, 483.

<sup>116</sup> *Mead* (1824) 2 B & C 605, 107 ER 509; *Hutchinson* (1822) 2 B & C 608, 107 ER 510(a).

<sup>117</sup> *Mills* [1995] 1 WLR 511, 521F–G, *per* Lord Steyn.

<sup>118</sup> See paras 2.16 and 2.18 above.

the hearsay rule in its current form, because it is plain that for all its complexity it is neither rational nor just.<sup>119</sup>

- 4.55 This provisional conclusion was supported by the majority of respondents, with Judge Richard May emphasising “as an important drawback” the wastage of court time. We take on board the argument of the Wales and Chester Circuit that, whatever reforms are made, substantial arguments will be mounted on both sides: “difficult problems will not go away”. Nevertheless, we still believe that it is a valid criticism of the present law on hearsay that it wastes court time.

**THE RULE “OFTEN CONFUSES WITNESSES AND PREVENTS THEM FROM TELLING THEIR STORY IN THE WITNESS-BOX IN THE NATURAL WAY”<sup>120</sup>**

- 4.56 The rule means that witnesses are interrupted in the course of narrating a series of events by being told that what they are about to say, or have said, is hearsay.<sup>121</sup> The CLRC considered this a valid criticism.<sup>122</sup> Wigmore thought the problem was so serious as to justify a major relaxation of the hearsay rule: he believed that witnesses should be allowed to make passing references to what other people had told them, subject to the right of either prosecution or defendants to have the original source of the statement summoned to give evidence if available.
- 4.57 On consultation, we were told by practitioners that this is much less of a problem than we had thought. For example, Ian Kennedy J explained that

where witnesses find it easier to give their evidence conversationally I doubt whether today any sensible judge stops them, provided naturally the recounted hearsay does not provide apparent evidence of some material fact.

We accept this point; but, insofar as there is a problem, the automatic admission of more first-hand oral hearsay would help to minimise it.

**SUMMARY OF CRITICISMS OF THE RULE**

- 4.58 The majority of respondents who dealt with it agreed with the summary set out in our consultation paper:

<sup>119</sup> Para 7.33 of the consultation paper.

<sup>120</sup> Law Reform Committee’s 13th Report, Hearsay Evidence in Civil Proceedings (1966) Cmnd 2964, para 40.

<sup>121</sup> An illustration was given by Professor Jackson:

A man is giving evidence as to why he remembered the time when he started to drive home. He says: “I had to be home by ten, and it was getting very foggy so at nine I rang Muriel and I says, ‘Muriel, what’s the fog like your end?’ and she says: ...” At this point he is stopped. What Muriel says is hearsay, and not admissible. The poor man is confused and bewildered, because his natural way of speaking is apparently taboo: the proper course is to go in for circumlocution whereby he makes it clear that in consequence of information received he decides to leave earlier than he otherwise would have done ...

*Jackson’s Machinery of Justice* (8th ed 1989, ed J R Spencer) p 266.

<sup>122</sup> CLRC, Evidence Report, para 228, adopting the words of the Law Reform Committee cited at the head of this paragraph.

There is no unifying principle behind the rule and this gives rise to anomalies and confusion. Court time is wasted because of the lack of clarity and complicated nature of the rule. Cogent evidence may be kept from the court, however much it may exonerate or incriminate the accused, because the fact-finders are not trusted to treat untested evidence with the caution it deserves, but if hearsay is admitted there is nothing to prevent them from committing on it alone. Witnesses may be put off by interruptions in the course of their oral evidence. Whether evidence will be let in or not is unpredictable because of the reliance on judicial discretion.<sup>123</sup>

- 4.59 In the consultation paper the first option we considered was that there should be no change to the present law of hearsay. We rejected this option.<sup>124</sup> We now review the reasons for that view.

#### **OPTION 1: NO CHANGE**

- 4.60 We provisionally rejected the option of no change because of the numerous and serious defects of the hearsay rule. The rule and its exceptions are excessively complex, causing confusion, anomalies and wasted time, both for the court and for the parties. The rule results in the exclusion of cogent evidence, even where it is the defence that seeks to adduce it. The admission of hearsay often depends on the exercise of judicial discretion, which leads to inconsistency of decisions from one court to another and an inability to predict the decision in any given case.<sup>125</sup>
- 4.61 On consultation, the overwhelming majority of respondents who dealt with this point were in favour of reform, and this support came from a variety of sources. Phillips LJ and Dyson J thought that the need for reform was urgent, while Wright J said that the consultation paper “makes an unarguable case for wholesale reform of the present law, and I agree with it unreservedly”. Another presiding judge, Blofeld J, had “no doubt that the present system is indefensible”. A similar view was taken by academic respondents such as Peter Mirfield,<sup>126</sup> by prosecuting authorities such as the Crown Prosecution Service,<sup>127</sup> and by JUSTICE.<sup>128</sup>
- 4.62 A small minority of respondents were satisfied with the present law: they included the Council of Circuit Judges<sup>129</sup> (who pointed out that they had only been able to get very limited responses from their members) and circuits such as the Wales and

<sup>123</sup> Para 7.84 of the consultation paper. The passage concludes that the admission or exclusion of hearsay evidence might result in the Strasbourg Court concluding that an accused had not had a fair trial. The implications of the Convention are considered in the next Part.

<sup>124</sup> Para 9.3 of the consultation paper.

<sup>125</sup> Para 9.2 of the consultation paper.

<sup>126</sup> “I do think the case for some relaxation of the hearsay rule in criminal cases is made out.”

<sup>127</sup> “The hearsay rule is excessively complex and leads to confusion and anomalous results. The rule could sensibly be reformed for these reasons alone.”

<sup>128</sup> “The case for reform is made out.”

<sup>129</sup> “We are concerned that the basic rule against hearsay should remain. We have serious reservations about either the necessity or desirability to alter the existing exceptions to the general rule. To do so would, in our view, make an already complicated but workable system yet more complicated.”



Chester Circuit. Having considered the arguments of those who think it preferable not to change the law, we believe that our analysis of the present law's defects is substantially unshaken. We conclude that the law needs to be changed.

- 4.63 The options for reform are set out in Part VI; but, before we consider them, we examine the implications of the Convention in Part V.

# PART V

## THE SIGNIFICANCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- 5.1 Before assessing six different options for reform in the next Part, we consider in this Part the implications of the European Convention on Human Rights for any proposed reforms. The United Kingdom has ratified the Convention, and has thus undertaken obligations in international law that it will conform in its domestic practice with the terms and principles of the Convention.<sup>1</sup>
- 5.2 In the consultation paper we explained that we tendered our provisional view on the relevance of the Convention with great diffidence, as it is difficult to predict with confidence the attitude of the European Court of Human Rights (“the Strasbourg Court”).<sup>2</sup> There are three reasons for this. First, the terms of the Convention are vague. Second, on many issues there is a dearth of decided authority. Finally, perhaps because the Strasbourg Court aims to interpret the Convention as a “living, developing document”, the doctrine of precedent weighs much less heavily with the Strasbourg Court than it does in English law, and the court appears to be changing its attitude to hearsay. In any event, “there is little predictive value, and not a great deal of consistency”.<sup>3</sup>

### ARTICLE 6

- 5.3 The principal provision of the Convention which protects the rights of the defendant at trial is Article 6, the relevant parts of which read as follows:
- (1) 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 ...
  - (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
  - (3) Everyone charged with a criminal offence has the following minimum rights: ...
    - (d) *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 ...<sup>4</sup>

- 5.4 The requirements of Article 6(3)(d) comprise one of the factors to be considered when the Strasbourg Court decides whether or not there has been a fair trial

<sup>1</sup> See Brownlie, *Principles of Public International Law* (4th ed 1990).

<sup>2</sup> Para 5.3 of the consultation paper.

<sup>3</sup> A L-T Choo, *Hearsay and Confrontation in Criminal Trials* (1996) p 186.

<sup>4</sup> Emphasis added.

within the meaning of Article 6(1); the two provisions are not considered independently of each other.<sup>5</sup>

- 5.5 Although several judgments of the Strasbourg Court in the last ten years have considered the impact of these provisions on the use of hearsay evidence by the prosecution, none of these cases come from the United Kingdom.<sup>6</sup> These decisions are hard to reconcile.
- 5.6 A series of decisions of the Court makes it plain that the word “witness” goes beyond its usual meaning (to an English lawyer) of someone who attends the trial to give oral evidence. It also includes a person who has made a formal statement to the police, which the prosecution has then put in evidence at trial.<sup>7</sup>
- 5.7 All the people whom the Strasbourg Court has so far categorised as “witnesses”, however, are people who have fed information, consciously and voluntarily, into the criminal justice system. In English parlance, the cases are concerned with depositions and police witness statements. It does not necessarily follow that a casual remark allegedly made by a third party, which a live witness repeats in evidence, counts as a statement of a “witness”, thus triggering the defendant’s right to question the witness – for instance, where a policeman giving evidence says “Smith had said to me that he was going to the church with a ladder, so I went there, and found him on the roof stripping the lead.” Relying on Smith’s statement for its truth would fall foul of the hearsay rule in England and Wales, but it would be considered unobjectionable in most Continental systems, and whether or not it breached Article 6(3)(d) would probably depend on all the circumstances taken together. The use of documentary evidence such as trade or business records, as evidence of transactions which are ingredients in the offence charged, seems less likely to be in breach of Article 6(3)(d) than the use of depositions and police witness statements in place of oral evidence from the witness.<sup>8</sup>
- 5.8 When will a trial be found to be unfair? The Strasbourg Court has said that the general principle of fairness is that all the evidence should be produced in the presence of the accused at a public hearing with a view to adversarial argument.<sup>9</sup> However, the cases show that this principle is not invariably observed to the letter.

<sup>5</sup> “The purpose of 6(3)(d) is to put the accused person on an equal footing with the prosecution”: *X v FRG* Appl 1151/61, (1962) 7 Collection of Decisions of the European Commission of Human Rights 118. See also *Barberà, Messeguè and Jabardo v Spain* (1989) 11 EHRR 360 and *Ochensberger v Austria* (1995) 18 EHRR CD170, 171.

<sup>6</sup> In *Blastland v United Kingdom* Appl 12045/86; (1988) 10 EHRR 528, the Strasbourg Commission found that what it understood to be the purposes of the hearsay rule of English law, namely ensuring that the best evidence is before the jury and avoiding undue weight being given to evidence which cannot be tested by cross-examination, were legitimate and that in principle the rule did not entail a breach of Article 6(1). The Commission did not discuss the legitimacy of the *exceptions* to the rule.

<sup>7</sup> This is implicit in the judgment in *Unterpertinger v Austria* (1991) 13 EHRR 175. The Strasbourg Court made the point explicitly in *Kostovski v The Netherlands* (1990) 12 EHRR 434, para 40; *Delta v France* (1993) 16 EHRR 574, para 34; *Artner v Austria* (1992) Series A No 242, para 19; and *Windisch v Austria* (1991) 13 EHRR 281, para 23.

<sup>8</sup> See *Lüdi v Switzerland* (1993) 15 EHRR 173.

<sup>9</sup> *Windisch v Austria* (1991) 13 EHRR 281.

In the context of possible reforms to the English hearsay rule, the significance of the rule that the accused should have the opportunity to put questions to the “witnesses against him” raises the following three issues:

- (1) Does the right to question mean a right to put questions to the witness directly, or is it enough that the defence can put questions to the witness via a magistrate or judge?<sup>10</sup>
- (2) Is the right to question a right to put questions to the witness orally at the trial, or is it enough for the defence to be given an opportunity to put its questions at an earlier stage in the proceedings?<sup>11</sup>
- (3) Is the right to question “witnesses” an absolute one? Can the prosecution use in evidence the statement of a witness whom the defence have been unable to question, if it is genuinely impossible for this to be arranged (for example, because the witness is dead), or if there is nothing that could be gained from asking the witness questions?<sup>12</sup>

### **Is there a right to put questions directly?**

5.9 The right “to examine or have examined witnesses against him” could be read as requiring the questions to be put directly by the defence: the defendant has the right “to examine witnesses” – by putting questions in person where he or she is unrepresented – or “to have witnesses examined” by getting the defending lawyer to put them, where the defendant is represented. If it is read in this way then it is understandable that Article 6(3)(d) was not found to have been violated where the lawyer was allowed to put questions to the witnesses, but the accused himself was not allowed to be present<sup>13</sup> – though it may seem surprising that the Strasbourg Commission found Article 6(1) to be satisfied in these circumstances.

5.10 It is much more likely, however, that the phrase “examine or have examined” was used to take account of the two different methods which the various European legal systems use for the examination of witnesses – the common law method, where witnesses are examined directly by the parties, and the method used in France, Germany and many other countries, where it is the presiding judge who examines the witnesses, and who can insist on the parties putting any questions they may have through the judge.<sup>14</sup> Thus, for example, it would not offend against

<sup>10</sup> See paras 5.9 – 5.10 below.

<sup>11</sup> See paras 5.11 – 5.12 below.

<sup>12</sup> See paras 5.13 – 5.20 below.

<sup>13</sup> *X v Denmark* Appl 8395/78, (1982) 27 Decisions and Reports 50.

<sup>14</sup> In *X, Y and Z v Austria* Appl 5049/71, (1973) 43 Collection of Decisions 38 (a case before the Strasbourg Commission which was declared inadmissible), important witnesses were heard “on commission” abroad. Neither the prosecutor nor, despite requests, the defendants’ representative were allowed to be present. Article 162 of the Austrian Code of Penal Procedure expressly provides for this procedure. Supplementary questions were put to the witnesses on the same basis at the request of the defence after it had studied the record of the first examination. The Commission therefore found that the accused’s right “to have examined witnesses against him” had been respected. Because Article 6(1) did not apply to the proceedings, the Commission could not go on to consider whether the trial as a whole was fair. Commissioner Trechsel has said extra-judicially in a speech to the

Article 6(3)(d) to provide that certain kinds of highly vulnerable witness should have the questions of both sides put to them through a single neutral person.<sup>15</sup>

**Must the defence be able to put its questions at the trial itself, or may the questions be put at an earlier stage?**

- 5.11 It is clear that the questions need not be put during the course of the trial itself. While the Strasbourg Court has said that it is preferable for the witnesses to be questioned orally at trial, the defendant's rights are not infringed if the court hears or reads the statement of an absent witness, provided that the defence had an opportunity to put its questions to him or her at an earlier stage.<sup>16</sup>
- 5.12 From this it follows that there could be no objection under Article 6(3)(d) of the Convention to an English court hearing the deposition of an absent witness which had been taken before a magistrate with the defence present, under provisions such as sections 42 and 43 of the Children and Young Persons Act 1933. Nor would there be any objection to the sort of procedure which the Pigot Committee proposed for taking the evidence of children ahead of trial.<sup>17</sup> On the other hand, provisions like section 23 of the 1988 Act, which make admissible statements given to the police when the accused is neither present nor represented, could, in certain circumstances, be incompatible with the Convention.

**Will a statement be inadmissible if the accused has never had a chance to question the witness?**

- 5.13 Is it ever possible to put before the court the statement of an absent witness whom the defence has never had a chance to question, without infringing the defendant's

Ministry of Justice in Vienna ("Die Garantie des 'fair trial' nach Art 6 EMRK und das strafprozessuale Vorverfahren", 17 September 1992) that the defendant's rights under the article are met if he or she can put questions through the judge.

<sup>15</sup> As the Pigot Committee proposed for very young or seriously traumatised children: Report of the Advisory Group on Video Evidence (Home Office, 1989), pp 27 ff.

<sup>16</sup> In *Kostowski v The Netherlands* (1990) 12 EHRR 434, para 41, the Strasbourg Court held unanimously that

In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument ... This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings ...

The Strasbourg Court repeated this statement in *Delta v France* (1993) 16 EHRR 574, para 36, in *Asch v Austria* (1993) 15 EHRR 597, para 27, and in *Saïdi v France* (1994) 17 EHRR 251, para 43. If the witnesses are questioned at a pre-trial hearing in the absence of the accused, this will not necessarily be unfair if the witnesses were heard again at trial when they could be questioned by the defence: *X v FRG* Appl 6566/74, (1975) 1 D & R 84; *Liefveld v The Netherlands* (1995) 18 EHRR CD103. See also *Isgro v Italy* (1991) Series A No 194. The same approach is taken in Canada: *Potvin* [1989] 1 SCR 525.

<sup>17</sup> See footnote 15 above.

rights under Article 6(3)(d)? There are two possible views. On a literal reading of Article 6, the answer might well be in the negative, and in the consultation paper we tended to this view.<sup>18</sup> Article 6(1) guarantees the defendant a trial that is in broad terms fair, and Article 6(3) gives him or her certain minimum rights without which the trial cannot be fair. Thus if the evidence in question counts as the statement of a “witness” it may not be used in evidence unless the defence had a chance to put its questions, however inconvenient that may be for the prosecution.

- 5.14 This is the line taken by the Strasbourg Court in *Unterpertinger v Austria*,<sup>19</sup> where it was held that the use of statements made to the police at an earlier time infringed the defendant’s rights. It was irrelevant that it was impossible to arrange a confrontation between the witnesses and the defence because the witnesses decided to exercise their privilege, as relatives of the defendant, to refuse to give any further evidence. The Court took a similar approach in *Windisch v Austria*<sup>20</sup> when it said:

The [Austrian] Government referred to the legitimate interest of the two women in keeping their identity secret. In its judgment the Regional Court stated that they were trustworthy persons and were afraid of reprisals on the part of the suspects. It added that the police depended on the co-operation of the population in investigating crimes.

This collaboration of the public is undoubtedly of great importance for the police in their struggle against crime. In this connection the Court notes that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of their statements by the trial court to found a conviction is another matter. The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed.<sup>21</sup>

<sup>18</sup> Paras 5.19 – 5.20 of the consultation paper.

<sup>19</sup> (1991) 13 EHRR 175. The accused was charged with assault on his wife and step-daughter. Although they had made statements to the police, by the time of the trial they refused to testify. They claimed a privilege which would not be available to them under English law. However, the scenario of alleged victims of assault refusing to testify is a familiar one.

<sup>20</sup> (1991) 13 EHRR 281.

<sup>21</sup> *Ibid.*, at para 30.

- 5.15 This was also the approach of the Court in *Lüdi v Switzerland*,<sup>22</sup> and the same principle was reiterated in *Saïdi v France*<sup>23</sup> where the accused had been convicted of drugs offences and involuntary homicide on identification evidence. The witnesses were examined by the *juge d'instruction*, but the defendant was not present and his request for a confrontation was refused. The Court held that the accused had not been given an “adequate and proper opportunity to challenge and question a witness against him”.
- 5.16 However, we said in the consultation paper that it might be legitimate to take an alternative view;<sup>24</sup> and in the light of the responses received, we are now inclined to this alternative view. This would involve saying (contrary to the literal wording of the Convention) that the rights expressly conferred by Article 6(3) are not absolute rights: they are merely factors which have to be considered in deciding a broader question – “Did the defendant receive a fair trial as required by Article 6(1)?” On this view it is proper for the court to allow in evidence the pre-trial statement of an absent witness whom the defendant has had (and will have) no chance to question, provided, first, that it is genuinely impossible to produce the witness for defence questioning, and second, that this evidence is supported by other evidence against the defendant.
- 5.17 Although this line of reasoning is not really compatible with the dicta we have cited from the *Unterpertinger* and *Windisch* cases, it is the line that the Strasbourg Court has taken in a number of other cases.<sup>25</sup> *Unterpertinger* has not been reversed or overruled, but its effect has been diluted. In at least three later decisions the court has accepted that criminal proceedings can be “fair” despite the use of statements from witnesses whom the defence was unable to question.<sup>26</sup>
- 5.18 Thus in one case the Court condoned the use of the statement where the witness was excused from the further questioning which the defence had requested, partly

<sup>22</sup> (1993) 15 EHRR 173. The accused had been convicted of drug trafficking on evidence which included statements by an anonymous witness, an undercover police officer, who, to preserve his anonymity, was never examined by the presiding judge, let alone by the defence. The Strasbourg Court found that Article 6(3)(d) had been breached.

<sup>23</sup> (1994) 17 EHRR 251.

<sup>24</sup> Para 5.21 of the consultation paper.

<sup>25</sup> The Court has followed an approach taken by the Strasbourg Commission in *X v Austria* Appl 4428/70, (1972) 15 YB EHRR 264, where the Commission rejected the appellant’s complaint as inadmissible on the ground that there was no absolute right to examine opposition witnesses. Part of the evidence against the appellant had consisted of hearsay evidence of a former Czech diplomat and an anonymous German secret service agent. The conviction stood nonetheless.

<sup>26</sup> *Bricmont v Belgium* (1990) 12 EHRR 217; *Asch v Austria* (1993) 15 EHRR 597; *Artnér v Austria* (1992) Series A No 242. See also *Liefveld v The Netherlands* (1995) 18 EHRR CD103, a decision of the Strasbourg Commission in which it was held that a trial was fair although the identity of a witness (“Bravo”) who was questioned by the defence was kept secret, and a statement by an anonymous informer, whom the defence did not have an opportunity to question, was admitted. The trial was held to be fair because “Bravo” was justified in wishing to keep his identity secret, there were opportunities to cross-examine him, the statement of the informer was supported by other evidence, and neither the statement of “Bravo” nor that of the informer constituted the only or main item of evidence on which the applicant’s conviction was based.

because of his age and ill-health.<sup>27</sup> In another case, it condoned the use of the statement where the key witness, who had been questioned by the police and by the presiding judge, but not by the defence, could not be heard because she could not be traced.<sup>28</sup> The majority of the Court found that the existence of other incriminating evidence, coupled with the accused's role in avoiding a confrontation with the witness at the pre-trial stages, justified the reception of the statement. One of the dissenting judges, Judge Vilhjálmsson, held that such a breach of the defendant's rights could not be justified in this way, because Article 6(3)(d) provided a "minimum" right.

- 5.19 In a third case the Court condoned the use of the statement where the witnesses, as relatives of the accused (as in the *Unterpertinger* case), had exercised their privilege not to testify, saying that "the right on which [the witness] relied in order to avoid giving evidence cannot be allowed to block the prosecution".<sup>29</sup> This ruling conveys the impression that, when striking the balance between the public interest in securing convictions of the guilty and the public interest in the adequate protection of the accused, the Court has had regard on occasion to the practicalities of criminal procedure, which must, nonetheless, remain fair.<sup>30</sup>
- 5.20 In each of these cases the Strasbourg Court thought it was an important element in making the trial a fair one that the national court had been able to base its guilty verdict on other evidence as well – though it is hard to see how the "other evidence" in *Asch* which justified the verdict (medical evidence and evidence of the accused's disposition) differed in quality from that in *Unterpertinger* (medical evidence, the accused's accounts and the divorce file), which did not. In these later cases the Court has, in effect, accepted that there can be derogations from a strict interpretation of Article 6(3)(d) on the grounds of sufficiency of other evidence.<sup>31</sup> This must necessarily entail the Court not only deciding which items of evidence carried weight with the

<sup>27</sup> *Bricmont v Belgium* (1990) 12 EHRR 217 – although it should be noted that in the case of Mr Bricmont, who was co-accused with his wife, the complaint succeeded. As there was no other evidence against him, the Strasbourg Court held that the trial had not been fair.

<sup>28</sup> *Artner v Austria* (1992) Series A No 342. Both the Commission and the Court reached their decisions in this case by majorities, of 9-7 and 5-4 respectively.

<sup>29</sup> *Asch v Austria* (1993) 15 EHRR 597, para 28: another majority decision.

<sup>30</sup> The same balancing act can be seen in the reasoning in a Commission decision, *X v Belgium* Appl 8417/78, (1979) 16 D & R 200, where the accused was charged with arson occasioning loss of life. His brother had died in a house fire which the police originally thought was accidental. However, an unnamed person told the police that the accused and his brother had had a row on the night of the fire. A police witness repeated in court what the anonymous informer had said. It was plain that the accused would not have been prosecuted had it not been for the remark of the informant. The Strasbourg Commission approached the question thus (at p 208):

The question which arises in the present case is therefore not so much that of the accused's right to have an informant summoned to appear in court as that of weighing the court's use of statements made by an informant against the applicant's right to a fair trial ...

<sup>31</sup> This was also part of the reasoning in *Isgrò* (1991) Series A No 194.



regional court, but also engaging in the exercise of assessing that evidence, as Judge Thór Vilhjálmsson said was being done in *Artner v Austria*.<sup>32</sup>

### **The use at trial of a witness's previous statements**

- 5.21 There is a decision of the Strasbourg Commission which indicates that, in certain circumstances, it is not unfair for the court to rely on the contents of previous statements of witnesses who testify in court. In *X v FRG*<sup>33</sup> two witnesses, A and W, had made statements to the police that they had received heroin from the accused. These statements were read out at trial. The witnesses were called and they both denied that they had received heroin from the accused. On appeal, their statements were read out again. W gave oral evidence again and still denied that the statement was true, whereas A was not heard (and the accused did not object). The Commission held that there was nothing wrong with the court relying on the original statements "as long as the use of such evidence is not in the circumstances unfair". It found that there was no unfairness because the accused had the opportunity to put questions to both witnesses at trial and to one of them on appeal; the accused had not objected to A's statement being read at the appeal without A being called; it was not the only evidence, the other evidence consisting of oral evidence from two police officers and a third civilian witness; and the court had carefully considered the issue of the witnesses' credibility.<sup>34</sup>

### **Victims of crime and the Convention**

- 5.22 Most of the case law of the Strasbourg Court on issues of criminal procedure has arisen from the parts of the Convention which provide guarantees for defendants. However, victims of crimes have human rights as well, and if a country's rules of criminal law, procedure or evidence are ineffective to protect such victims, this deficiency sometimes enables them to complain that their rights under the Convention have been infringed.
- 5.23 In the consultation paper we noted that English law is arguably open to criticism to the extent that it sometimes gives a vulnerable complainant the right in theory to be heard, but extracts for this right a price which many reasonable people in that category (or those whose job it is to care for them) might find so high that they would prefer to let the offender get away with it.<sup>35</sup> In one recent case a woman who was both mentally handicapped and epileptic was obliged to give evidence in open court, and undergo a prolonged cross-examination which caused her to suffer epileptic fits.<sup>36</sup> In another, a sex case, a child of 12 was cross-examined for over a week.<sup>37</sup> The requirement to give oral evidence is a greater obstacle for

<sup>32</sup> (1992) Series A No 242. The two dissenting judges in *Edwards v United Kingdom* (1993) 15 EHRR 417 took a similar view of what was happening where the Court made an assessment of the likely effect on the credibility of police witnesses of evidence which emerged after the trial.

<sup>33</sup> *X v FRG* Appl 8414/78, (1980) 17 D & R 231.

<sup>34</sup> See also a comparable case of the Canadian Supreme Court: *R v KGB* (1993) 79 CCC (3d) 257; para 10.99, n 108 below.

<sup>35</sup> Para 5.30 of the consultation paper.

<sup>36</sup> *Stretton* (1988) 86 Cr App R 7.

<sup>37</sup> A child sexual abuse case in South Wales: *Daily Telegraph* 10 August 1994.

mentally incapacitated people than for others. Although the hearsay rule has an impact upon the particular problems faced by vulnerable witnesses, we believe that the issues surrounding the evidence of such witnesses are beyond the scope of this report and need to be considered separately.<sup>38</sup>

### **The application of the hearsay rule to the defence as to the prosecution**

- 5.24 In the United Kingdom all official proposals to reform the hearsay rule have proceeded on the basis that the rule, and any exceptions to it, must operate in the same way for the prosecution as for the defence.<sup>39</sup> As far as the Convention is concerned, this is clearly not the case: although Article 6(3)(d) puts limits on the extent to which the prosecution may make use of hearsay evidence, nothing in Article 6 restricts the use of hearsay evidence by the defence. However, the second part of Article 6(3)(d) requires the attendance and examination of witnesses called against the accused *under the same conditions*, and some dicta of the Strasbourg Court describe the aim of Article 6 as being to put defence and prosecution on an equal footing.<sup>40</sup>

### ***The right of the defendant to adduce hearsay evidence***

- 5.25 We have previously referred to cases such as *Sparks*,<sup>41</sup> in which the Judicial Committee of the Privy Council held that a trial judge had rightly rejected evidence that the three-year-old victim of an indecent assault had told her mother that the wrongdoer was a coloured man, whereas the accused was white. Since Article 6(3)(d) does not apply to the defence in the same way as to the prosecution, it does not follow that evidence which the prosecution could not adduce should be excluded if tendered by the defence. On the contrary, the exclusion of cogent exculpatory evidence could constitute a violation of the right to a fair trial under Article 6(1). But where there are a number of defendants, the exercise by one defendant of a right to put in hearsay evidence might be fair under the Convention from that individual's point of view, and yet be unfair as against another defendant.

### **PROVISIONAL CONCLUSIONS IN THE CONSULTATION PAPER**

- 5.26 If a complaint is made that there has been a breach of the Convention, the Strasbourg Commission and the Court will look at all the circumstances of the case, and consider the proceedings as a whole, in order to decide whether there has been a violation of Article 6(1) or Article 6(3)(d). In *Saidi v France* it was held that

<sup>38</sup> See paras 11.40 – 11.41 of the consultation paper and paras 12.15 – 12.16 below. An inter-departmental group with representatives from the Home Office, the Lord Chancellor's Department, the Legal Secretariat to the Law Officers, the Crown Prosecution Service, the Department of Health and the Scottish Office is reviewing court procedures for people with learning disabilities.

<sup>39</sup> Eg, the proposals of the CLRC Evidence Report, para 250. See para 12.10 of the consultation paper.

<sup>40</sup> Eg, *X v FRG* Appl 1151/61, (1962) 7 Collection of Decisions 118.

<sup>41</sup> [1964] AC 964; and see para 4.4 above.

the taking of evidence is governed primarily by the rules of domestic law and ... it is in principle for the national courts to assess the evidence before them. The [Strasbourg] Court's task ... is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair.<sup>42</sup>

- 5.27 In the consultation paper we drew five main conclusions for possible reforms to the hearsay rule in England and Wales.<sup>43</sup> First, the use of hearsay evidence is compatible with the Convention if it consists of the statement of a witness whom, in the pre-trial phase, the defence has had a chance to question.
- 5.28 Secondly, the use of hearsay evidence which consists of statements from people whom the defence has had (and will have) no chance to question is probably compatible with the Convention where questioning by the defence is genuinely impossible; but such evidence should not found a conviction if it stands alone.<sup>44</sup>
- 5.29 Thirdly, where a witness does appear in court, there would apparently be no breach of Article 6(3)(d) if the court were to accept an earlier statement made by the witness as evidence of the truth of its contents – even where the witness has later contradicted that statement in the course of his or her oral evidence.<sup>45</sup>
- 5.30 Fourthly, although it is not necessary for the rules of evidence to apply in the same way to the prosecution and to the defence, the Convention requires that the accused should not be in a less advantageous position than the prosecution.
- 5.31 Finally, if a defendant were not allowed to use a cogent piece of evidence because it fell foul of the hearsay rule, he or she might be able to complain successfully that this infringed the right to a fair trial under Article 6(1); and the present operation of the rule leaves it open to this criticism.<sup>46</sup>

<sup>42</sup> (1994) 17 EHRR 251, at para 43.

<sup>43</sup> Paras 5.35 – 5.39 of the consultation paper.

<sup>44</sup> This was a significant factor in *Delta v France* (1993) 16 EHRR 574, and in *Saïdi v France* (1994) 17 EHRR 251.

<sup>45</sup> See para 5.21 above.

<sup>46</sup> The defendant in *Blastland v United Kingdom* 12045/86; (1988) 10 EHRR 528 (para 5.5, n 6 above) ran this argument, but the Strasbourg Commission declared his complaint inadmissible partly because, although he was not permitted to lead hearsay evidence of what the third party had said, he knew who the person was and there was (theoretically) nothing to stop him calling that person as a defence witness; and partly because he had the right to challenge the ruling, and it could not therefore be said that there was not “equality of arms”. This consideration weighed heavily with the Commission, and if this possibility had not existed the answer might have been different. See *Vidal v Belgium* (1992) Series A No 235-B, where the Strasbourg Court upheld the defendant's complaint that he had not received a fair trial where the Brussels Court of Appeal had refused to allow the defendant to call possibly relevant defence evidence, because they had given no reason for their refusal.

5.32 At paragraph 9.5 of the consultation paper we stated:

We believe the risk of there being a breach of the Convention where a person stands to be convicted on hearsay evidence alone is sufficiently serious to warrant requiring the court to stop the case where hearsay is the *only* evidence of an element of the offence. ... We provisionally propose that unsupported hearsay should not be sufficient proof of any element of an offence.

#### THE RESPONSE ON CONSULTATION

5.33 On consultation, we received cogent and powerful criticisms of the conclusion and provisional proposal in the preceding paragraph. These criticisms came from respondents with substantial knowledge of the Convention and of general criminal law principles. There were two aspects to these criticisms: that we were unduly cautious in our assessment of what the Convention requires, and that our proposal was beset with practical difficulties.

5.34 Phillips LJ was not persuaded that the provision we proposed was positively required by the Convention. He considered that it would “introduce a potentially complex and obstructive technicality without solving that problem.” He pointed out that if Article 6(3)(d) really is contravened by the hearsay rule, then it is not only English law that is vulnerable to criticism: “half the continental procedure is also likely to have to be torn up”. This is because other legal systems use a written dossier, compiled at the pre-trial phase, which includes statements of witnesses and is admissible in evidence at the trial. It is significant that in many European countries what would be called hearsay in England and Wales is admissible, and does not appear to be in contravention of the Convention.<sup>47</sup> Buxton J also doubted that the jurisprudence on the Convention justified our proposal. According to Dr Andrew L-T Choo,<sup>48</sup> the judgments on the Convention suggest that

the court does not mean to be prescriptive about what is required to ensure compliance with Article 6(3)(d): the Court does not really regard the existence of supporting evidence as an essential prerequisite to the admissibility of hearsay evidence adduced by the prosecution.

5.35 Turning to the practical implications of our proposal, we were told by many respondents of the difficulties it would cause. First, we were warned by Stuart-Smith LJ and Jowitt J, amongst others, that we would be likely to encounter problems with the concept of “supporting evidence” similar to those of corroboration.<sup>49</sup> Professor Sir John Smith commented that

<sup>47</sup> See paras 5.6 and 5.7 above and Appendix B of the consultation paper, which sets out in greater detail the provisions of different civil jurisdictions.

<sup>48</sup> The author of the newly published monograph, *Hearsay and Confrontation in Criminal Trials* (1996).

<sup>49</sup> These rules were repealed by the Criminal Law and Public Order Act 1994, s 32, following recommendations made by this Commission in *Corroboration of Evidence in Criminal Trials* (1992) Law Com No 202. Mr Peter Mirfield of Jesus College, Oxford asks “What, precisely, will be capable of amounting to corroboration such that the case can go ahead? Will we not need some technical rules – *Baskerville* reborn, perhaps?”. For details of the

we have just rid ourselves of one highly unsatisfactory and troublesome set of rules requiring corroboration, to the great benefit of the law, and it seems to me extremely odd to set about producing a new lot.

- 5.36 Secondly, if our provisional proposal were implemented, complex judicial directions to juries would be needed. The Office of the Judge Advocate General pointed out that this requirement “may be one of the principal stumbling blocks to reforming the current rules”.
- 5.37 Thirdly, we were told by Phillips LJ, Buxton J and Professor Sir John Smith that our requirement would introduce complexity and lead to endless argument.
- 5.38 Finally, the Crown Prosecution Service made the valid point that a literal interpretation of our provisional conclusion was that however much other evidence there might be, if the only evidence of *one* element is hearsay then there would be no case. They cannot support that position; nor can the Society of Public Teachers of Law.
- 5.39 We found these arguments very persuasive. It became clear to us that not only would our proposal lead to much legal argument about what constitutes supporting evidence, but that in some cases there *could* be no better evidence than the hearsay evidence which under our proposal would need to be backed up. For example, the hearsay statement might consist of a statement in a business document prepared by somebody with substantial knowledge of the matters set out, and yet be incapable of any form of corroboration save for a statement by the writer’s superior that the writer was a reliable and conscientious employee.
- 5.40 In the light of the comments received on consultation, we have reconsidered our provisional proposal and looked again at the safeguards that could be given to the party against whom the hearsay evidence would be adduced. These are set out in detail in Part XI below and summarised at paragraphs 1.48 – 1.50 above. We are satisfied that such safeguards, and in particular the duty on the court to acquit or direct an acquittal if the case depended wholly or substantially on unconvincing hearsay evidence such that a conviction would be unsafe,<sup>50</sup> would provide adequate protection for the accused.

## CONCLUSION

- 5.41 Our conclusion, therefore, is that the Convention does not require direct supporting evidence where it is sought to prove a particular element of the offence by hearsay. Adequate protection for the accused will be provided by the safeguards we propose, and in particular by recommendation 47. We are inclined to agree with the suggestion of Phillips LJ that we ignore that provisional proposal “unless

complexities of the law of corroboration and the problems of *Baskerville* reference should be made to Law Com No 202, paras 2.7 – 2.12, and *Cross on Evidence* (7th ed 1990) ch 6.

<sup>50</sup> This safeguard was not put forward in the consultation paper. It is considered in more detail at paras 11.26 – 11.32 below.

and until the jurisprudence of Strasbourg demonstrates that our hearsay rules are in conflict with the Convention”.<sup>51</sup> The other conclusions set out in paragraphs 5.27 – 5.31 above stand.

<sup>51</sup> Mr Peter Mirfield implored us to “do the right thing and let the Convention look after itself”.

## **PART VI**

# **THE SIX OPTIONS FOR REFORM**

- 6.1 We have already concluded that change is needed, and rejected the first option put forward in the consultation paper – namely preserving the present law.<sup>1</sup> We now consider the options for reform. In Part X of the consultation paper we considered six such options: the “free admissibility” approach;<sup>2</sup> the “best available evidence” principle;<sup>3</sup> an exclusionary rule with an inclusionary discretion;<sup>4</sup> adding an inclusionary discretion to the current scheme;<sup>5</sup> categories of automatic exceptions;<sup>6</sup> and, finally, categories of automatic exception plus a limited judicial discretion to admit evidence where the justice of the case requires it.<sup>7</sup> Each of these options has an underlying justification for admitting hearsay evidence – either that it is sufficiently *reliable* to be safely admitted, or that it is *necessary* to admit it in hearsay form because it would not otherwise be available to the court at all.
- 6.2 In the consultation paper we doubted whether approaches which leave admissibility entirely to the discretion of the court, or which operate automatically with no scope for a rule to be shaped to the individual case, would be appropriate. We provisionally concluded that it might be best to adopt a hybrid approach with a very limited scope for the exercise of discretion.<sup>8</sup> This approach was strongly supported on consultation.

### **OPTION 2: THE FREE ADMISSIBILITY APPROACH**

- 6.3 This option would entail the complete abolition of the hearsay rule. All relevant evidence would be admitted unless excluded on some other ground (for example, because it discloses that the accused has a criminal record, or because it would divert the attention of the fact-finders to irrelevant matters). Under this option, evidence would not need to meet any standard of reliability, nor to be unavailable in any other form, in order to be admitted.

#### **Advantages**

- 6.4 All the technicalities about the definition of hearsay and the scope of its exceptions would become irrelevant. There would, for example, be no problems with “implied assertions”;<sup>9</sup> the distinctions between real and hearsay evidence would cease to be significant.

<sup>1</sup> Para 4.62 above.

<sup>2</sup> Option 2: see paras 6.3 – 6.16 below and paras 10.3 – 10.27 of the consultation paper.

<sup>3</sup> Option 3: see paras 6.17 – 6.32 below and paras 10.28 – 10.35 of the consultation paper.

<sup>4</sup> Option 4: see paras 6.33 – 6.37 below and paras 10.36 – 10.55 of the consultation paper.

<sup>5</sup> Option 5: see paras 6.38 – 6.42 below and paras 10.56 – 10.64 of the consultation paper.

<sup>6</sup> Option 6: see paras 6.43 – 6.47 below and paras 10.65 – 10.72 of the consultation paper.

<sup>7</sup> Option 7: see paras 6.48 – 6.53 and paras 10.73 – 10.77 of the consultation paper.

<sup>8</sup> Paras 9.19 – 9.25 of the consultation paper.

<sup>9</sup> See paras 7.5 – 7.9 below.

- 6.5 Fact-finders would have the maximum amount of information before them on which to base their decision. There would be less danger of inconsistencies arising between the decisions of civil trials and criminal trials on the same facts, which can happen at present because not all the facts available to the civil tribunal are available to the criminal court.
- 6.6 The scope for the exercise of judicial discretion, with its ensuing disadvantages,<sup>10</sup> would be kept to a minimum – the common law discretion<sup>11</sup> and the discretion under section 78(1) of PACE to exclude prosecution evidence.
- 6.7 There would be no danger of cogent evidence being kept from the court. This is particularly important if the evidence tends to exonerate the accused.<sup>12</sup>

### **Disadvantages**

- 6.8 The disadvantages of this option fall into two classes: those relating to the *quality* of the evidence, and those relating to the *quantity* of the evidence that might be adduced. We start with the criticisms that concern the quality of the evidence.
- 6.9 A fundamental defect of this option is that it fails to attach any importance to the need for cross-examination. We believe that the basic principle should be that every witness should be cross-examined, and that only where this is not possible should evidence of statements be admitted without cross-examination taking place.
- 6.10 The lack of opportunity to cross-examine raises another serious disadvantage of this option, namely that it would probably infringe the Convention. Article 6(3)(d) could be contravened if hearsay evidence were adduced against an accused person, particularly if such evidence were admitted even though the witness was available but not called.<sup>13</sup>
- 6.11 This option would allow fact-finders to hear not only the evidence of unidentifiable persons but also second, third or fourth-hand evidence. The assumption would be that the fact-finders would be able to assess accurately the weight of such evidence; but, as Professor Jackson points out “The truth is not out there waiting to be picked up; it has to be constructed by a procedure”.<sup>14</sup> As we have seen from the psychological research,<sup>15</sup> the risks inherent in the repetition of narration from one person to another mean that the dangers of inaccuracy and ambiguity increase with the number of times a story is repeated. The ALRC

<sup>10</sup> On which, see paras 4.28 – 4.31 above.

<sup>11</sup> See PACE, s 82(3).

<sup>12</sup> This advantage is particularly important in relation to the Convention: see para 5.25 above.

<sup>13</sup> See *Saïdi v France* (1994) 17 EHRR 251, para 5.15 above.

<sup>14</sup> J D Jackson’s review of W Twining’s *Theories of Evidence: Bentham and Wigmore* (1985): (1987) 38 NILQ 98, 100.

<sup>15</sup> Para 3.6, n 10 above, and para 10.17 of the consultation paper.



thought the danger of inaccuracy grave enough to warrant the exclusion of all oral hearsay which was second-hand or more remote.<sup>16</sup>

- 6.12 The weaknesses of second or third-hand evidence would almost certainly still be pointed out by the judge to the jury, or by the clerk to the magistrates, even if there were no exclusionary rule. The direction that the judge would have to give could be extremely complicated, especially if the hearsay were, say, partly second-hand, partly third-hand and partly fourth-hand. A jury is likely to be easily confused.
- 6.13 Turning to the *quantity* of evidence, this option would leave the court open to a vast amount of evidence, much of it superfluous. It would be very tempting for a defendant to put before the court every conceivable piece of evidence in the hope of so confusing the fact-finders that they could not be sure of his or her guilt. There would be a very strong temptation for judges or magistrates to exclude evidence on the ground that it was insufficiently relevant: within a short time a body of cases would have developed on the question of what was or was not sufficiently relevant. We surmise that judicial suspicion of hearsay evidence might cause the hearsay rule to resurface in the exercise of this discretion.
- 6.14 There is also a substantial possibility that parties would soon become alert to the danger that the tribunal of fact would be sceptical of any evidence which was not first-hand: they might wish to bolster the credibility of absent witnesses by seeking to convince the court with more evidence that there were genuine reasons for the absence of the witnesses. In the Crown Court at present, evidence relating to the unavailability of witnesses is presented to the judge: if this option were adopted it is conceivable that parties would seek to present evidence about a witness's unavailability to the jury. For all these reasons we provisionally rejected this option.<sup>17</sup>

### **The response on consultation**

- 6.15 Out of the 31 respondents who dealt with this option, only the Society of Public Teachers of Law had any sympathy for it. Even this was equivocal, with only some of the group being attracted to it. There was strong opposition to this option: for example, the Criminal Bar Association was troubled by "the very real risk of injustice by the admission of such evidence incapable of challenge or scrutiny in cross-examination". The view of the Law Society was representative of others in stating that "there would exist a real danger of possible miscarriages of justice and the breakdown of the ... system because of the ... volume of material", while Curtis J predicted that if accepted it would "result in a costly free-for-all which will ensure few cases end in an acceptable time".
- 6.16 Personal experience of practitioners may or may not support faith in the abilities of fact-finders, be they stipendiary magistrates, lay magistrates, or jurors, not to be over-impressed by hearsay evidence. However, no research on actual jurors is

<sup>16</sup> ALRC, Evidence Report (1987 ALRC 38) para 139: ALRC Evidence (Interim) (1985 ALRC 26) vol 1, paras 664 ff.

<sup>17</sup> See para 10.27 of the consultation paper.

possible.<sup>18</sup> In the absence of evidence that such faith is well-founded, we think caution is advisable. Taking into account all these arguments as well as those put forward in the consultation paper, we reject this option.

### **OPTION 3: THE “BEST AVAILABLE EVIDENCE” PRINCIPLE**

- 6.17 Under this principle, the court would be required to hear first-hand evidence when it was available – but if it was unavailable, the court would have to take the best evidence that it could obtain. This option is very similar to the German approach.<sup>19</sup> In Germany, the court has a duty to seek out whatever is likely to reveal the truth. If first-hand evidence were available, this would not mean that second-hand evidence was inadmissible, only that the court should seek out the first-hand witness. The directness of the evidence would go to weight and not to admissibility. There would be no automatic bar on unreliable witnesses (subject, of course, to the discretions at common law and under section 78(1) of PACE).
- 6.18 This option would have the advantages of the “free admissibility” option,<sup>20</sup> in that the maximum information would be available to the fact-finders, and the technicalities of the hearsay rule and its exceptions would disappear. At first sight the disadvantages of that option would also apply, but we considered in the consultation paper whether the duty to call the first-hand source where available would mitigate any of them.
- 6.19 We pointed out that there is a fundamental difference in approach between the inquisitorial system which operates in Germany and the accusatorial system operated in England and Wales. The German system is operated by a professional judge who may make his or her own investigations before the trial.<sup>21</sup> By contrast, in England and Wales judges and magistrates do not take a comparable active role. It is difficult to see how, under our system, this option could be policed.
- 6.20 We also provisionally concluded that another significant difficulty with this option would be how to ensure that the parties respected the obligation to produce the source of the evidence where possible. If, for example, the source was supposed to be available, but failed to attend on the day of trial, there might be no way of adducing the better evidence.
- 6.21 We accepted that there would be less danger of fabricated evidence under this option than under the free admissibility system.<sup>22</sup> We referred to a problem which could arise where the source of the evidence was the accused. In most cases he or she would be available to the court, in the sense of being present in the court room, but his or her *oral evidence* would be available to the court only if he or she

<sup>18</sup> Contempt of Court Act 1981, s 8. See para 3.21 above.

<sup>19</sup> See Appendix B of the consultation paper.

<sup>20</sup> See paras 6.4 – 6.7 above and paras 10.8 – 10.14 of the consultation paper.

<sup>21</sup> See Appendix B and paras 5.22 – 5.36 of the consultation paper for a more detailed explanation of the German system.

<sup>22</sup> Under this option, witnesses who gave statements to the police would be less sure that they could escape going into the witness box, and there would therefore be less incentive to make untruthful statements.

chose to go into the witness box. If the accused did not so elect, the court would not be able to hear the best available evidence; a policy decision would then have to be made on the question whether hearsay evidence should be accepted in such circumstances. The alternative would be to give the court the power to *require* the accused to give evidence, which we did not believe to be a practical option.<sup>23</sup>

- 6.22 On consultation, 33 respondents dealt with this point. 30 agreed with our provisional rejection of this option. The majority agreed with us that this option was not suitable to an adversarial system, and that judges and magistrates would have to adopt an investigatory role which is alien to our system. The fear of manipulation of witnesses was also raised. JUSTICE said this option could lead to lengthy legal argument as to why the best evidence was not available, and to manipulation of proceedings, delays and adjournments. Support for our provisional conclusion came from many different constituencies,<sup>24</sup> including the Society of Public Teachers of Law, the Law Society, the General Council of the Bar, the Criminal Bar Association and numerous judges,<sup>25</sup> as well as the Western and Wales and Chester Circuits.
- 6.23 There was a significant, but very small, minority in favour of this option. Professor John Spencer, who acted as our consultant in the preparation of the consultation paper, argues that there should not be an exclusionary rule but an inclusionary one, under which no hearsay would be excluded as such, but each side would be obliged to produce the original source of its information if that source is still available.<sup>26</sup> He stresses that this option has been supported by many eminent writers in the common law world.<sup>27</sup>
- 6.24 On a theoretical level, Professor Spencer argues that judges and magistrates do not have a wholly passive role: “They do have certain powers and duties to see that the court gets to the truth”. This is indeed the case, but we do not think that it would be appropriate within our system for the judge or magistrate to “descend into the arena”<sup>28</sup> in the way which would seem to be necessary under Professor Spencer’s preferred option.
- 6.25 On the problem of how the requirement to produce the source could be policed, Professor Spencer wrote:

<sup>23</sup> But in certain circumstances s 35 of the Criminal Justice and Public Order Act 1994 allows the jury or magistrates to draw “such inferences as appear proper” from an accused’s failure to testify. This may put *pressure* on the accused to give evidence.

<sup>24</sup> In some cases, although there was not explicit support for the provisional conclusion, it was implicit in the preference for option 7.

<sup>25</sup> Including Stuart-Smith and Phillips LJJ, Dyson, Jowitt, Wright, Steel, Buckley, Blofeld and Bracewell JJ.

<sup>26</sup> See “Hearsay Reform: A Bridge not Far Enough” [1996] Crim LR 29.

<sup>27</sup> Such as Bentham, Thayer, McCormick and Glanville Williams. References to their writings are set out in [1996] Crim LR 29, 30, at nn 6–9.

<sup>28</sup> S Doran, “Descent into Avernus” (1989) 139 NLJ 1147, 1160, quoting Lord Greene MR’s judgment in *Yuill v Yuill* [1945] 1 All ER 183, 189.

