Preliminary Paper No 10

# HEARSAY EVIDENCE

an Options Paper prepared
for the Law Commission by
an advisory committee on evidence law

The Law Commission welcomes your comments
on the Options Paper and
seeks your response to the questions raised.

These should be forwarded to:

The Director, Law Commission, PO Box 2590,
Wellington

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# INTRODUCTION BY THE LAW COMMISSION

In 1988 the Law Commission set up a small advisory committee to continue the review of the law of evidence previously in the hands of the Evidence Law Reform Committee. The Commission sees it as an open question whether this review should lead eventually to a complete codification.

The members of the committee, as at May 1989, were:

B J Cameron CMG (Co-Chairman)
I L McKay (Co-Chairman)
C B Cato
R S Chambers
Hon R C Savage CBE

In common law systems such as ours the law which determines what evidence the courts can receive in disputes coming before them is sophisticated, detailed and sometimes highly technical. To be admissible evidence must of course be relevant to the issue to be decided. But by no means all evidence that is relevant is admissible.

The rules that exclude some relevant evidence are broadly of two kinds. First, there are the rules that exclude evidence in order to protect other important public interests. Thus the rules relating to spousal privilege protect confidences between husband and wife. The rules concerning public interest immunity (at one time called Crown privilege) protect defence, external relations and certain other national interests. All systems of law recognise these sorts of bases for excluding some potentially relevant evidence.

Secondly, there are the rules that exclude evidence on the basis that it is inherently too unreliable, emotionally prejudicial out of proportion to its probative value, or comes too close to usurping the functions of the jury or judge as fact-finder. Restrictions of this character are peculiarly developed in common law systems, giving the law of evidence in these countries much of its special and artificial nature. The rule against hearsay is a good example of this.

The advisory committee considered that the Law Commission's review of the law of evidence might usefully begin with the subject of hearsay evidence for a number of reasons. It is a characteristic and very technical aspect of evidence law in New Zealand and elsewhere in the common law world. It is of particular practical importance.

Parts of it have been the subject of repeated statutory attention in modern times. Yet the law on hearsay evidence is still in some respects unclear, inconsistent, and lacking in coherence. Various parts are still to be found in the common law. And some would say it is out of tune with the practical needs of cases being dealt with in the courts, and indeed sometimes fails to correspond with what actually happens there. In the recent case of R v Baker (CA 27/89, 17 March 1989), Cooke P stated:

> "I venture to think that [the hearsay rule] is one of the major and more-or-less everyday areas of the common law where, although just results are no doubt usually managed in practice, the courts have not succeeded in working out or articulating rules supplying deductive answers to practical problems."

The advisory committee has accordingly prepared this Options Paper, which examines a range of approaches to change in the law relating to hearsay evidence. It sets out the arguments for and against the options, which range from relatively small textual amendments to the Evidence Amendment Act 1980 to the abolition of the hearsay rule in civil cases.

The paper has been prepared on the basis that its purpose was not to take any particular position on the issues it raises but to enable them to be evaluated and to obtain reactions to them. However, a central and important question the paper raises is whether any further statutory intervention should be piecemeal or should attempt to deal with hearsay evidence more broadly. The answer to this could have important consequences for other topics taken up by the Law Commission in its ongoing review of the law of evidence.

The Law Commission is directed by its statute to have regard to the desirability of simplifying the expression and content of the law. It also has to advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. The hearsay rule in its present state is hardly remarkable either for intelligibility or ease of access. Partly for these reasons the Commission is tentatively disposed towards a broad approach and against further detailed legislation. It would particularly like to learn whether there is any reason why that philosophy ought not apply in this area.

The Law Commission commends the Options Paper to all those interested in the subject of evidence law, and along with the committee would welcome their response.

Submissions should be forwarded to:

The Director
Law Commission
PO Box 2590
Wellington

by Friday, 1 September 1989. Inquiries in the first instance can be directed to Megan Richardson ((04) 733-453).

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## PRELIMINARY

1 One of the most far-reaching exclusionary rules of evidence in our adversarial system of justice is the rule against hearsay, or the "hearsay rule" as it is often called. Under this rule evidence which is termed "hearsay" because it involves second-hand (or even third, fourth or fifth-hand) information cannot be admitted at trial and therefore cannot be considered by the fact-finder, whether judge or jury, in reaching a verdict. The obvious reason is the danger of multiplied error which is unable to be tested because the person who made the original statement cannot be cross-examined on it. But there are exceptions to the hearsay rule, both at common law and under statute. The main statutory ones are contained in the Evidence Amendment Act (No 2) 1980 which implements a 1967 Report of the then Torts and General Law Reform Committee.

2 However, the exceptions, including those in the Act itself, have never been easy to apply in practice. The varying interpretations accorded to s 3 of that Act by the Court of Appeal in the recent case of R v Hovell [1986] 1 NZLR 500 (discussed in detail below) provided but one example. A close analysis of the section only served to highlight its uncertainties. Other sections indicated similar problems. This led us to consider that the whole Act, as it relates to hearsay evidence, might be reviewed. Nine years have passed since it was enacted (and 22 years since the publication of the Report of the Torts and General Law Reform Committee on which it was based). This has given ample time for experience with the Act to be measured.

3 The Evidence Law Reform Committee (which superseded the Torts and General Law Reform Committee) in 1987 published a Report on Business Records and Computer Output proposing liberalised admissibility for business records as an exception to the hearsay rule. In the light of that Report it may be that the time has come for a somewhat bolder approach to hearsay evidence generally. Thus it was decided that the advisory committee should carry out a comprehensive review of the hearsay rule and its exclusions, and suggest possible options for reform.

4 This paper:

- examines the reasons for and against the hearsay rule, raising some general questions about the balance between the rule and its exceptions, and the possibility for variation depending on the nature of the proceedings and interests at stake (paras 5-17);

- analyses the present state of the law, including the 1980 Act, in the light of cases such as R v Hovell (paras 18-33); and

- indicates broad options for reform ranging from simple clarification of aspects of the Evidence Amendment Act, through full codification of the law on hearsay evidence, to abolition of the hearsay rule at least in civil cases (paras 34-80).

## DEFINITION AND RATIONALE

5 It must be stressed that a rule which excludes hearsay has nothing to do with the relevance of the statement to the facts in issue, nor with the nature of the information since the rule applies to statements of fact as well as opinion. Hearsay statements are excluded simply because they are not presented as first-hand information but are repeated orally or recorded in a document. The common law has long insisted that the person with immediate knowledge of a fact in issue should testify to that fact under oath in the presence of the court, and be subject to the possibility of cross-examination by the opposing party.

6 The hearsay rule is difficult to formulate in precise terms. As a general matter it excludes evidence which is not given orally by a witness at trial and based on that witness's own knowledge of events. But the boundaries at common law are unclear. In fact the rule conflates two rules. The first is that assertions made by persons other than a testifying witness are inadmissible as evidence of the facts asserted. Thus for example, whereas A (as a testifying witness) can give evidence of what she herself observed, she cannot give evidence of what she understands that B observed. The second rule is that previous assertions of a testifying witness are inadmissible as evidence of the facts now being asserted. So in the above example B cannot give evidence of what he stated earlier - he must testify out of his present recollection as to the events in issue. The first rule may be described as the rule against hearsay in the strict sense. But the policies which exclude hearsay evidence can extend to the second as well - and this is why it is included in the standard general formulation.

7 There are a number of policies behind the hearsay rule. Historically there has been a special significance accorded to a witness giving evidence under oath, and the emphasis has always been on oral evidence. The ability to

observe the demeanour of a witness is also undoubtedly important. However, the main policy behind the hearsay rule has to do with cross-examination: the rule reflects the reliance our adversarial system places on cross-examination as a way of testing the truth of evidence. The Law Reform Commission of Canada in its Study Paper on Hearsay (Toronto, 1974) summarised this:

> "A person's description of a past event might be incorrect because of five possible dangers: the danger that the person did not have personal knowledge of the event; the danger that the person did not accurately perceive the event; the danger that the person when he describes the event does not recall an accurate impression of what he perceived; the danger that the language a person uses to convey his recalled impression of the event is ambiguous or misleading; and the danger that the person describing the event might not be giving a sincere account of his knowledge (Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv L Rev 177). All of these dangers may be explored by effective cross-examination and the adversary is denied the opportunity of exposing imperfections of perception, memory, communication and sincerity and challenging the person's testimonial qualification of first-hand knowledge if the description is not given at trial by the person with alleged first-hand knowledge of the event ... ."

But some would say that the policy is narrower than cross-examination - and that the rule is simply based on a fundamental distrust of the ability of the jury to correctly evaluate evidence without having the potential defects drawn out and demonstrated before it: see for instance Cross, "What Should Be Done About the Rule Against Hearsay?" [1965] Crim LR 66, 97.

8 Indeed, historically, the hearsay rule, like many of the common law rules of evidence, may be said to be the child of the jury system. According to Wigmore on Evidence (Chadbourn ed, 1976, ch 45), it developed along with the modern concept of the jury, becoming fully established only around the end of the seventeenth century. More specifically, the rule is the child of the jury in the adversary system as we know it - where each party has the opportunity to expose the defects in the case put up by the other side. It presupposes that in difficult cases the jury cannot be counted on to properly evaluate evidence which has not been tested by cross-examination (although it is precisely the function

of the jury to weigh and assess evidence). But the rule is not limited to the jury. In cases without a jury it extends to the judge as fact-finder (although a judge at least should be expert in weighing evidence, and in any event would have to learn of its general character to determine its admissibility). There may well be some truth in what the hearsay rule presupposes about the difficulty in weighing evidence which has not been the subject of cross-examination. But it may be questioned whether the consequences should always be so far-reaching.

EXCEPTIONS AND DEVIATIONS

9 In fact there have been exceptions from the hearsay rule almost from the time it came into existence. Early examples cited in Wigmore on Evidence are:

- dying declarations;
- statements of fact against the declarant's interest;
- statements about family history;
- regular entries in records made in the course of business;
- statements about a person's reputation;
- official statements;
- statements in learned treatises;
- declarations of a mental condition;
- spontaneous exclamations.

These still exist - in one form or another - as common law or statutory limits on the rule against hearsay. In some cases they are treated as exclusions rather than exceptions, recogising the existence of a separate positive basis for admissibility (see eg para 25 below, "res gestae" evidence).

10 Mostly the exceptions come down to cases where -

(1) there is good reason for not requiring the maker of the statement to testify in person (generally expressed in terms of the declarant being "unavailable"); and

(2) there are circumstantial guarantees as to the reliability of the evidence.

Sometimes the latter by itself is sufficient, although the same reasons could arguably extend to much of the evidence which is still excluded by the hearsay rule.

11 Certain New Zealand statutes which establish specialised courts and other tribunals routinely empower the tribunal in question to receive such evidence as thought fit, whether or not it would be admissible under the ordinary rules. Examples are Family Courts, Children and Young Persons Courts in respect of their care and protection jurisdiction (to be vested in Family Courts under the Children, Young Persons, and their Families Act 1989), the Labour Court, Disputes Tribunals, the Planning Tribunal, Taxation Review Authorities and the Commerce Commission. The tribunals are effectively given a broad discretion to dispense with the rigid application of the hearsay rule, and hearsay evidence is regularly admitted: see for instance Department of Social Welfare v H and H (1987) 4 NZFLR 397 (videotaped evidence admitted in a Children and Young Persons Court). In some cases where ordinary courts themselves exercise a specialist jurisdiction they are empowered to dispense with the strict rules of evidence, as in the case of the Electoral Act 1956 s 166 and the Commerce Act 1986 s 79.

12 There are some general limits of the hearsay rule in the ordinary courts of justice - simply because there are limits on the scope of the law of evidence. Thus no proof is required of matters which are formally admitted, consented to in civil proceedings, or judicially noticed. The practical scope of the first is not of great significance. But the second is not unimportant. Indeed in many cases, criminal as well as civil, information is let in simply because a party does not happen to object to it (although in criminal cases a court on appeal can still set aside a conviction on the basis that the material should have been excluded). The capacity for a judge to take judicial notice of facts, or to direct a jury to do so, is also very wide. It extends to anything which is considered to be of general knowledge, or of which the judge can become informed through inquiries from general sources. The categories of these have been significantly extended by s 42 of the Evidence Act 1908, referring to standard works of general literature. And the cases have also taken a liberal approach: see for instance Ngai Tahu Maori Trust Board & Ors v Attorney-General & Ors (HC - Wellington, CP 553, 559, 610 & 614/87, 19 May 1989) where judicial notice was taken of the findings in a report of the Waitangi Tribunal.

13 The more general deficiencies of the hearsay rule have been summarised as follows:

> "The rule against hearsay has five disadvantages. First, it results in injustice where a witness who could prove a fact in issue is dead or unavailable to be called; secondly, it adds to the cost of proving facts in issue which are not really in dispute; thirdly, it adds greatly to the technicality of the law of evidence because of its numerous exceptions ...; fourthly, it deprives the court of material which would be of value in ascertaining the truth; and fifthly, it often confuses witnesses and prevents them from telling their story in the witness-box in the natural way." (Law Reform Committee, Hearsay Evidence in Civil Proceedings (1966) para 40; Criminal Law Revision Committee, Evidence (General) (1972) para 228).

