



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 27 - Part I**

**The Admissibility in Evidence of Computer  
Records and Other Documentary  
Statements**

**REPORT**

**JULY 1980**

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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To: THE HON. I.G. MEDCALF, Q.C., M.L.C.  
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on the admissibility in evidence of computer records and other documentary statements.

(Signed)

David K. Malcolm  
Chairman

15 July 1980

# CONTENTS

Paragraph

## CHAPTER 1 - INTRODUCTION

Terms of reference	1.1
The Working Paper	1.2
Overview of the existing law	1.3
The Commission's approach	1.7
Suggested implementation of the Commission's recommendations	1.9
Acknowledgements	1.10

## CHAPTER 2 - THE PRESENT LAW

Civil proceedings	2.1
Criminal proceedings	2.12

## CHAPTER 3 - RECOMMENDATIONS

INTRODUCTION	3.1
RECORDS PRODUCED BY COMPUTERS	3.2
BUSINESS RECORDS	3.5
CONDITIONS OF ADMISSIBILITY	3.10
Civil proceedings	3.10
Criminal proceedings	3.20
SAFEGUARDS AND ANCILLARY PROVISIONS	3.24
Introduction	3.24
Weight to be attached to evidence	3.25
Credibility of person responsible for the statement	3.27
Corroborative evidence	3.29
Discretion to exclude a statement	3.31
Statements made or recorded for the purpose of or in contemplation of criminal proceedings	3.32
Withholding documents from a jury	3.33
Inferences	3.34
Production of documents in court	3.35
Medical certificate	3.37

## CHAPTER 4 - OTHER MATTERS

BANKERS' BOOKS	4.1
The present law	4.1
Recommendations	4.5
DISCOVERY, INSPECTION AND PRODUCTION OF COMPUTER RECORDS	4.9
The present law	4.9

Recommendations	4.11
-----------------	------

<b>CHAPTER 5 - SUMMARY OF RECOMMENDATIONS</b>	<b>5.1</b>
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APPENDIX I	List of those who commented on the Working Paper
APPENDIX II	Suggested implementation of the Commission's recommendations on the admissibility of documentary statements
APPENDIX III	Extracts from the Evidence Act 1906-1979
APPENDIX IV	What is a computer?
APPENDIX V	The Law in England
APPENDIX VI	The Law in Victoria
APPENDIX VII	The Law in New South Wales
APPENDIX VIII	The Law in South Australia
APPENDIX IX	The Law in Queensland
APPENDIX X	The Law in the Australian Capital Territory
APPENDIX XI	The Law in Tasmania
APPENDIX XII	The Law of the Commonwealth of Australia
APPENDIX XIII	The Law in New Zealand
APPENDIX XIV	The recommendations of the Law Reform Commission of Canada



# CHARTER 1

## INTRODUCTION

### Terms of reference

1.1 The Commission was asked to consider and report on what provision, if any, should be made for the admissibility in court proceedings of records produced by computers. It was also asked to consider whether ss. 79B to 79E of the *Evidence Act 1906-1979*,<sup>1</sup> which relate to the admissibility of documentary statements, should be revised in view of reforms made in other jurisdictions.<sup>2</sup>

### The Working Paper

1.2 In May 1978, the Commission issued a working paper<sup>3</sup> to inform the public of the issues involved in the project and to elicit comment on those issues. The names of the organisations which submitted comments are listed in Appendix I to this Report.

### Overview of the existing law

1.3 Generally, all evidence which is relevant to a matter in dispute in a court proceeding is admissible. However, as a result of the hearsay rule some relevant oral and documentary statements are inadmissible. In *Phipson on Evidence* the hearsay rule is formulated as follows:<sup>4</sup>

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<sup>1</sup> These sections are reproduced in Appendix III of this report. The *Evidence Act 1906-1979* is referred to in this report as “the Evidence Act”.

<sup>2</sup> The Commission has also been asked to consider and report on:  
“...whether and in what circumstances ‘reproductions’ of existing documents should be admitted in evidence and the methods by which ‘reproductions’ can be produced.”

The matters raised by these terms of reference are being considered as a second part of this Project. A working paper will be issued as soon as research has been completed.

