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17-19-08

THE POST OFFICE

REGISTRY

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Our Ref PD/12411/MJH

Your Ref

Date 31st July 1995

Solicitor and Group Legal Services Director

CATHERINE CHURCHARD LLB

[REDACTED]
Criminal Law Team
Law Commission
Conquest House
37/38 John Street
Theobalds Road
LONDON WC1N 2BQ

Dear Madam

EVIDENCE IN CRIMINAL PROCEEDINGS
HEARSAY AND RELATED TOPICS
(LAW COMMISSION CONSULTATION PAPER NO. 138)

Thank you for your letter and enclosure of 10th July 1995.

After considering this matter, I take the view that Option 2 is to be preferred.

In practice, the operation of Section 69 of the 1984 Act is somewhat onerous from a prosecution viewpoint. I consider that computer evidence is, in principal, no different from any other sort of evidence and it should, in general terms, be admissible, so that any argument in Court would relate to its weight rather than its admissibility. I therefore consider that there should be a presumption that the machine is in working order etc. and if the Defence wish to argue otherwise, then clearly, they should be able to do so. At present, I therefore consider the evidential requirements to be far too strict and can hamper prosecutions.

Yours faithfully

[REDACTED]

HEAD OF CRIMINAL LAW DIVISION

THE POST OFFICE

2

THE SOLICITOR'S OFFICE IMPACT HOUSE 2 EDRIDGE ROAD CROYDON CR9 1PJ

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Date 26 October 1995

Solicitor and Group Legal Services Director

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F19

Dear Madam

LAW COMMISSION CONSULTATION PAPER NO. 138
"CRIMINAL LAW" EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND
RELATED TOPICS

This Office inter alia prosecutes offenders who have committed offences against the Post Office. The offenders can be employees, Sub-Postmasters or members of the public. Typical offences prosecuted by this office include theft of money from the till or false accounting by counter clerks or Sub-Postmasters and wilful delay and/or theft of mail by Royal Mail staff. This list of offences is not exhaustive.

A senior lawyer in this office has reviewed the above mentioned Consultation Paper.

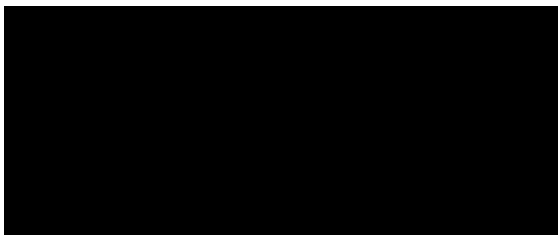
This Office welcomes your proposals especially in relation to repealing Section 69 of the Police and Criminal Evidence Act 1984 and repealing the discretionary provisions of Sections 25 and 26 of the Criminal Evidence Act 1988.

With regard to the present potential evidential problems caused by Section 69 of the Police and Criminal Evidence Act 1984, a large number of Sub-Postmasters now complete their cash accounts and other accounting records by using a computer. The Sub-Postmaster is often the only person working in the Sub-Post Office or the only person who uses the computer. In the event of the Sub-Postmaster being prosecuted for theft or false accounting, the Post Office may need to rely upon the computerised accounting records. The Sub-Postmaster is frequently the only person who can give the evidence required by Section 69 of the Police and Criminal Evidence Act 1984. In the absence of admissions or other direct evidence the Post Office may not be able to prove the case solely on the ground of being unable to satisfy the technical requirements of Section 69 of the Police and Criminal Evidence Act 1984.

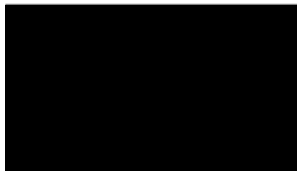
Computers are now being used within Branch Post Offices, Parcelforce Depots and Royal Mail Sorting Offices.

I hope that my comments are of some assistance.

Yours faithfully



To



17-19-08

Solicitor's Office

Somerset House
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Stephen Silber Esq QC
Law Commission
Conquest House
37/38 John Street
Theobald's Road
London WC1N 2BQ

16 October 1995

Dear Mr Silber

EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

(Law Commission Consultation Paper No 138)

As promised in my letter of 11 October I am now able to let you have our response to the above Consultation Paper.

We found the Consultation Paper to be of considerable interest and to be so complete and clear in its coverage as to leave little scope for worthwhile comment. I can start, however, with one general comment. Since we are experiencing a move away from adherence to formal rules of evidence in the civil cases which we conduct before General and Special Commissioners, we have no difficulty with the proposal at paragraph 1.15 that "the admissibility of hearsay evidence in criminal cases should continue to be governed by rules separate from those applicable to civil cases."

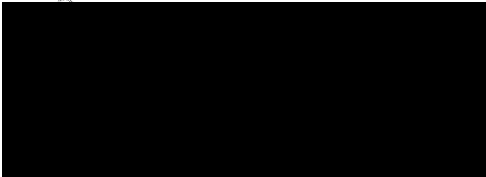
More specifically, we welcome the proposed rationalisation of the hearsay rule in criminal cases. We agree in general with the criticisms levelled at the rule and would endorse your provisional preference for automatic admissibility of specified types of hearsay evidence coupled with a limited discretion to admit "multiple hearsay" in certain circumstances (option 7).

The main concern that the Inland Revenue has in connection with the hearsay rule is the problem of adducing documentary evidence, mostly of a financial or business nature, in fraud cases. This problem has been considerably eased by sections 24 and 27 of the Criminal Justice Act 1988 and we have not suffered from the erratic use of discretion referred to in paragraph 9.14 of the Consultation Paper. We are therefore pleased to note that the paper recommends the retention of these provisions, even if in an altered form.

We are also wholeheartedly in agreement with the proposal to abolish section 69 PACE. The requirements of this section consume a considerable amount of our time without, as far as we can see, achieving any useful result.

That is really the total of the comments that we wish to make. I am sorry that we have taken so long to do so; but I hope that you find them useful, few though they are.