The first and fourth are possibly the most significant arguments against the hearsay rule - based as they are on the principle of our adversarial system that each party should have the opportunity to bring evidence in support of his or her case.

## POLICY ISSUES

14 Thus the hearsay rule, supplemented by its various exceptions, may be seen as a product of tensions between aspects of the adversarial system - which requires both that evidence of relevance to the case be able to be put before the court by the parties (para 13), and that any defects in that evidence be able to be exposed by them in view of the court (referring back to para 7). A major focus of this paper is: if the rule is to be retained, where should the balance lie between the need for a full view of the relevant evidence and the need to keep out evidence which cannot be tested in open court? More specifically:

(1) how far should the rule against hearsay extend; and

(2) on what basis should exceptions be allowed?

Should these be based on a general ground that there are circumstantial guarantees as to the reliability of the evidence, so that the opportunity for cross-examination can be dispensed with? Should unavailability of the declarant to testify be an added condition, taking account of whether or not cross-examination is practicable? Are

there some cases where the circumstantial guarantees are enough that unavailability need not be a condition?

15 Further questions are whether the same rules should apply to civil and criminal proceedings; to the accused as well as the prosecution in criminal cases; and to cases before a judge alone as well as those with a jury. If the answer is that the same rules should apply except when a different approach is justified in the circumstances, the question is what kind of circumstances justify a distinction. That a jury might be less experienced and expert in weighing evidence than a judge? That criminal proceedings are fundamentally more serious than civil proceedings, particularly for the accused (whose personal liberty may be at stake)? Or simply that the onus of proof is different in criminal and civil cases and this should be reflected also in the evidence rules?

16 There is also the question of what the distinctions should be if there are to be distinctions. For instance, if the rules are to be different for jury cases and those before a judge alone, how should the distinction be drawn in a practical way? Should it be based on whether or not jury trials are elected in particular cases? Or could a more general distinction be drawn between criminal trials, on the one hand, and civil proceedings (where jury trials are now rare)? Does the seriousness of criminal proceedings mean there should be greater protection of an accused's normal entitlement to cross-examine - as in the United States where the Constitution guarantees the accused's "right of confrontation" (although watered down in the case law to admit categories of particularly reliable evidence)? Or does it mean there should be safeguards against the accused manufacturing evidence to exculpate himself or herself - as there are in some other common law countries including New Zealand?

17 Finally, there is the question of how an appropriate balance should be drawn between the hearsay rule and its exceptions. Should it be established by judicial or legislative rules, perhaps with a moderate degree of discretion left to the judge in particular cases? Or should the terms be largely discretionary, leaving the balance to be drawn by the individual judge on a case-by-case basis (in which case the rule itself could perhaps disappear)? The interests of general predictability and uniformity may be at odds with the interests of justice being done in individual cases. In the end if the hearsay rule is to be retained a balance may have to be found between the competing interests involved. Does the answer lie somewhere between unfettered judicial discretions and relatively rigid statutory rules?

## THE PRESENT LAW

### THE EVIDENCE AMENDMENT ACT (NO 2) 1980

18 The Evidence Amendment Act (No 2) 1980, which deals primarily with hearsay evidence, supersedes previous Acts of 1945 and 1966, bringing their provisions for civil and criminal proceedings more in line. The Act is the outcome of the 1967 Report of the Torts and General Law Reform Committee. Broadly, the Committee recommended that -

(1) statements recorded at first-hand or in a business record be admissible if the maker of the statement is unavailable;

(2) statements repeated at first-hand be admissible in civil proceedings without a jury if the maker of the statement is unavailable, and in any proceedings in more limited cases (based on miscellaneous common law exceptions).

These recommendations were substantially adopted in the 1980 Act, in particular s 3 (documentary hearsay evidence) and ss 7-14 (oral hearsay evidence). A copy of Part I of that Act is attached for reference.

19 However, there are some departures from the Committee's proposals. Especially, a limitation was added to the documentary hearsay evidence provision to exclude statements made in contemplation of criminal proceedings. The original motivation stemmed from a desire to have some form of an "interested person" disqualification for admissibility in criminal proceedings (as there was in the 1945 Act for civil proceedings). The main purpose was to exclude statements manufactured by professional criminals. But the precise formulation of the present s 3(2) originated in a particular concern about the danger of fabrication by accomplices.

20 In addition the distinction made by the Torts and General Law Reform Committee between oral hearsay evidence in civil proceedings without a jury and other proceedings was altered to a simple distinction between civil proceedings (s 7) and criminal proceedings (ss 8-14). The reason given in the Report on the Bill by the Statutes Revision Committee was that there were so few civil juries that the number "would scarcely warrant provision of a separate evidential regime" from other civil proceedings. The Committee itself would have preferred a closer equation of criminal proceedings to civil proceedings, but

felt this could not be done without a more detailed review.

21 The Act also included a statutory reference to the meaning of "unavailable" which was not in the draft Bill. Specifically, s 2(2) provides that:

> "For the purposes of sections 3 to 8 of this Act, a person is unavailable to give evidence in any proceeding if, but only if, he -
> (a) is dead; or
> (b) is outside New Zealand and it is not reasonably practicable to obtain his evidence; or
> (c) is unfit by reason of old age or his bodily or mental condition to attend; or
> (d) cannot with reasonable diligence be found."

The general provision is supplemented by reference in s 3(1)(b) to the maker of the statement being unidentified or unable to recollect (s 4 allowing for the unlikely case where the maker nonetheless testifies in relation to the matter), and in s 3(1)(c) to undue expense or delay being caused by obtaining his or her evidence. The s 3(1)(b) and 3(1)(c) references are limited to business records and first-hand documentary hearsay evidence in civil proceedings respectively. In substance this is much the same as what was proposed by the Torts and General Law Reform Committee.

22 In other respects the Act largely reproduces the draft Bill prepared by the Torts and General Law Reform Committee. In particular it specifically provides for the admissibility of oral and documentary hearsay evidence by consent and extends this to criminal proceedings (s 15) and it has an overriding provision that the judge in a jury case can exclude otherwise admissible hearsay evidence on the basis that its prejudicial effect would outweigh its probative value or it would otherwise be "not necessary or expedient in the interests of justice" to admit the evidence (s 18) - drawing on the general common law discretion the judge has in criminal cases. The Act preserves the status of evidence which would be admissible as an exception to the hearsay rule under other statutory provisions or at common law (s 20).

23 This latter provision has some significance because there are a number of exceptions to the hearsay rule contained in individual statutes dealing with specialised subject matter. Thus for instance extracts from bankers' books are admissible as business records under their own provisions in the Banking Act 1982. Other statutes provide for the admissibility of certain types of "public

records". Particular categories are records certified as correct by an authorised person (eg an analyst's certificate made pursuant to the Pesticides Act 1979), entries in public registers (eg the Register of Births and Deaths), and extracts from public records kept by companies. (The specific reference to the admissibility of share registers would, however, go under the new Companies Bill proposed by the Law Commission: Company Law: Reform and Restatement (R 9, 1989).) The Evidence Act 1908 also makes some provision for statements in public documents. In particular s 28 provides for judicial notice to be taken of, among other things, statutes and regulations.

24 A further statutory provision of relevance in this context is found in the Summary Proceedings Act 1957. The Act deals with the taking of depositions and, in limited circumstances (requiring the consent of all the parties), written statements at a preliminary hearing. Section 184 states that the deposition or written statement may be read in evidence at the trial if "the person making the deposition, or written statement, is out of New Zealand or dead or is so ill as not to be able to travel, or if in any case all the parties consent". On the civil side the High Court Rules provide for the reception of affidavits. Provisions of possible significance for hearsay evidence are rr 500 and 501 which provide that affidavit evidence may be received by agreement, or pursuant to an order of the Court unless the opposite party desires the production of a witness for cross-examination and the witness can be produced. There may be some overlap here with ss 3 and 15 of the Evidence Amendment Act.

25 The 1980 Act also leaves two major common law principles which have a bearing on hearsay evidence outside the statutory scheme. The first concerns admissions and confessions (admissions made by an accused in criminal proceedings). Admissions are, broadly speaking, admissible against the person by or on whose behalf they are made. Confessions, however, are subject to the stricter test of voluntariness - but s 20 of the Evidence Act states that a confession is admissible notwithstanding that it was induced if the inducement is not likely to have rendered it untrue. The second common law principle relates to statements which are so closely connected to the facts under investigation as to form part of the "res gestae" (literally "the things that happened" although the phrase is unhelpful). Broadly speaking, they comprise statements of contemporaneous emotional or mental state of mind or physical sensation, spontaneous statements relating to the event, and statements accompanying and explaining the event - although the

actual boundaries are still being worked out in the cases: see for instance R v Baker (CA 27/89, 17 March 1989) where a very liberal approach was adopted.

26 A number of common law exceptions have residual application, notwithstanding specific statutory provisions which cover some of their aspects. One example is the common law exception for public documents which are kept and made available for the use and information of the public. This has residual effect beyond the exception for "business records" in the Evidence Amendment Act, and the specific statutory exceptions for public documents noted above. Other examples are the miscellaneous common law exceptions which are taken up in ss 8-14 of the Evidence Amendment Act as statutory exceptions in respect to oral hearsay evidence in criminal proceedings. On the other hand, the common law treatment of earlier statements used to refresh the memory of a testifying witness or to contradict a witness (extended by ss 10 and 11 of the Evidence Act) is premised on the basis that the statements are not "hearsay" because their use is confined to bolstering present testimony or attacking witness credibility.

27 Finally, the 1980 Act does not actually prohibit hearsay evidence, leaving that to the common law. Nor does it deal with the definition of "hearsay". The Torts and General Law Reform Committee did not attempt a statutory definition and in fact deliberately avoided the expressions "hearsay" or "hearsay evidence" in the wording of the various clauses of its draft Bill. Thus what is - and what is not - "hearsay" is still a matter for the common law. As already indicated, the common law draws a distinction depending on whether the statement is being offered in evidence to prove the truth of its contents. Thus simple non-assertive words or conduct are not captured by the hearsay rule. What is not clear, though, is whether the notion of "hearsay" extends to assertions which may be implied from words or deeds which were not really intended for this purpose.

## EXPERIENCE WITH THE 1980 ACT

28 The principal case under the Evidence Amendment Act is undoubtedly R v Hovell (cited para 2 above). The Court of Appeal was divided on whether a statement made to the police by a rape complainant was prima facie admissible as documentary hearsay evidence within s 3(1) (see para 18 above) and whether s 3(2) would exclude it because the complainant may have contemplated there would be some criminal proceedings at the time she made the statement.

The application of s 3(1) hinged on whether the documented statement was regarded as belonging to the complainant (who signed it as correct) or the police officer who wrote it down. McMullin and Somers JJ thought that the statement was the complainant's statement - and was therefore a statement made by a person with personal knowledge for the purposes of s 3(1)(a) (an interpretation which recently found support in a judgment on a similar provision of the English Police and Criminal Evidence Act: R v O'Loughlin [1988] 3 All ER 431). Richardson J thought the statement was the police officer's statement - and was therefore a statement made by a person in a document which is a "business record" for the purposes of s 3(1)(b).

29 The application of s 3(2) hinged on whether its specific reference to a "statement in a document that records an oral statement" could allow for the complainant being the recorder of her own oral statement. McMullin and Somers JJ thought that the provision could not extend this far, ie that s 3(2) could not apply to exclude s 3(1)(a) statements. Richardson J thought that s 3(2) could apply to s 3(1)(a) statements (although, technically speaking, he did not need to decide the point). In any event, the provision applied to s 3(1)(b) statements. The second issue under s 3(2) was whether the reference to "the criminal proceeding" being contemplated referred to specific criminal proceedings against the defendant, who had not been identified at that stage, or to the general liklehood of criminal proceedings. Richardson J thought that generally contemplated criminal proceedings were sufficient for the purposes of s 3(2). McMullin and Somers JJ expressed doubts on this but did not need to decide the question since they had already decided that s 3(2) did not apply. Thus, in the end the statement was admitted by majority decision, despite some quite significant differences between the majority and minority judges on the meaning of ss 3(1) and 3(2).

30 R v Hovell went to the Court of Appeal for a second time: [1987] 1 NZLR 610. On this occasion it was s 18 of the Evidence Amendment Act which was under consideration. It was argued that the phrase "not necessary or expedient in the interests of justice" in s 18 was a basis for excluding evidence which placed in jeopardy the liberty of an accused in criminal cases. The Court unanimously rejected the argument that s 18 provided a general "right of confrontation" for an accused, stating that:

> "[W]e cannot ignore the fact that Parliament has altered the general common law position by amendment, nor can we see any indication that the acceptance of such statements must be limited to

> less serious cases or peripheral evidence. Indeed, to impose such a general rule would be to place an unwarranted restriction on the clear words of s 3 prescribing the general conditions of admissibility." (p 612)

The Court did say that particular problems associated with the lack of opportunity to cross-examine could be dealt with under s 18. However Hovell's case did not qualify since the statement was too vague and unspecific for cross-examination to have helped. (Indeed the main identification evidence in that case was fingerprint evidence.) By contrast, in R v Walker (1987) 2 CRNZ 613, where the complainant's credibility was of central importance to the case for the accused, her statement was excluded under s 18.

