The Law Commission

(LAW COM. No. 216)

THE HEARSAY RULE IN CIVIL PROCEEDINGS

Presented to Parliament by the Lord High Chancellor
by Command of Her Majesty
September 1993

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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are:

The Honourable Mr Justice Brooke, *Chairman*
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THE LAW COMMISSION

THE HEARSAY RULE IN CIVIL PROCEEDINGS

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THE LAW COMMISSION

(Report on a reference under section 3(1)(e) of the Law Commissions Act 1965)

THE HEARSAY RULE IN CIVIL PROCEEDINGS

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I

INTRODUCTION AND SUMMARY OF PRINCIPAL RECOMMENDATIONS

1.1 In June 1988 the Civil Justice Review recommended that the Lord Chancellor should commission an enquiry by a law reform agency into the usefulness of the hearsay rule in civil proceedings and the current machinery for rendering hearsay admissible.[1] In October 1989 you referred this matter to the Law Commission. Our terms of reference were:

> "to consider the law of England and Wales relating to the admissibility of hearsay evidence in civil proceedings, and to advise
>
> (a) whether the rule against hearsay (as modified by the Civil Evidence Acts) should be retained in whole or in part;
>
> (b) whether or not it is retained, whether any, and if so what, procedures are required in circumstances where the evidence sought to be adduced is of a hearsay nature;
>
> (c) whether the rule should be applied differently in differing types of proceedings or circumstances."

1.2 We must stress at the outset that we were not required to examine the operation of the exclusionary rule in criminal proceedings. The Royal Commission on Criminal Justice, which reported in July 1993, was critical of the exclusion of hearsay evidence in criminal cases but they recommended that the Law Commission undertake a study of all the issues involved, before any changes are made.[2] Although some of our recommendations, particularly those concerned with the admissibility of business and computer records, may be considered capable of more general application, this could only be properly ascertained in a comprehensive review of the operation of the hearsay rule in the particular context of criminal proceedings, such as that which has been recommended by the Royal Commission.

1.3 In 1991 we published a Consultation Paper.[3] In that paper we provisionally recommended that the rule excluding hearsay evidence should be abolished but that there should be safeguards against any abuse of the power to adduce hearsay. A number of possible safeguards were discussed and comment was invited on this basic proposal and as to the safeguards which were desirable. We received a considerable measure of response and we are particularly grateful for the time and effort spent by consultees. This is an area where the practical experience of the judiciary and practitioners has been particularly valuable. A list of the respondents appears in Appendix 2.

1.4 The views of the persons and bodies we consulted supported our own provisional conclusions. The general view is that the current statutory regime is unwieldy, and that the law is unnecessarily difficult to understand and in some instances outmoded. The rules which govern its practical application are too complicated and as a result great reliance is placed by parties on the rule which allows hearsay evidence to be rendered admissible notwithstanding a party's non-compliance with the requirements as to prior notice.[4]

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[1] Report of the Review Body on Civil Justice (1988), Cm. 394, recommendation no. 26.

[2] Report of the Royal Commission on Criminal Justice (1993), Cm. 2263, recommendation no. 189 and ch. 8, paras. 25-26.

[3] The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117.

[4] R.S.C., O. 38, r.29.

1.5 Furthermore, recent developments in the law and practice of civil litigation point to a new approach, where the main emphasis is upon ensuring that, so far as possible and subject to considerations of reliability and weight, all relevant evidence is capable of being adduced.[5] Another part of this new approach is that litigation is conducted in a more open climate, with more emphasis upon identifying and refining the issues in advance, which in turn gives parties less opportunity to take tactical advantage of technical points at the trial stage.[6]

1.6 We were particularly impressed by comments from a number of judges and practitioners who were concerned that intelligent and rational witnesses and litigants were understandably confused by and dissatisfied with the existence of rules of evidence which sometimes operated to prevent them from giving evidence of matters which they rightly perceived as relevant and cogent. We acknowledge that if rules of evidence are difficult for laymen to understand or accept, public confidence in the judicial system may ultimately be diminished. The need to maintain that confidence provides a further reason to re-examine the rule and its operation in practice.

1.7 Our answers to the questions in our terms of reference are that in all civil proceedings:—

(a) Evidence should no longer be excluded on the ground that it is hearsay and the rule against hearsay, as modified by the Evidence Act 1938 and the Civil Evidence Act 1968, should be abolished.

(b) Hearsay evidence should, however, remain a category of evidence which is accorded special attention by courts. To this end:

  (i) parties should give notice, where reasonable and practicable, that they intend to rely on hearsay evidence, and

  (ii) courts should be provided with guidelines to assist them in assessing the weight to be attached to such evidence.

(c) There should be a uniform approach to the treatment of hearsay evidence in civil proceedings of all types, although rules of court may provide for the duty to give notice to be disapplied to specified classes of proceedings where appropriate.[7]

1.8 Our main recommendations are that:—

(a) Part 1 of the Civil Evidence Act 1968 should be repealed and the exclusionary rule abolished. (Paragraphs 4.1–4.6 and Recommendation 1.)

(b) Parties intending to rely on hearsay evidence should be under a duty to give notice of that fact where this is reasonable and appropriate, according to the particular circumstances of the case. Failure to give notice or adequate notice should not render the evidence inadmissible. However, in appropriate cases it may detract from the weight that will be placed on it or lead to costs sanctions being imposed. Rules of court may specify classes of proceedings where this notice requirement will not apply. (Paragraphs 4.8–4.13 and Recommendation 3.)

(c) There should be a power for a party to call a witness for cross-examination on his hearsay statement. (Paragraphs 4.14–4.16 and Recommendation 4.)

(d) Courts should be given guidelines and parties should be given a clear indication of the factors that may be taken into account when assessing the weight of hearsay evidence. (Paragraphs 4.17–4.19 and Recommendation 5.)

(e) Our recommended reforms should apply to civil proceedings in all courts and tribunals where the hearsay rule previously applied. (Paragraphs 4.44–4.45 and Recommendation 16.)

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[5] *Ventouris* v. *Mountain (No. 2)* [1992] 1 W.L.R. 887, 899 *per* Balcombe L.J. "The modern tendency in civil proceedings is to admit all relevant evidence, and the judge should be trusted to give only proper weight to evidence which is not the best evidence."

[6] For one account of the changes in civil procedure in recent years see C. Glasser, "Civil Procedure and the Lawyers—The Adversary System and the Decline of the Orality Principle", (1993) 56 M.L.R. 307.

[7] Para. 4.10.

1.9 We also recommend that the procedure for proving business and other records should be considerably simplified and that there should be no special procedure for proving computerised records. A document, including one generated by a computer, which forms part of the records of a business should be received in evidence, without the need for oral proof from a witness, if its authenticity is certified by an appropriate officer. We further propose that it should be possible to prove the absence of an entry by affidavit. (Paragraphs 4.38–4.43 and Recommendations 13–15.)

1.10 Where the maker of a hearsay statement is not called as a witness, our recommendations seek to ensure that evidence may still be adduced to attack or support his credibility, or to establish the existence of a previous or later inconsistent statement. (Paragraph 4.29 and Recommendation 7.)

1.11 We also recommend that previous consistent or inconsistent statements of a person called as a witness should continue to be admissible as evidence of the matters stated. (Paragraphs 4.30–4.31 and Recommendation 8.)

Arrangement of the rest of this Report

1.12 Part II summarises the development of the present statutory and common law rules.

Part III summarises the case for reform and the arguments for and in favour of abolishing the exclusionary rule.

Part IV contains the Commission's policy and recommendations for reform.

Part V contains a summary of recommendations.

Appendix 1 contains the draft Bill with explanatory notes.

Appendix 2 contains a list of those who responded to the Consultation Paper.

Appendix 3 contains Part I of the Civil Evidence Act 1968 and the Rules of Court enacted thereunder.

PART II

THE PRESENT LAW

Background

2.1 Part II of the Consultation Paper examined in some detail the development of the present common law and statutory rules governing the use of hearsay evidence in civil proceedings. For the purposes of this Report, we intend to provide merely a summary.

2.2 We adopted the basic formulation of the rule to be found in Cross i.e. " an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted."[1] Thus the rule covers both assertions made by persons who do not give oral evidence and previous assertions made by those who do. By using the term " assertion ", this formulation also deals with the point that hearsay statements may be made orally or in writing, or by conduct (that is implied assertions). So far as implied assertions are concerned, we noted that there is an element of doubt over the extent to which the hearsay rule extends beyond conduct which is manifestly intended to be assertive.[2]

2.3 We described how the common law rule is thought to have emerged as part of the development of the adversarial system, which did not favour extra-judicial assertions that could not be subjected to cross-examination. We traced the gradual erosion of the rule by the creation of exceptions, brought about by (a) practical considerations, or (b) the acceptance that particular types of hearsay evidence were inherently more reliable either, because of the way they were recorded (statements in public documents, for example) or because the statement was contrary to the interests of its maker (adverse admissions). Certain other types of hearsay evidence were admitted because they were likely to be the " best " and only available method of proof of a particular fact (e.g. evidence of age and reputation).

2.4 Various statutory reforms from the nineteenth century onwards demonstrated a similar acceptance that certain types of public and other records were sufficiently reliable to be regarded as prima facie evidence of the truth of their contents and also, that practical considerations should allow for copies of entries in certain categories of documents to be received in evidence, thus avoiding the need for the complete record or ledger to be physically produced. Examples include entries in registers of births, deaths and marriages, which can be proved by certificate by virtue of the Births and Deaths Registration Acts of 1874, 1936 and 1953 and the Marriage Act 1949, and entries from banking records, which are admissible under the Bankers' Books Evidence Act 1879.

2.5 Until the 1960s the contribution of statutory law in this field was of a piecemeal nature, although the Evidence Act 1938 represented an effort to deal with some of the problems we discuss in this Report. The decision of the House of Lords in *Myers* v. *D.P.P.*[3] led to a statutory revision of the rules first in criminal and then in civil proceedings.[4] Briefly, this was a case involving stolen motor cars. The key to their identification was their unique and indelible cylinder block numbers. At the time of manufacture this process had been observed by workmen and the numbers were recorded on cards. The cards had then been microfilmed and the original cards destroyed. The Crown sought to prove the numbers by calling the person who had custody of the microfilms. This evidence was held to be inadmissible, since this witness had not personally made the record and could not prove that it was correct. Their Lordships were unanimous in finding the limits of the existing exceptions unsatisfactory but a majority were of the opinion that further reform could not

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[1] *Cross on Evidence* (7th ed., 1990) p.42.

[2] *Wright* v. *Doe d. Tatham* (1837) 7 Ad. & E. 313 (letters written to the testator were held to be inadmissible in that the contents amounted to an implied assertion of the writer's opinion as to his mental capacity). See also *R.* v. *Kearly* [1992] 2 A. C. 228 and generally, R. Cross, " The Scope of the Rule Against Hearsay ", (1956) 72 L.Q.R. 91; M. Weinberg, " Implied Assertions and the Scope of the Hearsay Rule ", (1973) Melb. U.L. Rev. 268; S. Guest, " The Scope of the Hearsay Rule " (1985) 101 L.Q.R. 385; A. Ashworth & R. Pattenden, " Reliability, Hearsay Evidence and the English Criminal Trial ", (1986) 102 L.Q.R. 292; M. Hirst, " Conduct, Relevance and the Hearsay Rule ", (1993) 13 L.S. 54.

[3] [1965] A.C. 1001.

[4] The Criminal Evidence Act 1965 and the Civil Evidence Act 1968.

be achieved simply by continuing to extend the common law exceptions to the rule.[5] Consequently the Criminal Evidence Act 1965 significantly relaxed the law relating to the admission of business records in criminal proceedings.[6]

The Civil Evidence Act 1968 (the 1968 Act)

2.6 Part I of the 1968 Act gave effect to the recommendations of the Law Reform Committee[7] and now governs the admissibility of hearsay evidence in most civil proceedings. It makes all first-hand hearsay, and second-hand hearsay contained in records, admissible, provided that certain procedural conditions are met.[8] In addition to civil proceedings before the High Court and County Court, the Act applies to proceedings before any other tribunal which applies the strict rules of evidence[9] except for magistrates' courts. The Act does not apply where these rules do not apply. Thus, it does not apply to the wardship jurisdiction of the High Court,[10] or to the Court of Protection. It does not apply to other specialist jurisdictions, such as coroners' courts, where hearsay evidence has traditionally been received. This may be explained by factors such as the inquisitorial nature of their jurisdiction, or the fact that they are exercising an essentially administrative function or have a particular expertise.

2.7 As far as magistrates' courts are concerned, the Law Reform Committee considered that it would be inappropriate to apply the Act, with its emphasis on judicial discretion and on compliance with underlying rules, to these courts, given the wide scope of their jurisdiction, the preponderance of lay magistrates and the greater numbers of non-legally represented parties.[11] Nevertheless, a power was given to the Lord Chancellor to apply the provisions of the Act to magistrates' courts. This power, however, was never exercised. The position of magistrates' courts proceedings is considered in paragraphs 3.22–3.31 below.

The Principal Provisions of the 1968 Act

2.8 It would neither be convenient nor appropriate for us to attempt to provide a comprehensive commentary on the Act in this Report. What follows is a short summary of the principal provisions.

Admissibility of hearsay evidence

2.9 Section 1 (1) provides that, in civil proceedings, hearsay evidence i.e. "a statement other than one made by a person while giving oral evidence", shall be admissible as evidence of any fact stated therein. However, such evidence is only admissible if it complies with the requirements of the Act, or is made admissible by virtue of some other statutory provision, or if the parties have agreed that it be admitted.[12] "Statement" includes any statement of fact, whether made in words or otherwise.[13] Thus the Act superseded the common law rule and its exceptions.

2.10 Section 2(1) provides that a statement made by a person, whether orally or in a document or otherwise, is admissible as evidence of any fact of which direct oral evidence by him would be admitted, whether or not he is called as a witness. Thus, statements which are inadmissible for some other reason, for example irrelevancy or privilege, are not rendered admissible by the Act. However, its effect is limited by section 2(3), which provides that, where a statement made otherwise than in a document is sought to be admitted under this section, it may only be proved by the direct oral evidence of its maker or someone else who directly heard or perceived it. This effectively limits the admissibility of oral statements under section 2 to first-hand hearsay. A "first-hand" hearsay statement is a statement made by a person which is proved either by his direct oral evidence, or by the production of the document in which he made it, or by the direct oral evidence of a witness

[5] *Myers* v. *D.P.P.* [1965] A.C. 1001 *per* Lord Reid, at p.1022. See also *R.* v. *Kearly* [1992] 2 A.C. 228, 250–251, 277, *per* Lord Bridge and Lord Oliver. Cf. Lord Griffiths and Lord Browne-Wilkinson at pp.237, 287.

[6] The relevant law is now to be found in the Criminal Justice Act 1988, ss. 23 and 24.

[7] Law Reform Committee 13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964.

[8] See para. 2.11 below.

[9] Civil Evidence Act 1968, s.18.

[10] *In re K. (Infants)* [1965] A.C. 201.

[11] 13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964, para. 50.

[12] See Civil Evidence Act 1968, s. 18(5)(b).

[13] Civil Evidence Act 1968, s. 10(1).

who heard him make it.[14] In some cases evidence will be derived at several removes from the originator. This is called ' multiple hearsay ' or ' second-hand hearsay '. The rule restricting admissibility to first-hand hearsay does not apply where the statement in question has been made in the course of some other legal proceedings.[15] The effect of the words " otherwise than in a document " is commented on in paragraph 3.8 below.

Records

2.11 Section 4 provides that second-hand or multiple hearsay is admissible where it is contained in documents which form part of a record,[16] provided that the record was compiled by a person acting under a duty and the information was supplied by a person who might reasonably be supposed to have had personal knowledge of the matters dealt with. If the information has passed through intermediaries, each of them must have been acting under a duty. Persons acting under a " duty " include persons acting in the course of any trade, business, profession or other occupation, whether paid or unpaid.[17]

2.12 There is a considerable degree of overlap between sections 2 and 4. Many first-hand hearsay statements contained in records will be capable of admission under both sections.[18] An example which is frequently given is an official transcript of a previous court hearing.[19] The hearsay statement must be " contained " in the document as opposed to being recorded in it and must be a complete account rather than an edited personal aide memoire. Thus, for example, notes of an interview with a witness taken by a solicitor may not be admissible under section 4,[20] although evidence of the interview may be capable of being admitted under section 2 if the solicitor gives evidence, and he may then be permitted to use the notes to refresh his memory. We comment on the application of this section in paragraphs 3.9–3.13.

Statements produced by computers

2.13 Section 5 of the 1968 Act contains detailed provisions which lay down stringent preconditions for the admissibility of documents produced by computers. Many computer-generated documents will also be records compiled by persons acting under a duty. However section 4(1) expressly provides that such statements are admissible " without prejudice to section 5 ". Compliance with section 5 is therefore a prerequisite for all computer-produced documents.

2.14 The first four conditions in section 5 are that:—

(a) The document was produced over a period when the computer was regularly used to store or process information (subsections (2)(a) and (5)(c)).

(b) Over the relevant period similar information was regularly supplied to it (subsections (2)(b) and (5)(a)).

(c) Throughout the relevant period the computer was operating properly (subsection (2)(c)).

(d) The information derives from information supplied to the computer in the ordinary course of the activities then being carried on (subsections (2)(d) and (5)(b)).

2.15 There are further elaborate provisions for this category of evidence. Subsection (3) provides for the situation where more than one computer has been used to store or process information and it sets out four scenarios within which the document may be treated as having been produced by one computer. Subsection (4) provides that proof of compliance with any of the preconditions may be supplied by certificate, and section 6(5) creates an offence of wilful misstatement of any material statement contained in such a certificate. Subsection (6) defines " computer " as " any device for storing or processing information ". We comment on the application of this section in paragraphs 3.14–3.21.

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[14] *Cross on Evidence* (7th ed., 1990), p.541.

[15] Civil Evidence Act 1968, s.2(3).

[16] On the meaning of " record ", see paras. 3.10–3.11.

[17] Civil Evidence Act 1968, s. 4(3).

[18] *Cross on Evidence* (7th ed., 1990), p.543.

[19] *Taylor* v. *Taylor* [1970] 1 W.L.R. 1148.

[20] *Re D. (A Minor) (Wardship: evidence)* [1986] 2 F.L.R. 189.

Previous statements

2.16 Section 2(1) admits all previous statements, whether consistent or inconsistent, as evidence of the facts that they contain. However, the Committee took account of fears that use of consistent statements would encourage superfluous evidence. Section 2(2) therefore provides that, where the maker of a hearsay statement is to be called as a witness, the hearsay statement may not be given without leave and not before the conclusion of his examination in chief, unless evidence of the making of the statement has already been given by some other person, or unless the evidence needs to be given in order for the witness's evidence to be intelligible.[21] Leave will therefore be required to introduce a prior consistent statement.[22] The editor of Cross comments that " this is a wise provision, for the pointless proliferation of the previous statements of witnesses is to be deplored, although they may, exceptionally, be of considerable probative value."[23] Section 3(1)(b) preserves the common law position in providing that previous consistent statements are, however, admissible as of right to rebut suggestions of recent fabrication.

2.17 Section 2(2) also operates to prevent a party from calling a witness simply to adduce evidence of his out of court written statement, without taking him through a proper examination in chief. It corrected a practice that had grown up under section 1 of the Evidence Act 1938, which allowed for the admission of an out of court statement simply by calling the maker to confirm the contents.[24]

2.18 Where a witness is called to give oral evidence, a previous inconsistent statement of that witness will be admissible where it is proved by virtue of sections 3, 4 or 5 of the Criminal Procedure Act 1865.[25] A statement admitted in this way is also admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.[26] The admission of the previous inconsistent statements by a witness who is *not* called to give evidence is governed by section 7. Section 7(1)(a) provides that evidence relating to credibility which would have been admissible had the witness been called shall be admissible in his absence. Section 7(1)(b) provides that evidence of a previous inconsistent statement is admissible for the purpose of showing that the witness has contradicted himself. Evidence admitted under this section is also admissible as evidence of any fact stated therein.[27]

Statements used to refresh memory

2.19 Section 3(2) provides that where a witness is cross examined on a document which he has previously used to refresh his memory, the document becomes evidence and is admissible as proof of any fact of which direct oral evidence would be admissible.

Impeaching credibility

2.20 Section 7 deals with the problem of raising as an issue in proceedings the credibility of a maker of a statement who does not attend to give evidence (whether because of his unavailability or because the content of his statement has not been challenged). It provides that the fact that a person has not been called to give oral evidence does not prevent evidence from being adduced to challenge his credibility, or to prove the existence of a previous or later inconsistent statement. Rules of Court were made to ensure that this power was not abused, for example, by the opposing party deliberately deciding not to challenge a hearsay notice but then seeking to adduce damaging evidence as to the credibility of the maker of the statement.[28]

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[21]Civil Evidence Act 1968, s. 4(2) operates to similar effect with regard to records.

[22]*Morris* v. *Stratford on Avon R.D.C.* [1973] 1 W.L.R. 1059, where a witness's oral evidence was confused and inconsistent, evidence of a previously prepared proof was admitted, notwithstanding failure to give prior notice.

[23]*Cross on Evidence* (7th ed., 1990), p.542.

[24]*Hilton* v. *The Lancashire Dynamo Nevelin Ltd.* [1964] 1 W.L.R. 952.

[25]Civil Evidence Act 1968, s.3(1)(a).

[26]*Ibid.*

[27]Civil Evidence Act 1968, s.7(3).

[28]C.C.R., O. 20, r.21; R.S.C., O. 38, r.30.

Proof of documents and copies of documents

2.21 Section 6(1) provides for the proof of original documents and the authentication of copies of documents admissible under section 2, 4 or 5 of the 1968 Act. The most direct means of proving a private[29] document is to produce the original document in court.[30] Generally there is no difficulty in determining whether a document is an original and this is normally dealt with by the parties at an early stage in proceedings.[31] The court also has to be satisfied that a private document has been duly executed.[32] Copies of documents are received in evidence on condition that they are authenticated in a manner which the court approves. There is a general common law rule that copies of copies are inadmissible.[33]

Judicial discretion

2.22 Section 6(2) provides that, in deciding upon the admissibility of a hearsay statement, the court may draw inferences from the circumstances in which it was made. It has been commented[34] that it is difficult to see how this subsection is intended to operate, since section 8(3) deprives the courts of jurisdiction to exclude statements which comply with the applicable rules of court.[35]

Weight

2.23 Section 6(3) also provides some guidance as to the weight to be accorded to hearsay evidence. The emphasis is upon the extent to which the statement was made contemporaneously with the occurrence or existence of the facts it records and the existence of any incentive to conceal or misrepresent. In paragraphs 4.17–4.19 below we make recommendations which seek to build on and develop the approach adopted in section 6(3).

Corroboration

2.24 Section 6(4) provides that statements admissible under sections 2, 3 or 4 shall not be capable of amounting to corroboration of the evidence of the maker of the statement or the original supplier of the information.

Retained common law exceptions

2.25 To a large extent the need for exceptions was removed by the provisions contained in the Act for the conditional admissibility of first-hand and some second-hand hearsay. However, the Law Reform Committee recognised that certain common law and statutory exceptions existed which had safeguards already incorporated in them, or that their usefulness would be hampered by being subjected to the requirements of the Act.[36] Section 9 accordingly preserves various common law exceptions under which certain types of hearsay evidence are admissible as evidence of facts stated therein.

2.26 Section 9(2) deals with adverse admissions, published works of a public nature, and public documents and records. None of the provisions of the Act as regards notice and other constraints apply to these categories. The Law Reform Committee considered it inappropriate to apply the notice requirements to adverse admissions,[37] and it is a feature of the section that it enabled multiple hearsay of such admissions to be adduced.

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[29]For the distinction between public documents (such as statutes, treaties, letters patent, and records held by the Public Records Office), whose usual method of proof is by copy, and private documents see *Phipson on Evidence* (14th ed., 1990), para. 35-01.

[30]*Cross on Evidence* (7th ed., 1990), p.681.

[31]*Ibid.* p.682.

[32]*Ibid.* p.690.

[33]*Everingham* v. *Roundell* (1838) 2 M. & R. 138. But cf. *Lafone* v. *Griffin* (1909) 25 T.L.R. 308 cited in *Cross on Evidence* (7th ed., 1990), p.684.

[34]*Phipson on Evidence* (14th ed., 1990), para. 22-02. "It is thought that section 6(2) is directed at the case where the evidence is so unsatisfactory that it falls within the category of evidence which should not be permitted to be put before the jury."

[35]This is, however, subject to the power in section 8(3)(b) to give directions as to whether, and if so on what conditions, statements falling within sections 2(1), 4(1) and 5(1) will be admitted. See paras. 2.10, 2.11 and 2.13 above.

[36]13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964, paras. 42 and 43.

[37]*Ibid.*, para. 29.

2.27 Subsections (3) and (4) deal with evidence of reputation or family tradition and provide that in this context reputation is to be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed. Such evidence was formerly admissible under the common law and it specifically provided for under section 9 in the following circumstances, namely:—

(a) Evidence of reputation adduced to establish good or bad character.[38]

(b) Evidence of reputation or family tradition adduced to establish pedigree or the existence of marriage.[39]

(c) Evidence of reputation or family tradition adduced to establish a public or general right of way or to identify any person or thing.[40]

However the manner of admission of this category of evidence (e.g. as to prior notice) is regulated by the provisions of the Act.