Yours sincerely





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27 October 1995


Dear [Redacted]

**LAW COMMISSION CONSULTATION PAPER NUMBER 138
EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS**

I have read the above consultation paper with much interest.

BT has no corporate view on the general topic of hearsay. We would, however, strongly support the suggestion that Section 69 of PACE should be repealed without replacement.

Quite apart from those prosecutions which BT undertakes itself for telecommunications fraud, this company is frequently required to assist the police and CPS in prosecutions for malicious telephone calls and to provide evidence of making of calls in connection with other matters. The entire telecommunications system in this country and, indeed, over much of the globe, is dependent on the operation of computer networks, which connect calls and store records. These systems interact with each other, for the most part without human intervention, and there is a high degree of redundancy and automatic backup in the event of any breakdown. To prove in every case that every computer which feeds information into the system is working correctly is an extremely difficult matter, as a moment's thought will show, and the certification provisions in the Act do not provide an escape from the problem.

Yours sincerely

[Redacted]

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1 November 1995

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Your Reference: 17-19-02

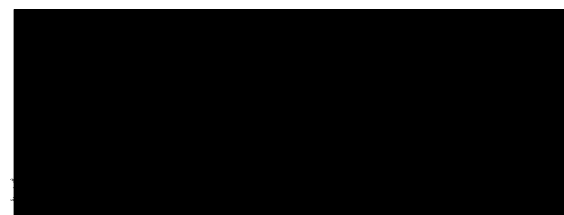
Dear Mr Silber,

EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

I refer to [REDACTED] letter of 9 October and now have pleasure in enclosing the Crown Prosecution Service response to Consultation Paper No. 138.

I hope the document will be of help to you in deciding how best to progress with the much needed reforms of this part of the law.

As I was responsible for the drafting of the response, I will be happy to provide any further information that you may require. My direct line is (0171) 273 8328.



Prosecution Policy Division
Policy Group

LAW COMMISSION CONSULTATION PAPER

EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

CROWN PROSECUTION SERVICE RESPONSE

Our main conclusions are summarised below and the remainder of this document is an explanation of how and why we have arrived at those conclusions.

HEARSAY EVIDENCE

- We most favour Option 7 modified to make all hearsay evidence admissible if it is both relevant and probative.
- One statute should define "hearsay evidence" and contain all the law relating to it.
- Evidence should be admissible for both prosecution and defence according to the same test - that it is both relevant and probative.

THE RULE AGAINST PREVIOUS CONSISTENT STATEMENTS

- We agree broadly with Option 3.

COMPUTER EVIDENCE

- We believe s.69 Police and Criminal Evidence Act 1984 should be repealed.

EXPERT EVIDENCE

- We are not aware of major problems but have no objections to Option 5.

1. LIMITATIONS ON REFORM

- 1.1 The CPS agrees with the Commission that any reform of domestic law should be compatible with the ECHR. [CP 9.4]

2. PRELIMINARY ISSUES

- 2.1 The CPS also agrees with the Commission that the hearsay rule is excessively complex and leads to confusion and anomalous results. The rule could sensibly be reformed for those reasons alone. [CP 9.2]
- 2.2 The CPS agrees that if the only evidence against a person is hearsay evidence that should not amount even to a case to answer. We are surprised that this should amount to a proposed reform. The CPS is required to apply the Code for Crown Prosecutors. Section 5.3 a of the Code requires Crown Prosecutors to consider whether evidence may be excluded because it is hearsay. If it is hearsay the Crown Prosecutor must be satisfied that there is enough other evidence for a realistic prospect of conviction. In practice, if the only evidence against a person was unsupported hearsay, the CPS would not continue with the case.
- 2.3 We have assumed that, in paragraph 2.2 we have correctly understood the Commission's proposal that "unsupported hearsay should not be sufficient proof of any element of an offence." An alternative interpretation of paragraph 9.5 of the Consultation Paper is a literal one - and for the sake of completeness we must deal with it.
- 2.4 It is, that however much other evidence there may be against a person, if the only evidence in relation to one element of the offence is hearsay then no case to answer is made out.
- 2.5 We are unable to agree with that interpretation. It may help to explain why with examples:
- (1) At midnight a security guard sees X break into a building and enter a computer room. Two minutes later X emerges, is later arrested by the police and makes no comment when interviewed. The computer, which belongs to Z, produces a printout indicating that at 0001 hours on the night in question a large amount of money

was transferred out of Z's account without his authority.

Assuming that the computer printout is hearsay, and that the requirements of s.24 Criminal Justice Act 1988 and s.69 Police and Criminal Evidence Act 1984 are satisfied is justice done if the printout cannot be used to prove an essential element of an offence - ie charges against X of burglary, theft, false accounting or under the Computer Misuse Act 1990 ?

- (2) S.32A Criminal Justice Act 1988 allows video recordings of child witnesses to be given in evidence in certain circumstances. S.33A of the same Act provides for a child's evidence to be given unsworn and s.34(2) of the Act removes the need for corroboration of childrens' evidence. Currently a video interview of a child can amount to the sum total of the evidence against a person and a jury could, in strict law, convict on it. Applying the proposal "unsupported hearsay should not be sufficient proof of any element of an offence" to this example would involve repeal of s.32A Criminal Justice Act 1988. We query whether this would command any public support. (What if the prosecution case amounted to several video interviews of different children all relating to the same incident ?)

[CP 9.5]

3 JUDICIAL DISCRETION

- 3.1 The CPS view is that judicial discretion is such an inherent part of the criminal justice system that any attempt to operate without it would be generally unacceptable. Even if a category based regime were to be implemented, judicial discretion either at common law or under s.78(1) Police and Criminal Evidence Act 1984 could not be excluded.
- 3.2 We recognise the benefits of judicial discretion in allowing evidence to be

assessed on a case by case basis. We agree with the Commission that a clear comprehensible structure for the exercise of judicial discretion in relation to evidence is lacking. If, as mentioned in paragraph 4.41 of the Consultation Paper, the Court of Appeal has difficulty in arriving at a definitive decision as to how ss.25 and 26 Criminal Justice Act 1988 relate to one another, similar problems will afflict judges, magistrates and lawyers in the lower courts.