31 Of the other cases under the Evidence Amendment Act Fiefa v Department of Labour [1983] NZLR 704 is of interest on the meaning of "unavailable". As already mentioned (para 21), although s 2(2) contains a statutory statement of "unavailability", s 3(1)(b) adds to this for business records the basis of lack of recollection. The Court held that the fact that 10 months had elapsed since the officer stamped the passport for the defendant was not of itself sufficient to show a reasonable likelihood of lack of recollection on his part. Further evidence was needed to show that 10 months was too long a period for the officer to remember. Thus the hearsay evidence of the stamp (to prove that the defendant's temporary permit to remain in New Zealand had expired) could not be admitted.

32 Difficulties with the definition of "business record" in s 2 of the Act (apart from the general problems associated with computer output) were discussed in the Evidence Law Reform Committee Report on Business Records and Computer Output. For instance, what is a "duty" for the purpose of the first part, and what is a "record ... relating to any business" for the purpose of the second part? The Committee pointed to a conflict in the cases on the question whether a business record could, for instance, include correspondence or invoices or consignment notes. There is also the question whether the maker of the business record and the supplier of the information (the maker of the original statement) could be one and the same. The Committee thought it was arguable that they could not but concluded that this would be an arbitrary and unjustified limitation on the admissibility of business records. In R v Hovell, however, the minority judge at least thought the maker of the record and the supplier of the information must be different persons for the purposes of s 3(1)(b).

33 There have been few cases on the Act's provisions regarding oral hearsay evidence. Whether this is because they create few problems of interpretation is unclear. The distinction made by these provisions between civil and criminal proceedings has led to some discussion. In Auckland District Law Society v Leary (HC-Auckland, M 1471/84, 12 November 1985) the question was whether proceedings to strike off a solicitor were criminal with the consequence that the narrower provisions of ss 8-14 would have to be satisfied if an oral hearsay statement was to be admitted. The Act provides no definition of civil as opposed to criminal proceedings. The Court adopted the statement in Pallin v Department of Social Welfare [1983] NZLR 266 that the distinction should be based on whether or not the goal of the proceedings is punishment - and held that in that case the goal was merely to protect the public. Therefore, the broader s 7 provision could be used to admit the statement as to the misconduct of the accused.

## THE OPTIONS FOR REFORM

34 The experience of the cases under the Evidence Amendment Act suggests that there may at least be room for clarification of some of the provisions in the Evidence Amendment Act. Thus a limited option for reform is a textual redrafting of the relevant provisions. The case of R v Hovell might suggest that something more is called for - perhaps even some sort of statutory "right of confrontation" for an accused in criminal proceedings. The general policy and practical considerations discussed earlier in this paper may, however, indicate that any move should be towards liberalising the admissibility of hearsay evidence. These competing interests have somehow to be balanced. Thus a second option for reform is to revise the Evidence Amendment Act as it relates to hearsay evidence; a third option extends this to all the statutory provisions on hearsay evidence; and a fourth option suggests that complete codification may be the only way to find the correct balance between the exclusion and inclusion of hearsay evidence. A final option raises the possibility of dispensing with the hearsay rule altogether, at least in civil proceedings.

35 Thus the options for reform which will be discussed in the remainder of this paper are:

- clarification of certain provisions of the Evidence Amendment Act (No 2) 1980 to deal with aspects which are misleading or ambiguous;

- a fuller revision of the Evidence Amendment Act with the aim of improving its general coherence and consistency;

- an extension of the fuller revision to the provisions of other Acts which deal with hearsay evidence;

- a comprehensive review of the law on hearsay evidence - dealing also with the aspects of hearsay evidence which are presently left to the common law;

- abolition of the hearsay rule, at least in civil proceedings.

36 There are several things to be noted here. First, the options might be exercised differently for criminal and civil proceedings, jury and judge-alone cases, or even

sometimes the accused and prosecutor in criminal proceedings (referring back to paras 15 and 16). Second, within the options there are subordinate options. For instance there are a number of ways in which the Evidence Amendment Act could be rewritten or reformed. And there are a number of possible definitions of "hearsay evidence". The choice of a particular broad option does not necessarily entail agreement with every specific suggestion made within it. Nor is it necessary to choose one broad option: specific options may be selected from different broad options. Finally, there may be other options - broad or specific - which have not been covered. This should not preclude further suggestions for reform (or indeed for no reform).

37 In formulating the options we acknowledge the assistance of the work which has already been done by the Evidence Law Reform Committee in its Report on Business Records and Computer Output. (A copy of the draft Bill prepared by that Committee is attached for closer reference.) An earlier Report prepared by the Guest Committee, a subcommittee of the then Law Revision Committee, is also of interest because this led to the 1966 Evidence Amendment Act (providing for the admission of business records in criminal proceedings for the first time) - and it also made proposals for far-reaching reforms to the law on hearsay evidence in civil and criminal proceedings. The latter proposals were not implemented, being superseded by the more cautious recommendations of the Torts and General Law Reform Committee.

38 We have gained useful information from reviews carried out in other countries - in particular the draft Code prepared by the Canadian Law Reform Commission (although its Report suffered the same fate as the broader proposals of the Guest Committee); and more recently the recommendations of the Canadian Federal/Provincial Task Force (although it remains to be seen what will become of these by way of actual legislation). In addition there has been a comprehensive draft Bill on Evidence prepared by the Australian Law Reform Commission. (This appears likely to have some success at the federal level and may be implemented at the state level as well.) The Scottish Law Commission has also reported on hearsay evidence, and its recommendations led to the Civil Evidence (Scotland) Act 1988. We refer, as well, to the English statutes on the subject - the Civil Evidence Act 1968, the Police and Criminal Evidence Act 1984, and the provisions of the Criminal Justice Act 1988 dealing with documentary hearsay evidence in criminal proceedings. The United States Federal Rules of Evidence are considered too, representing

a particularly comprehensive set of evidence laws which have worked well in practice - demonstrated by the fact that the majority of states have promulgated rules of evidence modelled on them. (Their business records provisions also formed the model for the Evidence Law Reform Committee draft Bill.) Finally, some reference is made to the California Evidence Code, the model favoured by the Guest Committee. Copies of the relevant provisions of the above Code, Rules, Acts and draft Bills are appended.

OPTION 1 - CLARIFY EVIDENCE AMENDMENT ACT

the s 3(2) proviso

39 The case of R v Hovell suggests that s 3 of the Evidence Amendment Act might well benefit from clearer drafting. Indeed in one respect at least the majority decision may not correspond with what was in fact intended by the legislature. It is unlikely that s 3(2) was really meant to be limited to s 3(1)(b) statements. Its historical rationale does not suggest this (refer para 19 above), and the policy of excluding manufactured evidence would seem to extend to first-hand as much as second-hand hearsay. The explanatory note to the clause in the Bill introduced into Parliament simply stated that the intention was to exclude from s 3(1) "any statement that is otherwise inadmissible in criminal proceedings if made when the maker knew that criminal proceedings were contemplated". One would have thought that if the intention was to limit s 3(2) to second-hand hearsay evidence it would have been a simple matter to state specifically that it was an exception only to s 3(1)(b).

40 Nevertheless the wording of s 3(2) does lend itself to the meaning adopted by the majority judges in the Court of Appeal. And their view on it must be regarded as authoritative. Thus if the (probable) original intention is to be preserved some changes will have to be made. One option is to omit the reference to a statement being "in a document that records the oral statement". For instance the comparable provision of the English Criminal Justice Act provides simply that if any "statement which is admissible in criminal proceedings" by virtue of its provisions appears to the court to have been prepared for the purpose of pending or contemplated criminal proceedings or a criminal investigation, it shall not be given in evidence in any criminal proceedings without the leave of the court (see s 26 of that Act).

41 There is another respect also in which s 3(2) could be made clearer. The Court in R v Hovell experienced some difficulty with the reference to "the criminal proceeding"

being contemplated, and only one judge came to a definite conclusion on the point. Thus the question as to the meaning of the reference is still open. It is not at all clear that it was intended to extend to cases where criminal proceedings are only a general possibility. A narrower meaning is suggested by the explanatory note to the clause in the Bill introduced into Parliament, and also by the historical rationale for the inclusion of the provision. But the broader interpretation was favoured by the judge in R v Hovell who reached a concluded view. Thus if s 3(2) is to be limited to the actually contemplated proceedings some drafting changes may be required: perhaps a simple alteration of the expression "the proceeding" to "that proceeding" in s 3(2)(a) would assist here.

s 3(1) - meaning of unavailable

42 There are other aspects of s 3 which could also benefit from clarification. It may help to expand the statutory notion of "unavailable" in s 2(2) to incorporate the references from ss 3(1)(b) and 3(1)(c). And s 3(1)(b) may require elucidation in the light of Feifa v Department of Labour (para 31 above). The narrow application in that case of the lack of recollection criterion may be literally within the terms of s 3(1)(b)(iii). But it might seem to be at odds with the expressed intention of the Torts and General Law Reform Committee to cover precisely those cases where there is a considerable lapse of time between the event and the trial. If the criterion is to be retained for business records, it might be preferable to state that a witness may be presumed to be unavailable if, for instance, a long period of time has passed since the event.

s 2 - definitions

43 The difficulties with the definition of "business record" in s 2 of the Act discussed in the Evidence Law Reform Committee Report (para 32 above) may suggest that a new definition is in order. Although the Committee considered that the existing provision could be interpreted in such a way as to deal with some of these difficulties, it also recognised that this was not necessarily the meaning a court would attribute to it. The Committee suggested a definition of "business record" which would, among other things, make it clear that a broad interpretation of "record" is to be preferred and which allows for the possibility that the maker of the record and the supplier of the information are one and the same (see cl 2 of the Committee's draft Bill).

problems with ss 7-14

44 The issue which arose in Auckland District Law Society v Leary (para 33 above) may suggest that if there remains a distinction between civil and criminal proceedings for the purposes of s 7 and ss 8-14 of the

Evidence Amendment Act (or for that matter s 3), this might at least be clarified as to its precise nature and purpose. It may be sufficient here to simply adopt the definition of criminal proceedings suggested in Pallin v Department of Social Welfare, making it clear that the focus is the punitive aim of the proceedings. On the other hand, a wider definition may be preferable, taking into account factors such as the protection of society as being more in line with current criminal policy.

s 18

45 Another provision which may benefit from greater precision is the s 18 discretion to exclude prejudicial evidence (see para 30 above). The Torts and General Law Reform Committee stated that the wording had not led to problems of application elsewhere, and would give the judge the flexibility to achieve individual justice on a case-by-case basis. Arguably the broad reference to admission of the evidence being "not necessary or expedient in the interests of justice" did not lead to problems of interpretation in R v Hovell at its second hearing in the Court of Appeal. Nonetheless there may be advantages in terms of predictability and uniformity in stating more specifically what is intended. For instance r 403 of the US Federal Rules of Evidence provides a guide that evidence which is otherwise admissible under the Rules may be excluded if -

> "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

There is a similar provision in cl 117 of the Australian draft Bill.

46 The above discussion indicates only some of the areas where textual amendments to the Evidence Amendment Act may be worthwhile from the point of view of clarification. But a larger question is whether clarification is sufficient - leading into the next option of a more thoroughgoing revision of the Act.

## OPTION 2 - REVISE EVIDENCE AMENDMENT ACT

proviso for manufactured evidence

47 The case of R v Hovell raises a number of issues which go beyond the interpretation of s 3 of the Evidence Amendment Act. For instance it brings into question the value of s 3(2) when there was clearly no intention on the part of the complainant to manufacture evidence (she could not even identify her assailant). It may be that the

provision should be narrowed to encompass only cases where there is a real risk or possibility of manufactured evidence. A still narrower provision would be one which is limited to cases where it can be shown that the evidence has actually been manufactured. It might be argued that at least the provision should require a showing of "interest" in the proceedings (from which a risk of manufacture could be deduced) as in the case of the 1945 Act. But the Torts and General Law Reform Committee stated that the latter provision had led to problems in practice. The Committee in fact recommended that the issue should be left to the fact-finder to determine as a matter of weight. And, even without s 3(2), s 18 could presumably be used to deal with particular cases of manufactured evidence.

48 A somewhat more specific discretion is found in the English Criminal Justice Act. Section 25 gives the judge a discretion to exclude otherwise admissible evidence if it would be "in the interests of justice" not to admit it, having regard to factors such as the nature and source of the document recording the statement and -

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

(Noteworthy here is the emphasis on protecting the accused from evidence which has not been the subject of cross-examination.)

49 A less roundabout way of achieving the same result may be the provision proposed by the Evidence Law Reform Committee for business records (drawing on the US Federal Rules of Evidence). Clause 3A(3) would enable the court to exclude hearsay evidence prima facie admissible as a business record if -

> "the source of the information contained in the document or the circumstances in which the document was made is not or are not sufficiently trustworthy to justify the admission of the document."

A similar provision could be used for evidence prima facie admissible in criminal proceedings under s 3(1)(a).