If one side tried to produce X with the sole purpose of repeating to the court what Y had told him, the judge – nudged if need be by counsel for the other side – would inquire if Y was later appearing as a witness. If the answer was “Yes”, the judge would inquire why it was therefore necessary to hear the tale second-hand from X first, and if there was no convincing reason,<sup>29</sup> the judge would tell X to go home because his evidence was redundant. If the answer was “No”, the judge would ask why not. The side calling X would then have to show that Y was unavailable for one of a number of reasons specified by law – and if they could not do this, they would not be allowed to use X as a substitute for Y.<sup>30</sup>

- 6.26 This view was supported by Professor John Jackson and the Standing Advisory Committee on Human Rights. Professor Jackson believes that we “should ... have approached the subject on the basis that relevant hearsay should be admissible except where there is a good reason for exclusion”.
- 6.27 We have given very careful consideration to the arguments of Professors Jackson and Spencer, but have come to the clear conclusion, in common with the vast majority of our consultees, that we cannot support this option. We envisage frequent arguments as to whether hearsay should be admitted. As we have pointed out,<sup>31</sup> it would be difficult to ensure that the parties respected the obligation to produce the source of their evidence where possible. We could not find a cogent answer to this point.
- 6.28 We were also impressed by the hostility to this option from those who operate in the magistrates’ courts.<sup>32</sup> This is hardly surprising because it is difficult to see how the option could work in summary trials. Magistrates would have to hear representations about what was the best evidence before deciding on admissibility. But we think it would be unacceptable for the Crown Court and the magistrates’ court to have differing rules of admissibility for hearsay, because the parties would not know what evidence would be admissible until the mode of trial had been decided.
- 6.29 Again, there would be problems with juries hearing evidence and then being instructed to disregard it, and it is significant that jury trials are not common in Germany. The type of problem that would arise appears from an example given by Professor Spencer in which a witness (A) referred, in his evidence, to something which another witness (B) had told him. After A had finished his evidence the judge would inquire if B was coming to give evidence. If the answer was in the negative, the judge would have to tell the jury to disregard what A had said that B had told him, unless B was absent for an acceptable reason. We believe that it is not desirable to have a system in which the parties can adduce evidence freely but

<sup>29</sup> As there might be – for example, if the incident took place a long time ago, X told Y about it immediately, Y recorded the statement in writing as X made it, and X is now likely to have no more than a hazy recollection of what happened. (Footnote in original)

<sup>30</sup> [1996] Crim LR 29, 30.

<sup>31</sup> At para 6.20 above.

<sup>32</sup> The Chief Metropolitan Stipendiary Magistrate, the Justices’ Clerks’ Society and the Magistrates’ Association.

the judge must then tell the jury to disregard some of it, or in which magistrates hear evidence which they must then disregard.

- 6.30 We note also that the German system requires hearsay to be corroborated.<sup>33</sup> We have previously referred to the cogent and compelling objections to a regime which requires hearsay to be corroborated.<sup>34</sup> This Commission advocated the abolition of the requirement of corroboration in criminal cases, and these proposals were subsequently enacted.<sup>35</sup> On further consideration, we believe that it would be wrong to introduce such a system into the law of hearsay.
- 6.31 By way of footnote, we would add that we are troubled by the change of attitude that this option would require on the part of practitioners and judges. It would be necessary for them to change habits of a life-time and be re-educated. We do not underestimate this task, and this consideration fortifies the conclusion that we had already reached.
- 6.32 Having carefully considered the arguments of Professors Spencer and Jackson, we agree with the vast majority of our consultees that this option should be rejected.

#### **OPTION 4: AN EXCLUSIONARY RULE WITH AN INCLUSIONARY DISCRETION**

- 6.33 Under this option,<sup>36</sup> there would be a definition of hearsay and a rule stating all hearsay is prima facie inadmissible. In place of the present exceptions, hearsay would be admissible, as a matter of law, where the party seeking to adduce it could satisfy the court, to the applicable standard of proof,<sup>37</sup> that the evidence was sufficiently reliable to merit being heard and that it was necessary to admit it in the interests of justice. Once the evidence was admitted, the fact that it was hearsay would go to its weight; the jury would be directed accordingly and the magistrates would be so advised by their clerk.
- 6.34 The implementation of this option would mean that many of the anomalies in the present rules would disappear. For instance, even if “implied assertions” were left within the scope of the rule against hearsay, if evidence of such an assertion were reliable enough it would be admitted anyway.
- 6.35 Adrian Zuckerman has suggested that

if the prosecution wishes to adduce hearsay evidence it must convince the court that it is of such probative weight that no injustice will be

<sup>33</sup> See para 5.34 and Appendix B of the consultation paper. In a recent case the Bundesgerichtshof held that “The evidence of a witness from hearsay can properly found a conviction only when its contents are confirmed by other evidence which is of greater probative value to the court”: BGH, 08.01.1991 (StV 1991, 197).

<sup>34</sup> See paras 5.35 – 5.39 above.

<sup>35</sup> Law Com No 202, which was implemented by the Criminal Justice and Public Order Act 1994, s 32.

<sup>36</sup> Which was proposed by the NZLC in its Preliminary Paper No.15, Evidence Law: Hearsay (1991).

<sup>37</sup> Ie on the balance of probabilities for the defence and beyond reasonable doubt for the prosecution.

caused to the accused by being deprived of the opportunity of cross-examination. As regards hearsay adduced by the accused, the general principle should be that it would be admissible whenever exclusion would undermine the interests of justice.<sup>38</sup>

The main advantages of this option would be that only evidence of a certain quality would be introduced, and there would be no superfluous evidence.

- 6.36 Against this must be considered the disadvantages. These include all the problems of basing a scheme on judicial discretion – namely, the danger of inconsistent decisions, the uncertainty as to which evidence would be admissible, and the particular difficulty in the magistrates’ courts that the magistrates would have to hear the evidence in order to decide on its admissibility. We considered these problems sufficiently serious to disqualify this option.<sup>39</sup>
- 6.37 On consultation, this option was strongly and cogently supported by Adrian Zuckerman,<sup>40</sup> and a number of respondents, including some judges,<sup>41</sup> were attracted by it. However, the force of the opposition to it was considerable, with the Law Society stating that it would “create hurdles in the operation of a court system”, and the Crown Prosecution Service believing that, compared with the present system, “it would be even more difficult to understand and even less certain in its practical operation”. The General Council of the Bar rejected it on the ground that any new scheme “must replace the present uncertainties with fewer not more uncertainties”.

#### **OPTION 5: ADDING AN INCLUSIONARY DISCRETION TO THE EXISTING SCHEME<sup>42</sup>**

- 6.38 One of the most forceful criticisms that we make of the current operation of the hearsay rule is that reliable evidence can be excluded because it does not fall within one of the recognised categories.<sup>43</sup> This option tries to address this defect by retaining the hearsay rule that we have at present, and the existing exceptions, but adding a residual judicial discretion. This would be used only in exceptional circumstances, to admit an item of hearsay which does not fall within any of the existing categories, but which is nevertheless sufficiently reliable and necessary to warrant admission.<sup>44</sup>

<sup>38</sup> A Zuckerman, *Principles of Criminal Evidence* (1992) p 221.

<sup>39</sup> Para 10.55 of the consultation paper.

<sup>40</sup> “The Futility of Hearsay” [1996] Crim LR 4, 15.

<sup>41</sup> Eg Poole J, Wright J and the North Eastern Circuit.

<sup>42</sup> Sir Rupert Cross thought this to be the least amendment which should be made to the hearsay rule: “The Scope of the Rule Against Hearsay” (1956) 72 LQR 91, 115.

<sup>43</sup> See paras 4.3 – 4.27 above.

<sup>44</sup> An example might be the Canadian case *R v D(D)* [1994] CCL 5873 (North West Territories Supreme Court) where a child who had been sexually abused identified the abuser to various adults but was too traumatised to give live testimony. The hearsay statements to the adults were admitted because the child was not available and because, having regard to the age and development of the child, the consistency of the repetition, the

- 6.39 A variant of this option would be to allow the courts to create *new categories* of hearsay exceptions where it was deemed necessary. This would involve a simple reversal of *Myers v DPP*,<sup>45</sup> which precluded the judicial creation of further exceptions or the extension of existing exceptions. Any such additions would, however, extend only to the present case and no further, even if logic demanded it. We think that piecemeal variation of the rule in this way would in principle be undesirable. A further variation of this option, suggested by Peter Carter,<sup>46</sup> would not only reverse *Myers* (thus allowing the courts to create new categories of exceptions) but also permit the admission of sufficiently reliable evidence on a one-off basis.
- 6.40 This option and its variants would enable evidence to be adduced, if it were sufficiently reliable, where it might otherwise be inadmissible under the present rules, for example because it was an “implied assertion”. It would also facilitate the admission of reliable first-hand oral hearsay, which still remains inadmissible after the passing of the 1988 Act. Another argument in favour of this option is that articulated by Lord Devlin,<sup>47</sup> that the judiciary may not be entitled to make new laws but they are better equipped than legislators to make new rules governing the admissibility of evidence.
- 6.41 However, this option does not address the other problems arising from the current rule which are set out in Part IV above. Moreover, there would be serious problems in ensuring that the appropriate standards of reliability and necessity were consistently applied in different courts. This would make it difficult to predict what evidence would be held admissible.<sup>48</sup> For both these reasons our provisional view was to reject this option.
- 6.42 On consultation it found minimal support: only three respondents favoured it.<sup>49</sup> Those hostile to it adopted our approach.<sup>50</sup> Having considered the views expressed on consultation, we believe that they fortify our provisional view, and that this option must be rejected because of its uncertainty.

#### **OPTION 6: CATEGORIES OF AUTOMATICALLY ADMISSIBLE EVIDENCE**

- 6.43 Under this option, if hearsay fell within one of certain specified categories it would *automatically* be admitted, subject only to the general and established discretions (at common law and under section 78(1) of PACE)<sup>51</sup> to exclude prosecution

absence of a reason to fabricate and the absence of signs of prompting or manipulation, the evidence met the test of reliability.

<sup>45</sup> [1965] AC 1001.

<sup>46</sup> “Hearsay; Whether and Whither?” (1993) 109 LQR 593.

<sup>47</sup> Lord Devlin, “Judges and Lawmakers” (1976) 39 MLR 1, 13.

<sup>48</sup> See paras 10.62 – 10.64 of the consultation paper.

<sup>49</sup> Peter Carter QC, Judge Michael Hucker and the Western Circuit.

<sup>50</sup> For example the Law Society said it would lack certainty and it would be difficult to apply the rule consistently and to advise clients, while the General Council of the Bar thought that “any new scheme must replace present uncertainties with fewer not more uncertainties”, and that this argument militated against option 5 as well as option 4.

<sup>51</sup> See para 1.31, n 49 above.

evidence. In the consultation paper we explained that this option assumes the ability of juries and magistrates to appreciate the weakness of hearsay evidence and properly to appraise its weight.<sup>52</sup> If hearsay evidence fell within one of the defined categories it could be adduced, and the tribunal of fact would be invited to form an opinion on its merits. The exceptions could be drafted so as to cover not only cases where direct evidence was unavailable but also cases where the hearsay was of a kind likely to be reliable.

- 6.44 The parties would be able to know in advance what evidence would be admissible (subject to the two discretions in respect of prosecution evidence). There would be a more uniform approach throughout all courts of criminal jurisdiction. Court time would not be wasted, and magistrates would not hear evidence which they would then have to ignore.
- 6.45 The principal disadvantage would be that it is quite likely that some unforeseeable cases of cogent hearsay evidence might fall outside the categories, however carefully drafted they were. We were influenced by *Beckford and Daley*,<sup>53</sup> in which the Court of Appeal held that evidence had correctly been regarded as inadmissible at trial but went on to quash the resulting conviction because its knowledge of the existence of the evidence left it with a “lurking doubt”. That case concerned an admission by a party to the proceedings which was not admissible on behalf of the prosecution. *Beckford and Daley* has since been disapproved, and the latest authority indicates that a defendant may adduce an admission by a co-defendant even though the prosecution could not do so.<sup>54</sup> However, although the particular problem which gave rise to injustice in *Beckford and Daley* has been resolved, for the time being, we remain concerned about the possibility of cogent hearsay evidence (particularly evidence which tends to point to the innocence of the accused) being inadmissible because it does not fit into any of the exceptions.
- 6.46 As an example, we look at the facts of *Myers*.<sup>55</sup> Myers and Quartey were charged with murder. They ran “cut-throat” defences, each saying the other was entirely responsible. Myers had made three separate admissions which tended to support her co-defendant’s contention that he had had nothing to do with the murder. Because the admissions tallied with the co-defendant’s defence they were very important evidence in his favour. They were admitted in evidence. If Myers had not been charged in the same proceedings, say because she had been dealt with in some other way, or had died before the trial, those admissions would not have been admissible. We do not suggest that all confessions to crimes by people not charged are worth admitting in evidence; but, where they are, it is clear that a miscarriage of justice could occur if there is no way that they *can* be admitted,

<sup>52</sup> See para 10.66 of the consultation paper.

<sup>53</sup> [1991] Crim LR 833. See para 7.48 of the consultation paper.

<sup>54</sup> *Beckford and Daley* was in conflict with *Campbell and Williams* [1993] Crim LR 448, and both authorities were reviewed in *Myers* [1996] 2 Cr App R 335. The Court of Appeal preferred the reasoning in the later case. Leave to appeal to the House of Lords has been granted.

<sup>55</sup> [1996] 2 Cr App R 335.



however reliable.<sup>56</sup> We therefore remain convinced that an option which lacks an inclusionary discretion is seriously defective.

- 6.47 We were disturbed by the inflexibility of this option, and provisionally rejected it for this reason.<sup>57</sup> On consultation, it was rejected by the vast majority of those who responded on this point. Its inadequacy is further illustrated by the issue of frightened witnesses. For cogent reasons which we develop later,<sup>58</sup> we have concluded that the statements of frightened witnesses should not be *automatically* admissible, but only with the leave of the court. This shows that not every hearsay exception can be framed as a category of automatically admissible evidence.

**OPTION 7: CATEGORIES OF AUTOMATIC ADMISSIBILITY PLUS A LIMITED INCLUSIONARY DISCRETION<sup>59</sup>**

- 6.48 In exploring the above options, we concluded that it is essential to strike the right balance between certainty and flexibility. If the rules of admissibility depend entirely on the exercise of judicial discretion, then there is too much uncertainty (the major defect of option 4); if there is no judicial discretion then cogent hearsay evidence could be excluded (the defect of option 6). We therefore turned to option 7, which combines rules of automatic admissibility (where discretion does not play a part) with an inclusionary discretion (to ensure fairness in the individual case).
- 6.49 Option 7 is, in essence, the same as the previous option, save that the inflexibility of that option would be remedied by the addition of a very *limited* discretion to admit what would otherwise be inadmissible hearsay. This we call the “safety-valve” provision. In other words, the defects of option 6 would be removed without re-introducing all the disadvantages that we have described as attending an open judicial discretion.<sup>60</sup>
- 6.50 Our provisional view was that there should be an inclusionary discretion of the kind we have described.<sup>61</sup> This central conclusion was approved by a clear majority of those who responded on the choice of option. Moreover, those who rejected it held widely differing views as to what the alternatives should be: their preferences were spread over each of the remaining six options and some additional individual variations, no single proposal being supported by more than four respondents.

<sup>56</sup> Another example can be found in the facts of *Thomas* [1994] Crim LR 745, which are set out at para 10.67, n 81 below.

<sup>57</sup> Paras 10.70 and 10.72 of the consultation paper.

<sup>58</sup> In essence, we believe that the automatic admission of the statements of frightened witnesses would make it too easy for witnesses to avoid cross-examination without good reason. See para 8.58 below.

<sup>59</sup> Such an option would be similar in structure to the scheme of the Federal Rules of Evidence of the United States, which consists of an exclusionary rule, categories of exceptions, and a residual inclusionary discretion.

<sup>60</sup> See paras 9.14 – 18 of the consultation paper.

<sup>61</sup> See para 10.77 of the consultation paper.

6.51 Those who favoured our preferred option were content generally to rely upon and adopt the arguments in the consultation paper. The Department of Trade and Industry's response was representative:

Option 7 appears ... to resolve the difficulties caused by the exclusion of cogent and reliable evidence, while clarifying and extending (where appropriate) the categories of admissible hearsay and providing for their automatic admission.

6.52 Broad support for this option came from many different constituencies: for example, of the judges, Stuart-Smith and Phillips LJ, together with Buxton, Allott, Tuckey, Dyson, Jowitt, Garland, Wright, Steel, Buckley, Blofeld, and Bracewell JJ, supported this option, as did the Recorder of Liverpool and many other circuit judges.<sup>62</sup> Professional bodies such as the Law Society, the London Criminal Courts Solicitors' Association, the General Council of the Bar and the Serious Fraud Office were also in favour.

6.53 The nature and force of the support for option 7 reinforced our provisional view that it was the best option. **We recommend that there should be a general rule against hearsay, subject to specified exceptions, plus a limited inclusionary discretion. (Recommendation 1)**

6.54 In the next Part we consider how an exclusionary hearsay rule should be formulated, and in Part VIII we consider in detail how the recommended option should work.

<sup>62</sup> Judge Gareth Edwards QC, Judge Kenny, Judge Colin Colston QC, Judge Tetlow, Judge Deveaux, Judge Graham Jones.

## **PART VII**

# **THE FORMULATION OF A RULE AGAINST HEARSAY**

- 7.1 We now consider how the rule against hearsay should be formulated. We focus on the distinction between assertions and direct evidence,<sup>1</sup> and a variety of cases in which this distinction has given rise to difficulty.<sup>2</sup> We explain the formulation that we proposed in the consultation paper for the purpose of avoiding these difficulties,<sup>3</sup> and how we have modified it.<sup>4</sup> Finally we consider the special problem of statements generated by machines.<sup>5</sup>

### **ASSERTIONS AND DIRECT EVIDENCE**

- 7.2 There are two basic ways of proving a fact in issue. First, it may be proved by proving some other fact which renders it more likely to be true: the other fact is directly probative of the fact to be proved. Second, it may be proved by means of a person's *assertion* that it is true. The hearsay rule applies only to the latter form of proof.
- 7.3 An assertion can consist of words or conduct or both. But, merely because a person's words or conduct are relied upon as evidence of a fact, it does not follow that they are an assertion of that fact. For example, a person's words may betray guilty knowledge without necessarily amounting to a confession of that person's guilt.
- 7.4 Often it will be clear whether a person's words or conduct are adduced as proof of a fact on the basis that they are directly probative of it – in other words, if it were not true then that person would probably not have spoken those words or acted in that way – or on the basis that they amount to an assertion of it. But it is sometimes debatable which of these is the case.

### **Borderline cases**

#### ***“Implied assertions”***

- 7.5 In *Wright v Doe d Tatham*,<sup>6</sup> for example, the issue was whether letters written to a man in which the writers appeared to assume the sanity of the recipient could be evidence of his sanity. Parke B held that the letters were hearsay because they were not directly probative of the fact to be proved, but only an assertion of it. He explained his decision with a now notorious illustration of a sea-captain who boards a ship, from which fact a court might be tempted to infer that the ship was

<sup>1</sup> See paras 7.2 – 7.4 below.

<sup>2</sup> See paras 7.5 – 7.16 below.

<sup>3</sup> See paras 7.17 – 7.23 below.

<sup>4</sup> See paras 7.24 – 7.41 below.

<sup>5</sup> See paras 7.42 – 7.50 below.

<sup>6</sup> (1837) 7 Ad & E 313 HL(E); 112 ER 488.

sea-worthy. Parke B said the hearsay rule would apply to such conduct, and evidence of it would be inadmissible.<sup>7</sup>

- 7.6 Parke B's approach was approved by a bare majority<sup>8</sup> of the House of Lords in *Kearley*.<sup>9</sup> The issue was whether, on a charge of possessing drugs with intent to supply, a prosecutor could rely on evidence by the police that they had been to the home of the defendant when he was not there, and had there received telephone and personal calls from people (who were not called as witnesses) asking about drugs that the defendant had for sale. It was held that the hearsay rule applies where it is sought to draw an inference of a fact from words or conduct which are intended to be assertive of some other fact, or are not intended to be assertive at all. As evidence of the fact that the defendant dealt in drugs, the callers' words were therefore hearsay; and, being unable to find any applicable exception to the rule, the majority of the House held them inadmissible.<sup>10</sup>
- 7.7 Evidence of the kind that was excluded in *Wright* and *Kearley* is usually referred to as an *implied assertion*. This is a somewhat unfortunate expression, for two reasons. First, it begs the question of whether the words or conduct in question *are* an assertion of the fact that they are adduced to prove. It is at least arguable that they are not assertive at all, but directly probative – in which case it would follow that they should not be caught by the hearsay rule.
- 7.8 Second, the word “implied” is here used in an unusual sense. Normally it refers to a statement which is not expressly spoken or written but is intended to be understood from what is said or done. But where there *is* an assertion of the fact to be proved, it is immaterial whether that assertion is express or (in the ordinary sense) implied. An assertion of a fact is no less of an assertion because it is implicit in an express assertion of a different fact, or because it takes the form of non-verbal conduct such as a gesture. An assertion can therefore be implied (in the ordinary sense) without being what is described in the context of hearsay as an “implied assertion”.<sup>11</sup>
- 7.9 Some respondents argued that “implied assertions” should fall within the hearsay rule, on the ground that, if an assertion would be inadmissible hearsay if made expressly, it should not make any difference that that assertion is implied. As one respondent put it, “Both are hearsay, plain and simple”. We agree that all assertions should be caught by the rule if they are adduced as evidence of the fact asserted, irrespective of whether they are express or implied. But this is not the

<sup>7</sup> *Cross and Tapper* points out, at p 591, that the illustration was unnecessary to Parke B's conclusion, and that “It remains to be seen whether there is any authority to support it”.

<sup>8</sup> Lords Bridge of Harwich, Ackner and Oliver of Aylmerton. Lords Griffiths and Browne-Wilkinson dissented.

<sup>9</sup> [1992] 2 AC 228.

<sup>10</sup> The majority of the judges in *Kearley* held the evidence in question to be inadmissible as being irrelevant in any event: *per* Lord Ackner at pp 253E–254A, Lord Oliver of Aylmerton at p 271, and Lord Bridge of Harwich at p 243C–G.

<sup>11</sup> Conversely, it may sometimes be arguable that even an express assertion of a fact should not be treated as being truly assertive in view of the purpose with which it is made. See para 7.27 below.

issue, and it is only the use of the expression “implied assertions” that suggests it is. The question is whether, in a case such as *Wright* or *Kearley*, there is an assertion at all.

### ***Negative assertions***

- 7.10 Closely connected to the problem of “implied assertions” is that of *negative* assertions. For the purposes of the hearsay rule it is obviously immaterial whether the fact to be proved is positive or negative, provided that an assertion of the fact is adduced as evidence of its truth. The difficulty arises where it is debatable whether the evidence of a negative fact is an assertion of it, or a fact suggesting in some other way that it is true.
- 7.11 Suppose, for example, that the fact to be proved is the fact that a particular event did not occur. The fact-finders may be invited to reason that, if it had occurred, its occurrence would have been recorded; and that, since its occurrence was not recorded, it did not occur. But is the non-recording of the event an *assertion* that it did not occur, or is it directly probative? In *Shone*<sup>12</sup> the evidence of a stock clerk and a sales manager that workers would have made entries on record cards if certain items had been lawfully disposed of, that there were no such entries, and that those items must therefore have been stolen, was held not to be hearsay but direct evidence of that fact. It seems that, if an inference is drawn from what a document says, the document is hearsay; but if an inference is drawn from what it does *not* say (or from the fact that no document exists), that is direct evidence.
- 7.12 Similarly, the hearsay rule may not apply where the court is invited to infer a negative fact from the fact that certain words were not *spoken*. Thus in *Harry*<sup>13</sup> the accused’s counsel sought to ask police witnesses about seven telephone calls made to the premises which Harry had occupied with the co-accused, P. None of the callers had asked for the appellant, and most had asked for P. The jury were to be invited to infer that it was P, not Harry, who was dealing in drugs. The fact that the callers had asked for P was held inadmissible, either as evidence against P<sup>14</sup> or to exculpate Harry; but the fact that they had not asked for Harry was admissible. What the callers said was hearsay; what they did *not* say was direct evidence.

### ***Identification evidence***

- 7.13 Yet another difficult case is that in which it is sought to adduce an utterance or writing as evidence of identification. The person identified may be the very person who is alleged to have spoken or written the words relied upon, or some other person. In either case it may be doubtful whether the words in question are an assertion of that person’s identity, or are directly probative of it.
- 7.14 In *Rice*<sup>15</sup> the Crown adduced a used airline ticket to Manchester, bearing the names “Rice and Moore”, in support of the evidence of a co-defendant named

<sup>12</sup> (1983) 76 Cr App 72.

<sup>13</sup> (1988) 86 Cr App R 105.

<sup>14</sup> See *Kearley* [1992] 2 AC 228 (paras 4.19 – 4.21 above), in which *Harry* was approved by Lords Ackner and Oliver of Aylmerton.

<sup>15</sup> [1963] 1 QB 857.

Hoather that he had flown to Manchester with Rice at about the time of the flight to which the ticket related, and that Rice had booked their ticket.<sup>16</sup> The Court of Appeal doubted that the ticket could be admissible as evidence that the *booking* had been made by a person called Rice: for that purpose it was hearsay. But it was held to be permissible for the jury to infer that the ticket had been *used* by someone called Rice, because of

the balance of probability recognised by common sense and common knowledge that an air ticket which has been used on a flight and which has a name upon it has more likely than not been used by a man of that name ...<sup>17</sup>

7.15 The distinction between these two uses of the ticket seems artificial: it was no more likely that the ticket had been *used* by someone called Rice than that it had been *issued* to someone of that name.<sup>18</sup> In our view it would have been better to treat the ticket as direct evidence, and admissible, on the latter issue as well as the former.

7.16 *Rice* was considered, and a similar conclusion reached, in *Lydon*.<sup>19</sup> A gun, allegedly used in a robbery, had been found by the side of a road which would have been used by the getaway car. Nearby were found two rolled-up pieces of paper bearing the words “Sean rules”. The appellant’s first name was Sean. It was held that this was not hearsay but direct evidence.

The inference that the jury could draw from the words written on the piece of paper is that the paper had been in the possession of someone who wished to write “Sean rules”, and that person would presumably either be named Sean himself or at least be associated with such a person, and thus it creates an inferential link with the appellant.<sup>20</sup>

It would have made no difference to the evidence’s admissibility, but only to its weight, if the pieces of paper had borne the appellant’s name in full. They were not so much an *assertion* by the writer (that his name was Sean) as something that a person *not* named Sean (and not associated with such a person) would be unlikely to write.

### **Our provisional proposal: intention to assert**

7.17 These borderline cases are not precisely analogous to one another. But they appear to have at least one feature in common, and one which is absent in the case of statements to which the hearsay rule *clearly* applies. This common feature is the fact that, while the words or conduct relied upon *may in fact* cause others to draw

<sup>16</sup> Moore was the name of another co-defendant. It was suggested that Rice had booked the ticket with the intention that Moore should accompany him, and that Hoather had taken Moore’s place; but the jury were directed, rightly in the view of the Court of Appeal, that the ticket was not evidence against Moore.

<sup>17</sup> [1963] 1 QB 857, 871, *per* Winn J, reading the judgment of the court.

<sup>18</sup> R Cross, “The Periphery of Hearsay” (1969) 7 Melb UL Rev 1, 7–11.

<sup>19</sup> (1987) 85 Cr App R 221.

<sup>20</sup> *Ibid*, at p 224, *per* Woolf LJ, reading the judgment of the court.

certain inferences, it is not the *intention* of the person whose words or conduct are in question that they should have that effect. The crucial question, we believe, is not whether any particular kind of assertion should be excluded from the ambit of the hearsay rule, but whether words or conduct which are not *intended* to assert a fact should be treated, for the purposes of the rule, as amounting to an assertion of that fact at all.

- 7.18 If it is known that a person spoke or acted in such a way as to cause someone else to infer the truth of a particular proposition, two inferences may be drawn: first that that person at that time believed that proposition to be true, and second that that belief was correct. Neither inference is inevitable: the person may have been seeking to mislead, or may have been mistaken. The hearsay rule recognises that if *both* these risks are present then, in the absence of an opportunity to cross-examine the person in question, there is good reason to exclude evidence of his or her words or conduct.
- 7.19 If, however, the risk of deliberate fabrication can be discounted, the possibility of a mistake is not necessarily sufficient reason to exclude evidence of the words or conduct. An example of this is the principle of *res gestae*, which, as preserved by our draft Bill,<sup>21</sup> permits evidence of a statement which “was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded”.
- 7.20 Where there is a substantial risk that an out-of-court assertion may have been deliberately fabricated, therefore, we think it right that the assertion should fall within the hearsay rule – whether it is express or implied. It follows that the rule should extend to any conduct which is intended to give the impression that a particular fact is true, and is adduced as evidence of that fact. But where that risk is not present – in other words, where the person from whose conduct a fact is to be inferred can safely be assumed to have believed that fact to be true – we do not think a court should be precluded from inferring that fact merely because that person may have been mistaken in believing it. And if that person did not intend anyone to infer it, it follows that that person cannot have been seeking to mislead anyone about it.
- 7.21 We therefore take the view that a person’s words or conduct should not be regarded as asserting a fact, and therefore should not be caught by the hearsay rule if adduced as evidence of that fact, unless that person *intends* to assert that fact.
- 7.22 In the consultation paper we noted that several other jurisdictions have excluded unintentional assertions from the ambit of the hearsay rule,<sup>22</sup> or have proposed doing so;<sup>23</sup> and we made a provisional proposal to this effect. Our proposed formulation of the hearsay rule was as follows:

<sup>21</sup> Clause 6(5)(a).

<sup>22</sup> In Scotland such assertions have never been seen as falling within the hearsay rule. The Federal Rules of Evidence exclude them (rule 801(a)), as does the Australian Evidence Act 1995, s 59.

<sup>23</sup> See cl 27(2)(b) of the Evidence Code prepared by the Law Reform Commission of Canada, and NZLC Preliminary Paper No 15, Evidence Law: Hearsay (1991) pp 32–33.

an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion that the person intended to assert.<sup>24</sup>

- 7.23 On consultation, the thrust of this proposal met with much support. Some respondents argued that it should make no difference whether an out-of-court assertion is express or implied: if it is repeated in court, and the person who made it does not give evidence, the other party faces difficulties in challenging the reliability of the assertion and the credibility of its maker. But this argument appears to be directed at the admission of implied assertions *in the ordinary sense*, and not at evidence which is not intended to be assertive at all. We still believe that the borderline cases discussed above ought not, in general, to be caught by the hearsay rule.

### **Modification of the provisional proposal**

- 7.24 However, many respondents, while agreeing that “implied assertions” should be taken outside the hearsay rule, had misgivings about our proposal to do this by formulating that rule in terms what the putative declarant intended to assert. We share these misgivings, and in the consultation paper drew attention to two practical difficulties with this approach.

First, admissibility then comes to depend on the chance of how an individual has expressed himself or herself, whether in a question or a direct statement. Secondly, cogent evidence would still be excluded. For example, a caller may say “Can I have my usual stuff?”, which would be admissible, as containing no factual assertion, but the words of a caller who says “The stuff you sold me last week was bad” will be inadmissible. Yet there is no obvious reason why the second statement is any less reliable as evidence than the first, if the court is not interested in the quality of the drugs supplied.<sup>25</sup>

We now consider whether our provisional proposal can be modified in such a way as to meet these objections.

### ***What is an intention to assert?***

ASSERTING A FACT AND CAUSING ANOTHER TO BELIEVE IT

- 7.25 As more than one respondent pointed out, the idea of an “intention to assert” is ambiguous. The crucial question, we have argued, is whether the person whose words or conduct are in question intended to convey the impression that the fact which it is now sought to infer from those words or that conduct was true. Only if that person did not intend to convey that impression can it safely be assumed that he or she was not deliberately seeking to mislead. It follows that what is crucial is not the way in which that person happened to express himself or herself, but the impression that his or her words or conduct were intended to convey.

<sup>24</sup> See paras 9.27 – 9.36 of the consultation paper.

<sup>25</sup> Para 7.69 of the consultation paper.



- 7.26 Thus evidence that a caller said “Can I have my usual stuff?” would be admissible to prove that the accused did habitually supply unlawful drugs; but this is not because the caller’s *words* do not amount to an assertion. It is because the caller’s intention is not to give anyone the impression that the person addressed is a drug-dealer, but simply to request drugs. The caller intends the words to be heard only by a person whom the caller believes to be a drug-dealer: obviously the caller has no wish to convince that person, or anyone else, that that person *is* a drug-dealer.
- 7.27 From this point of view it makes no difference that the caller says “The stuff you sold me last week was bad”. The inference to be drawn from these words is essentially the same as in the case of the words “Can I have my usual stuff?” – namely that the person whom the caller intends to address is in the habit of supplying drugs to the caller. On its face, admittedly, this is an express assertion that the person addressed sold drugs to the caller last week; and, since the caller obviously intends to say exactly what he or she does say, in one sense the caller intends to assert that fact. But it is not the caller’s intention to cause the person addressed to infer that that fact is true, since he or she already knows it. In *that* sense there is no intention to assert.
- 7.28 The point may be further illustrated by reference to *Teper*.<sup>26</sup> The defendant was charged with arson of his own shop. A woman had been heard to shout to a passing motorist “Your place burning and you going away from the fire”. If the woman’s intention were to draw the attention of bystanders to the fact that Teper was leaving the scene, her words would be hearsay, since she might have been trying to mislead the bystanders. If, however, she was intending *only* to indicate to the motorist that she knew he was Teper, she could not be seeking to *mislead* anyone about who he was. If he was Teper, he knew he was; and if he was not, she could not hope to convince him that he was. She might still be *asserting* that he was Teper, but she would not be intending to *persuade* anyone of this.
- 7.29 We recognise that it may sometimes be difficult to ascertain what impression, if any, the words or conduct in question were intended to convey, and legal argument may result.<sup>27</sup> But a party seeking to adduce evidence must always show, to the appropriate standard of proof, that the facts are such as to render the evidence admissible; and it will usually be possible to infer from the circumstances the intentions of the person in question.
- 7.30 It may be difficult in some cases for the prosecution to prove *beyond reasonable doubt* that that person did not intend to convey to an observer the fact that it is now sought to prove; but, in view of the risk of fabricated evidence being admitted without the opportunity for cross-examination, we think it is right that there should be this safeguard.
- 7.31 In the case of defence evidence the point will have to be proved only on the balance of probabilities; but, if it appears more likely that the relevant intention did

<sup>26</sup> [1952] AC 480.

<sup>27</sup> This problem was anticipated by the Crown Prosecution Service, the Society of Public Teachers of Law, Mr Justice Curtis, Alan Suckling QC, Professor John Jackson, Peter Mirfield and David Ormerod.

not exist than that it did, we think it right that the defence should be permitted to adduce the evidence. The possibility that it may have been fabricated can be taken into account in assessing the weight that it should be given.

- 7.32 This reasoning suggests that the crucial question should be, not whether the maker of the statement appears to have intended to *assert* the fact which the statement is adduced to prove, but whether he or she appears to have intended to *cause another person to believe* that fact.

#### CAUSING A PERSON TO ACT ON THE BASIS THAT A FACT IS TRUE

- 7.33 However, we think it would be going too far to say that a statement should *never* fall within the hearsay rule unless it appears to have been intended to cause another to believe the fact stated. We have argued that a statement should be regarded as hearsay if it seems possible that it may have been deliberately fabricated; and there may be cases where a statement is deliberately fabricated although it is not intended that another person should believe it to be true. This may be so if it is intended that another person, while not necessarily *believing* the fact stated, should *act on the basis that it is true*.

- 7.34 Suppose, for example, that A's job involves reimbursing his colleagues for their travelling expenses. It is sought to prove that his colleague B travelled to Glasgow on a particular date, by adducing her claim form in which she stated that she had done so. We believe that that evidence should fall within the hearsay rule, because the claim might be fabricated. But if it were necessary, in order to bring a statement within the hearsay rule, to show that it was made with the intention of causing a person to *believe* it, it might be argued that B's claim is made with no such intention. It may be that, when a claim is submitted to A, all he is required to do is to check that it complies with the rules laid down for such claims; and if it does, he automatically pays it. If B tells him she has been to Glasgow on business, he will pay for that journey. He will not consider whether he *believes* that B has been to Glasgow, and it is probably of no concern to B whether he believes it or not.<sup>28</sup> But she does intend that he should act on the basis that it is true; and we believe that this should be sufficient to bring her statement within the hearsay rule.

#### CAUSING A MACHINE TO OPERATE

- 7.35 Similarly, we believe that a statement should fall within the hearsay rule in any case where it is made with the intention that some action should be taken on the basis that the fact stated is true – even if the taking of that action involves no human intervention, but only the operation of a machine. Suppose, for example, that the processing of B's expenses claim is carried out not by A but by a computer system, which has been programmed to print a cheque for the appropriate amount if the information provided by the claimant appears to meet the specified criteria. Clearly the risk of fabrication is just as great as if the information were given to a human, and it would be arbitrary to apply different rules to the two cases.

<sup>28</sup> There is a similar difficulty in the law of deception: where a person assumes that everything is as it should be, and the defendant dishonestly takes advantage of that assumption, is the defendant obtaining *by deception*? See A T H Smith, "The Idea of Criminal Deception" [1982] Crim LR 721.

### ***Intention and purpose***

- 7.36 We have so far been referring to the *intention* with which the statement in question is made. But the word “intention” is ambiguous. In some contexts it refers only to the *purpose* with which a person acts – the objective that that person hopes to achieve by acting as he or she does. In others, it includes not only purpose but also what is sometimes called “oblique” intention. In this wider sense, a person “intends” not only the consequences that he or she *wishes* to bring about, but also those that he or she knows to be an inevitable side-effect of the consequences that he or she desires. In our recent reports we have used the word in the latter sense, reserving the word “purpose” for the former.<sup>29</sup>
- 7.37 The point is perhaps unlikely to be of great practical importance, but we have considered whether the applicability of the hearsay rule to a particular statement should depend on the *intention* (in our wider sense) or only on the *purpose* with which the statement is made. Should a person’s words or conduct count as a hearsay statement of a fact if that person does not positively desire that another should thereby be caused to believe that fact (or that another should be caused to act, or a machine to operate, on the basis that it is true), but knows that this will inevitably occur?
- 7.38 Our reason for focusing on the “intention” of the putative declarant is that, if that person is not seeking to convey a particular impression, it follows that he or she cannot be seeking to convey a *misleading* impression: the possibility of deliberate fabrication is thus ruled out.<sup>30</sup> But this argument seems equally applicable where, although he or she knows that a particular inference will inevitably be drawn, that is not his or her purpose. Moreover, if we were to include within the hearsay rule the case where he or she knows that a particular inference *will* be drawn, it is hard to see any rational basis for excluding the case where he or she knows that it *may* be drawn. We believe that the most defensible place to draw the line is between those consequences that it is the putative declarant’s *purpose* to bring about, and those that it is not.

### ***Multiple purposes***

- 7.39 On the other hand we see no reason to confine the hearsay rule to statements which are made *solely*, or even primarily, for one of the specified purposes. Where a person has more than one purpose for what he or she says or does, we believe it should be sufficient that at least one of those purposes falls within the categories we have identified.

### **Our recommended formulation**

- 7.40 **We recommend**

**(1) that (subject to the exceptions we recommend) in criminal proceedings a statement not made in oral evidence in the**

<sup>29</sup> See *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, paras 7.1 – 7.14, and cl 1(a) of the Criminal Law Bill annexed to that report.

<sup>30</sup> See paras 7.20 – 7.21 above.

**proceedings should not be admissible as evidence of any matter stated, and**

**(2) that a matter should be regarded as stated in a statement if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been**

**(a) to cause another person to believe the matter, or**

**(b) to cause another person to act, or a machine to operate, on the basis that the matter is as stated.<sup>31</sup> (Recommendation 2)**

7.41 In the borderline cases we described above, we believe that the difficulty of applying the law would be reduced by our recommended formulation of the hearsay rule. In a case such as *Kearley* or *Harry*,<sup>32</sup> for example, we think a court would normally have little difficulty in concluding that it was not the callers' purpose to cause anyone to believe that anyone was (or was not) selling drugs. Similarly, where a person has failed to record an event,<sup>33</sup> it will often be clear that that failure was not intended to give the impression that the event had *not* occurred. Either the event did not occur, or that person did not realise that it had: in either case, it will not have been his or her purpose to cause anyone to believe that it had not happened, because it will not have crossed his or her mind that anyone might think it had. And therefore the record will be *direct* evidence that the event did not occur.

#### **STATEMENTS PRODUCED BY MACHINES**

7.42 There is an additional difficulty where it is sought to adduce a statement generated by a machine. Usually the statement will be included in a document produced by the machine, such as a computer printout;<sup>34</sup> but it could equally be a reading on a gauge, or even the mechanical equivalent of an oral statement.

7.43 The present law draws a distinction according to whether the statement consists of, or is based upon, only what the machine itself has observed; or whether it incorporates, or is based upon, information supplied by a human being.

#### **Statements not based on human input**

7.44 The hearsay rule does not apply to tapes, films or photographs which record a disputed incident actually taking place,<sup>35</sup> or to documents produced by machines which automatically record an event or circumstance (such as the making of a telephone call from a particular number,<sup>36</sup> or the level of alcohol in a person's

<sup>31</sup> See cls 1 and 2 of the draft Bill.

<sup>32</sup> See paras 7.06 and 7.12 above respectively.

<sup>33</sup> As in *Shone*, para 7.11 above.

<sup>34</sup> In that case, s 69 of PACE lays down further requirements which must be satisfied before the statement can be admitted, whether it is hearsay or not: see Part XIII below.

<sup>35</sup> Eg *Dodson* (1984) 79 Cr App R 220, in which the two accused were photographed by security cameras during their attempted robbery of a building society.

<sup>36</sup> Eg *Neville* [1991] Crim LR 288; *Spiby* (1990) 91 Cr App R 186.

breath).<sup>37</sup> In such a case the court is not being asked to accept the truth of an assertion made by any person. The evidence is not hearsay but real evidence.

- 7.45 Our draft Bill preserves this rule by confining the word “statement” to a representation *made by a person*.<sup>38</sup> The conclusions printed out (or “spoken”) by a machine are not a statement for the purposes of the Bill, and therefore the hearsay rule does not apply to them.

### **Statements based on human input**

- 7.46 By contrast, the present law does sometimes exclude evidence of a statement generated by a machine, where the statement is based on information fed into the machine by a human being. In such a case, it seems, the statement by the machine is admissible *only* if the facts on which it is based are themselves proved.
- 7.47 In *Wood*,<sup>39</sup> for example, it was sought to prove that certain metal found in the appellant’s possession was of the same type as a stolen consignment, by adducing evidence of figures produced by a computer which had analysed the results of X-rays and other tests carried out by chemists. It was held that this was not hearsay because the chemists had given oral evidence of the results of the tests. In the absence of admissible evidence of those results, the computer’s analysis of the results would not have been admissible either. In *R v Coventry Justices, ex p Bullard*,<sup>40</sup> on the other hand, a computer printout stating that a person was in arrears with his poll tax was held to be inadmissible hearsay because it must have been based on information “implanted” into the computer by a human, which had not been properly proved.
- 7.48 We believe that this distinction is well-founded and should clearly be preserved. In a case such as *ex p Bullard* it would be absurd to admit the printout without requiring proof of the input on which it was based. The question is, on what basis should such evidence be excluded? One view is that it is hearsay, because it is tantamount to a statement made by the person who fed the data into the machine.<sup>41</sup> An alternative view is that the statement by the machine, properly understood, is conditional on the accuracy of the data on which it is based; and that, if those data are not proved to have been accurate, the statement therefore has no probative value at all. The question of hearsay does not arise, because the statement is simply irrelevant.
- 7.49 We believe that the latter view is closer to the truth, and that it is therefore unnecessary to complicate our hearsay rule by extending it to statements made by machines on the basis of human input. On the other hand we do not think it

<sup>37</sup> *Castle v Cross* [1984] 1 WLR 1372. In that case, the disputed statement from the machine was not a blood-alcohol reading, but a statement that the defendant had failed to provide a sample of his breath large enough for it to analyse. See also *Owens v Chesters* (1985) 149 JP 295.

<sup>38</sup> See cl 2(2) of the draft Bill.

<sup>39</sup> (1982) 76 Cr App R 23.

<sup>40</sup> (1992) 95 Cr App R 175.

<sup>41</sup> This is how the matter appears to have been regarded in *ex p Bullard*.

would be safe to assume that everyone will share this view. We must anticipate the argument that, if such statements are inadmissible at present, that is because they are hearsay; that, under our recommendations, they would no longer be hearsay, because our formulation of the rule would apply only to representations made by people; and that they would therefore cease to be inadmissible.

- 7.50 We have therefore concluded that a separate provision is necessary, independent of the hearsay rule. **We recommend that, where a representation of any fact is made otherwise than by a person, but depends for its accuracy on information supplied by a person, it should not be admissible as evidence of the fact unless it is proved that the information was accurate.**<sup>42</sup>  
**(Recommendation 3)**

<sup>42</sup> See cl 18 of the draft Bill.

## **PART VIII**

# **THE EXCEPTIONS TO THE RULE**

8.1 In Part VI we concluded that there should be an exclusionary hearsay rule, and that there should be specified exceptions to the rule, plus a limited inclusionary discretion.<sup>1</sup> Our proposed scheme also allows for the preservation of the discretions under section 78(1) of PACE and at common law to exclude prosecution evidence in certain circumstances. In the preceding Part we set out our formulation of the rule, and we now consider the exceptions in detail. We recommend that the specified exceptions should consist of

- (1) categories of automatic admissibility where the declarant's oral evidence is, for one of certain specified reasons, unavailable (which we call "the unavailability exception");
- (2) an exception under which statements made by witnesses who are in fear may be admitted with the leave of the court;
- (3) a business documents exception, and
- (4) certain preserved exceptions.

8.2 We begin by considering what kinds of hearsay evidence should be automatically admissible where the declarant is unavailable to give oral evidence.<sup>2</sup> We then proceed to consider what kinds of "unavailability" should justify the automatic admission of the declarant's statement.<sup>3</sup> In the case of one kind of unavailability, namely where the declarant is too frightened to give evidence, we recommend a separate exception under which the admission of a previous statement would not be automatic (as in the case of the unavailability exception) but would require the leave of the court.<sup>4</sup> We then turn to the exception for "business documents",<sup>5</sup> and then to the admissibility of confessions, mixed statements and denials.<sup>6</sup> Next, we review the other existing exceptions, statutory and common law, that, with one exception, we recommend should be retained.<sup>7</sup> We then discuss the proposed discretion to *admit* hearsay evidence where the interests of justice so require.<sup>8</sup> Finally we consider whether hearsay should be admissible where the parties agree that it should be admitted.<sup>9</sup>

<sup>1</sup> See paras 6.48 – 6.53 above.

<sup>2</sup> See paras 8.4 – 8.33 below.

<sup>3</sup> See paras 8.34 – 8.47 below.

<sup>4</sup> See paras 8.48 – 8.70 below.

<sup>5</sup> See paras 8.71 – 8.83 below.

<sup>6</sup> See paras 8.84 – 8.99 below.

<sup>7</sup> See paras 8.100 – 8.132 below.

<sup>8</sup> See paras 8.133 – 8.149 below.

<sup>9</sup> See para 8.150 below.

## STATEMENTS BY PERSONS WHO ARE UNAVAILABLE

- 8.3 In order to formulate our “unavailability exception” we must resolve two issues:
- (1) What kinds of hearsay should be automatically admissible where the declarant is unavailable to give oral evidence, for one of the recognised reasons?
  - (2) What should those reasons be?

### **What kinds of hearsay should be automatically admissible where the declarant is unavailable?**

#### ***Oral hearsay***

- 8.4 A major limitation of the present law is that only documentary evidence can be admitted under the 1988 Act:<sup>10</sup> there is no comparable provision for first-hand *oral* hearsay. In the consultation paper we accepted that oral evidence might on occasion be less cogent than documentary evidence, but our provisional view was that the law should not be limited in this way.<sup>11</sup> Our view has always been that there is no reason to believe that oral evidence is always less cogent or reliable than documentary evidence. We therefore proposed in the consultation paper that the unavailability exception should not be confined to documentary hearsay. This view was accepted by the vast majority of those respondents who addressed the point. Accordingly, **we recommend that the unavailability exception should extend to oral as well as documentary hearsay. (Recommendation 4)**

#### ***Statements by unidentified declarants***

- 8.5 Under the regime we proposed in the consultation paper, before the unavailability exception could be relied upon, the declarant would have to be identified to the satisfaction of the court, thus enabling the opposing party to challenge the declarant’s credibility and reliability. Our provisional view was that it would not be desirable to allow the admission of a statement by a person about whose identity no, or no adequate, information was available.
- 8.6 In the consultation paper, we gave the example of the defence calling a witness to say that when he was on a train in a particular foreign city he heard two men he did not know talking about how they carried out a murder for which the defendant was being charged and saying that the defendant had not been there. Our provisional view was that the party tendering the statement should be required to attribute the statement to a particular individual, with sufficient detail of that person’s identity for the court to be satisfied that the individual exists, and for the other party to have enough information to enable it to make enquiries about the declarant and to attack the declarant’s credibility at the trial if it thought it appropriate to do so.<sup>12</sup>

<sup>10</sup> See para 4.17 above.

<sup>11</sup> Para 11.7 of the consultation paper. Professor D J Birch has expressed a similar view: “The Criminal Justice Act 1988: (2) Documentary Evidence” [1989] Crim LR 15, 20.

<sup>12</sup> Para 11.9 of the consultation paper. See paras 11.19 – 11.23 below for the right to attack the declarant’s credibility.



- 8.7 On consultation a large majority of the respondents who addressed the point agreed with our views, but some respondents were concerned about such a condition applying to business documents. They feared that this would reproduce the situation that arose in *Myers*,<sup>13</sup> where the identity of the maker of the record was unimportant and the significant fact was that a proper record had been kept. We can reassure those respondents that we did not intend this condition to apply to business documents: our position is still that the business documents exception is separate from the unavailability exception, and the condition that the declarant be identified would not apply to it.<sup>14</sup>
- 8.8 As regards the unavailability exception, the provisions of Article 6(3)(d) of the Convention are pertinent. In certain circumstances, the admission of a statement by an unidentified person whom the defence has had no chance to question could be in breach of the Convention.<sup>15</sup> **We recommend that the unavailability exception should not be available unless the person who made the statement is identified to the court's satisfaction.**<sup>16</sup> (Recommendation 5)

***Facts of which the declarant could not have given oral evidence***

- 8.9 In the consultation paper, we adopted the approach of other recent legislation.<sup>17</sup> Our provisional view was that no statement should be admissible as evidence of any fact, opinion or other matter contained in it of which the declarant could not have given oral evidence. There was unanimous support for this proposal, and we now recommend its adoption.
- 8.10 This proposal has two aspects: it excludes hearsay evidence of
- (1) facts which are not admissible at all, whoever gives evidence of them; and
  - (2) facts which are admissible, but of which the *declarant* could not have given oral evidence.