<sup>3</sup> Law Reform Commission of Western Australia, *Admissibility in Evidence of Computer Records and Other Documents*, referred to in this report as “the Working Paper”. Because of its length, the Commission, for practical reasons, has departed from its usual practice of attaching the Working Paper as an appendix to its report. Any person who wishes to study it may obtain a copy, free of charge, at the Commission’s office.

<sup>4</sup> *Phipson on Evidence* (12th ed., 1976) at 263. A statement made by a person who is not called as a witness may, however, be admissible for some other purpose, for example, to prove that the statement was made. This may be relevant in showing the mental state and subsequent conduct of a person in whose presence the statement was made: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970.

“Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them”.

This formulation of the rule includes the rule that a witness’s own prior out-of-court statements are inadmissible as evidence of the truth of their contents. Other formulations treat these rules as separate. For the purpose of the Commission’s reference it is unnecessary to distinguish the rules as the result in any case is the same.<sup>5</sup>

1.4 A number of reasons have been advanced for excluding relevant evidence under the hearsay rule. The most important of these is that, unless the maker of the statement is called as a witness, the statement cannot be tested by cross-examination to expose any faults in perception, memory or understanding and any want of truthfulness or sincerity on the part of the maker of the statement. Other reasons which have been advanced are that -

- (a) such statements are not made on oath and the maker of the statement is not liable to prosecution for perjury;<sup>6</sup>
- (b) the admission of such statements might lead to the admission of manufactured or fabricated evidence; and
- (c) the admission of such statements would permit the multiplication of evidence, the investigation of side issues and the admission of evidence which it might be hard for a party to anticipate and deal with effectively.

1.5 Although these reasons provide some justification for the exclusion of relevant evidence, the rule has disadvantages. The major disadvantage is that it might lead to injustice if a potential witness is dead or cannot be called for some other reason and the facts cannot be proved except by tendering evidence of that person’s prior statements. The hearsay rule may also unduly add to the cost of proving the facts in issue in a trial if, for example, the maker of the statement is out of the State and has to be brought to Western Australia.

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<sup>5</sup> See *Cross on Evidence* (2nd Aust. ed., 1979) at 225, and the Report of New South Wales Law Reform Commission on *The Rule Against Hearsay* (1978) at 30.

<sup>6</sup> Unless, of course, the statement was made in a former court proceeding.



1.6 As a result of these difficulties a number of common law and statutory exceptions to the rule excluding hearsay statements, including former statements of witnesses, have been developed.<sup>7</sup> Amongst the common law exceptions to the hearsay rule are certain statements made by deceased persons,<sup>8</sup> statements in public documents and admissions or confessions of the parties. There is, however, no specific common law exception under which documentary statements (with which this project is concerned), and in particular records produced by computers, are admissible. The principal statutory exceptions to the hearsay rule in relation to documentary statements are contained in ss.79B-79D (which apply to civil proceedings) and s.79E (which applies to criminal proceedings) of the *Evidence Act*.<sup>9</sup>

### **The Commission's approach**

1.7 Sections 79B to 79E of the *Evidence Act*, when enacted in 1967,<sup>10</sup> were a significant advance on the then existing law which generally excluded documentary statements. Although the sections appear to have worked reasonably well they do, in the Commission's view, have a number of defects and unnecessary limitations. These are discussed in the following chapter.

1.8 The Commission's recommendations on the admissibility of documentary statements are discussed in Chapter 3. The Commission's principal recommendation is that s.79C of the *Evidence Act* should be redrafted so as to omit those limitations which appear to be unnecessary. The Commission's aim is to render the law on this subject simple and comprehensive, and in particular, to ensure that computer records are not excluded from being tendered in evidence by out-dated laws. The Commission also recommends that the law in civil and criminal proceedings should be brought into line and, consequently, that s.79E should be repealed.

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<sup>7</sup> Wigmore, *Evidence* (3rd ed., 1940) Vol.5 at 204 and 205, suggests that the various common law exceptions to the hearsay rule were developed because of a necessity for the evidence to be admitted and because the evidence had a circumstantial probability of trustworthiness.