Procedural requirements imposed by rules of court

2.28 Section 8 provides for rules of court to be made, compliance with which was to be regarded as a precondition to admissibility.[41] As with the substantive provisions, we do not intend to provide a comprehensive survey of the Rules in this Report. They are reproduced for reference in Appendix 3.

2.29 The major safeguard created by the rules of both the County Court and the High Court is the requirement to give notice of the intention to adduce hearsay evidence. The rules, which are complex, set time limits and prescribe the information which must accompany the giving of notice, in the range of circumstances envisaged by the Act. The principal requirements can be summarised as follows:—

- A party who wishes to adduce evidence by virtue of sections 2, 4 or 5 must serve notice within the prescribed time; 21 days after setting down for trial in the High Court and 14 days before the date fixed for trial in the County Court.[42]
- If the statement is to be admitted under section 2, the notice must contain particulars of the time, place and circumstances at or in which the statement was made, the person by whom and the person to whom it was made, and its substance.[43] Similarly detailed particulars are required for statements sought to be introduced under sections 4 and 5.[44]
- There are prescribed reasons why any person named in the notices, whether as the maker of a statement or as part of the chain of information envisaged by sections 4 and 5, cannot or should not be called: viz. the person in question is dead, beyond the seas, unfit, cannot with reasonable diligence be identified or found or, because of the passage of time, can no longer be expected to remember the matters in question.[45]
- A party which receives a notice of intention to adduce hearsay may serve a counter-notice to require the attendance of a person named as a maker of a statement in the original r.21 notice. A counter-notice must be served within 21 days after the service of the r.21 notice in the High Court and within 7 days after the service of the r.15 notice in the County Court.[46]
- There is a residual power for the court to allow hearsay evidence to be adduced, notwithstanding a failure to comply with the rules.[47]

We discuss some problems of the notification procedure which were highlighted by the responses to our Consultation Paper in paragraphs 3.2–3.7 below.

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[38] *Phipson on Evidence* (14th ed., 1990), paras. 18.01–18.06 and 18.70.

[39] *Ibid.*, para. 30.43.

[40] *Ibid.*, para. 30.27.

[41] Sections 2(1), 4(1), 5(1). The rules are to be found in C.C.R., O. 20, rr. 14–24 and R.S.C., O. 38, rr. 20–32. See The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, paras. 2.35–2.43.

[42] R.S.C., O. 38, r.21; C.C.R., O. 20, r.15.

[43] R.S.C., O. 38, r.22.

[44] R.S.C., O. 38, rr. 23, 24. See *Savings and Investment Bank* v. *Gasco Investments (Netherlands) B.V.* [1984] 1 W.L.R. 271, 285B.

[45] Civil Evidence Act 1968, s. 8(2)(b). The rules are to be found in R.S.C., O. 38, r.25 and C.C.R., O. 20, r.17(5).

[46] R.S.C., O. 38, r.26(1); C.C.R., O. 20, r.17(1).

[47] R.S.C., O. 38, r.29; C.C.R., O. 20, r.20. See also *Ford* v. *Lewis* [1971] 1 W.L.R. 623 and *Rover International Ltd.* v. *Cannon Film Sales Ltd.* [1987] 1 W.L.R. 1597.

Principal Subsequent Developments

The Civil Evidence Act 1972 (the 1972 Act)

2.30 The 1972 Act expands the area regulated by the 1968 Act to cover statements of opinion and expert evidence. Subject to necessary modifications, it extends the application of Part I of the 1968 Act, apart from section 5 (statements produced by computers), to statements of opinion. Section 2 of the 1972 Act makes provision for Rules of Court to modify the application of subsection (2) of section 2 of the 1968 Act to statements contained in experts' reports.[48] Further provisions allow for the admissibility of expert opinion[49] and expert evidence on matters of foreign law.[50] In addition, a non-expert may give admissible evidence of "relevant facts personally perceived by him".[51] As we commented in the Consultation Paper, the effect of this provision is that "any witness, whether expert or not, may give evidence of opinion where it is the unavoidable means of conveying facts which the witness directly perceived (for example, "The car was travelling at 30 m.p.h.").[52]

Family law[53]

2.31 We have already commented above that the rule excluding hearsay does not apply in the wardship jurisdiction of the High Court.[54] This is now also the position in all civil proceedings in which evidence is adduced in connection with the upbringing, maintenance or welfare of a child. Section 96(3)–(7) of the Children Act 1989 gave the Lord Chancellor power to disapply the hearsay rule by order in relation to such evidence.[55] The first order made under this section was, however, restrictive in scope. Although it allowed hearsay evidence in connection with the upbringing, maintenance or welfare of a child in all High Court and county court proceedings, so far as magistrates' courts proceedings were concerned, the scope of the order was restricted to specific classes of statement in the juvenile court.[56] Magistrates could not receive hearsay evidence in the domestic court at all. However, when the Children Act came into full force on 14 October 1991 a new order governing the admissibility of hearsay evidence also came into force.[57] This provided that hearsay evidence in connection with the upbringing, maintenance or welfare of a child should be admissible in the High Court or a county court, or in family proceedings in a magistrates' court. The scope of the order has subsequently been held to extend, not only to all the proceedings defined as "family proceedings" by section 8(2) of the Children Act, but also to other proceedings which are part of the magistrates' courts' family proceedings jurisdiction by virtue of section 92(2) of that Act.[58] Hearsay has also been held to be admissible in contempt proceedings under the order, although whether in fact hearsay evidence is admissible in a particular case will depend on the terms and purpose of the court order.[59] The Court of Appeal has said that there should be a "substantial connection" between the proposed evidence and the upbringing, maintenance or welfare of a child.[60] The 1991 Order has now been superseded by a new order, which extends the substance of the provisions of the 1991 order to proceedings under the Child Support Act 1991.[61]

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[48] See R.S.C., O. 38, rr. 35–44; C.C.R., O. 20, r.27.

[49] Civil Evidence Act, s. 3(1).

[50] Civil Evidence Act, s. 4(1).

[51] Civil Evidence Act, s. 3(2).

[52] The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, para. 2.74.

[53] We would like to express our thanks to John Spencer and Rhona Flin for making available to us a pre-publication copy of the chapter on hearsay from the forthcoming new edition of their book, *The Evidence of Children: The Law and Psychology*.

[54] *In re K. (Infants)* [1965] A.C. 201. See para. 2.6 above.

[55] This section was passed as a result of widespread criticism of the ruling in *H* v. *H*; *K* v. *K* [1989] 3 W.L.R. 933. In that ruling the Court of Appeal reversed two decisions in which county court judges had refused fathers access to their children, partly because these decisions were based on findings of sexual abuse based on hearsay evidence.

[56] S.I. 1990, No. 143.

[57] S.I. 1991, No. 1115.

[58] *Oxfordshire County Council* v. *R* [1992] 1 F.L.R. 648. This case concerned the question whether hearsay was admissible to determine whether a child should be kept in "secure accommodation".

[59] *C* v. *C (Contempt: Evidence)* [1993] 1 F.L.R. 220.

[60] *Ibid.*, 223.

[61] S.I. 1993, No. 621.

Recent changes to rules of court governing procedure[62]

2.32 Amendments have been made to the Rules of the Supreme Court, extending the courts' powers to require prior exchange of experts' evidence[63] and providing for experts to meet before or after disclosure to identify those parts of their evidence which are in issue.[64] Rules have also been amended to encourage more informative pleading,[65] to enable interrogatories to be administered without a court order[66] and to strengthen the power of the court to penalise in costs a party who unjustifiably fails to make admissions of facts or documents.[67] Similar amendments to rules governing interrogatories, costs and exchange of witness statements have been made to the County Court Rules.[68]

2.33 The procedure for ordering a pre-trial exchange of witness statements has recently been altered.[69] The rules enabling the court to order parties to exchange witness statements have applied to all the divisions of the High Court since 1988,[70] and this change was described in the White Book, even before the procedure was made into a mandatory requirement, as an "enormous and notable advance towards the open system of pre-trial procedure."[71] Section 5 of the Courts and Legal Services Act 1990 provided for rules of court to be made to introduce a general automatic pre-trial exchange of witness statements in line with the recommendation of the Civil Justice Review.[72] The revised R.S.C., Order 38, r.2A commences with a statement of its aims, namely that the powers of the court are to be exercised for the purpose of disposing fairly and expeditiously of the cause or matter before it and saving costs, having regard to all the circumstances of the case. The Court is put under a duty to order every party to serve witness statements on the other parties within fourteen days (or such other period as the Court shall specify) at the summons for directions, although as under the previous procedure, the Court may direct such an exchange to take place at any stage.[73] The parties have no power to agree any extensions of time in which exchange must take place but have to apply to the court in every case.[74]

2.34 These developments reflect a determination to move towards a climate of litigation where there is greater openness between parties, and towards what has been called the "cards on the table" approach, where time and costs are saved by closer attention to pre-trial preparation and early identification of the material issues. Their justification has been said to reside in the adversarial nature of our system of civil justice—"The theatrical nature of the English trial means that it cannot produce a fair result unless each party comes fully prepared to deal with the other side's case."[75] In our opinion they can also be seen in the context of a growing belief that fairness between the parties and the full ventilation of all the relevant issues are better achieved by these means than by an insistence on technical rules of evidence.

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[62] See also paras. 4.59–4.60 below. For a view of the wider context in which the changes discussed in this paragraph and elsewhere have occurred, see Sir Leonard Hoffmann, "Changing Perspectives in Civil Litigation", (1993) 56 M.L.R. 297.

[63] R.S.C., O. 38, r.37. R.S.C. (Amendment No. 4) 1989 (S.I. 1989, No. 2427).

[64] R.S.C., O. 38, r.38. R.S.C. (Amendment) 1987 (S.I. 1987, No. 1423).

[65] R.S.C., O. 18, r.12. Rules of the Supreme Court (Amendment No. 4) 1989, S.I. 1989, No. 2427.

[66] R.S.C., O. 26, rr. 1-6.

[67] R.S.C., O. 62, r.6(7) and (8).

[68] County Court (Amendment No. 4) Rules 1989, S.I. 1989, No. 2426.

[69] Rules of the Supreme Court (Amendment No. 2) 1992, S.I. 1992, No. 1907. The amended version of R.S.C., O. 38, r.2A came into force on 16 November 1992.

[70] The rules originally applied only to the Chancery Division, the Commercial Court and the Admiralty Court and for official referees' business (S.I. 1986, No. 1187) but were applied to work in the Queen's Bench Division in 1988 (S.I. 1988, No. 1340). The new rules are expressly incorporated in the rules of the County Court in C.C.R., O. 20, r.12. A provision to similar effect is contained in the Family Proceedings Courts (Children Act 1989) Rules 1991, r.17.

[71] The Supreme Court Practice 1991 Notes to O. 38, r.2A, para. 1.

[72] Report of the Review Body on Civil Justice (1988), Cm. 394, recommendation No. 22.

[73] R.S.C., O. 38, r.2A(2). Rule 2A(17) gives the court a general power to override some of the provisions of this sub-rule and to give such alternative directions as it thinks fit.

[74] R.S.C., O. 38, r.2A(2). Cf. C. Glasser, "Civil Procedure and the Lawyers—The Adversary System and the Decline of the Orality Principle", (1993) 56 M.L.R. 307, 314-315; "Civil Justice on Trial—The Case for Change", Report by the Independent Working Party set up jointly by the General Council of the Bar and the Law Society, June 1993. Cf. 4.45ff.

[75] Sir Leonard Hoffmann, "Changing Perspectives in Civil Litigation", (1993) 56 M.L.R. 297, 304.

The Civil Evidence (Scotland) Act 1988 (the 1988 Act)

2.35 The main features of this Act so far as it relates to the admissibility of hearsay evidence are that:

- The exclusionary rule is abolished in all civil proceedings.
- Both first-hand and multiple hearsay are admissible.
- The class of hearsay "statements" that are admissible is widely drawn. "Statement" is defined in the Act to include any representation (however made or expressed) of fact or opinion. However, precognitions[76] are specifically excluded from the definition.
- There is no requirement of any notice of the intention to adduce hearsay evidence.
- There is a specific power for any party to call extra witnesses. This enables a party to challenge by cross-examination the evidence of a person whose evidence has been tendered as hearsay.
- There is no statutory guidance as to the weight to be attached to hearsay evidence.
- No special provision is made for computer records. The definition of "record" extends to computer-held and computer-generated records.
- A document may be taken to form part of the records of a business or undertaking, without being spoken to in court.
- An authenticated copy of a document can be treated for evidential purposes as if it were the original.
- The absence of an entry in a record may be proved by affidavit.

2.36 The origin of the 1988 Act lay in the recommendations contained in a report by the Scottish Law Commission.[77] There are, however, significant differences between the draft bill proposed by the Commission and the Act. These differences will be discussed in detail as part of the case for our proposed recommendations in Part IV of this Report.

[76] These are statements prepared in collaboration with another for the purposes of litigation. See Report on Corroboration, Hearsay and Related Matters in Civil Proceedings (1986), Scot. Law Com. No. 100, para. 3.57. Cf. para. 4.16(d).

[77] Report on Corroboration, Hearsay and Related Matters in Civil Proceedings (1986), Scot. Law Com. No. 100.

PART III

THE CASE FOR REFORM

3.1 In this Part we mention the particular problems with the present law highlighted by our analysis of the responses to our Consultation Paper. We then summarise the two possible avenues for reform which we presented for consideration, and the outcome of the responses.

Problems with the 1968 Act

The notice provisions

3.2 There was general agreement by consultees with the view that the current regime is too elaborate and places unrealistic burdens on parties.[1] The Law Reform Committee envisaged that the rules would need revision in the light of experience,[2] but there has been no comprehensive reappraisal of them since their creation and hence no opportunity to reconsider what their purpose should be and whether it is being achieved.

3.3 We received several responses to the Consultation Paper which illustrated the extent to which compliance with the notice provisions has fallen into disuse. The Law Society, for example, commented that the rules are rarely relied on, save where a witness has died, disappeared, or moved overseas.[3] There has also been considerable criticism of the " beyond the seas " rule, which allows, for example, the admission of a statement made by a person in Jersey and excludes a statement from a person in Newcastle. There was unanimity that the prescribed time limits were not complied with and the Supreme Court Procedure Committee commented that consideration of the need to serve notices was usually made during the final preparation for trial. Other responses confirmed this view. For example, we were told that this was a matter that was usually left until the pre-trial conferences with counsel, which could be so close to the beginning of the trial that compliance with the set time limits was extremely difficult, if not impossible.

3.4 The impression we received from our consultees was that, where the rules were used at all, it was as a last resort, in extreme cases, for example where they were the simplest way of dealing with a formality, the other side not being entitled to object, or where the other side were regarded as being particularly difficult to deal with. In all other cases, the admissibility of hearsay evidence was more likely to be dealt with in correspondence between solicitors. No doubt over the years since 1968 notices have often been served some months before trial, particularly when counsel has been instructed to advise on evidence in good time, but we have no reason to suppose that the evidence we received on consultation is not an accurate reflection of contemporary practice.

3.5 The main criticism of the notice provisions, which are not generally co-ordinated with the provisions on witness statements and experts' evidence,[4] is that they impose unrealistic requirements. For example, in the High Court the Rules require that notice be given within 21 days after setting down.[5] Many consultees said that the time limits pay insufficient regard to the practical problems of preparing for trial and bear no relation to real case time-tables and the likely interval between setting down and trial. Furthermore, compliance to the letter with the rules was likely to lead to wasted costs, in identifying and categorising evidence which might be largely unobjectionable to the other side. On the other hand, the Law Society drew the important distinction that, despite the existence of discovery and prior service of affidavits and witness statements, the giving of notice served the crucial purpose of confirming that a party actually intended to rely on the hearsay statements. We were very grateful for the number of practical suggestions put forward.

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[1] See The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, para. 3.50. R. Ulrich, " Reform of the Law of Hearsay ", (1974) Anglo-American Rev. 184, 209 and J. D. Heydon, *Evidence, Cases and Materials* (3rd ed., 1991), p.372.

[2] 13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964, para. 46.

[3] The Holborn Law Society commented that " Many experienced practitioners can recall using or receiving hearsay notices less than half a dozen times in their professional lives."

[4] See paras. 2.33–2.34 above and The Hearsay Rule in Civil Proceedings, Consultation Paper No. 117. para. 2.83. But cf. the suggested practice in Group Actions, *Supreme Court Procedure Committee's Guide for Use in Group Actions* (1991), p.40 and the *Guide to Commercial Court Practice*, para. 14.1.

[5] R.S.C., O. 38, r.21(1). In the County Court, the requirement is " not less than 14 days before the date fixed for trial or hearing ": C.C.R., O. 20, r.15.

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3.6 It was the importance of adequate prior warning that was stressed by consultees. Generally, the right to insist on the attendance of witnesses was considered less important. The precise manner, form and categorisation of the notice was also regarded as less important.

3.7 To sum up, the response on consultation has led us to conclude that there is widespread dissatisfaction with the complexity of the current rules, so much so that compliance with them may have become the exception rather than the rule, with the parties relying on the discretion of the court to admit the hearsay evidence notwithstanding non-compliance with the notice procedure[6] or on agreements at trial to admit.[7] It may, however, be true that the system, by and large, works after a fashion. The Supreme Court Procedure Committee, for example, considered that non-observance of the rules did not cause much practical difficulty and that their chief function was to exist as an early warning system and a reminder to parties of the need to give notice. However, it is important to remember the purpose of notice, namely that sufficient time should be afforded to the parties to allow them to mount an effective challenge[8] to contentious evidence and to bring about a timely identification of the material issues, and consequently to save costs and time. We note the move towards greater exchange of witness statements but we do not think that there can be a substitute for the clear identification of the intention to rely on hearsay evidence, particularly in more complex cases, which involve substantial numbers of documents. Nor do we consider that the current informal practices can achieve these crucial objectives as effectively as can a clear duty to give notice. We discuss in Part IV the ways in which such a duty can be made adaptable to the needs of different proceedings and flexible in practical operation.

Section 2(3): statements "made otherwise than in a document"

3.8 The effect of this provision was considered by the Court of Appeal recently in *Ventouris* v. *Mountain (No. 2)*.[9] This case concerned the admissibility of tape recorded conversations made secretly by the defendant, who was not available to give oral evidence. By virtue of section 10(1)(c) of the 1968 Act, a tape recording is capable of being admitted as a "document". However, the court held that the question whether a statement had been "made otherwise than in a document" had to be determined from the point of view of the maker of the statement.[10] Thus, whilst the defendant had clearly intended to make statements in a "document", the other unwitting parties had not. As a result, those parts of the recorded conversation which came from the mouth of the defendant were capable of being admitted under section 2(1), as a statement made in a document, and these could be proved by another out of court statement, in this case by a statement made by the defendant to his solicitors, also adduced under section 2(1). So far as the recorded statements of the other parties to the conversation were concerned, these might be admissible to the limited extent of proving the context in which the defendant's statements were made. They were only admissible to any greater extent under section 2(3), which required that oral evidence be given.[11] In the circumstances of the case this was impossible. Although an extreme example, *Ventouris* demonstrates the artificiality which section 2(3) can produce.

Business records

3.9 As indicated in Part II, the admissibility of business and other records is at present governed by section 4 of the 1968 Act. The principal requirements are that the compiler of the record should have acted under a duty, having received the information from a person with personal knowledge of it. If he received it via some other person, then that person, and any others in the chain, must have acted under a similar duty.

3.10 There is some uncertainty as to the meaning of "record". This is best exemplified by the cases of *H.* v. *Schering Chemicals Ltd.*[12] and *Savings and Investment Bank* v. *Gasco*

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[6] R.S.C., O. 38, r.29.

[7] See also Report on Corroboration, Hearsay and Related Matters in Civil Proceedings (1986), Scot. Law Com. No. 100, para. 3.32.

[8] *Ibid.*, paras. 3.43–3.47.

[9] [1992] 1 W.L.R. 887.

[10] This has been followed in *Arab Monetary Fund* v. *Hashim* [1993] 1 Ll Rep. 543, 556 (statement dictated to a secretary with the intention that it would be duly reproduced in writing).

[11] See para. 2.10 above.

[12] [1983] 1 W.L.R. 143.

Investments (Netherlands) BV.[13] In *Schering,* a personal injury case, the plaintiffs sought to adduce a series of correspondence and articles from medical journals to prove the harmful effects of a drug. Bingham J. found that whilst such evidence was admissible to prove the state of general professional knowledge, they were not admissible " for the purpose of showing, on the strength of those facts and results, that the administering of the drug did cause the injuries complained of." It is hard to see how these materials could have met the " duty " requirement of section 4. However, Bingham J. held that in any event they could not constitute a " record ", since the intention behind section 4 was " to admit in evidence records which a historian would regard as original or primary sources, that is, documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts."[14]

3.11 Bingham J.'s words were quoted in *Gasco* by Peter Gibson J., who held that a report compiled by D.T.I. inspectors acting under a duty, from the evidence of witnesses who were also under a duty, was inadmissible. This judgment has been criticised on the grounds that courts ought to be willing to adopt a more liberal approach to the construction of the word " record " in section 4.[15] D.T.I. inspectors' reports may, however, be taken into account by the court when considering a winding up petition or an application for a disqualification order.[16] The rationale of this is that a report by inspectors is not ordinary hearsay evidence because inspectors act in a statutory fact-finding capacity and statute authorises the Secretary of State to take it into account in deciding whether to apply for the relief.[17]

3.12 So far as records generally are concerned, consultees commented that the current rules are based on an old fashioned view of business methods and office procedure, where records were largely kept manually and where overall responsibility could be attributed to individual record keepers. Nowadays record keeping is less likely to be a separate function within an organisation and has been largely taken over by technology. The requirement to identify a person with a duty to compile the core information is often unrealistic. Whilst various categories of officialdom may have no difficulty in complying, for example tax inspectors, policemen and people carrying out duties imposed by statute, the rules are increasingly difficult to apply to commerce and industry, where procedures are likely to be less rigid. Indeed, recent cases concerning the definition of " record " have shown that reports compiled by persons acting under a statutory duty may not necessarily be admitted.[18]

3.13 Since section 4 pre-supposes the existence of a person who has supplied the information contained in the record, problems may arise when a party seeks to prove the absence of an entry from the records of a business.[19]

Computer records

3.14 A fundamental mistrust and fear of the potential for error or mechanical failure can be detected in the elaborate precautions governing computer records in section 5 of the 1968 Act. The Law Reform Committee had not recommended special provisions for such records, and section 5 would appear to have been something of an afterthought with its many safeguards inserted in order to gain acceptance of what was then a novel form of evidence.[20] Twenty-five years later, technology has developed to an extent where computers and computer-generated documents are relied on in every area of business and

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[13] [1984] 1 W.L.R. 271.

[14] *H.* v. *Schering Chemicals Ltd.* [1983] 1 W.L.R. 143, 146E. These words were cited by Evans J. in *Arab Monetary Fund* v. *Hashim* [1993] 1 Ll Rep. 543, 557. A file of letters kept in a secure place for future reference was held to constitute a " record " (for the purposes of s.4(1) of the Civil Evidence Act 1968) of the transactions at issue, without an independent record, such as a ledger entry, being necessary.

[15] *Cross on Evidence* (7th ed., 1990), p.555.

[16] The most recent decision is *Re Rex Williams Leisure plc* [1993] B.C.L.C. 568. See also *Re St. Piran Ltd.* [1981] 1 W.L.R. 1300, 1306.

[17] *Re Rex Williams Leisure plc.* [1993] B.C.L.C. 568, 575. See Company Directors Disqualification Act 1986, s. 8(1); Insolvency Act 1986, s. 124.

[18] See paras. 3.10–3.11 above.

[19] See *R.* v. *Shone* (1982) 76 Cr. App.R. 72 and *R.* v. *Muir* (1983) 79 Cr. App.R. 153. Although these two cases were criminal cases, the relevant statutory language is the same.

[20] 13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964, para. 10. We had the benefit of comments made by Sir Wilfrid Bourne K.C.B., Q.C., a former Secretary to the Law Reform Committee.

have long been accepted in banking and other important record-keeping fields.[21] The conditions have been widely criticised,[22] and it has been said that they are aimed at operations based on the type of mainframe operations common in the mid 1960s, which were primarily intended to process in batches thousands of similar transactions on a daily basis.[23]

3.15 So far as the statutory conditions are concerned, there is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. It is at least questionable whether these requirements provide any real safeguards in relation to the reliability of the hardware or software concerned. In addition, they are capable of operating to exclude wide categories of documents, particularly those which are produced as the result of an original or a "one-off" piece of work. Furthermore, they provide no protection against the inaccurate inputting of data.

3.16 We have already referred to the overlap between sections 4 and 5.[24] If compliance with section 5 is a prerequisite, then computer-generated documents which pass the conditions set out in section 5(2) "shall" be admissible, notwithstanding the fact that they originated from a chain of human sources and that it has not been established that the persons in the chain acted under a duty. In other words, the record provisions of section 4, which exist to ensure the reliability of the core information, are capable of being disapplied. In the context of our proposed reforms, we do not consider that this apparent discrepancy is of any significance, save that it illustrates the fact that section 5 was something of an afterthought.