50 However, it may be thought that such a provision is inadequate to deal with the problem of confrontation in criminal proceedings - focussing, as it does, on the more

a separate "right" to confront

general problem of manufactured evidence. That is if there is serious concern about the ability of an accused to confront accusing witnesses there may have to be a separate restriction on the admissibility of hearsay evidence in criminal proceedings (over and above s 18). Moreover, it might not be sufficient to leave this to judicial discretion (though that is what the English s 25 does). A "confrontation" provision need not go further than the policy it seeks to protect. For instance it could be limited to making hearsay evidence against the accused inadmissible under s 3(1)(a) unless there is independent corroboration. But it could be taken further - for instance making inadmissible any evidence of central significance to the case against the accused (as indeed was argued in R v Hovell regarding s 18).

manufactured evidence in civil cases

51 It may be argued that there is no need to have a specific limitation for unreliable evidence in civil proceedings because there is less at stake, and furthermore the chances of it happening are less. Thus s 3(2) was only thought to be necessary for criminal proceedings. But the Evidence Law Reform Committee would extend its proposed s 3A(3) limitation to business records used in civil as well as criminal proceedings. It is true there can be a thin dividing line between the two, as evidenced by Auckland District Law Society v Leary. The Committee thought it would be unfortunate if differences in the law of evidence should lead to different results depending on the precise nature of the proceedings. There is, as well, at least some risk of manufactured evidence in civil proceedings, particularly where a great deal of money is at stake. Thus it may be preferable to extend a manufactured evidence proviso to s 3(1)(a) statements used in civil proceedings as well as s 3(1)(c) statements. If the limitation is expressed in a discretionary form (as the limitation proposed by the Evidence Law Reform Committee is) it need not cause injustice because of the lesser likelihood of its applicability in civil cases.

first-hand documentary hearsay evidence

52 Business records would become more easily admissible under the new provision recommended by the Evidence Law Reform Committee (cl 3A(3) draft Bill), and the proposed definition of "business record" is generally broader than that found in s 2 of the Evidence Amendment Act. But in one respect it may be narrower: it lists particular types of documents commonly used in a business context (whereas the present definition does not). Thus it is possible that some documents which are presently caught by that reference would no longer be if the Committee's proposals are implemented - for instance a statement recorded by a police officer. In some cases ss 3(1)(a) and 3(1)(c) could be sufficiently broad to pick them up, for instance

if the record is acknowldedged by the maker of the statement (as in R v Hovell). But one case which it may not always extend to is a statement which has not been so adopted. To deal with this it may be sufficient to simply replace the words "by a person" in the introduction to s 3(1)(a) with the words "or directly recorded" so that the phrase reads "any statement made or directly recorded in a document". This would make it clear that the person making the statement need not actually vouch for the document as long as it is in fact his or her statement which is written down.

**the unavailability requirement**

53 One of the main changes recommended for business records is that the present requirement for unavailability (including the broader s 3(1)(b) grounds of lack of identification or recollection) be dropped. The reason given by the Evidence Law Reform Committee was that there are adequate guarantees of the reliability of such records without looking to the supplier of the information, prepared, as they are, for use in the day-to-day operation of the business. (The converse of this is the Committee's recommendation that the evidence also be used to supplement the testimony of the supplier if called as a witness, extending the current s 4.) The question here is whether the unavailability requirement should be dropped also for first-hand hearsay evidence admissible under ss 3(1)(a) or 3(1)(c). The Australian draft Bill, for instance, provides for this where the event was "fresh in the memory of the declarant" (and actually requires the declarant to be called): cls 57(3) and 59. It may be that the concept of "unavailability" can be expanded - and this is dicussed below. But perhaps it would go too far to drop the "unavailability" requirement for all first-hand hearsay evidence since there are not always the same guarantees of reliability as for business records. Thus it may still be better, in general, to obtain the evidence from an available declarant testifying in person.

54 But there are some respects in which the concept of "unavailability" described in s 2(2) (para 21 above) could be made broader - for instance adopting the additional ss 3(1)(b) and 3(1)(c) criteria as more general bases (whether or not they are retained for business records). The reference to "unfitness by reason of old age" in the current definition of "unavailable" could possibly be extended also to encompass youth - thus allowing hearsay evidence of very young children who cannot be expected to give evidence in person. This would, for example, provide a way of dealing with the problem encountered in R v Sparks [1964] AC 964 (noted by both the Guest Committee and the Torts and General Law Reform Committee as an unfortunate case) - where a statement made by a

child to her mother about an assault she had suffered could actually have exculpated the accused.

evidence of children

55 The latter change would also provide an avenue for making easier and more effective the taking of evidence from children in sexual abuse cases - following the trend overseas, in the United States in particular (see eg the California Evidence Code, s 1228). There are some provisions for children's evidence transmitted through closed-circuit television or prerecorded on videotape in the Law Reform (Miscellaneous Provisions) Bill currently before Parliament but these do not rely on unavailability of the child to testify and the right to cross-examine is still retained in some form. Thus the Bill does not provide for an exception to the hearsay rule as such. In this context the changes might possibly be taken further.

56 For instance in addition to the options referred to in para 54, the concept of "unavailability" could perhaps be broadened to encompass unfitness by reason of emotional condition expanding on the current reference to "mental condition" in s 2(2)(c)) to deal with the problem of older children who are too traumatised to take the stand, even with the protection of screens and so on which courts can provide: see Crime Appeal 163/88 (1988) 3 CRNZ 315 (and also Crime Appeal 171/89, 22 June 1989, regarding closed circuit television). To provide some degree of objectivity, there might be a requirement for some sort of expert evidence to establish that the child is "unavailable" by reason of mental or emotional trauma (as in the case of the California Evidence Code, s 240). The Law Reform (Miscellaneous Provisions) Bill already provides for the use of expert evidence of psychiatric specialists and psychologists with relevant experience for limited purposes. It may be, however, that more work needs to be done in the general area of expert evidence before concrete proposals can be made in this context. This is something we will focus on when we come to consider further topics for evidence reform.

videotaped evidence

57 A related option is to consider whether there needs to be provision made for videotaped evidence in the Evidence Amendment Act. This would recognise the general value of the videotape as a mechanism for recording evidence. The current definition of "document" in s 2 may already be sufficiently broad to include a videotape, in particular its reference to "information recorded or stored by means of any tape-recorder, computer, or other device", or "any photograph, film, negative, tape or other device in which one or more visual images are embodied". The case law already suggests that there is no difference in principle between photographs, tape-recordings and

videofilms: see R v Fowden and White [1982] Crim LR 588. But to remove any doubt about videotapes the definition could be expanded to refer expressly to them. There are a number of arguments in favour of this. Videotaped evidence has already been accepted in cases as direct evidence (for instance on identification issues) and there would seem to be no reason why the same mechanism could not be used to record hearsay evidence. Indeed there might seem to be no reason why videotaped hearsay evidence should not be admissible as normal first-hand documentary hearsay evidence, subject to the same conditions of admissibility.

58 The above changes would of course go further than simply bringing the residual business records cases under the existing provisions for first-hand documentary hearsay evidence - effectively making prima facie admissible all first-hand documentary hearsay evidence when the maker of the statement is unavailable in a broad sense (as discussed in paras 54 and 56 above). But it would be in keeping with the generally liberal approach for business records proposed by the Evidence Law Reform Committee. It was also the approach recommended by the Guest Committee and the Canadian Law Reform Commission where it was justified on the grounds that the hearsay evidence is the best, often the only, evidence available in such cases.

first-hand oral hearsay evidence

59 A more far-reaching move would be to extend the same approach to oral hearsay evidence, effectively making all first-hand oral hearsay evidence admissible whenever the declarant is unavailable in a broad sense. First-hand oral hearsay evidence is already admissible in civil proceedings on much the same terms as documentary hearsay evidence under s 7 of the Evidence Amendment Act. Presumably this would continue to be the case. The question is whether a like approach should be extended to oral hearsay evidence in criminal proceedings. The Torts and Law Reform Committee did not go so far in its recommendations because it felt the combined problem of the evidence not being documented and at risk of manufacture made the evidence too unreliable. But both the Guest Committee and the Canadian Law Reform Commission recommended that oral hearsay evidence in criminal proceedings should not be treated differently on these grounds. As the Guest Committee pointed out, to have a blanket restriction for oral hearsay evidence in criminal proceedings means that valuable and reliable hearsay evidence could be lost (as in R v Sparks, para 54 above). There could still be specific provisos for manufactured evidence and even a right of confrontation in criminal proceedings, as for documentary hearsay evidence.

additional hearsay exceptions

60 The miscellaneous ss 8-14 exceptions could have continuing relevance as additional hearsay exceptions. Although in the Act these are limited to first-hand hearsay evidence (more specifically, first-hand oral hearsay evidence in criminal proceedings where the declarant is unavailable), this is not the case at common law since for each of the provisions there are particular circumstantial guarantees of reliability. If now fully reduced to statutory form, the common law exceptions could usefully supplement a general exception for first-hand hearsay evidence where the maker of the statement is unavailable. Further miscellaneous common law exceptions having particular guarantees of reliability could also be brought into the statutory scheme. At the same time the improvements made by the Torts and General Law Reform Committee in its statutory formulations could be continued - removing unnecessary restrictions on admissibility. This would do something to rationalise the miscellaneous common law exceptions to the hearsay rule.

general second-hand hearsay exceptions

61 It can perhaps be argued that there should be more general exceptions for second-hand hearsay evidence where both the maker of the original statement and the one with first-hand knowledge of it are unavailable. Thus for instance there could be a general exception for documentary hearsay evidence (not just business records) on the basis that the mere fact of documentation enhances the reliability of the evidence. Similarly for evidence used in civil proceedings on the basis that the danger of manufacture is less and there is not the same interest in confrontation. There are, of course, arguments to the contrary. Documents can be mistaken in what they record, especially if there is a longer chain of hearsay preceding the document. Evidence can be manufactured in civil proceedings as well (as mentioned above para 51). And, although there is not the same "confrontation" concern in civil proceedings (there being no risk of imprisonment), there can still be serious consequences for a defendant - not merely financial but also as to reputation. Thus more specific guarantees of reliability may be needed to justify exceptions or for second-hand hearsay evidence.

other reforms

62 There are other sections of the Evidence Amendment Act which it may be thought could usefully be improved. For instance it is debatable whether, without safeguards, the s 15 provision for the admissibility of hearsay evidence by consent is really appropriate for criminal proceedings. For example an accused might, under pressure or without advice, consent to something which is against his or her interests. The Torts and General Law Reform Committee was itself divided on this point. And cl 147 of the Australian draft Bill states that -

"In a criminal proceeding, the consent of the defendant is not effective ... unless -
(a) the defendant is represented by a legal practitioner; or
(b) the court is satisfied that the defendant understands the consequences of giving the consent."

63 The need for s 17 of the Evidence Amendment Act (specifying factors to be considered in the weighing of evidence) might also be questioned. This provision was examined by the Evidence Law Reform Committee in its Report on Business Records. The Committee pointed out that the factors s 17 specifies are only some of those a judge or jury may have to consider. It may be that by specifying some others will be overlooked. For this reason the Committee recommended that the provision be deleted, following a similar recommendation from the Australian Law Reform Commission (and there is no equivalent to s 17 in its draft Bill).

the s 18 discretion

64 The s 18 discretion to exclude prejudicial evidence may be worth consideration in this context. The option of achieving greater clarity and precision in its terms has already been discussed (para 45 above). Alternatively a general formulation may be preferable as allowing for a flexible application on a case-by-case basis. The possibly over-restrictive references to "prejudicial evidence" and "not necessary or expedient in the interests of justice" (deliberately formulated in the negative) could thus be dropped altogether. For instance s 78 of the English Police and Criminal Evidence Act is a provision to the effect that evidence may be excluded if its admission would adversely affect the fairness of the proceedings.

65 There is a further question whether s 18 should be extended to non-jury cases - as in the case of the English provision (and see similarly the US and Australian provisions referred to in para 45). The arguments for uniform treatment of jury and non-jury cases would support this. But it might be asked how much would be achieved if the judge has to learn of the evidence in order to determine whether it should be admitted. On the other hand if the discretion was extended to non-jury cases it could be used to make explicit what the judge should focus on in evaluating the evidence, with benefits in terms of uniformity and predictability. Finally, there is the question whether s 18 should be limited to hearsay evidence. The common law discretion to exclude prejucial evidence of course applies more generally. And the English s 78 applies to any evidence which is otherwise

admissible under the statutory provisions (the Australian and US discretions are the same in this respect). That question, however, goes beyond hearsay evidence and thus may need to be returned to at a later stage of our work on evidence law.

66 This discussion of some of the ways in which the Evidence Amendment Act might be modified leads into the broader option of reforming the whole of the statutory part of the law relating to hearsay evidence - or at least bringing all together in a coherent and accessible form.