<sup>13</sup> [1965] AC 1001. The defendants were charged with conspiracy to receive stolen cars and conspiracy to defraud. The prosecution sought to prove the identities of various cars by producing the manufacturer's records. The compilers of the records were not identifiable. There was no existing exception to the hearsay rule under which the records could be admitted.

<sup>14</sup> Another possible exception to the principle that the declarant should be identified is *res gestae*. In one strand of *res gestae* the court has to be satisfied that

the event was so unusual or startling or dramatic as to dominate the thoughts of the [declarant], so that his utterance was an instinctive reaction to the event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion ...

*Andrews* [1987] AC 281, 301, *per* Lord Ackner. In those circumstances the statement will be regarded as having an in-built guarantee of credibility. We return to this point at paras 8.119 – 8.120 below.

<sup>15</sup> *Doorson v Netherlands* (1996) 22 EHRR 330.

<sup>16</sup> See cl 3(b) of the draft Bill.

<sup>17</sup> See the 1988 Act, ss 23(1) and 24(1); Civil Evidence Act 1968, ss 2(1), 3(1), 4(1), 5(1), and Civil Evidence Act 1972, s 1(2), now superseded by the Civil Evidence Act 1995. See also para 11.10 of the consultation paper.

- 8.11 In the first place, it would not be possible to adduce hearsay evidence of a fact if even a witness with personal knowledge of the fact could not have given oral evidence of it, because the fact is itself inadmissible. If, for example, the fact stated is the fact that the defendant is of bad character (a fact which may not normally be proved at all), the statement would not become admissible merely because, had the fact stated been an admissible fact, a hearsay exception would have applied.
- 8.12 Secondly, it would not be possible to adduce hearsay evidence of a fact of which oral evidence could have been given by someone, if it could not have been given by the declarant. This may be so, for example, if the declarant
- (1) would not have been competent to give evidence at all, or
  - (2) had no personal knowledge of the fact stated.

#### DECLARANT NOT A COMPETENT WITNESS

- 8.13 The general rule is that all persons are competent to give oral evidence, save for the accused at the instigation of the prosecution, young children, and persons of defective intellect.<sup>18</sup> If the declarant would not have been competent, it would clearly be wrong to treat his or her statement as evidence of its truth.
- 8.14 The time when the declarant must have been competent as a witness should clearly be the time when the statement was made, rather than when it is sought to adduce it.<sup>19</sup> Suppose, for example, that a person makes a statement when of sound mind and later becomes intellectually defective because of an accident. Although the person may no longer be fit to testify – indeed, that may be why he or she is unavailable, with the result that the statement is admissible<sup>20</sup> – the quality of the statement will be unaffected.

#### MULTIPLE HEARSAY

- 8.15 Where even the declarant had no personal knowledge of the fact stated, the statement is said to be *multiple* hearsay. Suppose it is sought to prove that A stated that an event had occurred. If A had no personal knowledge of this event, but had been told of it by B, who had seen it, A's statement is multiple (in this case, second-hand) hearsay. Assuming that no hearsay exception would have applied,<sup>21</sup> A could not have given oral evidence of the event. Under our recommendation it would follow that A's statement would not be admissible evidence of the event even if A were unavailable to testify.
- 8.16 In the consultation paper we considered, but rejected, the automatic admission of multiple hearsay on the grounds of the declarant's unavailability.<sup>22</sup> There are

<sup>18</sup> See *Blackstone*, para F4.5.

<sup>19</sup> This was recommended at paras 5.25 – 5.27 of the SLC Report, which was given effect by the 1995 Act, s 259(1)(c).

<sup>20</sup> See para 8.36 below.

<sup>21</sup> For the position where an exception would have applied, see paras 8.18 – 8.23 below.

<sup>22</sup> Para 11.8 of the consultation paper.

critical differences between first-hand and multiple hearsay. First, in the case of first-hand hearsay, it is possible to question or challenge the person who heard the relevant statement being made, and then assess the weight to be attached to that person's evidence. This is not possible in the case of multiple hearsay. Secondly, as we have already pointed out,<sup>23</sup> we believe that there is a substantial risk, if any degree of hearsay more remote than first-hand hearsay were to be admissible, that unreliable or manufactured evidence might be admitted. Thirdly, a jury would have to be given much more complex directions for multiple hearsay than for first-hand hearsay,<sup>24</sup> and different directions would have to be tailored for each degree of hearsay. There is a substantial risk that the jury would be misled or distracted; in any event, disproportionate time and expense would be spent not only receiving such evidence but also on submissions as to its origins and weight.

- 8.17 We believe that, in general, multiple hearsay is too unreliable to be admitted; and we do not believe that the unavailability of the declarant is sufficient to justify an exception to this principle. This view was accepted by a large majority of respondents. **We recommend that the unavailability exception should not extend to a statement of any fact of which the declarant could not have given oral evidence at the time when the statement was made.**<sup>25</sup> **(Recommendation 6)**

*Cumulative use of hearsay exceptions*

- 8.18 This recommendation raises a further question. Where the declarant had no personal knowledge of the fact stated, it will normally follow from recommendation 6 that the statement is inadmissible (even if the declarant is unavailable) because the declarant could not have given oral evidence of the fact stated: it would have been hearsay. But what if the declarant *could* have given oral evidence of the fact stated, because, although the evidence would have been hearsay, a hearsay exception would have applied?
- 8.19 Suppose, for example, that A said that event *x* had occurred, and that A knew this because B had seen it happen and had told A about it immediately afterwards, in such circumstances that A could have given oral evidence of B's statement under the res gestae rule.<sup>26</sup> But A is dead. Should A's statement be admissible as evidence of *x*?
- 8.20 The statement is multiple hearsay, since A had no personal knowledge of the fact stated. The unavailability exception would not apply if, because A had no such knowledge, A would have been unable to give oral evidence of that fact. But in this case A *could* have given such evidence – by virtue not of personal knowledge, but of the res gestae exception. The question is: should it be sufficient for the purposes of the unavailability exception that the declarant could have given oral evidence of the fact stated, *even if that evidence would have been (admissible) hearsay*? Or should

<sup>23</sup> See paras 3.5 – 3.7 above.

<sup>24</sup> For the specimen direction that might be given in the case of first-hand hearsay, see para 3.23 above.

<sup>25</sup> See cls 3(a) and 12(1) of the draft Bill.

<sup>26</sup> Which we recommend should be preserved: see paras 8.115 – 8.121 below.

it be necessary that the declarant could have given oral evidence *without* resort to a hearsay exception?

- 8.21 We have concluded that the answer should depend on *which* hearsay exception would have rendered A's oral evidence admissible – in other words, how B's statement (the statement on which the statement of the unavailable declarant A is based) itself comes to be admissible. If B gives evidence, and B's previous statement is admissible under the rules that we recommend in relation to the previous statements of witnesses,<sup>27</sup> the fact that B is available for cross-examination is in our view sufficient to compensate for the fact that A's statement is multiple hearsay. And if B's statement is admissible on the ground that it was made in a business document,<sup>28</sup> we think that the presumed reliability of such documents is again sufficient to outweigh the drawbacks of multiple hearsay.
- 8.22 If, however, B's statement is admissible only on the basis that B is unavailable to testify, or under one of the common law exceptions (such as *res gestae*) that we recommend should be preserved,<sup>29</sup> we think it would be going too far to permit B's statement to be proved by means of *another* hearsay statement merely because the maker of that other statement is unavailable to testify. Our reasons are essentially those that we have given for excluding multiple hearsay in general from the unavailability exception – namely that with each additional step in the chain, the risk of error or fabrication increases. The question is whether, although the statement in question is multiple hearsay and may be unreliable, this risk is outweighed by the fact that the declarant is unavailable to testify, and that the statement is therefore the only way in which the evidence can be put before the court. We do not believe that this is so: there comes a point where the need to exclude potentially unreliable evidence must come before the desirability of allowing the court to hear the best evidence available.
- 8.23 **We recommend that the unavailability exception should not apply if the declarant's oral evidence of the fact stated would itself have been hearsay, and would have been admissible only under the unavailability exception or under one of the common law exceptions that we recommend should be preserved.**<sup>30</sup> (Recommendation 7)
- 8.24 Some examples may make this recommendation clearer. Suppose that B makes a statement to A; A in turn makes a statement about what B said, but dies before the trial. The death of the declarant is one of the kinds of unavailability that, in general, we recommend should render a statement admissible.<sup>31</sup> Is A's statement therefore admissible under the unavailability exception?

- (1) It may be that B's statement is adduced not as evidence of any matter stated but for some other purpose: the fact that it was made may itself be

<sup>27</sup> See Part X below.

<sup>28</sup> See paras 8.71 – 8.83 below.

<sup>29</sup> See paras 8.114 – 8.132 below.

<sup>30</sup> See cl 10(2) of the draft Bill.

<sup>31</sup> See para 8.35 below.

relevant. In that case, oral evidence by A of what B said would not have been hearsay at all, so A's out-of-court statement is not *multiple* hearsay. It is therefore admissible under the unavailability exception.

- (2) If B's statement is adduced as evidence of a matter stated, and does not fall within any hearsay exception, it is itself inadmissible. It cannot be proved at all, let alone by means of *another* hearsay statement.
- (3) If B gives evidence, and B's statement (though hearsay) is admissible under one of the exceptions that we recommend in respect of the previous statements of witnesses, A's statement (though multiple hearsay) is admissible under the unavailability exception.
- (4) If B's statement (though hearsay) is admissible under the exception for business documents, A's statement (though multiple hearsay) is admissible under the unavailability exception.
- (5) If B's statement is hearsay and is admissible only under the unavailability exception, or one of the common law exceptions (such as *res gestae*) that we recommend should be preserved, or both, A's statement is *not* admissible under the unavailability exception. B's statement must be proved either by evidence which is not hearsay or by hearsay which is admissible otherwise than under the unavailability exception.

8.25 It is not entirely clear whether this recommendation would be more or less strict than the present position.<sup>32</sup> Section 23 of the 1988 Act provides that, where a

<sup>32</sup> The authorities are of limited assistance on this point. In *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220 the House of Lords held inadmissible the evidence of a police officer that the mothers of two witnesses had told him that their sons were afraid to testify. Lord Mustill (with whom their Lordships agreed) said at p 1229D-F:

[I]f the police officer's evidence had been that the two young men had spoken to him directly of their fear, their witness statements would have been potentially admissible ...

In the event, however, the officer gave no such evidence, but merely recounted what the mothers had been told by their sons. Whatever may be the intellectual justification of the exception to the hearsay rule which enables the court to receive first degree hearsay as to state of mind, I feel no doubt that it cannot be stretched to embrace what is essentially a third-hand account of the witness' apprehensions.

But it does not follow that s 23, or its Northern Ireland equivalent, would not apply in a case where everyone in the chain of evidence is unavailable to give oral evidence (other than the witness whose oral evidence of the hearsay statement is in question), because the mothers were apparently available (and indeed were at the court house on the day of the hearing). Lord Mustill did not appear to regard that fact as crucial: his reasoning focuses on the number of removes between the frightened boys and the person in the witness box. But the argument that what the mothers had said to the officer was itself admissible under the equivalent of s 23 would obviously have been much stronger if the mothers had been unavailable, as that provision requires.

Other authorities are similarly inconclusive. In *Lockley and Corah* [1996] Crim LR 113 a transcript of a witness's evidence was held admissible under s 23 (and s 24) although it contained hearsay (namely a confession); but the point was not taken. And in *Castillo* [1996] 1 Cr App R 438 the defence argued that a statement was not admissible under s 23 because it was second-hand hearsay; but, as the Court of Appeal pointed out, it was not in

person is unavailable to testify for any of the reasons there set out, a statement made by that person in a document is admissible “as evidence of any fact of which direct oral evidence by him would be admissible”. It does not expressly provide that the statement is *not* admissible if oral evidence by the declarant would be admissible *hearsay*. But the shoulder note, “First hand hearsay”, suggests that the section was not intended to extend to multiple hearsay in any circumstances; and this would be the literal meaning of the section if, in the phrase “*direct* oral evidence”, the word “direct” were construed in its common sense of “non-hearsay”. We believe that this is the better view. In that case, our recommendation would relax the present law, by permitting multiple hearsay where the statement made by the unavailable declarant is about a statement which is admissible *without* resort to the unavailability exception or a common law exception – for example, where the maker of the latter statement gives evidence, and that statement is admitted to rebut a suggestion of recent fabrication.<sup>33</sup>

- 8.26 If we are wrong in this view, and section 23 can at present be used twice over, or combined with any other hearsay exception, our recommendation would make certain evidence inadmissible which is now admissible – namely where the fact to be proved by the statement admissible under section 23 is the making of another statement which is itself admissible only under section 23 or at common law. But the practical effect of the change would be small. This is because evidence cannot be adduced under section 23 if the court directs otherwise on the ground that it ought not to be admitted in the interests of justice;<sup>34</sup> while, if the court thinks that hearsay evidence *should* be admitted in the interests of justice, our recommendations would enable it to be admitted under the “safety-valve”.<sup>35</sup> Our rule against the cumulative use of the unavailability exception, or its combination with the preserved common law exceptions, means only that multiple hearsay would not become *automatically* admissible in these ways – whether or not the court thinks that its admission is in the interests of justice.

***Reliance on the exception by a party responsible for the declarant’s unavailability***

- 8.27 In deciding whether to permit or exclude the admission of hearsay evidence under sections 25 and 26 of the 1988 Act, the court must take into account all the circumstances which appear to it to be relevant. Where appropriate, such circumstances will obviously include the fact that the person tendering the statement has caused the unavailability of the declarant. Such a discretion would not arise in the case of our unavailability exception, because admissibility is automatic. We therefore provisionally proposed that where the person tendering a hearsay statement had caused the unavailability of the declarant, that statement could not be adduced.<sup>36</sup> In making this proposal, we were following the

fact second-hand hearsay at all, because it concerned the other declarant’s *availability*, not his *statement*. See Professor D J Birch’s commentary at [1996] Crim LR 193.

<sup>33</sup> See paras 10.41 – 10.45 below.

<sup>34</sup> 1988 Act, s 25(1).

<sup>35</sup> See paras 8.133 – 8.149 below.

<sup>36</sup> Para 11.30 of the consultation paper.

recommendation of the Scottish Law Commission in its recent report.<sup>37</sup> As we pointed out, similar provisions are to be found in the Federal Rules of Evidence<sup>38</sup> and the Evidence Code of the Law Reform Commission of Canada.<sup>39</sup>

- 8.28 On consultation, the respondents who dealt with this point were unanimously in favour, but we were warned of two outstanding problems. First, a person should not be regarded as responsible for the fact that the declarant cannot or will not give oral evidence where the unavailability arises out of the alleged offence. For example, where the defendant has in fact killed the victim, but before he died the victim was heard to say that he provoked the defendant so that the defendant is not to blame, the defendant should surely be allowed to rely upon this statement in answer to a charge of murder even though he may strictly speaking be “responsible” for the absence of the victim.
- 8.29 The second problem is that it might be contended that a defendant is “responsible” for the absence of a declarant although the defendant has not done anything to the declarant. For example, a defence declarant may have gone abroad and refused to come back because he is terrified that if he is cross-examined, he may say something (although he does not know what) which might upset or antagonise the defendant, even though he has no grounds for that fear. Professor Sir John Smith helpfully suggested that a person should be regarded as being responsible for the unavailability of a declarant only if he or she *deliberately* prevents the declarant from attending. The crucial point, it seems to us, is that if a party acts with the *intention* of preventing a witness from giving evidence, that party should not be able to rely on the hearsay statement of that witness. If the matter is put like this, the defendant in the previous paragraph would be able to adduce the statement of the dead victim, because although he is responsible for the victim’s unavailability, he did not cause it in order to stop the victim testifying.
- 8.30 **We recommend that a person should not be allowed to adduce a statement under the unavailability exception where the unavailability of the declarant is caused by the person in support of whose case it is sought to give the statement in evidence, or by a person acting on that person’s behalf, in order to prevent the declarant giving oral evidence (whether at all or in connection with the subject matter of the statement).**<sup>40</sup>  
**(Recommendation 8)**

#### THE BURDEN OF PROOF

- 8.31 Recommendation 8 raises the question of where the burden of proof should lie, when one party seeks to adduce a statement on the ground that the declarant is unavailable to give oral evidence and the other party alleges that that unavailability has been brought about by the first party. In the consultation paper we expressed the provisional view that the burden of proving the allegation should fall on the

<sup>37</sup> SLC Report, para 5.63, now implemented in s 259(3) of the 1995 Act.

<sup>38</sup> Rule 804(a).

<sup>39</sup> Law Reform Commission of Canada Report on Evidence (1977) s 29.

<sup>40</sup> See cl 5(9) of the draft Bill.

party making it.<sup>41</sup> This would in effect amount to an exception to the general rule that it is for the party adducing evidence to show that it is admissible. The justification for reversing the burden of proof is that, if the general rule were applied, the party seeking to adduce the evidence would have to prove a negative, namely that he or she was *not* responsible; and we consider this undesirable.

- 8.32 On consultation there was only one dissenter,<sup>42</sup> who thought that to place the burden on the defence when the prosecution was seeking to call hearsay evidence could be open to very considerable abuse. We take that point into consideration; but the defence would need to prove the allegation only on the balance of probabilities. Moreover, if the prosecution were to tender the statement on the basis that the declarant cannot be found, it would be for the prosecution to prove (beyond reasonable doubt) that the declarant had indeed disappeared, as distinct from being kept out of the way.<sup>43</sup> We remain of the view that our provisional approach was correct. **We recommend that, where a party alleges that the party tendering the statement caused the unavailability of the declarant in order to prevent the declarant from giving oral evidence, the burden of proof should rest on the party opposing the admission of the evidence.**<sup>44</sup> (Recommendation 9)

### *Summary*

- 8.33 In summary, the effect of recommendations 4 to 9 is that where a party is unable to adduce direct evidence, that party should be entitled to adduce first-hand hearsay evidence, whether oral or documentary, as evidence of any matter stated of which the declarant's oral evidence would have been admissible (otherwise than by virtue of the unavailability exception or one of the common law exceptions that we recommend should be preserved), provided that

- (1) the declarant is identified to the court's satisfaction;
- (2) the declarant's evidence falls within one of the categories of unavailability that we recommend below;<sup>45</sup> and
- (3) the party seeking to adduce the evidence is not shown to have caused the unavailability of the declarant in order to prevent the declarant from testifying.

### **What kinds of unavailability should make the declarant's statement admissible?**

- 8.34 We now turn to examine a number of different reasons why the declarant might be unavailable to give oral evidence. In each case, we consider whether the reason for

<sup>41</sup> Para 11.46 of the consultation paper.

<sup>42</sup> Jowitt J.

<sup>43</sup> See para 8.42 below.

<sup>44</sup> See cl 5(9) of the draft Bill ("... if it is shown that ...").

<sup>45</sup> See paras 8.34 – 8.43 below.



the declarant's unavailability is such as to justify making his or her first-hand hearsay statement automatically admissible.

### ***Death***

- 8.35 In the consultation paper, we provisionally proposed that a statement by a deceased person, whether oral or written, should be admissible in any criminal proceedings.<sup>46</sup> This proposal was accepted by almost all respondents. **We recommend that the unavailability exception should apply where the declarant is dead.**<sup>47</sup> (Recommendation 10)

### ***Illness***

- 8.36 Our provisional proposal was to follow the wording in section 23(2)(a) of the 1988 Act, which permits certain types of documentary hearsay to be admitted (subject to the exercise of discretion) where the declarant is unfit to give evidence "by reason of his bodily or mental condition".<sup>48</sup> On consultation this proposal was also accepted by almost all respondents. **We recommend that the unavailability exception should apply where the declarant is unfit to be a witness because of his or her bodily or mental condition.**<sup>49</sup> (Recommendation 11)

### ***Absence abroad***

- 8.37 The only people who can be compelled to attend court to give evidence are people within the United Kingdom.<sup>50</sup> Under section 23(2)(b) of the 1988 Act, a statement made by a person in a document is prima facie admissible if the person is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance.
- 8.38 Our provisional approach was that a party seeking to rely on a person's evidence should make efforts to ensure that that person attends: it is only when those efforts fail that a statement by that person can be adduced under the exception. Our provisional view was that the best test would be one of reasonable practicability.<sup>51</sup> We explained that a test of practicability alone would be unduly onerous: for example, it might be practicable for a foreign declarant to give evidence by live

<sup>46</sup> Para 11.13 of the consultation paper. The same recommendation was made at paras 5.34 – 5.35 of the SLC Report and implemented by the 1995 Act, s 259(2)(a).

<sup>47</sup> See cl 5(2) of the draft Bill.

<sup>48</sup> See para 11.14 of the consultation paper.

<sup>49</sup> See cl 5(3) of the draft Bill. This is similar to the 1995 Act, s 259(2)(a), following the recommendation in the SLC Report at paras 5.36 – 5.38.

<sup>50</sup> Writ of Subpoena Act 1805, s 3 and Criminal Procedure (Attendance of Witnesses) Act 1965, Sched 2, Part I. Further, by virtue of s 29(1A) of the Criminal Justice Act 1961, a person detained in a prison, young offender institution, remand centre or detention centre in the Channel Islands or the Isle of Man may be compelled to appear before a court in the United Kingdom to give evidence as long as the Secretary of State is satisfied that the attendance of that person is desirable in the interests of justice, or for the purposes of any public enquiry.

<sup>51</sup> Para 11.19 of the consultation paper.

television link, but the expense might not be justified if the evidence was very short and on a minor issue.

- 8.39 We believe that the merit of a test of *reasonable* practicability is that it would require the party to make reasonable efforts to bring the person concerned to court,<sup>52</sup> but would also enable the court to take into account all the circumstances of the case.<sup>53</sup> The sort of factors that might be taken into account would include the expense of adducing the evidence by alternative procedures,<sup>54</sup> the seriousness of the case, and the importance of the information in the statement. Another factor to be considered is whether it would be reasonably practicable to secure the evidence for trial at a later date, if that possibility is raised by either party.<sup>55</sup> On consultation, the vast majority of respondents who dealt with the point agreed with the test of reasonable practicability. **We recommend that the unavailability exception should apply where the declarant is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance.**<sup>56</sup> (Recommendation 12)

### *Disappearance*

- 8.40 Under section 23(2)(c) of the 1988 Act, a statement made by a person in a document is prima facie admissible if all reasonable steps have been taken to find the person but he or she cannot be found. Our provisional view was that the same approach should be adopted for the purpose of our unavailability exception, and we proposed that a statement should be automatically admissible if the declarant cannot be found.

- 8.41 On consultation, a large majority of those who responded on this point favoured our approach. David Ormerod,<sup>57</sup> however, argued that our proposal

raises difficulties in conjunction with the safeguard against a party adducing evidence when that party is responsible for the absence of the declarant. If the missing witness cannot be traced, how are we to know why he is absent, let alone whether a particular party had something to do with the absence? The Commission's objective is commendable, but the formula is unworkable.<sup>58</sup>

- 8.42 Although we have had to rework our proposal that a party who is responsible for the unavailability of the declarant should not be able to rely on the declarant's statement,<sup>59</sup> we do not agree that it renders the present proposal unworkable.<sup>60</sup> Our

<sup>52</sup> *Gonzales de Arango* (1991) 96 Cr App R 299, 403–404, *per* McCowan LJ.

<sup>53</sup> *Hurst* [1995] 1 Cr App R 82, 91–93, *per* Beldam LJ.

<sup>54</sup> *Maloney* [1994] Crim LR 525.

<sup>55</sup> See *French and Gowher* (1993) 97 Cr App R 421.

<sup>56</sup> See cl 5(4) of the draft Bill.

<sup>57</sup> Lecturer in Law at the University of Nottingham.

<sup>58</sup> D Ormerod, "The Hearsay Exceptions" [1996] Crim LR 16, 20.

<sup>59</sup> See paras 8.27 – 8.30 above.

<sup>60</sup> The wording of the 1995 Act, s 259(2)(c), has the same effect.

recommendation 9 is that, where it is alleged that the party adducing a statement is responsible for the unavailability of the declarant, the burden of proving that allegation should lie on the party making it. But this would apply only once it had been shown that the declarant *was* unavailable for one of the recognised reasons. If a party tenders a statement on the ground that all reasonable steps have been taken to find the declarant, but without success, that party must prove, to the appropriate standard of proof, that all reasonable steps *have* been taken. If it is suggested that, on the contrary, that party has taken steps to ensure that the declarant does *not* come to court, that party would have to disprove that suggestion in order to show that he or she had taken reasonable steps to produce the declarant. It is true that in this situation there may be no room for the operation of recommendation 9, but only because there is no need for it. This particular condition of admissibility is worded in such a way that recommendation 9 is unlikely to have any effect.

- 8.43 In the consultation paper, we invited views on whether the legislation should list the factors to be taken into account in deciding whether all reasonably practicable steps have been taken.<sup>61</sup> Only three respondents gave a view. We are persuaded that it would be unrealistic to list the factors relevant to reasonable practicability, and we do not recommend that this should be done. **We recommend that the unavailability exception should apply where the declarant cannot be found, although such steps as it is reasonably practicable to take to find him or her have been taken.**<sup>62</sup> (Recommendation 13)

#### ***Refusal to give evidence***

- 8.44 In the consultation paper we considered the position of the witness who attends court but (i) refuses to be sworn, or (ii) is sworn but refuses to testify or continue testifying, or (iii) is sworn but claims the privilege against self-incrimination.<sup>63</sup> We took the provisional view that the effect of a refusal was to make the evidence unavailable to the court, and that the hearsay statement would be better than no evidence at all. We therefore proposed that a further category of automatic admissibility should be where a witness refuses to give (or to continue giving) evidence although physically present in court. (If the refusal was deliberately caused by the party calling the witness, the hearsay statement would not be admissible.)<sup>64</sup>
- 8.45 On consultation a large number of those who dealt with the point were in favour of our provisional proposal; but a number of queries were raised, and some respondents thought that to admit a statement without inquiring into the reasons for the refusal made it too easy for fabricated statements to be admitted where the witness simply did not want to be cross-examined. We are persuaded that the risk would indeed be too great. Some of the cases we had in mind would be covered by

<sup>61</sup> Para 11.19 of the consultation paper.

<sup>62</sup> See cl 5(5) of the draft Bill.

<sup>63</sup> At paras 11.22 – 11.27 of the consultation paper.

<sup>64</sup> See paras 11.30 – 11.33 of the consultation paper. See now recommendation 8 at para 8.30 above.

our revised recommendation of an exception for witnesses who are in fear,<sup>65</sup> and we believe this provisional proposal is better omitted.

***Statements taken pursuant to letters of request***

8.46 The Serious Fraud Office proposed another category of evidence as an automatic exception to the hearsay rule, namely, where the evidence of the declarant was taken pursuant to a letter of request issued under section 3 of the Criminal Justice (International Co-operation) Act 1990.<sup>66</sup> Under this provision a judge, sheriff or magistrate can issue a letter of request for assistance in obtaining evidence outside the United Kingdom. Where such evidence is obtained, section 25 of the 1988 Act gives the court a discretion whether to admit it, and requires the court to have regard not only to the general matters set out in that section but also to

- (1) whether it was possible to challenge the statement by questioning the person who made it; and
- (2) (if proceedings had been instituted) whether the local law allowed the parties to the proceedings to be legally represented when the evidence was being taken.<sup>67</sup>

8.47 The position would change radically if our recommendations for categories of automatic admissibility were implemented, as many of the problems arising in respect of evidence taken under the 1990 Act would then disappear. The statement or evidence of a person who has complied with a letter of request would be automatically admissible if that person is dead, is too ill to attend court, is outside the United Kingdom and cannot reasonably be brought to court, or cannot be found despite reasonable steps being taken to find him or her. It would also be admissible, subject to the leave of the court, if that person does not attend through fear.<sup>68</sup> We are not aware of any difficulties in adducing evidence under the 1990 Act which would survive the implementation of these recommendations. Accordingly, we make no recommendation for a specific category of admissibility for statements obtained under letters of request.

**FEAR**

8.48 We were repeatedly told that a major problem in the administration of criminal justice today is that many witnesses are too frightened to give evidence.<sup>69</sup> As a result of this difficulty, prosecutions cannot be brought, or have to be aborted, because central evidence cannot be adduced. Proving that intimidation has taken place can be extremely difficult, as the consequence of successful intimidation is often that the witness disappears without any clear reason. The problem is not limited to prosecution witnesses: defendants sometimes have great difficulty in

<sup>65</sup> See paras 8.48 – 8.70 below.

<sup>66</sup> This provision is set out in Appendix B below.

<sup>67</sup> Criminal Justice (International Co-operation) Act 1990, s 3(8).

<sup>68</sup> See paras 8.48 – 8.70 below.

<sup>69</sup> See, eg, *The Times* 16 January 1997, p 8. The issue prompted Irene Adams MP's Witness Protection Bill. It fell at Second Reading.

ensuring that their witnesses attend at court, because the witnesses are fearful of antagonising the police or others involved or interested in the prosecution.<sup>70</sup>

### **The present law**

8.49 Under section 23(3) of the 1988 Act, a statement contained in a document is admissible (with the leave of the court)<sup>71</sup> if it was made to a police officer, or some other person charged with the duty of investigating offences or charging offenders, by a person who “does not give evidence through fear or because he is kept out of the way”. As *Blackstone* points out,<sup>72</sup> these provisions raise “difficult questions of interpretation”.

8.50 One problem with the present law is that it is uncertain whether it is limited to fear of injury by the person against whom the proceedings are being taken, or that person’s associates (for example, the informer who fears reprisals from a gang); or whether it extends to fear of (for example) injury to another, or of financial loss, or of being publicly identified by the media in connection with some other matter; or whether it includes the witness who is too traumatised by the offence itself to be able to face the ordeal of appearing in court. It would certainly cover the first kind of fear because, as Watkins LJ explained:

It will be sufficient that the court on the evidence is sure that the witness is in fear as a consequence of the commission of the material offence or of something said or done subsequently in relation to that offence and the possibility of the witness testifying as to it.<sup>73</sup>

It is also clear that it is not necessary to prove a connection between the offence and the fear,<sup>74</sup> but it is undecided whether the section covers a more general fear of going to court.

8.51 The Royal Commission was troubled about witnesses who “may find the publicity, or threat of it, surrounding their appearance in the witness box a powerful disincentive to giving evidence”.<sup>75</sup> After suggesting that witnesses do not have to disclose their addresses, the Commission went on to point out:

We also believe that greater use could be made of section 23 of the Criminal Justice Act 1988. This section allows the court to give leave for the statement of a witness to be read out where the witness is afraid to give oral evidence. Section 26 provides that the court should not give leave unless it is in the interests of justice to admit the statement. It is rare for section 23 to be used where the intimidated witness is the main witness, as the defendant would not be able to cross-examine. We would, however, like to see more use made of the section for other witnesses. One difficulty is that the CPS have no way of knowing in

<sup>70</sup> See the comments of the Court of Appeal in *Martin* [1996] Crim LR 589.

<sup>71</sup> See s 26 of the 1988 Act, which is set out in Appendix B.

<sup>72</sup> Para F16.9.

<sup>73</sup> *R v Acton JJ, ex p McMullen; R v Tower Bridge JJ, ex p Lawlor* (1991) 92 Cr App R 98, 105–6.

<sup>74</sup> *Martin* [1996] Crim LR 589.

<sup>75</sup> Report of the Royal Commission, ch 8, para 44.

advance whether the statement will be admitted or not. We therefore suggest that this is one of the matters which ought to be resolved prior to trial in accordance with the procedures which we have proposed in chapter seven.<sup>76</sup>

- 8.52 It has been held that the statutory words “does not give oral evidence through fear” include not only a witness who fails to attend, but also one who comes to court but refuses to be sworn, as well as one who takes the oath but, through fear, is unable to complete his or her evidence.<sup>77</sup> Until recently it was thought that a witness cannot be said to have failed to give evidence where he or she has given evidence “of significant relevance”, but only where “in no real sense did the evidence ... placed before the court go to decide the issues of fact in the case”.<sup>78</sup> However, this view has recently been rejected by the Court of Appeal.<sup>79</sup>
- 8.53 Yet another complication is that if a witness is frightened and refuses to give evidence, or refuses to testify while in the witness box, section 23 will apparently cover the situation; but a witness who is intimidated into telling a *false* story will be deemed hostile.<sup>80</sup> A hostile witness is one who does not appear to want to tell the truth.<sup>81</sup> A previous statement inconsistent with the testimony given from the witness box may be put to a hostile witness and proved, but it will go only to the witness’s credit, and will not be evidence of its truth. By contrast, where a statement is admitted under section 23 of the 1988 Act, it *will* be evidence of its truth. Thus, whether or not fact-finders are allowed to have regard to the contents of the previous statement on the issue of guilt may depend on how the individual reacts to intimidation.<sup>82</sup> Our provisional view was that this is not satisfactory.<sup>83</sup>
- 8.54 Finally, the exception applies only to statements made to the police or others charged with the duty of investigating offences or charging offenders. This presents problems for defendants whose witnesses are frightened, because they are unlikely

<sup>76</sup> *Ibid.*

<sup>77</sup> *R v Ashford JJ, ex p Hilden* [1993] QB 555.

<sup>78</sup> *Ibid*, per McCowan LJ at p 560; but the other member of the court, Popplewell J, held that s 23 applies irrespective of the point at which the witness is prevented by fear from giving further oral evidence.

<sup>79</sup> *Waters* (1997) 161 JP 249. The victim of a serious assault gave some evidence at trial, but professed to be unable to recall his attackers, although he had previously identified them in a witness statement. The court preferred the approach of Popplewell J (see n 78 above): “what matters is whether or not there is, at the time when the section is invoked, any relevant evidence which the witness is still expected to give, because if there is such evidence, then it can properly be said that the witness is in the position where he does not give oral evidence.”

<sup>80</sup> Although *Thompson* (1977) 64 Cr App R 96 indicates that a witness who refused to answer questions could be treated as hostile under the common law, the better view probably is that s 3 of the Criminal Procedure Act 1865 does not apply, and that s 23 of the 1988 Act now does.

<sup>81</sup> *Prefas* (1988) 86 Cr App R 111.

<sup>82</sup> As was noted in *Waters* (1997) 161 JP 249, 251F–G.

<sup>83</sup> We recommend at para 10.92 below that a witness’s previous inconsistent statement should be admissible as evidence of its contents, and not just as to credit. If this recommendation is adopted then this anomaly will disappear.

to have made statements to a police officer which could be admitted under section 23(3).

- 8.55 We regard each of these criticisms as being cogent. The uncertainty under the present law must discourage judges and magistrates from permitting the evidence of frightened witnesses to be adduced, and parties from seeking to adduce it. Bearing in mind the magnitude and significance of the problem of frightened witnesses, we believe that changes are called for.
- 8.56 In the consultation paper we expressed the provisional view that it was the fact that the person cannot be found (or does not attend after reasonable steps have been taken to secure his or her attendance) that should determine whether his or her evidence is admissible, rather than the reason for his or her non-appearance.<sup>84</sup> We did not therefore propose any separate exception for a witness who was in fear.

**Should there be a specific exception for the statements of witnesses who are afraid to testify?**

- 8.57 On consultation, we were repeatedly told that we should ensure that the courts were not deprived of the evidence of genuinely frightened witnesses, and that there should be a specific category for it. At the time of the consultation paper we had thought that the exceptions we proposed would cover all situations. If the witness could not be found, then the evidence would be automatically admissible; if the witness could be traced but did not want to testify, a summons or subpoena could be obtained, and, if those were ineffective, a warrant could be executed. In the light of the responses we now take the view that this would not be a practical solution, and that there should be an exception for witnesses who, through fear, do not give oral evidence.

**Should the exception be automatic?**

- 8.58 Our starting point is to favour automatic admissibility for all first-hand hearsay where the declarant is identifiable but unavailable; but the issue of frightened witnesses is unique. Unlike death or illness, fear is a state of mind, and it can be difficult to tell whether a witness is genuinely frightened or merely reluctant. We were repeatedly told, especially at Judicial Studies Board seminars attended by the Commissioner with special responsibility for criminal law,<sup>85</sup> that there is a very genuine risk that, if the statements of frightened witnesses were automatically admissible, prospective witnesses could give statements to the police in the knowledge that they could at a later stage falsely claim to be frightened, with the result that they could avoid having to go to court and be cross-examined. The general thrust of these responses was therefore that it would be undesirable to have an *automatic* exception to the hearsay rule for frightened witnesses. We agree, and believe that the leave of the court should continue to be required.

<sup>84</sup> Para 11.21 of the consultation paper.

<sup>85</sup> See para 1.23 above.

### **The exercise of the court's discretion**

- 8.59 In view of this conclusion, we must consider how the court should decide whether to give leave. We believe that a statement should readily be admitted where the witness is in fear, provided that the interests of justice do not dictate otherwise. In deciding whether the admission of such a statement is in the interests of justice, the court should have regard to what was said in the statement; to any risk of unfairness, whether to the defendant, to a co-defendant or to the prosecution; where appropriate, to the fact that the evidence could be received otherwise than from the witness in person in the courtroom;<sup>86</sup> and to any other relevant circumstances.
- 8.60 Any part played by a party to the proceedings in intimidating the witness would obviously be a factor taken into account by the court in the exercise of its discretion. If, for example, a prosecution witness has been intimidated by the accused, or persons acting on behalf of the accused, it is likely that the statement would be admitted. Conversely, if the witness's fear has no connection with the accused, it may not be fair to allow the statement to be admitted without the accused having a chance to cross-examine.
- 8.61 If it transpires that it is the party seeking to *adduce* the statement that has intimidated the witness, the question of discretion may not arise at all. This is because we have recommended that a party who deliberately ensures that a witness is not available to testify should not be able to rely on that witness's statement.<sup>87</sup> Similarly, if the party seeking to adduce the statement of a *frightened* witness were shown<sup>88</sup> to have caused the witness's fear in order to deter him or her from giving evidence, the exception for frightened witnesses would not apply.
- 8.62 Different people fear different things; and our view is that a court should look at matters through the eyes of the witness, bearing in mind his or her personal weaknesses, and assess whether that witness's failure to testify is reasonable in all

<sup>86</sup> Eg, a video-recording of the witness's testimony may be available; or he or she could testify from behind a screen, or via a television link under s 32 of the 1988 Act. We suggest that consideration should be given to extending these latter powers. At present, they are confined to offences against the person, cruelty to children and sexual offences, but it is difficult to see why this should be so. The Recorder of London advocated the wider use of television links. Our view is that evidence by television link is clearly better than hearsay, and we believe the matter should be looked into further. We considered making some suggestions for reform but we have not consulted fully on this issue as it does not involve the use of hearsay, and so we do not think it appropriate to this project. It is no doubt the sort of issue that will be considered by the inter-departmental group (consisting of officials from the Home Office, the Lord Chancellor's Department, the Legal Secretariat to the Law Officers, the Crown Prosecution Service, the Department of Health and the Scottish Office) which, the Home Office announced on 23 January 1997, has been asked to review court procedures for people with learning disabilities.

<sup>87</sup> See paras 8.27 – 8.30 above.

<sup>88</sup> The burden of proof would be on the party opposing the admission of the statement: see paras 8.31 – 8.32 above.



the circumstances.<sup>89</sup> The characteristics and circumstances of the witness clearly fall within the phrase “other relevant circumstances”.

### **What kind of fear should suffice?**

- 8.63 Section 23(3) does not specify exactly what the witness must be afraid of: it is left to the courts to determine whether fear of (for example) injury to another, or of financial loss, justifies the admission of the statement. We considered recommending that the circumstances in which fear justifies the reception of the statement should be set out in the legislation; but we concluded that it would probably be undesirable to do this, for two reasons. First, if the rules are too precise it makes it easier for those who seek to intimidate witnesses to work out how to do so without the statement being admitted. Secondly, we do not believe that it is possible to cover all the circumstances that may arise. The view that was implicit in the responses received on consultation, and that of those attending the February seminar and the two Judicial Studies Board seminars attended by one of our Commissioners, was that this branch of the law does not permit rigid categorisation of the circumstances in which a prospective witness should be able to avoid giving evidence because of fear.
- 8.64 By the same token, however, we do not believe that it is enough for the legislation simply to refer to “fear” without even a partial definition. This is because, in the absence of any definition, it must be open to a court to hold that a particular kind of fear (for example, fear of injury to another, or of financial loss) is not what Parliament meant by “fear”, and that the discretion to admit the statement is therefore not available. We believe it should be made clear that the discretion is a wide one. Indeed, we find it hard to envisage a situation where a court would be minded to admit the statement if it had the power to do so, but where it ought to be precluded from doing so because the particular kind of fear from which the witness was suffering was not the kind that ought to suffice.
- 8.65 The draft Bill therefore provides that, for the purposes of the exception for persons who do not give evidence through fear, “fear” must be widely construed.<sup>90</sup> For example, it is expressly provided that fear of the death or injury of another, or of financial loss, will suffice.
- 8.66 Conversely, the draft Bill does not provide that any particular kind of fear will *not* suffice. We considered the possibility of a provision to the effect that the fear of prosecution for perjury is not enough. The exception for a witness who is “in fear” is designed to facilitate the reception of evidence from intimidated witnesses and from those who are just scared of the process of giving evidence; it would be quite wrong for it to be used where the witness was only afraid of being prosecuted. But we decided that it was unnecessary to make express provision for this situation, since no court would think it “in the interests of justice” to allow a witness’s statement to be read on this basis.

<sup>89</sup> A similar approach can be found in the case of the defence of self-defence, where fact-finders have to assess whether the threatened individual acted reasonably, taking into account his or her personal circumstances.

<sup>90</sup> Clause 5(7).

### **Statements not made to the police**

- 8.67 Under the present law, the statement of a frightened witness can be adduced only if “the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders”.<sup>91</sup> We do not see why the fact that the statement was not made to a police officer should necessarily make it inadmissible. This condition can have the effect of putting the defence at a disadvantage, and we believe that it is unnecessary.

### **Witnesses who begin to testify but are afraid to continue**

- 8.68 Despite the recent decision referred to at paragraph 8.52 above, it is still not entirely clear whether a witness who has given a substantial part of his or her evidence before becoming frightened can be said to have failed to give oral evidence. If not, it seems that a previous statement by the witness does not become admissible merely because he or she becomes too afraid to continue. We see no reason why the exception should not apply irrespective of how much evidence the witness has already given; and this view was widely supported on consultation.

- 8.69 **We recommend that a statement made by a person who through fear does not give (or does not continue to give) oral evidence in the proceedings, at all or in connection with the subject matter of the statement, should be admissible with the leave of the court.**<sup>92</sup> (Recommendation 14)

- 8.70 We believe that the regime we recommend would in several ways make it easier to adduce the evidence of frightened witnesses. First, it makes it clear that “fear” is to be widely construed, and so the courts might be more sympathetic in assessing whether a witness is genuinely frightened. Second, it would make it clear beyond doubt that the exception extends not only to those who, through fear, do not come to court at all, but also to those who become fearful in the course of their evidence. Third, it would remove the restriction that a statement must have been made to a police officer in order to be admissible. Finally, it would remove the anomaly that, if the witness turns *hostile* through fear, the previous statement cannot be evidence of its contents.<sup>93</sup>

### **BUSINESS DOCUMENTS**

- 8.71 We have already referred<sup>94</sup> to the provisions of section 24 of the 1988 Act,<sup>95</sup> which permit the admission on a discretionary basis of “business etc documents”. There has been much enthusiasm for these powers, and it was not suggested to us that they should be cut down. **We recommend that there should continue to be an**

<sup>91</sup> 1988 Act, s 23(3)(a).

<sup>92</sup> See cl 5(6)–(8) of the draft Bill.

<sup>93</sup> See recommendation 40, paras 10.92 and 10.99 – 10.100 below.

<sup>94</sup> See paras 2.15 – 2.17 above.

<sup>95</sup> See Appendix B below.

**exception for statements contained in business documents.<sup>96</sup>**  
**(Recommendation 15)**

**Automatic admissibility**

- 8.72 A critical feature of section 24 is that the court retains a discretion whether to admit evidence falling within the ambit of the section. In the consultation paper we considered the advantages and disadvantages of judicial discretion<sup>97</sup> and concluded that it would be preferable to have categories of automatic admissibility with very limited scope for the exercise of discretion.<sup>98</sup> More specifically, we provisionally proposed that the discretionary provisions in sections 25 and 26 of the 1988 Act should be repealed when section 24 was re-enacted.<sup>99</sup>
- 8.73 In reaching that provisional conclusion we were very much influenced by the greater certainty that would follow from this approach. Considerable savings would result in court time currently spent in legal argument. We pointed out that the court would still retain a discretion to exclude prosecution evidence, either at common law (on the ground that its prejudicial effect exceeds its probative value) or by statute.<sup>100</sup> All the respondents who addressed this conclusion agreed with it, and we did not receive any cogent arguments that injustice would result.

***A restriction on automatic admissibility***

- 8.74 However, it became clear to us that, although business documents can be assumed in the main to be reliable, this assumption may not be true for each and every document; and, where it is apparent that a particular document is not or may not be reliable, it would be undesirable for it to be *automatically* admissible as a business document. For example, a letter would qualify as a business document as soon as it was posted, but there may be reason in the particular case to suspect that the contents are not to be relied upon. Or consider the case where a neighbour tells a social worker that she heard the couple next door beating their children on the previous night. The social worker makes a note in the official file. That note is a business document and automatically admissible; but if there were a provision along the suggested lines, the court could take into account information which led it to suspect that the account was at least exaggerated, and direct that it was not a business document.
- 8.75 Thus, where a statement is tendered in evidence and the court has cause to doubt its reliability, the court needs to be given an additional power to direct that the statement shall not be admissible as a business document. The court would take into account the purpose for which the statement is tendered,<sup>101</sup> the contents of

<sup>96</sup> See cl 4 of the draft Bill.

<sup>97</sup> Paras 9.11 – 9.18 of the consultation paper.

<sup>98</sup> Para 9.25 of the consultation paper.

<sup>99</sup> Para 11.59(c) of the consultation paper.

<sup>100</sup> For further details of these discretions see paras 9.7 – 9.9 of the consultation paper.

<sup>101</sup> There may be things about the document (such as the date) which are known to be unreliable, but which are not material to the use which the party wants to make of the statement.

the statement, the source of the information, and the way in which or the circumstances in which the information was supplied or received or the document was created or received. Where there is no particular reason to doubt the reliability of the statement, this power would not be available.

- 8.76 The party opposing the admission of the evidence would make a representation to the court, based on facts to which it could point, but without having to call evidence, and invite the court to consider whether a direction should be given that the document in question is not to be admitted as a business document. If it were necessary for the party tendering the document to call evidence to prove that the document was reliable, a voir dire would be held, in the same way as if that party had to call evidence to prove that the document was received in the course of a business.
- 8.77 **We recommend that statements falling within the business documents exception should be automatically admissible, but that the court should have power to direct that a statement is not admissible as a business document if it is satisfied that the statement’s reliability is doubtful.<sup>102</sup> (Recommendation 16)**

#### **The wording of the exception**

- 8.78 Where the document was not prepared with an eye to criminal proceedings<sup>103</sup> it is admissible under section 24, and subject only to the discretion and leave requirements of sections 25 and 26. If it was prepared with criminal proceedings in mind, however, section 24(4) provides that it is admissible only if the maker of the statement is unavailable,<sup>104</sup> does not give oral evidence through fear or because he or she has been kept out of the way,<sup>105</sup> or “cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement”.<sup>106</sup>
- 8.79 As we pointed out in the consultation paper,<sup>107</sup> the present wording of section 24(1)(ii) means that when one person supplies the information and another records it, the “maker of the statement” – the one who (where the statement was prepared for the purpose of criminal proceedings or a criminal investigation) must be unavailable or unable to remember – has been defined as the person who did

<sup>102</sup> See cl 4(6), (7) of the draft Bill.

<sup>103</sup> That is, for the purposes of pending or contemplated criminal proceedings or of a criminal investigation: s 24(4)(a) and (b).

<sup>104</sup> He is dead, is unfit to attend, is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance, or cannot be found, despite all reasonable steps having been taken to find him or her: s 23(2).

<sup>105</sup> And the statement was made to a police officer or some other officer charged with the duty of investigating offences: s 23(3).

<sup>106</sup> Section 24(4)(b)(iii).

<sup>107</sup> See paras 7.26 – 7.29 of the consultation paper.

the recording, not the person who supplied the information.<sup>108</sup> Thus, where an employee of a credit card company records a report of a lost or stolen card, the maker of the statement is the employee, not the card-owner who reports the loss.<sup>109</sup>

8.80 It follows that, where an oral statement is made by one person to another, who records it in the course of business for the purpose of criminal proceedings or a criminal investigation, the record is admissible if the person recording it cannot remember the matters stated – even if the person who made the oral statement can. Thus in *Field*<sup>110</sup> the Court of Appeal held that the section enabled the court to receive evidence of a statement which a police officer had taken from a young child, as the “maker” was the officer, not the child. The court thought the point was difficult, but held that the officer

was making a statement which represented her recollection of her conversation with the child. It follows that for the purposes of the section she is the maker of the statement.

It was therefore the officer’s recollection that mattered, not the child’s.

8.81 This appears to be a drafting oversight and cannot have been the intention of Parliament. The basis of section 24 is that persons who record information in the course of a trade, business, profession or other occupation can normally be assumed to have recorded that information accurately; the cross-examination of such persons is unlikely to be particularly helpful because all they will say, if they can recall the incident at all, is that they recorded what they were told. In contrast to this, the supplier of the information here is a person of particular importance, as the fact-finders would normally have to gauge the accuracy of his or her evidence (for example, by how well he or she stood up to cross-examination).

8.82 We therefore conclude that the person who (where the statement was prepared for the purpose of criminal proceedings or a criminal investigation) must be unavailable, or unable to remember the matters stated, should be the *supplier of the information*. We are fortified in that conclusion by reference to section 68 of PACE, which adopted a similar approach.

8.83 **We recommend that, where a business document contains a statement which was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, and the information contained in the statement was supplied by another person, the statement should be admissible only if that person is unavailable to give oral**

<sup>108</sup> This is because s 24(1)(ii), in describing the kind of document that falls within the section, stipulates that “the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with”.

<sup>109</sup> See *Bedi* (1992) 95 Cr App R 21.

<sup>110</sup> (1992) 97 Cr App R 357, 362; see also *Carrington* [1994] Crim LR 438, of which the facts are given at para 4.18, n 34 above.