3.3 We appreciate that judicial discretion leads to less certainty. In the CPS's response to the Commission's Questionnaire we highlighted some of the practical problems we had encountered. Our view was that, whilst we accepted the need for a defendant to receive a fair trial, judicial discretion to admit evidence was normally likely to be exercised in favour of the prosecution when the evidence was subordinate or peripheral to the case. We accepted that the courts must be less ready to admit decisive evidence which cannot be challenged by the defence. We remain of that view but feel that the problems of uncertainty are compounded by the complexity of the law in this area.

3.4 We did tentatively consider a two tier system with judicial discretion being severely limited or even excluded in the magistrates' courts but retained in the higher courts. We felt that the idea had little to recommend it. It might improve certainty but at the expense of justice. [CP 9.6 - 9.25]

4 "HEARSAY" A DEFINITION

4.1 The Commission's suggested definition of hearsay is: "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion that the person intended to assert."

4.2 We would wish to have as simple a definition as possible. We have to say that we are more attracted to Professor Cross's definition of hearsay as "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted."

- 4.3 The difficulty we see with the Commission's definition is that the court will have to determine the intention of the person concerned. All the difficulties inherent in identifying what is an implied assertion remain. Professor Cross's definition omits any reference to intention but that still would mean that implied assertions were inadmissible in the light of the ruling in *Kearley*.
- 4.4 We would prefer an alternative approach of having a statutory definition of hearsay evidence coupled with a framework defining tightly the scope of judicial discretion on its admissibility.
- 4.5 As mentioned above, we favour Professor Cross's definition and further suggest that all of what is currently hearsay evidence should be admissible provided that the court finds that it is both relevant and probative. [CP 9.26 - 9.36]

5 OPTIONS FOR REFORM

5.1 We start with two premises:

- 1) that the present law is in need of reform to make it more readily understandable
- 2) that any new law must realistically allow for the exercise of some degree of judicial discretion.

5.2 We refer to the various options for reform as they appear in the Consultation Paper (Options 2 to 6 - there being no Option 1).

6 OPTION 2

6.1 Our view is that this would be impractical. The criminal justice system in England and Wales is adversarial and based on the calling of live witnesses. The Royal Commission on Criminal Justice did not recommend any fundamental alteration

to that.

- 6.2 This option would permit either prosecution or defence to base a case wholly on hearsay evidence unfettered as to either quality or quantity. If it were to become law, Crown Prosecutors would have to take decisions on whether to prosecute on the basis of potentially poorer quality evidence than at present. It would be impossible to make a meaningful judgment on what evidence the court might rely upon in reaching its decision. An increase in the number of wrongful convictions and in the workload of the appellate courts would be a virtually certain result. Equally those lowered evidential standards would apply to the defence - for example by using evidence that could not be challenged, and could potentially be fabricated, to attack the character of a live prosecution witness or to support an alibi. [CP 10.3 - 10.27]

7 OPTION 3

- 7.1 This option, to begin with, is readily understandable. Unlike Option 2 it compels the parties to seek the best evidence available and to that extent would preserve current standards.
- 7.2 This option, which works in the German inquisitorial system, would have to have in built safeguards, applying to both prosecution and defence, if it were to work satisfactorily in England and Wales.
- 7.3 Unless there was a limit to the types of evidence admissible in this option it would amount to Option 2 by another name. The quality of the evidence might not be so adversely affected but the potential for quantity would remain uncontrolled.
- 7.4 We would envisage having a statutory definition of hearsay evidence and, in the absence of better evidence, it would not be admissible unless it was both relevant and probative.

7.5 A further necessary control would be to require both prosecution and defence to give advance notice to each other and the court of details of any hearsay evidence it was proposed to rely on and the reason for not relying on first hand evidence.

This would encourage thorough and timely preparation of the case and curb any temptation not to seek the best available evidence from the outset.

7.6 In paragraph 10.33 of the Consultation Paper the question is raised of the accused present in court who declines to give evidence. We believe that s.35 Criminal Justice and Public Order Act 1994 covers this situation.

7.7 Paragraph 10.32 of the Consultation Paper deals with the danger of increased fabricated evidence. We question whether this is likely. Witnesses on occasions now make false statements in the knowledge of a future court hearing - relaxation of the hearsay rule will not, we suspect, encourage others to do likewise. [CP 10.28 - 10.35]

8 OPTION 4

8.1 We agree with the Commission that this option has twin disadvantages over even the current system. It would be even more difficult to understand and even less certain in its practical application. [CP 10.36 -10.55]

9 OPTION 5

9.1 We agree with the Commission that this option, though laudable in its intended object, simply adds a further layer of uncertainty on to the existing ones. [CP 10.56 - 10.64]

10. OPTION 6

10.1 This option is for a category based system. The first problem is to define all the relevant categories of evidence. The Commission recognise that it is a difficult one to overcome. We agree, not least because the law lags behind rather than

leads developments in the outside world. Computers, telecommunications and medical science are but three of many fields.