## OPTION 3 - REVISE STATUTORY LAW ON HEARSAY EVIDENCE

public documents

67 The main category of hearsay exceptions provided for in various statutes (other than the Evidence Amendment Act) is for specific types of "public documents". It may be questioned whether these are properly dealt with by specific statutes - given that the main function of the provisions is to make exceptions to the hearsay rule. Bringing them within the scope of the Evidence Amendment Act would also allow for rationalisation. Possibly some could be dropped or dealt with under other hearsay provisions (for instance company records, as indeed bankers' records, might better be dealt with under a general business records provision). Some also might better be dealt with under a judicial notice provision (as for instance cl 120 of the Australian draft Bill referring to legislation, regulations and other "matters of law"). A general provision for "public documents" could also be extended to encompass those which are admissible at common law as well, dispensing with the more unhelpful limitations. A decision would have to be made whether the common law requirement that the record be prepared and available for public use should be retained. The US Federal Rules of Evidence, for instance, omit the requirement, defining "public records or reports" as documents of public offices or agencies with a public character, and providing for their admissibility under similar conditions as for business records (see r 803(8)).

depositions and affidavits

68 There is also some scope for bringing the Summary Proceedings Act provisions for depositions and written statements (para 24 above) within the terms of the Evidence Amendment Act. Especially, s 184 could be transferred since it provides for admissibility at the stage of the actual trial (whereas the other sections relate to the preliminary hearing). At the same time that provision could be extended to cover, not only cases where the person making the statement is out of New Zealand, dead or ill, but also other cases of unavailability (as discussed

in paras 21, 54 and 56). Attention would need to be given to the rules regarding the reception of affidavit evidence in the High Court Rules. Rules 500 and 501 could perhaps be subsumed under the hearsay provisions in the Evidence Amendment Act - especially if broad provision was made there for first-hand documentary hearsay evidence when the declarant is unavailable (referring back to para 58). Alternatively they could be left in the High Court Rules on the basis that they are concerned purely with procedural aspects of the reception of affidavits.

69 The discussion so far has already touched on some of the issues currently left to the common law which might be brought under the Evidence Amendment Act. The question still to be addressed is whether this process should be completed so that the entire body of law dealing with hearsay evidence would be brought within the statutory regime, as for instance in the Federal Rules of Evidence and the California Evidence Code. This was recommended by the Guest Committee and the Canadian Law Reform Commission as well. More recently, the Canadian Federal/Provincial Task Force and Australian Law Reform Commission proposed comprehensive legislation covering hearsay evidence. In 1967 the Torts and General Law Reform Committee appreciated the desirability of codifying the law of hearsay evidence but felt that the time was not yet ripe. Now, perhaps, the time has arrived where this is a feasible option.

OPTION 4 - REVISE ENTIRE LAW ON HEARSAY EVIDENCE

70 An initial decision would have to be made about the structure of a hearsay evidence code. There could for instance be an explicit prohibition of hearsay evidence, with its scope carefully defined, followed by a list of the exceptions and exclusions. This is the approach of the Federal Rules of Evidence and the California Evidence Code as well as the Canadian and Australian drafts. It may be that a greater number of the present "exceptions" to the hearsay rule could be treated as full exclusions (recognising that their guarantees of reliability provide a separate basis of admissibility). A more radical approach still might be simply to spell out that evidence which it is thought should be excluded by the hearsay rule, although that would involve a complete rewriting of the rule (and is not attempted here).

definition of "hearsay"

71 The basic and initial question (still in New Zealand left to the common law) is the precise concept and ambit of "hearsay". The Torts and General Law Reform Committee did not attempt a statutory definition because of a lack

of clarity at common law - in particular whether conduct not intended to be assertive of the truth of something which may be inferred from it is covered (see para 27 above). Nevertheless a statutory formulation may be in order if only to resolve some of those questions. "Hearsay" is defined in the Federal Rules of Evidence as -

> "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (r 801)

"Statement", in turn, is defined as an oral or written assertion or non-verbal conduct which is "intended ... as an assertion". Thus the scope of implied assertions is limited to those which the declarant meant to be asserted. The rationale is that only in such cases is there likely to be value in cross-examining the person who made the original statement. Similar definitions are found in the California Evidence Code as well as the Canadian draft Evidence Code and draft Uniform Evidence Act. The definition in the Australian draft Bill is more condensed: it refers simply to "previous representations" offered to prove the existence of facts intended to be asserted (cl 54(1)).

72 Another aspect of the definitional question is how to deal with the distinctions drawn at common law between what is and what is not hearsay in the case of testifying witnesses. For instance it has been mentioned that an earlier statement used to contradict a testifying witness or to refresh a witness's memory is not regarded as hearsay (para 26). But in the first case it might be argued that the evidence has to be considered by the fact-finder to determine whether it contradicts the witness's testimony - and it may be difficult to ignore what is actually said. And in the second case it might be pointed out that it can be hard to distinguish between merely refreshing memory and actual self-information. Such distinctions cannot be avoided altogether. But it may be that a statutory definition of what is "hearsay" can take a more principled approach in general. For instance is there any need to encompass within a <u>hearsay</u> rule an earlier statement of a testifying witness who has sufficient recollection of the matters dealt with in the statement to be cross-examined on them?

res gestae; confessions and admissions

73 The admissibility of admissions and confessions and of statements forming part of the "res gestae" has already been referred to (para 25 above). There may be a question whether an attempt should be made to bring these within the statutory regime. Certainly some clarification of their

relationship with the hearsay rule might assist (eg in R v Baker the res gestae basis for admitting the statement was not made clear). But, given that the significance of these doctrines goes well beyond their hearsay implications, it may be preferable to treat such issues as separate topics rather than incidentally in the context of a review of hearsay evidence.

residual discretion to admit hearsay evidence

74 The last question under this broad option is whether any codification should attempt to be exhaustive. We have suggested that ss 8-14 of the Evidence Amendment Act might be enlarged to encompass other specific exceptions where there are adequate guarantees of reliability (para 60 above). But there may still be cases where the evidence does not come within a particular statutory exception but in the particular circumstances is likely to be reliable. Its admission need not be prohibited altogether, even within the context of a code, since the statute can allow for a residual judicial discretion to admit such evidence. Thus rr 803 and 804 of the Federal Rules of Evidence allow for the admissibility of statements not specifically covered by their exceptions but having "equivalent circumstantial guarantees of trustworthiness" (and meeting other conditions). The Canadian draft Uniform Evidence Act goes further, providing for the court to be able to create new exceptions to the hearsay rule - although it is difficult to reconcile such a broad power with the concept of a code.

## OPTION 5 - ABOLISH THE HEARSAY RULE

75 The most radical approach to the hearsay rule would be to abolish it altogether. Thus the question of admissibility could be left to the judge in the individual case to deal with entirely in terms of a general discretion (going further than the discretionary rule approach suggested in para 17). Alternatively the evidence could simply be admitted and any evaluation left to the fact-finder, whether jury or judge, to deal with as a matter of weight. It should be recalled that the first is already the approach adopted for a number of specialised courts and tribunals in New Zealand, and sometimes the ordinary courts exercising specialist jurisdictions (para 11 above).

the hearsay rule in civil proceedings

76 The abolition option has not, as yet, been taken up for criminal proceedings in any common law jurisdiction to our knowldege. But the Civil Evidence (Scotland) Act effectively dispenses with the hearsay rule in civil proceedings. In England the Civil Justice Review (1988) has suggested that the Civil Evidence Act might also be

reviewed to determine whether the hearsay rule should be abolished or whether the machinery for rendering hearsay admissible should be further reformed (para 270).

77 The Scottish reform goes even further than was recommended in the Scottish Law Commission's Report. There it was felt that the benefits of cross-examination should be preserved by a judicial discretion to require the maker of the statement to take the stand if available, and to exclude the hearsay evidence in the case of non-compliance. But, even given that restriction, the result would distinguish significantly between civil and criminal proceedings - which is difficult to reconcile with the Scottish Law Commission's earlier criticism of the English Civil Evidence Act as creating "important and anomalous" differences between the law of evidence in civil and criminal cases (Memorandum No 46 (1980), p 136). The real justification for limiting the reform of the hearsay rule to civil proceedings seems to have stemmed from a broad public opposition to reform in criminal cases rather than any argument of principle.

78 It should be noted that in Scotland there is no longer the institution of the civil jury. In practice the same is almost true in New Zealand since the vast majority of civil cases are judge-alone (currently only 3 or 4 a year involve a jury). Thus in nearly all civil cases the judge as fact-finder would determine the weight to be given evidence at present excluded by the hearsay rule. So it can be argued that it would be safe and certainly simpler to dispense with the technicalities of the hearsay rule. On a narrower level the argument could be made at least for those civil cases which actually fall to be dealt with by a judge alone. Then, possibly, it could also be made for those criminal cases which are heard without a jury (making the distinction not between criminal and civil cases, but between jury and judge-alone cases).

79 But if the hearsay rule is important in terms of a broader policy of maintaining the ability to cross-examine, it might be argued that something more should be required even for civil proceedings or proceedings without a jury. At least the hearsay rule supports a general power to have witnesses who are available produced for cross-examination. And, if the judge has a discretion whether or not to admit the evidence (and thus there is some power to have a witness produced), there may be problems of achieving predictability and uniformity in the approach adopted in particular cases. Thus it may be argued that a somewhat less radical reform of the hearsay rule would be

preferable to abolishing it altogether, even for some proceedings. There is also a question of how much would be achieved in practice by abolishing the hearsay rule if other exclusionary rules - for instance the "best evidence rule" (which supposedly requires that the best evidence available be used, but at the moment has only residual application) - could eventually develop to take over part of its function. It may be preferable instead to modify the hearsay rule to become a sort of best evidence rule itself (as in fact is suggested in paras 53 and 58 above).

80 So, in the end the issue is whether to retain a perhaps rather different rule designed to promote the adversarial process of cross-examination, or whether to abolish the hearsay rule in the interests of simplicity and of allowing all relevant evidence to be given whatever weight it is thought to deserve. It may be that the more moderate reform of the rule would be sufficient to minimise the risk of excluding potentially reliable evidence and at the same time retaining the benefits of cross-examination. But the advantages of the option of abolishing the hearsay rule cannot be downplayed - and on a broader level there may be very real benefits in signalling a shift towards a far simpler approach to the law of evidence generally.

## SUMMARY

81 To summarise, the discussion of broader principles, the analysis of the present law on hearsay, and the options set out above raise the following policy issues:

(1) Where should the balance lie between the need for a full view of the relevant evidence and the need to exclude evidence which cannot be tested in open court? How should it be drawn - by specific legislative rules or broader discretionary principles? (paras 14, 17)

(2) Should the same principles apply to civil and criminal proceedings; to the prosecution and the accused in criminal cases; to cases with a jury and those tried by a judge alone? (paras 15 and 16)

(3) Has the present law on hearsay evidence - in particular the Evidence Amendment Act (No 2) 1980 - worked well in practice? (paras 28-33 and 36)

82 The Paper suggests that if there is a need for reform there are a number of possible approaches ranging from the rather cautious to the quite radical. Thus the broader options discussed in the remainder of the Paper are:

(4) Should the Evidence Amendment Act be redrafted with the aim of clarifying certain provisions which have proved to be somewhat misleading or ambiguous? In particular what revisions are suggested by the case of R v Hovell [1986] 1 NZLR 500? (paras 39-45)

(5) Should the Evidence Amendment Act be subject to more extensive revision going beyond mere clarification? Should there be general admissibility for first-hand hearsay evidence when the declarant is unavailable in a broad sense? Should there be specific provision for videotaped evidence, particularly thinking of child sexual abuse cases? Need unavailability always be a requirement? In what circumstances should second-hand hearsay evidence be admissible? What protections should there be against manufactured evidence? For an accused's right of confrontation? Should there be a more

generalised overiding discretion to exclude hearsay evidence? (paras 47-65)

(6) Should the process of revision be continued to encompass statutory provisions outside the Evidence Amendment Act relating to hearsay evidence, for instance the public document provisions in various statutes, the provisions regarding depositions in the Summary Proceedings Act 1957, and possibly the provisions regarding affidavits in the High Court Rules? (paras 67-68)

(7) Should the hearsay rule be codified incorporating the important aspects currently left to the common law (including the very prohibition of hearsay evidence). How should "hearsay" be defined? How should res gestae and admissions and confessions be dealt with? Should a judge have a residual discretion to admit hearsay evidence? (paras 69-74)

(8) Should the hearsay rule be abolished at least in civil proceedings or proceedings without a jury? Should it be replaced by a judicial discretion to determine what evidence should be admitted, or should evaluation of hearsay evidence be left to the fact-finder to determine as a matter of weight? Is this a feasible option in practice? (paras 75-80)

More specific discussion and suggestions on the various options are found in the paper itself.

83 We invite responses to the above questions from those with an interest in the area of hearsay evidence. Of particular value on the more detailed aspects would be comments based on practical experience of the present law. But more generally we would appreciate comments on this Options Paper and the broader issues it raises.

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## APPENDICES (LEGISLATION)

1980, No. 27

**An Act to amend the Evidence Act 1908**

*[4 October 1980*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

**1. Short Title, commencement, and application**—(1) This Act may be cited as the Evidence Amendment Act (No. 2) 1980, and shall be read together with and deemed part of the Evidence Act 1908 (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 1st day of January 1981.