3.17 Computer-generated evidence falls into two categories. First, there is the situation envisaged by the 1968 Act, where the computer is used to file and store information provided to it by human beings. Second, there is the case where the record has itself been produced by the computer, sometimes entirely by itself but possibly with the involvement of some other machine. Examples of this situation are computers which are fed information by monitoring devices. A particular example is automatic stock control systems, which are now in common use and which allow for purchase orders to be automatically produced. Under such systems evidence of contract formation will lie solely in the electronic messages automatically generated by the seller's and buyer's computers. It is easy to see how uncertainty as to how the courts may deal with the proof and enforceability of such contracts is likely to stifle the full development and effective use of such technology.[25] Furthermore, uncertainty may deter parties from agreeing that contracts made in this way are to be governed by English law and litigated in the English courts.

3.18 It is interesting to compare the technical manner in which the admissibility of computer-generated records has developed, compared with cases concerning other forms of sophisticated technologically produced evidence, for example radar records.[26] In the *Statue of Liberty* case radar records, produced without human involvement and reproduced in photographic form, were held to be admissible to establish how a collision of two ships had occurred. It was held that this was "real" evidence, no different in kind from a monitored tape recording of a conversation. Furthermore, in these cases, no extra tests of reliability need be met and the common law rebuttable presumption is applied, that the machine was in order at the material time. The same presumption has been applied to intoximeter printouts.[27]

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[21]As examples of post-1968 developments; see the Patents, Designs and Marks Act 1986, Sch. 1, s.1 which allows for registers to be held on computer and the Banking Act 1979, Sched. 6, which provides that the definition of "bankers' books" for the purposes of s. 9 of the Bankers' Books Evidence Act 1879 includes computerised records. The Land Registration Act 1925, s. 113 was modified by section 66 of the Administration of Justice Act 1982. This modification enabled the register to be kept in computerised form and permitted the office copies of the register which are admissible in evidence to be reproductions of parts of the register maintained electronically.

[22]*Cross on Evidence* (7th ed., 1990), p.558; C. Tapper, *Computer law* (4th ed., 1989) ch. 9, esp. at p.395. See generally The Hearsay Rule in Civil Proceedings, Consultation Paper No. 117, paras. 3.61–3.69.

[23]C. Reed, "The Admissibility and Authentication of Computer Evidence—A Confusion of Issues", (1990) 6(2) *Computer Law and Security Report*, p. 13.

[24]Para. 2.13 above.

[25]C. Reed, "The Admissibility and Authentication of Computer Evidence—A Confusion of Issues", (1990) 6(2) *Computer Law and Security Report*, p.13.

[26]See *Sapporo Maru (Owners)* v. *Statue of Liberty (Owners)* [1968] 1 W.L.R. 739; *Cross on Evidence* (7th ed., 1990), pp.48–51; Tapper, *Computer Law* (4th ed., 1989), p.375. Cf. *R.* v. *Coventry Justices, ex p. Bullard and Another, The Times*, 24th February 1992, discussed in para. 3.27ff.

[27]*Castle* v. *Cross* [1984] 1 W.L.R. 1372.

3.19 There are a number of cases which establish the way in which courts have sought to distinguish between types of computer-generated evidence, by finding in appropriate cases that the special procedures are inapplicable because the evidence is original or direct evidence. As might be expected, case law on computer-generated evidence is more likely to be generated by criminal cases of theft or fraud, where the incidence of such evidence is high and the issue of admissibility is more likely to be crucial to the outcome and hence less liable to be agreed.[28] For example, even in the first category of cases, where human involvement exists, a computer-generated document may not be considered to be hearsay if the computer has been used as a mere tool, to produce calculations from data fed to it by humans, no matter how complex the calculations, or how difficult it may be for humans to reproduce its work, provided the computer was not " contributing its own knowledge ".[29]

3.20 There was no disagreement with the view that the provisions relating to computer records were outdated and that there was no good reason for distinguishing between different forms of record keeping or maintaining a different regime for the admission of computer-generated documents.[30] This is the position in Scotland under the 1988 Act.[31] Furthermore, we were informed of fears that uncertainty over the treatment of such records in civil litigation in the United Kingdom was a significant hindrance to commerce and needed reform.[32]

3.21 Consultees considered that the real issue for concern was authenticity[33] and that this was a matter which was best dealt with by a vigilant attitude that concentrated upon the weight to be attached to the evidence, in the circumstances of the individual case, rather than by reformulating complex and inflexible conditions as to admissibility.

Magistrates' courts

3.22 We have already referred to the fact that the 1968 Act does not apply to magistrates' courts.[34] In 1989 the Government announced its intention of applying the 1968 Act to all civil proceedings in magistrates' courts but this has not yet been done.[35] The non-application of the 1968 Act to magistrates' courts arose out of the recommendations of the Law Reform Committee whose report formed the basis for the 1968 statutory regime.[36] The committee recognised the desirability of applying the same rules of evidence in civil cases irrespective of the court in which they are litigated[37] but decided that this principle was outweighed by other factors. These were (i) that since the great majority of magistrates' work is criminal in nature, where hearsay evidence is largely inadmissible, the rule should remain for their civil jurisdiction as it would be undesirable for magistrates to have to apply different rules of evidence according to the kind of case which they were trying,[38] (ii) that the proposed notice and counter-notice regime would be difficult to apply in magistrates' courts, where many litigants do not have legal assistance and (iii) that it would be difficult for lay magistrates to exercise the judicial discretion required if hearsay were admitted.[39]

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[28]The law governing criminal cases is now contained in the Police and Criminal Evidence Act 1984, s. 69, and the Criminal Justice Act 1988, ss. 23–28 and sch. 2.

[29]*R* v. *Wood* (1983) 76 Cr.App.R. 23.

[30]C. Tapper, *Computer law* (4th ed., 1989), p.395.

[31]For the background to this reform see Report on Corroboration, Hearsay and Related Matters in Civil Proceedings (1986), Scot. Law Com. No. 100, paras. 3.63–3.66.

[32]Lloyd's of London in particular were concerned that section 5 might discourage international insurance business from being conducted in London. They are co-sponsors of LIMNET, an electronic network used by insurers, brokers and others. Their concern is that the continued existence of section 5 may discourage international buyers from conducting business electronically in the London market. The United Nations Commission on International Trade Law (UNCITRAL) Working Group on E.D.I. (Electronic Data Interchange) is carrying out a review of the legal issues arising from the increased use of E.D.I. in international commerce. It is possible that the outcome will be a Model Law, intended to be incorporated into the national law of as many countries as possible. In its Report of 9th March 1993 it is recorded that strong support was expressed for a provision declaring E.D.I. records to be admissible evidence. The existence of the hearsay rule was considered to be " an undesirable and unnecessary obstacle to the use of E.D.I. in international trade. "

[33]M.J.L. Turner, " Examining the Authenticity of Computer Generated Evidence ", (1992) S.J. Supp. Vol. 136 No. 48.

[34]See para. 2.7 above.

[35]2nd February 1989. Announcement by John Patten M.P., Minister of State at the Home Office.

[36]13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964.

[37]*Ibid.*, para. 49.

[38]They did not consider that the Evidence Act 1938 had made any great difference to civil business in magistrates' courts, *ibid.*, para. 49.

[39]*Ibid.*, para. 50.

3.23 The first reason given by the Law Reform Committee seems to have lost some of its force since the abrogation of the hearsay rule in family proceedings.[40] In this important jurisdiction magistrates now hear hearsay evidence. Magistrates' courts are now subject to four different regimes for evidence, depending on whether the proceedings fall under the (a) licensing, (b) family proceedings, (c) civil, or (d) criminal jurisdictions.

3.24 Licensing has long been established as belonging within a class of jurisdictions where the strict rules of evidence are inappropriate. The jurisdiction is regarded as administrative in nature.[41] Magistrates may therefore take hearsay evidence into account when deciding on such matters as the granting of betting, firearm and intoxicating liquor licences.

3.25 The Children Act 1989 came into force on 14th October 1991. Specialist family proceedings courts now combine what were hitherto two separate jurisdictions in cases involving the welfare of children; the domestic jurisdiction of the magistrates' courts over private marital and parental cases and the care jurisdiction of the juvenile courts in cases involving local authorities. We have already referred to the abrogation of the exclusionary rule by the Children (Admissibility of Hearsay Evidence) Order 1991.[42]

3.26 However, the fact that magistrates will continue to hear cases involving matrimonial disputes under their existing domestic jurisdiction, governed by the Domestic Proceedings and Magistrates Courts Act 1978, where the rules of evidence are set by the common law and by the Evidence Act 1938, is causing difficulties. The hearsay rule will (subject to the 1938 Act) continue to apply in cases involving childless couples, or couples with children over the age of eighteen. In reality it is often highly artificial to seek to make a distinction between issues which affect the children and those which only concern the adult parties. Issues relating to financial provision and domestic violence are good examples of this. Even in cases where there are no children whose interests need to be considered, it should be recognised that the domestic jurisdiction of magistrates is to an extent *sui generis*. It involves a high element of discretion, based on the need to consider the future as well as the current position of the parties and their best interests.

3.27 Apart from the licensing and children cases, the common law and the Evidence Act 1938 apply to the civil jurisdiction of magistrates' courts. This covers such diverse matters as local government, planning and public health as well as their domestic jurisdiction. The decision not to apply the 1968 statutory regime to magistrates' courts has led to difficulties, most recently in relation to proceedings concerning the community charge.

3.28 When applying to magistrates for liability orders against people who had failed to pay community charge, local authorities developed a practice of submitting computer print-outs as evidence of the amount claimed. In such civil proceedings in the magistrates' courts, as we have already stated,[43] the hearsay rule remains fully applicable, subject to the common law and to the Evidence Act 1938.[44] It was widely acknowledged[45] that such

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[40] Para. 2.31.

[41] *Kavanagh* v. *Chief Constable of Devon and Cornwall* [1974] Q.B. 624, 633 and 634.

[42] Para. 2.31.

[43] Para. 2.7.

[44] Section 1 of the Evidence Act 1938 provides that,

> " In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
>
> (i) if the maker of the statement either—
>
> (a) had personal knowledge of the matters dealt with by the statement; or
>
> (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
>
> (ii) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. "

[45] Stone's Justices' Manual 1991, Vol. 1, preface, p.ix.

print-outs were therefore inadmissible but it was not until the case of *R.* v. *Coventry Justices, ex parte Bullard and Another*[46] that a liability order made on the basis of computer-generated evidence was successfully challenged.

3.29 In *Bullard* the court first considered the nature of the computer record. If it contained records produced without human intervention, it would be admissible as "real" evidence. However, in this case it was clear that the information in the council's print-out had a human source so that the print-out was clearly inadmissible unless it fell within an exception to the hearsay rule. It was not argued before the justices or the High Court that the council's records were "statements made by a person in a document" and that the print-out was therefore potentially admissible under section 1(1) of the 1938 Act. The council did not attempt to satisfy any of the conditions laid out in that section.[47] In any case, section 1(3) precludes the admission of any such statement if it is made by a "person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish". In a totally different context it has been held that an employee of a party to an action is a "person interested".[48]

3.30 The position revealed by the case of *Bullard* was subsequently rectified by an amendment to the community charge regulations made in 1989.[49] Following that case a late amendment was also made to the Bill which became the Local Government and Finance Act 1992 which made a similar provision for computer evidence in magistrates' courts in respect of the Council Tax.[50] Under the regulations only the applicant authority is entitled to adduce hearsay computer evidence. It follows that a council tax payer cannot adduce a print-out of one authority's register to challenge his entry on another council's register.[51]

3.31 Among the responses we received, there was a general support for the suggestion that the same rules of evidence should apply to all civil proceedings in magistrates' courts. A requirement of notice need not be of such a formal nature as to give rise to the sort of objections which concerned the Law Reform Committee (see paragraph 3.22 above).[52] Concern was expressed by some consultees, however, over requiring lay justices to assume the additional burden of weighing hearsay evidence, particularly in the absence of guidelines. This view echoes the view previously expressed in an appeal on the operation of the hearsay rule in care proceedings in the juvenile court—

> "I do not suggest that the justices are incapable of putting out of their minds the substance of the complaint, but questions of admissibility and weight are more suitable for professional judges."[53]

This concern was not shared by the Family Law Bar Association, who commented that in their experience magistrates, guided by their clerks, were well able to identify and deal with hearsay.

The Flexible Transfer of Proceedings

3.32 Section 92(7) and paragraphs 1(3) and 2 of Schedule 11 of the Children Act 1989 allow for concurrent jurisdiction between the High Court, a county court and a magistrates' court in all proceedings under the Act.[54] The Lord Chancellor may provide for the vertical and lateral transfer of proceedings. The aim is to "create a flexible system under which cases may, according to their complexity, be heard at the appropriate level of court."[55]

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[46] *The Times*, 24th February 1992. Press reports suggested that the judgment in *Bullard* would cost local authorities £6 million, that up to 150,000 non-payers would have grounds to appeal against liability orders and that 170 people imprisoned for non-payment might have grounds for appeal. See e.g. *The Guardian*, 21 February 1992.

[47] See n. 44 above.

[48] *Cartwright* v. *W. Richardson & Co. Ltd.* [1955] 1 W.L.R. 340.

[49] S.I. 1992, No. 474 amending S.I. 1989, No. 438.

[50] Local Government and Finance Act 1992, sched. 4, para. 14. The new regulations are to be found in S.I. 1992, No. 613.

[51] Cf. A. Murdie, "Hearsay Evidence in Poll Tax Cases", (1992) 142 N.L.J. 1551.

[52] For our proposed flexible notice requirement see paras. 4.9–4.13 below.

[53] *Bradford City Council* v. *K. (Minors)* [1990] 2 W.L.R. 532, 546A.

[54] The Children (Allocation of Proceedings) Order 1991, S.I. 1991, No. 1677.

[55] *Clarke Hall and Morrison on Children* (10th ed., 1989), p.119.

3.33 Furthermore under section 1 of the Courts and Legal Services Act 1990 the Lord Chancellor may also make provision for conferring jurisdiction on the High Court for County Court cases and vice versa, and for specifying proceedings that may only be brought in either court. The criteria include the value of the action, the nature of the parties and the proceedings and the complexity of the case.

3.34 In our view greater uniformity of rules of evidence should be seen as an important parallel objective. It would be contrary to the aims of both Acts if decisions on the appropriate tribunal to hear particular cases were to be influenced by the parties' perceptions of the evidential advantages to be won or lost. The danger of such "forum shopping" was referred to by a number of consultees.

The Options for Reform

3.35 It is undeniably true that much hearsay evidence is now rendered admissible by statute. However, the 1968 statutory regime is based upon the principle that hearsay evidence is intrinsically inadmissible. Statutory reform to date has concentrated on widening the categories of exceptions to the rule.

3.36 In our Consultation Paper we considered that we had presented a strong case for reform. However, we were aware that an opposite opinion could be put forward. It could be said that no reform at all was called for, because the 1968 Act was generally understood by practitioners, that its more inconvenient provisions were ignored and that the admissibility of evidence in civil litigation was largely determined by *ad hoc* agreement between the parties, subject to the supervision of the court.

3.37 We do not underestimate the value of accepted practice and familiarity with an existing body of law. However, there is widespread dissatisfaction with many aspects of the current system. In some respects, such as the procedures governing the admissibility of business and computer records, it is arguably obsolete. In others, such as the rules which govern the manner in which parts of the Act are applied, procedures have become so complex that they arguably restrict and subvert its purpose. We do not consider that it is a justifiable objection to reform that the existing system is so unsatisfactory that it is largely ignored.

3.38 Given that reform of some kind was clearly called for, we presented our consultees with the only two options that appeared viable to us;

Option 1: Continued limited admissibility within the framework of a simplified Civil Evidence Act procedure

3.39 In our Consultation Paper we examined the rationale behind the continued retention of the exclusionary approach to hearsay evidence in civil proceedings.[56] In presenting this option, we said that it had the following advantages. It preserves the basic scheme of the 1968 Act which is familiar and accepted, and which was successful in simplifying to a considerable degree the confusion surrounding the common law rule. This option would also maintain the benefits of prior notification. It would be possible to simplify the notification procedures and to modernise the rules governing business records and computer evidence without losing these advantages.

3.40 We saw the following disadvantages with this option. First, the attitude to evidence which is now emerging in the courts has undermined the exclusionary principle which was enshrined in the 1968 Act. We have noted that the court's new approach is to prefer to have all relevant information before it and then to judge its weight.[57] This does not sit well with the presumption of the 1968 Act, which declares a whole class of relevant evidence inadmissible subject to a complicated statutory admission procedure. Secondly, developments in procedural law have made the notification procedure far less important as a safeguard. The main purpose of the notification procedure in the 1968 regime is to prevent surprise. We therefore suggested that the rules providing for the exchange of

[56]See The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, Part III, in particular paras. 3.1–3.21, and for the advantages and disadvantages of this option, see paras. 4.12–4.18.

[57]See generally The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, paras. 2.81–2.83 and in particular *Davies* v. *Eli Lilly & Co.* [1987] 1 W.L.R. 428, 431H and *Ventouris* v. *Mountain (No. 2)* [1992] 1 W.L.R. 887, 899.

witness statements, which have since been made mandatory, have obviated the need for such a formal and detailed notice safeguard. Thirdly, we thought it doubtful that within the context of an exclusionary rule it would be possible to make the rules for notification sufficiently simple, and these were in any event inappropriate for certain types of proceedings, such as those in magistrates' courts.

Option 2: Abolition of the Exclusionary Rule

3.41 This option entailed the abolition of the exclusionary rule, while incorporating the reforms to the rules governing business records and computer evidence envisaged as part of Option 1, together with the provision of safeguards judged to be necessary to prevent abuse of the court's process.[58]

3.42 We saw the main advantage of this approach as its simplicity. The rules of evidence would become simpler to understand, for practitioners, courts and litigants alike. This option enables parties to concentrate on substantive issues as opposed to technical evidential points. We also pointed out that reform on this model reflected the common sense judgment that no party would willingly put forward hearsay evidence if better direct evidence were available. The principal objection to abolition of the exclusionary rule has been that it would further diminish the opportunity for cross-examination in civil proceedings. Traditionally, cross-examination has been regarded as the most effective means of testing the reliability of witnesses. However, the Law Reform Committee did not think that the inability to cross-examine constituted a sufficient ground for excluding hearsay evidence.[59] Now that so few cases are heard by juries and whilst so many depend substantially upon documents, we were doubtful whether the abolition of the exclusionary rule would lead to an appreciable decline in the incidence of cross-examination.

3.43 As for the disadvantages of this option, we noted the comments of the Law Reform Commission of New South Wales which were to the effect that abolition without guidance as to the circumstances in which hearsay should be admitted might lead the judges to re-invent the rule under another guise to protect the courts against an apprehended flood of valueless evidence.[60] We also noted that it would be a further potential disadvantage if it were to turn out that abolition of the rule led to the belief that courts no longer considered hearsay evidence to be inferior evidence.

Summary of the Responses

3.44 A large majority of consultees favoured our provisional view that reform should be by abolition of the exclusionary rule. Support was particularly strong from the judiciary, practising solicitors and their representative organisations and academics. Of the individual categories of persons and bodies who responded, the great majority of the Judges were in favour. They included Lord Scarman, Lord Donaldson, the then Master of the Rolls, the Chief Chancery Master, the Council of H.M. Circuit Judges and the Association of District Judges.

3.45 The legal, professional and other bodies in favour included The Law Society, the Family Law Bar Association, the London Solicitors Litigation Association, the Magistrates' Association and the Law Reform Advisory Committee for Northern Ireland. While some individual practising barristers who responded favoured abolition, the Law Reform Committee of the Bar Council and some other practising barristers expressed their support for the retention of the exclusionary rule. We understand many of their concerns although we do not believe these justify retention of the rule. As will be seen in Part IV of this Report, we depart from their views, in that we recommend the abolition of the exclusionary rule. However, we believe that our proposals, in particular the retention of a clear definition of hearsay and the stress upon reliability and weight, meet their main objections and the concerns of those who, although supporting abolition, explicitly referred to the need for safeguards.

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[58]For the advantages and disadvantages of this option, see The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, paras. 4.33–4.41.

[59]13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964, para. 8.

[60]Report No. 29, para. 1.3.3. Developments in Australia and other common law jurisdictions are summarised in the Appendix to Consultation Paper No. 117.

3.46 There was favourable comment on this reform being part of a wider move towards placing all relevant evidence before the court, balanced by greater pre-trial disclosure. Lord Scarman was among several who commented that the increasing use of documents and computer stored information was changing the nature of civil trials. He added that " the lesson of the past twenty years has surely been that you cannot retain the general exclusionary rule and keep the law clear and simple. " Practitioners and academics also commented that the hearsay rule was difficult to explain to clients and students alike.

3.47 What was particularly striking was the extent to which practitioners in the magistrates' courts and the County Court commented that the exclusionary rule was almost impossible to apply and had largely fallen into disuse. We were told that in these courts the pressure of business and the numbers of unrepresented defendants had made the rule unworkable. Expediency in these cases should be balanced by a rigorous attitude towards relevance and weight. The Family Law Bar Association also commented that no system could prevent unexpected hearsay when witnesses give oral evidence. Although this is more likely to be a problem in certain kinds of litigation, it demonstrates the general problem to which we referred in paragraph 1.6 above, of the difficulty in attempting to enforce a rule of law which is not necessarily founded on common sense and does not necessarily bear any relation to the way that reasonable people approach fact finding in other areas of life.

PART IV

OUR POLICY AND RECOMMENDATIONS FOR REFORM

Admissibility of Hearsay Evidence

4.1 The results of the consultation exercise confirmed the provisional conclusions which we had reached.[1] First, the weaknesses in the current law and procedure regarding hearsay evidence in civil proceedings are both significant in number and material in nature. Second, these weaknesses cannot be remedied by a piecemeal attempt to reform the 1968 Act and to simplify the rules of procedure made under it.[2] Our policy is, therefore, to abrogate the rule of evidence whereby evidence of a hearsay nature may not be adduced in civil proceedings as evidence of the facts asserted. We intend that this reform should extend not only to first-hand hearsay (the 1968 Act already extends thus far rendering this type of evidence admissible if the statutory notification conditions are met or in the discretion of the court) but also to multiple hearsay of whatever degree and form.

4.2 In formulating our policy we have had regard to two guiding principles:—

(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence.

(2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible.

These principles informed the recommendations of the Scottish Law Commission[3] and they were specifically approved by all sides in debates in Parliament during the passage of the Bill which became the Civil Evidence (Scotland) Act 1988.[4] We have, however, come to conclusions in some areas which are at variance with both the Scottish Law Commission's recommendations and the actual legislative position in Scotland. We discuss these differences under the relevant headings below.

4.3 We have referred already to recent developments in civil procedure.[5] In the last section of this part of the Report we discuss recent recommendations to move even further in the direction of greater judicial intervention in the course of proceedings.[6] The moves towards greater openness at the pre-trial stage to encourage settlement and shorten trials[7] provide both the policy context for our proposed reforms and the procedural structure into which our new provisions regarding hearsay evidence must fit. The greater the degree of judicial involvement with the pre-trial preparation the less strong any argument becomes that the exclusionary rule is necessary as a means of controlling the quality of the evidence brought before the court. One of the reasons we have chosen to recommend a flexible notice provision as a safeguard following the abolition of the exclusionary rule is because it seems in accord with the developing " cards on the table " approach.

4.4 In adopting the policy option of abolishing the exclusionary rule we have also had regard to the fact that there are many tribunals where the strict rules of evidence, including the exclusionary rule against hearsay, are not applied and where consultation did not reveal any general dissatisfaction with the quality of the decision making or the fairness to the parties. It should be remembered that many of these tribunals, such as Industrial Tribunals and various disciplinary tribunals, are engaged in contentious and difficult matters of disputed fact, sometimes of a quasi-criminal nature, where the outcome can have profound effects on the parties' livelihoods and reputations. The experience of these tribunals does not support the argument that the retention of the exclusionary rule is necessary to maintain high standards. Indeed, the experience and quality of judges in superior courts suggests that, if anything, there should be less concern about abolition of the exclusionary rule in those courts. Information about the conduct of civil proceedings in Scotland since the rule was abolished by the Civil Evidence (Scotland) Act 1988 does not

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[1] The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, paras. 5.1–5.6.

[2] See paras. 3.37 and 3.42–3.43 above for the reasons for this view.

[3] Report on Corroboration, Hearsay and Related Matters (1986), Scot. Law Com. No. 100, para. 1.3.

[4] Hansard (H.L.), 12 November 1987, col. 1541; Hansard (H.C.), 16 May 1988, col. 737.

[5] Paras. 1.5 and 2.32–2.34.

[6] " Civil Justice on Trial—The Case for Change " (June 1993) a report by the Independent Working Party set up jointly by the General Council of the Bar and the Law Society. See paras 4.54ff.