- 10.2 A category based system would be comprehensible but not necessarily certain. The categories would require systematic review and revision and failure to do so could result in injustice either to prosecution or defence.
- 10.3 We note that in paragraph 10.68 of the Consultation Paper that the Commission favours a category based system because it is not aware of any miscarriage of justice arising from the operation of the Criminal Justice Act 1988. We cannot help wondering whether that bears out our impression that this kind of evidence tends to be admitted only when it is of a subordinate or peripheral nature.
- 10.4 The fundamental drawbacks of a category system are that it carries an inbuilt obsolescence as well as excluding any form of judicial discretion to correct its faults. We do not view it as being either workable or generally acceptable. [CP10.65 - 10.72]

11 OPTION 7

- 11.1 This is option 6 with a limited judicial discretion added to act as a "safety valve" and we will deal with the various proposals in the order that they appear in the Consultation Paper.
- 11.2 **Proposal 1**
- 11.3 We agree with this but would commend Professor Cross's definition of hearsay.
- 11.4 **Proposal 2**
- 11.5 We broadly agree but question the need to limit the proposal to first hand hearsay. We accept that hearsay evidence should in the ordinary course of events

be given less weight than live evidence, but we question whether in all circumstances multiple hearsay should be given no weight whatever. The "safety valve" provision is designed to allow for multiple hearsay in any event and we wonder whether, even if evidence is multiple hearsay, it should not be admissible anyway (provided that it is both relevant and probative).

11.6 Proposal 3

11.7 There is nothing objectionable in this proposal but we have the following comments:

Proposal 3(b)(i)

Is it realistic to use the fact that a witness is outside the United Kingdom as a basis for reading his or her statement ? It may cost more and take longer to get from Edinburgh to London than it does from Paris.

We suggest that the Commission consider firstly the merits of expanding the categories of evidence that may be admitted both in England and Wales and elsewhere via live television link. A second consideration is whether to extend this facility to the magistrates' courts. The witness could then be cross examined and the court would almost certainly be able to make a better assessment of the witness than simply having his or her statement read.

Proposal 3 (c)

Witnesses may refuse to give evidence for all manner of reasons. Frequently it happens that one party in a relationship assaults the other, but as time passes they become reconciled. The aggrieved may no longer wish to support the prosecution. Proposal 3(c) would permit a prosecutor to go ahead with such a case against the aggrieved's wishes. (A witness may now be compelled to attend court if it is felt in the public interest to do so).

Another type of case is where a witness makes a false statement. If, knowing that, the witness refuses to testify can it be right to admit the witness's statement ?

Finally, defendants are witnesses. Does proposal 3(c) not remove the right to remain silent ?

Given that for the purposes of Proposal 3(c) there is a witness in court refusing to testify, or to continue to testify, would it not be wiser to let the court conduct its own enquiry as to the reasons and act accordingly rather than making the witness's statement automatically admissible ?

11.8 Proposal 4

11.9 We agree

11.10 Proposal 5

11.11 We agree, but given the need to make the law as simple and comprehensible as possible we suggest that, rather than preserving or re-enacting these various statutes, they should all be incorporated into one homogenous piece of legislation allowing any person interested to refer to the statute law on hearsay evidence at as a whole.

11.12 Proposal 6

11.13 We agree

11.14 Proposal 7

11.15 We fully understand the thinking behind the need for a "safety valve" provision. Our concern is that, given that the magistrates' courts deal with the bulk of criminal cases in England and Wales it is there that the "safety valve" is likely to be used most often.

11.16 We considered the idea of a two tier system with very limited discretion in the magistrates' court and rejected it. Paragraph 11.38 of the Consultation Paper

invites views as to the circumstances in which the safety valve should be available. Unfortunately we cannot envisage any practical way to limit its use.

11.17 Every case, no matter how minor, is individual. We operate in an adversarial system. If there is to be a safety valve it must be available as and when required. The price for that is that some unmeritorious attempts to use it, particularly in the magistrates' courts, will be inevitable.

11.18 We refer to paragraph 11.8 of the Consultation Document. The safety valve caters amongst other things for multiple hearsay. Given that the magistrates are judges of fact and law we imagine that, like a jury, they may be misled or distracted. They may also spend time listening not only to the evidence but the attendant submissions. Our view is that the objectives of simplifying and speeding up the judicial process are unlikely to be achieved. [CP 10.73 - 11.61]

12 SHOULD REFORMS TO THE HEARSAY RULE APPLY EQUALLY TO PROSECUTION AND DEFENCE IN CRIMINAL CASES ?

12.1 (We did not look at Courts - Martial, Professional Tribunals or Coroners' Courts as we do not have sufficient expertise of their various operations for us to be able to make meaningful comments).

12.2 We favour the level playing field approach that rules on admissibility of evidence should apply equally to prosecution and defence. As regards hearsay evidence, it has greater potential for unreliability than live evidence.

12.3 We consider it would be wrong to make it more difficult to prove cases by introducing more liberal evidential standards for the defence. Other considerations apart, it would do nothing to simplify the system and would be unlikely to improve public confidence that justice was being done.

12.4 We recognise that under ss. 23 and 24 Criminal Justice Act 1988 the law currently

imposes a higher standard of proof of establishing the foundation requirements on the prosecution than it does on the defence. [CP p.180 footnote 6].

- 12.5 We wonder whether this does not confuse the overall standard of proof with the standard by which a particular piece of evidence ought or ought not to be admitted. We recommend that the same test should apply to both parties and it should be simply that the evidence sought to be admitted is both relevant and probative. The weight to be attached to it should be a matter for the magistrates or jury as the case may be.
- 12.6 This solution has the advantage of being simpler, and fairer than the present law. It would in no way affect the overall standard of proof applicable to the prosecution nor curtail judicial discretion to exclude evidence at common law or under s.78 Police and Criminal Evidence 1984. [CP 12.2 - 12.15]

13 THE RULE AGAINST PREVIOUS CONSISTENT STATEMENTS

- 13.1 We agree with the Commission that this area of the law needs reform. The area in which the current law causes greatest practical problems is the inability for a witness to refresh his or her memory from a previous statement when giving evidence. In our view Option 3 solves that main problem, and others, in a common sense manner and brings legal practice into line with what actually happens in daily life.
- 13.2 We wonder whether the test in Option 3(d) "reasonably be expected" is intended to be an objective or subjective test.
- 13.3 It might not be reasonable, for example, to expect a witness with Alzheimer's disease or with particular memory problems to remember very much at all. On the other hand a person with a particular interest and knowledge of some topic could reasonably be expected to remember more about details concerning it than the man or woman in the street.