(3) This Act shall apply for the purposes of any proceeding commenced on or after the 1st day of January 1981, but shall not apply for the purposes of any proceeding commenced before that date or any appeal, review, or other proceeding relating to the determination of any such proceeding.

## PART I

### Admissibility of Hearsay Evidence

**2. Interpretation**—(1) In this Part of this Act, unless the context otherwise requires,

"Business" means any business, profession, trade, manufacture, occupation, or calling of any kind; and includes the activities of any Department of State, local authority, public body, body corporate, organisation, or society:

"Business record" means a document made—

(a) Pursuant to a duty; or

(b) In the course of, and as a record or part of a record relating to, any business,—

from information supplied directly or indirectly by any person who had, or may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information he supplied:

"Court" includes, in addition to the Courts referred to in section 2 of the principal Act, an arbitrator or other person to whom any submission to arbitration is referred:

"Document" means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes—

(a) Any writing on any material:

(b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:

(c) Any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:

(d) Any book, map, plan, graph, or drawing:

(e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced:

"Duty" includes any duty imposed by law or arising under any contract, and any duty recognised in carrying on any business practice:

"Party" includes the prosecutor or the informant in any criminal proceeding:

"Proceeding" includes, in addition to the matters referred to in section 2 of the principal Act, any arbitration or reference:

"Statement" means any representation of fact or opinion, whether made in words or otherwise; and includes a statement made by a witness in any proceeding.

(2) For the purposes of sections 3 to 8 of this Act, a person is unavailable to give evidence in any proceeding if, but only if, he—

(a) Is dead; or

(b) Is outside New Zealand and it is not reasonably practicable to obtain his evidence; or

(c) Is unfit by reason of old age or his bodily or mental condition to attend; or

(d) Cannot with reasonable diligence be found.

*Documentary Hearsay Evidence*

**3. Admissibility of documentary hearsay evidence**—(1) Subject to subsection (2) of this section, and to sections 4 and 5 of this Act, in any proceeding where direct oral evidence of a fact or an opinion would be admissible, any statement made by a person in a document and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion if—

(a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; or

(b) The document is a business record, and the person who supplied the information for the composition of the record—

(i) Cannot with reasonable diligence be identified; or

(ii) Is unavailable to give evidence; or

(iii) Cannot reasonably be expected (having regard to the time that has elapsed since he supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he supplied; or

(c) In civil proceedings only,—

(i) The maker of the statement had personal knowledge of the matters dealt with in the statement; and

(ii) Undue delay or expense would be caused by obtaining his evidence.

(2) Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that—

(a) Records the oral statement of any person made when the criminal proceeding was, or should reasonably have been, known by him to be contemplated; and

(b) Is otherwise inadmissible in the proceeding.



**4. Admissibility of previous statement by witness**—(1) Nothing in section 3 (1) (b) of this Act shall render admissible a statement previously made by a person who is called as a witness in any proceeding and gives evidence relating to the matters contained in that statement, unless the Court is of the opinion that its probative value outweighs or may outweigh the probative value of the evidence given by the witness in relation to those matters (whether the statement is consistent or inconsistent with that evidence).

(2) If the Court is of the opinion that the probative value of the previous statement outweighs or may outweigh the probative value of the witness's evidence, the previous statement shall be admitted at the conclusion of the evidence-in-chief of that witness or during his cross-examination, but not otherwise.

**5. Hearsay evidence not corroboration in certain cases**—For the purpose of any rule of the common law or of practice or the provisions of any Act requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement that is admissible by virtue of section 3 (1) (b) of this Act shall not be treated as corroboration of evidence given at the trial of the proceeding by the maker of the statement other than direct evidence in relation to any matter contained in the statement of which the maker of the statement had personal knowledge.

**6. Proof of document admissible under this Part**—A statement in a document that is admissible as evidence under this Part of this Act may be proved by the production of—

(a) The original document or of the material part of the document in which the statement is contained; or

(b) A copy of the original document, or of the material part of the document in which the statement is contained, certified to be a true copy in such manner as the Court may approve.

*Oral Hearsay Evidence in Civil Proceedings*

**7. Admissibility of oral hearsay evidence in civil proceeding**—In any civil proceeding where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evi-

dence of that fact if the maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence.

*Oral Hearsay Evidence in Criminal Proceedings*

**8. Conditions for admissiblity of oral hearsay evidence**—In any criminal proceeding where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact, if—

(a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; and

(b) The statement qualifies for admission under any of sections 9 to 14 of this Act.

**9. Statement against interest**—(1) Subject to section 8 of this Act, a statement qualifies under this section for admission if the maker of the statement knew or believed, or may reasonably be supposed by the Court to have known or believed, that the statement was, in whole or in part, against his interest at the time he made it.

(2) In subsection (1) of this section, "interest" means any pecuniary or proprietary interest, and any interest in any proceeding pending or anticipated by the maker of the statement.

**10. Statement in course of duty**—(1) Subject to section 8 of this Act, a statement qualifies under this section for admission if the maker of the statement made it in the performance of any duty, and had no motive to conceal or misrepresent any fact or opinion relating to the subject matter of the statement.

(2) For the purposes of subsection (1) of this section, it shall be immaterial whether or not—

(a) The matters dealt with in the statement relate to acts of the maker of the statement:

(b) The statement was made contemporaneously with the matters dealt with in it.

**11. Pedigree statement**—Subject to section 8 of this Act, a statement qualifies under this section for admission if—

(a) The statement relates to the existence or nature of family relationship or descent; and



(b) The maker of the statement was directly or indirectly related by birth or adoption or by or through marriage to the person whose family relationship to or descent from any other person is in issue in any proceeding; and

(c) The maker of the statement made it before any dispute about the matters dealt with in the statement arose.

**12. Post-testamentary statement**—(1) Subject to section 8 of this Act, and to subsection (2) of this section, a statement qualifies under this section for admission if the maker of the statement had previously made a will or other testamentary writing, and the statement relates to the contents of that will or testamentary writing.

(2) No such statement shall be admissible to prove that the requirements of the Wills Act 1837 of the United Kingdom Parliament have been satisfied.

**13. Statement relating to public or general rights, or Maori custom**—Subject to section 8 of this Act, a statement qualifies under this section for admission if the statement relates to the existence of a public or general right or of Maori custom.

**14. Dying statement**—(1) Subject to section 8 of this Act, a statement qualifies under this section for admission if—

(a) The maker of the statement is dead; and

(b) He knew or believed, or may reasonably be supposed by the Court to have known or believed, that his death was imminent; and

(c) He would, if he were not dead, be a competent witness for the party who wishes to adduce the statement as evidence under this section.

(2) For the purpose of subsection (1) of this section, it shall be immaterial whether or not—

(a) The maker of the statement entertained any hope of recovery:

(b) The statement related to the cause of its maker's injury or illness:

(c) The statement was complete.

*Provisions of General Application*

**15. Admissibility of oral and documentary hearsay evidence by consent**—In any proceeding where direct oral evidence of a fact or an opinion would be admissible, any

statement, whether oral or in a document, made by a person and tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion, with the consent of all the parties to the proceeding.

**16. Court may draw inference, etc.**—For the purpose of deciding whether or not any statement is admissible as evidence under this Part of this Act, the Court may draw any reasonable inference from the circumstances in which the statement was made and, in the case of a statement in a document, from the form or contents of the document in which it is contained; and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

**17. Weight to be attached to hearsay evidence**—In determining the weight, if any, to be attached to a statement that is admissible as evidence under this Part of this Act, the Court shall have regard to all the circumstances from which any inference can reasonably be drawn relating to the accuracy or otherwise of the statement, and, in particular, to—

(a) The time when the statement was made in relation to the occurrence or existence of the facts or opinions stated that the statement is tendered to prove; and

(b) The question whether or not the maker of the statement, or any person by or through whom information was supplied to the maker of the statement, had any motive to conceal or misrepresent any fact or opinion relating to the subject matter of the statement.

**18. Court may reject unduly prejudicial evidence**—Notwithstanding sections 3 to 8 of this Act, where the proceeding is with a jury, the Court may, in its discretion, reject any statement that would be admissible in the proceeding under any of those sections, if the prejudicial effect of the admission of the statement would outweigh its probative value, or if, for any other reason the Court is satisfied that it is not necessary or expedient in the interests of justice to admit the statement.

**19. Power of Court hearing appeal**—In an appeal from any order made by a Court or by a Judge under this Part of this Act or from any determination of a Court to admit or reject



evidence under section 18 of this Act, the Court hearing the appeal may draw its own inferences, and may substitute its own discretion for any discretion exercised by the Court or Judge whose decision is appealed from.

### *Miscellaneous Provisions*

**20. Savings**—(1) Nothing in this Part of this Act shall prejudice the admissibility of any evidence that would be admissible apart from the provisions of this Part of this Act.

(2) Nothing in this Part of this Act shall render admissible any evidence that is inadmissible under any other Act.

(3) Nothing in this Part of this Act shall derogate from—

(a) Section 10 of the principal Act (relating to proof of inconsistent statements of witnesses) or section 11 of the principal Act (relating to cross-examination as to previous statements in writing):

(b) The rules of the common law relating to the admissibility of evidence as to complaints:

(c) The rules of the common law or the provisions of any Act relating to the admissibility of confessions and admissions of the parties:

(d) The rules of the common law relating to evidence of character:

(e) The rules of the common law or the provisions of any Act relating to the reading in evidence of depositions taken in a preliminary hearing in a trial on indictment.

**21. Repeals**—(1) The following enactments are hereby repealed:

(a) Section 25A of the principal Act (as inserted by section 2 of the Evidence Amendment Act 1966):

(b) Sections 2 (2), 3, and 4 of the Evidence Amendment Act 1945:

(c) Section 2 of the Evidence Amendment Act 1966.

(2) Section 2 (1) of the Evidence Amendment Act 1945 is hereby amended by repealing the definition of the term "statement".

APPENDIX B

Evidence Law Reform Committee Draft
Evidence Amendment Bill

Appendix 3

EVIDENCE AMENDMENT

ANALYSIS

A BILL INTITULED

An Act to amend the Evidence Act 1908 relating to business records and related matters

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title, commencement, and application - (1) This Act may be cited as the Evidence Amendment Act 1987, and shall be read together with and deemed part of the Evidence Act 1908.

(2) This Act shall come into force on the 1st day of April 1988.

(3) This Act shall apply for the purposes of any proceeding commenced on or after the 1st day of April 1988, but shall not apply for the purposes of any proceeding commenced before that date or any appeal, review, or other proceeding relating to the determination of any such proceeding.

2. Interpretation - (1) Section 2 (1) of the Evidence Amendment Act (No. 2) 1980 is hereby amended by inserting in the definition of the term "business", after the words "or calling of any kind", the words ", whether or not carried on for profit".

(2) Section 2 (1) of the Evidence Amendment Act (No. 2) 1980 is hereby further amended by repealing the definition of the term "business record", and substituting the following definition:

"'Business record' means any account, bill, invoice, label, ledger entry, letter, manifest, note, ticket, or other document made -

"(a) In the course of, and as a record or part of a record relating to, and in accordance with the usual practice of, any business, or pursuant to a duty; and

"(b) By any person, or from information supplied directly or indirectly by one or more persons, who had or who may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the document or in the information supplied, whether or not the identity of that person or of any of those persons is known:".

APPENDIX B

3. Admissibility of documentary hearsay evidence - Section 3 (1)(b) of the Evidence Amendment Act No. 2) 1980 is hereby repealed.

4. Admissibility of business records - The Evidence Amendment Act (No. 2) 1980 is hereby amended by inserting, after section 3, the following section:

"3A. (1) Subject to subsection (3) of this section, in any proceeding where direct oral evidence of a fact or an opinion would be admissible, any business record tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion.

"(2) Subject to subsection (3) of this section, a business record may be admissible in any proceeding as tending to establish the non-occurrence or non-existence of a particular matter, if -

"(a) That matter is one that, had it occurred or existed, would have been referred to in that record; and

"(b) No such reference is made to that matter in the record.

"(3) No business record shall be admissible under this section if the Court considers that the source of the information contained in the document or the circumstances in which the document was made is not or are not sufficiently trustworthy to justify the admission of the document.

"(4) For the purposes of this section, it shall be for the person seeking the admission of the document to prove, by the testimony of the custodian of the document or of some other qualified witness, that the document is a business record, but it shall not be necessary to call the person who made the document or the person or any of the persons who supplied the information from which the document was made, unless the Court considers that any such person should be called."

5. Admissibility of business record made by witness - The Evidence Amendment Act (No. 2) 1980 is hereby amended by repealing section 4, and substituting the following section:

"4. A business record that is admissible under section 3A of this Act may be admitted notwithstanding that any person concerned in the making of the document is a witness in the proceeding, whether or not the witness gives evidence that is consistent or inconsistent with the document."

6. Business record not corroboration in certain cases - Section 5 of the Evidence Amendment Act (No. 2) 1980 is hereby amended by omitting the expression "section 3 (1)(b)", and substituting the expression "section 3A".