[7] But cf. A. Jack, " Radical Surgery for Civil Procedure ", (1993) 143 N.L.J. 891.

suggest that a more cautious approach should be taken. We have been told that the 1988 Act has made very little difference in practice since practitioners will not rely on hearsay evidence if they can avoid doing so.

4.5 We have decided against the option of reforming the 1968 Act. The presumption enshrined in the Act is that hearsay should be inadmissible subject to the statutory and common law exceptions prescribed in the Act. We do not consider this presumption to be a satisfactory basis for a modern law of civil evidence. This presumption conflicts with the first guiding principle which we have adopted i.e. that all relevant evidence should be admissible unless there is good reason for it to be treated as inadmissible. It might be said that the fact that it is hearsay is in itself a good reason but the number of exceptions to the hearsay rule and the pressure to expand the category of exceptions[8] are very strong indications in themselves that the mere fact that a statement is hearsay is a sufficient ground for regarding a piece of relevant evidence as unreliable. We believe that the circumstances which could render a hearsay statement unreliable as evidence are so multifarious that the fact that it is hearsay is something which should go to weight rather than admissibility. For this reason we consider that it would be wrong merely to reverse the present presumption and make inadmissibility the exception rather than the rule. We have noted in this regard the view expressed by Balcombe L.J. that " the modern tendency in civil proceedings is to admit all relevant evidence and the judge should be trusted to give only proper weight to evidence which is not the best evidence. "[9] Although hearsay evidence, like any other category of evidence, can be excluded if it is irrelevant or superfluous,[10] we believe that the fact that it is hearsay should no longer be a ground for making it prima facie inadmissible. We conclude, therefore, that Part I of the 1968 Act should be repealed and not merely reformed.

4.6 However, in advocating a new principle of admissibility we are aware that hearsay evidence potentially raises particular problems for the court in according weight to it and for the parties in having sufficient opportunity to assess the true strength of their opponents' case. We have therefore proposed that certain procedural safeguards be applied to hearsay evidence. In order that these safeguards can be applied we believe that it is important that the concept of hearsay evidence should continue to be understood and recognised. To this end our Bill contains a definition of hearsay, which builds on the definition contained in the 1986 Act[11] and is wide enough to cover oral and written statements, statements by conduct and expressions of opinion (to the extent that they are covered by the 1972 Act).[12] In proposing to include a definition it is only intended to identify that which would have formerly fallen within the exclusionary rule. It seemed preferable to give an explicit definition rather than leave the courts to determine what statements would have been subject to the exclusionary rule had it not been abolished. Although there will be less at stake since the main definition concerns notice and weight rather than admissibility, we envisage that there will continue to be reference to the existing case-law in cases where the boundary of the definition is unclear.

Therefore, subject to the safeguards outlined below, we **recommend that:**

1. **In civil proceedings evidence should not be excluded on the ground that it is hearsay. We further recommend that multiple hearsay as well as simple hearsay should henceforth be admissible.**[13]

Hearsay Evidence Admissible Under Other Statutes

4.7 Section 1 of the 1968 Act preserved the effect of any other statutory provision which renders hearsay admissible as evidence. Many of these provisions were concerned with such matters as particular forms of proof of documents and statutory certificates or

[8] As famously in the case of *Myers* v. *D.P.P.* [1965] A.C. 1001 and more recently in the children's cases *H* v. *H*; *K* v. *K (Child Abuse: Evidence)* [1990] Fam. 86.

[9] *Ventouris* v. *Mountain (No. 2)* [1992] 1 W.L.R. 887, 899.

[10] Paras. 4.49ff. below.

[11] See section 1(1) of the Civil Evidence Act 1968.

[12] See clause 1(2)(a) for the definition of " hearsay " and clause 12 for the definition of " statement ".

[13] See clause 1(2)(b) of the draft Bill. For the meaning of " multiple hearsay " see para. 2.10 above.

declarations of certain facts in particular contexts.[14] In some cases, for instance the Bankers' Books Evidence Act 1879, the statute appears to address all the evidential issues necessary for achieving its aim.[15] In others, it simply enables a matter to be proved by the production of a document of a particular kind which would otherwise have fallen foul of the rule against hearsay. Perhaps the most important modern statutory provision is that in section 96(3)–(7) of the Children Act 1989 and the orders made under it, outlined in Part II.[16] These provide for the admission of hearsay evidence in connection with the upbringing, maintenance or welfare of a child. The main object of this provision, together with others in the 1989 Act,[17] was to allow courts dealing with issues relating to the future of children to follow the practice prevailing in the wardship jurisdiction in the High Court and to have access to all the relevant information, untrammelled by technical rules of evidence.[18] It is not our policy to affect the operation of the existing statutory provisions rendering hearsay admissible, whether for particular purposes or in particular circumstances, or to add procedural burdens where none exist at present, particularly in the case of a statutory code as recent as the Children Act.

Therefore, we **recommend that:**

2. **Existing statutory provisions making hearsay evidence admissible should not be affected by our proposals.**[19]

The Need for Safeguards

4.8 Despite the fact that the large majority of those we consulted were in favour of the abolition of the exclusionary rule, an equal proportion explicitly referred to the need for safeguards. In the Consultation Paper, in addition to notice provisions, we discussed the following safeguards:[20] power to adduce evidence reflecting on the credibility of the makers of hearsay statements, power to lead additional witnesses, restriction of the use of hearsay evidence where it is reasonable and practicable for the witness to attend, statutory guidelines on the weight to be attached to hearsay evidence, and costs rules. We also sought views as to the extent to which there should be a discretion to exclude hearsay evidence which (a) is repetitive or is otherwise of little probative value, (b) consists of statements made in contemplation of litigation, or (c) consists of previous statements of witnesses. Of the safeguards which were suggested, the majority of consultees were in favour of retaining a simplified system of notice and developing the use of guidelines on the weight to be attached to hearsay evidence. In addition, in examining the views of those who wished to preserve the exclusionary rule, it was apparent that among their major concerns was the fear that abolition would lead to cases being overloaded with second-rate evidence.

(a) Requirement to give advance notice

4.9 We intend that a major safeguard against abuse of the freedom to adduce hearsay evidence should be found in a new, simplified notice provision. We considered how best to formulate a policy that ensured advance notfication without re-introducing undue complexity or rigidity. We believe that it is important that this formulation should clarify the purpose for which the duty is imposed. Accordingly our proposed provision ensures that the criterion for establishing compliance with the duty to give notice will be whether the notice enables the recipient party to deal with the implications of the evidence being hearsay. We intend our notice provision to be a departure from the complexity of the current notice rules which require a considerable amount of detail about the statement

[14] e.g. Births and Deaths Registration Acts 1836 to 1953; Marriage Act 1949; Army Act 1955, section 198(5); Solicitors Act 1974, section 18; Inheritance (Provision for Family and Dependants) Act 1975, section 21. See generally *Phipson on Evidence* (14th ed., 1990), Chap. 31, para. 31-19.

[15] In the case of the 1879 Act, to minimise disruption of banking business by allowing copies of entries to be received rather than originals.

[16] Para. 2.31.

[17] e.g. sections 7(4) and 41(11), dealing with reports and evidence given by welfare officers and guardians *ad litem*, and section 45(7) dealing with reports and evidence in emergency protection cases.

[18] c.f. *H* v. *H; K* v. *K (Child Abuse: Evidence)* [1990] Fam. 86 (C.A.) and *Re W. (Minors) (Wardship: Evidence)* [1990] 1 F.L.R. 203 C.A. One effect of the 1989 Act was to oblige local athorities to use statutory procedures rather than wardship for child abuse cases. On statements made by children and reported to the court (e.g. through the medium of a video-recording in proceedings under the 1989 Act) see *Re M. (Minors) (Sexual Abuse: Evidence)* [1993] 1 F.C.R. 253, (C.A.).

[19] See clause 1(3) of the draft Bill. See also clause 7(2) discussed below.

[20] The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, paras. 4.7–4.9, 4.26–4.32 and 4.42–4.56.

maker and the circumstances in which the statement was made.[21] We endorse the objectives of the current system which are (a) that all issues arising out of the adduction of hearsay evidence should be dealt with before trial and (b) that there should be no surprises at trial.[22] However, we believe that these objectives can be met by a notice provision which requires a party to give notice that they intend to rely on hearsay evidence and which puts the onus onto the receiving party to demand such particulars as they require in order to be able to make a proper assessment of the weight and cogency of the hearsay evidence which the other party seeks to adduce, and to be in a position to respond adequately to it. Our proposed clause should operate in a way which is complementary to the other means by which parties can become aware of the strength of the opposing parties' case, which encourage pre-trial settlement and concentration of attention at trial on the essential issues. In the High Court and County Court where the exchange of witness statements is now mandatory[23] we consider that the most convenient means of satisfying the proposed notice requirement will be by attaching the hearsay notice to the bundle of exchanged documents. The timetable laid down for the exchange of witness statements under O. 38, r.2A is already used in group actions and in the Commercial Court,[24] to set dates by which any notice or counter-notices under the 1968 Act should be issued. For these reasons, our notice provisions will not add significantly to the procedural burdens already borne by the parties.

4.10 In proposing our notice requirement we appreciate that there are an infinite variety of circumstances which can arise during litigation, which can render compliance with such a duty impracticable. For example, in some of the courts to which the Bill will apply, it will be more common for hearings to be arranged urgently, or for circumstances to arise where advance notification carries a real risk of danger to the witness or some other person. Our draft clause allows for the possibility that in some circumstances it would be unreasonable and impracticable for any notice at all to be given. Generally we are mindful of the fact that our proposals would extend across the spectrum of civil litigation and that the rules will apply to extremely diverse proceedings, involving a wide range of litigants of different means and varying access to legal representation and being enforced by courts and tribunals of widely differing jurisdiction and composition. We have accordingly attempted to draft the notice provision in such a way as to maximise its flexibility and allow for its adaptation to meet the needs of litigants in different situations. The duty is expressly made subject to any agreement between the parties. This will permit its exclusion, if thought appropriate, in an arbitration agreement, and will also allow the party for whose benefit the clause exists to waive compliance with it if he is willing to do so.[25] The notice requirement is also made subject to rules of court to allow it to be disapplied in respect of certain classes of proceedings if, as experience is gained, this is felt to be appropriate. Where hearsay evidence is already admissible by virtue of a statutory exception, the notice requirement in our proposals will not apply.[26] Thus, for instance, it will not apply where hearsay evidence is admitted under the Children Act. Such evidence is currently admitted without any notice requirement.[27]

4.11 If a party does not give notice, where it would have been reasonable and practicable in all the circumstances for him to do so, we have decided not to recommend that the courts be allowed to refuse to admit the evidence. We consider that a failure to comply with this safeguard is a matter which should be treated as an abuse of the court's process and not as one which should go to admissibility. In reaching this conclusion we have been influenced by the arguments put during the passage through Parliament of the Bill that became the Civil Evidence (Scotland) Act 1988. In its Report the Scottish Law Commission proposed a simplified version of the formal notice and counter-notice provision in the 1968 Act.[28] It was proposed that non-compliance with this requirement could lead to the hearsay evidence being inadmissible in cases where it would have been reasonable and practicable for the witness to attend.[29] This proposal was not adopted by the Government because it

[21]R.S.C., O. 38, r.23, reproduced in Appendix 3.

[22]The Supreme Court Practice notes to O. 38, r.20/2.

[23]R.S.C., O. 38, r.2A; C.C.R., O. 20, r.12.

[24]See the Supreme Court Procedure Committee's *Guide for Use in Group Actions* (1991), ch. 5 and *The Guide to Commercial Court Practice* (1990), para. 14.1.

[25]This second qualification is a continuation of the policy of the 1968 Act (s.1(1)). We note that it is said that this is the most common means by which hearsay evidence is currently admitted. See *Cross on Evidence* (7th ed., 1990), p. 544.

[26]See clause 1(4) of the draft Bill.

[27]The Children (Admissibility of Hearsay Evidence) Order 1993, S.I. 1993, No. 621.

[28]Report on Corroboration, Hearsay and Related Matters (1986), Scot. Law Com. No. 100, paras. 3.43–3.47.

[29]See Scottish Law Commission draft Bill clause 2(3), Scot. Law Com. No. 100, p. 52.

was thought that this sanction could have the effect of simply re-introducing the rule against hearsay, which the Bill aimed to abolish completely.[30] The proposed notice provision was therefore not incorporated into the Act. As a consequence hearsay evidence is admissible in Scotland without that safeguard.

4.12 Having decided that inadmissibility should not be available as a sanction, we consider that express reference should be made to the powers of the court to penalise failure to comply with our notice requirement in other ways. We believe that the courts' inherent powers to control the conduct of proceedings include the power to rectify prejudice to parties adversely affected by a failure to comply. In these circumstances the relevant powers would be likely to include granting an adjournment to allow the recipient time to deal with the effect of late notification, or to compel the opposing party to perfect an inadequate notice. In extreme cases, it might involve ordering the trial to start again, if the adjournment brought about by the late or imperfect notice is likely to be considerable. We believe, however, that modern judges are reluctant to allow adjournments where one party has been tardy if they can possibly avoid this, because a costs sanction for tardiness is rarely a satisfactory remedy, particularly for plaintiffs who have waited a long time for a hearing date. In the wardship jurisdiction, where the hearsay rule has never applied, there is good authority for the view that it is well within the inherent powers of a judge to deal with the problems that arise where a large amount of hearsay evidence is produced.[31] In addition to these powers over the course of proceedings our draft notice provision makes reference to costs sanctions. Although, as we have said, a costs sanction does nothing to rectify prejudice, it can operate as an effective deterrent. At present Order 38, r.32 allows for costs to be ordered against a party for an abuse of the current counter-notice provisions. The rule-making power in our draft Bill[32] could be used, if it was thought appropriate, to make rules which would provide a costs sanction for a failure to give notice in contravention of the proposed notice clause. We have further provided that the court may consider non-compliance with a notice requirement when addressing itself to the question of how much weight should be attached to the evidence. In a Scottish case decided under the 1988 Act it was held that in certain circumstances the courts would declare admissible evidence to be wholly unreliable, in effect according it no weight.[33] In extreme circumstances an English court might declare that hearsay evidence tendered in unjustified non-compliance of the notice requirement could similarly be accorded no weight. We discuss the wider issues involved in weighing hearsay evidence in the next subsection.

4.13 In summary, therefore, we are conscious that the creation of a duty to give notice could be criticised as introducing an unnecessary degree of formality, albeit in our view minimal, across the board to civil proceedings.[34] However, in the light of the concerns expressed by some of our consultees at the abolition of the exclusionary rule we believe it is necessary to balance the effect of complete abolition, by recommending a notice provision which is complementary to recent procedural developments towards more open litigation. We believe that the duty is expressed in a way which allows it to be flexible in response to different situations across all types of civil proceedings. But where a duty to give notice as such is inappropriate to a whole class of proceedings we have provided a formula by which it can be disapplied in all civil proceedings which form part of that class. We are also conscious that to create such a duty without the sanction of refusal to admit the evidence, could be said to render the duty unenforceable. However, we believe that the court's inherent powers to control the course of proceedings,[35] its powers to impose costs sanctions and the proposed weighing provisions will be sufficient to ensure compliance.

We therefore **recommend that:**

3. **Parties intending to rely on hearsay evidence should be under a duty to give notice of that fact to all other parties to the proceedings wherever it is reasonable and practicable in the circumstances to enable those parties to deal with any matters arising from its being hearsay. This duty should be subject to any agreement, or any rules of court, to the contrary. Failure to comply with this duty should not affect the admissibility of the evidence but might attract costs or other sanctions at the court's disposal.**

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[30] Hansard (H.C.) 16 May 1988, col. 743; Hansard (H.L.) 12 November 1987, col. 1542.

[31] *In re K (Infants)* [1965] A.C. 201, 243A, *per* Lord Devlin.

[32] See Clause 11.

[33] *T.S.B. Scotland Plc* v. *James Mills (Montrose) Ltd. (in receivership)* 1992 S.L.T. 519.

[34] See paras. 4.9–4.10.

[35] See paras. 4.53ff.

(b) Power to call and to cross-examine additional witnesses

4.14 In our Consultation Paper we asked whether the power to call additional witnesses should function as a means to ensure that a witness whom it is reasonable and practicable to call is in fact called if his hearsay statement is challenged.[36] The great majority of those who commented on this proposed safeguard were in favour of it. We had noted that during the passage of the Bill which became the Civil Evidence (Scotland) Act 1988 the provisions to call additional witnesses[37] were highlighted as a safeguard in the situation where the hearsay statement of a witness who could have been called was disputed.[38] In view of the Government's rejection of the Scottish Law Commission's proposal that there should be a notice requirement for hearsay evidence, the power to call additional witnesses was also regarded as a safeguard against the possibility that a party might be unfairly surprised by hearsay evidence at trial.[39]

4.15 The position in England and Wales is different to that in Scotland in so far as the power to call additional witnesses falls within the court's general power to regulate its own proceedings. The only restriction on a party who wishes to call additional witnesses is that the leave of the court is required in certain circumstances, for instance after a party has closed its case.[40] However, this power in itself may not suffice as a safeguard because a party who has objected to the use of a hearsay statement and who wants the witness to give oral evidence will want to be able to cross-examine him both as to the accuracy of the statement and his credibility as a witness. Under the present law this is not possible, except where the witness has, in the opinion of the judge, proved to be 'adverse'.[41] We therefore propose a power which would enable rules of court to be made to allow a party to cross-examine a witness called by him where hearsay evidence has been adduced by another party to the proceedings and that party has refused to produce the witness.

4.16 In the Consultation Paper we also canvassed views on the possibility of giving the court power to exclude hearsay evidence when it is reasonable and practicable for the witness to attend.[42] Consultees were evenly divided on the issue. The Scottish Law Commission's recommendation of such a power was, however, not a free-standing safeguard but was bound together with its recommendation for a notice provision.[43] It was proposed that where no notice had been given or a notice had been followed by the service of a counter-notice, a party could object to the admissibility of a hearsay statement where it would have been reasonable and practicable for the statement maker to attend as a witness. As indicated above,[44] the Government rejected this proposal largely because it represented an unwelcome qualification on the general admissibility of hearsay statements at the heart of the Bill. As we have explained,[45] we have taken a different approach to safeguards which does not rely on the sanction of inadmissibility. In the light of this and of the fact that we propose that a party be given power to call and cross-examine a witness whose statement has been tendered as hearsay when the party tendering the evidence refuses to call him, we consider that it is neither necessary nor appropriate for there to be a power to exclude hearsay evidence in these circumstances. A further argument against creating such a power is that we recommend that the fact that a party is seeking to rely on a hearsay statement by a person who could be called as a witness should be a factor to be taken into account in evaluating the weight of evidence and should, as indicated below, be expressly mentioned in the statutory guidelines.[46] We consider it very unlikely that, save in

[36] The Hearsay Rule in Civil Proceedings, Consultation Paper No. 117, para. 4.45.

[37] Civil Evidence (Scotland) Act 1988, s.4.

[38] The Hearsay Rule in Civil Proceedings, Consultation Paper No.117, para. 4.28. Cf. Official Report (H.C.) of the First Committee on the Civil Evidence (Scotland) Bill, 21 June 1988 (second sitting), cols. 44–58.

[39] Hansard (H.C.) 4 July 1988, col. 733.

[40] *Cross on Evidence* (7th ed., 1990) p. 267; *Neigut* v. *Hanania, The Times*, 6 January 1983.

[41] Criminal Procedure Act 1865, s.3. Cf. *Phipson on Evidence* (14th ed., 1990), para. 12–09.

[42] The Hearsay Rule in Civil Proceedings, Consultation Paper No. 117, paras. 4.46–4.47.

[43] Report on Corroboration, Hearsay and Related Matters (1986), Scot. Law Com. No. 100, para. 3.54. The Northern Ireland Law Reform Advisory Committee is provisionally of the same view, see Discussion Paper No. 1 (1990).

[44] Para. 4.11.

[45] Para. 4.11.

[46] See draft Bill clause 4(2)(a).

the most unusual of circumstances, a court would give any weight to a statement where a witness who could speak to it is unwilling to give evidence.[47]

We therefore **recommend that:**

4. There should be a power for rules of court to be made to allow a party to call a witness whose evidence has been tendered as hearsay by another party, and to enable that party to cross-examine that person on the statement.

(c) Weighing of hearsay evidence

4.17 In the Consultation Paper we canvassed the idea that statutory guidelines should be formulated, to assist courts to assess the weight they would attach to hearsay evidence. The Inner London Magistrates' Courts Service in particular responded positively to this suggestion and considered that guidelines would have a "beneficial declaratory effect." We regard their views as particularly important, since reform in this field may be more potentially disruptive, certainly in the short term, on courts with high volumes of work, a large proportion of lay judiciary and greater numbers of unrepresented parties.[48] Among other responses in favour of guidelines we noted Lord Donaldson of Lymington's comment that as guidelines became generally known and applied, a climate would continue to be fostered where "practitioners would produce the best evidence available."

4.18 The concept of providing guides as to weight is not novel: section 6(3) of the 1968 Act contains guidelines.[49] However, the Civil Evidence (Scotland) Act 1988 does not contain any such provisions and the Scottish Law Commission only touched briefly on the suggestion.[50] We favour developing the use of guidelines for the following reasons. First, having abolished the exclusionary rule, we wish to place extra emphasis on the need for courts to be vigilant in testing the reliability of such evidence.[51] Secondly, we think it important that parties are deterred from abusing the abolition of the rule, for example by deliberately failing to give notice, by giving late and inadequate notice, by relying on hearsay evidence in preference to calling a dubious witness to give direct evidence of a fact, or by attempting to conceal an essential weakness in a case by amassing hearsay statements on a point. As we have mentioned above,[52] the draft Bill also gives an express indication that failure to comply with the duty to give notice may be taken into account at this stage as affecting the weight to be given to hearsay evidence, for instance, where the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent a proper evaluation of its weight.[53]

4.19 For these reasons, the draft Bill attached to this Report, after providing that the court is to have regard to "all the circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence"[54] in estimating the weight, if any, to be given to hearsay evidence, contains the following guidelines:—

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay and whether any person involved had any motive to conceal or misrepresent matters;

(d) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(e) whether the circumstances in which evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.[55]

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[47] See, by analogy, *T.S.B. (Scotland) plc* v. *James Mills (Montrose) Ltd. (in receivership)* 1992 S.L.T. 519.

[48] The Family Law Bar Association, which favoured abolition, commented that the role played by legally qualified clerks to the Justices is crucial to ensure that magistrates continue to be supplied with expert advice on matters of law.

[49] Cf. Evidence Act 1938, s. 2.

[50] Report on Corroboration, Hearsay and Related Matters (1986), Scot. Law Com. No. 100, para. 2.38.

[51] Clause 4(1).

[52] Para. 4.12.

[53] Clause 2(4)(b), referring to clause 4.

[54] Clause 4(1).

[55] Clause 4(2)(e).

We are conscious of the danger that providing guidelines in any statute runs the risk that they will be applied dispositively, or as a check list. We believe that we have formulated this part of the Bill as clearly as possible to make it plain that each case must be considered according to its particular circumstances and that the guidelines are not intended to impose any new obligation on courts but merely to indicate the more important factors which the court should bear in mind in the case of hearsay evidence when it performs its usual function of weighing the evidence before it.

We therefore **recommend that:**

5. **Statutory guidelines should be provided for all courts to assist them to assess the weight they should attach to hearsay evidence.**

(d) The power to exclude repetitious and superfluous evidence[56]

4.20 In 1988 the Civil Justice Review reported the concerns of judges of the Chancery Division, who supported the abolition of the hearsay rule, that further relaxation of the rule would involve the courts having to listen to unnecessary anecdotal evidence, which in turn would lead to delays and increased costs.[57] The Law Reform Committee when it considered its proposals for reform of the exclusionary rule which formed the basis of the 1968 Act, thought that the danger of such a proliferation of evidence was easily exaggerated.[58] We considered the issue as one which could go beyond the confines of 'anecdotal' evidence and extend to the possibility of superfluous, repetitious, or prolix evidence prolonging trials unnecessarily. In the Consultation Paper we therefore canvassed the possibility of giving courts specific statutory powers to control proceedings, as one of the safeguards where evidence adduced is of a hearsay nature.[59] We asked for comment on the possibility of a clause similar to that found in Rule 403 of the U.S. Federal Code,[60] which would be capable of covering superfluous evidence generally.

4.21 Although some consultees did favour a statutory discretionary power, nearly half of those who responded on this point specifically thought that the present powers of the courts were adequate. Others thought that the potential problem would be better addressed by costs sanctions, while views were also expressed that the issue concerned the weight to be attached to evidence rather than its admissibility. It further emerged from the consultation exercise that many practitioners were unsure of the extent of the courts' existing powers to exclude evidence.[61]

4.22 In the light of the responses we considered recommending an express statutory provision. In the end, however, we have decided not to recommend such a provision for three reasons:

(i) a statutory discretionary power to exclude repetitious and superfluous evidence could not sensibly be limited to evidence of a hearsay nature,

(ii) if this is a problem, it is best dealt with by stricter control of trial processes and, although it is not well known, we believe that the power to exclude repetitious and superfluous evidence in fact already exists, and

(iii) if it is thought that any further articulation of this power is desirable taking account of the modern approach to civil litigation generally, it is better dealt with by amendment of the Rules of Court.