**evidence or cannot reasonably be expected to have any recollection of the matters dealt with in the statement.**<sup>111</sup> (Recommendation 17)

#### **CONFESSIONS, MIXED STATEMENTS AND DENIALS**

8.84 The defendant's confession was an ancient exception to the hearsay rule. It was amended and codified by section 76(1) of PACE, which provides:

In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

8.85 A confession which is prima facie admissible under section 76(1) may be inadmissible as a result of section 76(2), or the common law discretion, or the discretion to exclude evidence adduced by the prosecution pursuant to section 78(1).<sup>112</sup>

8.86 In theory, the only out-of-court statements by a defendant that are admissible as evidence of the truth of their contents are those that incriminate the defendant making them.<sup>113</sup> Purely "self-serving statements", such as denials in the police station, are not admissible as evidence of innocence. In the case of a "mixed statement" (one which is partly incriminating and partly self-serving), the whole statement is regarded as evidence in the case, but the incriminating parts may carry more weight than the self-serving parts, and a judge is entitled to point this out.<sup>114</sup>

8.87 A mixed statement has recently been defined as one which contains not only denials but also "an admission of facts which are significant to any issue in the case, meaning those which are capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt".<sup>115</sup> It is not every insignificant admission of fact, however, that turns an exculpatory statement into a mixed one. The court went on to say that admissions merely of what was obvious, admissions which the appellant could hardly fail to make, and admissions made in the course of what is essentially an exculpatory statement do not have this effect.

8.88 In practice, the court is almost always told what the defendant said on arrest and on being charged, even if it was "purely self-serving", in which case it will be

<sup>111</sup> See cl 4(5) of the draft Bill, which provides that the person who must be unavailable to testify or unable to remember is the "relevant person", who for the purposes of cl 4 is defined by cl 4(2)(b) as the person who supplied the information contained in the statement.

<sup>112</sup> The full text of ss 76 and 78(1) is set out at Appendix B.

<sup>113</sup> An exculpatory account is obviously not being put in as evidence of the truth of its contents by the prosecution and therefore is not strictly speaking hearsay when adduced by the Crown: see *Mawaz Khan* [1967] 1 AC 454.

<sup>114</sup> *Sharp* [1988] 1 WLR 7, affirming *Duncan* (1981) 73 Cr App R 359.

<sup>115</sup> *Garrod*, October 18 1996, CA No 93/6450/Z2.

evidence of the reaction of the accused when first taxed with the incriminating facts.<sup>116</sup>

- 8.89 A related common law rule is that the accused's response on discovery of incriminating articles in his or her possession is admissible, if he or she testifies to the same effect, as evidence of consistency. It has been suggested that this is on the principle that the accused may give a plausible explanation as to why the goods are in his or her possession, which it would be unfair to exclude.<sup>117</sup>

### **Our provisional proposal and the response on consultation**

- 8.90 In the consultation paper we proposed that confessions should continue to be admissible against their makers, subject to section 76 of PACE and the discretions at common law and under section 78(1) of PACE to exclude prosecution evidence. All the responses to this proposal were in favour of it.<sup>118</sup>
- 8.91 In Part XIII of the consultation paper, which dealt with previous statements by testifying witnesses, we proposed, in line with the CLRC position, that a testifying defendant's previous statement on accusation should be admissible as evidence of its truth, save for prepared self-serving statements.<sup>119</sup> (We rather misleadingly described this as "preserving the present position". In fact, the difference from the present position would be that under our proposal the fact-finders could consider the out-of-court account as evidence on the issues, and not merely as "evidence of reaction".) We note that *Cross and Tapper* recommends the abolition of this exception to the rule against previous consistent statements.<sup>120</sup> The CLRC proposed making all out-of-court statements by testifying witnesses admissible.<sup>121</sup>
- 8.92 Our proposal was supported by a large majority of those who commented. Those who did not support it were either concerned about the position of a co-accused, or objected generally to the idea of a statement being admitted as evidence of the truth of its contents. Even those in favour of our proposal were, however, unable to point to defects in the current practice. On further reflection, we experienced considerable difficulties in devising an alternative scheme which works fairly and sensibly and covers both the case where the defendant testifies and the case where he or she does not. **We recommend that the current law be preserved in respect of admissions, confessions, mixed statements, and evidence of reaction.**<sup>122</sup> (Recommendation 18)

### ***Confessions and co-defendants***

- 8.93 At the time of publication of the consultation paper, the authorities were in conflict on the admissibility of the confession of an accused at the behest of a co-

<sup>116</sup> *Storey* (1968) 52 Cr App R 334, 338, *per* Widgery LJ.

<sup>117</sup> See R N Gooderson, "Previous Consistent Statements" [1968] CLJ 64, 70-74.

<sup>118</sup> Para 11.58 of the consultation paper.

<sup>119</sup> Paras 13.42 - 13.55 of the consultation paper.

<sup>120</sup> *Cross and Tapper*, p 307.

<sup>121</sup> CLRC, Evidence Report, para 236(i).

<sup>122</sup> See cl 6(6) of the draft Bill.

accused.<sup>123</sup> The Court of Appeal has since held that, where there is an issue as between two accused as to whether a crime was committed by one or the other or by both, an admission by one defendant may be adduced by the other even where that admission could not be adduced on behalf of the prosecution, provided it was voluntary.<sup>124</sup>

8.94 In the case of a confession which the prosecution seeks to adduce, section 76(2) of PACE applies, so that, if the defence makes representations that the confession was obtained by oppression or in consequence of anything which was likely to make it unreliable, the prosecution must prove beyond reasonable doubt that it was not so obtained. In the case of a confession which a co-accused seeks to put in evidence, the common law principle that a confession must be voluntary to be admissible applies.

8.95 Given that we are recommending the codification of the hearsay rule, it seems to us that the best way to ensure the harmonious development of the law on the admissibility of confessions, at the instance of the prosecution and at that of a co-accused, is to adapt the principle of section 76(2) to the case where one defendant seeks to adduce the confession of another. The only difference would be in the applicable standard of proof: the prosecution has to satisfy section 76(2) to the criminal standard of proof, but a co-accused would have to satisfy the analogous requirement only on the balance of probabilities. **We recommend that the admissibility of a confession by one co-accused at the instance of another should be governed by provisions similar to section 76 of PACE, but taking into account the standard of proof applicable to a defendant.**<sup>125</sup>  
**(Recommendation 19)**

8.96 Where a confession is admitted against one accused on behalf of a co-accused, the fact-finders may consider the admission as exonerating the defendant who did not make it, but may not take it as evidence against the defendant who made it. A hearsay admission is still evidence only against the person who made it, and a jury must be warned accordingly.<sup>126</sup> A number of our respondents thought it extremely important that this principle be retained, and we agree.

### ***Confessions and third parties***

8.97 A confession by someone who is not a defendant in the proceedings is inadmissible hearsay, following *Blastland*.<sup>127</sup> There is a further complication in the case of third party confessions because, as we noted in the consultation paper, “as long as

<sup>123</sup> In *Beckford and Daley* [1991] Crim LR 833 the Court of Appeal upheld the judge’s ruling that the admission of one accused could not be adduced by the co-accused, but in *Campbell and Williams* [1993] Crim LR 448 a contrary decision was reached.

<sup>124</sup> *Myers* [1996] 2 Cr App R 335. Leave to appeal to the House of Lords has been granted. Professor Birch points out that the court seems to indicate that even if the confession was voluntary the court has a discretion to exclude it; yet there is authority to the contrary: *Lobban v R* [1995] 1 WLR 877.

<sup>125</sup> See cl 17 of the draft Bill, which would insert a new s 76A into PACE.

<sup>126</sup> *Gunewardene* [1951] 2 KB 600, 610, *per* Lord Goddard CJ; *Lowery* [1973] 58 Cr App R 35; *Spinks* (1981) 74 Cr App R 263.

<sup>127</sup> [1986] AC 41.



*Blastland* is authority that third party admissions are *irrelevant* unless the inescapable conclusion is that only the third party could have committed the crime, no relaxation of the hearsay rule [will] enable a court to hear a third party admission”.<sup>128</sup> In the consultation paper we referred to criticism of this aspect of *Blastland* by Professor Birch,<sup>129</sup> and added that, in our view, the fact that someone else has confessed to the offence is logically relevant, and that this is so whether that other person is charged in the same proceedings or not.

- 8.98 Relevance is a matter of fact, and it is for the courts to decide whether a confession is relevant in any individual case. What we are concerned about is the exclusion of confessions which *are* relevant. What should not arise is the situation where, because it is known that someone else has confessed, it is feared that a conviction is unsafe, but evidence of that confession could not be admitted at the trial.<sup>130</sup>
- 8.99 Under our proposals, a relevant third party confession could be admitted if the confessor has died, is too ill to attend court, cannot be found or is outside the United Kingdom: such statements would be automatically admissible to the extent that oral evidence by that person would be admissible. Where the confessor is too frightened to testify, the confession could be admitted with the leave of the court. In other cases – for example, where the confessor’s whereabouts are known but he or she disobeys a witness order, or the confessor testifies but refuses to answer questions which may incriminate him or her – the confession will still be unavailable to the court. In such cases, the defence would have to fall back on the safety-valve<sup>131</sup> in order to have evidence of the confession admitted.

#### **OTHER STATUTORY EXCEPTIONS**

- 8.100 In the consultation paper, our provisional view was that certain statutory provisions dealing specifically with hearsay should be retained.<sup>132</sup> Those provisions were section 9 of the Criminal Justice Act 1967,<sup>133</sup> sections 3 and 4 of the Bankers’ Books Evidence Act 1879,<sup>134</sup> section 46(1) of the Criminal Justice Act 1972 (which is a provision equivalent to section 9 of the Criminal Justice Act 1967 for written statements made in Scotland or Northern Ireland and some statements made outside the United Kingdom), and paragraphs 1 and 1A of Schedule 2 to the

<sup>128</sup> Para 7.37, n 72 of the consultation paper.

<sup>129</sup> “Hearsay-Logic and Hearsay-Fiddles: *Blastland* revisited”, in P Smith (ed), *Essays in Honour of J C Smith* (1987). See paras 7.41 – 7.45 of the consultation paper.

<sup>130</sup> We referred at paras 7.46 – 7.47 of the consultation paper to cases where this situation seemed to have arisen: *Cooper* [1969] 1 QB 267, *Wallace and Short* (1978) 67 Cr App R 291, and *Hails* (unreported, 6 May 1976, CA, of which the facts are given by Roskill LJ at p 297 of *Wallace and Short*). See also paras 4.12 – 4.13 above.

<sup>131</sup> See paras 8.133 – 8.149 below.

<sup>132</sup> See para 11.60 of the consultation paper.

<sup>133</sup> This provision enables a witness statement to be adduced at trial in the absence of an objection by the opposing party, where advance notice of the intention to adduce the statement has been given.

<sup>134</sup> As amended by Sched 6 to the Banking Act 1979. These provisions permit a copy of an entry in a bankers’ book to be adduced as prima facie evidence of the entry, provided that certain conditions are complied with.

Criminal Appeal Act 1968, which provide for the admissibility of a transcript of evidence given at an earlier trial where the retrial is ordered by the Court of Appeal.<sup>135</sup> The draft Bill appended to this report allows for the continuation of these statutory provisions (but amends the Criminal Appeal Act 1968, Schedule 2, paragraph 1).<sup>136</sup>

- 8.101 There are also other, rarely-used, statutory provisions which permit hearsay evidence to be adduced, many of them created before 1988,<sup>137</sup> on which we did not express a view in the consultation paper. We have considered what should happen to these provisions in the light of our general policy that the new Bill should be as comprehensive as possible, whilst at the same time not containing any provisions which are no longer needed in light of our reforms. We have decided not to recommend the repeal of any of these provisions, because it has not been suggested to us that they cause any difficulties and it is impossible to be sure that their repeal would not cause difficulties for prosecutors.
- 8.102 On consultation the proposals regarding section 9 of the Criminal Justice Act 1967 and section 46(1) of the Criminal Justice Act 1972 were accepted. We now turn to consider the exception for bankers' books, and then that for transcripts of evidence at retrials.

#### **Bankers' Books Evidence Act 1879, sections 3 and 4**

- 8.103 Our proposal to retain these provisions was accepted by almost all consultees who addressed the point. Professor Sir John Smith commented that sections 3 and 4 of the Bankers' Books Evidence Act 1879 do not deal with the original entries in bankers' books, and suggested that this statute could be amended. We believe that the originals would be covered by clause 4 of our draft Bill, and copies can continue to be covered by the 1879 Act, and that it is not necessary to amend the 1879 Act.<sup>138</sup>
- 8.104 We also considered whether we should include a provision making it clear that computer printouts are admissible in evidence. Although the 1879 Act makes "a copy" admissible, this term is not defined in that Act. However, a court construing those words today would have regard to the fact that the definition of "bankers'

<sup>135</sup> At a retrial, a transcript of the record of the evidence given by any witness at the original trial may be read as evidence if the parties agree or if the witness is dead or unfit or all reasonable efforts to find or bring him or her to court have failed. The judge's leave is required. Although the provision does not make this explicit, such leave would obviously not be granted if it were not in the interests of justice to adduce such evidence.

<sup>136</sup> See paras 8.105 – 8.107 below.

<sup>137</sup> See Appendix C to the consultation paper. The Merchant Shipping Act 1995, s 286 (replacing s 691 of the Merchant Shipping Act 1894) and the Children and Young Persons Act 1933, ss 42 and 43 (as substituted by the Criminal Justice and Public Order Act 1994, s 44(3), Sched 4, Pt 11, para 5) are also currently in force. The Magistrates' Courts Act 1980, s 105, has been repealed by the 1996 Act, ss 47, 80, Sched 1, Pt 1, paras 1, 11, and Sched 5(10) in accordance with provision made by order under Sched 2, para 7.

<sup>138</sup> A similar result has been achieved in relation to civil evidence, where copies continue to be governed by the 1879 Act but the original books benefit from the abolition of hearsay contained in s 1 of the Civil Evidence Act 1995.

books” has been amended<sup>139</sup> so that it now covers records kept on “magnetic tape” or any form of “electronic data retrievable mechanism”. We therefore believe that computer printouts would be regarded by the courts as “copies” of such records. We are encouraged in this view because it is only in this form (or on a screen) that entries stored in a computer will be legible, and thus of use to the court.

### **Evidence given at an earlier trial**

- 8.105 There is a rule at common law which allows for the admission of a transcript of the evidence of a witness who testified at the original trial where the witness is unavailable at the retrial.<sup>140</sup> In the case of retrials ordered by the Court of Appeal, paragraph 1 of Schedule 2 to the Criminal Appeal Act 1968 applies.<sup>141</sup> A transcript has also recently been held to be admissible under sections 23 or 24 of the 1988 Act.<sup>142</sup>
- 8.106 Under our recommended regime, if there is a retrial, evidence given at the original trial would be a “statement” which would be admissible by virtue of clause 3 of the draft Bill where the witness was unavailable to testify at the retrial. This would conflict with the existing statutory and common law rules. In particular, evidence admitted pursuant to paragraph 1 of Schedule 2 to the 1968 Act is admissible only by leave of the court. If the 1968 Act is left as it currently stands, then both that Act (which requires the court’s leave) and the new automatic exception (which does not) could apply to a transcript. Evidence given at a trial is as much a statement as any other kind of statement, and it seems to us that the circumstances in which it becomes admissible should be the same, whatever the reason for the retrial.
- 8.107 We were concerned about whether a party should be compelled to put in a transcript of the earlier proceedings (which would include cross-examination) rather than a witness statement. We do not believe that it is a matter of great importance because if the party sought to put in the statement (as opposed to the transcript of evidence), the opposing party would be able to adduce the part of the

<sup>139</sup> By the Banking Act 1979, Sched 6, Pt 1, para 1.

<sup>140</sup> The transcript is admissible where the witness has died, is absent by procurement of the defendant, or is too ill to travel: *Hall* [1973] QB 496, *Thompson* [1982] QB 647, *Scaife* (1851) 5 Cox CC 243. The case where the witness is outside the jurisdiction is not covered. The court has a discretion to exclude the transcript if it would be unfair to the accused to admit it.

<sup>141</sup> As amended by the 1996 Act, Sched 2, para 5. It provides that a transcript may, with the leave of the judge, be read where the parties agree, or where the judge is satisfied that the witness is dead or unfit to give evidence or to attend for that purpose, or that all reasonable efforts to find him or to secure his attendance have been made without success. The full text of the provision is set out at Appendix B. Although it was said by Dunn LJ in *Thompson* [1982] QB 647, 659, that Sched 2 does no more than state the common law, it can be seen that the circumstances listed are slightly different from those provided for by the common law. *Keane* states at p 264 that the common law principles apply only where the statutory provision does not, and we think this must be so.

<sup>142</sup> *Lockley and Corah* [1996] Crim LR 113. The circumstances in which a transcript of the evidence of an absent witness may be read at common law are broadly similar to those in s 23(2) of the 1988 Act, but there is no equivalent to s 23(3) of the 1988 Act. This appears to us to create an anomaly.

transcript containing the cross-examination (or indeed the evidence in chief) under clause 3 or clause 13 of the draft Bill. **We therefore recommend that evidence given at the original trial should be admissible in a retrial like any other statement if the witness is unavailable to give oral evidence, and that it should be immaterial whether the retrial was ordered by the Court of Appeal or a judge at first instance.**<sup>143</sup> (Recommendation 20)

### **The Criminal Procedure and Investigations Act 1996**

- 8.108 The changes which this Act has made to the law of hearsay are detailed in Part II above. The effect of paragraphs 1 and 2 of Schedule 2 to the Act<sup>144</sup> is to make statements and depositions admitted at committal proceedings admissible at trial in the Crown Court, subject to the right of the opposing party (invariably the defence) to object; but paragraphs 1(4) and 2(4) provide that an objection may be overridden if the judge thinks it would be in the interests of justice so to order.
- 8.109 In other words, the Schedule creates new exceptions to the hearsay rule which are reliant on judicial discretion, and which may apply where the maker of the statement has never been cross-examined and is not unavailable to give oral evidence. It will be clear from Part III, where we discuss the justifications of the hearsay rule, that in our view cross-examination of the witness at trial should be dispensed with only where it is necessary to do so (because the witness is unavailable). It will also be clear from our discussion of the effect of the Convention that to admit a hearsay statement against the accused, when the declarant could have been called, may contravene Article 6(1) and Article 6(3)(d).<sup>145</sup>
- 8.110 Further, we perceive grave disadvantages in making a rule of admissibility wholly dependent on the exercise of judicial discretion.<sup>146</sup> These disadvantages are exacerbated in the case of paragraphs 1(4) and 2(4) because the discretions set out are wholly unstructured and unguided. The Minister of State for the Home Office said in debate in the House of Lords that the Government anticipated that the discretions would be exercised in the same way as the discretions under the Criminal Justice Acts 1925 and 1988,<sup>147</sup> but there is nothing in the Act to say so.
- 8.111 Lastly, the Schedule creates a significant disparity between trials in the Crown Court and in magistrates' courts: in the Crown Court the defence will have to rely on the judge's discretion, arguing that it is not in the interests of justice for a statement to be admitted, whereas in a summary trial the same statement would not be prima facie admissible in the first place.
- 8.112 The Minister also said that the Government was not seeking to introduce anything new or revolutionary, and it appears that the aim was to simplify committal

<sup>143</sup> See cl 21 of the draft Bill, which would substitute a new para 1 for paras 1 and 1A of Sched 2 to the Criminal Appeal Act 1968.

<sup>144</sup> Which came into force on 1 April 1997.

<sup>145</sup> See paras 5.13 – 5.20 above.

<sup>146</sup> See paras 4.28 – 4.31 above.

<sup>147</sup> *Hansard* (HL) 26 June 1996, vol 573, col 952.

proceedings, and then to allow any statements admitted at committal, the contents of which were *not* disputed by the other parties, to be admitted at trial without the witness having to be called.

- 8.113 The consultation paper was published before the 1996 Act was introduced, and so we did not consult on the question of whether paragraphs 1(4) and 2(4) of Schedule 2 should be retained or repealed, but, in the light of the responses received to our provisional views on judicial discretion,<sup>148</sup> we believe that consultees would agree that these paragraphs should be repealed. **We recommend the repeal of paragraphs 1(4) and 2(4) of Schedule 2 to the Criminal Procedure and Investigations Act 1996.**<sup>149</sup> **(Recommendation 21)**

#### EXISTING COMMON LAW EXCEPTIONS

##### **Res gestae**

- 8.114 We now turn to consider whether we should retain the common law exception for res gestae.<sup>150</sup> This exception has four separate strands to it, each with its own precondition for admissibility and individual justifications for its existence.<sup>151</sup> They may be conveniently dealt with under the following heads.

##### ***Spontaneous statements made by way of reaction to a relevant act or event***

- 8.115 Although there was some early doubt about this exception,<sup>152</sup> it is now clearly accepted that “spontaneous exclamations ... appear to represent the most important application of the res gestae principle”.<sup>153</sup> The present test, however, is not whether the words were said when the offence was actually taking place, but whether the person who made the statement was then so emotionally overpowered by the event that he or she is almost certain to have been telling the truth as he or she perceived it.<sup>154</sup> Despite the frequent references in cases on res gestae to the evidence of the victim,<sup>155</sup> it seems to be clear that any person’s evidence may be res gestae, including any witness<sup>156</sup> and the accused.<sup>157</sup>

<sup>148</sup> To which we refer at paras 4.28 – 4.31 above.

<sup>149</sup> See cl 20 of the draft Bill.

<sup>150</sup> For a summary of the law see paras 3.38 – 3.49 of the consultation paper.

<sup>151</sup> This follows the classification adopted by *Cross and Tapper* pp 723ff.

<sup>152</sup> For example, RW Baker in *The Hearsay Rule* (1950) lists this under the heading “spurious exceptions”. He accepts that Wigmore had put forward “well reasoned arguments” for such an exception but found no support for it in the English authorities at the time, which in his opinion were concerned either with other hearsay exceptions or with original evidence.

<sup>153</sup> *Andrews & Hirst on Criminal Evidence* (2nd ed 1992) para 20.19.

<sup>154</sup> See *Ratten v R* [1972] AC 378.

<sup>155</sup> See, eg, Lord Ackner in *Andrews* [1987] AC 281.

<sup>156</sup> For example, in *Fowkes*, *The Times* 8 March 1856, it was the witness to a murder who shouted “There’s Butcher”.

<sup>157</sup> See, eg, *Glover* [1991] Crim LR 48.

8.116 The primary test for admissibility as part of the *res gestae* is now “can the possibility of concoction or distortion be disregarded?”<sup>158</sup> Thus the less dramatic the event and the longer the interval before the statement was made, the less likely it is that the *res gestae* exception will be applied. It was held not to apply to remarks made 20 minutes after a not particularly dramatic traffic accident. The event which had occurred was not so unusual or dramatic as to have dominated the thoughts of the victim 20 minutes after it took place.<sup>159</sup>

8.117 There is a five stage test for the admission of such evidence:

- (1) Can the possibility of concoction or distortion be disregarded?
- (2) To answer this, ask if the event was so unusual, startling or dramatic that it dominated the thoughts of the victim causing an instinctive reaction without the chance for reasoned reflection, in conditions of approximate, but not necessarily exact, contemporaneity.
- (3) To be sufficiently spontaneous the statement must be closely connected with the event causing it.
- (4) There must be no special features making concoction or distortion likely.
- (5) There must be no special features likely to result in error, for example, drunkenness.<sup>160</sup>

8.118 At one time it may have been thought that “the event” in question must be the crime,<sup>161</sup> but this is not so in Lord Ackner’s five-stage test.<sup>162</sup> We do not see why a statement made in response to some exciting event *after* the commission of the crime might not provide an equal guarantee of reliability – for example where a bystander says, as the police chase the defendant after the crime, “Be careful, he’s got a gun,” and the issue at the trial is whether the defendant was armed.

8.119 We were concerned about the admission of *res gestae* evidence because very frequently the identity of the maker of the *res gestae* statement is not known. That means that the party against whom the statement is adduced cannot discredit that person. It may be possible to show that the declarant had a poor view, or was intoxicated, but other evidence discrediting the declarant may not be forthcoming. We were very troubled by this, but on consultation we were repeatedly reassured that nobody was aware of miscarriages of justice caused by the admission of *res*

<sup>158</sup> *Andrews* [1987] AC 281, 300, *per* Lord Ackner.

<sup>159</sup> *Tobi v Nicholas* (1988) 86 Cr App R 323.

<sup>160</sup> This summarises the five-stage test set out by Lord Ackner in *Andrews* [1987] AC 281 at pp 300–301.

<sup>161</sup> See *Gibson* (1887) 18 QBD 537; *Téper v R* [1952] AC 480, 488, *per* Lord Normand, relying on *Gibson*; *Bedingfield* (1879) 14 Cox CC 341.

<sup>162</sup> The dicta in *Téper v R* could have been interpreted as applying only to statements concerning the identification of the accused; and in *Ratten v R* [1972] AC 378 Lord Wilberforce said, at p 389: “The possibility of concoction, or fabrication, where it exists, is ... an entirely valid reason for exclusion ... [T]he test should not be the uncertain one whether the making of the statement was in some sense part of the event or transaction.”

gestae, which in itself has a precondition for admissibility that the possibility of concoction or distortion can be disregarded.<sup>163</sup> If there is no possibility of concoction or distortion but only of mistake, the lack of any opportunity to discredit the declarant personally is of comparatively little consequence.<sup>164</sup>

- 8.120 In the consultation paper we referred to views which suggest that a response to an exciting event may be misleading, not because of concoction or distortion, but because the witness had only partial knowledge.<sup>165</sup> We recognise that this may occur, but still take the view that statements made in the heat of the moment should be admissible. To return to the example of the bystander who thinks that the defendant has a gun: the bystander could well be mistaken, but the statement is clearly relevant and it would seem odd not to let the fact-finders hear of it. The risk of a mistake would no doubt be stressed in counsel's closing speech, and referred to by the judge in the summing up.
- 8.121 Our fears have therefore been allayed. **We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded.**<sup>166</sup> (Recommendation 22)

***Statements accompanying and explaining relevant acts***

- 8.122 This form of statement may properly be regarded as an intrinsic part of the relevant act so long as there is an essential connection between the two; exclusion of such statements would have the effect of unfairly distorting the overall picture and possibly resulting in false inferences being drawn from the act.<sup>167</sup>
- 8.123 The act which the statement accompanies and explains must itself be "relevant". What we are looking for is an act which may have some relevance taken alone, such as handing over money, but which can be truly evaluated only if words accompanying it are admitted.<sup>168</sup> Conversely, the act of dialling a number on a telephone is unlikely to be relevant in itself. Thus in *Kearley*<sup>169</sup> the prosecution had sought to prove that the appellant was a drug-dealer by producing evidence of telephone calls and visits to his home after his arrest from people seeking to buy drugs from him; some of them asked for their "usual supply," thereby implicitly

<sup>163</sup> See para 8.117 above.

<sup>164</sup> Cf our argument that "implied assertions" should be admissible, if relevant, because if there is no possibility of deliberate fabrication then the risk of mistake should go to weight rather than admissibility: paras 7.17 – 7.21 above.

<sup>165</sup> Para 7.10 of the consultation paper.

<sup>166</sup> See cl 6(5)(a) of the draft Bill.

<sup>167</sup> *Andrews & Hirst on Criminal Evidence* (2nd ed 1992) para 20.16 gives the illustration of a person running off as a policeman approaches. This might appear incriminating; but if, as he runs away, the person calls out that he risks missing his last train home, the fact-finders should know this even if they might choose not to believe the explanation.

<sup>168</sup> An example, in the case of handing over money, might be accompanying words that "I don't owe you anything but I just want you off my back".

<sup>169</sup> [1992] 2 AC 228.

asserting that they had purchased drugs from him in the past. As Lord Bridge said,<sup>170</sup> the argument that this *res gestae* exception was applicable to the telephone calls could not succeed because the act of dialling was not relevant in itself – only the words used made it relevant. The evidence was ultimately ruled inadmissible on grounds of relevancy.<sup>171</sup>

- 8.124 We believe that there might be occasions when this exception is justified, and we are not aware of any injustice being caused by it. On balance we think it worth retaining. **We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement.**<sup>172</sup> (Recommendation 23)

### *Statements describing states of mind*

- 8.125 Statements concerning the declarant's state of mind are admitted at common law chiefly on the basis of necessity: what a person feels or intends or wants is so much a matter within that person's own knowledge that, in the absence of evidence from him or her, it would be impossible to prove the matter in any other way. It is also fair to say that, in the absence of a motive to misrepresent, it is the sort of statement that is more likely to be true than false. The statement must of course be relevant to an issue in the case.<sup>173</sup>
- 8.126 This exception has contemporary significance because it is often the only way in which a party can prove that a witness is too frightened to attend court – for

<sup>170</sup> *Ibid*, at p 246, disapproving *Davidson v Quirke* [1923] NZLR 552; *McGregor v Stokes* [1952] VLR 347; *Police v Machirus* [1977] 1 NZLR 288.

<sup>171</sup> Lord Oliver explained at [1992] 2 AC 228, 274:

I confess that I find some difficulty in seeing how, by any accepted application of the *res gestae* principle, declarations made to the police after the arrest of the defendant could become part of the *res gestae* unless it be that, the charge being one relating to a continuing user of the premises, anything done at or on the premises falls to be treated as part of the *res gestae*.

<sup>172</sup> See cl 6(5)(b) of the draft Bill.

<sup>173</sup> In *Moghal* (1977) 65 Cr App R 56, the defendant was charged with the murder of R but claimed that the crime had been committed by S. A statement made by S six months before, in which she declared her intention to murder R, was held admissible. But statements which S made to the police after R had been killed, in which she described her state of mind and feelings before and at the time of the killing, were rejected as inadmissible hearsay on the grounds that

the condition precedent to the admissibility of such statements is that they should relate to the maker's contemporaneous state of mind or emotion. Contemporaneousness is ... a question of degree. But we are clear that what [S] said to policemen investigating the crime was far too long after the event to be admitted as evidence ... of the state of her mind and feelings before and at the time of the killing.

The decision to admit the evidence of declaration of intention was doubted by the House of Lords in *Blastland* [1986] AC 41, but only on the grounds that it was an isolated declaration of intention made six months before the murder and thus was insufficiently relevant.



example, by calling a police officer to say that the witness said that he or she was afraid. **We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement relates to a mental state (such as intention or emotion).**<sup>174</sup> (Recommendation 24)

***Statements describing physical sensations***

8.127 As a further exception to the hearsay rule, evidence of what a person said may be given to prove the physical sensations experienced by that person, if they are in dispute or are relevant to a matter in dispute: for example, that the person was in pain<sup>175</sup> or was hungry.<sup>176</sup> The rationale for this exception is that such evidence will be the best (and usually the only) way of proving the fact in question.

8.128 It is usually said that this exception permits evidence of what a person said his or her feelings were, but not of their cause.

If a man says to his surgeon, “I have a pain in the head” ... that is evidence; but, if he says to his surgeon, “I have a wound”; and was to add, “I met John Thomas, who had a sword, and ran me through the body with it,” that would be no evidence against John Thomas.<sup>177</sup>

In the case of *Gilbey*,<sup>178</sup> Lord Cozens-Hardy MR held that although contemporaneous assertions made concerning physical sensations were admissible, statements made attesting to the *cause* of those sensations were not.<sup>179</sup>

8.129 We believe that this exception serves a useful purpose and succeeds in giving part of the overall picture.<sup>180</sup> **We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement relates to a physical sensation.**<sup>181</sup> (Recommendation 25)

<sup>174</sup> See cl 6(5)(c) of the draft Bill.

<sup>175</sup> *Aveson v Kinnaird* (1805) 6 East 188; 102 ER 1258.

<sup>176</sup> *Conde* (1867) 10 Cox CC 547.

<sup>177</sup> *Nicholas* (1846) 2 Car & K 246, 248; 175 ER 102, *per* Pollock CB.

<sup>178</sup> *Gilbey v Great Western Railway* (1910) 102 LT 202.

<sup>179</sup> In *Gloster* (1888) 16 Cox CC 471, the deceased had died from injuries alleged to have been caused by an abortion. Counsel for the Crown contended that the statements of the deceased, which gave both the cause of her injuries and the name of the doctor who had performed the termination, were admissible as they contained evidence of the bodily feelings of the deceased, that the statements could not be admitted in part and excluded in part, and that they must therefore be admitted whole. He also argued that some of the relevant statements were admissible as part of the *res gestae*, by analogy to the “excited utterances” of the victim of an assault. His arguments were rejected, and Charles J held that “admissible statements were to be confined to contemporaneous symptoms”.

<sup>180</sup> Thus in *Conde* (1867) 10 Cox CC 547, where the accused were charged with murdering a child by starving it, the prosecution was able to produce evidence concerning the child’s complaints of hunger.

<sup>181</sup> See cl 6(5)(c) of the draft Bill.

### **The common enterprise exception**

- 8.130 Acts done or declarations made in furtherance of a conspiracy are admissible at common law against all parties to the conspiracy, so long as the existence of the conspiracy is proved by some extrinsic evidence.<sup>182</sup> Where the acts or declarations are hearsay, this amounts to a hearsay exception. The exception is evolving: it may apply not only to those charged with conspiracy but to any defendants involved in a common enterprise,<sup>183</sup> and it may be sufficient that the statement was made in the course of the conspiracy, rather than in furtherance of it.<sup>184</sup>
- 8.131 The exception can be justified as a pragmatic one, as it might be hard to prove a conspiracy without it, and we would not seek to change the law about how a conspiracy may be proved; and so it is our view that the exception should be retained. **We recommend the retention of the common law rule that a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.**<sup>185</sup> (Recommendation 26)

### **Other common law exceptions**

- 8.132 **We recommend that the following common law exceptions be retained,** because they fulfil useful functions and we are not aware that they cause any difficulties:
- (1) published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps) as evidence of facts of a public nature stated in them;**
  - (2) public documents (such as public registers, and returns made under public authority with respect to matters of public interest) as evidence of facts stated in them;**
  - (3) records (such as the records of certain courts, treaties, Crown grants, pardons and commissions) as evidence of facts stated in them;**
  - (4) evidence relating to a person's age or date or place of birth;**
  - (5) reputation as evidence of a person's good or bad character;**
  - (6) reputation or family tradition as evidence of pedigree or the existence of a marriage, the existence of any public or general right, or the identity of any person or thing; and**

<sup>182</sup> *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, 731.

<sup>183</sup> In *Gray* [1995] 2 Cr App R 100 the court considered *Tripodi v R* (1961) 104 CLR 1 which applies the same considerations to all cases of "preconcert" or joint enterprise, but saw no scope for its application on the facts. See also *Tauhore* [1996] 2 NZLR 641.

<sup>184</sup> Compare *Blake and Tye* (1844) 6 QB 126, 115 ER 49 with *Devonport* [1996] Crim LR 255.

<sup>185</sup> See cl 6(8) of the draft Bill.

**(7) informal admissions made by an agent.<sup>186</sup> (Recommendation 27)**

**THE SAFETY-VALVE: AN INCLUSIONARY DISCRETION**

- 8.133 An integral part of our preferred option<sup>187</sup> is a limited inclusionary discretion to admit hearsay which falls within no other exception. Its purpose would be to prevent potential injustice which could arise through the exclusion of hearsay evidence. We envisage that it would only be used exceptionally.
- 8.134 In the consultation paper we proposed that this discretion
- (a) should extend to oral as well as documentary hearsay;
  - (b) should extend to multiple as well as first-hand hearsay; and
  - (c) should be available if (but only if) it appears to the court that
    - (i) the evidence is so positively and obviously trustworthy that the opportunity to test it by cross-examination can safely be dispensed with, and
    - (ii) the interests of justice require that it be admitted.<sup>188</sup>

- 8.135 We now examine, in the light of the responses on consultation, whether this discretion is desirable, and conclude that it is.<sup>189</sup> We then look at the terms of the discretion and suggest a revised wording for it.<sup>190</sup> We explain how we see it fitting with our other recommended reforms, and with the existing discretions at common law and under section 78(1) of PACE to exclude prosecution evidence, and give examples of how it might be used.<sup>191</sup> Finally, we consider whether it should be available to both the prosecution and the defence.<sup>192</sup>

**Should there be a limited inclusionary discretion?**

- 8.136 A very substantial majority of respondents were in favour of the existence of the safety-valve; three were in favour of it only for the defence,<sup>193</sup> and five were against it altogether.<sup>194</sup> Three respondents<sup>195</sup> pointed out that it was hard to reconcile our

<sup>186</sup> See cl 6(2)–(4) and 6(7) of the draft Bill. A further common law exception that we recommend should be preserved relates to matters forming part of the professional expertise of an expert witness: see para 9.8 below and cl 6(9) of the draft Bill.

<sup>187</sup> For an overview of the structure of this preferred option see paras 6.48 – 6.49 above.

<sup>188</sup> See paras 11.7, 11.36 and 11.37 of the consultation paper..

<sup>189</sup> Para 8.136 below.

<sup>190</sup> Paras 8.137 – 8.142 below.

<sup>191</sup> Paras 8.143 – 8.147 below.

<sup>192</sup> Paras 8.148 – 8.149 below.

<sup>193</sup> Buxton J, Professor Sir John Smith and Vivian Robinson QC.

<sup>194</sup> Peter Mirfield (who thought Glanville Williams' example at n 198 below a slim basis on which to give up clarity), Mr Justice Ian Kennedy, the Criminal Bar Association, and (on the basis of the Summary document) the Western and the Wales and Chester Circuits.

criticisms of judicial discretion with our proposal of the creation of a judicial discretion. We recognise that we are introducing the risks of inconsistency and unpredictability which accompany judicial discretion, but believe that without such a discretion the proposed reforms would be too rigid: some limited flexibility must be incorporated. As we have said, our purpose is to allow for the admission of reliable hearsay which could not otherwise be admitted, particularly to prevent a conviction which that evidence would render unsafe. We remain convinced that the safety-valve is needed. **We recommend that there should be a limited discretion to admit hearsay evidence not falling within any other exception. (Recommendation 28)**

#### **What should its terms be?**

- 8.137 Three respondents<sup>196</sup> did not agree that the safety-valve should extend to multiple hearsay and referred us to the reservations we had expressed about multiple hearsay.<sup>197</sup> We are still of the view that multiple hearsay (outside business documents) is generally less likely to be reliable than first-hand hearsay, but we do not think this must invariably be the case. This discretion should provide for the exceptional case where multiple hearsay is, unusually, of high probative value. The illustration given by Professor Glanville Williams which we cited in the consultation paper would be such a case.<sup>198</sup> We therefore consider that the safety-valve should extend to multiple hearsay.
- 8.138 Some respondents thought our proposed wording needed revision. As David Ormerod pointed out,<sup>199</sup> requirement (c)(i) was designed to provide a reliability test, and (c)(ii) a necessity test. Several respondents thought the test at (c)(i) was too high: some queried how it could ever be satisfied. It was also pointed out that it in effect required the judge to usurp the role of the jury: the Department of Trade and Industry added that the party allowed to adduce the evidence could then tell the jury that since the judge had found the evidence “positively and obviously trustworthy”, they should accept it as true. It was also pointed out that there is some overlap between (c)(i) and (c)(ii), since “it can’t be ‘in the interests of justice’ if the evidence is not trustworthy or cross-examination cannot safely be dispensed with”.<sup>200</sup>

<sup>195</sup> The Society of Public Teachers of Law, Professor Sir John Smith and the Criminal Bar Association.

<sup>196</sup> Curtis J, the Criminal Bar Association and John Nutting QC.

<sup>197</sup> See paras 8.15 – 8.17 above, and paras 6.8 – 6.18 and 11.8 of the consultation paper.

<sup>198</sup> See para 10.74 of the consultation paper. A and B are elderly sisters who are both lying ill when they hear that their acquaintance X has been arrested on a serious charge. A realises that she saw X board a train at a place and time which are inconsistent with his guilt, and she tells this to B just before she dies. B tells this to C, a parson, just before she, too, dies. The information coincides exactly with X’s alibi defence at the trial. Glanville Williams, “The new proposals in relation to double hearsay and records” [1973] Crim LR 139.

<sup>199</sup> D C Ormerod, “The Hearsay Exceptions” [1996] Crim LR 16, 23.

<sup>200</sup> Buckley J.

- 8.139 We accept these criticisms, and take note of Lamer CJC’s comment (of which David Ormerod reminded us)<sup>201</sup> that it is not essential that “reliability be established with absolute certainty”, but it is sufficient if the possibility of untruthfulness and mistake are “substantially negate[d]”.<sup>202</sup> What is required is not a test of *actual* reliability, as that would indeed lead to the judge usurping the jury’s role. Rather, the judge or magistrates should ask whether the circumstances surrounding the making of the statement indicate that it *could* be treated as reliable.<sup>203</sup>
- 8.140 Some respondents suggested dispensing with (c)(i) and saying simply that the evidence should be admitted if the interests of justice require it. Our view is that on its own this phrase is too vague, and would doubtless lead to widely differing practices in different courts followed by a rush of appeals. We regard this as extremely undesirable, as one of our aims is to achieve as much certainty as is compatible with fairness.
- 8.141 We have given careful consideration to all the points made and alternative formulations proposed. **We recommend that the inclusionary discretion**
- (1) should extend to oral as well as documentary hearsay, and to multiple as well as first-hand hearsay; and**
  - (2) should be available if the court is satisfied that, despite the difficulties there may be in challenging the statement, its probative value is such that the interests of justice require it to be admissible. (Recommendation 29)**
- 8.142 The phrase “probative value” is designed to encourage the court to consider, amongst other features, the degree of relevance of the statement, the circumstances in which it was made, the extent to which it appears to supply evidence which would not otherwise be available, and the creditworthiness of the declarant. In considering the interests of justice the court would take into account the reason the declarant cannot give oral evidence, the extent to which the accused can controvert the statement, and the risk of unfairness to the accused.

<sup>201</sup> [1996] Crim LR 16, 24.

<sup>202</sup> *Smith* (1992) 94 DLR (4th) 590, 601 and 604.

<sup>203</sup> The appropriate approach is set out by Arbour JA of the Ontario Court of Appeal:

[T]he trial judge must determine not whether the hearsay evidence is likely to be true, but whether it should be presented to the trier of fact despite the fact that it was not given under oath and, more importantly, that it was not subjected to the adversarial test of cross-examination. The focus is thus on the circumstantial factors surrounding the making of the statement that are likely to affect its ultimate trustworthiness and that might have been elicited by a skilful cross-examination. These factors are referred to as the hearsay dangers. The fewer such dangers, the less the need to exclude hearsay.

*Hawkins* (1995) 22 OR (3d) 193, 209.

### **How it would work in practice**

- 8.143 A party would only need to turn to the safety-valve where none of the other exceptions could be used. By definition, therefore, the declarant must be unavailable for some reason *other* than death, illness, fear, disappearance, or being outside the United Kingdom. The declarant need not have been competent at the time the statement was made. The declarant need not even be identified. We do not anticipate that there would be a large number of applications to admit evidence via the safety-valve. The Crown Prosecution Service was concerned that there would be a large number of unmeritorious applications, particularly in the magistrates' courts. Our view is that all courts would regard the safety-valve as an exception to be used in very limited circumstances, and if it is too freely used, the Court of Appeal or Divisional Court will give guidance.<sup>204</sup>
- 8.144 Where possible, an application to have evidence admitted via the safety-valve would be made at the Plea and Directions Hearing or pre-trial review. As the Judge Advocate General pointed out, if the admissibility of an item of evidence has not been resolved pre-trial, a voir dire may be necessary for the judge or magistrates to decide on the admissibility of the evidence. We believe that voir dire is best avoided if possible because, apart from the time that they take and the interruption to the flow of the trial, the evidence given at a voir dire is frequently different from that given in the trial (if the evidence is admitted), as counsel and witnesses learn from the voir dire and adapt their questions and answers accordingly. Inevitably, however, in some cases it will only become apparent that an application under the safety-valve will be needed on the day of the trial itself. We return to this point below.<sup>205</sup>
- 8.145 In theory, both section 78(1) of PACE and the common law discretion to exclude prosecution evidence will apply. In practice, these discretions will add nothing, as they are both concerned with fairness to the accused, and it would be illogical for a judge to decide that it was in the interests of justice to admit evidence, but that to do so would have such an adverse effect on the fairness of the proceedings that that same evidence ought to be excluded. Similarly it is inconceivable that evidence which would otherwise have been admitted under the safety-valve might be excluded under our recommended discretion to exclude evidence which would result in undue waste of time.<sup>206</sup> If evidence is sufficiently reliable to justify invoking the safety-valve, it cannot be the kind of evidence that would result in undue waste of time.
- 8.146 Where the evidence was admitted, a judge would warn the jury about its weaknesses, as in the case of other hearsay evidence.<sup>207</sup> Any opposing party could adduce evidence to controvert the contents of the statement and to challenge the credibility of the declarant as if he or she had given oral evidence.

<sup>204</sup> We give some examples of cases where an application might be made at para 8.147 below.

<sup>205</sup> See paras 11.8 – 11.11 below.

<sup>206</sup> See paras 11.16 – 11.18 below.

<sup>207</sup> See the specimen direction issued by the Judicial Studies Board and cited at para 3.23 above. This would of course have to be tailored to the individual case, particularly where the evidence admitted under the safety-valve was multiple hearsay.

8.147 Here are three examples of cases where an application might be made under the safety-valve:

- (1) D is prosecuted for indecent assault on a child. The child is too young to testify, but she initially described her assailant as “a coloured boy”. The defence is identity and the defendant is white.<sup>208</sup>
- (2) D is prosecuted for the murder of his girlfriend. He denies that it was he who killed her. Fixing the time of the murder is an essential part of proving that D must have done it. An eight-year-old child tells the police that she saw the victim leaving her home at a time after the prosecution says she was dead. By the time the case comes to trial, the child can remember nothing about when she saw the victim.<sup>209</sup>
- (3) D is charged with assault. X, who is not charged, admits to a friend that he, X, committed the assault. D and X are similar in appearance. X’s confession is inadmissible hearsay unless the safety-valve is used.<sup>210</sup>

**Should it be available to both the prosecution and the defence?**

8.148 Three of the respondents<sup>211</sup> thought that the safety-valve should only be available to the defence. They pointed out that the inspiration for the creation of a safety-valve came primarily from the concern that wrongful convictions might occur if exculpatory evidence could not be admitted.<sup>212</sup> In addition, it is more important for the defence to be able to predict, as early as possible, what evidence will be admissible against the defendant, and uncertainty can be eliminated by restricting the safety-valve to defence evidence.

8.149 The vast majority of respondents agreed with our provisional view that the safety-valve should be available to both the prosecution and the defence. We believe that this is consistent with principle.<sup>213</sup> We do not think there is any danger of hearsay evidence of poor quality being admitted against a defendant, nor of a principle which exists to protect the defendant being undermined,<sup>214</sup> because the court will admit hearsay under the safety-valve only where it is in the interests of justice for it

<sup>208</sup> The facts of *Sparks* [1964] AC 964.

<sup>209</sup> The facts of *Thomas* [1994] Crim LR 745.

<sup>210</sup> The facts of *Cooper* [1969] 1 QB 267. In that case the hearsay point does not appear to have been taken: the confession was admitted at trial, but the defendant was convicted anyway. The Court of Appeal did not criticise the trial judge, but quashed the conviction.

<sup>211</sup> Buxton J, Professor Sir John Smith and Vivian Robinson QC. Sir John Smith thought that generally the same rules ought to apply to the prosecution and to the defence, but that this general principle ought not to apply to the safety-valve.

<sup>212</sup> See para 10.76 of the consultation paper.

<sup>213</sup> On which see paras 12.2 – 12.8 below.

<sup>214</sup> Such as the principle that a confession is only admissible against its maker: *Surujpaul* [1958] 1 WLR 1050, 1056, *per* Lord Tucker; *A-G’s Reference (No 4 of 1979)* [1981] 1 WLR 667, 676E, *per* Lord Lane CJ; *Spinks* (1982) 74 Cr App R 263. We have already considered the position where one co-accused seeks to adduce the admission of another co-accused: see para 8.95 above.

to be admitted. **We recommend that the inclusionary discretion be available to both the prosecution and the defence. (Recommendation 30)**

#### **ADMITTING HEARSAY BY CONSENT**

- 8.150 At present, uncontested evidence can be given in the form of written statements or depositions: they can be read out in court, thereby avoiding the inconvenience or expense that would otherwise be incurred in summoning the witness to testify in person. Written statements may also be tendered if certain conditions are satisfied: these conditions include service of the statement by the party proposing to tender it upon the other parties to the proceedings, and none of those other parties serving a counter-notice objecting to its being tendered in evidence.<sup>215</sup> **We recommend that hearsay evidence should be admissible if all parties to the proceedings agree to it being admissible.**<sup>216</sup> **(Recommendation 31)**

<sup>215</sup> Criminal Justice Act 1967, s 9.

<sup>216</sup> See cl 1(1)(c) of the draft Bill.



## **PART IX**

### **EXPERT EVIDENCE**

- 9.1 In this Part, we examine the impact of the hearsay rule on expert evidence.<sup>1</sup> The Royal Commission on Criminal Justice set out its concerns in the following terms:

It has been brought to our attention that, because of the rules on hearsay evidence, an expert witness may not strictly speaking be permitted to give an opinion in court based on scientific tests run by assistants unless all those assistants are called upon to give supporting evidence in court. It seems to us that this rule is badly in need of change and we recommend that it be considered by the Law Commission as part of the review of the rules of evidence that we recommend in chapter eight.<sup>2</sup> Meanwhile, although the defence must have the right to examine the assistants of expert witnesses if it so chooses, we look to the courts and to the parties to make the maximum use of the facility to present the evidence of assistants in written form until such time as the law is changed. Any unreasonable exploitation of the system should be met by sanctions against the counsel concerned if he or she is found to be responsible.<sup>3</sup>

- 9.2 We believe the problem extends beyond scientific tests to include many other types of expert evidence – such as accountancy evidence – in which the expert has relied on work carried out by other people. In all these cases there is a risk that the defence will insist on the prosecution calling everybody who carried out any work that was relied on by the expert in his or her report.

#### **THE PRESENT LAW**

##### **The exceptions to the hearsay rule that cover expert evidence**

- 9.3 There are three exceptions peculiar to expert evidence; two are common law and one is contained in section 30(1) of the 1988 Act.
- 9.4 The first exception relates to knowledge which forms part of the expert's professional expertise, although not acquired through personal experience. Thus an expert has been permitted to give evidence that in a standard pharmaceutical guide, kept in every pharmacy, a particular drug was described as a form of penicillin.<sup>4</sup> Similarly, an anthropologist has been permitted to give evidence about the indigenous peoples in a particular region, even though this evidence was founded partly upon statements made to the anthropologist by Australian aboriginals.<sup>5</sup>

<sup>1</sup> We have been assisted by an article by R Pattenden, "Expert Opinion Evidence Based on Hearsay" [1982] Crim LR 85.

<sup>2</sup> See para 1.2 above. (Footnote added)

<sup>3</sup> Report of the Royal Commission, ch 9, para 78.

<sup>4</sup> *Borowski v Quayle* [1966] VR 382. The United States Federal Rules of Evidence include a specific exception for learned treatises: Rule 803(18).

<sup>5</sup> *Milirrpum v Nabalco Property Ltd* (1971) 17 FLR 141, 161.