13.4 A second consideration is the nature of the details that the witness could not recall. Were they routine or out of the ordinary; were they of great quantity or otherwise ?

13.5 A possible way out of becoming entangled in objective and subjective tests would simply be to delete from Option 3(d) the words "and the details are such that the witness cannot reasonably be expected to remember them." In effect this is a subjective test but, memory being in its own right subjective, we cannot conceive of any more practical alternative. [CP 13.1 - 13.55]

14 COMPUTER EVIDENCE

14.1 We agree that the main problem with computer evidence is probably incorrect entry of data. Experience shows, though, that the other problems of software faults, hardware faults and unauthorised tampering with computer systems are not without significance.

14.2 S.69 of the Police and Criminal Evidence Act 1984 is, frankly, a source of difficulty to us. We are all too familiar with problems in complying with it, which are increasing as computer systems develop. We note with interest that the Internet is not mentioned in the Consultation Paper.

14.3 We agree with the Commission that s.69 Police and Criminal Evidence Act 1984 is becoming increasingly out of touch with developments in technology and it should be repealed. [CP 14.1 - 14.32]

15 EXPERT EVIDENCE

15.1 The Royal Commission on Criminal Justice asked the Commission to look at this topic because of particular concern that the system might be exploited by defence practitioners not only seeking to cross examine the prosecution expert but also the

various assistants who may have helped in carrying out tests.

- 15.2 The Crown Prosecution Service was alive to the problem and considered it in 1992 with particular reference to statements from the Forensic Science Service.
- 15.3 Forensic scientists' witness statements now contain details of those who have assisted in the various tests and their role in those tests. If the defence wish to have more details of the part played by an assistant we would normally obtain a witness statement and serve it on the defence. In a case where the expert relied on information provided by an assistant which he was not in a position to fully explain, then we would normally call the assistant to give evidence so that the court was in possession of all relevant facts.
- 15.4 In practice we are not aware of any widespread attempts to exploit the system by defence practitioners but we would have no objection to Option 5 as suggested by the Commission in this part of the Consultation Paper. [CP 15.1 - 15.26]

16 CONCLUSIONS

16.1 Hearsay Evidence

16.2 We most favour Option 7 BUT modified so that:

Proposal 2 was replaced with a provision that, subject to common law and s.78 Police and Criminal Evidence Act 1984, all hearsay evidence be admissible if relevant and probative.

We would wish to see all the statute law on hearsay evidence incorporated into one piece of legislation also containing Professor Cross's definition of hearsay evidence.

- 16.3 We recommend that the same standard should apply to both prosecution and defence in seeking to have any evidence admitted namely that it be both relevant

and probative.

16.4 As a less satisfactory alternative we would choose Option 3 - the best available evidence approach.

To use hearsay evidence prior notice would be required and reasons given for the unavailability of better evidence.

Hearsay evidence would be as defined by Professor Cross and this definition included in a statute.

Subject to the foregoing all hearsay evidence would be admissible provided the court found it both relevant and probative.

The same standard should apply to prosecution and defence in seeking to have evidence admitted namely that it be relevant and probative.

16.5 The Rule against Previous Consistent Statements

16.6 We agree with Option 3 in the Consultation Paper. We have minor misgivings on the interpretation of the wording in Option 3(d).

16.7 Computer Evidence

16.8 In our view s.69 and Schedule 3 Police and Criminal Evidence Act 1984 serve no useful purpose and should be repealed.

16.9 Expert Evidence

16.10 We are not aware of major practical problems over the use of Expert Evidence in court. We would not object, though, to Option 5 as proposed by the Commission.



Home

A C K W O U L O O S W H O

SS



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Date 9 November 1995

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17-19-08

Dear Stephen:

RE: EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS

... Further to my letter of 10 October, I now have pleasure in enclosing our response to your paper.

You will see that in general we agree with the approach that you are proposing to adopt, although we have made a number of suggestions concerning some aspects of the proposals. We do have one substantial concern. This relates to your proposals for satisfying the European Convention on Human Rights. We consider that in some respects your proposals go further than is required by the Convention.

I would be happy to provide you with any further information that you may need, or meet to discuss any aspects of our response which seem to you to require clarification.

I am also, at Mr Hammond's invitation, enclosing a copy of my minute to him commenting on the issues raised in your recent meeting concerning the law on dishonesty. I hope that this will be of some assistance.

Yours sincerely,

[Redacted signature area]

RESPONSE TO LAW COMMISSION'S CONSULTATION PAPER
ON EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND
RELATED TOPICS

A. HEARSAY

INTRODUCTION

The Department agrees with the Law Commission that the current law is in need of reform and that option 7 is the most appropriate option. Option 7 appears to us to resolve the difficulties caused by the exclusion of cogent and reliable evidence, while clarifying and extending (where appropriate) the categories of admissible hearsay, and providing for their automatic admission. We set out below, however, a number of comments on points of detail.

The Department agrees with the Law Commission's proposed definition of hearsay, and we welcome in particular the exclusion of implied assertions from the definition.

We have addressed one substantial issue in this response. This concerns the proposal, which follows the Law Commission's consideration of the relationship between the current and proposed law on hearsay and Article 6 of the ECHR, that there should not be a conviction where any ingredient of an offence depends on hearsay evidence alone, including confessions. This proposal causes us considerable concern and will have a major effect on criminal prosecutions. This aspect is discussed further below. In short, however, the Department is of the view that there may be many cases where otherwise unsupported but reliable and admissible hearsay evidence, whether oral or written, will constitute all or part of the evidence of one or more ingredients of an offence, and that therefore the proposal will result in many cases not being prosecuted which under the present law could be prosecuted. We are not persuaded that, given the case law on the ECHR, any change needs to be as broad as is proposed. In any event, in our view, confessions as evidence do not offend against the provisions of Article 6, which is concerned with the attendance of witnesses so that they can be tested in cross examination.