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[56] The power to exclude insufficiently relevant evidence is dealt with at paras. 4.50–4.52.

[57] Report of the Review Body on Civil Justice (1988), Cm. 394, para. 268, and see Law Commission C.P. No. 117 (1991), The Hearsay Rule in Civil Proceedings, para. 1.3, note 3.

[58] 13th Report, Hearsay Evidence in Civil Proceedings (1966), Cmnd. 2964, para. 10.

[59] The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, para. 4.53.

[60] Evidence which is otherwise admissible (which includes hearsay, but applies generally) may be excluded if "its probative value is substantially outweighed by. . .considerations of undue delay, waste of time, or needless presentation of cumulative evidence".

[61] We describe the courts' existing powers in paras. 4.49–4.64.

(i) The scope of any statutory provision

4.23 Our project concerned hearsay evidence. However, a discretionary power to exclude superfluous and repetitious evidence could not sensibly be restricted to hearsay evidence alone. If evidence is repetitious and superfluous it is fundamentally objectionable, whether or not it is also hearsay. Furthermore a provision with such general effect raises policy issues which were not within the terms of reference for our project. Without detailed consideration of matters such as the correct balance to be struck between the competing interests of private litigants conducting their case as they see fit, the interests of would-be litigants waiting for their day in court, and the public interest in the efficient administration of justice, we consider it inappropriate to recommend enacting a statutory power with such potentially widespread effects on court management.

(ii) There are existing powers

4.24 Although it is not well-known, the power to exclude repetitious and superfluous evidence already exists. It resides both in the court's ability to exclude insufficiently relevant evidence and in the High Court's inherent jurisdiction to regulate its proceedings. We consider that these powers are adequate to deal with the problem of repetitious, superfluous and prolix evidence. In response to the concerns expressed by some of our consultees we set out these powers in the last section of this part of the Report,[62] together with our reasons for recommending that if these powers are in need of clarification this should be done by rules of court and not by primary legislation.

Competence and Credibility in relation to Hearsay Evidence

4.25 We have found no reason to depart substantively from the provisions of the 1968 Act which deal either with questions of competence in relation to the hearsay which is affected by our proposals or with the impeachment of the credibility of people who have not been called as witnesses at trial.

(a) Competence

4.26 Under the 1968 Act, the admissibility of all categories of hearsay statements is subject to the requirement that " direct oral evidence by [the statement maker] would be admissible ".[63] The maker of any statement made admissible by this section must, therefore, himself be competent to give evidence of the matter.[64] A requirement expressed in almost identical terms is present in the Civil Evidence (Scotland) Act 1988.[65] In our general admissibility clause[66] we propose that evidence shall not be excluded on the ground that it is hearsay, *if it is otherwise admissible,* but we have decided to state the competence requirement separately in response to developments in Scotland. Two recent Scottish cases have raised the issue of the date on which a witness has to be competent in order for his hearsay evidence to be admissible.[67] Neither the Scottish Act nor the 1968 Act specify a date at which the statement maker ought to have been competent to give evidence. The two candidates for this date are the date of the proceedings and the date on which the statement was made. We propose that the relevant date should be the time at which the statement was made.[68] This choice of dates will not affect the evidence of very young children since a child who is incompetent at the hearing because of lack of understanding due to his or her age will certainly have lacked the necessary understanding when the earlier statement was made.

4.27 The threshold of competence for children in civil proceedings is now provided by section 96(2) of the Children Act 1989. Where the court is of the opinion that a child called as a witness does not understand the nature of an oath, the child may give unsworn evidence if the court is of the opinion that (a) the child understands that it is his duty to

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[62] Paras. 4.49–4.64 below.

[63] See Civil Evidence Act 1968, ss. 2(1), 3(1).

[64] See *Cross on Evidence* (7th ed., 1990), p.544.

[65] S. 2(1)(b) reads—" a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement *of which direct oral evidence by that person would be admissible* " (emphasis added).

[66] Clause 1(1).

[67] *F.* v. *Kennedy* (1992) S.C.L.R. 139; *M. and Another* v. *Kennedy* (1993) S.C.L.R. 69.

[68] This was also the Scottish Law Commission's preferred date. See Memorandum No. 46 (1980), para. T.08.

speak the truth and (b) he has sufficient understanding to justify his evidence being heard.[69] Formally, this new provision represents a considerable relaxation of the situation prior to the passing of the 1989 Act when only children competent to take an oath could give evidence in civil proceedings.[70] Section 96(2) of the 1989 Act applies in all civil proceedings of any description and hence will apply to the hearsay evidence which is covered by our proposals.[71]

4.28 The other group of people who are principally affected by the competence rule are mentally incapacitated adults. There is at present no power, equivalent to that in section 96(2) of the Children Act 1989, for a court to receive unsworn evidence from adults who are unable to understand the oath but may be able to understand the duty to tell the truth.[72] The problem is not particularly acute at the moment, as the jurisdiction of the ordinary courts to deal with issues relating to the care and welfare of mentally incapacitated adults is so limited and the Court of Protection is not bound by the strict rules of evidence. The question will require some attention if a new jurisdiction such as that which we are considering in another of our current law reform projects were to come into being.[73]

(b) Impeaching credibility

4.29 We considered that it was important to preserve the position under the 1968 Act, that where a hearsay statement is adduced without oral evidence from its maker, the other side should have the same opportunity to adduce evidence for the purpose of attacking his credibility and that the party that has adduced it should be capable of presenting evidence to support the statement maker's credibility.[74] We also wish to preserve the current position that evidence may be adduced of previous and later inconsistent statements of a person not called as a witness in proceedings.[75]

We therefore **recommend that:**

6. **The requirement that the maker of a statement which is adduced as hearsay should be competent to give direct oral evidence should be retained, and that the date on which the statement was made should be the date on which the statement maker is required to satisfy this condition.**

7. **Evidence should continue to be admissible to impeach or support the credibility of a person not called as a witness, and evidence tending to show that such a person made previous or later inconsistent statements, and has thereby contradicted himself, should also continue to be admissible.**

Previous Consistent or Inconsistent Statements of Witnesses

4.30 We have described the current provisions for the admission of previous consistent and inconsistent statements in Part II.[76] We propose to preserve this position, making only those changes which follow necessarily from the new basis for admissibility that we recommend. Our draft clause therefore makes the previous statements of witnesses (other than witness statements which fall within the ambit of R.S.C. O.38, r.2A) subject to the new notice and weighing provisions. We do not intend that witness statements which fall within the ambit of R.S.C. O.38, r.2A should be regarded as 'previous statements' for the purposes of our proposed provisions. A party intending to adduce hearsay evidence of a previous statement may do so as of right only for the purpose of rebutting a suggestion that his evidence has been recently fabricated. Where the suggestion is made during the course of, or shortly before, a trial, the notice requirement would not cause difficulties, since all

[69] This is identical with the provision in s. 38(1) of the Children and Young Persons Act 1933, which provided for unsworn evidence to be given by children in criminal proceedings. This has now been repealed by the Criminal Justice Act 1991, s. 52(2) which provides that the power of the court in criminal proceedings to determine that a particular person is not competent shall apply to children of tender years as it applies to other persons.

[70] See J.R. Spencer and R. H. Flin, *The Evidence of Children* (1st ed., 1990), ch.4. The authors, however, report that in practice children's evidence might be received by courts prepared to "bend" the hearsay rule: *ibid.*, p. 54.

[71] The position of hearsay evidence admitted under the provisions of the Children Act (i.e. in connection with the upbringing, maintenance or welfare of a child), in particular section 96(3)–(7) is, as we have indicated in para. 4.7 above, unaffected by our proposals.

[72] There is also no general power, equivalent to that under section 96(3)–(7) of the 1989 Act, to receive hearsay evidence of all kinds in proceedings relating to the welfare of mentally incapacitated adults.

[73] Law Commission Consultation Papers Nos. 128–130.

[74] Civil Evidence Act 1968, s. 7(1)(a). See para. 2.20 above and clause 5(2)(a) of our draft Bill.

[75] Civil Evidence Act 1968, s. 7(1)(b); Clause 5(2)(b) of our draft Bill.

[76] Paras. 2.16–2.18.

that is required is such notice as is " reasonable and practicable in the circumstances ". In other cases the leave of the court will be required, as it is under the 1968 Act. We endorse the view that this leave requirement is necessary to prevent the pointless proliferation of previous statements, which would needlessly prolong trials and increase costs.[77]

4.31 We do not propose any provision, such as that which appears in section 2(2)(b) of the Civil Evidence Act 1968, which would govern the proper course for the leading of hearsay evidence of previous statements. Where witness statements have been exchanged, witnesses do not now necessarily give oral evidence in chief, and as the practice of judges in dealing with such evidence seems to vary, we consider that it would be inappropriate for this to be prescribed in primary legislation. It is expressly stated in the Bill that by making previous inconsistent statements generally admissible we do not intend to subvert section 3 of the Criminal Procedure Act 1865 which provides for the circumstances in which a party may treat his own witness as " adverse ", or the related rules in sections 4 and 5 of that Act.[78] We also make clear that nothing in the new provisions (taken together with the repeal of Part I of the 1968 Act) is intended to revive the pre-1968 position. The pre-1968 position was that evidence of previous statements of witnesses was admissible in certain cases only to support credibility and was not admissible as evidence of the facts stated.[79]

We therefore **recommend that:**

8. Previous consistent or inconsistent statements of a person called as a witness should continue to be admissible as evidence of the matters stated.

Common Law Exceptions to the Hearsay Rule

4.32 Section 9(2) of the 1968 Act preserves the several common law exceptions to the hearsay rule, namely admissions adverse to interest, published works dealing with matters of a public nature, and public documents and records, such as court records and treaties. In the case of adverse admissions, there will no longer be any need to provide for such exceptions and we propose that this exception be superseded.[80] In the case of published works dealing with matters of a public nature, and public documents and records, however, some of the statutory provisions which we believe should not be affected by our proposals presuppose the existence of the common law rules about public registers.[81] We have, therefore, concluded that we cannot preserve the operation of those sections without preserving the relevant rules of the common law.[82]

4.33 So far as the notice and weighing provisions are concerned, adverse admissions are in a different category from the other exceptions and it is clearly necessary that the same provisions need to apply to these as apply to other hearsay statements. By contrast, in the case of published works dealing with matters of a public nature, and public documents and records, it will be rare for the weight to be attached to such evidence to be a matter for debate. Moreover, we are preserving the common law rules concerning public registers, and it is not our policy to add procedural burdens where none exist at present. We have therefore concluded that the notice and weighing provisions should not apply to these cases.[83]

4.34 We also propose to retain the clarificatory provisions which are now contained in the 1968 Act to the effect that matters of reputation are admissible as evidence of character, and that evidence of reputation or family tradition are admissible in particular cases as evidence of fact and not as a statement or multiplicity of statements.[84] Evidence of reputation is by necessity composed of a multiplicity of hearsay statements and, if treated

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[77] See para. 2.16 above.

[78] Clause 6(3) (which describes the provisions of the 1865 Act).

[79] Clause 6(5).

[80] Clause 7(1).

[81] Evidence (Foreign, Dominion and Colonial Documents) Act 1933, s.1; Oaths and Evidence (Overseas Authorities and Countries) Act 1963, s.5, on which see clause 13(3) of the draft Bill.

[82] Clause 7(2).

[83] *Ibid.*

[84] Civil Evidence Act 1968, s. 9(3); clause 7(3) of our draft Bill.

as such, strict application of the notice and weighing procedures would be impossible. Exactly the same considerations apply to questions of pedigree and to proof of public or general rights, such as rights of way.

We therefore **recommend that:**

9. **Adverse admissions should be admissible as hearsay statements under clause 1 of the draft Bill and should be subject to the notice and weighing provisions.**

10. **The common law rules effectively preserved by section 9(1) and (2)(b) to (d) of the Civil Evidence Act 1968 concerning published works dealing with matters of a public nature, and public documents and records shall continue to have effect.**

11. **Evidence of reputation or family tradition for certain specified purposes should be admissible as a fact and not as a statement or multiplicity of statements.**

Statements

4.35 Hearsay evidence is constituted by statements. These statements can be made orally or in writing, be contained in a record or a computer print-out or in many other forms. We consider that, as part of the definition of hearsay, "statement" needs to be defined. We have already commented on the fact that there has always been a debate as to whether assertive or non-assertive conduct or both should come within the definition of a hearsay statement.[85] The question is unresolved and the consultation exercise did not take the argument any further. The 1968 Act did not provide an answer but it seems to us that further attempts to resolve the issue are misplaced in the context of the reforms which we are proposing and we consider that this particular issue should, as under the 1968 Act, be a matter for judicial consideration and development.

4.36 Hearsay statements in whatever form will be made admissible as evidence of the matters stated by clause 1 of our draft Bill. In the next section we consider the proof of statements in documents and copies of documents. Business and computerised records, which raise additional issues as to their manner of proof, are considered thereafter.

Proof of Statements Contained in Documents and Copies of Documents

4.37 We have described the provisions governing the proof of statements in original documents and the admission of copies of documents under the 1968 Act in Part II of this Report.[86] We propose not to depart from the policy of the 1968 Act concerning the proof of original documents and the authentication of copies of documents. In civil proceedings the use of copy documents rather than originals is widespread; it avoids disruption to business and administration in cases where the authenticity of the document is not at issue. We have decided not to follow the lead of the Civil Evidence (Scotland) Act 1988, which provides that a copy of a document shall be deemed to be a true copy if it purports to be authenticated by "a person responsible for the making of the copy".[87] We propose instead that the manner of authentication should continue to be a matter entirely for the court at its discretion. We do propose, however, to depart from the existing law in so far as we propose that copies of copies should be received in evidence, subject to authentication in such a manner as the court may approve.[88] Our draft provision follows the wording of section 27 of the Criminal Justice Act 1988.

We therefore **recommend that:**

12. **Where a statement contained in a document is admissible as evidence in civil proceedings, it should be capable of being proved, by the production of that document, or by the production of a copy of that document, authenticated in such manner as the court might approve. It should be immaterial how many removes there are between a copy and the original.**

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[85] See para. 2.2 above and The Hearsay Rule in Civil Proceedings (1991), Consultation Paper No. 117, paras. 2.9–2.11.

[86] Para. 2.21.

[87] Civil Evidence (Scotland) Act 1988, s.6. It has been commented that this section presumably requires the office junior in charge of a photocopier to attest to a copy of a document. See D. Field, "Civil Evidence: A Quantum Leap" 1988 S.L.T. 349.

[88] Draft Bill Clause 8(2).

Proof of Business, Computerised and other Records

(a) Records of a business or a public authority

4.38 We propose that the provisions of section 4 of the 1968 Act be replaced with a simpler regime. As discussed above,[89] the 1968 Act ties the admissibility of records to the existence of a chain of duty linking the suppliers of information to the record in question and requiring personal knowledge by the compiler of the matters recorded. Under our proposed Bill, business and other records will be admitted under clause 1. We intend that the court's approach to the reliability of the records should be governed by the same considerations as will apply to all other forms of hearsay evidence, namely the weighing provisions contained in clause 3 of the draft Bill. We do not consider that any additional safeguards beyond those applicable to all other hearsay statements are required for business or other records.

4.39 In addition we consider that steps should be taken to make it easier to get such records admitted in evidence. Once it is accepted that there is often unlikely to be a witness who can give relevant and direct evidence of all or any aspects of the compilation of a record, it becomes artificial to require the record to be produced by a witness.[90] We therefore propose that documents certified by an officer of a business or public authority should be capable of being received in evidence without further proof.[91] The form and content of certificates may be a matter which will call for some guidance, in the form of rules.[92] If so, then we would hope that the general comments we make at paragraph 4.42 below would be followed. For the purposes of this section we propose that " business " be defined widely so as to include " any activity regularly carried out over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual ". This is to reflect our view that it is the quality of regularity that lends a business record its reliability, not the existence of a profit motive or the juridical nature of the person carrying on the activity. We are conscious that a business defined in this way may not have " officers " in any strict sense of the word. We have accordingly defined " officer " in terms of a sufficiently responsible person in relation to the records or activities of the business concerned.

4.40 We consider that the absence of an entry in a record should be capable of being formally proved, despite the fact that proving a negative and more particularly the inferences to be drawn from it, will rarely be possible by reference to any human source.[93] In our view the most appropriate method of doing this is by way of affidavit of an officer of the business or authority.[94] In line with our policy of allowing self-regulation by the parties and the courts, we deliberately refrain from specifying the contents of the affidavit. Clearly, in those exceptional cases where the fact of the absence from the record is of particular significance, or where the inferences sought to be drawn are challenged by the other side, the weighing provisions, the inherent powers of the court to require further particulars, and the normal pressures of litigation can be expected to produce further evidence, in order to explain such matters as the system of record keeping and its reliability.

4.41 We have sought to define the term " records " in a manner which concentrates on the form in which they are kept and which allows for the widest possible admission.[95] We have not sought to define the type of record which is capable of being admitted. Our proposals do not resolve the question, discussed above,[96] of whether a report by a D.T.I. inspector constitutes a record. However, this question only goes to the *manner* of admission of the document. Under our proposals statements in such documents will be admissible by virtue of the general abrogation of the exclusionary rule. Legitimate complaints about balance and accuracy would accordingly be dealt with as matters going to weight. We are aware, of course, that in the case of reports by D.T.I. inspectors, the report may draw on interviews with witnesses conducted under conditions of confidentiality and the inspectors will not be able to attest personally to all the facts asserted in the report. In complex cases

[89] See paras. 2.11–2.12 and 3.9–3.13 above.

[90] See the discussion at para. 3.12.

[91] Clause 9(1). This facilitating provision, along with the others contained in our proposed clause, may be disapplied by the court in appropriate circumstances: see Clause 9(5).

[92] Clause 11 empowers the making of rules for carrying into effect the provisions of the draft Bill.

[93] *R.* v. *Shone* (1982) 76 Cr. App. R. *72; R.* v. *Shepherd* [1993] 2 W.L.R. 102.

[94] Clause 9(3).

[95] Clauses 9(2) and 9(4).

[96] Paras. 3.10–3.11 above.

questions of public interest immunity are also likely to arise. These matters, however, will fall to be dealt with under the ordinary rules of evidence and should not, in our view, be governed by a rule which excludes the contents of such reports altogether from admission as evidence.

4.42 Business and other records have long been treated as belonging to a class of evidence which can be regarded as likely to be reliable. However, we recognise that there are bound to be exceptions in particular cases. We have therefore included a specific discretion, allowing courts to disapply the certification provisions.[97] We also recognise that there may be other classes of evidence which can be regarded as likely to be reliable but in respect of which there is no similar self proving process. The Society of Public Notaries of London, in its response to us, pointed to the unfavourable evidential status of notarial acts in the English courts when compared with the law in civil law jurisdictions in which a notarial act may be tendered in evidence without further proof being required of its provenance or of the veracity of the statements made in it by the notary. This was said to inhibit the international exchange of legal instruments and the harmonisation of legal procedures.[98] The abolition of the hearsay rule would in fact remove one of the hurdles to the reception of notarial acts in evidence. However, the question whether notarial acts should be received as proof of the statements of fact made by the notary raises wider issues about the categories of self-proving documents which fall outside the scope of our inquiry, on which we have not consulted, and on which we therefore make no recommendations.

(b) Computerised records

4.43 In the light of the criticisms of the present provisions and the response on consultation,[99] we have decided to recommend that no special provisions be made in respect of computerised records. This is the position in Scotland under the 1988 Act and reflects the overwhelming view of commentators, practitioners and others. That is not to say that we do not recognise that, as familiarity with and confidence in the inherent reliability of computers has grown, so has concern over the potential for misuse, through the capacity to hack, corrupt, or alter information, in a manner which is undetectable.[100] We do not underestimate these dangers. However the current provisions of section 5 do not afford any protection and it is not possible to legislate protectively. Nothing in our proposals will either encourage abuse, or prevent a proper challenge to the admissibility of computerised records, where abuse is suspected. Security and authentication are problems that experts in the field are constantly addressing and it is a fast evolving area. The responses from experts in this field, such as the C.B.I., stressed that, whilst computer-generated information should be treated similarly to other records, such evidence should be weighed according to its reliability, with parties being encouraged to provide information as to the security of their systems.[101] We have proposed a wide definition for the word " document ".[102] This will cover documents in any form and in particular will be wide enough to cover computer-generated information.

We therefore **recommend that:**

13. **Documents, including those stored by computer, which form part of the records of a business or public authority should be admissible as hearsay evidence under clause 1 of our draft Bill and the ordinary notice and weighing provisions should apply.**

14. **The current provisions governing the manner of proof of business records should be replaced by a simpler regime which allows, unless the court otherwise directs, for a**

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[97] Clause 9(5).

[98] We were told that whereas instruments issued by notaries in most other European Community countries may now be enforced in the United Kingdom under Article 50 of the Brussels Convention (Civil Jurisdiction and Judgments Act, 1982), in formalistic jurisdictions acts of English notaries are liable to be rejected on the grounds that they do not possess the necessary quality of authenticity in England.

[99] See the discussion at paras. 3.14–3.21 above.

[100] As examples of the growing concern in this field, see Criminal Law Computer Misuse (1989), Law Com. No. 186, Cm. 819; Data Protection Act 1984; Computer Misuse Act 1990, s. 1.

[101] We were also aware of the Verdict Report 1987 on the current position on legal admissibility of digitally transmitted and processed data and information in the U.K. prepared by the Central Computer and Telecommunications Agency (C.C.T.A.) for H.M. Treasury. This report recommended that repeal of section 5 should be balanced by the establishment of an official body to draw up guidelines and a code of practice with regard to the design, security and management of computer and communications systems.

[102] Clause 12 of the draft Bill.

document to be taken to form part of the records of a business or public authority, if it is certified as such, and received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records.

15. The absence of an entry should be capable of being formally proved by affidavit of an officer of the business or authority to which the records belong.

The Meaning of "civil proceedings"

(a) Tribunals

4.44 Section 18(1) of the 1968 Act includes within its definition of civil proceedings "civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply".[103] Although we are proposing that the exclusionary rule at the heart of the 1968 Act be abolished, we recommend that the strict rules of evidence should be retained as the criterion for the application of our Bill's provisions. Unlike the Civil Evidence (Scotland) Act 1988 our Bill retains the distinction between hearsay and other evidence and distinct safeguards apply to the former. Accordingly tribunals in which the hearsay rule used to be applied[104] will now be under a duty to apply the section 3 provisions while those tribunals which have a more informal, less court-like procedure will not be affected. The Civil Evidence (Scotland) Act 1988, by contrast, applies to all civil courts and tribunals unless there is a specific provision in their rules of procedure.[105] We have not followed this approach for two reasons. Firstly, because in Scotland the abolition of the exclusionary rule was not accompanied by procedural safeguards, whereas our Bill includes specific procedural provisions for dealing with hearsay evidence. Secondly we did not consider it desirable to impose on tribunals, most of whom do not apply the strict rules of evidence generally,[106] a specific requirement to disapply the procedural requirements we propose. Our proposed safeguards will apply wherever the hearsay rule used to apply and not otherwise.

(b) Arbitrations

4.45 We intend our reforms to apply to those arbitrations in which the strict rules of evidence are applied.[107] The orthodox position taken in the texts on arbitration and reflected in our Consultation Paper is that, in the absence of a stipulation to the contrary, arbitrations are subject to the rules of evidence.[108] However, this view has recently been questioned.[109] We also understand that as part of the consideration of a statutory restatement of the law of arbitration the Department of Trade and Industry's Advisory Committee on Arbitration is likely to recommend that the strict rules of evidence should not apply to arbitration. Accordingly we do not consider that it is either necessary or appropriate in the context of these proposals to resolve this question. However, in the current state of the law, professional organisations which determine the rules governing many arbitrations and advisors considering arbitration clauses in contracts will need to examine our recommendations and decide whether they wish to opt out of them by making appropriate provision in the rules or in the contract. Our Bill takes a neutral stance and we have adopted a definition which leaves the way clear for resolution of this question either by legislation on arbitration or, failing that, by the courts.

We therefore **recommend that:**

16. The provisions we recommend should apply to all civil proceedings to which the strict rules of evidence apply.

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[103] Civil Evidence Act 1968, s. 18(1)(a).

[104] e.g. the Lands Tribunal, the Solicitors Disciplinary Tribunal and the Commissioners of Income Tax.

[105] Civil Evidence (Scotland) Act 1988, s. 9(c).

[106] Submission of the Council on Tribunals.

[107] Clause 10.

[108] *Russell on the Law of Arbitration* (20th ed., 1982) p. 273; Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed., 1989), p. 352; *Halsbury's Laws of England* (4th ed.) vol. 2, para. 672. The application of the rules to arbitrations under County Courts Act 1984, section 64 are freed from the application of the strict rules of evidence by section 10(3A) of the 1968 Act and C.C.R., Order 19, rule 5(2). Arbitration not conducted under English procedural law, is not considered in the above texts.