- 9.5 The second exception enables an expert to draw on technical information widely used by members of the expert's profession and regarded as reliable.<sup>6</sup> The expert is able from such information to draw conclusions from the background facts.<sup>7</sup>
- 9.6 Thirdly, section 30(1) of the 1988 Act<sup>8</sup> allows an expert report<sup>9</sup> to be adduced in criminal proceedings as evidence of any fact or opinion of which the person making it could have given oral evidence,<sup>10</sup> subject to the proviso that the court's leave is required if it is proposed to put in the report without calling its maker.<sup>11</sup> In deciding whether or not to give leave, the court is required by section 30(3) to have regard
- (1) to the contents of the report;
  - (2) to the reasons why it is proposed that the person making the report shall not give oral evidence;
  - (3) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
  - (4) to any other circumstances that appear to the court to be relevant.
- 9.7 We are not aware of any authorities on the manner in which the discretion conferred by section 30 should be exercised,<sup>12</sup> but we would regard it as extremely

<sup>6</sup> In *Rowley v London and North West Railway* (1873) LR 8 Ex 221 an accountant who had personal knowledge of the insurance business was allowed to give evidence of the average duration of life of two people by reference to the Carlisle Actuarial Tables.

<sup>7</sup> Thus in *Abadom* (1983) 76 Cr App R 48, the Court of Appeal held admissible the evidence of an expert who had measured the refractive index of certain fragments of glass found on the defendant's shoes and compared it with that of broken glass found at the scene of the crime. The expert was able to refer to statistics collated by the Home Office Central Research Establishment in order to demonstrate that the refractive index found in both samples was uncommon, thus suggesting that the defendant was there when the window was broken.

<sup>8</sup> See Appendix B.

<sup>9</sup> I.e. a written report by a person dealing wholly or mainly with matters on which he or she is (or would if living be) qualified to give expert evidence: s 30(5).

<sup>10</sup> Section 30(4).

<sup>11</sup> Section 30(2). Advance notice must be given of the intention to adduce expert evidence: Crown Court (Advance Notice of Expert Evidence) Rules, SI 1987 No 716 (L2), as amended by the Crown Court (Advance Notice of Expert Evidence) (Amendment) Rules, SI 1997 No 700 (L6), made pursuant to PACE, s 81; Magistrates' Court (Advance Notice of Expert Evidence) Rules, SI 1997 No 705 (L11), made pursuant to the Magistrates' Courts Act 1980, s 144, and the 1996 Act, s 20(3) and (4). If advance notice is not given, the leave of the court must be obtained before the evidence is adduced.

<sup>12</sup> In *Hurst* [1995] 1 Cr App R 82 it was held that the trial judge had rightly refused to admit a psychiatric report under s 30, but on the ground that it went no further than a speculative opinion and was therefore inadmissible anyway. The psychiatrist had in fact been available to give evidence.

unlikely that the courts would allow an expert report to be adduced without calling the maker if the opposing party had a genuine wish to cross-examine on it.

### **Retention of the existing exceptions**

- 9.8 We believe that the existing exceptions are readily justifiable, and it was not suggested on consultation that any of them should be abolished or reduced in scope. **We recommend the preservation of the common law exceptions under which an expert witness may draw on the body of expertise relevant to his or her field.**<sup>13</sup> **(Recommendation 32)** We make no recommendation for any change to section 30 of the 1988 Act.
- 9.9 The next question is whether these exceptions go far enough.

### **THE PROBLEMS WITH THE PRESENT LAW**

- 9.10 In the consultation paper, we set out the present law and focused on the problem that arises where the information relied on by the expert is outside the personal experience of the expert and is not proved by other admissible evidence: in that case, the information is inadmissible as evidence unless it falls within an exception to the hearsay rule.<sup>14</sup> In other words “hearsay evidence does not become admissible to prove acts because the person who proposes to give it is a physician”.<sup>15</sup> Morland J has observed that this situation is not uncommon as, where an expert is giving an opinion,

almost inevitably he would rely upon primary facts provided either by a machine or derived from the evidence of other witnesses who had made primary findings of fact or, as experts themselves, made earlier expert conclusions and opinions on findings of fact presented to them.<sup>16</sup>

- 9.11 The potential for the waste of court time and public money was illustrated in the recent case of *Jackson*,<sup>17</sup> where the defendant did not in fact dispute the expert’s conclusion but had not formally admitted the facts on which it was based. No evidence of those facts was presented to the court in the course of the prosecution case, and it was only after the defendant had given evidence that the point was taken. The prosecution was allowed to close the evidential gap, which it seems had gone unnoticed until this late stage. The Court of Appeal recommended the use of

<sup>13</sup> See cl 6(9) of the draft Bill.

<sup>14</sup> Paras 15.3 – 15.11 of the consultation paper.

<sup>15</sup> *Ramsey v Watson* (1961) 108 CLR 642, 649, *per* Dixon CJ and McTiernan, Kitto, Taylor and Windeyer JJ. Similarly in a criminal case, *Turner* [1975] QB 834, 840B–C, Lawton LJ, speaking for the Court of Appeal, observed: “It is not for this court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked”.

<sup>16</sup> *Golizadeh* [1995] Crim LR 232.

<sup>17</sup> [1996] Crim LR 732.

formal admissions and of section 30 of the 1988 Act to overcome such problems,<sup>18</sup> and also that such issues be addressed at the Plea and Directions Hearing.

#### **OPTIONS FOR REFORM CONSIDERED IN THE CONSULTATION PAPER<sup>19</sup>**

##### **No change**

- 9.12 We considered the present law and were impressed by the criticisms made by the Royal Commission.<sup>20</sup> Above all, we realised that the present rules enable a determined defendant to require the attendance of people who helped the expert by carrying out routine tests and performing routine calculations, even though (as in *Jackson*)<sup>21</sup> there is no real likelihood that this would achieve anything other than the unnecessary expenditure of time and money on the strict proof of purely formal evidence. We received support for our provisional rejection of the option of preserving the present position.

##### **Retain the present system and impose cost sanctions against the counsel concerned**

- 9.13 We then considered the possibility suggested by the Royal Commission, which would be to impose cost sanctions against the counsel concerned.<sup>22</sup> Our provisional view was that there were two main obstacles to the making of such an order. First, a legal representative does not act improperly, unreasonably or negligently simply by acting for a party who pursues a claim or defence which is plainly doomed to failure. In *Ridehalgh v Horsefield* the court pointed out that

clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.<sup>23</sup>

Problems arise from the nature of the advocate's job and, in particular, from the specific task of deciding whether and how to cross-examine a particular witness.<sup>24</sup>

<sup>18</sup> But s 30 is of limited value for this purpose, since it permits the admission of an expert's report only as evidence of facts or opinions of which the author could have given oral evidence. If the expert cannot give oral evidence of the facts stated by his or her assistants because that would be hearsay, a report by the expert stating those facts is not admissible either.

<sup>19</sup> Paras 15.12 – 15.26 of the consultation paper.

<sup>20</sup> See para 9.1 above.

<sup>21</sup> See para 9.11 above.

<sup>22</sup> Paras 15.13 – 15.20 of the consultation paper. It could be argued that where the defence is taking advantage of errors by the prosecution (as in *Jackson*), both parties should be subject to sanctions.

<sup>23</sup> [1994] Ch 205, 234C–D, *per* Sir Thomas Bingham MR.

<sup>24</sup> *Ibid*, at p 236F–H:

Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions

- 9.14 The second obstacle follows from the first. A court cannot normally decide whether sanctions should be imposed on the lawyers involved without looking closely at their client's instructions – which the doctrine of legal professional privilege will preclude it from doing unless the client waives the privilege.
- 9.15 On consultation, there was inadequate support for this option, and we reject it.

**An exception to the hearsay rule for information relied on by an expert**

- 9.16 Another option was simply to create an exception to the hearsay rule for information relied on by an expert.<sup>25</sup> Our provisional view was that the consequence of such a change would be to deprive the opposing party of the right to cross-examine the person providing the information in *every* such case.<sup>26</sup> We therefore came to the provisional view that this option should not be adopted. That view was supported on consultation, and we therefore reject this option.

**An exception to the hearsay rule for information relied on by an expert and provided by someone who cannot be expected to have any recollection of the matters stated**

- 9.17 Our preferred option was the creation of an exception to the hearsay rule for information relied on by an expert *and* provided by someone who cannot be expected to have any recollection of the matters stated.<sup>27</sup> This exception would be in addition to any other exceptions to the rule. It commended itself to us as we thought it would achieve two aims. First, it would save the type of wasteful and unnecessary cross-examination which caused so much concern to the Royal Commission.<sup>28</sup> Second, it would prevent the waste of court time and expense which would result if that person were required to attend, since he or she would be unable to add to the evidence before the court.
- 9.18 On consultation, this option received much support. However, respondents with particular experience of the problem<sup>29</sup> said that it would not assist them, either because the expert's assistants would normally be expected to remember the work that they had done, or because the assistants work under such close supervision that there is nothing they can tell the court which the expert could not. This

quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.

See also *Orchard v South Eastern Electricity Board* [1987] QB 565, 579–580, *per* Dillon LJ, and 572, *per* Lord Donaldson MR; and *R v Horsham DC, ex p Wenman* [1995] 1 WLR 680, 702G, *per* Brooke J.

<sup>25</sup> Para 15.23 of the consultation paper.

<sup>26</sup> Para 15.24 of the consultation paper.

<sup>27</sup> Paras 15.25 – 15.26 of the consultation paper.

<sup>28</sup> See para 9.1 above.

<sup>29</sup> Eg the Home Office Forensic Science Service, and at least one major accountancy firm.

option would not help in either of these situations. We have therefore concluded that this option would do little to improve the present position.

**An exception to the hearsay rule for information relied on by an expert, subject to a judicial discretion to direct that the supplier of the information be tendered for cross-examination**

- 9.19 The remaining option put forward in the consultation paper was to require the leave of the court before a party relying on information supplied by an expert's assistant could be forced to tender the assistant for cross-examination. The expert's report would be accompanied by a list of the persons involved in its preparation, together with a description of the tasks carried out by each of them; the onus would then pass to the other side to indicate which of them it proposes to cross-examine, and why. The court would then determine whether a triable issue had been shown. It would be necessary to require the leave of the court because otherwise there would be no effective sanction where no, or no adequate, reasons were given.<sup>30</sup>
- 9.20 In the consultation paper we were attracted by this option, but did not feel able to propose its adoption because it would mean that the defence would have to disclose the nature of its case before it could cross-examine on the issues properly raised: at that time, such a change would have been a major innovation. We added that if the law were changed so as to require disclosure by the defence, this would become an attractive option.<sup>31</sup>
- 9.21 Since the publication of the consultation paper, the Criminal Procedure and Investigations Act 1996 has been passed. Section 5 requires disclosure by the defence, in trials on indictment, of the nature of the defence and the issues which will be in dispute.<sup>32</sup> The introduction of this requirement seems to weaken the argument that the defence should not be asked to justify requiring a particular witness to attend for cross-examination. If the nature of the defence has to be revealed anyway, it is hard to see what unfairness can flow from the need to reveal the nature of the questions that it is proposed to ask of an expert's assistant.
- 9.22 The defence would not be required to disclose in detail the questions that it proposes to put, only the general line of enquiry. Since the prosecution will already know what contribution the assistant made to the expert's conclusions, it is unlikely to be greatly advantaged by having advance notice of the general issues that the defence wishes to raise. Moreover, if the defence seriously wishes to challenge the prosecution's expert evidence it will usually do so by calling an expert witness of its own; and under the existing rules it would have to give advance notice of this evidence.<sup>33</sup> It therefore has little to lose by having to give notice of the issues that it wishes to explore with the assistant in cross-examination. The main effect of such a requirement, we believe, would be to

<sup>30</sup> Para 15.21 of the consultation paper.

<sup>31</sup> Para 15.22 of the consultation paper.

<sup>32</sup> Section 31(6) also allows the judge, in unusually complex or long cases, to order the defence to give a number of details about the defence.

<sup>33</sup> See n 11 above.

prevent defendants who do *not* seriously wish to challenge the prosecution's evidence from attempting to disrupt or prolong the trial by insisting that witnesses attend court for no good reason.<sup>34</sup>

## **OUR RECOMMENDATION**

### **Extending the disclosure requirements**

9.23 At present, under the Crown Court (Advance Notice of Expert Evidence) Rules 1987<sup>35</sup> and the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997<sup>36</sup> a party proposing to adduce expert evidence (otherwise than in relation to sentence) is required to furnish the other party or parties with "a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence".<sup>37</sup> Any other party may then require, in writing, to be provided with

a copy of (or if it appears to the party proposing to adduce the evidence to be more practicable, a reasonable opportunity to examine) the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure has been carried out.<sup>38</sup>

A party who fails to comply with these requirements may not adduce the evidence in question without the leave of the court.<sup>39</sup>

9.24 Under our proposed regime, these requirements would be extended so that the advance notice would include a list of any persons who had supplied information on which the expert relied, and a brief description of the information that each such person had supplied. Any other party to the proceedings could apply for a direction that any such person must give evidence in person; but such a direction could be made only if the party applying for it showed that it was in the interests of justice, by satisfying the court that there was a real issue which could be better pursued with the assistant than with the expert. The application would normally be made at a Plea and Directions Hearing in a trial on indictment, at a preparatory hearing in fraud or other long and complicated cases, or at a pre-trial review in a summary trial. Rules of court would lay down the precise procedure to be followed.

<sup>34</sup> It is of course possible that the *prosecution* might unreasonably insist on the attendance of assistants who have supplied information to the defence's expert witness; but it has not been suggested to us that this is a serious problem. Our recommendation would nevertheless apply to both prosecution and defence.

<sup>35</sup> See n 11 above.

<sup>36</sup> See n 11 above.

<sup>37</sup> Rules 3(1) and 3(1)(a) respectively.

<sup>38</sup> Rules 3(1) and 3(1)(b) respectively.

<sup>39</sup> Rule 5 in each case.

### **A new hearsay exception**

- 9.25 If no such application were made in respect of any assistant listed, or it were made but refused, a new hearsay exception would come into play. The expert witness would be able to base his or her evidence on any information supplied by that assistant on matters of which that assistant had (or may reasonably be supposed to have had) personal knowledge,<sup>40</sup> and any information so relied upon would be admissible as evidence of its truth.
- 9.26 If, however, a direction were made that the assistant must give evidence in person, no exception would apply, and the expert could rely only on
- (1) facts within his or her personal knowledge,
  - (2) technical information or matters within his or her professional expertise (by virtue of the common law exceptions), or admissible under any other exception, and
  - (3) matters given in evidence by other witnesses, including the assistant.
- 9.27 The exception we propose would be confined to matters of which the assistant could have given direct oral evidence. It follows that it would not extend to matters of opinion, or to facts which only a person with the necessary expertise could establish (such as the scientific analysis of samples), if the assistant in question did not have the necessary expertise to give admissible evidence of those matters. In the somewhat unlikely event of there being a real issue as to whether the assistant was qualified to supply the information in question, it would clearly be a case for a direction that the assistant must give evidence. The admissibility of the assistant's evidence would then be determined in the ordinary way, on a voir dire,<sup>41</sup> and the expert could rely on the assistant's information only to the extent that the assistant was permitted to, and did, give evidence of it.
- 9.28 The advance notice rules have recently been extended to the magistrates' court, and our recommended new exception could also extend to the magistrates' court. The only difference would be that it would be the fact-finders, the magistrates, who would determine whether the expert's assistant should be required to attend court. We see no objection to this, since, if the defence wishes to attack the assistant's conclusions, it will do so in any event, whether or not it succeeds in requiring the assistant to attend. We therefore recommend that the new rules should apply in all criminal trials.

<sup>40</sup> In accordance with our belief that multiple hearsay should not normally be admissible.

<sup>41</sup> See *Silverlock* [1894] 2 QB 766; *Bonython* (1984) 38 SASR 45.



9.29 **We recommend**

- (1) that the Crown Court (Advance Notice of Expert Evidence) Rules 1987<sup>42</sup> and the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997<sup>43</sup> should be amended so as to require advance notice of the name of any person who has prepared a statement on which it is proposed that an expert witness should base any opinion or inference, and the nature of the matters stated; and**
- (2) that, where such notice has been given, and the person who prepared the statement had (or may reasonably be supposed to have had) personal knowledge of the matters stated, the expert witness should be able to base any opinion or inference on the statement, and the statement should then be admissible as evidence of what it states, unless the court directs otherwise on application by any other party to the proceedings.<sup>44</sup> (Recommendation 33)**

<sup>42</sup> SI 1987 No 716 (L2) as amended by the Crown Court (Advance Notice of Expert Evidence) (Amendment) Rules 1997 SI 1997 No 700 (L6).

<sup>43</sup> SI 1997 No 795 (L11).

<sup>44</sup> See cl 16 of the draft Bill.

# PART X

## PREVIOUS STATEMENTS BY WITNESSES

- 10.1 In this Part we consider the cases where the party calling a witness seeks to use a previous statement by the witness. First we consider the admissibility of a statement which is *consistent* with the witness's oral evidence,<sup>1</sup> and then that of a statement which *stands in for* or *supplements* the oral evidence<sup>2</sup> (for example, where the statement is used to refresh the witness's memory). Finally we look at previous statements which are *inconsistent* with the oral evidence of the person who made them, and their use in cross-examination.<sup>3</sup>

### PREVIOUS CONSISTENT STATEMENTS

#### Summary of the present law

##### *The rule*

- 10.2 A statement to the same effect as the witness's oral evidence is inadmissible as evidence of what it states. This is an aspect of the rule against hearsay, and is subject to the exceptions to that rule – for example, where the previous statement forms part of the *res gestae*.<sup>4</sup> What we called in the consultation paper<sup>5</sup> the rule against previous consistent statements (and what others have called the rule against narrative) is the rule that such a statement cannot even be used to enhance the credibility of the witness's oral evidence, by demonstrating the consistency of his or her story. This rule is subject to several exceptions.

##### *Exceptions to the rule*

###### TO REBUT A SUGGESTION OF LATE INVENTION

- 10.3 First, evidence of what a witness said early on may be given to rebut a suggestion that his or her story is a "late invention".<sup>6</sup> In this case, the previous statement is not evidence of the truth of its contents, and is supposed to be used on the issue of the witness's credibility alone.
- 10.4 This exception is of limited value, as the mere fact that a witness's testimony is impeached in cross-examination will not automatically make such evidence admissible.<sup>7</sup> This remains true "even if the impeachment takes the form of contradiction or inconsistency between the evidence given at the trial and

<sup>1</sup> See paras 10.2 – 10.62 below. The admissibility of a *defendant's* previous exculpatory statements is discussed at paras 8.84 – 8.99 above.

<sup>2</sup> See paras 10.63 – 10.86 below.

<sup>3</sup> See paras 10.87 – 10.101 below.

<sup>4</sup> See paras 8.114 – 8.129 above. The *res gestae* exception to the hearsay rule, and the exceptions covering a defendant's response on accusation (see paras 8.88 – 8.99 above), apply in the same way whether or not the maker of the statement testifies.

<sup>5</sup> Paras 13.1 – 13.4 of the consultation paper.

<sup>6</sup> *Oyesiku* (1971) 56 Cr App R 240.

<sup>7</sup> *Fox v General Medical Council* [1960] 1 WLR 1017.

something said by the witness on a former occasion”.<sup>8</sup> If it is put to a witness that his or her testimony is fabricated or mistaken, merely pointing to an earlier occasion when the witness made the same allegation is no answer. If, however, it is put to a witness that, for example, he or she has colluded with the defendant, and the witness can point to an earlier statement which predates the date of the alleged collusion, then, in the words of Dixon CJ,<sup>9</sup> the earlier statement “rationally tends to answer the attack”.<sup>10</sup>

#### PREVIOUS IDENTIFICATION

- 10.5 A second exception is “evidence ... admitted in criminal trials from time immemorial of the identification of the accused [by witnesses] out of court”.<sup>11</sup> The rationale for admitting evidence of such identifications is “to show that the [witness] was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or a mistake”.<sup>12</sup>
- 10.6 In recent years, this exception has been extended to the case where the victim composed a Photofit that looked just like the accused,<sup>13</sup> or guided a police artist to draw the person’s likeness in a sketch.<sup>14</sup> (These developments make it seem distinctly anomalous that the court is not permitted to receive evidence of the words the witness used to describe what the attacker looked like, evidence which the hearsay rule would certainly exclude.)
- 10.7 This exception applies even where the witness does not repeat the identification while giving evidence – in which case, strictly speaking, the earlier identification is merely a previous statement and not a previous *consistent* statement. However, the usual practice is for the witness to confirm the earlier identification, and so we consider this exception here.

#### RECENT COMPLAINT

- 10.8 The best known exception to the rule against previous consistent statements is “recent complaint”.<sup>15</sup> Where the defendant is charged with a sexual offence,<sup>16</sup> and

<sup>8</sup> *Coll* (1889) 24 LR Ir 522, 541, *per* Holmes J.

<sup>9</sup> *Nominal Defendant v Clements* (1961) 104 CLR 476, 480.

<sup>10</sup> See, eg, *Oyesiku* (1971) 56 Cr App R 240, in which the prosecution insinuated that the accused’s wife had made up her testimony to support her husband. She had, however, made a statement to her husband’s solicitors before he was released from custody, and her statement tended to show that her evidence was independent.

<sup>11</sup> *Fannon* (1922) 22 S NSW 427, 429–430, *per* Ferguson J.

<sup>12</sup> *Ibid*, at p 551.

<sup>13</sup> *Cook* [1987] QB 417; *Constantinou* (1990) 91 Cr App R 74.

<sup>14</sup> *Smith* [1976] Crim LR 511.

<sup>15</sup> *Lillyman* [1896] 2 QB 167; *Osborne* [1905] 1 KB 551; *Blackstone*, para F6.14; *Archbold*, paras 8-103 to 8-106.

<sup>16</sup> This exception extends to any sexual offence, whether committed against a male or a female, and whether or not consent is in issue: eg *Osborne* [1905] 1 KB 551.

the complainant has given evidence about the alleged offence,<sup>17</sup> the court can hear the terms of the original complaint, provided it was made spontaneously and at the first reasonable opportunity;<sup>18</sup> the court may also hear evidence to explain why the alleged victim did *not* tell anyone, if that is an issue.<sup>19</sup>

- 10.9 “Spontaneously” was explained by Ridley J as meaning that this exception applies “only where there is a complaint not elicited by questions of a leading and inducing or intimidating character”.<sup>20</sup> Ridley J also said:

[T]he mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible ...<sup>21</sup>

- 10.10 This dictum was later explained thus:

The court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened.<sup>22</sup>

### **Justifications and criticisms of the rule against previous consistent statements**

- 10.11 The main justification for the hearsay rule, namely the impossibility of cross-examining the declarant, clearly has no force where the witness testifies and is available for cross-examination. It can therefore be argued persuasively that courts could safely be more liberal in admitting previous statements than in admitting statements where the declarant does not testify.
- 10.12 The main reason for the rule against previous consistent statements is that the evidence would be at least superfluous, for the assertions of a witness are to be regarded in general as true, until there is some particular reason for regarding them as false. *Cross and Tapper* explains:

<sup>17</sup> See *Wallwork* (1958) 42 Cr App R 153, in which the complainant, a five-year-old girl, did not testify because she was too frightened, and so evidence of her recent complaint was inadmissible.

<sup>18</sup> In the recent case of *Valentine* [1996] 2 Cr App R 213, 223–224, Roch LJ, giving the judgment of the court, said:

What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity. Further, a complaint will not be inadmissible merely because there has been an earlier complaint, provided that the complaint can fairly be said to have been made as speedily as could reasonably be expected.

The Supreme Court of Western Australia has interpreted the law similarly: see *Miller v R* (1995) 13 WAR 504.

<sup>19</sup> *Greenwood* [1993] Crim LR 770.

<sup>20</sup> *Osborne* [1905] 1 KB 551, 561.

<sup>21</sup> [1905] 1 KB 551, 556.

<sup>22</sup> *Norcott* [1917] 1 KB 347, 350, *per* Viscount Reading CJ.

The necessity of saving time by avoiding superfluous testimony and sparing the court a protracted inquiry into a multitude of collateral issues which might be raised about such matters as the precise terms of the previous statement is undoubtedly a sound basis for the general rule.<sup>23</sup>

We agree.

- 10.13 An associated reason is that if previous statements are admitted, the focus of the trial moves from the oral testimony to the statements. Where the quality of the previous statements is doubtful, this consideration has particular force.<sup>24</sup> The merits of oral evidence were described in *Butera v DPP*:<sup>25</sup>

A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence.

- 10.14 Although we would not endorse this assessment in every particular,<sup>26</sup> we share the concern to maintain the traditional emphasis on oral evidence. However, we also think it undesirable that evidence should be kept from the court where it is of better quality than the oral evidence available at trial, thus giving a false impression of the quality of that oral evidence.
- 10.15 A further concern has been the risk that, if the rule against previous consistent statements were abolished, previous statements could easily be manufactured.<sup>27</sup> But our general approach is that, where the witness is available to be asked about the circumstances in which the earlier statement was allegedly made, the risk of manufacture should go to weight, not admissibility.

<sup>23</sup> *Cross and Tapper*, p 295, referring to *Fox v General Medical Council* [1960] 3 All ER 225, 230; [1960] 1 WLR 1017, 1024–1025

<sup>24</sup> We noted at para 3.52 of the consultation paper that research has shown that the quality of witness statements taken by police officers may well be poor. Not only may the story appear in the officer's words rather than the witness's, but the content of the statement may not even accurately reflect what the witness told the officer. See M McLean, "Quality Investigation? Police Interviewing of Witnesses" in *A New Look at Eye-Witness Testimony* (British Academy of Forensic Sciences, 1994); D Wolchover and A Heaton-Armstrong, "A Sounder System", *The Independent* 16 April 1997.

<sup>25</sup> [1987] 164 CLR 180, 189 (High Court of Australia).

<sup>26</sup> See paras 3.9 – 3.12 above for our conclusions on the advantages of observing a witness testify.

<sup>27</sup> See *Roberts* [1942] 1 All ER 187, 191E, *per* Humphreys J; *Jones v The South Eastern Chatham Railway Company's Managing Committee* (1918) 87 LJKB 775, 778, *per* Swinfen Eady LJ.

### ***Criticisms of the exceptions***

#### SUGGESTION OF LATE INVENTION

- 10.16 Two criticisms must be made of this exception. First, it is limited in scope: it applies only where it is suggested that the witness's oral evidence is a "late invention". The mere fact that the witness's credibility is attacked by reference to a previous inconsistent statement does not entitle the witness to refer in turn to previous consistent statements which might redress the balance – for example where the inconsistent statement was a retraction made under pressure, but the consistent statements were freely made.<sup>28</sup>
- 10.17 Secondly, the fact-finders are once again expected to appreciate the subtle distinction between treating the statement as evidence of its contents and as evidence that the witness is telling the truth when he or she gives evidence to the same effect. This is probably too much to expect. To say that a witness's previous statement of *x* is not probative of *x*, but makes the witness's evidence of *x* more credible, seems to us to be a distinction without a difference.
- 10.18 As we have seen, this exception comes into play only in very limited circumstances. But if it were to be extended – for example, to allow a previous statement to be admitted to bolster oral evidence whenever it transpired in cross-examination that the witness had at some time made a statement conflicting with the oral evidence – the effect would be to let in most previous statements. This would approach option 2, which we consider, and reject, at paragraphs 10.30 – 10.34 below.

#### PREVIOUS IDENTIFICATION

- 10.19 In regarding what is said outside the courtroom as inferior to what is said in the witness box, the rule against previous consistent statements assumes that the truth of the earlier identification is immaterial and that it only supports the evidence given in court. This is a fiction because it is really at the earlier identification (whether immediately after the crime, at an identification parade or in the course of one of the other procedures set out in the Code of Practice)<sup>29</sup> that the witness makes the judgment that the person picked out is the offender. The subsequent identification in court is something of a formality. Indeed, the courts have cautioned against *permitting* identifications made in court for the first time,<sup>30</sup> let alone relying on them. It is the out-of-court identification that is significant. If the witness can pick out the accused in court, that may or may not enhance the earlier identification, depending on the circumstances.
- 10.20 Given that the person making the identification is available to be asked about the circumstances of the original sighting (and about any loss of memory) and that the true identification is that made before the trial, there does not seem to be any sound reason for excluding available evidence of the earlier identification, whether or not it is repeated in court; nor for saying that, when it is admissible, it goes only to credibility.

<sup>28</sup> *Beattie* (1989) 89 Cr App R 302, 307, *per* Lord Lane LJ.

<sup>29</sup> Code of Practice for the Identification of Persons, issued by the Secretary of State under PACE, s 66(b).

<sup>30</sup> See *Eatough* [1989] Crim LR 289.

10.21 We noted in the consultation paper that the identification exception extends only to identifications of people, and referred to cases such as *Jones v Metcalfe*<sup>31</sup> as revealing a deficiency in the law.<sup>32</sup> Thus, where it is sought to establish the registration number of a car involved in an incident, and an eye-witness A, who saw the incident, related the number to B, who did not, it is inadmissible hearsay for B to tell the court what the number was for the purpose of proving which car was involved. Our recommendations 35 and 38 are designed to address this problem.<sup>33</sup>

#### RECENT COMPLAINT

10.22 The purpose of this exception is to support the credibility of the witness. The exception is limited to sexual offences. Not only does this limitation give rise to anomalies,<sup>34</sup> but it might be thought equally important for the court to know the terms in which the alleged victim complained, whatever the nature of the offence. The rationale for the limitation is that independent evidence is unlikely to be available, and more will depend on the testimony of the parties in sexual offences than in non-sexual offences.<sup>35</sup>

10.23 A second objection is that the rule makes necessary a convoluted direction, which the CLRC described as “wholly unrealistic and difficult for a jury to appreciate”,<sup>36</sup> to the effect that a “recent complaint” is not evidence that the alleged victim was assaulted, but merely evidence that he or she is now telling the truth when repeating the complaint.

10.24 A third objection which we noted in the consultation paper<sup>37</sup> is that the exception is limited to complaints spontaneously made “at the first opportunity after the offence which reasonably offers itself”.<sup>38</sup> Although the particular circumstances of the complainant are taken into account in deciding what was the “first reasonable opportunity”, the complaint must have been made “as speedily as could reasonably be expected”.<sup>39</sup> This rule seems to be based on the idea that the natural reaction of any genuine victim of a sexual offence is to tell someone immediately; but research clearly shows that most victims are too embarrassed to tell anyone, let alone to do so spontaneously and early.<sup>40</sup> Many victims will therefore find their

<sup>31</sup> [1967] 1 WLR 1286, where the Divisional Court reached its decision with reluctance (see Diplock LJ and Widgery J at 1290C); *McLean* (1967) 52 Cr App R 80; A Ashworth and R Pattenden, “Reliability, Hearsay Evidence and the English Criminal Trial” (1986) 102 LQR 292, 298–300.

<sup>32</sup> Para 13.12 of the consultation paper.

<sup>33</sup> See paras 10.52 and 10.80 below.

<sup>34</sup> Eg, if a burglar enters a house and sexually assaults the complainant, evidence can be given of the original complaint, whereas if the burglar only steals property from the premises it cannot.

<sup>35</sup> See *Cross and Tapper*, p 298.

<sup>36</sup> CLRC Evidence Report, para 232.

<sup>37</sup> At para 13.8.

<sup>38</sup> *Osborne* [1905] 1 KB 551, 561, *per* Ridley J.

<sup>39</sup> See n 18 above.

<sup>40</sup> J Temkin, *Rape and the Legal Process* (1987) pp 145–146.

evidence cannot be supported by telling the court the terms of their original complaints.

- 10.25 Since the consultation paper was published the common law has developed so that this objection does not have the force it once had. Following *Valentine*,<sup>41</sup> a court will now take into account the personal circumstances of the complainant when ruling on whether the complaint was made at the first reasonable opportunity.
- 10.26 A fourth objection is that the current law makes the complaint inadmissible if it was “assisted”. In our view, complainants of sexual offences are often reluctant to say what has happened, and do not speak easily and freely; they may well have to be helped to articulate the complaint. That of itself should go to weight, and not to admissibility.

### **The options and the response on consultation**

- 10.27 In the consultation paper we considered three options, namely, retaining the present law,<sup>42</sup> allowing all previous consistent statements to be admissible,<sup>43</sup> or (the preferred option) permitting previous consistent statements to be admitted as evidence of the truth of their contents in certain specified circumstances.<sup>44</sup> We now propose to review each of those options in the light of the responses received on consultation.

#### ***Option 1: retain the present law***

- 10.28 We provisionally rejected this option because of the defects in the law.<sup>45</sup> *Cross and Tapper* criticises the rule, accurately in our view, for

its inconsistency with other rules, its illogicality, its capacity to prejudice the accused, its arbitrary scope, and the resentment created by allowing the credibility of one of the parties to the dispute to be bolstered, but not that of the other.<sup>46</sup>

- 10.29 On consultation, a large majority of respondents agreed that this option should be rejected. Those who preferred this option did not persuade us that no improvement is needed to this area of law.

#### ***Option 2: all previous consistent statements to be admissible***

- 10.30 The CLRC recommended the abolition of the rule against previous consistent statements, and in Scotland it has been severely restricted in scope.<sup>47</sup> In spite of

<sup>41</sup> [1996] 2 Cr App R 213: see n 18 above.

<sup>42</sup> See para 13.39 of the consultation paper.

<sup>43</sup> See paras 13.40 – 13.41 of the consultation paper.

<sup>44</sup> See paras 13.42 – 13.55 of the consultation paper.

<sup>45</sup> See paras 10.11 – 10.26 above.

<sup>46</sup> *Cross and Tapper*, p 302 (footnote omitted).

<sup>47</sup> In Scotland, by virtue of s 18 of the Criminal Justice (Scotland) Act 1995 and s 260 of the Criminal Procedure (Scotland) Act 1995 (which are identically worded), a witness’s previous statement is admissible if it was contained in a “document” and sufficiently authenticated by the witness prior to trial, provided that the witness would have been



these weighty precedents, we felt obliged to reject this option in the consultation paper.<sup>48</sup> We believed that it would allow any number of previous consistent statements to be admitted where they add little or nothing, and that the fact-finders would be distracted from the more important evidence. Defendants might be tempted to make many denials in the hope that their sheer volume would impress a lay tribunal. We were also concerned that the fact-finding body would not be assisted by the statements. One respondent pointed out that we had said in the consultation paper that the hearsay rule wastes court time by requiring evidence to be given orally which could be more easily, quickly and cheaply presented in written form,<sup>49</sup> and queried why we did not apply this argument here. It seems to us that this option would *increase* the total amount of evidence put before the court, not simplify the form in which it was adduced, and so there would be no saving of court time.

- 10.31 On consultation our view was accepted by a large majority of those who commented, but there was powerful support for this option from two distinguished academics. Professor John Spencer wrote that the rule requires us “to accept two remarkable scientific propositions: first, that memory improves with time; and secondly, that stress enhances a person’s powers of recall.” He found the argument that court time would be wasted “very unconvincing”.<sup>50</sup> His views were supported by Dr Andrew L-T Choo.<sup>51</sup>
- 10.32 These views were not shared by the other respondents, many of whom took the very strong view that this option would let in large quantities of unnecessary and irrelevant material. They stressed that only relevant evidence is admissible, and that any reform of the rule against previous statements should not invite irrelevant evidence. It is, of course, already within the power of the court to exclude insufficiently relevant evidence,<sup>52</sup> and statements which add almost nothing to the oral testimony are likely to be insufficiently relevant. Therefore, if the rule against previous statements were abolished, only those previous statements that did in fact add value, or enhance the witness’s credibility, would become admissible. But there might be an increase in the number of marginally relevant statements admitted at trial if this option were adopted.
- 10.33 We considered this option in the light of the argument that the court would not permit previous statements to be admitted unless they were relevant. We foresee long arguments on the relevance of particular statements, and we believe a better way would be to define the cases where such evidence *could* be relevant, such as to rebut an allegation of recent invention.

competent at the time of making the statement, and so long as he or she confirms being the originator of the statement and adopts it as his or her evidence.

<sup>48</sup> See para 13.41 of the consultation paper.

<sup>49</sup> See para 6.97 of the consultation paper.

<sup>50</sup> See generally “Hearsay Reform: A Bridge Not Far Enough?” [1996] Crim LR 29, 32.

<sup>51</sup> The author of *Hearsay and Confrontation in Criminal Trials* (1996).

<sup>52</sup> Eg *Tooke* (1990) 90 Cr App R 417, where a previous consistent statement by the defendant duplicated an earlier statement he had made, which was admitted; therefore “it was not relevant nor did it add anything to the weight of the other testimony”.

10.34 Those who opposed this option were also concerned that trials would focus on statements in documents, rather than on oral evidence. This concern gains force from the doubts about the quality of witness statements generally. We find the reasoning of those unhappy with this option very persuasive, and have therefore decided to reject it.

***Option 3: a witness's previous statement to be admissible as evidence of the truth of its contents only in certain specific circumstances***

10.35 This was our preferred option in the consultation paper.<sup>53</sup> It would differ from the existing law in that, where the previous statement was admissible, it would be admissible as evidence of the facts stated, and not merely to bolster the credibility of the witness's oral evidence. In other words it would amount to an exception to the rule against hearsay, and not (as at present) only to the rule against narrative.

10.36 A large majority of the respondents who commented supported this option. Some respondents were disturbed by the prospect of previous statements going not only to credibility but also to the issues, because, in their view, this would amount to the substitution of an out-of-court statement for sworn evidence. Where (as in the exceptions we propose) the witness is available to testify, it seems to us that the previous consistent statement will add to the oral evidence, not replace it.<sup>54</sup> And the witness is, of course, available to be cross-examined on both the earlier statement and the oral evidence in chief.

10.37 We believe that this option would not entail any breach of the Convention. The Strasbourg Commission held that there had been no breach of Article 6(3)(d) of the Convention<sup>55</sup> where, in the Danish Court of Appeal, a witness's earlier statement made at the City Court was simply read out and he was asked to confirm or deny that he stood by the statement. The Commission held that this practice might reduce the value of the evidence but was not impermissible because there was an opportunity to ask further questions at the appeal stage.<sup>56</sup>

10.38 For these reasons, we consider that this option strikes the right balance between maintaining an emphasis on oral evidence and preventing relevant evidence being kept from the fact-finders. We conclude, therefore, that a previous statement by a witness should be admissible, not only to support the witness's credibility but also as evidence of the truth of what it states, in the following cases:<sup>57</sup>

- (1) a statement adduced to rebut an allegation of recent invention;

<sup>53</sup> See paras 13.42 – 13.55 of the consultation paper.

<sup>54</sup> Where there are gaps in the witness's oral evidence, or the previous statement replaces it entirely, the previous statement could take the place of oral evidence. We consider these situations separately at paras 10.63 – 10.81 below.

<sup>55</sup> The text of Article 6(3)(d) is set out at para 5.3 above.

<sup>56</sup> *Hauschildt v Denmark* Appl 10486/83, 49 Decisions and Reports 86, 102. See also para 5.21 above.

<sup>57</sup> There are three other circumstances in which we recommend that a previous statement by a witness be admissible: viz children's evidence recorded on video, cases where the witness cannot remember details, and previous inconsistent statements. These are considered later in this Part.

- (2) a prior identification or description of a person, object or place; and
- (3) recent complaint.

### **General considerations**

- 10.39 There are two aspects to the recommended option: first, the recommended exceptions to the general exclusionary rule, which are set out in detail at paragraphs 10.41 – 10.61 below; and second, the recommendation that, when the previous statement is admitted under one of these exceptions, it should be evidence of its truth and should not go merely to the credibility of the witness. We consider in relation to each of the recommended exceptions the use that may be made of a statement falling within the exception. But we may say here that the argument is the same in two of the three cases (the exception being prior identifications): that the distinction between treating a statement as evidence on the issues and evidence as to credibility is one which is likely to cause confusion, particularly with juries, and it should for that reason be dispensed with. We do not believe that fact-finders (especially juries) can distinguish between using previous statements to show consistency and as evidence of their truth.
- 10.40 The following considerations apply to previous statements admitted under any of the exceptions we recommend.
- (1) The statement may be oral or contained in a document.
  - (2) The witness must not have been incompetent as a witness for the party calling him or her at the time the statement was made.
  - (3) Where it is the prosecution that seeks to adduce the previous statement, it will be open to the court to exclude it pursuant to the common law discretion, or under section 78 of PACE if it would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. This may arise where the probative value of the statement is slight, but its capacity to prejudice the fact-finders against the defendant is great.
  - (4) If the content of the previous statement is inadmissible for some reason other than the fact that it is hearsay (for example, because it is prejudicial), it will remain inadmissible.
  - (5) As regards statements which are partly consistent and partly inconsistent with the oral evidence, the whole of the statement may be considered as evidence.<sup>58</sup>

We now turn to the detail of the recommended exceptions.

<sup>58</sup> We are recommending that admissible inconsistent statements be treated as evidence of their contents, and not just as going to credibility: see para 10.92 below. It follows that fact-finders would be able to treat the inconsistent parts of a largely consistent statement as evidence of what they state.

## **The recommended exceptions**

### ***To rebut a suggestion of late invention***

- 10.41 In the consultation paper we put forward the provisional view that, if it is contended that an allegation is an afterthought, the witness should be entitled to have any previous statement put before the court, so that the fact-finders would have all the available information before them and would be able to ascertain whether an allegation is a recent invention.<sup>59</sup> This view received the support of a large majority of the people who commented on it.
- 10.42 Some respondents thought that we overestimated the injustices caused by this exception. Buxton J pointed out that the suggestion of recent invention is rebutted by a previous statement whether its contents are true or not. It would therefore be illogical to turn this exception to the rule against previous consistent statements into an exception to the hearsay rule, and more complications would result.
- 10.43 A factor which we think should be taken into account is that the defence may be deterred from cross-examining on a previous statement if to do so would result in a number of previous statements consistent with the witness's oral evidence being admitted in evidence. It seems to us undesirable to deter proper cross-examination.
- 10.44 Reform of this exception has to be considered in tandem with our recommendation that where a previous *inconsistent* statement is admitted, it should be evidence of the truth of its contents.<sup>60</sup> On the one hand, one might argue that the inconsistent statement is balanced by the oral evidence, and any previous consistent statement could safely be left to go only to credibility, insofar as the distinction has any meaning in the individual case. On the other hand, it could be potentially unfair if an inconsistent statement were admitted as an exception to the hearsay rule, but a contradictory statement, which was consistent with the oral evidence, went only to credibility. We prefer this latter view, and think also that it would be positively undesirable for the fact-finders to be encouraged to think that a statement is made more credible by repetition.
- 10.45 We have concluded that the circumstances in which this minor exception can be used are best left alone, but that, where a statement is admitted under it, it should go to truth and not be restricted to credibility. **We recommend that where a previous statement by a witness is admitted as evidence to rebut a suggestion that the witness's oral evidence has been fabricated, that statement should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.**<sup>61</sup> (Recommendation 34)

<sup>59</sup> Paras 13.49 – 13.50 of the consultation paper.

<sup>60</sup> On which, see paras 10.91 and 10.92 below.

<sup>61</sup> See cl 8(2) of the draft Bill.

***Evidence of a previous identification or description of a person, object or place***

- 10.46 We have set out above the problems with the current law.<sup>62</sup> In summary, they are as follows. First, it is a fiction that the earlier identification supports the identification made in court; second, the same principle extends to out-of-court identifications of objects; and third, it is anomalous that the words used to describe a person are not admissible while a picture of that person is. In the consultation paper we proposed that a witness's previous statement should be admissible, as evidence of the truth of its contents, where it constitutes a previously made identification or description.<sup>63</sup>
- 10.47 On consultation, a large majority of the respondents who commented on this proposal were in favour. The principal objection, voiced by the Wales and Chester Circuit, was to out-of-court evidence being admitted as evidence of its truth rather than going simply to credibility, for fear that the trial would centre on written statements and not on the oral evidence. As we have said, in this instance it is not simply a matter of a fine distinction between evidence and non-evidence: rather, it is a fiction that the out-of-court identification plays only a supporting role. Nevertheless, as we wish to keep the focus of the trial on the oral evidence, we suggest that the witness be required to confirm that, to the best of his or her belief, he or she made the out-of-court statement and it was true.
- 10.48 As regards the identification of objects, a problem tends to arise when the identifying features of the object are of a kind which a witness cannot easily remember, such as an identification number or a car registration number. In this instance, the previous statement is not strictly speaking *consistent* with the oral evidence but *supplements* it, filling in gaps; and the use of a previous statement to fill gaps in the witness's oral evidence is considered at paragraphs 10.63 – 10.80 below. But the problem is relevant in the present context because the underlying principle is the same: the true identification, whether of a person or a car, is that made outside the court room.
- 10.49 Where the witness has not learnt the identifying feature of the object by heart (a practice which is not particularly recommended), he or she may seek to refer to a document in which it is written down. That document is hearsay, but if it was written contemporaneously, either by the witness or at his or her dictation and checked by him or her, the witness may use the document to "refresh his or her memory", and recite the number to the court. This is not possible where the statement was not contemporaneous, or the witness did not check the number dictated,<sup>64</sup> or it was not written down at all but another witness claims to remember what the first witness said it was.
- 10.50 The question is whether the out-of-court identification of objects should be permitted in the same way as identifications of people, or whether the problem is better dealt with by our recommended exception for the witness who can no

<sup>62</sup> See paras 10.19 – 10.21 above.

<sup>63</sup> See paras 13.51 – 13.55 of the consultation paper.

<sup>64</sup> See *McLean* (1967) 52 Cr App R 80; *Jones v Metcalfe* [1967] 1 WLR 1286; *Kelsey* (1982) 74 Cr App R 213.

longer remember relevant details. The latter exception would solve most of the difficulties that arise in relation to the identification of objects, but in our view it would be anomalous to exclude that case from the present exception. It would mean that a witness could give admissible evidence of a previous identification of a person, even if he or she could remember clearly the physical characteristics of the person identified, but could not give evidence of a previous identification of an object unless he or she could not reasonably be expected to remember the characteristics of the object. We have therefore concluded that the present exception should extend to the identification of objects (and places) as well as people.

10.51 The third problem to which we have referred is the anomaly that a picture or sketch of a person may be admitted, but words previously used by the witness to describe that person may not. It is to overcome this anomaly that we propose that a previous description be admitted in evidence.

10.52 **We recommend that, where**

- (1) a witness has made a previous statement which identifies or describes a person, object or place, and**
- (2) while giving evidence the witness indicates that to the best of his or her belief he or she made the statement, and it states the truth,**

**the statement should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.<sup>65</sup>**  
**(Recommendation 35)**

***Recent complaint***

10.53 We take the view that the exception of “recent complaint” should be retained in a form which would meet the criticisms of the present law. As we saw above,<sup>66</sup> there are four problems with the current form of this exception. First, it is confined to sexual offences. Second, it makes little sense to distinguish between evidence being directly probative of the facts asserted and being merely supportive of the oral testimony. Third, a complaint is inadmissible unless made at the first reasonable opportunity. Finally, a complaint is inadmissible if it was “assisted”.

10.54 There is an argument that it is useful to know the terms in which the original complaint was made, whatever the nature of the offence,<sup>67</sup> and the first question is whether this is in fact the case. We referred in the consultation paper to research which shows that the most accurate account of an event is more likely to be given shortly afterwards than at trial,<sup>68</sup> and that the account may be “contaminated”,

<sup>65</sup> See cl 8(4), (5) of the draft Bill.

<sup>66</sup> See paras 10.22 – 10.26.

<sup>67</sup> See, eg, J R Spencer, “Hearsay Reform: A Bridge Not Far Enough?” [1996] Crim LR 29, 33.

<sup>68</sup> See para 13.33 of the consultation paper; J R Spencer and R H Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) p 268.

however unwittingly, by the person to whom it was made,<sup>69</sup> or simply changed by the act of repeating it.<sup>70</sup> It is true, however, that the first statement may not always be the most accurate. On consultation, the Criminal Bar Association commented that later statements tend to be more detailed and complete than early statements. (Judge Graham Jones suggested that the evidence of important witnesses should be recorded on video as soon as possible, and used as their evidence in chief.)

10.55 Although conscious of the potential dangers of admitting the original complaint, we take the view that the version recollected at trial is not likely to be any more accurate – after all, many witnesses will remind themselves of their evidence by reading their witness statements before they testify – and at least the witness is available to be cross-examined.

10.56 We do not see any justification for limiting this exception to sexual offences, and we recommend that this limitation be removed.

10.57 As we state above,<sup>71</sup> the direction to a jury that the complaint serves only to show that the witness is now telling the truth, and may not itself be taken as evidence of what happened, is unrealistic. We therefore take the view that, where a previous complaint is admissible at all, it should be treated as evidence of the truth of its contents, and not merely to support the witness’s credibility.

10.58 As we state above,<sup>72</sup> the common law has moved on since the consultation paper was completed, and the courts can now take a more liberal view of how soon a complainant can be expected to make a complaint. We therefore recommend no change to the existing requirement that the complaint be made as soon as could reasonably be expected.

10.59 We note above that, in our view, the fact that a complainant has been helped to articulate his or her complaint should go to weight and not to admissibility.<sup>73</sup>

10.60 **We recommend that, where**

- (1) a witness claims to be a person against whom an offence to which the proceedings relate has been committed,**
- (2) the witness has made a previous statement which consists of a complaint about conduct which would, if proved, constitute the offence or part of the offence,**

<sup>69</sup> We note the care taken not to “contaminate” the evidence in chief of a child where it is recorded on video, eg by avoiding leading questions. See “Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings” (HMSO 1992) p 1.

<sup>70</sup> We referred at para 3.52 of the consultation paper to research which casts doubt on the reliability of the witness statements taken by police officers: see n 24 above.

<sup>71</sup> See para 10.23 above.

<sup>72</sup> See para 10.25 above.

<sup>73</sup> See para 10.26 above.

- (3) **the complaint was made as soon as could reasonably be expected after the alleged conduct,**
- (4) **the complaint was not made as a result of a threat or a promise,**
- (5) **before the statement is adduced the witness gives oral evidence in connection with its subject matter, and**
- (6) **while giving evidence the witness indicates that, to the best of his or her belief, he or she made the statement and it states the truth,**

**the statement should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.<sup>74</sup>**  
**(Recommendation 36)**

10.61 Before leaving this exception, it may be helpful to explain the interaction between it and section 78 of PACE. There may be cases where, although evidence of the complaint is prima facie admissible under this exception, the court will exercise its discretion to exclude the statement because it would have such an adverse effect on the fairness of the trial. For example, if the issue in a sexual assault case is that of identity, and the complaint sheds no light on that issue, the details of the complaint will have little probative value and could be highly prejudicial. In such a case the defendant would be protected by the exclusion of the evidence under section 78.