OPTION 7 AND THE LAW COMMISSION'S PROPOSAL

The most notable change is that first hand oral hearsay will be admissible for the first time (other than the old common law exceptions) if the unavailability/fear requirements are established and the witness is identifiable. 3(c) extends the admissibility of evidence from those not attending through fear to those who attend but cannot then bring themselves to start/finish their evidence, although it is not restricted to those in fear (see Department's comments on this below). Although the new proposals seem to cover most situations that have given

cause for concern in past cases, the discretion is intended to catch for example, multiple oral hearsay where its reliability and cogency is such that the interests of justice demand its admission.

The Department welcomes in particular these features of the proposals.

OBSERVATIONS ON SPECIFIC POINTS RAISED IN THE CONSULTATION PAPER

Observations are made on SOME of the aspects discussed in the Consultation Paper. As only a few matters are commented on, they are dealt with on a topic by topic basis.

1. Dying declarations - (3.29 and 7.18)

This rule arose on the basis that those settled in the hopeless expectation of death are unlikely to die with lies upon their lips. It is argued that there is no rationale why this rule should apply to murder/manslaughter cases only. The Department has not had the time to study the authorities, but it may be that the rule was built up around statements concerned with the identity of the killer. It is easy to see that the relationship in time between the identification of the killer and the act to which it relates adds greater weight to the argument for admissibility than it would where the declaration concerns some matter occurring some time previously and unrelated to the cause of death. Here time may have led to the reliability of the statement becoming open to question. The proposals would allow for the admission of such a statement regardless of the charge.

2. Oral hearsay

The Law Commission is of the opinion that while oral evidence may on occasion be less cogent than documentary evidence the law should not make a distinction between the two types of hearsay.

The Department considers that documentary hearsay can often be inherently more reliable than oral hearsay. For instance where something is reduced to writing at the time the information is received or soon thereafter, the room for error when relating what was said later is reduced, leaving just the reliability of the information conveyed open to question. Whereas if there is no written record, you have the additional features that the receiver's memory and his understanding of the information that was conveyed to him are susceptible to error. On the other hand striking information is likely to be remembered correctly in whatever form it is received.

We consider that the right approach is to leave it to the jury to weigh up the strength of the evidence and accordingly we agree with the Law Commission's proposal. The proposal would require the prosecution to call the witness where it is feasible to do so in cases in which the statutory exceptions do not apply.

3. Preservation of statutory exceptions

(a) S.24 CJA 1988

The Law Commission proposes to preserve section 24 but repeal sections 25 & 26. We accept and welcome this approach. It will mean that documentary evidence covered by s24 will therefore be automatically admitted since the judge will no longer have a decision to take in the absence of a submission under s78 of PACE or under the common law. We think however that there is a strong possibility that there will be no change of approach on the part of counsel and judges, and that they will continue to think in terms of there being a decision to take as to whether this type of evidence should be admitted, and perhaps hark back to the type of criteria which at present are found in ss25 and 26. A central question to be addressed will be what is the proper scope of s78 and the common law in these circumstances. Presumably they ought not to be applicable in the type of situations that are presently covered by ss25 and 26. We think that it would be useful for guidance to be provided in this area, either on the face of the statute or through an early expression of judicial view, in order to avoid inconsistency of decision making on the part of judges.

The Department agrees that amendment of s24 is required to ensure that it is the provider of the information not the creator of the document whose unavailability needs to be established.

We agree it is important that arguments concerning the admission of evidence should be conducted and ruled upon at the pre trial hearings so that the prosecution can at least attempt to fill gaps where rulings go against them. We do not think that such arguments are appropriate to be dealt with in the Magistrates' Court in committal or dismissal proceedings. The prosecution may be well justified for resource reasons in seeking to rely on section 24 in particular.

(b) Other exceptions

No mention is made in the consultation paper of preserving s102 or s103 of the MCA 1980, or s30 CJA 1988. For the avoidance of doubt, we believe these should be included in any list of statutory exceptions. We note too that video evidence under s32A of the CJA is not included in the list of statutory exceptions. It is not clear whether this is deliberate or not. The paper is critical of the new law which was introduced by Part III of the Criminal Justice Act 1991 (see paras. 13.20 - 13.24). Nevertheless given that the law has only recently been introduced, and after much Parliamentary debate, we believe that there should be much fuller consideration of the issue before the law is effectively abrogated.

4. Hostile and fearful witnesses

The Law Commission comments (para 7.24) on the apparent oddity that section 23 allows for the admissibility as evidence of the truth of its contents of a statement of a witness proven to be kept out of the way through fear, while in the case of a hostile witness the statement is only admitted for credibility purposes.

We consider that the distinction is reasonable. In the latter instance, the hostile witness has actually taken the oath and (apparently) lied. The other has simply not come to court through fear which will have had to be established beyond reasonable doubt. If a witness is prepared to lie, however fearful, they may well be less than reliable and it may be appropriate that his/her statement is not admitted as to the truth of its contents but only as to credit. We do not believe that either option 7 or the proposals concerning the admissibility of previous statements (para 13.55) would allow for the admission as evidence of the truth of its contents a previous statement which is inconsistent with evidence that the witness gives in court. If we are wrong in this understanding then our view is that the proposals ought not to extend to this situation.

The Department also notes that Option 7 category 3(c) of the proposals does not require that the refusal to give evidence is through fear. This would therefore allow for the stubborn witness who may have lied in his or her statement, rather than in evidence, to have their statement read. This is a category of witness whose statement the Department believes it is inappropriate to read to establish the truth thereof. Many witnesses come to a grinding halt when they find themselves in a corner from which there is no escape. We consider that a rule which allows for the automatic admission of their previous evidence as evidence of the truth of its contents in these circumstances is too generous to the witness. The case for the categories covered by the automatic exception is based on the fact that the balance between admitting the evidence and protecting the accused is clearly in favour of admitting the evidence. We do not consider that the outcome of the balancing test is as clear in the case of hostile witnesses. Our view is that automatic admissibility is better left to cover those who do not continue their evidence through fear. The previous evidence of a hostile witness could still be admitted under the safety valve.