[109] Sir Johan Steyn and V. V. Veeder Q.C., I.C.C.A. *International Handbook on Commercial Arbitration* (1988), p. 24; R. J. Buxton Q.C., "The Rules of Evidence as Applied to Arbitrations", (1992) 58 J.C.I. Arb 229. See also S. Kyd, *A Treatise on the Law of Awards* (2nd ed., 1799), p. 3 which suggests that arbitration was not subject to the strict rules of evidence, and note that it appears that arbitration was never subject to the rule that a party could not give evidence (the provisions of section 12(3) of the Arbitration Act 1950 can be traced back to section 41 of the Common Law Procedure Act 1833).

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Rule-making Powers

4.46 We have already referred at length to the shortcomings of the current County Court and High Court Rules.[110] However, it is unrealistic to assume that the proposed new system can be fully implemented without the creation of any rules. We have therefore included a general rule-making power.[111] We do not recommend the formulation of any particular rules at this time. We believe that it is possible that, as the Act is implemented, experience will reveal a need for particular aspects to be clarified, with the aim of providing further guidance to litigants and courts.[112] We would stress, however, that our view, which was supported in consultation, is that any rules of court which are made should be uniform, so far as possible, and equally capable of being applied to every tier of court.

We therefore **recommend that:**

17. There should be power to make rules of court to make such provision as is necessary or expedient for putting into effect the provisions proposed in the draft Bill.

Corroboration

4.47 Section 6(4) of the 1968 Act specifically provides that hearsay evidence shall not be admissible to corroborate evidence given by the maker of a statement. We do not consider it is necessary to include a similar provision. We believe that the temptation to try to construct a strong case out of several thin statements is addressed by the weighing considerations we propose in clause 3. A multiplicity of statements emanating from the same witness may not in any event amount to corroboration, which must be provided by an independent source.[113] Furthermore, we are doubtful whether the requirement for corroboration still exists in any area of civil litigation.[114]

Savings

4.48 There are many provisions in rules of court by which the court may set conditions on the admissibility of certain classes of evidence, for example evidence by affidavit[115] or expert evidence.[116] We consider it would be wrong in principle if any of our proposed reforms were to allow parties to evade a restriction placed on the admissibility of a piece of evidence by adducing it as hearsay.[117]

We therefore **recommend that:**

18. None of the above recommendations should affect the exclusion of evidence on grounds other than that it is hearsay. This should be the case whether the evidence falls to be excluded in pursuance of any enactment or rule of law or for failure to comply with rules of court or an order of the court.

The Court's Existing Powers to Exclude Repetitious, Superfluous and Prolix Evidence

4.49 As indicated above,[118] some of those who replied to our Consultation Paper were concerned that the abolition of the exclusionary rule could lead to a proliferation of evidence of little probative value, and some therefore favoured the enactment of a specific power to exclude evidence which is repetitious, superfluous or prolix.[119] We have already given our reasons for not recommending such a power.[120] However, as the existing powers of the court in relation to all admissible evidence are not well known, we thought that as part of the background to our recommendations, it would be useful to describe the powers

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[110] See paras. 3.2–3.7 above.

[111] Clause 11.

[112] For example, it may become necessary to specify the basic elements to be contained in a Notice, possibly in line with R.S.C., O. 41, r.5(2), which relates to affidavit evidence.

[113] For a brief statement, see Corroboration of Evidence in Criminal Trials (1991), Law Com. No. 202, Cm 1620, Appendix B.

[114] See *Cross on Evidence,* (7th ed., 1990) p. 248, n.9.

[115] R.S.C., O. 38, r.2; C.C.R., O. 20, r.8.

[116] R.S.C., O. 38, r.36; C.C.R., O. 20, r.27.

[117] Cf. *Rover International Ltd.* v. *Cannon Films Sales Ltd.* [1987] 1 W.L.R. 1597, 1601.

[118] Para. 4.20.

[119] Para. 4.21.

[120] Paras. 4.22–4.24.

we believe the court has to exclude, or otherwise exert some degree of control over, evidence adduced by the parties. These may have been masked in part because of the exclusionary rule concerning hearsay which in its unreformed state, operated as a blunt and indiscriminate means of excluding evidence. If our recommendations are accepted the existing powers of the court, which are more precise and sensitive to context, will become more important.

(a) The power to exclude insufficiently relevant evidence

4.50 The courts have traditionally ruled that evidence that goes to collateral issues is inadmissible on the ground that it is insufficiently relevant.[121] It is a basic rule that the subject of the test of relevancy is the fact averred (in relation to the cause pleaded), and not the evidence itself adduced in support of it.[122] However, the aim of this practice of excluding evidence is to keep the court's investigation "within reasonable limits, and secure promptitude, precision and satisfaction in the administration of justice".[123] Cross draws the cases together in support of a general rule which states that—

"[A]ll evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or *insufficiently relevant* should be excluded."[124]

4.51 In addition to this power to exclude evidence adduced in support of insufficiently relevant facts, there is authority for the proposition that the courts have power to exclude evidence, even where it is relevant, on the grounds of prolixity. In the Courts of Equity of the last century "needlessly prolix" evidence could be declared to be "impertinent", along with evidence of matters not in the pleadings and evidence of admitted or immaterial issues.[125] Impertinent schedules or documents could be struck out and a costs penalty imposed by a taxing master. In a case in which lengthy and over-complicated tradesmens' bills were declared impertinent, it was made clear that needless prolixity was itself impertinent, even though the fact in issue was relevant to the case as pleaded.[126] In another case documentary answers to interrogatories were said to be impertinent because they were set out at too full a length.[127] However, with regard to oral evidence it was not considered as a species of impertinence that many witnesses are examined on the same fact.[128]

4.52 In more recent textbooks a similar principle is stated in a more general form without citing the old Chancery practice of referring a party for impertinence e.g. "The rule confining evidence to the points in issue not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving the issues themselves."[129] *Best on Evidence*[130] states that evidence may be excluded if its production would cause needless vexation, expense or delay.[131] *Phipson on Evidence* is less forthright but suggests that evidence of marginal relevance which tends merely to create prejudice, a confusion of issues or a waste of time will be rejected.[132] Apart from Cross, whose analysis has been considered above,[133] the textbooks tend not to cite any authorities for their assertions. *Best,* for example, refers to a "power in all tribunals" to

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[121] *Agassiz* v. *London Tramway Co.* (1872) 27 L.T. 492; *Hollingham* v. *Head* (1858) 27 L.J.C.P. 241.

[122] *Phipson on Evidence* (14th ed., 1990), para. 7–04. Cf. *R.* v. *Kilbourne* [1973] A.C. 729, 756D, *per* Lord Simon of Glaisdale: "evidence is relevant if it is logically probative or disprobative of some matter which *requires* proof" (emphasis added).

[123] *Per* Lord O'Hagan in *Managers of the Metropolitan Asylum District* v. *Hill* (1882) 47 L.T. 29, 31.

[124] *Cross on Evidence* (7th ed., 1990), p.51 (emphasis added).

[125] R.N. Gresley, *A Treatise on the Law of Evidence in the Courts of Equity* (1st ed., 1836), p.158.

[126] "A prolix setting forth of a pertinent manner is impertinent" *Slack* v. *Evans* (in Chancery, M.T. 1819) (1819) 7 Price 278, n. Cf. *Bally* v. *Williams* (1825) 1 M'Cle 334.

[127] *King* v. *Teale* (1819) 7 Price 278.

[128] *Vaughan* v. *Lloyd* (1787) 1 Cox 312.

[129] Taylor, *A Treatise on the Law of Evidence as administered in England and Ireland* (12th ed., 1931) (Ed. R.P. Croom-Johnson and G.F.L. Bridgman), para. 316.

[130] (12th ed., 1922), para. 47.

[131] There is an analogous well established power to exclude 'similar fact' evidence in civil proceedings, where its probative value is outweighed by the degree to which its introduction will complicate and prolong the trial. See *Berger* v. *Raymond Sun Ltd.* [1984] 1 W.L.R. 625, 632E and *Mood Music Publishing Co.* v. *De Wolfe Ltd.* [1976] 1 Ch. 119, 127D. See also, J. Peysner, "Being Civil to Similar Fact Evidence", (1993) 12 C.J.Q. 188, 194.

[132] (14th ed., 1990), para. 7–07. For a similar approach, see A.A.S. Zuckerman, *The Principles of Criminal Evidence* (1st ed., 1989), p. 40.

[133] Para. 4.50.

restrain the liberty of the litigant within due bounds so as to prevent abuse to the administration of justice.[134] The only possible source of this power (in the absence of case law or statute) is that referred to above as the inherent jurisdiction of the court.

(b) The inherent jurisdiction of the court

4.53 The inherent jurisdiction is a pool of innominate powers to which the High Court may have recourse in the exercise of all its functions so as to fulfil its role as a superior court.[135] It enables the High Court to "act effectively within its jurisdiction".[136] Lord Devlin in *Connelly* v. *D.P.P.* asserted that the inherent powers of the High Court may be used to "make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by all sides".[137] Only the High Court possesses an inherent jurisdiction on which it can draw directly but any practices or rules which are established under it can be applied in the County Court by virtue of section 76 of the County Courts Act 1984.[138] Although a magistrates' court has powers to exclude insufficiently relevant evidence it has no inherent jurisdiction itself to control abuse of its own proceedings.[139] It cannot therefore develop its own powers or apply any High Court powers for dealing with repetitious evidence. If, in their family proceedings jurisdiction or their residual other civil jurisdiction, prolix or superfluous evidence proves to be a problem, we consider that the enactment of a statutory provision analogous to section 76 of the County Courts Act 1984 would be the most appropriate solution.

4.54 The fact that the inherent powers of the court have not been invoked (or at least not litigated) to exclude prolix, repetitious or superfluous evidence may be due to a number of factors including the existence of the hearsay rule, the posthumous influence of the best evidence rule and a view of the judicial function which suggested that its exercise was inappropriate. As far as the hearsay rule is concerned it would no doubt have been simpler to exclude doubtfully relevant evidence on the ground of it being hearsay rather than on other less well defined grounds. The best evidence rule was held in high regard in the late eighteenth and early nineteenth centuries. Chief Baron Gilbert, in his 1756 treatise on evidence, for example called it the "first and most signal rule of evidence".[140] However, its operation as a rule excluding inferior secondary evidence was whittled away in the nineteenth century until all that remained was a rule excluding copies or substitutes of documents where the absence of the originals could not be adequately explained.[141] The rule has been interpreted at different times as having an exclusionary effect and an inclusionary effect.[142] After its demise as a strict rule, it would seem that the exclusionary aspect remained lodged in the minds of advocates and judges as a "large moral principle" which therefore operated as an informal means of excluding superfluous evidence throughout the nineteenth century, and perhaps into the early twentieth century as well.[143]

4.55 We believe that the main reason why judicial powers to exclude repetitious and superfluous evidence have remained unfamiliar and obscure is the view that the judge's function is to be a "passive umpire". This militated against judicial intervention in the course of proceedings.[144] There is good reason to think that this view of the judge as merely 'holding the ring' has recently undergone a reappraisal.

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[134] *Best on Evidence* (12th ed., 1922), para. 47.

[135] See Sir I.H. Jacob, "The Inherent Jurisdiction of the Court" in *The Reform of Civil Procedural Law and other Essays in Civil Procedure* (1982). For a useful summary, see *Halsbury's Laws of England* (4th ed.), vol. 37, para. 14.

[136] *Per* Lord Morris of Borth-y-Gest in *Connelly* v. *D.P.P.* [1964] A.C. 1255, 1301. Cf. *Montreal Trust Company* v. *Churchill Forest Industries* [1971] 4 W.W.R. 542.

[137] [1964] A.C. 1255, 1347.

[138] This section reads "In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court". Cf. *Williamson* v. *Rider* [1963] 1 Q.B. 89, 94 and *Senior* v. *Holdsworth* [1976] Q.B. 23, 32.

[139] Stone's Justices' Manual (1993), para. 1–49. Cf. *Reg.* v. *Clerkenwell Metropolitan Stipendiary Magistrate, ex p. The Telegraph P.L.C. and Others* [1993] 2 W.L.R. 233, 239B.

[140] *Gilbert on Evidence* (1st ed., 1754), p.3.

[141] See *R.* v. *Francis* (1874) L.R. 2 (contradicting *Chenie* v. *Watson* (1797) Peake Add. Cas. 123) and *Dowling* v. *Dowling* (1860) 10 Ir. C.L.R. 244 (overruling *Williams* v. *East India Co.* (1802) 3 East 193); *Garton* v. *Hunter* [1969] 2 Q.B. 37, 44D.

[142] For these two aspects see *Cross on Evidence* (4th ed., 1974) p. 15. According to the traditional exclusionary interpretation only the best evidence is to be admitted. The less familiar inclusionary interpretation is that the best evidence that *the nature of the case will allow* should be received. For the latter aspect see *Omychund* v. *Barker* (1745) 1 Atk. 21, which held that the depositions of non-christian "Gentoo" witnesses should be received. Cf. *R.* v. *Governor of Pentonville Prison, ex p. Osman* [1989] 3 All E.R. 701, 728.

[143] See Thayer, *A Preliminary Treatise on Evidence at Common Law* (1898), p. 505.

[144] *R.* v. *Dora Harris* [1927] 2 K.B. 587, 590.

4.56 In *Mercer v. Chief Constable of the Lancashire Constabulary* Lord Donaldson M.R. said that,

> " Over the last quarter of a century there has been a sea change in legislative and judicial attitudes towards the conduct of litigation, taking the form of increased positive case management by the judiciary and the adoption of procedures designed (a) to identify the real issues in dispute and (b) to enable each party to assess the relative strengths and weaknesses of his own and his opponent's case at the earliest possible moment and well before any trial. "[145]

More recently in *A.B. v. John Wyeth and Brother Ltd.*, Steyn L.J., in the context of a group action, said that,

> " Inevitably, High Court judges assigned to the control of such litigation must depart from transitional procedures and adopt interventionist case management techniques. "[146]

Steyn L.J. founded this proposition on the inherent jurisdiction of the court and, if this is so, it is difficult to see how, as a matter of logic, the power to adopt such techniques can be restricted to group actions. Responses to the Consultation Paper from judges and practitioners indicated a high degree of support for this sort of approach to litigation practice.

4.57 The House of Lords has also recently called for judges to become more involved in pre-trial management—

> " The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisors are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the judge taking time to read in advance pleadings, documents certified by counsel to be necessary, and short skeleton arguments of counsel."[147]

Lord Templeman went on to recommend that the *time and scope of oral evidence* and oral argument should be limited by the judge and that appellate courts should be unwilling to entertain complaints concerning the results of this practice.[148]

4.58 The judicial dicta cited above suggest that the traditional role of the judge as " passive umpire " is being challenged in two respects. First, through calls for greater judicial involvement in pre-trial case management, and secondly through calls for greater judicial intervention at the trial itself. These two areas of development also represent two of the main themes underlying the recommendations of the Independent Working Party set up jointly by the General Council of the Bar and the Law Society.[149] The Report cites the unnecessary prolongation of cases and delay in the legal process as the main impetus for reform. It recommends a more interventionist judicial approach both at the pre-trial stage and at trial, " to ensure that the parties get on with the action and that there is no unnecessary waste of valuable court time ".[150]

(i) Pre-trial management

" If the courts once provided a potent but immobile backdrop against which parties prepared for trial in their own way in their own time, that is no longer the case ".[151]

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[145] [1991] 1 W.L.R. 367, 373C.

[146] [1993] 4 Med. L.R. 1, 6. See generally the Supreme Court Procedure Committee's *Guide for Use in Group Actions* (1991), ch. 5.

[147] *Banque Keyser Ullman S.A.* v. *Skandia (U.K.) Insurance Co. Ltd.* [1991] 2 A.C. 249, 280.

[148] *Ibid.*

[149] " Civil Justice on Trial—The Case for Change ", June 1993, para. 1.8.

[150] *Ibid.*, para. 4.9.

[151] Glasser and Roberts, " Dispute Resolution: Civil Justice and its Alternatives ", (1993) 56 M.L.R. 277, 281.

4.59 We have already commented on the mandatory exchange of witness statements and on other procedural reforms which make parties to litigation more fully aware of the opposing side's case.[152] In *Mercer v. Chief Constable of the Lancashire Constabulary*[153] Lord Donaldson M.R. drew attention to the possibilities provided by the summons for directions for greater judicial regulation of the course of litigation. He called in particular for a more robust use of the provisions of R.S.C., Ord. 25, r.4 under which the court can secure agreements from the parties as to the conduct of proceedings.[154] The arrangements for pre-trial directions, which have been operating in family proceedings since the Children Act came into force, also operate as a form of pre-trial review.[155] The introduction of a pre-trial review was considered by both the Civil Justice Review in 1988[156] and the Independent Working Party of the General Council of the Bar and Law Society in 1993.[157] The Civil Justice Review recommended that the system of pre-trial hearings in the High Court should be expanded on an experimental basis.[158] The Independent Working Party recommended the introduction of a pre-trial review to consider *inter alia* a provisional time-table for the giving of evidence and the identification of the extent and nature of documentation to be presented before the court.[159] The intended effect of this hearing is to encourage settlement and reduce the times of trials.[160]

4.60 Greater use of pre-trial management fits well with the policy behind our proposed notice and weighing provisions, which aim to create an atmosphere in which the minds of both the judge and the parties are concentrated on assessing the true probative value of evidence to be adduced.

(ii) Trial procedure

4.61 In urging greater intervention by the judge at trial along similar lines to the suggestions made by Lord Templeman, cited above,[161] the Joint Working Party of the Bar Council and Law Society did not propose that judges be given any new powers. Although this is not explicitly stated in the report it is clear that the powers required to put their recommendations on judicial intervention into effect must have been thought to be within the existing inherent jurisdiction of the court to regulate its own proceedings. The principle that "judicial intervention should balance the right of each side to a fair hearing with the need not to waste court time"[162] is one which we would endorse. We consider it equally appropriate when it is applied to the exercise of the courts' powers in relation to the adduction of repetitious and prolix evidence. In those cases where greater intervention at the pre-trial stage is possible, it will not itself prevent the adduction of prolix, repetitious or superfluous evidence. However, the fact that the judge will be much more familiar with the case on such occasions should encourage the use of the whole range of available powers which we have discussed.[163] We have noted the position of the County Court in respect of the inherent jurisdiction of a court to regulate its own proceedings.[164] We consider that all of the proposals for the reform of civil procedure that we have discussed are equally applicable, with necessary modifications, to the County Court.[165]

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[152] Paras. 2.32–2.34.

[153] [1991] 1 W.L.R. 367, 376A.

[154] This call is echoed by the Independent Working Party Report, para. 4.33.

[155] See the Family Proceedings Rules, Rule 2.24(4), S.I. 1991, No. 1247 L.20. This opportunity for pre-trial review also applies to magistrates' courts.

[156] Report of the Review Body on Civil Justice, Cm. 394, paras. 255–260.

[157] "Civil Justice on Trial—The Case for Change", June 1993, paras. 4.31–4.33.

[158] Cm 394, recommendation 24(ii).

[159] *Ibid.*, para. 4.33. See also para. 4.33(iii).

[160] *Ibid.*, para. 4.31. However, for the view that expanded interlocutory steps increase delay and costs, see A. Jack, "Radical Surgery for Civil Procedure", (1993) 143 N.L.J. 891.

[161] Para. 4.57.

[162] *Ibid.*, para. 6.14 (vi).

[163] *Ibid.*, para. 6.13.

[164] Para. 4.53.

[165] The Report by the Independent Working Party set up by the General Council of the Bar and the Law Society recommends the development of a uniform rule book for both the High Court and County Court: para. 7.3.

(c) Articulation in rules of court rather than statute

4.62 If it is thought that the courts' exclusionary powers should be made more explicit we believe that this should be done by Rules of Court rather than primary legislation.[166] The "Guide to Commercial Court Practice",[167] for example, which draws together the various Rules of Court and Practice Directions as a guide to the way in which the Commercial Court regulates its own procedure, has been described as stemming from the inherent jurisdiction of the High Court.[168] The exclusion of relevant evidence in the interests of the good administration of justice has been said to be an area in which "the development of the law has generally been judicial; parliamentary intervention is likely to be at best occasional and delayed".[169] Although this remark was made in the specific context of a claim of public interest immunity it is submitted that the exclusion of needlessly prolix and superfluous evidence can also be said to be "peculiarly within the competence of the judge in his control of the *cursus curiae*".[170]

4.63 Until the proposed procedural developments we have described come into effect it will often not be until the end of a trial that the relation of the evidence as a whole to the issues at the heart of a dispute will be clear. It will be far easier to make a fair judgment about what evidence was in fact *needlessly* prolix or otherwise superfluous at that stage. It may, therefore, be considered better to make superfluity or prolixity of evidence a matter which is taken into account when costs are assessed. For example, it could be made clear, by amendment to the Rules or otherwise, that "misconduct" for the purposes of R.S.C., Ord. 62, r.10 includes the adduction of superfluous or repetitious evidence. Such a measure could, in due course, have a significant regulatory effect.

(d) Conclusion

4.64 Civil procedure is still in the process of change. Both the Report of the Review Body on Civil Justice[171] and the Report by the Independent Working Party of the General Council of the Bar and the Law Society[172] made recommendations which would further increase the judicial role in the regulation of litigation both pre-trial and at trial. These proposed reforms have implications for the most basic characteristics of our system of Civil Justice,[173] which our consultation process for this project could only touch on indirectly. Furthermore, it is still unclear how the handling of evidence in court proceedings will be affected by the new approach to case management. In the light of this, and because of the reasons given in para. 4.19 above, we decided not to recommend a statutory power to exclude superfluous, repetitious or prolix evidence.

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[166] For discussion of the advantages of procedural reform by these means see Sir Leonard Hoffmann, "Changing Perspectives on Civil Litigation", (1993) 56 M.L.R. 297, 304.

[167] The Supreme Court Practice (1993), p. 1239.

[168] See *Bayerische Ruckversicherung Aktiengesellschaft* v. *Clarkson Puckle Overseas Ltd., The Times*, 23 January 1989; 139 N.L.J. 256. The case concerned the order in which expert and other evidence could best be given in order to make best use of the expert witnesses and get to the issues which lay at the centre of the dispute.

[169] *Per* Lord Simon of Glaisdale in *D.* v. *N.S.P.C.C.* [1978] A.C. 171, 235C.

[170] *Ibid.*

[171] Report of the Review Body on Civil Justice (1988), Cm 394.

[172] "Civil Justice on Trial—The Case for Change", June 1993.

[173] C. Glasser, "Civil Procedure and the Lawyers—The Adversary System and the Decline of the Orality Principle", (1993) 56 M.L.R. 307.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In civil proceedings evidence should not be excluded on the ground that it is hearsay. We further recommend that multiple hearsay as well as simple hearsay should henceforth be admissible.

(paragraphs 4.1 to 4.6; clause 1)

5.2 Existing statutory provisions making hearsay evidence admissible should not be affected by our proposals.

(paragraph 4.7; clause 1)

5.3 Parties intending to rely on hearsay evidence should be under a duty to give notice of that fact to all other parties to the proceedings wherever it is reasonable and practicable in the circumstances to enable those parties to deal with any matters arising from its being hearsay. This duty should be subject to any agreement, or any rules of court, to the contrary. Failure to comply with this duty should not affect the admissibility of the evidence but might attract costs or other sanctions at the court's disposal.

(paragraphs 4.9 to 4.13; clause 2)

5.4 There should be a power for rules of court to be made to allow a party to call a witness whose evidence has been tendered as hearsay by another party, and to enable that party to cross-examine that person on the statement.

(paragraphs 4.14 to 4.16; clause 3)

5.5 Statutory guidelines should be provided for all courts to assist them to assess the weight they should attach to hearsay evidence.

(paragraphs 4.17 to 4.19; clause 4)

5.6 The requirement that the maker of a statement which is adduced as hearsay should be competent to give direct oral evidence should be retained, and that the date on which the statement was made should be the date on which the statement maker is required to satisfy this condition.

(paragraphs 4.26 to 4.28; clause 5)

5.7 Evidence should continue to be admissible to impeach or support the credibility of a person not called as a witness, and evidence tending to show that such a person made previous or later inconsistent statements, and has thereby contradicted himself, should also continue to be admissible.

(paragraph 4.29; clause 5)

5.8 Previous consistent or inconsistent statements of a person called as a witness should continue to be admissible as evidence of the matters stated.

(paragraphs 4.30 to 4.31; clause 6)

5.9 Adverse admissions should be admissible as hearsay statements under clause 1 of the draft Bill and should be subject to the notice and weighing provisions.

(paragraphs 4.32 to 4.34; clause 7)

5.10 The common law rules effectively preserved by section 9(1) and (2)(b) to (d) of the Civil Evidence Act 1968 concerning published works dealing with matters of a public nature, and public documents and records shall continue to have effect.

(paragraphs 4.32 to 4.34; clause 7)

5.11 Evidence of reputation or family tradition for certain specified purposes should be admissible as a fact and not as a statement or multiplicity of statements.

(paragraphs 4.32 to 4.34; clause 7)

5.12 Where a statement contained in a document is admissible as evidence in civil proceedings, it should be capable of being proved, by the production of that document, or by the production of a copy of that document, authenticated in such manner as the court might approve. It should be immaterial how many removes there are between a copy and the original.