#### **Documentary statements as exhibits**

10.62 We are aware of the danger that written statements may make more of an impression upon fact-finders, particularly upon jurors, than oral evidence. Some previous statements of witnesses will be contained in documents, and, once admitted or proved, they become exhibits in the case. The normal practice is for the jury to take exhibits with them when they retire. This is unlikely to be appropriate as a matter of course for a witness's previous statements. We believe that where such statements are contained in documents they should not automatically be taken into the jury room, but that the court should have a discretion to permit this where appropriate. **We recommend that where a statement previously made by a witness in a document is admitted, the document should not accompany the jury when they retire to consider their verdict, unless the court considers it appropriate or all the parties to the proceedings agree that it should accompany the jury.<sup>75</sup>**  
**(Recommendation 37)**

<sup>74</sup> See cl 8(4), (7) and (8) of the draft Bill.

<sup>75</sup> See cl 11 of the draft Bill.



**PREVIOUS STATEMENTS WHICH TAKE THE PLACE OF OR SUPPLEMENT ORAL TESTIMONY**

**Inability to remember**

***The present law***

- 10.63 A witness may refresh his or her memory from a statement in a document made contemporaneously with the events it concerns and while the facts were fresh in his or her memory. If the statement was recorded by someone else, the witness may nevertheless make use of it if the witness verified or adopted the statement.<sup>76</sup> The document does not become an exhibit merely because a witness refreshes his or her memory from it.
- 10.64 Where the statement was not made contemporaneously, the law used to be governed by *Da Silva*.<sup>77</sup> The Court of Appeal there held that a judge has a discretion, to be exercised in the interests of justice, to allow a witness to refresh his or her memory from a non-contemporaneous statement, provided

(1) that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place; (2) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it; (3) that he had not read the statement before coming into the witness box; (4) that he wished to have an opportunity to read the statement before he continued to give evidence.

The witness was not to be allowed to hold on to the statement while giving evidence, as would be the case if it were contemporaneous.<sup>78</sup>

- 10.65 The rules laid down in *Da Silva* have recently been relaxed in *ex p Cochrane*,<sup>79</sup> so that a witness may now refer to a non-contemporaneous statement even if the witness had read it before coming into the witness box. In that case, the witness had not taken in the contents of his statement when he read it because he was afraid of facing the defendants.

***Criticisms of the present law***

- 10.66 Sight of the earlier statement may or may not refresh the witness's memory; in some cases there may be no actual recollection, but the witness is able to read the details in the statement and fill in the gaps. It may be a fiction that it is the oral evidence that counts; the best evidence may well be the earlier statement. If the witness cannot remember the matters stated even with the help of the statement, the statement is effectively hearsay.
- 10.67 In some cases that best evidence may be lost to the court entirely, for example where the statement was written down by someone other than the witness and not

<sup>76</sup> *Eleftheriou* [1993] Crim LR 947.

<sup>77</sup> [1990] 1 WLR 31.

<sup>78</sup> *Ibid*, at p 36.

<sup>79</sup> *R v South Ribble JJ, ex p Cochrane* [1996] Crim LR 741.

checked by the witness,<sup>80</sup> or where even reading the statement prompts no recollection of the events.<sup>81</sup> One may take the view that, even if the evidence is the best available, because it was not checked by the witness it is of such poor quality that the hearsay rule rightly excludes it. On the other hand, one may say that it is better than nothing, and that the circumstances in which it was created should not go to admissibility but only to weight.

- 10.68 Some anomalies are thrown up by the present law. For example, the situation described in the preceding paragraph can be avoided if the evidence concerns an identification.<sup>82</sup> Although the principle is the same even if the forgotten detail is not an identification, the law treats the two situations differently. A second example is the use of a different exception to the hearsay rule to let the evidence in, “by the back door” as it were.<sup>83</sup>
- 10.69 Finally, as one respondent<sup>84</sup> wrote, “It is quite absurd that a witness can read his non-contemporaneous statement outside the court and then rush into court and give evidence in accordance with that statement, yet not be able to use it in court to refresh his memory.” This absurdity is now mitigated by *ex p Cochrane*,<sup>85</sup> but elements of it may still persist.

#### ***The option provisionally proposed and the response on consultation***

- 10.70 In the consultation paper we proposed that a previous statement of a witness should be admitted, as evidence of its truth, where the witness is unable to remember details contained in a statement which the witness had made or adopted when the details were fresh in his or her memory and it is unreasonable at the date of trial to expect the witness to be able to recall them.<sup>86</sup> We took the view that this option would ensure that evidence which is of sufficient importance to be worthy of consideration by the fact-finders would be admissible. It would also recognise the difficulty that witnesses have in remembering detailed evidence.

<sup>80</sup> See *McLean* (1967) 52 Cr App R 80; *Jones v Metcalfé* [1967] 1 WLR 1286; *Kelsey* (1982) 74 Cr App R 213; and para 10.21 above.

<sup>81</sup> As occurred in *Thomas* [1994] Crim LR 745 where the eight-year-old witness who had provided exculpatory evidence in a statement to police had no recollection of events at all by the time of the retrial. Sight of the statement did not refresh her memory and the evidence which tended to show the defendant had not committed the murder with which he was charged never reached the jury.

<sup>82</sup> *Osbourne and Virtue* [1973] QB 678, in which there were two eye-witnesses who had attended identification parades. Neither of them identified the accused at court. One could not remember having picked out anyone at the parade, but did not explicitly deny that she had done so. The second witness’s evidence about what had happened at the parade was very contradictory and confused, saying both that she had and that she had not picked out one of the accused. The defence objected to the evidence of the police inspector about what had happened at the parades, but it was permitted.

<sup>83</sup> Eg *Carrington* [1994] Crim LR 438, where the witness (being at work at the time) called out details to a colleague, who wrote them down. The note was admitted under s 24 of the 1988 Act.

<sup>84</sup> Judge Wickham.

<sup>85</sup> See para 10.65 above.

<sup>86</sup> Para 13.53 of the consultation paper.

- 10.71 If such statements were admissible, the witness could of course be cross-examined on the truth of the contents of the earlier statement and the circumstances in which it was made, and contradictory evidence could be led about the matters dealt with in the statement. Any objection could be taken, to the statement or any part of it, and any question put to the witness, which could properly have been taken or put if the witness had given the evidence in chief in the ordinary way.
- 10.72 On consultation a large majority of those who commented were in favour of this proposal. Those who did not favour our proposal were concerned about a written statement forming part of the evidence and the danger that the trial would proceed on the basis of written statements, not oral evidence. One respondent<sup>87</sup> said that if such a statement is accusatory, the defendant should have the right to cross-examine the witness when the statement is made or shortly afterwards. Another respondent<sup>88</sup> thought the words “and it is unreasonable at the date of trial to expect the witness to be able to recall them” added an unnecessary complication; but we do not think it would be acceptable for a witness to be permitted to refer to a previous statement about a matter which the witness ought to be able to remember.

### ***Our recommendations***

#### ADMITTING THE WITNESS’S PREVIOUS STATEMENT AS EVIDENCE OF ITS TRUTH

- 10.73 In our view the rules applicable in this situation should be as follows. First, the fact that the witness (W) has to rely on another person (X),<sup>89</sup> or a document, or both, to fill in details which she can no longer recall, should go to the weight of the evidence of those details but should not in itself make it inadmissible.<sup>90</sup> This is so whether W recorded the details in person, or X recorded what W said they were, or X gives evidence of what W said they were.
- 10.74 However, in order to exclude previous statements of inadequate reliability, W’s previous statement should not be admissible unless
- (1) she made it when the details were fresh in her memory;
  - (2) she does not, and cannot reasonably be expected to, remember them well enough to give oral evidence of them; and

<sup>87</sup> Professor Friedman.

<sup>88</sup> The Crown Prosecution Service.

<sup>89</sup> W is for convenience assumed to be female, and X male.

<sup>90</sup> Following the lead of the Court of Appeal in *Osbourne and Virtue* [1973] QB 678, 690, *per* Lawton LJ: “One asks oneself as a matter of commonsense why, when a witness has forgotten what she did, evidence should not be given by another witness with a better memory to establish what, in fact, she did when the events were fresh in her mind”.

- (3) she adopts it, in the course of her evidence, as her statement. In other words she must indicate that, to the best of her belief, she made the statement and it is true.<sup>91</sup>

- 10.75 If these requirements are satisfied, we believe that the statement should be admissible. This means it would be possible to prove what W then stated the now-forgotten details to be. The terms of the previous statement could be proved in various ways. Where W made the statement in a document, for example (which includes verifying and acknowledging a document in which X had recorded the terms of W's oral statement), it could be proved by producing the document, or a copy of it. Where the statement was neither made in a document nor recorded, it could be proved by calling a witness who heard it and remembers it.
- 10.76 Where the statement was oral and was recorded in a document by X, but W did not verify and acknowledge it, we believe it should be possible to rely on the document as proof of what she said. Under our draft Bill this result would be achieved by treating X's record as a statement by X, and therefore admissible subject to the conditions set out in paragraph 10.74 above. In other words X must have made the record when W's statement was fresh in *his* memory; it must not be reasonable to expect him to remember it well enough to give oral evidence of it; and he must confirm that, to the best of his belief, the document is an accurate record of what W said.
- 10.77 If X fell within the unavailability exception his statement would be automatically admissible, without having to prove that it was made when W's statement was fresh in X's memory.<sup>92</sup> Although his statement is multiple hearsay (being evidence of W's hearsay statement), and in general we do not believe that multiple hearsay should be admissible merely because the declarant is unavailable to testify,<sup>93</sup> the fact that W is available for cross-examination seems to us to justify admitting X's statement of what W said.<sup>94</sup>
- 10.78 In the great majority of cases there will be a document of some sort in which W or X has recorded what W observed. This is because, if the fact in question is the sort of fact that W cannot reasonably be expected to remember without the help of a document, it is unlikely that another person will be able, without such help, to remember what W stated that fact to be. But this is not inconceivable, because different people find different facts memorable. Suppose that W reads the model name of a car and tells X what it was. W may then forget it, because she knows nothing about cars and to her it is just a meaningless word; but X may remember it because he has an encyclopaedic knowledge of the motor industry and, to him, the name summons up a mental image of the model in question. In such a case we

<sup>91</sup> Obviously W need not remember what she said: that would be tantamount to a requirement that she remember the details she stated. It is sufficient if W says "what I told X was true" and X says "this is truly what W told me".

<sup>92</sup> See paras 8.34 – 8.43 above, and cls 3 and 5 of the draft Bill.

<sup>93</sup> See paras 8.15 – 8.17 above.

<sup>94</sup> Clause 10(2) of the draft Bill would not exclude X's statement because W's statement is admissible under cl 8(4), ie otherwise than under cl 3 or a rule preserved by cl 6. See para 8.21 above.

see no reason why X should not fill the gap in W's recollection. The rule that we recommend is therefore not confined to cases where the statement is recorded in a document, but applies also where X gives oral evidence that he remembers what W said.

10.79 We acknowledge that it would be possible for witnesses to collude so that evidence could be admitted under this exception; but they can be cross-examined. W might be asked about visibility at the time, and X about how clearly he heard what W said, whether he checked it and so on. It is one of the main functions of cross-examination to alert the fact-finders to the danger that evidence has been fabricated, and we do not see why this should not be possible in such a case.

10.80 **We recommend that, if**

- (1) a witness does not, and cannot reasonably be expected to, remember a matter well enough to be able to give oral evidence of it,**
- (2) the witness previously made a statement of that matter when it was fresh in the witness's memory, and**
- (3) the witness indicates while giving evidence that, to the best of his or her belief, he or she made the statement and it is true,**

**the statement should be admissible as evidence of that matter.<sup>95</sup>**  
**(Recommendation 38)**

#### MEMORY-REFRESHING DOCUMENTS

10.81 Under this recommendation it might not be strictly necessary to preserve the existing rule that a witness may refresh his or her memory from a contemporaneous note. Instead of treating the note as merely a way of jogging the witness's memory (which will often be a fiction, because, even with the help of the note, the witness has no independent recollection), the court could acknowledge the reality and treat the note itself as evidence of the matters stated in it. But sometimes the witness genuinely does remember, when reminded by the note. It follows that the rules on the use of memory-refreshing documents would not become completely redundant under our recommendations, and we do not recommend that they should cease to have effect.

10.82 However, if the present rules were allowed to stand unaltered alongside the new rules set out in recommendation 38, an anomaly would arise. Where a witness uses a document to refresh his or her memory, and is cross-examined on parts of the document which the witness has *not* used for that purpose, the document may be exhibited; but it goes only to the witness's consistency and is not evidence of its truth.<sup>96</sup> If, under our recommendations, the document were put forward not as a memory-refreshing document but as hearsay, it *would* be evidence of its truth. We do not believe that the evidential status of the document should depend whether it

<sup>95</sup> See cl 8(4) and (6) of the draft Bill.

<sup>96</sup> *Britton* (1987) 85 Cr App R 14; *Sekhon* (1987) 85 Cr App R 19; *Archbold*, para 8-86.

is initially relied upon under the new rules or the old, and we think that it should be treated as evidence of its truth in both cases. **We recommend that a statement made by a witness in a document which is used by the witness to refresh his or her memory, on which the witness is cross-examined, and which as a consequence is received in evidence, should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.**<sup>97</sup> (Recommendation 39)

### **Children's evidence recorded on video**

- 10.83 Part III of the Criminal Justice Act 1991 created a new and important exception to the hearsay rule.<sup>98</sup> Provided that a child is available to come to court to give live evidence, a previous interview with the child, recorded on video, may be put in evidence in place of the child's examination in chief. The new provision lays down very detailed restrictions on the courts in which the procedure may be used,<sup>99</sup> the type of offence for which the defendant must be facing trial,<sup>100</sup> and the age of the child (which varies according to the nature of the offence).<sup>101</sup> The videotape is admissible only where the judge grants leave.<sup>102</sup>
- 10.84 This provision was intended to help the child by relieving him or her of some of the burden of giving evidence. However, judges have told us that it sometimes has the opposite effect: because there is no examination in chief, the child, once called to give evidence, is thrust immediately into a hostile cross-examination, and this experience gives the witness the impression that the court is against him or her.<sup>103</sup>

### ***The response on consultation***

- 10.85 On consultation, it was strongly suggested by a number of respondents that the use of video should be extended.<sup>104</sup> For example, the Recorder of London asked, "is there any good reason why [the video provisions] should not be extended to all trials on indictment?"
- 10.86 This is obviously a question which needs to be addressed, but we do not consider this project to be suitable for it. This was not a matter on which we sought views

<sup>97</sup> See cl 8(3) of the draft Bill.

<sup>98</sup> By inserting a new section 32A into the 1988 Act. Section 32A is set out at Appendix B.

<sup>99</sup> Section 32A(1).

<sup>100</sup> Section 32(2). On the interpretation of this subsection see *Lee* [1996] 2 Cr App R 266.

<sup>101</sup> Section 32A(7).

<sup>102</sup> Section 32A(2). Where leave is granted, the child may not give evidence in chief, on matters dealt with in the recording, by other means: s 32A(6A), inserted by the 1996 Act, s 62.

<sup>103</sup> See the contribution of the Minister of State for the Home Office, Mr David Maclean MP, to a parliamentary debate on child witnesses: *Hansard* (HC) 13 December 1994, vol 251, col 900.

<sup>104</sup> The most common extension suggested was that it should be possible to use it for key witnesses other than children who are, for various reasons, either vulnerable or frightened. Some respondents also suggested that cross-examination of children should be recorded on video – implementing the recommendations of the the Pigot Committee (Report of the Advisory Group on Video Evidence, Home Office 1989).

on consultation, and we therefore do not feel able to make recommendations on it. However, we believe that the matter should be looked at further. The fundamental point is that there appears to be a clearly held view that we should not reduce the scope of the provisions for the giving of evidence on video, and we make no recommendation for any change to these provisions.

#### **PREVIOUS INCONSISTENT STATEMENTS**

- 10.87 We now turn to consider statements made by a witness which are inconsistent, in whole or in part, with that witness's oral testimony.

#### **Summary of the present law**

- 10.88 A witness may be cross-examined on an oral or written statement made before the trial which is inconsistent with his or her oral testimony. The evidential use of the earlier statement is governed by the common law. If the witness accepts the earlier statement as being true, it is evidence of its facts; but where the witness denies the truth of the earlier statement it is not evidence, being nothing but hearsay,<sup>105</sup> in which case the earlier statement reflects only on the witness's credibility. If the witness does not admit making the earlier statement then the making of the statement may be proved.<sup>106</sup>

#### **Criticism of the present law**

- 10.89 The inconsistent statement is supposed to reflect only on the witness's credibility, and therefore the fact-finders may not treat it as evidence directly on the facts in issue. It may be argued that the first statement can only cancel out the oral testimony because rejection of the testimony does not entail acceptance of the statement. *Cross and Tapper*, rightly in our view, describes this argument as "simply another instance of the pseudo-logic occasionally indulged in by lawyers".<sup>107</sup> Where it is possible (on the basis of other evidence, or the witness's response under cross-examination) to treat the earlier statement as the true one, we do not see why the fact-finders should not do so: if jurors or magistrates are trusted to decide that a witness has lied throughout, and to disregard that witness's testimony, why should they not be free to decide that the witness's previous statement was correct, and to take as reliable the parts of the testimony that they find convincing?<sup>108</sup> As with other instances of the distinction between a statement going to credit and going to the issue, it may be doubted whether fact-finders appreciate or observe the distinction.

<sup>105</sup> *Birch* (1924) 18 Cr App R 26; *Gillespie and Simpson* (1967) 51 Cr App R 172; *Askew* [1981] Crim LR 398. See also *Golder, Jones and Porritt* [1960] 3 All ER 457, 459, where the inconsistent statement was put to a witness deemed to be hostile.

<sup>106</sup> See generally s 4 of the Criminal Procedure Act 1865, and s 3 in the case of a hostile witness. Section 5 regulates the way in which the earlier statement may be used. The text of these sections is set out at Appendix B.

<sup>107</sup> *Cross and Tapper*, p 317.

<sup>108</sup> This argument is put persuasively by P Murphy in "Previous Consistent and Inconsistent Statements" [1985] Crim LR 270, 282–283. See also *KGB* (1993) 79 CCC (3d) 257, in which the Canadian Supreme Court held that the truth of the previous statements could be considered by the jury because there were sufficient indications that the statements were reliable. See para 13.46 of the consultation paper.

10.90 Further, the current law creates an anomaly in that the statement of a frightened witness may be admitted as evidence (under section 23(3) of the 1988 Act) where the witness fails to attend,<sup>109</sup> but if the effect of fear on the witness is to make him or her hostile, then the previous statement is not admissible as evidence of its contents – it simply negates the witness’s oral evidence. The result is that the admissibility of the statement as evidence turns on the way the witness acts when afraid.<sup>110</sup>

### **The proposed reform**

10.91 The CLRC recommended that a previous inconsistent statement, where admitted, should be admissible as evidence of the truth of its contents,<sup>111</sup> regarding it as too subtle a distinction to admit the statement only in order to neutralise the effect of the evidence given in court.<sup>112</sup> They believed that “as under the Civil Evidence Act [1968], contradictory statements by the same person should confront one another on the same evidential footing”.<sup>113</sup> They claimed that in the case of “a previous statement by a person who is called as a witness there is a special reason for proposing to make the statement admissible”, on the grounds that what is said soon after the events in question is likely to be at least as reliable as the evidence given at the trial, if not more so.<sup>114</sup> Although this may not always be the case, they considered that “it is likely to be helpful to the court or jury to have both statements”, especially where the trial takes place long after the events in question. Other jurisdictions have enacted such a reform,<sup>115</sup> and we are not aware that any problems have resulted. In the consultation paper we indicated that we had in mind a recommendation along these lines.<sup>116</sup> There was some support for it, although David Ormerod thought that the effect in relation to hostile witnesses called for detailed discussion. Those who were opposed to previous consistent statements being evidence of their truth were, naturally, also opposed to previous inconsistent statements being treated as evidence.

10.92 **We recommend that a previous inconsistent or contradictory statement by a witness which**

<sup>109</sup> See para 2.14 above.

<sup>110</sup> This was commented upon in the recent case of *Waters* (1997) 161 JP 249, 251F-G.

<sup>111</sup> CLRC Evidence Report, para 236, and cls 31(3) and 33 of the draft Bill attached to that Report.

<sup>112</sup> *Ibid*, at para 232.

<sup>113</sup> *Ibid*, at para 257.

<sup>114</sup> *Ibid*, at para 239.

<sup>115</sup> Under the Australian Evidence Act 1995, s 60, evidence of a previous representation by a witness is not subject to the hearsay rule if it is admitted to show that the witness has contradicted it; see also the Queensland Evidence Act 1977, s 101. Rule 801(d)(1) of the United States Federal Rules of Evidence provides that a prior statement by a witness is not hearsay if

The declarant testifies at the trial or hearing and is subject to cross-examination concerning his statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition ...

<sup>116</sup> See para 13.47 of the consultation paper.



- (1) **the witness admits making, or**
- (2) **is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865,**

**should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.<sup>117</sup> (Recommendation 40)**

10.93 Some respondents expressed concern about injustice arising where the whole of a statement is admitted although the witness is cross-examined on only a part of it. Another objection made by some consultees was that if the fact-finders are allowed to take the statement into the retiring room or jury room with them, it may be regarded as more cogent or persuasive than the oral evidence. We believe that recommendation 37,<sup>118</sup> under which documentary statements made by witnesses would not accompany the fact-finders when they consider their verdict unless the parties agree or the court gives leave, should allay these concerns.

***How the proposal will work in practice***

10.94 Cross-examination on the basis of an inconsistent statement is normally conducted by the opposing party. Where the opposing party is the prosecution, evidence to the same effect as the inconsistent statement will probably have been adduced as part of the prosecution case in any event.

10.95 Our recommendation would effect a change where a defendant implicates a co-accused in a prior statement, but does not implicate him or her when testifying. At present, the prior statement would not amount to evidence against the co-accused. The rationale for this is that the out-of-court statement should not be admitted in evidence because a person accused of a crime has every incentive to blame someone else, and the person blamed will not have had the opportunity to cross-examine the accuser.

10.96 On the other hand, where a defendant implicates a co-accused when testifying, that *does* count as evidence against the co-accused. The effect of our recommendation would be that where a defendant implicates a co-accused in an out-of-court statement *and* is available for cross-examination, that prior statement could be admitted as evidence against the co-accused. Given that the co-accused *can* cross-examine the accused on the incriminating statement, and the fact that it will be obvious to the fact-finders that the accused has not been consistent, we believe that there is no danger in permitting the fact-finders to decide for themselves whether to believe the oral testimony, the previous statement, or neither.

10.97 Our recommendation would in some circumstances work in the defendant's favour.

W makes a statement to the police, in which he admits his participation in an offence, and exculpates D. Later, D is charged with

<sup>117</sup> See cl 7(1) of the draft Bill.

<sup>118</sup> See para 10.62 above.

the offence, and W, having been allowed to plead guilty to a lesser charge, gives evidence for the prosecution against D. In the course of his evidence, W repudiates his statement and says that D participated in the offence.<sup>119</sup>

10.98 The practical consequences of the reform that we recommend would be as follows.

- (1) A defendant could be convicted even where the complainant does not come up to proof, because the fact-finders could accept the complainant's out-of-court statement as true (even though he or she does not confirm it in the witness box).<sup>120</sup>
- (2) When considering a submission of no case to answer, the court would have to take account of the contents of a previous inconsistent statement admitted in evidence.
- (3) Where the previous statement was relied on by the prosecution, section 78 of PACE would apply.
- (4) If the quality of the out-of-court statement were such that a conviction would be unsafe, the court would be under a duty to direct an acquittal (or, on summary trial, to dismiss the information).
- (5) The judge would have to treat the previous statement as evidence in the summing up.
- (6) Where a previous inconsistent statement was admitted in evidence although the witness maintained that it was untrue, a careful direction might be needed. Although the weight to be attached to the oral testimony and the out-of-court statement would be a matter for the fact-finders, it might help a jury if they were told that they are not obliged to accept either version of events as true, and if their attention were drawn to other items of evidence which might help them decide which parts of the evidence to believe and which to reject.

#### HOSTILE WITNESSES

10.99 To illustrate the effect of our recommended reform in relation to hostile witnesses, we now consider two commonplace examples, the alleged assault victim and the accomplice who turns prosecution witness. In each case the witness fails to come up to proof.

10.100 In the former case, the alleged victim, having been deemed hostile by the court on application by the prosecution, denies the truth of the complaint made to the police on the night of the alleged assault. He or she now says it was all made up. On cross-examination by the prosecution the witness has difficulty explaining the injuries received, of which there is independent evidence. Under our

<sup>119</sup> P Murphy, "Previous Consistent and Inconsistent Statements" [1985] Crim LR 270, 282.

<sup>120</sup> But see (4) below.

recommendation the fact-finders would be able to convict if, despite the witness's repudiation of the incriminating statement, they were sure that the accused committed the assault charged. But if there were no other evidence, the court might be persuaded that a conviction would be unsafe, in which case it would direct an acquittal or dismiss the information.

- 10.101 In the latter case, suppose that W has already pleaded guilty and is now a witness for the prosecution. W has been deemed hostile and claims that he did not make the confession attributed to him in which he implicated D. That confession is admissible against D, as if W were a testifying co-accused.

# **PART XI**

## **SAFEGUARDS FOR THE PARTY AGAINST WHOM HEARSAY EVIDENCE IS ADDUCED**

- 11.1 In this Part we consider the position of a party against whom hearsay evidence is adduced, and who is thus deprived of the opportunity to test that evidence by cross-examination. We set out the safeguards we recommend, in the order in which they would arise in practice. Some of the safeguards are inherent in our regime;<sup>1</sup> some exist under current law;<sup>2</sup> and some we recommend should be introduced to compensate for the loss of the right to cross-examine.<sup>3</sup> Finally we mention a safeguard which we raised for discussion in the consultation paper, but which we do not think is necessary or desirable.<sup>4</sup>

### **DISCLOSURE OF THE PROSECUTION CASE**

- 11.2 There is a duty on the prosecution to disclose evidence on which it proposes to rely, except in the case of summary offences.<sup>5</sup> Thus the defendant should be aware in advance of the trial of the case he or she has to meet.

### **SAFEGUARDS INHERENT IN OUR RECOMMENDED SCHEME**

#### **Multiple hearsay is not admissible**

- 11.3 Under our recommendations, a statement would not normally be admissible unless made by a person with personal knowledge of the matters stated.<sup>6</sup> A statement by a person with no such knowledge, repeating what had previously been said by another person who did have such knowledge, would normally be inadmissible – even if each statement, taken alone, would have fallen within an exception to the hearsay rule.<sup>7</sup> The exception to this principle most likely to arise in practice is the case of business documents, which are already admissible even if they contain multiple hearsay.

<sup>1</sup> Namely, the recommendation that an absent declarant be identified (save in certain cases – see para 11.5 below), and the general principle that multiple hearsay is not admissible.

<sup>2</sup> Disclosure of the prosecution case; the burden of proof; the standard of proof; the judicial discretions at common law and under s 78(1) of PACE; the right to challenge the credibility of the absent declarant; and the judge's direction to the jury.

<sup>3</sup> The application for hearsay evidence to be admitted to be made pre-trial where possible – and a binding ruling to be given; formal notice to be given of intention to adduce hearsay evidence; an additional power to exclude evidence; and the court's duty to stop the trial if a conviction would be unsafe.

<sup>4</sup> See paras 11.36 – 11.38 below.

<sup>5</sup> Magistrates' Courts (Advance Information) Rules, SI 1985 No 601; Magistrates' Courts Act 1980, ss 5A–D; Criminal Justice Act 1987, s 4. See also Part I of the 1996 Act.

<sup>6</sup> See paras 8.15 – 8.17 above.

<sup>7</sup> See paras 8.18 – 8.26 above.

### **The absent declarant must be identified**

- 11.4 We believe that, for a party to be able to discredit the maker of a hearsay statement or to controvert its contents, the maker must be identified. We therefore recommend that a person should be identified to the satisfaction of the court before his or her statement can be adduced on the ground that he or she is unavailable to testify.<sup>8</sup>
- 11.5 This recommendation would not apply to business documents or evidence admitted under the safety-valve. In each of those cases we believe that there are sufficient built-in protections for the identification of the witness to be dispensed with.<sup>9</sup> In the case of business documents, we believe that there is a partial inherent guarantee of reliability, as such a document cannot be admitted unless the person who supplied the information contained in it “had or may reasonably be supposed to have had personal knowledge of the matters dealt with”.<sup>10</sup> Moreover, we recommend that the court should have a discretion to direct that a statement is not admissible under the business documents exception if there is reason to doubt its reliability.<sup>11</sup> In the case of evidence tendered under the safety-valve the threshold for admissibility is high, and the court would be required to take into account the interests of any opposing party before deciding whether the evidence should be admitted.<sup>12</sup>

### **FORMAL NOTICE TO BE GIVEN**

- 11.6 As we believe that a party should be able to controvert the contents of a hearsay statement, and to challenge the credibility of its maker,<sup>13</sup> a party should, where possible, be notified of another party’s intention to rely on hearsay evidence. Phillips LJ suggested that each party should be required before trial to give notice of a provisional intention to adduce documentary evidence and, in the absence of a challenge by any other party, the evidence would be automatically admissible. We regard this as a very helpful idea, and we would extend it to all hearsay, not just documents.<sup>14</sup>
- 11.7 **We recommend that, where it is known in advance of the trial that a party will seek to adduce hearsay evidence, rules of court should require that party to give notice of the intention to do so.**<sup>15</sup> **(Recommendation 41)** The

<sup>8</sup> Recommendation 5; see paras 8.5 – 8.8 above.

<sup>9</sup> We do not recommend that this requirement apply to statements falling within the res gestae exception either. We are recommending the preservation of the res gestae exception in its current form (see paras 8.114 – 8.129 above) and are not aware of any injustice caused by the admission of res gestae statements made by unidentified persons.

<sup>10</sup> See cl 4(2)(b) of the draft Bill.

<sup>11</sup> See paras 8.74 – 8.77 above, and cl 4(6), (7) of the draft Bill.

<sup>12</sup> Under cl 9 of the draft Bill, evidence could be admitted only if “the court is satisfied that, *despite the difficulties there may be in challenging the statement*, its probative value is such that the interests of justice require it to be admissible”.

<sup>13</sup> See paras 11.19 – 11.23 below.

<sup>14</sup> Although the procedural details differ somewhat, the 1995 Act, s 259(5), also requires notice. This follows recommendation 12(1) of the SLC Report.

<sup>15</sup> See cl 24 of the draft Bill.

normal way of giving notice would be by serving the statement of the witness who it is proposed should give evidence of the hearsay statement, or should produce a document containing it, under section 9 of the Criminal Justice Act 1967. In the absence of a challenge by any other party, the evidence would then be admissible.

**APPLICATION FOR A RULING ON ADMISSIBILITY TO BE MADE PRE-TRIAL WHERE POSSIBLE**

- 11.8 Our provisional view in the consultation paper was that if the parties do not agree that a hearsay statement should be admitted, an application should be made to the court, preferably before the trial and, where this is not possible, at the start of the trial.<sup>16</sup> We suggested<sup>17</sup> that, in the case of a trial on indictment, the appropriate place and time would be at the Plea and Directions Hearing.<sup>18</sup> In fraud cases,<sup>19</sup> and in other long and complex cases on indictment,<sup>20</sup> the appropriate time would be at a preparatory hearing. In the case of a summary trial, it would be at a pre-trial review, if one is held.
- 11.9 We have always been keen that a ruling on admissibility should be made as early as possible. In many cases the admission or exclusion of the statement might affect the plea, or the question of whether the proceedings are to continue, so that an early ruling might well lead to an earlier conclusion of the case. Another advantage is that if the statement is ruled admissible, the opposing party will then have an opportunity to investigate its accuracy and the credibility of its maker.
- 11.10 On consultation, this approach was approved by all save two of the respondents who addressed the point. We were warned that many circumstances in which hearsay evidence will have to be adduced (such as where a witness falls ill or is threatened) will only become apparent at the trial, and we accept that it will not always be possible for an application to be made before the trial. One experienced criminal practitioner, Peter Rook QC, was concerned that the need for pre-trial applications might cause difficulties for the defence, because it could be forced to make premature disclosure of its case. We can see the force of this point, but believe that it has been substantially reduced by recent developments which put pressure on the defence to disclose its case. There are sanctions if an accused fails to mention facts of importance relating to his or her defence when questioned or charged.<sup>21</sup> In addition, under Part I of the 1996 Act, in the case of a trial on

<sup>16</sup> Para 11.42 of the consultation paper.

<sup>17</sup> At para 11.43 of the consultation paper.

<sup>18</sup> At such hearings, the prosecution and the defence are expected to inform the court of (among other things) the issues in the case, any questions as to the admissibility of the evidence which appears on the face of the papers, and any application for evidence to be given by closed circuit television or to put in a pre-recorded interview with a child witness. Any rulings made at a Plea and Directions Hearing are capable of being binding under Part IV of the 1996 Act.

<sup>19</sup> A preparatory hearing may be ordered by a judge in a Crown Court trial when an indictment reveals a case of fraud of such seriousness and complexity that substantial benefits are likely to accrue from such a hearing: Criminal Justice Act 1987, s 7(1).

<sup>20</sup> In such cases it is possible for a judge to order a preparatory hearing under the 1996 Act, s 29.

<sup>21</sup> Criminal Justice and Public Order Act 1994, s 34.

indictment the defence is required to supply a written statement which sets out in general terms the nature of the accused's defence, and indicates the matters on which the accused takes issue with the prosecution and why he or she does so.<sup>22</sup> If a defendant makes late disclosure, he or she risks adverse comment from the trial judge (or, with leave, any other party), and the jury may draw whatever inference is appropriate.<sup>23</sup>

- 11.11 Under section 40 of the 1996 Act, a judge may make a ruling on the admissibility of evidence, including hearsay, at a pre-trial hearing, which is binding from the time it is made until the case is disposed of.<sup>24</sup> A judge may subsequently discharge or vary any ruling if it appears to him or her to be in the interests of justice to do so, and this power may be exercised on the application of any party to the case or by the court of its own motion.<sup>25</sup> We see no reason to exempt hearsay evidence from this general provision. We also consider that where magistrates make pre-trial rulings on evidence, their rulings should also be binding.<sup>26</sup> **We recommend that a party seeking to rely on a hearsay statement should make an application for its admission before the trial where possible, and, where this is not possible, at the earliest practicable opportunity, and a ruling on admissibility should be binding, save where there is a change of circumstances. (Recommendation 42)**

#### **THE BURDEN OF PROOF**

- 11.12 Where a party seeks to adduce hearsay evidence, the burden is on that party to prove the foundation requirements for the admission of that evidence. For example, if the prosecution wishes to adduce a business document, it must prove that the document tendered falls within the provisions of section 24 of the 1988 Act.<sup>27</sup> We would not seek to alter the burden of proof.<sup>28</sup>

#### **THE STANDARD OF PROOF**

- 11.13 The standard of proof for the foundation requirements of hearsay evidence is the same as for any other form of evidence adduced by the party seeking to put in the

<sup>22</sup> 1996 Act, s 5.

<sup>23</sup> 1996 Act, s 11.

<sup>24</sup> A case is regarded as disposed of if the defendant is acquitted or convicted, or if the prosecutor decides not to proceed with the case: 1996 Act, s 40(3).

<sup>25</sup> 1996 Act, s 40(4); but no application may be made by a party to the case unless there has been a material change of circumstances since the ruling was made: s 40(5).

<sup>26</sup> If pre-trial reviews become uniform practice, this is a matter which could be covered in the rules governing such reviews.

<sup>27</sup> It has recently been held that the foundation requirements need not be proved in respect of s 24: *Ilyas and Knight* [1996] Crim LR 810. With respect, this cannot be quite right: a court may be satisfied that the foundation requirements are proved simply by looking at the document, but it is surely not absolved from being satisfied that they *are* proved to the requisite standard. See Professor Sir John Smith's commentary on *Ilyas and Knight*.

<sup>28</sup> We do, however, recommend that where a party alleges that the party seeking to have hearsay admitted because the declarant is unavailable has caused the unavailability, then the burden of proving that allegation should fall on the party making it. See paras 8.31 – 8.32 above.

hearsay. Thus, where the prosecution wishes to adduce hearsay, it must satisfy the court of the necessary conditions beyond reasonable doubt,<sup>29</sup> whereas the defence need only satisfy the court of those conditions on the balance of probabilities.<sup>30</sup> Our provisional view was that this approach was consistent with general principles and should continue to apply under our proposed reforms.<sup>31</sup>

- 11.14 On consultation all those who responded on the point were in favour of this approach, with one exception, who could not see the logic in the Crown having to meet a higher standard of proof. As this concerned an important point of principle, the Commissioner with special responsibility for criminal law raised the matter at Judicial Studies Board seminars which he attended to discuss this project.<sup>32</sup> The consensus of those attending the seminars was that the present rules are correct, and that the standard of proof required for the admission of hearsay adduced by any party should be the same as that required for the admission of any other evidence adduced by that party. We conclude that, as now, the burden of proving facts which render hearsay admissible should be on the party seeking to adduce it, the standard of proof being the same as for any other evidence adduced by that party.

#### **JUDICIAL DISCRETIONS**

- 11.15 The defendant would continue to be protected by the two discretions available to the court to exclude evidence on which the prosecution seeks to rely: the discretion at common law to exclude evidence whose prejudicial effect outweighs its probative value, as part of the court's duty to ensure that the accused has a fair trial,<sup>33</sup> and the discretion contained in PACE, section 78(1).<sup>34</sup>

#### **AN ADDITIONAL POWER TO EXCLUDE EVIDENCE**

- 11.16 In the consultation paper,<sup>35</sup> we referred to section 135 of the Evidence Act 1995 of the Commonwealth of Australia, and Rule 403 of the United States Federal Rules of Evidence, both of which allow the court to exclude admissible evidence.<sup>36</sup> We invited comment on the possible introduction of such a power in our jurisdiction.

<sup>29</sup> *Case* [1991] Crim LR 192.

<sup>30</sup> *Mattey and Queeley* [1995] 2 Cr App R 409.

<sup>31</sup> Para 11.45 of the consultation paper.

<sup>32</sup> See para 1.23 above.

<sup>33</sup> *Collins* (1938) 26 Cr App R 177; *Sang* [1980] AC 402; *Blithing* (1983) 77 Cr App R 86; *Scott v R* [1989] AC 1242; *Henriques v R* (1991) 93 Cr App R 237. Although the common law discretion is preserved by PACE, s 82(3), it is doubtful whether it adds anything to the statutory discretion. See para 4.43, n 71 of the consultation paper.

<sup>34</sup> The text of which is set out at Appendix B.

<sup>35</sup> Para 11.35 of the consultation paper.

<sup>36</sup> Section 135 gives the judge a discretion to exclude evidence tendered by either party "if its probative value is substantially outweighed by the dangers that the evidence might (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time". Rule 403 of the Federal Rules of Evidence provides that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or of confusion of the issues, or of misleading the jury, or of considerations of undue delay, waste of time or needless presentation of cumulative evidence.



There was a small and mixed response to this question, with about two-thirds being against the conferment of such a power.

- 11.17 On further consideration, we came to the view that a power in similar terms to the Australian or American powers would not be appropriate within our recommended scheme, but that there would be a need for a power to exclude superfluous hearsay evidence. Evidence which is wholly irrelevant is not admissible at all, but evidence which has some relevance is prima facie admissible. Under our recommendations, more hearsay evidence would be admissible than is presently the case, but we propose the abolition of two of the powers that courts currently have to control the quality and quantity of some hearsay evidence which is adduced, namely sections 25 and 26 of the 1988 Act. Evidence which the prosecution seeks to adduce may still, under our proposals, be excluded by the court in the exercise of its discretion at common law or under section 78(1) of PACE, but this does not cover superfluous evidence which would not make the trial unfair, and there is no control on the quantity of defence hearsay evidence.
- 11.18 The new power to exclude superfluous hearsay would be available in relation to all hearsay evidence which would otherwise be admissible under our recommended scheme. We envisage that exercise of this power will be appropriate only in exceptional cases, where the probative value of the evidence is so slight that almost nothing is gained by admitting it. This power will help the opposing party and also ensure that the court's time is not wasted, thereby meeting the point which concerned some respondents, that the admission of hearsay would lead to a lot of barely relevant evidence being adduced. **We recommend that the court should have power to refuse to admit a hearsay statement if it is satisfied that the statement's probative value is substantially outweighed by the danger that to admit it would result in undue waste of time.**<sup>37</sup> (Recommendation 43)

#### **THE RIGHT TO CHALLENGE THE CREDIBILITY OF THE ABSENT DECLARANT**

- 11.19 Under the 1988 Act, a person against whom hearsay evidence has been admitted may adduce contradictory evidence in circumstances akin to those in which contradictory evidence would have been permitted, had the witness given oral evidence.<sup>38</sup> In the consultation paper we considered these to be important rights, providing some compensation for the fact that the maker of the hearsay statement cannot be cross-examined, and so we proposed that the position under the 1988 Act should apply in respect of hearsay evidence adduced under our proposals.<sup>39</sup>
- 11.20 We drew the attention of our readers to one matter which caused us some concern. Where matters to the discredit of a witness are put to the witness in cross-examination, but the witness denies them, the cross-examining party may or may not be able to adduce evidence in rebuttal, depending on the nature of the attack.<sup>40</sup> If a particular attack could have been supported by evidence in rebuttal,

<sup>37</sup> See cl 15 of the draft Bill.

<sup>38</sup> The 1988 Act, s 28(2), Sched 2, para 1(c).

<sup>39</sup> Para 11.49 of the consultation paper.

<sup>40</sup> The cross-examining party can call evidence in rebuttal to show that the witness has been convicted of a crime, is biased in favour of the party calling him or her, or has previously made a statement inconsistent with his or her present testimony: *Cross and Tapper*, pp 326–

had it been made against a witness who denied it, we think it should clearly be possible to make it against the absent maker of a hearsay statement.

11.21 The more difficult question is whether it should be possible to attack the credibility of an absent declarant on a matter on which, had the declarant given oral evidence, his or her denial would have been final. The approach of section 5(2) of the Civil Evidence Act 1995 is to exclude evidence of any such matter. The alternative is to permit such evidence, on the ground that to do otherwise would place the attacking party at an unfair disadvantage where, had the declarant appeared in person, he or she would have admitted the matter or denied it in an unconvincing way.<sup>41</sup> The position under the 1988 Act is that such evidence is allowed, subject to the leave of the court.<sup>42</sup> The purpose of the requirement of leave was to avoid the admission of evidence which might, for example, be unfair to the declarant, who could not personally defend his or her credibility, or which might be presented at such length that the trial would be unduly protracted. Our provisional view was that the reasoning behind the provisions of the 1988 Act was to be preferred, and we had no reason to believe that these provisions have caused any problems in practice.<sup>43</sup>

11.22 On consultation, many respondents agreed with our provisional view, but some expressed the concern that it might lead to a multiplicity of witnesses and side issues. We note that these problems have not arisen under the 1988 Act and we therefore consider it unnecessary to make specific provision for them. **We recommend that, where a hearsay statement is admitted and the maker of the statement does not give evidence, the following evidence should be admissible to discredit the maker of the statement:**

- (1) evidence which, had the maker given evidence, would have been admissible as relevant to his or her credibility; and**
- (2) (with the leave of the court) evidence of any matter which, had the maker given evidence, could have been put to him or her in cross-examination as relevant to his or her credibility but of which evidence could not have been adduced by the cross-examining party.<sup>44</sup> (Recommendation 44)**

### **Inconsistent statements**

11.23 It follows from the previous recommendation that any other statement made by the maker of the hearsay statement which is inconsistent with the hearsay statement would be admissible to discredit the maker, like a previous inconsistent

327. In other cases the witness's answers must be treated as final: *A-G v Hitchcock* (1847) 1 Exch 91, 99.

<sup>41</sup> These suggestions were considered in the SLC Report at para 6.16; the latter (that the evidence be admissible) was preferred by the SLC, and implemented by the Criminal Procedure (Scotland) Act 1995, s 259(4)(b).

<sup>42</sup> 1988 Act, s 28(2) and Sched 2, para 1(b).

<sup>43</sup> See para 11.50 of the consultation paper.

<sup>44</sup> See cl 13(2)(a), (b) of the draft Bill.

statement by a witness. In the latter case we have recommended that the previous statement should be admissible not only to discredit the witness's oral evidence but, by way of exception to the hearsay rule, as evidence of its truth.<sup>45</sup> We see no reason to draw a distinction in this respect between an inconsistent statement made by a witness and one made by the maker of a hearsay statement. **We recommend that, where a hearsay statement is admitted and the maker of the statement does not give evidence, evidence that the maker of the statement made another statement, inconsistent with the hearsay statement,**

- (1) should be admissible for the purpose of showing that the maker contradicted himself or herself,<sup>46</sup> and**
- (2) when so admitted, should also be admissible as evidence of any matter stated in it of which oral evidence by the maker would be admissible.<sup>47</sup> (Recommendation 45)**

#### **The right to call additional evidence where the credibility of the declarant has been attacked**

- 11.24 Where the credibility of the maker of a hearsay statement is attacked, the party adducing the statement may wish to rehabilitate the declarant's credibility, or adduce additional evidence to bolster his or her case. In Scotland, in such circumstances, the judge or magistrate may permit either party to lead additional evidence of such description as the judge may specify.<sup>48</sup> Our provisional view was that such a procedure would also be useful and appropriate under our proposed regime, and should apply to all hearsay statements.<sup>49</sup>
- 11.25 On consultation, the vast majority of those who commented on this matter agreed with our provisional view, but there was concern that it might lead to protracted evidence on collateral issues. We can see the force of that point, but believe that it would be sufficient to leave the matter to the judgment of the court. **We recommend that where an allegation has been made against the maker of a hearsay statement, the court should have power to permit a party to lead additional evidence of such description as the court may specify for the purposes of denying or answering the allegation.<sup>50</sup> (Recommendation 46)**

#### **THE COURT'S DUTY TO STOP THE TRIAL**

- 11.26 Before the Court of Appeal's decision in *Galbraith*,<sup>51</sup> a judge was allowed to stop a case and direct an acquittal if he or she took the view that the prosecution

<sup>45</sup> See paras 10.91 – 10.92 above.

<sup>46</sup> See cl 13(2)(c) of the draft Bill.

<sup>47</sup> See cl 7(2) of the draft Bill.

<sup>48</sup> 1995 Act, s 259(9).

<sup>49</sup> Para 11.51 of the consultation paper.

<sup>50</sup> See cl 13(3) of the draft Bill.

<sup>51</sup> [1981] 1 WLR 1039.

evidence was such that a conviction would be *unsafe and unsatisfactory*.<sup>52</sup> This allowed the judge to halt the trial where, for example, a confession was unconvincing and constituted the main or only evidence.

- 11.27 The position was altered in *Galbraith*, where it was held that this rule allowed the judge to usurp the role of the jury. It was held that a judge should stop a case only where (i) there is no evidence that the defendant committed the offence or (ii) the judge decides that, taking the prosecution evidence at its highest, a reasonable jury properly directed could not properly convict on it. The court went on:

Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.<sup>53</sup>

- 11.28 *Galbraith* maintains the traditional allocation of roles: matters of law are for the judge, and issues of fact are for the jury. This distinction has been staunchly maintained by the courts because in general it serves the interests of justice. Nevertheless, exceptions exist. For example, the court may be asked<sup>54</sup> to rule whether a confession adduced by the prosecution has been, or may have been, obtained by oppression, or in consequence of anything said or done which was likely to render it unreliable. In the Crown Court this issue of fact is reserved for the judge, because of a perceived risk that the jury may act upon evidence which is not to be relied upon.
- 11.29 Another instance of evidence which can be unreliable is identification evidence: where identification is in issue, and the judge concludes that the quality of the identification evidence is poor and unsupported by other evidence, the judge should withdraw the case from the jury and direct an acquittal.<sup>55</sup>
- 11.30 The Royal Commission recommended that *Galbraith* be reversed, "so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the

<sup>52</sup> See the discussion in *Galbraith* [1981] 1 WLR 1039, 1061D–1062E, *per* Lord Lane CJ.

<sup>53</sup> At p 1042, *per* Lord Lane CJ. The court approved *Barker* (1977) 65 Cr App R 287, where, in the course of refuting a submission that the conviction was unsafe and unsatisfactory because of inconsistencies in a crucial document, Lord Widgery CJ said, at p 288: "It is not the judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks the witness is lying."

<sup>54</sup> Under s 76(2) of PACE.

<sup>55</sup> *Turnbull* [1977] QB 224. Similarly, where a case depends on a confession by a person with a mental handicap the case should be withdrawn from the jury: *MacKenzie* (1993) 96 Cr App R 98.

jury”.<sup>56</sup> No final view has yet been reached about whether this recommendation will be acted upon by the Government.<sup>57</sup>

11.31 The justifications for creating exceptions to the rule in *Galbraith* is that the risk that the jury may act upon evidence which is not to be relied upon “may well be seen as serious enough to outweigh the general principle that the functions of the judge and jury must be kept apart”.<sup>58</sup> Experience has shown that identification evidence, and confessions, can be unreliable. The same can be said of hearsay. It seems to us that a derogation from *Galbraith* may be justified in the case of hearsay evidence on the same basis: even though the (absent) declarant may be honest, his or her evidence, being hearsay, may be so poor that a conviction would be unsafe.<sup>59</sup>

11.32 **We recommend that if the case against the accused is based wholly or partly on a hearsay statement, and the evidence provided by the statement is so unconvincing that, considering its importance to the case against the accused, the accused’s conviction of the offence would be unsafe, the magistrates should be required to acquit, or (as the case may be) the judge should be required to direct the jury to acquit, the accused of the offence.**<sup>60</sup> (Recommendation 47)

#### THE JUDGE’S DIRECTION TO THE JURY

11.33 The Court of Appeal has held that a judge may direct the jury that hearsay evidence is different from other evidence and that they must remember, when assessing such evidence, that it has not been subject to cross-examination and they

<sup>56</sup> Report of the Royal Commission, ch 4, paras 42, 77, 85 and 87, and Recommendation 86. The recommendation was not confined to cases involving hearsay.

<sup>57</sup> At para 45 of Royal Commission on Criminal Justice: Final Government Response (1996) the Government said it was considering the recommendation, but saw some difficulties with the proposed formula and how it would differ from the ruling in *Galbraith*.

<sup>58</sup> *Daley v R* [1994] 1 AC 117, 129D, *per* Lord Mustill. In that case the Judicial Committee of the Privy Council examined the relationship between *Galbraith* and *Turnbull* [1977] QB 224. Their Lordships justified the approach adopted in the identification cases on the ground that “the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction”: p 129F.

<sup>59</sup> It is possible, for example, to envisage a case in which the defendant is charged with assault, and the evidence against him consists of the statement from the alleged victim (who is unavailable to testify at the trial) and medical evidence. The defence is self-defence. The medical evidence is consistent with both the prosecution and the defence version of events. At the trial, the defence adduces evidence that the alleged victim was so drunk at the time of the assault that it is likely that his perception of events at the time, and his recollection of them, were inaccurate. In such circumstances, the court would be likely to conclude that the alleged victim’s statement is not to be relied upon, and that a conviction would be unsafe.