We believe that the Law Commission may have unintentionally left one further situation in this area out of their proposals. This is the situation where a witness is found but refuses to come to court through fear. Category 3 (b) (ii) does not cover this situation, and neither does category 3 (c).

We favour the approach of providing examples of reasonable practicality (which would apply to all the situations in category (b)). We agree with the examples provided in para. 11.19.

5. Further thoughts on automatic admissibility.

A major concern regarding the automatic admissibility of evidence is the potential for fabrication. The dangers are greater in the case of defence evidence since the judge has a residual power to exclude prosecution evidence. For example, the defendant or other defence witness asserts that someone admitted the crime with which he is charged. He can identify them but they cannot be found or are at some known address abroad. Given that this would fall within the automatically admissible category, it is open to abuse. There would appear to be two options. The first is to

leave it to the jury to assess the weight of the evidence given the inevitable question marks over such facts. The alternative is to have a discretion to exclude evidence which fails to meet some test of reliability. We believe that usually the jury should be well able to assess the reliability of evidence such as that in the example above by using their common sense. But juries do need protection from misleading and confusing evidence and because of the nature of the trial process are not in as good a position as the judge to tell whether evidence will waste the court's time. Accordingly we favour a limited discretion to exclude evidence along the lines of the USA example provided in the paper whereby evidence likely to mislead, waste the court's time or confuse can be excluded.

The Department is against the introduction of a provision to exclude "post charge" hearsay, where hearsay statements made after the defendant has been charged would not be admitted, on the basis that they are more likely to be fabricated/unreliable. This unnecessarily fetters the judge's discretion. The discretion that we propose and the common sense of juries should be an adequate safeguard.

6. The safety valve

Various cases are referred to in order to demonstrate the unfair consequences of the strict rules currently in force: inadmissible but potentially critical or apparently cogent exculpatory evidence could not be put before the jury. In particular, confessions by third parties, and other cases such as demonstrated by the facts of R v Sparks 1964 AC 964 and the type of anomaly that could be produced by a slight variant of the facts in R v Carrington [1994] Crim L R 438 (see para 4.29) should clearly be capable of admission in appropriate circumstances. It is intended that such evidence would be admissible under the new safety valve proposal.

First hand hearsay would become admissible under the automatically admissible categories given the right facts, but it is intended that in the case of multiple hearsay or other excluded categories the safety valve would catch any evidence clearly appropriate for admission in the interests of justice. Implied assertions would be admissible as falling outside the draft definition of hearsay.

We query whether the wording of the safety valve will produce the results intended. We appreciate that the intention is to create a limited exception, but the requirement in category 7 (c) (i) is so strict that we fear that many meritorious cases will be excluded. How often can it be stated with confidence that evidence is so positively and obviously trustworthy that the opportunity to test it by cross-examination can safely be dispensed with? That conclusion can perhaps sometimes be reached when it has been possible to study the demeanour of the witness in giving the evidence, but self-evidently in the circumstances covered by the proposed rule that opportunity does not arise. Will not judges rightly take as their starting premise that human understanding and powers of communication is often flawed, and that given that fact it is almost impossible to say that any

evidence is so inherently reliable that there is no need for cross-examination?.

Further, the effect of the proposal would be to put the judge in the place of the jury on an issue of fact. We wonder if this goes too far. There are occasions under the present law where judges decide issues of fact, eg whether there has been oppression under s76, but they do not decide central issues. To continue the confessions example, the judge does not decide whether the confession is true. We can envisage circumstances in the future in which the defence, having gained the admission of evidence under the safety valve, might address the jury on the basis that since the judge has found the evidence to be positively and obviously trustworthy they really ought to accept it. We consider that there is a good case for limiting the judge's role to being a filter.

Given the problems discussed above we invite the Law Commission to consider a wider test, perhaps limited to interests of justice issues alone, with the aim of leaving questions of weight to be decided by the jury.

7. Article 6 of The European Convention on Human Rights

It seems that this is considered not to be an absolute rule (X V Austria Appl 4428/70 1972), and the discussion in chapter 5 helpfully draws attention to the approach taken by the Strasbourg Court in interpreting the Convention. In the light of the caselaw discussed in that chapter, we query whether the proposed new rule that unsupported hearsay should not be sufficient proof of any element of an offence needs to be in such wide terms. An illustration of particular problem areas for us may be helpful.

(a) Confessions. The Law Commission propose that the new rule would extend to confession evidence (page 178, footnote 91). This would mean that a defendant could not be convicted on the basis of a confession alone. This is a radical departure from the current accepted practice, the effects of which are not discussed in the consultation paper but do require further consideration. It does not seem to us that Article 6 affects the admissibility of confessions where the witness to the confession is available to give evidence, since art.6(3)(d) is concerned with the right to examine or have examined witnesses against defendants and that right is satisfied in these circumstances. This is the usual situation in a criminal trial where the police or other investigators give evidence as to what they were told by the defendant. Further, it is arguable that where the confession is contained in a tape recording which the jury are able to hear, or a transcript of which they can read, or in a video recording, art.6(3)(d) has no application since the evidence is provided direct to the jury and not through the medium of a witness. As to fairness generally, sections 76 and 78 of PACE protect the interviewee. Confessions can be the very best evidence of guilt. It may be impossible to prove certain ingredients of crimes without the confession. To prevent a conviction on such a premise might itself

potentially offend Article 8 on the basis of the points made in chapter 5 about the position of victims. The Department would request that such a proposal be the subject of further consultation as a subject in its own right if the Law Commission maintains its view.