(paragraph 4.37; clause 8)

5.13 Documents, including those stored by computer, which form part of the records of a business or public authority should be admissible as hearsay evidence under clause 1 of our draft Bill and the ordinary notice and weighing provisions should apply.

(paragraph 4.38; clause 1)

5.14 The current provisions governing the manner of proof of business records should be replaced by a simpler regime which allows, unless the court otherwise directs, for a document to be taken to form part of the records of a business or public authority, if it is certified as such, and received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records.

(paragraphs 4.39 to 4.43; clause 9)

5.15 The absence of an entry should be capable of being formally proved by affidavit of an officer of the business or authority to which the records belong.

(paragraph 4.40; clause 9)

5.16 The provisions we recommend should apply to all civil proceedings to which the strict rules of evidence apply.

(paragraphs 4.44 to 4.45; clause 10)

5.17 There should be power to make rules of court to make such provision as is necessary or expedient for putting into effect the provisions proposed in the draft Bill.

(paragraph 4.46; clause 11)

5.18 None of the above recommendations should affect the exclusion of evidence on grounds other than that it is hearsay. This should be the case whether the evidence falls to be excluded in pursuance of any enactment or rule of law or for failure to comply with rules of court or an order of the court.

(paragraph 4.48; clause 13)

(Signed) HENRY BROOKE, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
3 August 1993

APPENDIX A

Civil Evidence Bill

ARRANGEMENT OF CLAUSES

Admissibility of hearsay evidence

DRAFT

OF A

B I L L

INTITULED

An Act to provide for the admissibility of hearsay evidence in civil proceedings and certain related matters. A.D. 1993.

BE 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:—

Admissibility of hearsay evidence

Admissibility of hearsay evidence.

1.—(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.

Safeguards in relation to hearsay evidence

Notice of proposal to adduce hearsay evidence.

2.—(1) A party proposing to adduce hearsay evidence shall, subject to the following provisions of this section, give to the other party or parties to the proceedings—

(a) such notice (if any) of that fact, and

(b) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

EXPLANATORY NOTES

Clause 1 implements Recommendations 1 and 2. It abolishes the rule against the admission of hearsay in civil proceedings.

Subsection (1) abolishes the old common law exclusionary rule.

Subsection (2), in paragraph (a) defines "hearsay". Paragraph (b) applies the provisions of the Bill, where relevant, to statements at several removes from the original statement maker.

Subsections (3) and (4) implement Recommendation 2 and provide that hearsay evidence, which is admissible by virtue of existing statutes, will not be affected by our proposals.

Clause 2 implements Recommendation 3 and makes provision for parties to be enabled to make pre-trial enquiries, where necessary, of matters arising from evidence being hearsay.

Subsection (1) imposes a general duty on parties to give fair warning, where reasonable and practicable, that they intend to adduce hearsay evidence.

(2) Provision may be made by rules of court—

(a) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and

(b) as to the manner in which the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with this section does not affect the admissibility of the evidence but may be taken into account by the court—

(a) in considering the exercise of its powers with respect to the course of proceedings and costs, and

(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4 below.

Power to call witness for cross-examination on hearsay statement.

3. Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief.

Considerations relevant to weighing of hearsay evidence.

4.—(1) In estimating the weight (if any) to be given to hearsay evidence the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard shall be had, in particular, to such of the following considerations as may be relevant—

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay and whether any person involved had any motive to conceal or misrepresent matters;

(d) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(e) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

Supplementary provisions as to hearsay evidence

Competence and credibility.

5.—(1) Hearsay evidence shall not be admitted if or to the extent that it is shown to consist of, or to be proved by means of, a statement made by a person who at the time he made the statement was not competent as a witness.

Subsection (2) makes the duty to give notice subject to rules of court, to allow for the possibility that it may disapplied in areas where this is considered appropriate, and to allow for the manner in which the duties imposed by subsection 1 are to be complied with to be prescribed.

Subsection (3) makes provision for the duty in subsection 1 to be excluded by agreement (for instance, in an arbitration agreement) and to be waived.

Subsection (4) provides that failure to comply with the duty to give notice will not attract the sanction of inadmissibility but may attract costs or other sanctions at the court's disposal.

Clause 3 implements Recommendation 4 and provides for a power to call for cross-examination a person whose statement has been tendered as hearsay evidence.

Clause 4 implements Recommendation 5 and provides courts with statutory guidelines to assist them to assess the weight they should attach to hearsay evidence.

Clause 5 implements Recommendations 6 and 7.

Subsection (1) restates the requirement found in sections 1,4 and 5 of the Civil Evidence Act 1968 that the maker of a statement which is adduced as hearsay should be competent to give direct oral evidence.

For this purpose "not competent as a witness" means suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings; but a child shall be treated as competent as a witness if he satisfies the requirements of section 96(2)(a) and (b) of the Children Act 1989 (conditions for reception of unsworn evidence of child). 1989 c. 41.

(2) Where 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.

Previous statements of witnesses.

6.—(1) Subject as follows, the provisions of this Act as to hearsay evidence apply equally (but with any necessary modifications) in relation to a previous statement made by a person called as a witness in the proceedings.

(2) A party who has called or intends to call a person as a witness in the proceedings may not adduce evidence of a previous statement made by that person, except—

(a) with the leave of the court, or

(b) for the purpose of rebutting a suggestion that his evidence has been fabricated.

This shall not be construed as preventing a witness statement (that is, a written statement of oral evidence which a party to the proceedings intends to lead) from being adopted by a witness in giving evidence or treated as his evidence.

(3) Where section 3, 4 or 5 of the Criminal Procedure Act 1865 applies, which make provision as to— 1865 c. 18.

(a) how far a witness may be discredited by the party producing him,

(b) the proof of contradictory statements made by a witness, and

(c) cross-examination as to previous statements in writing,

this Act does not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with those sections.

This is without prejudice to any provision made by rules of court under section 3 above (power to call witness for cross-examination on hearsay statement).

Subsection (2) is modelled on section 7(1) of the Civil Evidence Act 1968 and makes special provision for evidence going to credibility.

Clause 6 implements Recommendation 8.

Subsection (1) applies the provisions of the Bill to previous consistent and inconsistent statements of witnesses.

Subsection (2) paragraph (a) is based on section 2(2)(b) of the Civil Evidence Act 1968. Paragraph (b) is based on section 3(1)(b) of the Civil Evidence Act 1968.

Subsection (3) preserves the operation of sections 3,4 and 5 of the Criminal Procedure Act 1865 as did section 3(1)(a) of the 1968 Act.

(4) Nothing in this Act affects any rule of law as to the circumstances in which, where a person called as a witness in civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in the proceedings.

(5) Nothing in this section shall be construed as preventing a statement of any description referred to above from being admissible in accordance with section 1 as evidence of the matters stated.

Evidence formerly admissible at common law. 1968 c. 64.

7.—(1) The common law rule effectively preserved by section 9(1) and (2)(a) of the Civil Evidence Act 1968 (admissibility of admissions adverse to a party) is superseded by the provisions of this Act.

(2) The common law rules effectively preserved by section 9(1) and (2)(b) to (d) of the Civil Evidence Act 1968, that is, any rule of law whereby in civil proceedings—

(a) published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated in them,

(b) public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated in them, or

(c) records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated in them,

shall continue to have effect.

(3) The common law rules effectively preserved by section 9(3) and (4) of the Civil Evidence Act 1968, that is, any rule of law whereby in civil proceedings—

(a) evidence of a person's reputation is admissible for the purpose of proving his good or bad character, or

(b) evidence of reputation or family tradition is admissible—

(i) for the purpose of proving or disproving pedigree or the existence of a marriage, or

(ii) for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing,

shall continue to have effect in so far as they authorise the court to treat such evidence as proving or disproving that matter.

Where any such rule applies, reputation or family tradition shall be treated for the purposes of this Act as a fact and not as a statement or multiplicity of statements about the matter in question.

(4) The words in which a rule of law mentioned in this section is described are intended only to identify the rule and shall not be construed as altering it in any way.

Other matters

Proof of statements contained in documents.

8.—(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—

(a) by the production of that document, or

Subsection (5) provides that statements adduced for the purposes, and subject to the conditions in the foregoing subsections, shall be admissible as evidence of the matters stated in them.

Clause 7 implements Recommendations 9, 10 and 11.
It makes provision for evidence formerly admissible at common law.

Clause 8 implements Recommendation 12. It is modelled on section 27 of the Criminal Justice Act 1988.

Subsection (1) provides for the proof of statements contained in documents and copies of documents.

(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.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

Proof of records of business or public authority.

9.—(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

For this purpose—

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section—

"records" means records in whatever form;

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"public authority" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records.

General

Meaning of "civil proceedings".

10. In this Act "civil proceedings" means civil proceedings before any tribunal in relation to whose proceedings the strict rules of evidence apply, whether as a matter of law or by agreement of the parties.

References to "the court" and "rules of court" shall be construed accordingly.

Provisions as to rules of court.

11.—(1) Any power to make rules of court regulating the practice or procedure of the court in relation to civil proceedings includes power to make such provision as may be necessary or expedient for carrying into effect the provisions of this Act.

Subsection (2) reverses the common law rule that copies of copies cannot be received in evidence.

Clause 9 implements Recommendation 13, 14 and 15.
It provides for the manner of proof of records of a business or a public authority.

Subsection (4) contains definitions for "records", "business", "officer" and "public authority".

Clause 10 implements Recommendation 16.
It defines the scope of the Bill's application to "civil proceedings".

Clause 11 implements Recommendation 17 and is a general rule-making power, which allows rules of court to be made as is necessary or expedient for putting into effect the provisions of the draft Bill.

(2) Any rules of court made for the purposes of this Act as it applies in relation to proceedings in the High Court apply, except in so far as their operation is excluded by agreement, to arbitration proceedings to which this Act applies, subject to such modifications as may be appropriate,

Any question arising as to what modifications are appropriate shall be determined, in default of agreement, by the arbitrator or umpire, as the case may be.

1984 c. 28.

(3) In relation to a reference under section 64 of the County Courts Act, subsection (2) above applies with the substitution of "county court" for "High Court".

Interpretation.

12. In this Act—

"civil proceedings" has the meaning given by section 10 and "court" and "rules of court" shall be construed in accordance with that section;

"document" means anything on which information of any description is recorded, and "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;

"hearsay" shall be construed in accordance with section 1(2);

"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;

"the original statement", in relation to hearsay evidence, means the underlying statement (if any) by—

(a) in the case of evidence of fact, a person having personal knowledge of that fact, or

(b) in the case of evidence of opinion, the person whose opinion it is; and

"statement" means any representation of fact or opinion, however made.

Savings.

13.—(1) Nothing in this Act affects the exclusion of evidence on grounds other than that it is hearsay.

This applies whether the evidence falls to be excluded in pursuance of any enactment or rule of law, for failure to comply with rules of court or an order of the court, or otherwise.

(2) Nothing in this Act affects the proof of documents by means other than those specified in section 8 or 9.

(3) Nothing in this Act affects the operation of the following enactments—

1868 c. 37.

(a) section 2 of the Documentary Evidence Act 1868 (mode of proving certain official documents);

1882 c. 9.

(b) section 2 of the Documentary Evidence Act 1882 (documents printed under the superintendence of Stationery Office);

EXPLANATORY NOTES

Clause 12 is the interpretation provision.

Clause 13 is the savings provision and implements Recommendation 18.

(c) section 1 of the Evidence (Colonial Statutes) Act 1907 (proof of statutes of certain legislatures); 1907 c. 16.

(d) section 1 of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 (proof and effect of registers and official certificates of certain countries); 1933 c. 4.

(e) section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 (provision in respect of public registers of other countries). 1963 c. 27.

Consequential amendments and repeals.

14.—(1) The enactments specified in Schedule 1 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act.

(2) The enactments specified in Schedule 2 are repealed to the extent specified.

Short title, commencement and extent.

15.—(1) This Act may be cited as the Civil Evidence Act 1993.

(2) The provisions of this Act come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument, and different days may be appointed for different provisions and for different purposes.

(3) An order under subsection (2) may contain such transitional provisions as appear to the Lord Chancellor to be appropriate; and subject to any such provision, the provisions of this Act shall not apply in relation to proceedings begun before commencement.

(4) This Act extends to England and Wales.

(5) The provisions of Schedules 1 and 2 (consequential amendments and repeals) extend to Scotland or Northern Ireland so far as they relate to enactments which so extend.

Clause 14 provides for consequential amendments and repeals.

SCHEDULES

Section 14(1).

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

Army Act 1955 (c.18)

1. For section 62 of the Army Act 1955 (making of false documents) substitute—

"Making of false documents.

62.—(1) A person subject to military law who—

(a) makes an official document which is to his knowledge false in a material particular, or

(b) makes in any official document an entry which is to his knowledge false in a material particular, or

(c) tampers with the whole or any part of an official document (whether by altering it, destroying it, suppressing it, removing it or otherwise), or

(d) with intent to deceive, fails to make an entry in an official document,

is liable on conviction by court-martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

(2) For the purposes of this section—

(a) a document is official it is or is likely to be made use of, in connection with the performance of his functions as such, by a person who holds office under, or is in the service of, the Crown; and

(b) a person who has signed or otherwise adopted as his own a document made by another shall be treated, as well as that other, as the maker of the document.

(3) In this section 'document' means anything on which information of any description is recorded.".

Air Force Act 1955 (c.19)

2. For section 62 of the Air Force Act 1955 (making of false documents) substitute—

"Making of false documents.

62.—(1) A person subject to air force law who—

(a) makes an official document which is to his knowledge false in a material particular, or

(b) makes in any official document an entry which is to his knowledge false in a material particular, or

(c) tampers with the whole or any part of an official document (whether by altering it, destroying it, suppressing it, removing it or otherwise), or

(d) with intent to deceive, fails to make an entry in an official document,

is liable on conviction by court-martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

(2) For the purposes of this section—

(a) a document is official it is or is likely to be made use of, in connection with the performance of his functions as

such, by a person who holds office under, or is in the service of, the Crown; and

(b) a person who has signed or otherwise adopted as his own a document made by another shall be treated, as well as that other, as the maker of the document.

(3) In this section 'document' inclues anything on which information of any description is recorded.".

Naval Discipline Act 1957 (c.53)

3. For section 35 of the Naval Discipline Act 1957 (making of false documents) substitute—

"Falsification of documents.

35.—(1) A person subject to this Act law who—

(a) makes an official document which is to his knowledge false in a material particular, or

(b) makes in any official document an entry which is to his knowledge false in a material particular, or

(c) tampers with the whole or any part of an official document (whether by altering it, destroying it, suppressing it, removing it or otherwise), or

(d) with intent to deceive, fails to make an entry in an official document,

is liable to imprisonment for a term not exceeding two years or any less punishment authorised by this Act.

(2) For the purposes of this section—

(a) a document is official it is or is likely to be made use of, in connection with the performance of his functions as such, by a person who holds office under, or is in the service of, the Crown; and

(b) a person who has signed or otherwise adopted as his own a document made by another shall be treated, as well as that other, as the maker of the document.

(3) In this section 'document' means anything on which information of any description is recorded.".

Gaming Act 1968 (c.65)

4. In section 43 of the Gaming Act 1968 (powers of inspectors and related provisions), for subsection (11) substitute—

"(11) In this section 'document' means anything on which information of any description is recorded, and '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.".

Vehicle and Driving Licences Act 1969 (c.27)

5. In section 27 of the Vehicle and Driving Licences Act 1969 (admissibility of records as evidence), for subsection (2) substitute—

"(2) In subsection (1) of this section—

'document' means anything on which information of any description is recorded, and '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

SCH. 1 'statement' means any representation of fact, however made.".

Taxes Management Act 1970 (c.9)

6. Section 20D of the Taxes Management Act 1970 (interpretation of ss.20 to 20CC), for subsection (3) substitute—

"(3) Without prejudice to section 127 of the Finance Act 1988, in sections 20 to 20CC above 'document' means, subject to sections 20(8C) and 20A(1A), anything on which information of any description is recorded.".

Vehicles (Excise) Act 1971 (c.10)

7. In section 31 of the Vehicles (Excise) Act 1971 (admissibility of records as evidence), for subsection (2) substitute—

"(2) In subsection (1) above—

'document' means anything on which information of any description is recorded, and '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.".

Civil Evidence Act 1972 (c.30)

8.—(1) Section 5 of the Civil Evidence Act 1972 (interpretation and application of Act) is amended as follows.

(2) For subsection (1) (meaning of "civil proceedings" and "court") substitute—

"(1) In this Act 'civil proceedings' means civil proceedings before any tribunal in relation to whose proceedings the strict rules of evidence apply, whether as a matter of law or by agreement of the parties; and references to 'the court' shall be construed accordingly.".

(3) For subsection (2) (application of High Court or county court rules to certain other civil proceedings) substitute—

"(2) The rules of court made for the purposes of the application of sections 2 and 4 of this Act to proceedings in the High Court apply, except in so far as their application is excluded by agreement, to proceedings before tribunals other than the ordinary courts of law, subject to such modifications as may be appropriate.

Any question arising as to what modifications are appropriate shall be determined, in default of agreement, by the tribunal.

(2A) In relation to a reference under section 64 of the County Courts Act 1984, subsection (2) above applies with the substitution of 'county court' for 'High Court'.".

International Carriage of Perishable Foodstuffs Act 1976 (c.58)

9. In section 15 of the International Carriage of Perishable Foodstuffs Act 1976 (admissibility of records as evidence), for subsection (2) substitute—

"(2) In this section—

'document' means anything on which information of any description is recorded, and '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.".

Value Added Tax Act 1983 (c.55)

10. In section 48(1) of the Value Added Tax Act 1983, at the appropriate place insert—

"'document' means anything on which information of any description is recorded, and '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;".

Police and Criminal Evidence Act 1984 (c.60)

11. In the Police and Criminal Evidence Act 1984—

(a) in section 72(1) (interpretation of provisions relating to documentary evidence), in the definition of "copy" and "statement", and

(b) in section 118(1) (general interpretation), in the definition of "document",

for "Part I of the Civil Evidence Act 1968" substitute "the Civil Evidence Act 1993".

Companies Act 1985 (c.6)

12. In section 709 of the Companies Act 1985 (inspection, &c. of records kept by registrar), in subsection (3) (use in evidence of certified copy or extract), for the words from "In England and Wales" to the end substitute—

"In England and Wales this is subject, in the case of proceedings to which section 69 of the Police and Criminal Evidence Act 1984 applies, to compliance with any applicable rules of court under subsection (2) of that section (which relates to evidence from computer records).".

Finance Act 1985 (c.54)

13.—(1) Section 10 of the Finance Act 1985 (production of computer records, &c.) is amended as follows.

(2) In subsection (1) (general scope of powers conferred in relation to assigned matters within meaning of Customs and Excise Management Act 1979), for the words from "were a reference" to the end substitute "were a reference to anything on which information of any kind is recorded and any reference to a copy of a document were a reference to anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly".

(3) In subsection (3) (documents within powers conferred by subsection (2)), for the words ", within the meaning of Part I of the Civil Evidence Act 1968," substitute ", within the meaning given by subsection (1) above,".

(4) In subsection (5) (scope of offences relating to false documents, &c.), for "the same meaning as in Part I of the Civil Evidence Act 1968" substitute "the meaning given by subsection (1) above".

(4) Omit subsection (7) (adaptation of references to Civil Evidence Act 1968).

SCH. 1

Criminal Justice Act 1988 (c.33)

14. In Schedule 2 to the Criminal Justice Act 1988 (supplementary provisions as to documentary evidence), for paragraph 5 (application of interpretation provisions) substitute—

"5. Expressions used in Part II of this Act and in the Civil Evidence Act 1993 which are defined in that Act have the same meaning in Part II of this Act.".

Finance Act 1988 (c.39)

15.—(1) Section 127 of the Finance Act 1988 (production of computer records, &c.) is amended as follows.

(2) In subsection (1) (general scope of powers conferred by or under Taxes Acts), for the words from "were a reference" to the end substitute "were a reference to anything on which information of any kind is recorded and any reference to a copy of a document were a reference to anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly".

(3) In subsection (3) (documents within powers conferred by subsection (2)), for the words ", within the meaning of Part I of the Civil Evidence Act 1968," substitute ", within the meaning given by subsection (1) above,".

(4) Omit subsection (5) (adaptation of references to Civil Evidence Act 1968).

Housing Act 1988 (c.50)

16. In section 97 of the Housing Act 1988 (information, &c. for applicant), for subsection (3) substitute—

"(3) In this section 'document' means anything on which information of any kind is recorded.".

Road Traffic Offenders Act 1988 (c.53)

17. In section 13 of the Road Traffic Offenders Act 1988 (admissibility of records as evidence), for subsection (3) substitute—

"(3) In the preceding subsections—

'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;

'document' means anything on which information of any description is recorded; and

'statement' means any representation of fact or opinion, however made.".

Children Act 1989 (c.41)

18. In section 96(7) of the Children Act 1989 (evidence given by, or with respect to, children: interpretation) for the definition of "civil proceedings" and "court" substitute—

"'civil proceedings' and 'court' have the same meaning as in the Civil Evidence Act 1993;".

Leasehold Reform, Housing and Urban Development Act 1993 (c.28) SCH. 1

19. In section 10(9) of the Leasehold Reform, Housing and Urban Development Act 1993 (right of qualifying tenant to certain information: interpretation), for the definition of "document" substitute—

"'document' means anything on which information of any description is recorded;".

SCHEDULE 2

Section 14(2).

REPEALS

Chapter	Short title	Extent of repeal
1938 c. 28.	Evidence Act 1938.	Sections 1 and 2. Section 6(1) except the words from "'Proceedings'" to "references". Section 6(2)(b).
1968 c. 64.	Civil Evidence Act 1968.	Part I.
1969 c. 27.	Driving and Vehicle Licences Act 1969.	Section 27(3)(b).
1971 c. 10.	Vehicles (Excise) Act 1971.	Section 31(4)(b) and (5).
1972 c. 30.	Civil Evidence Act 1972.	Section 1. Section 2(1) and (2). In section 2(3)(b), the words from "by virtue of section 2" to "out-of-court statements)". In section 3(1), the words "Part I of the Civil Evidence Act 1968 or". In section 6(3), the words "1 and", in both places where they occur.
1975 c. 63.	Inheritance (Provision for Family and Dependants) Act 1975.	Section 21.
1979 c. 2.	Customs and Excise Management Act 1979.	Section 75A(6)(a). In section 118A, subsections (6)(a) and (7)(a).
1980 c. 43.	Magistrates' Courts Act 1980.	In Schedule 7, paragraph 75.

SCH. 2

Chapter	Short title	Extent of repeal
1983 c. 55.	Value Added Tax Act 1983.	Section 48(4). In Schedule 7— (a) paragraph 7(5)(a); and (b) in paragraph 7(6), the words "section 5(4) of the Civil Evidence Act 1968 or".
1984 c. 28.	County Courts Act 1984.	In Schedule 2, paragraphs 33 and 34.
1985 c. 54.	Finance Act 1985.	Section 10(7).
1986 c. 21.	Armed Forces Act 1986.	Section 3.
1988 c. 39.	Finance Act 1988.	Section 127(5).
1990 c. 26.	Gaming (Amendment) Act 1990.	In the Schedule, paragraph 2(7).
1991 c. 31.	Finance Act 1991.	In Schedule 3, paragraph 14.

APPENDIX B

List of persons and organisations who commented on Consultation Paper No. 117

His Honour Judge Aglionby
District Judge G. Angel, Senior District Judge of the Family Division
Mr. N. H. Andrews, University of Cambridge
The Honourable James Arbuthnot M.P.
Association of British Insurers
Association of District Judges
Attorney General of New South Wales
Sir Wilfred Bourne K.C.B., Q.C.
Bond Pearce, Solicitors
His Honour Judge Leonard Bromley Q.C.
His Honour Judge Michael Broderick
Dr. S. Castell, Computer and Systems Telecommunications Ltd.
City of London Law Society
City of Bradford Metropolitan Council
Professor S. M. Cretney, University of Bristol
Council on Tribunals
Council of H.M. Circuit Judges
Departmental Advisory Committee on Arbitration Law
Lord Donaldson of Lymington
Mr. J. Donovan, Solicitor
Faculty of Advocates
Family Law Bar Association
His Honour Judge Fricker Q.C.
The General Council of the Bar
M. Griffiths, Barrister
His Honour Judge Goldstone
Professor D. S. Greer, The Queen's University of Belfast
District Judge R. G. Greenslade
Dr. S. Guest, University College London
Mr. R. Harkin, Brighton University
The Home Office
M. N. Howard Q.C.
Holborn Law Society
Inner London Magistrates' Association
Institute of Legal Executives
Mr. J. Jackson, The Queen's University of Belfast
The Right Honourable Sir Michael Kerr
His Honour Judge Michael Kershaw Q.C.
Law Reform Advisory Committee for Northern Ireland
The Law Society
Law Society of Scotland
The Law Society's Young Solicitors Group
London Common Law Commercial Bar Association
London Solicitors' Litigation Association
Lovell White Durrant, Solicitors
Lord Justice Lloyd
Lloyd's of London
Mrs. A. B. Macfarlane, The Master of the Court of Protection
The Magistrates' Association
Metropolitan Police Solicitor
Mr. C. Miller, Solicitor at Simmons and Simmons
Mr. Justice Morritt
Mr. R. D. Munrow, Chief Chancery Master
National Consumer Council
The New Zealand Law Commission
Mr. D. H. O. Owen, Privy Council Office
Mr. Justice Phillips
Pannone March Pearson, Solicitors
Peter Carter Ruck and Partners, Solicitors

Mr. P. Palmer, Barrister
Police Federation of England and Wales
Ms. D. Price, Barrister
Mr. C. Reed, Queen Mary and Westfield College London
Mr. J. L. Rose
Lord Scarman
Scottish Courts Administration
His Honour Judge David Smith
Society of Public Notaries of London
Society of Public Teachers of Law
The Official Solicitor to the Supreme Court
Solicitors Family Law Association
Mr. J. Spencer, University of Cambridge
Lord Justice Staughton
199 Strand Chambers, Barristers
The Supreme Court Procedure Committee
Mr. P. K. J. Thompson
Professor W. Twining, University College London
V. V. Veeder Q.C.
His Honour Judge R. L. Ward Q.C.
Mr. Justice Wood
District Judge W. Wills

APPENDIX C

PART I OF THE CIVIL EVIDENCE ACT 1968 (c.64) (as amended)

ARRANGEMENT OF SECTIONS

PART I

HEARSAY EVIDENCE

Section

An Act to amend the law of evidence in relation to civil proceedings, and in respect of the privilege against self-incrimination to make corresponding amendments in relation to statutory powers of inspection or investigation [25th October 1968]

PART I

HEARSAY EVIDENCE

Pt. I (except s. 5) extended by Civil Evidence Act 1972 (c.30). s. 1(1): amended by Inheritance (Provision for Family and Dependants) Act 1975 (c.63). s. 21

Hearsay evidence to be admissible only by virtue of this Act and other statutory provisions, or by agreement.