<sup>60</sup> See cl 14(1), (4) of the draft Bill. Similarly cl 14(2) requires the court to direct the jury to acquit of any offence not charged, of which they could convict by way of alternative to an offence charged, if it would be unsafe to allow them to convict of the alternative because the case for it is based wholly or partly on unconvincing hearsay. Clause 14(4)(b) has the corresponding effect in the magistrates’ court. Clause 14(3) makes corresponding provision for the case where the jury are required to determine whether the defendant did the act (or made the omission) charged under the Criminal Procedure (Insanity) Act 1964, s 4A, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

have not had the opportunity of seeing the maker of the statement in the witness box.<sup>61</sup> The Judicial Studies Board published a new specimen direction in May 1996, which is appropriate where hearsay evidence is admitted and not agreed. The direction is tailored to the individual case, but the judge reminds the jury that they have not seen the witness in the witness box, and that the witness has not been cross-examined.<sup>62</sup>

11.34 In the consultation paper we considered whether the judge ought to be required to direct a jury in a particular way when hearsay evidence has been adduced.<sup>63</sup> The duty of a judge in summing up the evidence is not merely to remind the jury of the evidence but also to use his or her experience and judgment to help them assess it, and to do so in such a way as to ensure that the trial is fair; thus the judge has a particular duty to put the defence case to the jury. In respect of doubtful hearsay evidence, the judge would have to warn the jury of possible reasons why they should not rely on that evidence, or ways in which they should scrutinise or test it before relying on it. Subject to this basic duty, the judge has a wide discretion in deciding how to sum up.<sup>64</sup>

11.35 Our provisional view was that it would be undesirable to fetter the judge's discretion and that there is no need to require any particular form of warning.<sup>65</sup> Nothing was said on consultation to make us reconsider that approach. In the light of this, we are happy to accede to the plea of the Recorder of London, Judge Sir Lawrence Verney, "There are increasing constraints on the Judge's discretion as to how to sum up. Please do not add to them." We therefore make no recommendation that there should be any statutory duty on a judge to direct the jury in any particular way on hearsay evidence.

#### **A POSSIBLE FURTHER SAFEGUARD**

11.36 As we have already said,<sup>66</sup> we have been concerned that the admission of hearsay might lead to manufactured evidence going in. This fear led the CLRC to recommend a bar on the admission of statements which came into existence after the defendant was charged.<sup>67</sup> In New Zealand a bar has been imposed on statements created after legal proceedings could reasonably have been known by the declarant to be contemplated.<sup>68</sup> These options exclude hearsay evidence

<sup>61</sup> See *Scott v R* [1989] AC 1242, 1259, and *Cole* [1990] 1 WLR 866, 869. But in *Kennedy* [1992] Crim LR 37 the Court of Appeal held that a jury should not be directed that less weight is to be given to hearsay statements than to evidence given from the witness box.

<sup>62</sup> The text of the direction is set out at para 3.23 above.

<sup>63</sup> Paras 11.54 – 11.56 of the consultation paper.

<sup>64</sup> *McGreevy* [1973] 1 WLR 276, 281F–G, *per* Lord Morris of Borth-y-Gest. See also *Lawrence* [1982] AC 510, 519–20, *per* Lord Hailsham of Marylebone.

<sup>65</sup> See para 11.56 of the consultation paper.

<sup>66</sup> See para 3.5 above.

<sup>67</sup> CLRC Evidence Report, para 237(iv).

<sup>68</sup> Evidence Amendment Act (No 2) 1980, s 3(2)(a).

regardless of its reliability and, for that reason, we concluded provisionally that such a safeguard would not be desirable.<sup>69</sup>

11.37 On consultation, this view was supported by a large majority of those who responded on the point. We have come to the conclusion that our provisional view was correct, for two reasons. First, witnesses who can give exculpatory evidence, such as alibi witnesses, are likely to be contacted, and statements taken from them, only after the defendant has been charged. A bar on hearsay statements made after charge would probably exclude far more defence hearsay (regardless of its reliability) than prosecution hearsay.

11.38 Secondly, we are, of course, conscious of the danger that dishonest statements may be made after the defendant has been charged; but statements made before charge may also be false. We do not think that the fear of manufacture justifies the exclusion of the statement in the event of the subsequent unavailability of the witness. We believe that the risk of manufactured evidence can be addressed by requiring the declarant to be identified, by restricting hearsay admissible on the grounds of the declarant's unavailability to first-hand hearsay, and, in Crown Court trials, by a warning to the jury about the risks of manufacture.<sup>70</sup>

<sup>69</sup> See para 11.34 of the consultation paper.

<sup>70</sup> We assume that magistrates would be conscious of the weaknesses of hearsay evidence.

## PART XII

# PROCEDURAL MATTERS

- 12.1 In this Part we consider whether the defence should be subject to the same rules on hearsay as the prosecution, and whether our proposed reforms should apply to hearings before tribunals other than criminal courts. We then mention two procedural suggestions which were raised for discussion in the consultation paper, but in respect of which we are not making any recommendations, namely, reducing the number of interruptions to a witness's oral testimony, and introducing a procedure for taking evidence on commission.

### APPLICATION OF THE RULES

#### **Should the same rules on hearsay apply to the prosecution and to the defence?**

- 12.2 It has been suggested that there might be different rules for the admission of hearsay at the instance of the prosecution and of the defence, because the function of the hearsay rule is to protect the accused. For example, Lord Oliver of Aylmerton has stated that the hearsay rule "has been evolved and applied over many years in the interest of fairness to persons accused of crime".<sup>1</sup> But, as we have pointed out, the rule does not always work to the advantage of the defendant.<sup>2</sup> In fact it has been expressly held that special exceptions are not to be made for the defendant:

The idea, which may be gaining prevalence in some quarters, that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts, which if proved would be relevant and would assist the defence, is wholly erroneous.<sup>3</sup>

- 12.3 There are some differences between the rules applicable to the prosecution and the defence in the admission of evidence under the 1988 Act,<sup>4</sup> and some statutory provisions which apply to the prosecution but not to the defence. For example, section 78(1) of PACE<sup>5</sup> allows only prosecution evidence to be excluded: it does not apply to the defence. Similarly the defence, but not the prosecution, is protected from the use of hearsay evidence under Article 6(3)(d) of the Convention.<sup>6</sup> There is also a common law discretion which precludes the prosecution (but not the defence) from adducing evidence whose probative value is outweighed by its likely prejudicial effect.<sup>7</sup>

<sup>1</sup> *Kearley* [1992] AC 228, 278C.

<sup>2</sup> See paras 3.32 and 3.33 above.

<sup>3</sup> *Turner* (1975) 61 Cr App R 67, 88, *per* Milmo J.

<sup>4</sup> Sections 23–26, which are set out at Appendix B.

<sup>5</sup> Which is set out at Appendix B.

<sup>6</sup> See para 5.24 above.

<sup>7</sup> See para 11.15 above.



12.4 We agree with the traditional view that the conviction of an innocent person is a more serious miscarriage of justice than the acquittal of someone who is guilty.<sup>8</sup> It has been argued that it follows from this principle that Parliament and the courts should be more concerned to prevent unreliable evidence being adduced by the prosecution than by the defence.<sup>9</sup>

12.5 With that in mind, we considered in the consultation paper the option of having different rules for the prosecution and the defence.<sup>10</sup> Our provisional view was to reject this option, for three reasons.<sup>11</sup> First, because a defendant can ensure his or her acquittal by raising a reasonable doubt, we were concerned that if greater latitude were allowed to the defence than the prosecution, it would be easy to ensure, by the use of manufactured or very low quality hearsay, that a doubt would arise. As the Scottish Law Commission explained,

it is ... necessary to maintain or improve, as far as possible, the effectiveness of the criminal justice system not only in acquitting the innocent but also in convicting the guilty. No doubt an ideal rule would both protect the innocent and assist the conviction of the guilty. In the real world, however, a rule designed to protect the innocent also protects those who are in fact guilty. That is true of the rule requiring proof of guilt beyond reasonable doubt, and we think it would also be true of a rule giving the defence wider rights than the Crown to lead hearsay evidence.<sup>12</sup>

12.6 Secondly, our provisional view that there should be some form of safety-valve for cogent and credible testimony which ought in the interests of justice to be admitted<sup>13</sup> meant that a defendant would not be precluded from adducing reliable hearsay evidence, as is currently the case,<sup>14</sup> and so there is no need for more liberal rules to apply to the defence.

12.7 The third factor was that, as the Scottish Law Commission explained,<sup>15</sup> the existence of different rules would produce a curious and unsatisfactory result. The prosecution might be entitled to cross-examine a defence witness on hearsay evidence which the witness had given in chief but which the prosecution, had it called the witness itself, would not have been able to elicit. An accused might be entitled to elicit from a defence witness hearsay evidence implicating a co-accused which the prosecution would not have been able to lead.

<sup>8</sup> *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, 278G, *per* Lord Reid. Cf the view of the CLRC, at para 27 of its Evidence Report, that “it is as much in the public interest that a guilty person should be convicted as it is that an innocent person should be acquitted”.

<sup>9</sup> Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd ed 1963) pp 209–211.

<sup>10</sup> See paras 12.7 – 12.10 of the consultation paper.

<sup>11</sup> See paras 12.11 – 12.13 of the consultation paper.

<sup>12</sup> SLC Report, para 4.32.

<sup>13</sup> See paras 10.77 and 11.36 – 11.38 of the consultation paper.

<sup>14</sup> See paras 4.4 – 4.13 above.

<sup>15</sup> The SLC Report, para 4.32.

- 12.8 Our provisional view was that the same rules on hearsay should apply to the defence as to the prosecution, save for the different standards of proof.<sup>16</sup> On consultation, a large majority of those who responded on this point agreed with our provisional conclusion.<sup>17</sup> The Society of Public Teachers of Law was in favour of different rules for the prosecution and the defence because of the imbalance of resources between prosecution and defence, but did not give details of how this would affect the admission of hearsay evidence. It is noteworthy that this view was not shared by the judges and practitioners who responded on this point, and we do not believe that there is any force in it. **We recommend that the same rules on hearsay should apply to both prosecution and defence (save for the different standards of proof and the existing discretions to exclude prosecution evidence). (Recommendation 48)**

**Should the same hearsay reforms apply in courts-martial, professional tribunals governed by statute, and coroners' courts?**

***Courts-martial***

- 12.9 The present position is that the rules governing the admissibility of evidence in proceedings before courts-martial are the same as those observed in trials on indictment in England and Wales,<sup>18</sup> with the necessary service modifications. Any modifications to the relevant hearsay provisions therefore apply automatically to courts-martial. Our provisional view was that our reforms should apply in courts-martial, and this approach was accepted on consultation.

***Professional tribunals***

- 12.10 Certain professional tribunals established by statute are also governed to a considerable extent by the rules of evidence in criminal proceedings. The regulatory bodies for doctors, nurses, midwives and health visitors, dentists and opticians have been created and are governed by statute, and the procedures followed by the professional conduct committees of these bodies are broadly similar to those followed in summary trials. These committees may not receive evidence of complaints which would not be admissible in ordinary criminal proceedings, unless the legal assessor serving on the committee is satisfied that the duty of the committee to make thorough and proper inquiries makes such receipt desirable.<sup>19</sup> Our provisional view was that the reformed hearsay rule should apply to professional tribunals established by statute. This was welcomed by those professional bodies that responded, which included the British Medical Association, the General Dental Council, the General Optical Council and the

<sup>16</sup> See para 12.14 of the consultation paper.

<sup>17</sup> Some respondents agreed that generally the rules should be the same, but thought that the safety-valve should only be open to the defence. See para 8.136 above.

<sup>18</sup> Army Act 1955, s 99 (as amended); Air Force Act 1955, s 99 (as amended); and Naval Discipline Act 1957, s 64A.

<sup>19</sup> General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order of Council, SI 1988 No 2255, r 50(1); Nurses, Midwives and Health Visitors (Professional Conduct) Rules 1987 Approval Order, SI 1987 No 2156, r 18(1); General Dental Council Professional Conduct Committee (Procedure) Rules Order of Council, SI 1984 No 1517, r 26(2); General Optical Council (Disciplinary Committee) (Procedure) Order of Council, SI 1985 No 1580, r 14.

United Kingdom's Central Nursing Council for Nursing, Midwifery and Health Visiting.

### ***Coroners' courts***

- 12.11 We have also considered the position of coroners' courts, while bearing in mind that they are not concerned with the question of criminal liability but only with the cause of death. Indeed rule 42 of the Coroners Rules 1984<sup>20</sup> provides that "No verdict shall be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person or (b) civil liability".
- 12.12 We were told on consultation by the Coroners' Society of England and Wales that the existing rules cause no substantial difficulties because a coroner can admit a statement in a document if, in his or her opinion, it is not likely to be disputed and the maker has died or cannot give oral evidence within a reasonable time. This view was supported by others with experience of inquests,<sup>21</sup> who believed that no change in the law was necessary. We agree. **We recommend that any reform of the hearsay rule should apply where the criminal rules of evidence currently apply, namely courts-martial and professional tribunals established by statute, but should not affect coroners' courts. (Recommendation 49)**

## **TRIAL PROCEDURE**

### **The avoidance of unnecessary interruptions to oral evidence**

- 12.13 In the consultation paper we criticised the current practice because one consequence of it is that witnesses are frequently interrupted in the course of giving evidence when they say "he said ...", although what "he said" is often quite innocuous.<sup>22</sup> We provisionally suggested that if a witness gives inadmissible hearsay evidence while giving oral evidence at a trial, it should not be treated as hearsay if it has already been given in some other admissible form in the course of the same trial.<sup>23</sup>
- 12.14 On consultation some of our respondents doubted that this was a practical or satisfactory way of dealing with the problem. For example, Phillips LJ pointed out: "The fact that witness A has given direct evidence of a fact (which may have been hotly challenged) cannot of itself justify witness B giving hearsay evidence of the same fact. The desirable approach is that the trial procedure should afford Counsel the time to agree what hearsay evidence can be led without objection." Others took a similar view. We have come to the conclusion that this is really a matter of trial management, whether in the magistrates' court or the Crown Court, and should not be the subject of legislation. We therefore make no recommendation on this point.

<sup>20</sup> SI 1984 No 552.

<sup>21</sup> Dr Paul Knapman, HM Coroner, and Mr Paul Matthews, the Editor of *Jarvis on Coroners* and a Deputy Coroner for the City of London.

<sup>22</sup> Paras 7.74 – 7.75 of the consultation paper.

<sup>23</sup> Para 11.52 of the consultation paper.

### **Evidence taken “on commission”**

12.15 In the consultation paper we considered briefly the possibility of introducing a system for evidence to be taken “on commission”, but concluded that to do so would constitute a radical change to English criminal procedure, and was outside the scope of our remit.<sup>24</sup> We did, however, invite consultees to comment if they took a different view.<sup>25</sup> Professor J R Spencer has argued<sup>26</sup> that such a change would not be so radical, given that evidence may already be taken in advance of trial in both civil and criminal proceedings in England,<sup>27</sup> although he concedes that this does not often occur in criminal proceedings. He points out that there is power to take evidence on commission in Scotland, and this power has recently been extended.<sup>28</sup> In his opinion, leaving the law as it is would result in two undesirable possibilities –

failures of justice because vital evidence is missing, or filling the evidential gap with the statements the absent witness made to the police – so letting in evidence from people whom the defence have had no chance to cross-examine, and probably infringing Article 6(3)(d) of the European Convention on Human Rights.<sup>29</sup>

12.16 Our view is that there will not be failures of justice due to missing evidence, because if the witness is unavailable then, as Professor Spencer notes, the statement made to the police will be admissible; and we do not think that admitting such a statement would entail breaching the Convention where the declarant is unavailable.<sup>30</sup>

<sup>24</sup> Para 11.41 of the consultation paper.

<sup>25</sup> Professor Jackson and the Standing Advisory Commission on Human Rights (Northern Ireland) are in favour of giving consideration to procedures which would allow the evidence of vulnerable and frightened witnesses to be taken on commission. This will presumably be one of the matters considered by the inter-departmental group which is reviewing court procedures for people with learning disabilities: see para 8.59, n 86 above.

<sup>26</sup> “Hearsay Reform: A Bridge Not Far Enough?” [1996] Crim LR 29, 31–32.

<sup>27</sup> See paras 2.11, n 14, and 2.21 above.

<sup>28</sup> Prisoners and Criminal Proceedings (Scotland) Act 1993, s 33.

<sup>29</sup> [1996] Crim LR 29, 32.

<sup>30</sup> See para 5.16 above.

## PART XIII

# COMPUTER EVIDENCE

- 13.1 In *Minors* Steyn J summed up the major problem posed for the rules of evidence by computer output:

Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer. ... If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have “bugs”. ... Realistically, therefore, computers must be regarded as imperfect devices.<sup>1</sup>

- 13.2 The legislature sought to deal with this dilemma by section 69 of PACE,<sup>2</sup> which imposes important additional requirements that must be satisfied before computer evidence is adduced – whether it is hearsay or not.<sup>3</sup>
- 13.3 In practice, a great deal of hearsay evidence is held on computer,<sup>4</sup> and so section 69 warrants careful attention. It must be examined against the requirement that the use of computer evidence should not be unnecessarily impeded, while giving due weight to the fallibility of computers.

### PACE, SECTION 69

- 13.4 In the consultation paper we dealt in detail with the requirements of section 69:<sup>5</sup> in essence it provides that a document produced by a computer may not be adduced as evidence of any fact stated in the document unless it is shown that the computer was properly operating and was not being improperly used.<sup>6</sup> If there is any dispute as to whether the conditions in section 69 have been satisfied, the court must hold a trial within the trial to decide whether the party seeking to rely on the document has established the foundation requirements of section 69.
- 13.5 In essence, the party relying on computer evidence must first prove that the computer is reliable – or, if the evidence was generated by more than one computer, that *each* of them is reliable.<sup>7</sup> This can be proved by tendering a written

<sup>1</sup> [1989] 1 WLR 441, 443D–E.

<sup>2</sup> The text of this section is set out in Appendix B.

<sup>3</sup> *Shephard* [1993] AC 380.

<sup>4</sup> Eg shop till rolls (*Shephard* [1993] AC 380), and building society records (*Minors* [1989] 1 WLR 441).

<sup>5</sup> Paras 14.3 – 14.9 of the consultation paper.

<sup>6</sup> But a computer is not regarded as failing this test where it is *designed* to produce a slightly inaccurate result. In *Ashton v DPP* (1996) 160 JP 336 a Lion Intoximeter reading of the appellant’s alcohol level added the words “trace acetone” to show that it might not be wholly accurate, but was held admissible because this was the way in which the device was designed to work.

<sup>7</sup> *Cochrane* [1993] Crim LR 48.

certificate,<sup>8</sup> or by calling oral evidence.<sup>9</sup> It is not possible for the party adducing the computer evidence to rely on a presumption that the computer is working correctly.<sup>10</sup> It is also necessary for the computer records themselves to be produced to the court.<sup>11</sup>

### **The problems with the present law**

- 13.6 In the consultation paper we came to the conclusion that the present law was unsatisfactory, for five reasons.<sup>12</sup>
- 13.7 First, section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out, “most computer error is either immediately detectable or results from error in the data entered into the machine”.<sup>13</sup>
- 13.8 Secondly, advances in computer technology make it increasingly difficult to comply with section 69: it is becoming “increasingly impractical to examine (and therefore certify) all the intricacies of computer operation”.<sup>14</sup> These problems existed even before networking became common.
- 13.9 A third problem lies in the difficulties confronting the *recipient* of a computer-produced document who wishes to tender it in evidence: the recipient may be in no position to satisfy the court about the operation of the computer. It may well be that the recipient’s opponent is better placed to do this.<sup>15</sup>
- 13.10 Fourthly, it is illogical that section 69 applies where the document is tendered in evidence,<sup>16</sup> but not where it is used by an expert in arriving at his or her conclusions,<sup>17</sup> nor where a witness uses it to refresh his or her memory.<sup>18</sup> If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible; and conversely, if it is not safe to admit the output, it can hardly be safe for a witness to rely on it.<sup>19</sup>

<sup>8</sup> PACE, Sched 3, para 8.

<sup>9</sup> PACE, Sched 3, para 9.

<sup>10</sup> *Shephard* [1993] AC 380, 384E, *per* Lord Griffiths, with whom Lords Emslie, Roskill, Ackner and Lowry agreed.

<sup>11</sup> *Burr v DPP* [1996] Crim LR 324.

<sup>12</sup> Paras 14.10 – 14.22 of the consultation paper.

<sup>13</sup> C Tapper, “Discovery in Modern Times: A Voyage around the Common Law World” (1991) 67 *Chicago-Kent Law Review* 217, 248.

<sup>14</sup> S Castell, “Evidence and Authorisation: is EDI [Electronic Data Interchange] ‘legally reliable?’” (1990) 6(5) *Computer Law and Security Report* 2.

<sup>15</sup> C Tapper, “Evanescent Evidence” (1993) 1(1) *International Journal of Information and Technology Law* 35, 52.

<sup>16</sup> *Shephard* [1993] AC 380.

<sup>17</sup> *Golizadeh* [1995] Crim LR 232.

<sup>18</sup> *Sophocleous v Ringer* [1988] RTR 52.

<sup>19</sup> See Professor D J Birch’s commentary on *Sophocleous v Ringer* at [1987] Crim LR 423.

- 13.11 At the time of the publication of the consultation paper there was also a problem arising from the interpretation of section 69. It was held by the Divisional Court in *McKeown v DPP*<sup>20</sup> that computer evidence is inadmissible if it cannot be proved that the computer was functioning properly – even though the malfunctioning of the computer had no effect on the accuracy of the material produced. Thus, in that case, computer evidence could not be relied on because there was a malfunction in the clock part of an Intoximeter machine, although it had no effect on the accuracy of the material part of the printout (the alcohol reading). On appeal, this interpretation has now been rejected by the House of Lords: only malfunctions that affect the way in which a computer processes, stores or retrieves the information used to generate the statement are relevant to section 69.<sup>21</sup>
- 13.12 In coming to our conclusion that the present law did not work satisfactorily, we noted that in Scotland, some Australian states,<sup>22</sup> New Zealand, the United States and Canada, there is no separate scheme for computer evidence, and yet no problems appear to arise.<sup>23</sup> Our provisional view was that section 69 fails to serve any useful purpose, and that other systems operate effectively and efficiently without it.<sup>24</sup>
- 13.13 We provisionally proposed that section 69 of PACE be repealed without replacement.<sup>25</sup> Without section 69, a common law presumption comes into play:

In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time.<sup>26</sup>

- 13.14 Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been – in which case the party would have to prove that it was (beyond reasonable doubt in the case of the prosecution, and on the balance of probabilities in the case of the defence). The principle has been applied to such devices as speedometers<sup>27</sup> and traffic lights,<sup>28</sup> and in the consultation paper we saw no reason why it should not apply to computers.

<sup>20</sup> [1995] Crim LR 69.

<sup>21</sup> *DPP v McKeown; DPP v Jones* [1997] 1 WLR 295. It was also doubted whether the clock could properly be regarded as part of the computer: p 303F, *per* Lord Hoffmann, with whom their Lordships agreed.

<sup>22</sup> New South Wales and Tasmania, as well as the Commonwealth (federal) jurisdiction.

<sup>23</sup> *The VERDICT Report* (1987) p 84.

<sup>24</sup> See para 14.32 of the consultation paper.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Phipson*, para 23-14, approved by the Divisional Court in *Castle v Cross* [1984] 1 WLR 1372, 1377B, *per* Stephen Brown LJ.

<sup>27</sup> *Nicholas v Penny* [1950] 2 KB 466.

<sup>28</sup> *Tingle Jacobs & Co v Kennedy* [1964] 1 WLR 638n.

### **The response on consultation**

- 13.15 On consultation, the vast majority of those who dealt with this point agreed with us. A number of those in favour<sup>29</sup> said that section 69 had caused much trouble with little benefit.
- 13.16 The most cogent contrary argument against our proposal came from David Ormerod.<sup>30</sup> In his helpful response,<sup>31</sup> he contended that the common law presumption of regularity may not extend to cases in which computer evidence is central. He cites the assertion of the Privy Council in *Dillon v R*<sup>32</sup> that “it is well established that the courts will not presume the existence of facts which are central to an offence”. If this were literally true it would be of great importance in cases where computer evidence is central, such as Intoximeter cases.<sup>33</sup> But such evidence has often been permitted to satisfy a central element of the prosecution case. Some of these cases were decided before section 69 was introduced;<sup>34</sup> others have been decided since its introduction, but on the assumption (now held to be mistaken)<sup>35</sup> that it did not apply because the statement produced by the computer was not hearsay.<sup>36</sup> The presumption must have been applicable; yet the argument successfully relied upon in *Dillon*<sup>37</sup> does not appear to have been raised.
- 13.17 It should also be noted that *Dillon* was concerned not with the presumption regarding machines but with the presumption of the regularity of official action.<sup>38</sup> This latter presumption was the analogy on which the presumption for machines was originally based; but it is not a particularly close analogy, and the two presumptions are now clearly distinct.
- 13.18 Even where the presumption applies, it ceases to have any effect once evidence of malfunction has been adduced. The question is, what sort of evidence must the defence adduce, and how realistic is it to suppose that the defence will be able to adduce it without any knowledge of the working of the machine? On the one hand the concept of the evidential burden is a flexible one: a party cannot be required to produce more by way of evidence than one in his or her position could be expected to produce. It could therefore take very little for the presumption to be

<sup>29</sup> The Inland Revenue, the Post Office, the Crown Prosecution Service, BT and the Department of Trade and Industry.

<sup>30</sup> Lecturer in Law at the University of Nottingham.

<sup>31</sup> “Proposals for the Admissibility of Computer Evidence” (Oct/Nov 1995) *Comput & Law* 22.

<sup>32</sup> [1982] AC 484.

<sup>33</sup> The Intoximeter is a computer which is currently subject to the provisions of s 69: *R v Medway Magistrates’ Court, ex p Goddard* [1995] RTR 206.

<sup>34</sup> Eg *Castle v Cross* [1984] 1 WLR 1372.

<sup>35</sup> *Shephard* [1993] AC 380.

<sup>36</sup> Eg *Spiby* (1990) 91 Cr App R 186; *Neville* [1991] Crim LR 288.

<sup>37</sup> Which was not a new argument: the earliest authority relied on was *Willis* (1872) 12 Cox CC 164.

<sup>38</sup> The case concerned a prison officer’s liability for negligently permitting an escape, and the issue was whether the prosecution could rely on a presumption that the prisoners were in lawful custody.



rebutted, if the party against whom the evidence was adduced could not be expected to produce more. For example, in *Cracknell v Willis*<sup>39</sup> the House of Lords held that a defendant is entitled to challenge an Intoximeter reading, in the absence of any signs of malfunctioning in the machine itself, by testifying (or calling others to testify) about the amount of alcohol that he or she had drunk.

- 13.19 On the other hand it may be unrealistic to suppose that in such circumstances the presumption would not prevail. In *Cracknell v Willis* Lord Griffiths said:

If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath testing machine is reliable or that the presumption can only be challenged by a particular type of evidence then Parliament must take the responsibility of so deciding and spell out its intention in clear language. Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible.<sup>40</sup>

But his Lordship went on:

I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by *Hughes v McConnell*<sup>41</sup> before being persuaded that it is not safe to rely upon the reading that it produces.<sup>42</sup>

- 13.20 Lord Goff did not share Lord Griffiths' optimism that motorists would not seek to challenge the analysis by spurious evidence of their consumption of alcohol, but did share his confidence in

the good sense of magistrates who, with their attention drawn to the safeguards for defendants built into the Act ..., will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a printout, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure.<sup>43</sup>

<sup>39</sup> [1988] AC 450.

<sup>40</sup> *Ibid*, at p 468C–D.

<sup>41</sup> [1985] RTR 244, where there was considerable evidence (apart from the Intoximeter reading) that the defendant had been very drunk, but the magistrates accepted his evidence that he had drunk only three pints of shandy. The Divisional Court's decision that the reliability of the Intoximeter could not be challenged by such evidence was overruled in *Cracknell v Willis*.

<sup>42</sup> [1988] AC 450, 468D–E.

<sup>43</sup> *Ibid*, at p 472B–C.

- 13.21 These dicta may perhaps be read as implying that evidence which merely contradicts the reading, without directly casting doubt on the reliability of the device, may be technically admissible but should rarely be permitted to succeed. However, it is significant that Lord Goff referred in the passage quoted to the safeguards for defendants which are built into the legislation creating the drink-driving offences.<sup>44</sup> In the case of other kinds of computer evidence, where (apart from section 69) no such statutory safeguards exist, we think that the courts can be relied upon to apply the presumption in such a way as to recognise the difficulty faced by a defendant who seeks to challenge the prosecution's evidence but is not in a position to do so directly. The presumption continues to apply to machines other than computers (and until recently was applied to non-hearsay statements by computers) without the safeguard of section 69; and we are not aware of any cases where it has caused injustice because the evidential burden cast on the defence was unduly onerous. Bearing in mind that it is a creature of the common law, and a comparatively modern one, we think it is unlikely that it would be permitted to work injustice.
- 13.22 Finally it should not be forgotten that section 69 applies equally to computer evidence adduced by the defence. A rule that prevents a defendant from adducing relevant and cogent evidence, merely because there is no positive evidence that it is reliable, is in our view unfair.

### **Our recommendation**

- 13.23 We are satisfied that section 69 serves no useful purpose. We are not aware of any difficulties encountered in those jurisdictions that have no equivalent. We are satisfied that the presumption of proper functioning would apply to computers, thus throwing an evidential burden on to the opposing party, but that that burden would be interpreted in such a way as to ensure that the presumption did not result in a conviction merely because the defence had failed to adduce evidence of

<sup>44</sup> At pp 470G–471A he summarised these safeguards as follows:

First, specimens of breath have to be analysed by means of a machine. Second, such a machine has to be a device of a type approved by the Secretary of State. Third, as is well known, the relevant approved device has built into it a mechanism by which it tests itself, and prints out the results of such a test on the statement automatically produced by it, each time it analyses a person's specimen of breath. Fourth, a requirement to provide a specimen of breath can only be made at a police station. Fifth, two specimens have to be given, and that with the higher reading has to be disregarded. Sixth, if the specimen with the lower reading contains less than a specified quantity of alcohol, the defendant may ask that it be replaced with a specimen of blood or urine, in which event, if he provides such a specimen, no specimen of breath shall be used. This is a formidable list of protections for the motorist.

malfunction which it was in no position to adduce. We believe, as did the vast majority of our respondents, that such a regime would work fairly. **We recommend the repeal of section 69 of PACE.<sup>45</sup> (Recommendation 50)**

<sup>45</sup> See cl 19 of the draft Bill.

## **PART XIV**

# **OUR RECOMMENDATIONS**

In this Part we set out our recommendations, with reference to the paragraphs of the report where they appear.

### **THE RULE AGAINST HEARSAY**

1. We recommend that there should be a general rule against hearsay, subject to specified exceptions, plus a limited inclusionary discretion.

(paragraph 6.53)

2. We recommend

- (1) that (subject to the exceptions we recommend) in criminal proceedings a statement not made in oral evidence in the proceedings should not be admissible as evidence of any matter stated, and

- (2) that a matter should be regarded as stated in a statement if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been

- (a) to cause another person to believe the matter, or

- (b) to cause another person to act, or a machine to operate, on the basis that the matter is as stated.

(paragraph 7.40)

### **Statements produced by machines**

3. We recommend that, where a representation of any fact is made otherwise than by a person, but depends for its accuracy on information supplied by a person, it should not be admissible as evidence of the fact unless it is proved that the information was accurate.

(paragraph 7.50)

### **THE EXCEPTIONS TO THE RULE**

#### **The unavailability exception**

***What kinds of hearsay should be automatically admissible where the declarant is unavailable?***

4. We recommend that the unavailability exception should extend to oral as well as documentary hearsay.

(paragraph 8.4)

5. We recommend that the unavailability exception should not be available unless the person who made the statement is identified to the court's satisfaction.

(paragraph 8.8)

6. We recommend that the unavailability exception should not extend to a statement of any fact of which the declarant could not have given oral evidence at the time when the statement was made.

(paragraph 8.17)

7. We recommend that the unavailability exception should not apply if the declarant's oral evidence of the fact stated would itself have been hearsay, and would have been admissible only under the unavailability exception or under one of the common law exceptions that we recommend should be preserved.

(paragraph 8.23)

8. We recommend that a person should not be allowed to adduce a statement under the unavailability exception where the unavailability of the declarant is caused by the person in support of whose case it is sought to give the statement in evidence, or by a person acting on that person's behalf, in order to prevent the declarant giving oral evidence (whether at all or in connection with the subject matter of the statement).

(paragraph 8.30)

9. We recommend that, where a party alleges that the party tendering the statement caused the unavailability of the declarant in order to prevent the declarant from giving oral evidence, the burden of proof should rest on the party opposing the admission of the evidence.

(paragraph 8.32)

***What kinds of unavailability should make the declarant's statement admissible?***

10. We recommend that the unavailability exception should apply where the declarant is dead.

(paragraph 8.35)

11. We recommend that the unavailability exception should apply where the declarant is unfit to be a witness because of his or her bodily or mental condition.

(paragraph 8.36)

12. We recommend that the unavailability exception should apply where the declarant is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance.

(paragraph 8.39)

13. We recommend that the unavailability exception should apply where the declarant cannot be found, although such steps as it is reasonably practicable to take to find him or her have been taken.

(paragraph 8.43)

#### **Fear**

14. We recommend that a statement made by a person who through fear does not give (or does not continue to give) oral evidence in the proceedings, at all or in connection with the subject matter of the statement, should be admissible with the leave of the court.

(paragraph 8.69)

#### **Business documents**

15. We recommend that there should continue to be an exception for statements contained in business documents.

(paragraph 8.71)

16. We recommend that statements falling within the business documents exception should be automatically admissible, but that the court should have power to direct that a statement is not admissible as a business document if it is satisfied that the statement's reliability is doubtful.

(paragraph 8.77)

17. We recommend that, where a business document contains a statement which was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, and the information contained in the statement was supplied by another person, the statement should be admissible only if that person is unavailable to give oral evidence or cannot reasonably be expected to have any recollection of the matters dealt with in the statement.

(paragraph 8.83)

#### **Confessions, mixed statements and denials**

18. We recommend that the current law be preserved in respect of admissions, confessions, mixed statements, and evidence of reaction.

(paragraph 8.92)

19. We recommend that the admissibility of a confession by one co-accused at the instance of another should be governed by provisions similar to section 76 of PACE, but taking into account the standard of proof applicable to a defendant.

(paragraph 8.95)

### **Evidence given at an earlier trial**

20. We recommend that evidence given at the original trial should be admissible in a retrial like any other statement if the witness is unavailable to give oral evidence, and that it should be immaterial whether the retrial was ordered by the Court of Appeal or a judge at first instance.

(paragraph 8.107)

### **The Criminal Procedure and Investigations Act 1996**

21. We recommend the repeal of paragraphs 1(4) and 2(4) of Schedule 2 to the Criminal Procedure and Investigations Act 1996.

(paragraph 8.113)

### **Res gestae**

22. We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded.

(paragraph 8.121)

23. We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement.

(paragraph 8.124)

24. We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement relates to a mental state (such as intention or emotion).

(paragraph 8.126)

25. We recommend the retention of the common law exception under which a statement is admissible as evidence of any matter stated if the statement relates to a physical sensation.

(paragraph 8.129)

### **The common enterprise exception**

26. We recommend the retention of the common law rule that a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.

(paragraph 8.131)

### **Other common law exceptions**

27. We recommend that the following common law exceptions be retained:

- (1) published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps) as evidence of facts of a public nature stated in them;
- (2) public documents (such as public registers, and returns made under public authority with respect to matters of public interest) as evidence of facts stated in them;
- (3) records (such as the records of certain courts, treaties, Crown grants, pardons and commissions) as evidence of facts stated in them;
- (4) evidence relating to a person's age or date or place of birth;
- (5) reputation as evidence of a person's good or bad character;
- (6) reputation or family tradition as evidence of pedigree or the existence of a marriage, the existence of any public or general right, or the identity of any person or thing; and
- (7) informal admissions made by an agent.

(paragraph 8.132)

#### **The safety-valve**

28. We recommend that there should be a limited discretion to admit hearsay evidence not falling within any other exception.

(paragraph 8.136)

29. We recommend that the inclusionary discretion

- (1) should extend to oral as well as documentary hearsay, and to multiple as well as first-hand hearsay; and
- (2) should be available if the court is satisfied that, despite the difficulties there may be in challenging the statement, its probative value is such that the interests of justice require it to be admissible.

(paragraph 8.141)

30. We recommend that the inclusionary discretion be available to both the prosecution and the defence.

(paragraph 8.149)

#### **Admitting hearsay by consent**

31. We recommend that hearsay evidence should be admissible if all parties to the proceedings agree to it being admissible.

(paragraph 8.150)



## **EXPERT EVIDENCE**

32. We recommend the preservation of the common law exceptions under which an expert witness may draw on the body of expertise relevant to his or her field.

(paragraph 9.8)

33. We recommend

- (1) that the Crown Court (Advance Notice of Expert Evidence) Rules 1987<sup>1</sup> and the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997<sup>2</sup> should be amended so as to require advance notice of the name of any person who has prepared a statement on which it is proposed that an expert witness should base any opinion or inference, and the nature of the matters stated; and
- (2) that, where such notice has been given, and the person who prepared the statement had (or may reasonably be supposed to have had) personal knowledge of the matters stated, the expert witness should be able to base any opinion or inference on the statement, and the statement should then be admissible as evidence of what it states, unless the court directs otherwise on application by any other party to the proceedings.

(paragraph 9.29)

## **PREVIOUS STATEMENTS BY WITNESSES**

### **Suggestion of late invention**

34. We recommend that where a previous statement by a witness is admitted as evidence to rebut a suggestion that the witness's oral evidence has been fabricated, that statement should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

(paragraph 10.45)

### **Evidence of a previous identification or description**

35. We recommend that, where

- (1) a witness has made a previous statement which identifies or describes a person, object or place, and
- (2) while giving evidence the witness indicates that to the best of his or her belief he or she made the statement, and it states the truth,

the statement should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

<sup>1</sup> SI 1987 No 716 (L2), as amended by the Crown Court (Advance Notice of Expert Evidence) (Amendment) Rules, SI 1997 No 700 (L6).

<sup>2</sup> SI 1997 No 795 (L11).

(paragraph 10.52)

**Recent complaint**

36. We recommend that, where

- (1) a witness claims to be a person against whom an offence to which the proceedings relate has been committed,
- (2) the witness has made a previous statement which consists of a complaint about conduct which would, if proved, constitute the offence or part of the offence,
- (3) the complaint was made as soon as could reasonably be expected after the alleged conduct,
- (4) the complaint was not made as a result of a threat or a promise,
- (5) before the statement is adduced the witness gives oral evidence in connection with its subject matter, and
- (6) while giving evidence the witness indicates that, to the best of his or her belief, he or she made the statement and it states the truth,

the statement should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

(paragraph 10.60)

**Documentary statements as exhibits**

37. We recommend that where a statement previously made by a witness in a document is admitted, the document should not accompany the jury when they retire to consider their verdict, unless the court considers it appropriate or all the parties to the proceedings agree that it should accompany the jury.

(paragraph 10.62)

**Inability to remember**

38. We recommend that, if

- (1) a witness does not, and cannot reasonably be expected to, remember a matter well enough to be able to give oral evidence of it,
- (2) the witness previously made a statement of that matter when it was fresh in the witness's memory, and
- (3) the witness indicates while giving evidence that, to the best of his or her belief, he or she made the statement and it is true,

the statement should be admissible as evidence of that matter.

(paragraph 10.80)

39. We recommend that a statement made by a witness in a document which is used by the witness to refresh his or her memory, on which the witness is cross-examined, and which as a consequence is received in evidence, should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

(paragraph 10.82)

**Previous inconsistent statements**

40. We recommend that a previous inconsistent or contradictory statement by a witness which

- (1) the witness admits making, or
- (2) is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865,

should be admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

(paragraph 10.92)

**SAFEGUARDS FOR THE PARTY AGAINST WHOM HEARSAY EVIDENCE IS ADDUCED**

**Formal notice to be given**

41. We recommend that, where it is known in advance of the trial that a party will seek to adduce hearsay evidence, rules of court should require that party to give notice of the intention to do so.

(paragraph 11.7)

**Application for a ruling on admissibility to be made pre-trial where possible**

42. We recommend that a party seeking to rely on a hearsay statement should make an application for its admission before the trial where possible, and, where this is not possible, at the earliest practicable opportunity, and a ruling on admissibility should be binding, save where there is a change of circumstances.

(paragraph 11.11)

**An additional power to exclude evidence**

43. We recommend that the court should have power to refuse to admit a hearsay statement if it is satisfied that the statement's probative value is substantially outweighed by the danger that to admit it would result in undue waste of time.

(paragraph 11.18)

### **The right to challenge the credibility of the absent declarant**

44. We recommend that, where a hearsay statement is admitted and the maker of the statement does not give evidence, the following evidence should be admissible to discredit the maker of the statement:

- (1) evidence which, had the maker given evidence, would have been admissible as relevant to his or her credibility; and
- (2) (with the leave of the court) evidence of any matter which, had the maker given evidence, could have been put to him or her in cross-examination as relevant to his or her credibility but of which evidence could not have been adduced by the cross-examining party.

(paragraph 11.22)

45. We recommend that, where a hearsay statement is admitted and the maker of the statement does not give evidence, evidence that the maker of the statement made another statement, inconsistent with the hearsay statement,

- (1) should be admissible for the purpose of showing that the maker contradicted himself or herself, and
- (2) when so admitted, should also be admissible as evidence of any matter stated in it of which oral evidence by the maker would be admissible.

(paragraph 11.23)

46. We recommend that where an allegation has been made against the maker of a hearsay statement, the court should have power to permit a party to lead additional evidence of such description as the court may specify for the purposes of denying or answering the allegation.

(paragraph 11.25)

### **The court's duty to stop the trial**

47. We recommend that if the case against the accused is based wholly or partly on a hearsay statement, and the evidence provided by the statement is so unconvincing that, considering its importance to the case against the accused, the accused's conviction of the offence would be unsafe, the magistrates should be required to acquit, or (as the case may be) the judge should be required to direct the jury to acquit, the accused of the offence.

(paragraph 11.32)

### **PROCEDURAL MATTERS**

48. We recommend that the same rules on hearsay should apply to both prosecution and defence (save for the different standards of proof and the existing discretions to exclude prosecution evidence).

(paragraph 12.8)

49. We recommend that any reform of the hearsay rule should apply where the criminal rules of evidence currently apply, namely courts-martial and professional tribunals established by statute, but should not affect coroners' courts.

(paragraph 12.12)

**COMPUTER EVIDENCE**

50. We recommend the repeal of section 69 of PACE.

(paragraph 13.23)

*(Signed)* MARY ARDEN, *Chairman*  
ANDREW BURROWS  
DIANA FABER  
CHARLES HARPUM  
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*  
4 April 1997



# APPENDIX A

## DRAFT CRIMINAL EVIDENCE BILL

### INDEX

This index shows where in the report each substantive provision of the draft Bill is explained.

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# Criminal Evidence Bill

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## ARRANGEMENT OF CLAUSES

### *Hearsay: main provisions*

Clause

1. The hearsay rule.
2. Statements and matters stated.

### *Exceptions to hearsay rule*

3. Cases where a witness is unavailable.
4. Business and other documents.
5. The five conditions.
6. Common law exceptions.
7. Inconsistent statements.
8. Other previous statements of witnesses.
9. Discretion to admit hearsay.

### *Hearsay: supplementary*

10. Multiple hearsay.
11. Documents produced as exhibits.
12. Competence.
13. Credibility.
14. Court's duty where evidence is unconvincing.
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### *Miscellaneous*

16. Expert evidence: preparatory work.
17. Confessions.
18. Representations other than by a person.
19. Computer records.
20. Statements and depositions.
21. Evidence at retrial.
22. Proof of statements in documents.
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24. Rules of court.
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27. Armed forces.



## Clause

28. Consequential amendments.
29. Repeals.
30. Commencement.
31. Extent.
32. Citation.

## SCHEDULES:

- Schedule 1 —Armed Forces.
- Schedule 2 —Repeals.

A

# B I L L

INTITULED

An Act to make provision about evidence in criminal proceedings. A.D. 1997.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 *Hearsay: main provisions*

**1.**—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is not admissible as evidence of any matter stated unless— The hearsay rule.

- (a) this Act or any other statutory provision makes it admissible,
- (b) any rule of law preserved by section 6 makes it admissible, or
- 10 (c) all parties to the proceedings agree to it being admissible.

(2) The common law rules governing the admissibility of hearsay evidence in criminal proceedings are abolished (except for the rules preserved by section 6).

**2.**—(1) In this Act references to a statement or to a matter stated are to be read as follows. Statements and matters stated.

(2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

(3) A matter stated is one to which this Act applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—

- (a) to cause another person to believe the matter, or
- 20 (b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

*Exceptions to hearsay rule*

Cases where a witness is unavailable.

**3.** In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

- (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter, 5
- (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
- (c) any of the five conditions mentioned in section 5 is satisfied (absence of relevant person etc).

Business and other documents.

**4.—(1)** In criminal proceedings a statement contained in a document is 10 admissible as evidence of any matter stated if—

- (a) oral evidence given in the proceedings would be admissible as evidence of that matter,
- (b) the requirements of subsection (2) are satisfied, and
- (c) the requirements of subsection (5) are satisfied, in a case where 15 subsection (4) requires them to be.

(2) The requirements of this subsection are satisfied if—

- (a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office, 20
- (b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and
- (c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in paragraph (a) 25 received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

(3) The persons mentioned in paragraphs (a) and (b) of subsection (2) may be the same person. 30

(4) The additional requirements of subsection (5) must be satisfied if the statement—

- (a) was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, but
- (b) was not prepared in accordance with section 3 of the Criminal 35 Justice (International Co-operation) Act 1990 or an order under paragraph 6 of Schedule 13 to the Criminal Justice Act 1988 (which relate to overseas evidence).

1990 c. 5.

1988 c. 33.

(5) The requirements of this subsection are satisfied if—

- (a) any of the five conditions mentioned in section 5 is satisfied (absence 40 of relevant person etc), or
- (b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances). 45

(6) A statement is not admissible under this section if the court makes a direction to that effect under subsection (7).

(7) The court may make a direction under this subsection if satisfied that the statement's reliability as evidence for the purpose for which it is tendered is  
5 doubtful in view of—

- (a) its contents,
- (b) the source of the information contained in it,
- (c) the way in which or the circumstances in which the information was supplied or received, or
- 10 (d) the way in which or the circumstances in which the document concerned was created or received.

**5.—**(1) Here are the five conditions referred to in sections 3 and 4.

The five conditions.

(2) The first condition is that the relevant person is dead.

(3) The second condition is that the relevant person is unfit to be a witness  
15 because of his bodily or mental condition.

(4) The third condition is that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance.

(5) The fourth condition is that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have  
20 been taken.

(6) The fifth condition is that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings—

- (a) at all, or
- (b) in connection with the subject matter of the statement,
- 25 and the court gives leave for the statement to be given in evidence.

(7) For the purposes of subsection (6) "fear" must be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(8) Leave may be given under subsection (6) only if the court considers  
30 that the statement ought to be admitted in the interests of justice, having regard—

- (a) to the statement's contents,
- (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how likely it is  
35 that the statement can be controverted if the relevant person does not give oral evidence),
- (c) in appropriate cases, to the fact that special arrangements could be made for the relevant person to give evidence (for example, through a television link or from behind a screen), and
- 40 (d) to any other relevant circumstances.

(9) A condition which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in it are caused—

- (a) by the person in support of whose case it is sought to give the statement in evidence, or

(b) by a person acting on his behalf,  
in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

Common law exceptions.

6.—(1) The rules of law to which this section applies are preserved. 5

(2) This section applies to any rule of law under which in criminal proceedings—

- (a) published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated in them, 10
- (b) public documents (such as public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated in them,
- (c) records (such as the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts 15 stated in them, or
- (d) evidence relating to a person's age or date or place of birth may be given by a person without personal knowledge of the matter.

(3) This section also applies to any rule of law under which in criminal proceedings evidence of a person's reputation is admissible for the purpose 20 of proving his good or bad character; but the rule is preserved only so far as it allows the court to treat such evidence as proving the matter concerned.

(4) This section also applies to any rule of law under which in criminal proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving— 25

- (a) pedigree or the existence of a marriage,
- (b) the existence of any public or general right, or
- (c) the identity of any person or thing;

but the rule is preserved only so far as it allows the court to treat such evidence as proving or disproving the matter concerned. 30

(5) This section also applies to any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if—

- (a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded, 35
- (b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or
- (c) the statement relates to a physical sensation or a mental state (such as intention or emotion).

(6) This section also applies to any rule of law relating to the admissibility of 40 confessions or mixed statements in criminal proceedings.

(7) This section also applies to any rule of law under which in criminal proceedings—

- (a) an admission made by an agent of an accused person is admissible against the accused as evidence of any matter stated, or 45

(b) a statement made by a person to whom an accused person refers a person for information is admissible against the accused as evidence of any matter stated.

(8) This section also applies to any rule of law under which in criminal proceedings a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.

(9) This section also applies to any rule of law under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field.

**7.—**(1) If in criminal proceedings a person gives oral evidence and—

(a) he admits making a previous inconsistent statement, or

(b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865,

the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

Inconsistent statements.

1865 c. 18.

(2) If in criminal proceedings evidence of an inconsistent statement by any person is given under section 13(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

**8.—**(1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.

(2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

Other previous statements of witnesses.

(3) A statement made by the witness in a document—

(a) which is used by him to refresh his memory while giving evidence,

(b) on which he is cross-examined, and

(c) which as a consequence is received in evidence in the proceedings, is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—

(a) any of the following three conditions is satisfied, and

(b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5) The first condition is that the statement identifies or describes a person, object or place.

(6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not, and cannot reasonably be expected to, remember them well enough to give oral evidence of them in the proceedings.

(7) The third condition is that—

- (a) the witness claims to be a person against whom an offence has been committed,
- (b) the offence is one to which the proceedings relate,
- (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,
- (d) the complaint was made as soon as could reasonably be expected after the alleged conduct,
- (e) the complaint was not made as a result of a threat or a promise, and
- (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.

(8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.

Discretion to admit hearsay.

**9.** In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if the court is satisfied that, despite the difficulties there may be in challenging the statement, its probative value is such that the interests of justice require it to be admissible.

*Hearsay: supplementary*

Multiple hearsay.

**10.**—(1) If there is a series of statements not made in oral evidence (such as “A said that B said that C shot the deceased”) sections 1 and 3 to 9 apply as follows.