7. Credibility in relation to business records - The Evidence Amendment Act (No. 2) 1980 is hereby amended by inserting, after section 5, the following section:

"5A. (1) This section applies in every case where -

"(a) A business record is admitted in evidence under section 3A of this Act; and

APPENDIX B

"(b) Any person involved in making the document is not called as a witness.

"(2) Subject to subsection (3) of this section, in any case to which this section applies, evidence shall be admissible -

"(a) If it would have been admissible, had the person been called as a witness, as tending to destroy or support that person's credibility; or

"(b) As tending to show that any statement made by that person is consistent with any other statement made by that person at any time.

"(3) No evidence is admissible under this section of any matter of which, had the person been called as a witness and denied the matter in cross-examination, evidence would not have been admissible if adduced by the party cross-examining that person."

8. Weight to be attached to hearsay evidence - Section 17 of the Evidence Amendment Act (No. 2) 1980 is hereby repealed.

9. New Part (relating to business records) inserted - The Evidence Amendment Act (No. 2) 1980 is hereby amended by inserting, after Part I, the following Part:

"PART IA
"FURTHER PROVISIONS RELATING TO
BUSINESS RECORDS

"21A. Admissibility of records made by device - (1) In this section, 'business record' means any account, bill, invoice, label, ledger entry, letter, manifest, note, ticket, or other document -

"(a) Made in the course of, and as a record or part of a record relating to, and in accordance with the usual practice of, any business, or pursuant to a duty; and

"(b) Containing information from one or more devices designed for, and used for the purposes of any business in or for recording, measuring, counting, or identifying information, not being information based on information supplied by any person.

"(2) A business record within the meaning of this section shall be admissible in any proceedings in the same circumstances and subject to the same conditions as a business record within the meaning of Part I of this Act, and the provisions of that Part, so far as they are applicable and with any necessary modifications, shall apply to every business record within the meaning of this section."

APPENDIX C

## Canadian Law Reform Commission Draft Evidence Code, ss 27-31

### Hearsay

Hearsay rule

**27.** (1) Hearsay evidence is inadmissible except as provided in this Code or any other Act.

Definitions "Hearsay"

(2) In this Code

(a) "hearsay" means a statement, other than one made by a person while testifying at a proceeding, that is offered in evidence to prove the truth of the statement; and

"Statement"

(b) "statement" means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion.

Exception: previous statement by witness

**28.** A statement previously made by a witness is not excluded by section 27 if the statement would be admissible if made by him while testifying as a witness.

Exception: statement of person unavailable as witness

**29.** (1) A statement made by a person who is unavailable as a witness is not excluded by section 27 if the statement would be admissible if made by the person while testifying as a witness.

"Unavailable as a witness" defined

(2) "Unavailable as a witness" includes situations where a person who made a statement

Dead or unfit

(a) is dead or unfit by reason of his bodily or mental condition to attend as a witness;

Attendance cannot be obtained

(b) is absent from the proceeding and the proponent of his statement has been unable to procure his attendance by process or other reasonable means;

Refuses to testify

(c) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so;

Unable to remember

(d) testifies to a lack of memory of the subject matter of the statement; or

Cost and trouble of attendance not warranted

(e) is absent from the proceeding and the importance of the issue or the added reliability of his testimony in court does not justify the expense or inconvenience of procuring his attendance or deposition.

When proponent procures unavailability

(3) A statement is not admissable under this section if the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying.

Notice required before tendering evidence

(4) A statement is not admissible under this section unless the party seeking to give it in evidence has within a reasonable time given notice to every other party of his intention to do so with particulars of the statement and the reason why the person is unavailable as a witness.

Exception: statements against party

**30.** The following statements are not excluded by section 27 when offered against a party:

Party's statement

(a) a statement made, authorized, adopted or agreed to by the party;

Agent

(b) a statement by the party's agent or servant concerning a matter within the scope of his agency or employment and made during the continuation of that relationship;

Person in privity of title

(c) a statement regarding title by a predecessor in title or other person in privity of title with the party; and

Person in common enterprise

(d) a statement by a person engaged with the party in common enterprise made in pursuance of their common purpose.

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Other exceptions

31. The following are not excluded by section 27:

Statements made in course of regularly conducted activities

(a) A record of a fact or opinion, if the record was made in the course of a regularly conducted activity at or near the time the fact occurred or existed or the opinion was formed, or at a subsequent time if compiled from a record so made at or near such time;

Public records and reports

(b) records, reports or statements of public offices or agencies, setting forth the activities of the office or agency, matters observed pursuant to a duty imposed by law, or in civil cases and against the prosecution in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law;

Records of vital statistics

(c) records or data compilations of vital statistics if the report thereof was made to a public office pursuant to requirements of law;

Absence of record or entry

(d) evidence that a matter is not included in a record made in the course of a regularly conducted activity, to prove the non-occurrence or non-existence of the matter if it was of a kind of which such a record was regularly made or preserved;

Marriage, baptismal and similar certificates

(e) statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter;

Ancient documents

(f) statements in a document in existence twenty years or more;

Market reports

(g) market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations;

Judgment of previous conviction

(h) evidence of a final judgment adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment, except when tendered by the prosecution in a criminal proceeding against anyone other than the person adjudged guilty;

General reputation

(i) reputation of a person's character arising before the controversy among those with whom he associates or in the community;

Reputation re personal or family history

(j) reputation among members of a person's family by blood, adoption or marriage, or among his associates, or in the community, concerning a fact of his personal or family history, such as birth, death or relationship;

Reputation re boundaries

(k) reputation in a community, arising before the controversy, as to boundaries or of customs affecting lands in the community; and

Reputation re general history

(l) reputation as to events of general history important to the community, province or country where they occurred.

## PART V – ADMISSION AND USE OF EVIDENCE: EXCLUSIONARY RULES

### *Division 1 – Hearsay evidence*

#### *Subdivision A – The hearsay rule*

**Exclusion of hearsay evidence**

**54.** (1) Evidence of a previous representation is not admissible to prove the existence of a fact intended by the person who made the representation to be asserted by the representation.[8]

(2) Such a fact is in this Division referred to as an asserted fact.

(3) Where evidence of a previous representation is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of an asserted fact.[9]

#### *Subdivision B – "First-hand" hearsay*

**Restriction to "first-hand" hearsay**

**55.** (1) A reference in this Subdivision to a previous representation is a reference to a previous representation that was made by a person whose knowledge of the asserted fact was or might reasonably be supposed to have been based on what the person saw; heard or otherwise perceived, other than a previous representation made by some other person about the asserted fact.

(2) Such knowledge is in this Division referred to as personal knowledge.

8. The following exceptions are available:
   - first-hand hearsay –
     - civil proceedings, where the maker of the representation is unavailable (section 56) or available (section 57)
     - criminal proceedings, where the maker of the representation is unavailable (section 58) or available (section 59), subject to notice requirements under section 60
   - business records (section 61)
   - tags and labels (section 62)
   - telegrams, telexes, &c. (section 63)
   - marriage, family history, family relationships or public or general rights (section 64)
   - admissions (section 71)
   - representations about employment or authority (subsection 76(2))
   - representations about common purpose (subsection 76(2))
   - some exceptions to the rule in *Hollington v Hewthorn* (subsection 81(3))
   - good character and expert opinion about accuseds (sections 91, 92 and 95)
   - authentication by affidavit (subsection 142(2)) and
   - orders under section 147.
9. Powers relevant to this provision include sections 117, 118 and 143.



**Exception: civil proceedings where maker not available**

**56.** In a civil proceeding, where the person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply in relation to –

(a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer to understand the representation.[10]

**Exception: civil proceedings where maker available**

**57.** (1) This section applies in a civil proceeding where the person who made a previous representation is available to give evidence about an asserted fact.

(2) Where it would cause undue expense or undue delay, or would not be reasonably practicable, to call that person to give evidence, the hearsay rule does not apply in relation to –

(a) oral evidence of the representation given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer to understand the representation.[11]

(3) Where that person has been or is to be called to give evidence, the hearsay rule does not apply in relation to evidence of the representation that is given by –

(a) that person; or

(b) a person who saw, heard or otherwise perceived the making of the representation,

if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(4) Where subsection (3) applies in relation to a representation, a document containing the representation shall not, unless the court gives leave, be tendered before the conclusion of the examination in chief of the person who made the representation.

**Exception: criminal proceedings where maker not available**

**58.** (1) This section applies in a criminal proceeding where the person who made a previous representation is not available to give evidence about an asserted fact.

10. There are notice requirements: see section 60.
11. There are notice requirements: see section 60.

(2) The hearsay rule does not apply in relation to evidence of a previous representation that is given by a witness who saw, heard or otherwise perceived the making of the representation, being a representation that was –

(a) made under a duty to make that representation or to make representations of that kind;

(b) made at or shortly after the time when the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication;

(c) made in the course of giving sworn evidence in a legal or administrative proceeding if the defendant, in that proceeding, cross-examined the person who made the representation, or had a reasonable opportunity to cross-examine that person, about it; or

(d) against the interests of the person who made it at the time when it was made.[12]

(3) For the purposes of paragraph (2)(c), a defendant who was not present at a time when the cross-examination of a person might have been conducted but could reasonably have been present at that time may be taken to have had a reasonable opportunity to cross-examine the person.

(4) If a representation –

(a) tends to damage the reputation of the person who made it;

(b) tends to show that that person has committed an offence; or

(c) tends to show that that person is liable in an action for damages,

then, for the purposes of paragraph (2)(d), the representation shall be taken to be against the interests of the person who made it.

(5) The hearsay rule does not prevent the admission or use of evidence of a previous representation adduced by a defendant, being evidence that is given by a witness who saw, heard or otherwise perceived the making of the representation.[13]

(6) Where evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply in relation to evidence of a previous representation about the matter adduced by some other party, being evidence given by a witness who saw, heard or otherwise perceived the making of the second-mentioned representation.

**Exception: criminal proceedings where maker available**

59. (1) In a criminal proceeding, where the person who made a previous representation is available to give evidence about an asserted fact, the hearsay rule does not apply in relation to evidence of the previous representation that is given by –

12. There are notice requirements: see section 60.
13. There are notice requirements: see section 60.



(a) that person; or

(b) a person who saw, heard or otherwise perceived the representation being made,

if –

(c) at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; and

(d) the person who made it has been or is to be called to give evidence in the proceeding.

(2) Subsection (1) does not apply in relation to evidence adduced by the prosecutor of a representation that was made for the purpose of indicating the evidence that the person who made it would be able to give in a legal or administrative proceeding.

(3) Where subsection (1) applies in relation to a representation, a document containing the representation shall not, unless the court gives leave, be tendered before the conclusion of the examination in chief of the person who made the representation.

**Notice to be given**

60. (1) Subject to the succeeding provisions of this section, the provisions of section 56 and subsections 57(2), 58(2) and 58(5) do not apply in relation to evidence adduced by a party unless that party has given notice in writing in accordance with the regulations to each other party of the intention to adduce the evidence.

(2) Where such a notice has not been given, the court may, on the application of a party and subject to conditions, direct that one or more of those provisions is to apply –

(a) notwithstanding the failure of the party to give such notice; or

(b) in relation to specified evidence with such modifications as the court specifies.

(3) In a civil proceeding, where the writing by which notice is given discloses that it is not intended to call the person who made the previous representation concerned on a ground referred to in subsection 57(2), a party may, not later than 7 days after notice has been given, by notice in writing given to each other party, object to the tender of the evidence, or of a specified part of the evidence.

(4) The notice shall set out the grounds on which the objection is based.

(5) The court may determine the objection on the application of a party made at or before the hearing.

(6) If the objection is unreasonable, the court may order that the party objecting shall, in any event, bear the costs (ascertained on a solicitor and client basis) incurred by another party –

(a) in relation to the objection; and

(b) in calling the person who made the representation to give evidence.

*Subdivision C — Other hearsay*

**Exception: business records**[14]

**61.** (1) Where a previous representation —

(a) is contained in a document that is or forms part of the records belonging to or kept by a business or at any time was or formed part of such a record; and

(b) was made or recorded in the document in the course of, or for the purposes of, a business,

then, if the representation was made —

(c) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

(d) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact,

the hearsay rule does not prevent the admission or use of the document so far as it contains the representation.[15]

(2) Sub-section (1) does not apply if the representation was prepared or obtained for the purpose of conducting, or in contemplation of or in connection with, a legal or administrative proceeding.

(3) Where —

(a) the happening of an event of a particular kind is in question; and

(b) in the course of a business, a system has been followed of making and keeping a record of the happening of all events of that kind,

the hearsay rule does not prevent the admission or use of evidence that tends to prove that there is no record kept in accordance with that system of the happening of the event.

**Exception: contents of tags, labels, &c.**[16]

**62.** Where a document has been attached to an object or writing has been placed on a document or object, being a document or writing that may reasonably be supposed to have been so attached or placed in the course of a business, the hearsay rule does not prevent the admission or use of the document or writing.