(b) Business records under s24. Section 24 CJA 1988 is relied on heavily by the Department in prosecuting fraud cases. It avoids the need to call a multitude of witnesses to prove relatively formal albeit sometimes critical matters. If the proposed rule concerning unsupported hearsay were to apply, s24 would be largely undermined.

Sometimes the source will not be identifiable to call first hand evidence and no other evidence will be available on that aspect. In *R v Foxley* (1995) CLR 636 a former MOD official was charged with receiving corrupt payments. Evidence of payments into Swiss bank accounts were produced as a result of a Letter of Request to the Swiss Authorities to prove that the payments were made. No one testified as to their creation and to the circumstances of it and the meaning etc. The Court of Appeal relied on section 24 for the admission of the documents and allowed for inferences to be drawn as to the circumstances of creation. Professor Smith argues that the documents were real evidence and not hearsay and therefore section 24 does not need have been relied on. Even if he was right in that case, one can envisage cases with similar facts arising where other evidence to support reliable hearsay evidence would not be available.

More often though the witness could be traced, but it would take considerable time to deal with such evidence in court.

The Department does not consider that the admission of evidence of this nature breaches the general principle of unfairness in the Convention. The rule against hearsay stems from the need to call reliable evidence which can be tested as to its reliability by cross examination. Where the evidence is such that its reliability is virtually beyond question, eg certain business records, it cannot be said to be unfair not only to admit but also to rely on it to prove a particular ingredient of an offence. The evidence revealed by the facts in *DPP v Myers* 1965 AC 1001 was highly reliable. To prevent a conviction because proof of the vehicles in question depends on hearsay would seem to be absurd. Yet were the recorders of the chassis numbers identifiable?

Leaving aside issues of fairness, it seems that art.6(3) (d) does not apply to evidence of this nature since it does not come into being as part of the criminal investigation process (see paras. 5.9 and 5.10)

(c) Miscellaneous. Outside these general categories it is not difficult to imagine other situations in which it would seem to be unfair not to admit the evidence and yet the evidence would be excluded by the proposed rule. For

instance, in a rape case the victim has since died and the only issue in dispute is lack of consent. The victim made a statement before she died. In addition independent witnesses have heard her screams and there is forensic evidence, but this evidence, while persuasive, is not specific enough in time and place to constitute adequate corroboration. The new proposal would seem to prevent a conviction. Would the victim be regarded as a "witness" for the purposes of art. 6 in these circumstances? If in this example the defendant had confessed, would that be capable of constituting corroboration under the proposal. In other words, can one piece of uncorroborated hearsay corroborate another piece of uncorroborated hearsay?

In all the above instances the effects of the proposed new rule would be severe, and we would argue that it is by no means clear that human rights law would be against the admission of such evidence. We consider that if any new rule concerning unsupported hearsay is to be introduced there is scope for making it much narrower than the present proposal while still being within the Convention.

8. Interruptions to prevent hearsay.

The Commission proposes a partial solution by allowing facts already admitted in direct evidence to be given as hearsay evidence. The Department does not believe that this will prevent interruptions but rather it will lead to more arguments as to what is already in evidence and what is not. Where a witness statement contains hearsay Counsel will know what is likely to emerge and can deal with it accordingly. Where it is unknown, the situation will not be resolved any more easily under the proposed law, because it will need to be established whether the proposed hearsay remark has been adduced in evidence directly yet or not. In addition, it may be a remark that a subsequent witness can prove the truth of but on which evidence has not been given and tested yet. The reality of interruptions is that Counsel often does not know whether they are dealing with hearsay or not. Many Counsel never consider whether evidence is intended to establish the truth of its contents or to prove that it was said. We believe that the new proposals will lead only to more wrangling over what are predominantly side issues.

9. Different reforms For Prosecution and Defence?

The Department is of the opinion that the same rules on hearsay should apply to the defence as to the prosecution. The system is already properly weighted in favour of the defence in order to prevent the conviction of innocent defendants through the different burdens and standards of proof. In addition, there is greater provision for the exclusion of prosecution evidence.

B. OTHER RELATED TOPICS

1. Previous Consistent Statements.

The Department supports the proposals, but we have a concern

about the issue of discretion. It seems that the proposals for previous statements will constitute a different exception under the hearsay rule. How will this fit in with the proposals in option 7? In particular will this category of hearsay be automatically admitted? We consider that if judges had a discretion they would use it sparingly, mindful that the main concern in admitting previous statements is to avoid burdening the jury with paper the contents of which they have to assess when they should be concentrating on the evidence from the witness box. Earlier in this response we have proposed that judges have a discretion to exclude evidence which is misleading, confusing or wastes the court's time. We think that such a discretion would be helpful in this context as well.

2. Computer Evidence.

The Department strongly supports the proposals to repeal section 69 of PACE.

3. Expert Evidence.

Experts often rely on assistants to do much of the ground work for them. The Department considers that where results of base fact finding are recorded in writing section 24 can be sought to be relied on. Under the other proposals in the paper, such evidence would be admitted subject to the judge's discretion under s78 or the common law. Where any opinion of an assistant is relied on that individual should be available to cross examine.

It may be that this will be sufficient to deal with the difficulties that have been encountered, but it is not possible to know at this stage how judge's will use their discretion under s78 and the common law once ss25 and 26 are abolished. In these circumstances we are attracted by option 3. This would require expert witnesses to list the assistants and the tasks performed by each of them. Leave would have to be sought for any given assistant to be called. The Law Commission's concern is that this requires the defence to disclose part of their case to secure the leave of the judge for a given assistant to be called. However, given that any defence expert evidence must be served in advance, it may impinge little on that non disclosure right.

We believe that the Law Commission's preferred option whereby a further exception be introduced allowing for the admissibility of information relied on by an expert where it is provided by a person who cannot be expected to have any recollection of the matters stated is already covered by its proposed reformulation of s24.