- (2) If a statement—
  - (a) is relied on as evidence of a matter stated in it, and
  - (b) is admissible for that purpose only under section 3 or a rule preserved by section 6,

the fact that the statement was made must be proved by evidence admissible otherwise than under section 3.

- (3) Otherwise—
  - (a) sections 1 and 3 to 9 apply to the admissibility of each statement, and
  - (b) different statements may be admissible under different sections (or different provisions of the same section).

Documents produced as exhibits.

**11.**—(1) This section applies if on a trial on indictment for an offence—

- (a) a statement made in a document is admitted in evidence under section 7 or 8, and
- (b) the document or a copy of it is produced as an exhibit.

(2) The exhibit must not accompany the jury when they retire to consider their verdict unless—

- (a) the court considers it appropriate, or

- (b) all the parties to the proceedings agree that it should accompany the jury.

**12.**—(1) Nothing in section 3, 7 or 8 makes a statement admissible as evidence if it was made by a person who was not competent to give evidence in criminal proceedings at the time he made the statement. Competence.

(2) Nothing in section 4 makes a statement admissible as evidence if any person who, in order for the requirements of section 4(2) to be satisfied, must at any time have supplied or received the information concerned or created or received the document or part concerned—

- (a) was not competent to give evidence in criminal proceedings at that time, or  
 (b) cannot be identified but cannot reasonably be assumed to have been so competent.

(3) For the purposes of this section a person is not competent to give evidence in criminal proceedings if he suffers from such mental or physical infirmity, or lack of understanding, as would make a person incompetent to give evidence in criminal proceedings; but a person under the age of 14 must be treated as competent unless it appears to the court that he is incapable of giving intelligible testimony.

**13.**—(1) This section applies if in criminal proceedings— Credibility.

- (a) a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and  
 (b) the maker of the statement does not give oral evidence in connection with the subject matter of the statement.

(2) In such a case—

- (a) any evidence which (if he had given such evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings;  
 (b) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;  
 (c) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself.

(3) If as a result of evidence admitted under this section an allegation is made against the maker of a statement, the court may permit a party to lead additional evidence of such description as the court may specify for the purposes of denying or answering the allegation.

(4) In the case of a statement in a document which is admitted as evidence under section 4 each person who, in order for the statement to be admissible, must have supplied or received the information concerned or created or received the document or part concerned is to be treated as the maker of the statement for the purposes of subsections (1) to (3) above.



Court's duty where evidence is unconvincing.

**14.**—(1) If on a person's trial on indictment for an offence the court is satisfied at any time after the close of the case for the prosecution that—

(a) the case against the accused is based wholly or partly on a statement not made in oral evidence in the proceedings, and

(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the accused, his conviction of the offence would be unsafe,

the court must direct the jury to acquit him of that offence.

(2) If on a person's trial on indictment for an offence—

(a) the circumstances are such that (under the common law or a statutory provision) he may if acquitted of that offence be found guilty of another offence, and

(b) the court is satisfied as mentioned in subsection (1) in respect of that other offence,

the court must direct the jury to acquit him of that other offence. 15

(3) If—

1964 c. 84.

(a) a jury is required to determine under section 4A(2) of the Criminal Procedure (Insanity) Act 1964 whether a person being tried on indictment for an offence did the act or made the omission charged against him as the offence, and

(b) the court is satisfied as mentioned in subsection (1) above in respect of that offence,

the court must direct the jury to return a verdict of acquittal of that offence.

(4) If on the summary trial of an information for an offence the court is satisfied as mentioned in subsection (1) in respect of— 25

(a) that offence, and

(b) any other offence of which the court may (under the common law or a statutory provision) find the accused guilty on that information,

the court must dismiss the information.

(5) Subsections (1) to (3) apply to an indictment containing more than one count as if each count were a separate indictment. 30

(6) This section does not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to dismiss an information.

Court's general discretion to exclude evidence.

**15.**—(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if— 35

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the statement's probative value is substantially outweighed by the danger that to admit it would result in undue waste of time. 40

(2) Nothing in this Act prejudices—

1984 c. 60.

(a) any power of a court to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 (exclusion of unfair evidence), or

- (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).

*Miscellaneous*

- 16.**—(1) This section applies if—
- 5 (a) a statement has been prepared for the purposes of criminal proceedings,
- (b) the person who prepared the statement had or may reasonably be supposed to have had personal knowledge of the matters stated,
- 10 (c) notice is given under the appropriate rules that another person (the expert) will in evidence given in the proceedings orally or under section 9 of the Criminal Justice Act 1967 base an opinion or inference on the statement, and 1967 c. 80.
- (d) the notice gives the name of the person who prepared the statement and the nature of the matters stated.
- 15 (2) In evidence given in the proceedings the expert may base an opinion or inference on the statement.
- (3) If evidence based on the statement is given under subsection (2) the statement is to be treated as evidence of what it states.
- (4) This section does not apply if the court, on an application by a party to 20 the proceedings, orders that it is not in the interests of justice that it should apply.
- (5) The matters to be considered by the court in deciding whether to make an order under subsection (4) include—
- 25 (a) the expense of calling as a witness the person who prepared the statement;
- (b) whether relevant evidence could be given by that person which could not be given by the expert;
- (c) whether that person can reasonably be expected to remember the matters stated well enough to give oral evidence of them.
- 30 (6) Subsections (1) to (5) apply to a statement prepared for the purposes of a criminal investigation as they apply to a statement prepared for the purposes of criminal proceedings, and in such a case references to the proceedings are to criminal proceedings arising from the investigation.
- (7) The appropriate rules are rules made—
- 35 (a) under section 81 of the Police and Criminal Evidence Act 1984 1984 c. 60. (advance notice of expert evidence in Crown Court), or
- (b) under section 144 of the Magistrates' Courts Act 1980 by virtue of 1980 c. 43. section 20(3) of the Criminal Procedure and Investigations Act 1996 c. 25. 1996 (advance notice of expert evidence in magistrates' courts).
- 40 **17.** In the Police and Criminal Evidence Act 1984 insert the following section after section 76— Confessions.
- “Confessions may be given in evidence for co-accused. 76A.—(1) In any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
- 45

(2) If, in any proceedings where a co-accused proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

- (a) by oppression of the person who made it; or 5
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence for the co-accused except in so far as it is proved to the court on a balance of the probabilities that the confession (notwithstanding that it may be true) was not so obtained. 10

(3) Before allowing a confession made by an accused person to be given in evidence for a co-accused in any proceedings, the court may of its own motion require the fact that the confession was not obtained as mentioned in subsection (2) above to be proved in the proceedings on the balance of probabilities. 15

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence— 20

- (a) of any facts discovered as a result of the confession; or
- (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so. 25

(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf. 30

(6) Subsection (5) above applies—

- (a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and 35
- (b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession. 40

(7) In this section “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).”

Representations  
other than by a  
person.

**18.** Where a representation of any fact—

- (a) is made otherwise than by a person, but 45
- (b) depends for its accuracy on information supplied (directly or indirectly) by a person,

the representation is not admissible in criminal proceedings as evidence of the fact unless it is proved that the information was accurate.

19. Section 69 of the Police and Criminal Evidence Act 1984 (conditions to be satisfied before evidence from computer records is admitted) is repealed. Computer records. 1984 c. 60.
20. In Schedule 2 to the Criminal Procedure and Investigations Act 1996— Statements and depositions. 1996 c. 25.
- 5 (a) in paragraph 1 omit sub-paragraph (4) (power of the court to overrule an objection to a statement being read as evidence by virtue of that paragraph);
- 10 (b) in paragraph 2 omit sub-paragraph (4) (power of the court to overrule an objection to a deposition being read as evidence by virtue of that paragraph).
21. For paragraphs 1 and 1A of Schedule 2 to the Criminal Appeal Act 1968 (oral evidence and use of transcripts etc. at retrials under that Act) substitute— Evidence at retrial. 1968 c. 19.
- 15 *“Evidence*
- 1.—(1) Evidence given at a retrial must be given orally if it was given orally at the original trial, unless section 3 of the Criminal Evidence Act 1997 applies (exceptions to the hearsay rule where a witness is unavailable).
- 20 (2) Paragraphs 1 and 2 of Schedule 2 to the Criminal Procedure and Investigations Act 1996 (use of written statements and depositions) do not apply at a retrial to a written statement or deposition read as evidence at the original trial.”
22. Where a statement in a document is admissible as evidence in 25 criminal proceedings, the statement may be proved by producing either— Proof of statements in documents.
- (a) the document, or
- (b) (whether or not the document exists) a copy of the document or of the material part of it,
- authenticated in whatever way the court may approve.
- 30 23.—(1) In the Criminal Justice Act 1988, the following provisions (which are to some extent superseded by provisions of this Act) are repealed— Documentary evidence: repeals. 1988 c. 33.
- (a) Part II and Schedule 2 (which relate to documentary evidence);
- 35 (b) in Schedule 13, paragraphs 2 to 5 (which relate to documentary evidence in service courts etc).
- (2) In consequence of the repeal by subsection (1) above of section 25 of the Criminal Justice Act 1988, section 3 of the Criminal Justice (International Co-operation) Act 1990 is amended as follows— 1990 c. 5.
- 40 (a) in subsection (8) for “section 25 of the Criminal Justice Act 1988” substitute “Article 5 of the Criminal Justice (Evidence, Etc.)(Northern Ireland) Order 1988”;
- (b) in subsection (10) omit the words from “and” to the end.

*General*

Rules of court.

**24.**—(1) Rules of court may make such provision as appears to the appropriate authority to be necessary or expedient for the purposes of this Act; and the appropriate authority is the authority entitled to make the rules.

(2) The rules may make provision about the procedure to be followed and other conditions to be fulfilled by a party proposing to tender a statement in evidence under any provision of this Act. 5

(3) The rules may require a party proposing to tender the evidence to serve on each party to the proceedings such notice, and such particulars of or relating to the evidence, as may be prescribed. 10

(4) The rules may provide that the evidence is to be treated as admissible by agreement of the parties if—

(a) a notice has been served in accordance with provision made under subsection (3), and

(b) no counter-notice in the prescribed form objecting to the admission 15 of the evidence has been served by a party.

(5) The rules may provide that if a party proposing to tender evidence fails to comply with a prescribed requirement—

(a) the evidence is not admissible except with the court's leave;

(b) where leave is given the court or jury may draw such inferences 20 from the failure as appear proper;

(c) the failure may be taken into account by the court in considering the exercise of its powers with respect to costs.

(6) The rules may—

(a) limit the application of any provision of the rules to prescribed 25 circumstances;

(b) subject any provision of the rules to prescribed exceptions;

(c) make different provision for different cases or circumstances.

(7) Nothing in this section prejudices the generality of any enactment conferring power to make rules of court; and no particular provision of this 30 section prejudices any general provision of it.

(8) In this section “prescribed” means prescribed by rules of court.

Savings.

**25.**—(1) Nothing in this Act affects the exclusion of evidence on grounds other than those referred to in section 1(1).

1984 c. 60.

(2) Subject to section 17, nothing in this Act makes a confession by an 35 accused person admissible if it would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.

(3) In subsection (2) “confession” has the meaning given by section 82 of the Police and Criminal Evidence Act 1984.

Interpretation.

**26.**—(1) In this Act— 40

“copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

“criminal proceedings” means criminal proceedings in relation to which the strict rules of evidence apply;

“document” means anything in which information of any description is recorded;

5 “oral evidence” includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs;

“rules of court” has the meaning given by subsection (3);

“service courts” has the meaning given by subsection (4);

10 “statutory provision” means any provision contained in, or in an instrument made under, this or any other Act, including any Act passed after this Act.

(2) Section 2 (statements and matters stated) contains other general interpretative provisions.

(3) Rules of court are—

15 (a) Crown Court Rules;

(b) Criminal Appeal Rules;

(c) rules under section 144 of the Magistrates’ Courts Act 1980; 1980 c. 43.

(d) rules regulating the practice and procedure of service courts.

(4) Service courts are—

20 (a) courts martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; 1955 c. 18.  
1955 c. 19.

(b) disciplinary courts constituted under section 52G of the Naval Discipline Act 1957; 1957 c. 53.

(c) the Courts-Martial Appeal Court;

25 (d) Standing Civilian Courts.

**27.** Schedule 1 (armed forces) has effect. Armed forces.

**28.** In section 5D(2) of the Magistrates’ Courts Act 1980— Consequential amendments.

30 (a) in paragraph (a) for “section 23 or 24 of the Criminal Justice Act 1988 (statements in certain documents)” substitute “section 3 or 4 of the Criminal Evidence Act 1997 (statements admissible in certain circumstances)”;

(b) in paragraph (b) for “section 23 or 24 of that Act” substitute “section 3 or 4 of that Act”.

35 **29.** The enactments specified in Schedule 2 are repealed to the extent specified. Repeals.

**30.—**(1) This Act has effect in relation to criminal proceedings begun on or after such day as the Secretary of State may appoint by order made by statutory instrument. Commencement.

40 (2) Different days may be appointed for different provisions or for different purposes.

(3) An order under this section may include such supplementary, incidental, consequential or transitional provisions as appear to the Secretary of State to be necessary or expedient.

Extent.	<b>31.</b> —(1) Subject to subsections (2) to (4), this Act extends to England and Wales only.	5
	(2) So far as this Act has effect in relation to proceedings before service courts, it extends to any place where such proceedings may be held.	
	(3) The following provisions extend to England and Wales and Northern Ireland—	
	(a) section 23(2);	10
1990 c. 5.	(b) in Schedule 2, the entry relating to section 3(10) of the Criminal Justice (International Co-operation) Act 1990;	
	(c) section 29 above, so far as it relates to that entry.	
	(4) Subsections (2) and (3) extend to the places they respectively mention.	
Citation.	<b>32.</b> This Act may be cited as the Criminal Evidence Act 1997.	15

## SCHEDULES

## SCHEDULE 1

Section 27.

## ARMED FORCES

*General*

5 1.—(1) Sections 1 to 26 have effect in relation to proceedings before service courts (whether in the United Kingdom or elsewhere).

(2) In their application to such proceedings those sections have effect with the modifications set out in paragraphs 2 to 7.

*Modifications*

10 2. In section 4 insert after subsection (7)—

“(8) In subsection (4) “criminal proceedings” includes summary proceedings under section 76B of the Army Act 1955, section 76B of the Air Force Act 1955 or section 52D of the Naval Discipline Act 1957; and the definition of “criminal proceedings” in section 26(1) has effect accordingly.”

15 3. In section 5(4) for “United Kingdom” substitute “country where the court is sitting”.

4.—(1) In section 11(1) omit the words “on indictment”.

(2) In section 11(2)—

20 (a) for “jury when they retire to consider their” substitute “court when it retires to consider its”;

(b) for “jury” in paragraph (b) substitute “court”.

5.—(1) In section 14(1) and (2) omit the words “on indictment” and “direct the jury to”.

(2) For section 14(3) substitute—

25 “(3) If—

(a) a court is required to determine under section 115B(2) of the Army Act 1955, section 115B(2) of the Air Force Act 1955 or section 62B(2) of the Naval Discipline Act 1957 whether a person being tried for an offence did the act or made the omission charged against him as the offence, and

30

(b) the court is satisfied as mentioned in subsection (1) above in respect of that offence,

the court must return a verdict of acquittal of that offence.”

(3) Omit section 14(4).

35 (4) For section 14(5) substitute—

“(5) Subsections (1) to (3) apply to a charge sheet containing more than one charge as if each charge were a separate charge sheet.”

(5) For section 14(6) substitute—

40 “(6) This section does not prejudice any other power a court may have to acquit a person of an offence.”

6. For section 16(7) substitute—

“(7) The appropriate rules are those regulating the practice and procedure of service courts.”



SCH. 1

7. In section 26 insert after subsection (1)—

“(1A) In this Act “criminal investigation” includes any investigation which may lead—

- (a) to proceedings before a court-martial or Standing Civilian Court, or
- (b) to summary proceedings under section 76B of the Army Act 1955, section 76B of the Air Force Act 1955 or section 52D of the Naval Discipline Act 1957.”

*Amendments*

1955 c. 18. 8. In section 99(1) of the Army Act 1955 and in section 99(1) of the Air Force Act 1955 c. 19. 1955 (rules of evidence) after “courts-martial etc.)” insert “, to sections 1 to 26 of the Criminal Evidence Act 1997 (as applied by Schedule 1 to that Act)”.

1957 c. 53. 9. In section 64A of the Naval Discipline Act 1957 (rules of evidence) after “courts-martial etc)” insert “, to sections 1 to 26 of the Criminal Evidence Act 1997 (as applied by Schedule 1 to that Act)”.

1968 c. 20. 10. For paragraph 1 of Schedule 1 to the Courts-Martial (Appeals) Act 1968 (use at retrial under Naval Discipline Act 1957 of record of evidence given at original trial) substitute—

“1. Evidence given at the retrial of any person under section 19 of this Act shall be given orally if it was given orally at the original trial, unless section 3 of the Criminal Evidence Act 1997 applies (exceptions to the hearsay rule where a witness is unavailable).”

11. For paragraph 3 of Schedule 1 to the Courts-Martial (Appeals) Act 1968 (use at retrial under Army Act 1955 of record of evidence given at original trial) substitute—

“3. Evidence given at the retrial of any person under section 19 of this Act shall be given orally if it was given orally at the original trial, unless section 3 of the Criminal Evidence Act 1997 applies (exceptions to the hearsay rule where a witness is unavailable).”

12. For paragraph 5 of Schedule 1 to the Courts-Martial (Appeals) Act 1968 (use at retrial under Air Force Act 1955 of record of evidence given at original trial) substitute—

“5. Evidence given at the retrial of any person under section 19 of this Act shall be given orally if it was given orally at the original trial, unless section 3 of the Criminal Evidence Act 1997 applies (exceptions to the hearsay rule where a witness is unavailable).”

1976 c. 52. 13. In paragraph 11 of Schedule 3 to the Armed Forces Act 1976 (rules of evidence) after “(courts-martial etc.)” insert “and to sections 1 to 26 of the Criminal Evidence Act 1997 (as applied by Schedule 1 to that Act)”.

Section 29.

SCHEDULE 2

REPEALS

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Chapter	Short title	Extent of repeal
1949 c. 88.	Registered Designs Act 1949.	In section 17, in subsection (8) the words “Subject to subsection (11) below,” in subsection (10) the words “,

45

Chapter	Short title	Extent of repeal
1949 c. 88.— <i>cont.</i>	Registered Designs Act 1949.— <i>cont.</i>	subject to subsection (11) below,” and subsection (11).
5 1955 c. 18.	Army Act 1955.	Section 200A.
1955 c. 19.	Air Force Act 1955.	Section 200A.
1968 c. 20.	Courts-Martial (Appeals) Act 1968.	Section 37A.
1976 c. 52.	Armed Forces Act 1976.	In Schedule 3, paragraph 17A.
10 1977 c. 37.	Patents Act 1977.	In section 32, in subsection (9) the words “Subject to subsection (12) below,” in subsection (11) the words “, subject to subsection (12) below,” and subsection (12).
15		
1979 c. 2.	Customs and Excise Management Act 1979.	Section 75A(6)(b).
1984 c. 60.	Police and Criminal Evidence Act 1984.	Section 118A(6)(b).
20		Sections 69 and 70.
		Parts II and III of Schedule 3.
		In Schedule 6, paragraphs 28(4), 29(4), 34 and 36.
1985 c. 6.	Companies Act 1985.	In section 709(3) the words from “In England and Wales” to the end.
25		
1988 c. 33.	Criminal Justice Act 1988.	Part II.
		Schedule 2.
		In Schedule 13, paragraphs 2 to 5.
30		In Schedule 15, paragraph 32.
1990 c. 5.	Criminal Justice (International Co-operation) Act 1990.	In section 3(10) the words from “and” to the end.
1994 c. 9.	Finance Act 1994.	Section 22(2)(b).
35		In Schedule 7, paragraph 1(6)(b).
1994 c. 23.	Value Added Tax Act 1994.	In Schedule 11, paragraph 6(6)(b).
1995 c. 38.	Civil Evidence Act 1995.	In Schedule 1, paragraphs 10 and 12.
40		
1996 c. 8.	Finance Act 1996.	In Schedule 5, paragraph 2(6)(a).
1996 c. 25.	Criminal Procedure and Investigations Act 1996.	In Schedule 2, paragraphs 1(4), 2(4) and 5.

# **APPENDIX B**

## **EXTRACTS FROM RELEVANT LEGISLATION**

### **CRIMINAL PROCEDURE ACT 1865**

#### **3      *How far witnesses may be discredited by the party producing***

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

#### **4      *As to proof of contradictory statements of adverse witness***

If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

#### **5      *Cross-examinations as to previous statements in writing***

A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his 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: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

### **BANKERS' BOOKS EVIDENCE ACT 1879**

#### **3      *Mode of proof of entries in bankers' books***

Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded.

#### **4      *Proof that book is a banker's book***

A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, this section shall have effect with the omission of the words "orally or".

## **CIVIL EVIDENCE ACT 1968**

### **10 Interpretation of Part I ...**

(1) In this Part of this Act –

"computer" has the meaning assigned by section 5 of this Act; "document" includes, in addition to a document in writing –

- (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
- (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

"film" includes a microfilm;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In this Part of this Act any reference to a copy of a document includes –

- (a) in the case of a document falling within paragraph (c) but not (d) of the definition of "document" in the foregoing subsection, a transcript of the sounds or other data embodied therein;
- (b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not, and any reference to a copy of the material part of a document shall be construed accordingly.

## **CRIMINAL APPEAL ACT 1968**

### **Schedule 2: Procedural and other provisions applicable on order for retrial**

1. On a retrial, paragraphs 1 and 2 of Schedule 2 to the Criminal Procedure and Investigations Act 1996 (use of written statements and depositions) shall not apply to any written statement or deposition read as evidence at the original trial; but a transcript of the record of the evidence given by any witness at the original trial may, with the leave of the judge, be read as evidence –

- (a) by agreement between the prosecution and the defence; or
- (b) if the judge is satisfied that the witness is dead or unfit to give evidence or to attend for that purpose, or that all reasonable efforts

to find him or to secure his attendance have been made without success,

and in either case may be so read without further proof, if verified in accordance with rules of court.

- 1A. Subject to paragraph 1 above, evidence given orally at the original trial must be given orally at the retrial.

## **POLICE AND CRIMINAL EVIDENCE ACT 1984**

### **Part VII: Documentary evidence in criminal proceedings**

#### **69 *Evidence from computer records***

- (1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown –
- (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;
  - (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and
  - (c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.
- (2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.

#### **71 *Microfilm copies***

In any proceedings the contents of a document may (whether or not the document is still in existence) be proved by the production of an enlargement of a microfilm copy of that document or of the material part of it, authenticated in such manner as the court may approve.

Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices this section shall have effect with the omission of the words "authenticated in such manner as the court may approve".

#### **72 *Part VII – supplementary***

- (1) In this Part of this Act –  
"copy" and "statement" have the same meanings as in Part I of the Civil Evidence Act 1968; ...
- (2) Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

#### **76 *Confessions***

- (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

- (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –
- (a) by oppression of the person who made it; or
  - (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
- the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
- (3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.
- (4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence –
- (a) of any facts discovered as a result of the confession; or
  - (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.
- (5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.
- (6) Subsection (5) above applies –
- (a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and
  - (b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.
- (7) Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.
- (8) In this section “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).
- (9) Where the proceedings mentioned in subsection (1) above are proceedings before a magistrates’ court inquiring into an offence as examining justices this section shall have effect with the omission of –
- (a) in subsection (1) the words “and is not excluded by the court in pursuance of this section”, and
  - (b) subsections (2) to (6) and (8).

**78** *Exclusion of unfair evidence*

- (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would

have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

- (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.
- (3) This section shall not apply in the case of proceedings before a magistrates' court inquiring into an offence as examining justices.

### **118 *General interpretation***

- (1) In this Act –  
“document” has the same meaning as in Part I of the Civil Evidence Act 1968; ...

## **Schedule 3: Provisions supplementary to sections 68 and 69**

### ***Part II: Provisions supplementary to section 69***

8. In any proceedings where it is desired to give a statement in evidence in accordance with section 69 above, a certificate –
  - (a) identifying the document containing the statement and describing the manner in which it was produced;
  - (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
  - (c) dealing with any of the matters mentioned in subsection (1) of section 69 above; and
  - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer,shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.
9. Notwithstanding paragraph 8 above, a court may require oral evidence to be given of anything of which evidence could be given by a certificate under that paragraph; but the preceding provisions of this paragraph shall not apply where the court is a magistrates' court inquiring into an offence as examining justices.
10. Any person who in a certificate tendered under paragraph 8 above in a magistrates' court, the Crown Court or the Court of Appeal makes a statement which he knows to be false or does not believe to be true shall be guilty of an offence and liable –
  - (a) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both;
  - (b) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum (as defined in section 74 of the Criminal Justice Act 1982) or to both.
11. In estimating the weight, if any, to be attached to a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular –
  - (a) to the question whether or not the information which the information contained in the statement reproduces or is derived

from was supplied to the relevant computer, or recorded for the purpose of being supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information; and

- (b) to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.
12. For the purposes of paragraph 11 above information shall be taken to be supplied to a computer whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment.

***Part III: Provisions supplementary to sections 68 and 69***

14. For the purpose of deciding whether or not a statement is so admissible the court may draw any reasonable inference –
- (a) from the circumstances in which the statement was made or otherwise came into being; or
  - (b) from any other circumstances, including the form and contents of the document in which the statement is contained.
15. Provision may be made by rules of court for supplementing the provisions of section 68 or 69 above or this Schedule.

**CRIMINAL JUSTICE ACT 1988**

**Part II: Documentary evidence in criminal proceedings**

**23 *First-hand hearsay***

- (1) Subject –
- (a) to subsection (4) below;
  - (b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968 (evidence given orally at original trial to be given orally at retrial); and
  - (c) to section 69 of the Police and Criminal Evidence Act 1984 (evidence from computer records),

a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if –

- (i) the requirements of one of the paragraphs of subsection (2) below are satisfied; or
  - (ii) the requirements of subsection (3) below are satisfied.
- (2) The requirements mentioned in subsection (1)(i) above are –
- (a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
  - (b) that –
    - (i) the person who made the statement is outside the United Kingdom; and
    - (ii) it is not reasonably practicable to secure his attendance; or



- (c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.
- (3) The requirements mentioned in subsection (1)(ii) above are –
  - (a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and
  - (b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.
- (4) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.
- (5) This section shall not apply to proceedings before a magistrates' court inquiring into an offence as examining justices.

**24 *Business etc documents***

- (1) Subject –
  - (a) to subsections (3) and (4) below;
  - (b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968; and
  - (c) to section 69 of the Police and Criminal Evidence Act 1984,
 a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied –
  - (i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and
  - (ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.
- (2) Subsection (1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it –
  - (a) in the course of a trade, business, profession or other occupation; or
  - (b) as the holder of a paid or unpaid office.
- (3) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.
- (4) A statement prepared otherwise than in accordance with section 3 of the Criminal Justice (International Co-operation) Act 1990 or an order under paragraph 6 of Schedule 13 to this Act or under section 30 or 31 below for the purposes –
  - (a) of pending or contemplated criminal proceedings; or
  - (b) of a criminal investigation,
 shall not be admissible by virtue of subsection (1) above unless –

- (i) the requirements of one of the paragraphs of subsection (2) of section 23 above are satisfied; or
  - (ii) the requirements of subsection (3) of that section are satisfied; or
  - (iii) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement.
- (5) This section shall not apply to proceedings before a magistrates' court inquiring into an offence as examining justices.

**25 *Principles to be followed by court***

- (1) If, having regard to all the circumstances –
- (a) the Crown Court –
    - (i) on a trial on indictment;
    - (ii) on an appeal from a magistrates' court;
    - (iii) on the hearing of an application under section 6 of the Criminal Justice Act 1987 (applications for dismissal of charges of fraud transferred from magistrates' court to Crown Court); or
    - (iv) on the hearing of an application under paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (applications for dismissal of charges in certain cases involving children transferred from magistrates' court to Crown Court); or
  - (b) the criminal division of the Court of Appeal; or
  - (c) a magistrates' court on a trial of an information,
- is of the opinion that in the interests of justice a statement which is admissible by virtue of section 23 or 24 above nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.
- (2) Without prejudice to the generality of subsection (1) above, it shall be the duty of the court to have regard –
- (a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;
  - (b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;
  - (c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and
  - (d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

**26** *Statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations*

Where a statement which is admissible in criminal proceedings by virtue of section 23 or 24 above appears to the court to have been prepared, otherwise than in accordance with section 3 of the Criminal Justice (International Co-operation) Act 1990 or an order under paragraph 6 of Schedule 13 to this Act or under section 30 or 31 below, for the purposes –

- (a) of pending or contemplated criminal proceedings; or
- (b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard –

- (i) to the contents of the statement;
- (ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
- (iii) to any other circumstances that appear to the court to be relevant.

This section shall not apply to proceedings before a magistrates' court inquiring into an offence as examining justices.

**27** *Proof of statements contained in documents*

Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved –

- (a) by the production of that document; or
- (b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

authenticated in such manner as the court may approve; and it is immaterial for the purposes of this subsection how many removes there are between a copy and the original.

This section shall not apply to proceedings before a magistrates' court inquiring into an offence as examining justices.

**28** *Documentary evidence – supplementary*

- (1) Nothing in this Part of this Act shall prejudice –
  - (a) the admissibility of a statement not made by a person while giving oral evidence in court which is admissible otherwise than by virtue of this Part of this Act; or
  - (b) any power of a court to exclude at its discretion a statement admissible by virtue of this Part of this Act.
- (2) Schedule 2 to this Act shall have effect for the purpose of supplementing this Part of this Act.

### **Part III: Other provisions about evidence in criminal proceedings**

#### **30 *Expert reports***

- (1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.
- (2) If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.
- (3) For the purpose of determining whether to give leave the court shall have regard –
  - (a) to the contents of the report;
  - (b) to the reasons why it is proposed that the person making the report shall not give oral evidence;
  - (c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
  - (d) to any other circumstances that appear to the court to be relevant.
- (4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence.
- (4A) Where the proceedings mentioned in subsection (1) above are proceedings before a magistrates' court inquiring into an offence as examining justices this section shall have effect with the omission of –
  - (a) in subsection (1) the words "whether or not the person making it attends to give oral evidence in those proceedings", and
  - (b) subsections (2) to (4).
- (5) In this section "expert report" means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

#### **31 *Form of evidence and glossaries***

For the purpose of helping members of juries to understand complicated issues of fact or technical terms Crown Court Rules may make provision –

- (a) as to the furnishing of evidence in any form, notwithstanding the existence of admissible material from which the evidence to be given in that form would be derived; and
  - (b) as to the furnishing of glossaries for such purposes as may be specified,
- in any case where the court gives leave for, or requires, evidence or a glossary to be so furnished.

#### **32 *Evidence through television link***

- (1) A person other than the accused may give evidence through a live television link in proceedings to which subsection (1A) below applies if –
  - (a) the witness is outside the United Kingdom; or
  - (b) the witness is a child, or is to be cross-examined following the admission under section 32A below of a video recording of

testimony from him, and the offence is one to which subsection (2) below applies,

but evidence may not be so given without the leave of the court.

- (1A) This subsection applies –
- (a) to trials on indictment, appeals to the criminal division of the Court of Appeal and hearings of references under [section 17 of the Criminal Appeal Act 1968];<sup>1</sup> and
  - (b) to proceedings in youth courts [and appeals to the Crown Court arising out of such proceedings].<sup>2</sup>
- (2) This subsection applies –
- (a) to an offence which involves an assault on, or injury or a threat of injury to, a person;
  - (b) to an offence under section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16);
  - (c) to an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978; and
  - (d) to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a), (b) or (c) above.
- (3) A statement made on oath by a witness outside the United Kingdom and given in evidence through a link by virtue of this section shall be treated for the purposes of section 1 of the Perjury Act 1911 as having been made in the proceedings in which it is given in evidence.
- (3A) Where, in the case of any proceedings before a youth court –
- (a) leave is given by virtue of subsection (1)(b) above for evidence to be given through a television link; and
  - (b) suitable facilities for receiving such evidence are not available at any petty-sessional court-house in which the court can (apart from this subsection) lawfully sit,
- the court may sit for the purposes of the whole or any part of those proceedings at any place at which such facilities are available and which has been appointed for the purposes of this subsection by the justices acting for the petty sessions area for which the court acts.
- (3B) A place appointed under subsection (3A) above may be outside the petty sessions area for which it is appointed; but it shall be deemed to be in that area for the purpose of the jurisdiction of the justices acting for that area.

<sup>1</sup> The words in square brackets are to be replaced by the words “section 9 of the Criminal Appeal Act 1995” with effect from a day to be appointed: Criminal Appeal Act 1995, s 29(1), Sched 2, para 16.

<sup>2</sup> The words in square brackets are to be replaced by the words “, appeals to the Crown Court arising out of such proceedings and hearings of references under section 11 of the Criminal Appeal Act 1995 so arising” with effect from a day to be appointed: Criminal Appeal Act 1995, s 29(1), Sched 2, para 16.

[(3C) Where –

(a) the court gives leave for a person to give evidence through a live television link, and

(b) the leave is given by virtue of subsection (1)(b) above,

then, subject to subsection (3D) below, the person concerned may not give evidence otherwise than through a live television link.

(3D) In a case falling within subsection (3C) above the court may give permission for the person to give evidence otherwise than through a live television link if it appears to the court to be in the interests of justice to give such permission.

(3E) Permission may be given under subsection (3D) above –

(a) on an application by a party to the case, or

(b) of the court's own motion;

but no application may be made under paragraph (a) above unless there has been a material change of circumstances since the leave was given by virtue of subsection (1)(b) above.]<sup>3</sup>

(4) Without prejudice to the generality of any enactment conferring power to make rules to which this subsection applies, such rules may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this section.

(5) The rules to which subsection (4) above applies are –

(a) Crown Court Rules; and

(b) Criminal Appeal Rules.

### **32A *Video recordings of testimony from child witnesses***

(1) This section applies in relation to the following proceedings, namely –

(a) trials on indictment for any offence to which section 32(2) above applies;

(b) appeals to the criminal division of the Court of Appeal and hearings of references under [section 17 of the Criminal Appeal Act 1968]<sup>4</sup> in respect of any such offence; and

(c) proceedings in youth courts for any such offence [and appeals to the Crown Court arising out of such proceedings].<sup>5</sup>

(2) In any such proceedings a video recording of an interview which –

(a) is conducted between an adult and a child who is not the accused or one of the accused (“the child witness”); and

(b) relates to any matter in issue in the proceedings,

<sup>3</sup> Inserted by the 1996 Act, s 62(1), with effect from a day to be appointed under s 62(4).

<sup>4</sup> The words in square brackets are to be replaced by the words “section 9 of the Criminal Appeal Act 1995” with effect from a day to be appointed: Criminal Appeal Act 1995, s 29(1), Sched 2, para 16.

<sup>5</sup> The words in square brackets are to be replaced by the words “, appeals to the Crown Court arising out of such proceedings and hearings of references under section 11 of the Criminal Appeal Act 1995 so arising” with effect from a day to be appointed: Criminal Appeal Act 1995, s 29(1), Sched 2, para 16.

may, with the leave of the court, be given in evidence in so far as it is not excluded by the court under subsection (3) below.

- (3) Where a video recording is tendered in evidence under this section, the court shall (subject to the exercise of any power of the court to exclude evidence which is otherwise admissible) give leave under subsection (2) above unless –
- (a) it appears that the child witness will not be available for cross-examination;
  - (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court; or
  - (c) the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted;

and where the court gives such leave it may, if it is of the opinion that in the interests of justice any part of the recording ought not to be admitted, direct that that part shall be excluded.

- (4) In considering whether any part of a recording ought to be excluded under subsection (3) above, the court shall consider whether any prejudice to the accused, or one of the accused, which might result from the admission of that part is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.
- (5) Where a video recording is admitted under this section –
- (a) the child witness shall be called by the party who tendered it in evidence;
  - (b) that witness shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with adequately in his recorded testimony.
- (6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony; and accordingly –
- (a) any such statement shall be admissible evidence of any fact of which such testimony from him would be admissible;
  - (b) no such statement shall be capable of corroborating any other evidence given by him;

and in estimating the weight, if any, to be attached to such a statement, regard shall be had to all the circumstances from which any inference can reasonably be drawn (as to its accuracy or otherwise).

- [(6A) Where the court gives leave under subsection (2) above the child witness shall not give relevant evidence (within the meaning given by subsection (6D) below) otherwise than by means of the video recording; but this is subject to subsection (6B) below.
- (6B) In a case falling within subsection (6A) above the court may give permission for the child witness to give relevant evidence (within the meaning given by subsection (6D) below) otherwise than by means of the video recording if it appears to the court to be in the interests of justice to give such permission.

- (6C) Permission may be given under subsection (6B) above –
- (a) on an application by a party to the case, or
  - (b) of the court’s own motion;
- but no application may be made under paragraph (a) above unless there has been a material change of circumstances since the leave was given under subsection (2) above.
- (6D) For the purposes of subsections (6A) and (6B) above evidence is relevant evidence if –
- (a) it is evidence in chief on behalf of the party who tendered the video recording, and
  - (b) it relates to matter which, in the opinion of the court, is dealt with in the recording and which the court has not directed to be excluded under subsection (3) above.]<sup>6</sup>
- (7) In this section “child” means a person who –
- (a) in the case of an offence falling within section 32(2)(a) or (b) above, is under fourteen years of age or, if he was under that age when the video recording was made, is under fifteen years of age; or
  - (b) in the case of an offence falling within section 32(2)(c) above, is under seventeen years of age or, if he was under that age when the video recording was made, is under eighteen years of age.
- (8) Any reference in subsection (7) above to an offence falling within paragraph (a), (b) or (c) of section 32(2) above includes a reference to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within that paragraph.
- (9) In this section –
- “statement” includes any representation of fact, whether made in words or otherwise;
- “video recording” means any recording, on any medium, from which a moving image may by any means be produced and includes the accompanying sound-track.
- (10) A magistrates’ court inquiring into an offence as examining justices under section 6 of the Magistrates’ Courts Act 1980 may consider any video recording as respects which leave under subsection (2) above is to be sought at the trial.
- (11) Without prejudice to the generality of any enactment conferring power to make rules of court, such rules may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this section.
- (12) Nothing in this section shall prejudice the admissibility of any video recording which would be admissible apart from this section.

**Schedule 2: Documentary evidence – supplementary**

1. Where a statement is admitted as evidence in criminal proceedings by virtue of Part II of this Act –

<sup>6</sup> Inserted by the 1996 Act, s 62(2), with effect from a day to be appointed under s 62(4).



- (a) any evidence which, if the person making the statement had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;
  - (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 in cross-examination as relevant to his 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 making the statement, made (whether orally or not) some other statement which is inconsistent with it shall be admissible for the purpose of showing that he has contradicted himself.
2. A statement which is given in evidence by virtue of Part II of this Act shall not be capable of corroborating evidence given by the person making it.
3. In estimating the weight, if any, to be attached to such a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.
4. Without prejudice to the generality of any enactment conferring power to make them –
- (a) Crown Court Rules;
  - (b) Criminal Appeal Rules; and
  - (c) rules under section 144 of the Magistrates' Courts Act 1980,
- may make such provision as appears to the authority making any of them to be necessary or expedient for the purposes of Part II of this Act.
5. (1) In Part II of this Act –
- “document” means anything in which information of any description is recorded;
- “copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly; and
- “statement” means any representation of fact, however made.
- (2) For the purposes of Part II of this Act evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs shall be treated as given orally.
6. In Part II of this Act “confession” has the meaning assigned to it by section 82 of the Police and Criminal Evidence Act 1984.

## **CRIMINAL JUSTICE (INTERNATIONAL CO-OPERATION) ACT 1990**

### **Part I: Criminal proceedings and investigations**

#### **3 *Overseas evidence for use in United Kingdom***

- (1) Where on an application made in accordance with subsection (2) below it appears to a justice of the peace or a judge ... –
- (a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and

- (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,
- he may issue a letter (“a letter of request”) requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation.
- (2) An application under subsection (1) above may be made by a prosecuting authority or, if proceedings have been instituted, by the person charged in those proceedings.
- (3) A prosecuting authority which is for the time being designated for the purposes of this section by an order made by the Secretary of State by statutory instrument may itself issue a letter of request if –
- (a) it is satisfied as to the matters mentioned in subsection (1)(a) above; and
- (b) the offence in question is being investigated or the authority has instituted proceedings in respect of it.
- (4) Subject to subsection (5) below, a letter of request shall be sent to the Secretary of State for transmission either –
- (a) to a court or tribunal specified in the letter and exercising jurisdiction in the place where the evidence is to be obtained; or
- (b) to any authority recognised by the government of the country or territory in question as the appropriate authority for receiving requests for assistance of the kind to which this section applies.
- (5) In cases of urgency a letter of request may be sent direct to such a court or tribunal as is mentioned in subsection (4)(a) above.
- (6) In this section “evidence” includes documents and other articles.
- (7) Evidence obtained by virtue of a letter of request shall not without the consent of such an authority as is mentioned in subsection (4)(b) above be used for any purpose other than that specified in the letter; and when any document or other article obtained pursuant to a letter of request is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to such an authority unless that authority indicates that the document or article need not be returned.
- (8) In exercising the discretion conferred by section 25 of the Criminal Justice Act 1988 (exclusion of evidence otherwise admissible) in relation to a statement contained in evidence taken pursuant to a letter of request the court shall have regard –
- (a) to whether it was possible to challenge the statement by questioning the person who made it; and
- (b) if proceedings have been instituted, to whether the local law allowed the parties to the proceedings to be legally represented when the evidence was being taken.

## **CIVIL EVIDENCE ACT 1995**

### **1 *Admissibility of hearsay evidence***

- (1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
- (2) In this Act –

- (a) “hearsay” means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
  - (b) references to hearsay include hearsay of whatever degree.
- (3) Nothing in this Act affects the admissibility of evidence admissible apart from this section.
- (4) The provisions of sections 2 to 6 (safeguards and supplementary provisions relating to hearsay evidence) do not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

**5 *Competence and credibility***

- (2) Where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness –
- (a) evidence which if he had been so called would be admissible for the purpose of attacking or supporting his credibility as a witness is admissible for that purpose in the proceedings; and
  - (b) evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he had contradicted himself.

Provided that evidence may not be given of any matter of which, if he had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

**CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996**

**Schedule 2: Statements and depositions**

**1 *Statements***

- (1) Sub-paragraph (2) applies if –
- (a) a written statement has been admitted in evidence in proceedings before a magistrates’ court inquiring into an offence as examining justices,
  - (b) in those proceedings a person has been committed for trial,
  - (c) for the purposes of section 5A of the Magistrates’ Courts Act 1980 the statement complied with section 5B of that Act prior to the committal for trial,
  - (d) the statement purports to be signed by a justice of the peace, and
  - (e) sub-paragraph (3) does not prevent sub-paragraph (2) applying.
- (2) Where this sub-paragraph applies the statement may without further proof be read as evidence on the trial of the accused, whether for the offence for which he was committed for trial or for any other offence arising out of the same transaction or set of circumstances.
- (3) Sub-paragraph (2) does not apply if –
- (a) it is proved that the statement was not signed by the justice by whom it purports to have been signed,

- (b) the court of trial at its discretion orders that sub-paragraph (2) shall not apply, or
  - (c) a party to the proceedings objects to sub-paragraph (2) applying.
- (4) If a party to the proceedings objects to sub-paragraph (2) applying the court of trial may order that the objection shall have no effect if the court considers it to be in the interests of justice so to order.

## **2 *Depositions***

- (1) Sub-paragraph (2) applies if –
- (a) in pursuance of section 97A of the Magistrates' Courts Act 1980 (summons or warrant to have evidence taken as a deposition etc) a person has had his evidence taken as a deposition for the purposes of proceedings before a magistrates' court inquiring into an offence as examining justices,
  - (b) the deposition has been admitted in evidence in those proceedings,
  - (c) in those proceedings a person has been committed for trial,
  - (d) for the purposes of section 5A of the Magistrates' Courts Act 1980 the deposition complied with section 5C of that Act prior to the committal for trial,
  - (e) the deposition purports to be signed by the justice before whom it purports to have been taken, and
  - (f) sub-paragraph (3) does not prevent sub-paragraph (2) applying.
- (2) Where this sub-paragraph applies the deposition may without further proof be read as evidence on the trial of the accused, whether for the offence for which he was committed for trial or for any other offence arising out of the same transaction or set of circumstances.
- (3) Sub-paragraph (2) does not apply if –
- (a) it is proved that the deposition was not signed by the justice by whom it purports to have been signed,
  - (b) the court of trial at its discretion orders that sub-paragraph (2) shall not apply, or
  - (c) a party to the proceedings objects to sub-paragraph (2) applying.
- (4) If a party to the proceedings objects to sub-paragraph (2) applying the court of trial may order that the objection shall have no effect if the court considers it to be in the interests of justice so to order.

# **APPENDIX C**

## **LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON THE CONSULTATION PAPER**

The following list includes not only those who responded to the consultation paper as a whole, but also those who responded only to the summary or to the extracts on computer evidence and expert evidence, or who subsequently assisted.

### ***Individuals***

Mr Justice Allott  
Lord Justice Auld, Senior Presiding Judge  
Judge William Barnett QC  
Lord Bingham of Cornhill, the Lord Chief Justice of England  
Mr Justice Blofeld  
Sir Wilfrid Bourne KCB QC  
Mrs Justice Bracewell  
Mr Justice Buckley  
Mr Justice Buxton  
Mr Peter Carter QC  
Mr John M Cartwright  
Dr Stephen Castell  
Mr Justice Cazalet  
Dr Andrew L-T Choo  
Judge Colin Colston QC  
Mr Justice Curtis  
Lord Davidson  
Judge Rhys Davies QC  
Mr Conrad Dehn QC  
Judge John Devaux  
Mr Justice Dyson  
Judge G O Edwards QC  
Professor David Feldman  
Professor Richard D Friedman  
Mr Justice Garland  
Judge Barry Green QC  
Mr A D Harverd, Hacker Young (Chartered Accountants)  
Mr Michael Hirst  
Judge Michael Hucker  
Mr R C Hughes, Ernst & Young (Chartered Accountants)  
Professor John Jackson  
Mr David Jeffreys QC

Mr Justice Johnson  
Judge Graham Jones  
Mr Justice Jowitt  
Judge Kenny  
Mr Justice Ian Kennedy  
Mr Paul Knapman, H M Coroner  
Mr Justice Longmore  
Mr Nigel Ley  
Mr Justice McKinnon  
Mr A J Mainz, Coopers & Lybrand (Chartered Accountants)  
Mr John Malthouse, Malthouse & Company (Chartered Accountants)  
Mr Justice Mantell  
Mr Norman Marsh QC  
Mr Paul Matthews, Hopkins & Wood (Solicitors)  
Judge Richard May  
Mr Christopher Millard, Clifford Chance (Solicitors)  
Mr Peter Mirfield  
Mr Justice Morland  
Professor Peter Murphy  
Mr John Nutting QC  
Mr Justice Ognall  
Mr David Ormerod  
Lord Justice Phillips  
Judge David Pitman  
Mr Justice Poole  
Mr Justice Potts  
Mr Vivian Robinson QC  
Mr Peter Rook QC  
Lord Justice Rose, Vice-President of the Court of Appeal  
Mr Justice Rougier  
Mr Alec Samuels JP  
Mr Justice Singer  
Professor Sir John Smith CBE QC FBA  
The Honourable Mr Justice Smith, Supreme Court of Victoria  
Professor John Spencer  
Mrs Justice Steel  
Lord Justice Stuart-Smith  
Mr Alan Suckling QC  
Dr Richard Susskind, Masons (Solicitors)  
Judge Tetlow  
Mr Justice Tuckey  
Judge Sir Lawrence Verney, Recorder of London  
Judge J R Whitley

Judge Wickham, Recorder of Liverpool  
Judge Harold Wilson  
Mr Michael Worsley QC  
Mr Justice Wright  
Mr A A S Zuckerman

***Organisations***

Association of Chief Police Officers  
Bar Mutual Indemnity Fund Ltd  
British Medical Association  
British Telecommunications plc  
Criminal Bar Association  
Criminal Law Sub-Committee of the Council of Circuit Judges  
Coroners' Society of England and Wales  
Crown Prosecution Service  
Department of Trade and Industry  
Forensic Science Service and Metropolitan Police Forensic Science Laboratory  
General Council of the Bar  
General Dental Council  
General Medical Council  
General Optical Council  
HM Council of Circuit Judges  
HM Customs & Excise  
Inland Revenue  
JUSTICE  
Justices' Clerks' Society  
The Law Society  
Liberty  
The London Criminal Courts Solicitors' Association  
The Magistrates' Association  
Metropolitan Stipendiary Magistrates, Legal Committee  
North Eastern Circuit  
Office of the Judge Advocate General  
The Post Office  
Royal Ulster Constabulary  
Serious Fraud Office  
Society of Public Teachers of Law, Criminal Justice Group  
South Eastern Circuit  
Standing Advisory Commission on Human Rights (Northern Ireland)  
Touche Ross Forensic Services  
UK Central Council for Nursing, Midwifery, and Health Visiting  
Wales & Chester Circuit  
Western Circuit

# **APPENDIX D**

## **PARTICIPANTS IN THE LAW COMMISSION SEMINAR ON CRIMINAL HEARSAY OF 10 FEBRUARY 1996**

Lord Justice Brooke (former Chairman of the Law Commission)

Professor Andrew Ashworth FBA (London – Editor of the Criminal Law Review)

Professor Diane Birch (Nottingham)

The Right Honourable Sir Robert Carswell, Lord Chief Justice of Northern Ireland

Judge Neil Dennison QC (Common Serjeant at the Central Criminal Court)

Mr Christopher Dickson (Serious Fraud Office)

Mr Anthony Edwards (President of the London Criminal Courts Solicitors' Association)

Mr Anthony Evans (Stipendiary Magistrate, Chairman of the Magistrates' Criminal Committees)

The Right Honourable Sir Donald Farquharson (retired Lord Justice of Appeal)

Mr Christopher Hudson (Home Office)

Mr Brian Leveson QC

Sheriff Iain McPhail QC (former Scottish Law Commissioner)

Judge Richard May (Oxford)

Mr Christopher Newell (Director of Casework, Crown Prosecution Service)

Mr David Nissen (Legal Adviser to the Home Office)

Mr Stephen Pollard (Kingsley Napley)

Miss Jenny Rowe (Lord Chancellor's Department)

Mr Robert Seabrook QC (former Chairman of the Bar)

Professor Sir John Smith CBE QC FBA (Nottingham)

Professor John Spencer (Cambridge)

Lord Williams of Mostyn QC

### **The Law Commission**

Mrs Justice Arden (Chairman)

Mr Stephen Silber QC (Commissioner)

Miss Diana Faber (Commissioner)