1.—(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.

(2) In this section "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.

Admissibility of out-of-court statements as evidence of facts stated.

2.—(1) In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person by whom the statement was made, the statement—

(*a*) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(*b*) without prejudice to paragraph (*a*) above, shall not be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person by whom it was made, except—

(i) where before that person is called the court allows evidence of the making of the statement to be given on behalf of that party by some other person; or

(ii) in so far as the court allows the person by whom the statement was made to narrate it in the course of his examination-in-chief on the ground that to prevent him from doing so would adversely affect the intelligibility of his evidence.

(3) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it:

Provided that if the statement in question was made by a person while giving oral evidence in some other legal proceedings (whether civil or criminal), it may be proved in any manner authorised by the court.

S. 2(1) extended by Inheritance (Provision for Family and Dependants) Act 1975 (c.63). s. 2(1) Power to exclude s. 2(2) conferred by Civil Evidence Act 1972 (c.30). s. 2(1)

Witness's previous statement, if proved, to be evidence of facts stated. 1865 c.18.

3.—(1) Where in any civil proceedings—

(*a*) a previous inconsistent or contradictory statement made by a person called as a witness in those proceedings is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865; or

(*b*) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in those proceedings; and where a document or any part of a document is received in evidence in any such proceedings by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

Admissibility of certain records as evidence of facts stated.

4.—(1) Without prejudice to section 5 of this Act, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any facts stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement—

(*a*) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and

(*b*) without prejudice to paragraph (*a*) above, shall not without the leave of the court be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information.

(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.

S. 4 amended by Civil Evidence Act 1972 (c. 30), s. 1(2)

Admissibility of statements produced by computers.

5.—(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(*a*) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(*b*) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(*c*) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(*d*) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(*a*) above was regularly performed by computers, whether—

(*a*) by a combination of computers operating over that period; or

(*b*) by different computers operating in succession over that period; or

(*c*) by different combinations of computers operating in succession over that period; or

(*d*) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(*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 to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act—

(*a*) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(*b*) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(*c*) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3) above, in this Part of this Act "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

Provisions supplementary to ss. 2 to 5.

6.—(1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 2, 4 or 5 of this Act it may, subject to any rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 2, 4 or 5 of this Act, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 2, 3, 4 or 5 of this Act 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*) in the case of a statement falling within section 2(1) or 3(1) or (2) of this Act, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;

(*b*) in the case of a statement falling within section 4(1) of this Act, to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and

(*c*) in the case of a statement falling within section 5(1) of this Act, 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 thereto, contemporaneously with the occurrence or existence of the facts dealt with in that information, and 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.

(4) For the purpose of any enactment or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated—

(*a*) a statement which is admissible in evidence by virtue of section 2 or 3 of this Act shall not be capable of corroborating evidence given by the maker of the statement; and

(*b*) a statement which is admissible in evidence by virtue of section 4 of this Act shall not be capable of corroborating evidence given by the person who originally supplied the information from which the record containing the statement was compiled.

(5) If any person in a certificate tendered in evidence in civil proceedings by virtue of section 5(4) of this Act wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both.

Admissibility of evidence as to credibility of maker etc. of statement admitted under s. 2 or 4.

7.—(1) Subject to rules of court, where in any civil proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence by virtue of section 2 of this Act—

(*a*) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and

(*b*) evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that that person has contradicted himself:

Provided that nothing in this subsection shall enable evidence to be given of any matter of which, if the person in question 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.

(2) Subsection (1) above shall apply in relation to a statement given in evidence by virtue of section 4 of this Act as it applies in relation to a statement given in evidence by virtue of section 2 of this Act, except that references to the person who made the statement and to his making the statement shall be construed respectively as references to the person who originally supplied the information from which the record containing the statement was compiled and to his supplying that information.

(3) Section 3(1) of this Act shall apply to any statement proved by virtue of subsection (1)(*b*) above as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in paragraph (*a*) of the said section 3(1).

Rules of court.

8.—(1) Provision shall be made by rules of court as to the procedure which, subject to any exceptions provided for in the rules, must be followed and the other conditions which, subject as aforesaid, must be fulfilled before a statement can be given in evidence in civil proceedings by virtue of section 2, 4 or 5 of this Act.

(2) Rules of court made in pursuance of subsection (1) above shall in particular, subject to such exceptions (if any) as may be provided for in the rules—

(*a*) require a party to any civil proceedings who desires to give in evidence any such statement as is mentioned in that subsection to give to every other party to the proceedings such notice of his desire to do so and such particulars of or relating to the statement as may be specified in the rules, including particulars of such one or more of the persons connected with the making or recording of the statement or, in the case of a statement falling within section 5(1) of this Act, such one or more of the persons concerned as mentioned in section 6(3)(*c*) of this Act as the rules may in any case require; and

(*b*) enable any party who receives such notice as aforesaid by counter-notice to require any person of whom particulars were given with the notice to be called as a witness in the proceedings unless that person is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he was connected or concerned as aforesaid and to all the circumstances) to have any recollection of matters relevant to the accuracy or otherwise of the statement.

(3) Rules of court made in pursuance of subsection (1) above—

(*a*) may confer on the court in any civil proceedings a discretion to allow a statement falling within section 2(1), 4(1) or 5(1) of this Act to be given in evidence notwithstanding that any requirement of the rules affecting the admissibility of that statement has not been complied with, but except in pursuance of paragraph (*b*) below shall not confer on the court a discretion to exclude such a statement where the requirements of the rules affecting its admissibility have been complied with;

(*b*) may confer on the court power, where a party to any civil proceedings has given notice that he desires to give in evidence—

(i) a statement falling within section 2(1) of this Act which was made by a person, whether orally or in a document, in the course of giving evidence in some other legal proceedings (whether civil or criminal); or

(ii) a statement falling within section 4(1) of this Act which is contained in a record of any direct oral evidence given in some other legal proceedings (whether civil or criminal),

to give directions on the application of any party to the proceedings as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved; and

(*c*) may make different provision for different circumstances, and in particular may make different provision with respect to statements falling within sections 2(1), 4(1) and 5(1) of this Act respectively;

and any discretion conferred on the court by rules of court made as aforesaid may be either a general discretion or a discretion exercisable only in such circumstances as may be specified in the rules.

(4) Rules of court may make provision for preventing a party to any civil proceedings (subject to any exceptions provided for in the rules) from adducing in relation to a person who is not called as a witness in those proceedings any evidence which could otherwise be adduced by him by virtue of section 7 of this Act unless that party has in pursuance of the rules given in respect of that person such a counter-notice as is mentioned in subsection (2)(*b*) above.

(5) In deciding for the purposes of any rules of court made in pursuance of this section whether or not a person is fit to attend as a witness, a court may act on a certificate purporting to be a certificate of a fully registered medical practitioner.

(6) Nothing in the foregoing provisions of this section shall prejudice the generality of section 75 of the County Courts Act 1984, section 144 of the Magistrates' Courts Act 1980 or any other enactment conferring power to make rules of court; and nothing in section 75(2) of the County Courts Act 1984 or any other enactment restricting the matters with respect to which rules of court may be made shall prejudice the making of rules of court with respect to any matter mentioned in the foregoing provisions of this section or the operation of any rules of court made with respect to any such matter.

1984 c. 28.
1980 c. 43.
1984 c. 28.

S. 8(2) restricted by Civil Evidence Act 1972 (c.30), s. 2(2)

Admissibility of certain hearsay evidence formerly admissible at common law.

9.—(1) In any civil proceedings a statement which, if this Part of this Act had not been passed, would by virtue of any rule of law mentioned in subsection (2) below have been admissible as evidence of any fact stated therein shall be admissible as evidence of that fact by virtue of this subsection.

(2) The rules of law referred to in subsection (1) above are the following, that is to say any rule of law—

(*a*) whereby in any civil proceedings an admission adverse to a party to the proceedings, whether made by that party or by another person, may be given in evidence against that party for the purpose of proving any fact stated in the admission;

(*b*) whereby in any civil proceedings published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated therein;

(*c*) whereby in any civil proceedings public documents (for example, public registers, and returns made under public authority with respect to matters of public interest) are admissible as evidence of facts stated therein; or

(*d*) whereby in any civil proceedings records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated therein.

In this subsection "admission" includes any representation of fact, whether made in words or otherwise.

(3) In any civil proceedings a statement which tends to establish reputation or family tradition with respect to any matter and which, if this Act had not been passed, would have been admissible in evidence by virtue of any rule of law mentioned in subsection (4) below—

(*a*) shall be admissible in evidence by virtue of this paragraph in so far as it is not capable of being rendered admissible under section 2 or 4 of this Act; and

(*b*) if given in evidence under this Part of this Act (whether by virtue of paragraph (*a*) above or otherwise) shall by virtue of this paragraph be admissible as evidence of the matter reputed or handed down;

and, without prejudice to paragraph (*b*) above, reputation shall for the purposes of this Part of this Act be treated as a fact and not as a statement or multiplicity of statements dealing with the matter reputed.

(4) The rules of law referred to in subsection (3) above are the following, that is to say any rule of law—

(*a*) whereby in any civil proceedings evidence of a person's reputation is admissible for the purpose of establishing his good or bad character;

(*b*) whereby in any civil proceedings involving a question of pedigree or in which the existence of a marriage is in issue evidence of reputation or family tradition is admissible for the purpose of proving or disproving pedigree or the existence of the marriage, as the case may be; or

(*c*) whereby in any civil proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving the existence of any public or general right or of identifying any person or thing.

(5) It is hereby declared that in so far as any statement is admissible in any civil proceedings by virtue of subsection (1) or (3)(*a*) above, it may be given in evidence in those proceedings notwithstanding anything in sections 2 to 7 of this Act or in any rules of court made in pursuance of section 8 of this Act.

(6) The words in which any rule of law mentioned in subsection (2) or (4) above is there described are intended only to identify the rule in question and shall not be construed as altering that rule in any way.

Interpretation of Part I, and application to arbitrations, etc.

10.—(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.

(3) For the purposes of the application of this Part of this Act in relation to any such civil proceedings as are mentioned in section 18(1)(*a*) and (*b*) of this Act other than civil proceedings on a reference to arbitration under section 64 of the County Courts Act 1984, any rules of court made for the purposes of this Act under section 84 of the Supreme Court Act 1981 shall (except in so far as their operation is excluded by agreement) apply, subject to such modifications as maybe appropriate, in like manner as they apply in relation to civil proceedings in the High Court: 1984 c.28.

(3A) For the purposes of the application of this Part of this Act in relation to proceedings on an arbitration under section 64 of the County Courts Act 1984 any rules made for the purposes of this Act under section 75 of that Act shall (except in so far as their operation is excluded by agreement) apply, subject to such modifications as may be appropriate, in like manner as they apply in relation to proceedings in the county court. 1984 c.28.

(4) If any question arises as to what are, for the purposes of any such civil proceedings as are mentioned in section 18(1)(*a*) or (*b*) of this Act, the appropriate modifications of any such rule of court as is mentioned in subsection (3) above, that question shall, in default of agreement, be determined by the tribunal or the arbitrator or umpire, as the case may be.

S. 10(3)(4) extended by Civil Evidence Act 1972 (c. 30) s. 5(2)

III. HEARSAY EVIDENCE

Interpretation and application (O.38, r.20)

38/20 **20.**—(1) In this Part of this Order "the Act" means the Civil Evidence Act 1968 and any expressions used in this Part of this Order and in Part I of the Act have the same meanings in this Part of this Order as they have in the said Part I.

(2) This Part of this Order shall apply in relation to the trial or hearing of an issue or question arising in a cause or matter and to a reference, inquiry and assessment of damages, as it applies in relation to the trial or hearing of a cause or matter.

Added by R.S.C. (Amendment) 1969 (S.I. 1969 No. 1105)

Notice of intention to give certain statements in evidence (O.38, r.21)

38/21 **21.**—(1) Subject to the provisions of this rule, a party to a cause or matter who desires to give in evidence at the trial or hearing of the cause or matter any statement which is admissible in evidence by virtue of section 2, 4 or 5 of the Act must—

(*a*) in the case of a cause or matter which is required to be set down for trial or hearing or adjourned into Court, within 21 days after it is set down or so adjourned, or within such other period as the Court may specify, and

(*b*) in the case of any other cause or matter, within 21 days after the date on which an appointment for the first hearing of the cause or matter is obtained, or within such other period as the Court may specify,

serve on every other party to the cause or matter notice of his desire to do so, and the notice must comply with the provisions of rule 22, 23 or 24, as the circumstances of the case require.

(2) Paragraph (1) shall not apply in relation to any statement which is admissible as evidence of any fact stated therein by virtue not only of the said section 2, 4 or 5 but by virtue also of any other statutory provision within the meaning of section 1 of the Act.

(3) Paragraph (1) shall not apply in relation to any statement which any party to a probate action desires to give in evidence at the trial of that action and which is alleged to have been made by the deceased person whose estate is the subject of the action.

(4) Where by virtue of any provision of these rules or of any order or direction of the Court the evidence in any proceedings is to be given by affidavit then, without prejudice to paragraph (2), paragraph (1) shall not apply in relation to any statement which any party to the proceedings desires to have included in any affidavit to be used on his behalf in the proceedings, but nothing in this paragraph shall affect the operation of Order 41, rule 5, or the powers of the Court under Order 38, rule 3.

(5) Order 65, rule 9, shall not apply to a notice under this rule but the Court may direct that the notice need not be served on any party who at the time when service is to be effected is in default as to acknowledgement of service or who has no address for service.

Amended by R.S.C. (Writ and Appearance) 1979 (S.I. 1979 No.1716).

Statement admissible by virtue of section 2 of the Act: contents of notice (O.38, r. 22)

22.—(1) If the statement is admissible by virtue of section 2 of the Act and was made otherwise than in a document, the notice must contain particulars of— **38/22**

(*a*) the time, place and circumstances at or in which the statement was made;

(*b*) the person by whom, and the person to whom, the statement was made; and

(*c*) the substance of the statement or, if material, the words used.

(2) If the statement is admissible by virtue of the said section 2 and was made in a document, a copy or transcript of the document, or of the relevant part thereof, must be annexed to the notice and the notice must contain such (if any) of the particulars mentioned in paragraph (1)(*a*) and (*b*) as are not apparent on the face of the document or part.

(3) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reasons relied on.

Statement admissible by virtue of section 4 of the Act: contents of notice (O.38, r. 23)

23.—(1) If the statement is admissible by virtue of section 4 of the Act, the notice must have annexed to it a copy or transcript of the document containing the statement, or of the relevant part thereof, and must contain— **38/23**

(*a*) particulars of—

(i) the person by whom the record containing the statement was compiled;

(ii) the person who originally supplied the information from which the record was compiled; and

(iii) any other person through whom that information was supplied to the compiler of that record;

and, in the case of any such person as is referred to in (i) or (iii) above, a description of the duty under which that person was acting when compiling that record or supplying information from which that record was compiled, as the case may be;

(*b*) if not apparent on the face of the document annexed to the notice, a description of the nature of the record which, or part of which, contains the statement; and

(*c*) particulars of the time, place and circumstances at or in which that record or part was compiled.

(2) If the party giving notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on.

Statement admissible by virtue of section 5 of the Act: contents of notice (O.38, r.24)

38/24 **24.**—(1) If the statement is contained in a document produced by a computer and is admissible by virtue of section 5 of the Act, the notice must have annexed to it a copy or transcript of the document containing the statement, or of the relevant part thereof, and must contain particulars of—

(*a*) a person who occupied a responsible position in relation to the management of the relevant activities for the purpose of which the computer was used regularly during the material period of store or process information;

(*b*) a person who at the material time occupied such a position in relation to the supply of information to the computer, being information which is reproduced in the statement or information from which the information contained in the statement is derived;

(*c*) a person who occupied such a position in relation to the operation of the computer during the material period;

and where there are two or more persons who fall within any of the foregoing subparagraphs and some only of those persons are at the date of service of the notice capable of being called as witnesses at the trial or hearing, the person particulars of whom are to be contained in the notice must be such one of those persons as is at that date so capable.

(2) The notice must also state whether the computer was operating properly throughout the material period and, if not, whether any respect in which it was not operating properly or was out of operation during any part of that period was such as to affect the production of the document in which the statement is contained or the accuracy of its contents.

(3) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on.

Reasons for not calling a person as a witness (O.38, r.25)

38/25 **25.** The reasons referred to in rules 22(3), 23(2) and 24(3) are that the person in question is dead, or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or that despite the exercise of reasonable diligence it has not been possible to identify or find him or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice relates.

Counter-notice requiring person to be called as a witness (O.38, r.26)

26.—(1) Subject to paragraphs (2) and (3), any party to a cause or matter on whom a notice under rule 21 is served may within 21 days after service of the notice on him serve on the party who gave the notice or a counter-notice requiring that party to call as a witness at the trial or hearing of the cause or matter any person (naming him) particulars of whom are contained in the notice. **38/26**

(2) Where any notice under rule 21 contains a statement that any person particulars of whom are contained in the notice cannot or should not be called as a witness for the reason specified therein, a party shall not be entitled to serve a counter-notice under this rule requiring that person to be called as a witness at the trial or hearing of the cause or matter unless he contends that that person can, or as the case may be, should be called, and in that case he must include in his counter-notice a statement to that effect.

(3) Where a statement to which a notice under rule 21 relates is one to which rule 38 applies, no party on whom the notice is served shall be entitled to serve a counter-notice under this rule in relation to that statement, but the foregoing provision is without prejudice to the right of any party to apply to the Court under rule 28 for directions with respect to the admissibility of that statement.

(4) If any party to a cause or matter by whom a notice under rule 21 is served fails to comply with a counter-notice duly served on him under this rule, then, unless any of the reasons specified in rule 25 applies in relation to the person named in the counter-notice, and without prejudice to the powers of the Court under rule 29, the statement to which the notice under rule 21 relates shall not be admissible at the trial or hearing of the cause or matter as evidence of any fact stated therein by virtue of section 2, 4 or 5 of the Act, as the case may be.

Determination of question whether person can or should be called as a witness (O.38, r.27)

27.—(1) Where in any cause or matter a question arises whether any of the reasons specified in rule 25 applies in relation to a person particulars of whom are contained in a notice under rule 21, the Court may, on the application of any party to the cause or matter, determine that question before the trial or hearing of the cause or matter or give directions for it to be determined before the trial or hearing and for the manner in which it is to be so determined. **38/27**

(2) Unless the Court otherwise directs, the summons by which an application under paragraph (1) is made must be served by the party making the application on every other party to the cause or matter.

(3) Where any such question as is referred to in paragraph (1) has been determined under or by virtue of that paragraph, no application to have it determined afresh at the trial or hearing of the cause or matter may be made unless the evidence which it is sought to adduce in support of the application could not with reasonable diligence have been adduced at the hearing which resulted in the determination.

Directions with respect to statement made in previous proceedings (O.38, r.28)

28. Where a party to a cause or matter has given notice in accordance with rule 21 that he desires to give in evidence at the trial or hearing of the cause or matter— **38/28**

(*a*) a statement falling within section 2(1) of the Act which was made by a person, whether orally or in a document, in the course of giving evidence in some other legal proceedings (whether civil or criminal), or

(*b*) a statement falling within section 4(1) of the Act which is contained in a record of direct oral evidence given in some other legal proceedings (whether civil or criminal)

any party to the cause or matter may apply to the Court for directions under this rule, and the Court hearing such an application may give directions as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved.

Power of Court to allow statement to be given in evidence (O.38, r.29)

38/29 **29.**—(1) Without prejudice to section 2(2)(*a*) and 4(2)(*a*) of the Act and rule 28, the Court may, if it thinks it just to do so, allow a statement falling within section 2(1), 4(1) or 5(1) of the Act to be given in evidence at the trial or hearing of a cause or matter notwithstanding—

(*a*) that the statement is one in relation to which rule 21(1) applies and that the party desiring to give the statement in evidence has failed to comply with that rule, or

(*b*) that that party has failed to comply with any requirement of a counter-notice relating to that statement which was served on him in accordance with rule 26.

(2) Without prejudice to the generality of paragraph (1) the Court may exercise its power under that paragraph to allow a statement to be given in evidence at the trial or hearing of a cause or matter if a refusal to exercise that power might oblige the party desiring to give the statement in evidence to call as a witness at the trial or hearing an opposite party or a person who is or was at the material time the servant or agent of an opposite party.

Restriction on adducing evidence as to credibility of maker, etc. of certain statements (O.38, r.30)

38/30 **30.** Where—

(*a*) a notice given under rule 21 in a cause or matter relates to a statement which is admissible by virtue of section 2 or 4 of the Act, and

(*b*) the person who made the statement, or, as the case may be, the person who originally supplied the information from which the record containing the statement was compiled, is not called as a witness at the trial or hearing of the cause or matter, and

(*c*) none of the reasons mentioned in rule 25 applies so as to prevent the party who gave the notice from calling that person as a witness,

no other party to the cause or matter shall be entitled, except with the leave of the Court, to adduce in relation to that person any evidence which could otherwise be adduced by him by virtue of section 7 of the Act unless he gave a counter-notice under rule 26 in respect of that person or applied under rule 28 for a direction that that person be called as a witness at the trial or hearing of the cause or matter.

Notice required of intention to give evidence of certain inconsistent statements (O.38, r.31)

31.—(1) Where a person, particulars of whom were contained in a notice given under rule 21 in a cause or matter, is not to be called as a witness at the trial or hearing of the cause or matter, any party to the cause or matter who is entitled and intends to adduce in relation to that person any evidence which is admissible for the purpose mentioned in section 7(1)(*b*) of the Act must, not more than 21 days after service of that notice on him, serve on the party who gave that notice, notice of his intention to do so. **38/31**

(2) Rule 22(1) and (2) shall apply to a notice under this rule as if the notice were a notice under rule 21 and the statement to which the notice relates were a statement admissible by virtue of section 2 of the Act.

(3) The Court may, if it thinks it just to do so, allow a party to give in evidence at the trial or hearing of a cause or matter any evidence which is admissible for the purpose mentioned in the said section 7(1)(*b*) notwithstanding that the party has failed to comply with the provisions of paragraph (1).

Costs (O.38, r.32)

32. If— **38/32**

(*a*) a party to a cause or matter services a counter-notice under rule 26 in respect of any person who is called as a witness at the trial of the cause or matter in compliance with a requirement of the counter-notice, and

(*b*) it appears to the Court that it was unreasonable to require that person to be called as a witness,

then, without prejudice to Order 62 and, in particular, to rule 10(1) thereof, the Court may direct that any costs to that party in respect of the preparation and service of the counter-notice shall not be allowed to him and that any costs occasioned by the counter-notice to any other party shall be paid by him to that party.

Certain powers exercisable in chambers (O.38, r.33)

33. The jurisdiction of the Court under sections 2(2)(*a*), 2(3), 4(2)(*a*) and 6(1) of the Act may be exercised in chambers. **38/33**

Statements of opinion (O.38, r.34)

34. Where a party to a cause or matter desires to give in evidence by virtue of Part I of the Act, as extended by section 1(1) of the Civil Evidence Act 1972, a statement of opinion other than a statement to which Part IV of this Order applies, the provisions of rules 20 to 23 and 25 to 33 shall apply with such modifications as the Court may direct or the circumstances of the case may require. **38/34**

Added by R.S.C. (Amendment) 1974 (S.I. 1974 No. 295).

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