**Exception: telecommunications**[17]

**63.** Where a document has been —

(a) produced by a telecommunications installation; or

(b) received from the Australian Telecommunications Commission,

14. For provisions relating to the mode of proof, and authentication, of business records, see sections 125, 126 and 127 and paragraph 130(1)(e).
15. For the definition of "personal knowledge", see subsection 55(2).
16. For provisions relating to the mode of proof, and authentication, of tags, labels, &c., see section 133.
17. For presumptions as to source and destination of telegrams, telexes, &c., see section 134.



being a document that records a message that has been transmitted by means of a telecommunications service, the hearsay rule does not prevent the admission or use of a representation in the document as to —

(c) the identity of the person from whom or on whose behalf the message was sent;

(d) the date on which, the time at which or the place from which the message was sent; or

(e) the identity of the person to whom the message was addressed.

**Exception: reputation as to certain matters**

**64.** (1) The hearsay rule does not prevent the admission or use of evidence of —

(a) reputation that a man and a woman cohabitating at a particular time were married to each other at that time;

(b) reputation as to family history or a family relationship; or

(c) reputation as to the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply in relation to evidence adduced by the prosecutor, but, where evidence as mentioned in subsection (1) has been admitted, this subsection does not prevent the admission or use of evidence that tends to contradict it.

**Exception: interlocutory proceedings**

**65.** The hearsay rule does not prevent the admission or use of evidence adduced in an interlocutory proceeeding if the party who adduces it also adduces evidence of its source.

APPENDIX E

Civil Evidence (Scotland) Act 1988

**ELIZABETH II** **c. 32**

# Civil Evidence (Scotland) Act 1988

**1988 CHAPTER 32**

An Act to make fresh provision in relation to civil proceedings in Scotland regarding corroboration of evidence and the admissibility of hearsay and other evidence; and for connected purposes. [29th July 1988]

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:—

Rule requiring corroboration abolished.

**1.**—(1) In any civil proceedings the court or, as the case may be, the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by that evidence notwithstanding that the evidence is not corroborated.

(2) Any rule of law whereby any evidence may be taken to be corroborated by a false denial shall cease to have effect.

Admissibility of hearsay.

**2.**—(1) In any civil proceedings—

(a) evidence shall not be excluded solely on the ground that it is hearsay;

(b) 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; and

(c) the court, or as the case may be the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by the evidence notwithstanding that the evidence is hearsay.

(2) Nothing in this section shall affect the admissibility of any statement as evidence of the fact that the statement was made.

(3) In paragraph (e) of section 5 of the Court of Session Act 1988 (power to make provision as regards the Court of Session for admission of written statements etc. in lieu of parole evidence), for the words "the admission in lieu of parole evidence of written statements (including affidavits) and reports, on such conditions as may be prescribed" there shall be substituted the words "written statements (including affidavits) and reports, admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988, to be received in evidence, on such conditions as may be prescribed, without being spoken to by a witness".

1971 c. 58.

(4) For paragraph (e) of section 32(1) of the Sheriff Courts (Scotland) Act 1971 (corresponding power to make provision as regards the sheriff court) there shall be substituted the following paragraph—

"(e) providing in respect of any category of civil proceedings for written statements (including affidavits) and reports, admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988, to be received in evidence, on such conditions as may be prescribed, without being spoken to by a witness;".

Statement as evidence as to credibility.

3. In any civil proceedings a statement made otherwise than in the course of the proof by a person who at the proof is examined as to the statement shall be admissible as evidence in so far as it tends to reflect favourably or unfavourably on that person's credibility.

Leading of additional evidence.

4.—(1) For the purposes of section 2 or 3 above, any person may at the proof, with leave of the court, at any time before the commencement of closing submissions—

(a) be recalled as a witness whether or not he has been present in court since giving evidence initially; or

(b) be called as an additional witness whether or not he has been present in court during the proof (or during any other part of the proceedings).

1840 c. 59.

(2) Nothing in section 3 of the Evidence (Scotland) Act 1840 (presence in court not to disqualify witnesses in certain cases) shall apply as respects a witness called or recalled under subsection (1) above.

Document as part of business records.

5.—(1) Unless the court otherwise directs, a document may in any civil proceedings be taken to form part of the records of a business or undertaking if it is certified as such by a docquet purporting to be signed by an officer of the business or undertaking to which the records belong; and a statement contained in any document certified as aforesaid may be received in evidence without being spoken to by a witness.

(2) For the purposes of this section, a facsimile of a signature shall be treated as a signature.

Production of copy document.

6.—(1) For the purposes of any civil proceedings, a copy of a document, purporting to be authenticated by a person responsible for the making of the copy, shall, unless the court otherwise directs, be—

(a) deemed a true copy; and

(b) treated for evidential purposes as if it were the document itself.

(2) In subsection (1) above, "copy" includes a transcript or reproduction.

(3) Sections 3 to 5 of the Bankers' Books Evidence Act 1879 (mode of proof of entries in bankers' books, proof that book is a bankers' book and verification of copy of entry in such a book) shall not apply to civil proceedings. 1879 c. 11.

Statement not contained in business records.

**7.**—(1) In any civil proceedings, the evidence of an officer of a business or undertaking that any particular statement is not contained in the records of the business or undertaking shall be admissible as evidence of that fact whether or not the whole or any part of the records have been produced in the proceedings.

(2) The evidence referred to in subsection (1) above may, unless the court otherwise directs, be given by means of the affidavit of the officer.

(3) In section 6 of the Bankers' Books Evidence Act 1879 (case in which banker not compellable to produce book), after the word "Act" there shall be inserted the words "or under the Civil Evidence (Scotland) Act 1988".

Evidence in actions concerning family relationships, etc.

**8.**—(1) In any action to which this subsection applies (whether or not appearance has been entered for the defender), no decree or judgment in favour of the pursuer shall be pronounced until the grounds of action have been established by evidence.

(2) Subsection (1) above applies to actions for divorce, separation or declarator of marriage, nullity of marriage, legitimacy, legitimation, illegitimacy, parentage or non-parentage.

(3) Subject to subsection (4) below, in any action for divorce, separation or declarator of marriage or nullity of marriage, the evidence referred to in subsection (1) above shall consist of or include evidence other than that of a party to the marriage (or alleged or purported marriage).

(4) The Lord Advocate may by order made by statutory instrument provide that subsection (3) above shall not apply, or shall apply subject to such modifications as may be specified in the order, in respect of such class or classes of action as may be so specified.

(5) No order shall be made under this section unless a draft of the order has been laid before Parliament and has been approved by resolution of each House.

Interpretation.

**9.** In this Act, unless the context otherwise requires—

"business" includes trade or profession;

"civil proceedings" includes, in addition to such proceedings in any of the ordinary courts of law—

(a) any hearing by the sheriff under section 42 of the Social Work (Scotland) Act 1968 of an application for a finding as to whether grounds for the referral of a child's case to a children's hearing are established, except in so far as the application relates to a ground mentioned in section 32(2)(g) of that Act (commission by the child of an offence); 1968 c. 49.

(b) any arbitration, whether or not under an enactment, except in so far as, in relation to the conduct of the arbitration, specific provision has been made as regards the rules of evidence which are to apply;

(c) any proceedings before a tribunal or inquiry, except in so far as, in relation to the conduct of proceedings before the tribunal or inquiry, specific provision has been made as regards the rules of evidence which are to apply; and

(d) any other proceedings conducted wholly or mainly in accordance with rules of procedure agreed between the parties themselves (or as respects which it would have been open to them to agree such rules had they wished to do so) except in so far as any such agreement makes specific provision as regards the rules of evidence which are to apply;

"court" shall be construed in accordance with the definition of "civil proceedings";

"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 recorded 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 recorded so as to be capable (as aforesaid) of being reproduced therefrom;

"film" includes a microfilm;

"hearsay" includes hearsay of whatever degree;

"made" includes "allegedly made";

"proof" includes trial or other hearing of evidence, proof on commission and any continued proof;

"records" means records in whatever form;

"statement" includes any representation (however made or expressed) of fact or opinion but does not include a statement in a precognition; and

"undertaking" includes any public or statutory undertaking, any local authority and any government department.

Repeals and application.

**10.**—(1) The enactments specified in columns 1 and 2 of the Schedule to this Act are hereby repealed to the extent specified in column 3 of the Schedule.

(2) This Act shall apply to proceedings whether commenced before or after the date of its coming into force (but not to proceedings in which proof commenced before that date).

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

1868 c. 37. (a) section 2 of the Documentary Evidence Act 1868 (mode of proving certain documents);

1882 c. 9. (b) section 2 of the Documentary Evidence Act 1882 (documents printed under superintendence of Stationery Office);

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(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); and 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.

Citation, commencement and extent.

**11.**—(1) This Act may be cited as the Civil Evidence (Scotland) Act 1988.

(2) This Act shall come into force on such day as the Lord Advocate may by order made by statutory instrument appoint.

(3) This Act shall extend to Scotland only.

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APPENDIX F

Criminal Justice Act 1988, Part II

## PART II

### DOCUMENTARY EVIDENCE IN CRIMINAL PROCEEDINGS

First-hand hearsay.

**23.**—(1) Subject—

(a) to subsection (4) below;

1968 c. 19

(b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968 (evidence given orally at original trial to be given orally at retrial); and

1984 c. 60.

(c) to section 69 of the Police and Criminal Evidence Act 1984 (evidence from computer records),

a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if—

(i) the requirements of one of the paragraphs of subsection (2) below are satisfied; or

(ii) the requirements of subsection (3) below are satisfied.

(2) The requirements mentioned in subsection (1)(i) above are—

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

PART II

(b) that—

(i) the person who made the statement is outside the United Kingdom; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.

(3) The requirements mentioned in subsection (1)(ii) above are—

(a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

(b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

(4) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984. 1984 c. 60.

Business etc. documents.

24.—(1) Subject—

(a) to subsections (3) and (4) below;

(b) to paragraph 1A of Schedule 2 to the Criminal Appeal Act 1968; and 1968 c. 19.

(c) to section 69 of the Police and Criminal Evidence Act 1984,

a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied—

(i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and

(ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.

(2) Subsection (1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it—

(a) in the course of a trade, business, profession or other occupation; or

(b) as the holder of a paid or unpaid office.

(3) Subsection (1) above does not render admissible a confession made by an accused person that would not be admissible under section 76 of the Police and Criminal Evidence Act 1984.

(4) A statement prepared otherwise than in accordance with section 29 below or an order under paragraph 6 of Schedule 13 to this Act or under section 30 or 31 below for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

shall not be admissible by virtue of subsection (1) above unless—

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(i) the requirements of one of the paragraphs of subsection (2) of section 23 above are satisfied; or

(ii) the requirements of subsection (3) of that section are satisfied; or

(iii) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement.

Principles to be followed by court.

25.—(1) If, having regard to all the circumstances—

(a) the Crown Court—

(i) on a trial on indictment;

(ii) on an appeal from a magistrates' court; or

(iii) on the hearing of an application under section 6 of the Criminal Justice Act 1987 (applications for dismissal of charges of fraud transferred from magistrates' court to Crown Court); or

1987 c. 38.

(b) the criminal division of the Court of Appeal; or

(c) a magistrates' court on a trial of an information,

is of the opinion that in the interests of justice a statement which is admissible by virtue of section 23 or 24 above nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of subsection (1) above, it shall be the duty of the court to have regard—

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;

(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and

(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

Statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations.

26. Where a statement which is admissible in criminal proceedings by virtue of section 23 or 24 above appears to the court to have been prepared, otherwise than in accordance with section 29 below or an order under paragraph 6 of Schedule 13 to this Act or under section 30 or 31 below, for the purposes—

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard—

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(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(iii) to any other circumstances that appear to the court to be relevant.

Proof of statements contained in documents.

**27.** Where a statement contained in a document is admissible as evidence in criminal proceedings, it may be proved—

(a) by the production of that document; or

(b) (whether or not that document is still in existence) by the production of a copy of that document, or of the material part of it,

authenticated in such manner as the court may approve; and it is immaterial for the purposes of this subsection how many removes there are between a copy and the original.

Documentary evidence—supplementary.

**28.**—(1) Nothing in this Part of this Act shall prejudice—

(a) the admissibility of a statement not made by a person while giving oral evidence in court which is admissible otherwise than by virtue of this Part of this Act; or

(b) any power of a court to exclude at its discretion a statement admissible by virtue of this Part of this Act.

(2) Schedule 2 to this Act shall have effect for the purpose of supplementing this Part of this Act.

APPENDIX G

Federal Rules of Evidence, Article VIII

## RULE 801

**Rule 801. Definitions**

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

## RULE 802

**Rule 802. Hearsay Rule**

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

## RULE 803

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).—Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.—To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.—Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.—Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.—Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history.—Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.—Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries.—Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

## RULE 804

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability.—"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.—(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

APPENDIX H

California Evidence Code, s 1228

**§ 1228. Admissibility of certain out-of-court statements of minors under the age of 12; establishing elements of certain sexually oriented crimes**

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

(a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.

(b) The statement describes the minor child as a victim of sexual abuse.

(c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.

(d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.

(e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.

(f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement.

If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

(Added by Stats.1984, c. 1421, § 1. Amended by Stats.1985, c. 1572, § 1.)

**§ 240. "Unavailable as a witness"**

(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

(Stats.1965, c. 299, § 2. Amended by Stats.1984, c. 401, § 1; Stats.1988, c. 485, § 1.)