<sup>8</sup> Such as declarations against interest, declarations in the course of a duty and declarations as to public or general rights.

<sup>9</sup> There are other less extensive exceptions such as s.19(1) of the *Registration of Births, Deaths and Marriages Act 1961-1979*. The bankers' books provision in the *Evidence Act* may also be an exception to the hearsay rule: see paragraph 4. 1 below.

<sup>10</sup> *Evidence Act Amendment Act (No. 2) 1967*.

## **Suggested implementation of the Commission's recommendations**

1.9 Appendix II to this report contains the Commission's suggested draft of legislation to incorporate the Commission's recommendations on the admissibility of documentary statements. The Commission recognises, however, that its recommendations may be implemented in other ways and by different drafting techniques. The Commission would be available to liaise with Parliamentary Counsel on this matter.

## **Acknowledgements**

1.10 In preparing the Working Paper and Report the Commission received assistance from the Branch Manager in Western Australia of IBM Australia Limited, the Managers of the Financial and Government Group and the Data Centre of NCR Australia Pty. Ltd. and the Managers of the Electronic Data Process Centre and the Bankcard Centre of the Rural and Industries Bank of Western Australia. The Commission is grateful to all these people for their assistance. The Commission also expresses its thanks to those organisations which submitted comments on the Working Paper.

## CHAPTER 2 THE PRESENT LAW

### Civil proceedings

2.1 In civil proceedings a documentary statement<sup>1</sup> is admissible under s.79C of the *Evidence Act* if the maker of the statement either had personal knowledge of the matters dealt with by the statement or, in so far as he did not, he made the statement in the performance of a duty to record information supplied, whether directly or indirectly, by a person who had, or may reasonably be expected to have had, personal knowledge of the matters dealt with in the information he supplied.<sup>2</sup>

2.2 In any such case, the maker of the statement must be called as a witness<sup>3</sup> unless -<sup>4</sup>

- (i) he is dead;
- (ii) he is bodily or mentally unfit to attend;
- (iii) he is out of the State and it is not reasonably practicable to secure his attendance;
- (iv) all reasonable efforts to identify or find him have been unsuccessful; or
- (v) the other party does not require his attendance.

2.3 The court has a discretion to admit a statement notwithstanding that it is tendered by the party calling the maker of it; or that the maker of the statement is available but not called as a witness; or that the original document is lost, destroyed, or mislaid, provided a true copy is produced in its place.<sup>5</sup>

2.4 The party tendering the statement in evidence does not have an absolute right to have it admitted if the requirements of the section are met, for the court may nevertheless exclude the statement if it would be inexpedient in the interests of justice to admit it.<sup>6</sup> Section 79D(2) provides that a statement rendered admissible by s.79C is not to be treated as corroboration of evidence given by the maker of the statement. Section 79D also lays down guidelines to be

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<sup>1</sup> This includes a representation of fact or opinion: *Evidence Act 1906-1979*, s.79B(b).

<sup>2</sup> *Id.*, s.79C(1)(a).

<sup>3</sup> *Id.*, s.79C(1)(b).

<sup>4</sup> *Id.*, s.79C(2).

<sup>5</sup> *Id.*, s.79C(3). These discretions are discussed in paragraphs 2.10 and 2.11 below.

<sup>6</sup> *Evidence Act 1906-1979*, s.79C(4).

taken into account by the court in estimating the weight to be attached to a statement rendered admissible by s.79C.<sup>7</sup>

2.5 There is some doubt as to whether statements in records produced by computers are admissible under s.79C. This doubt arises because it is necessary to show that the statement was “made by a person in a document”.<sup>8</sup> This requirement appears to mean that a person must actually have recorded the statement in the document personally so it is not sufficient for a statement to be made by one person and recorded in a document by someone else.<sup>9</sup>

2.6 The following example highlights problems which arise when one attempts to apply s.79C to statements in records produced by computers. Suppose an order for an item, such as a spare part, is taken by an employee of a company over the telephone from a customer. The employee, or another employee on the instructions of the first, using a keyboard terminal, feeds the details of the order into the computer and this information is stored by the computer in its internal memory and then on a disc pending processing. The information is then processed so that the various files kept by the computer are updated, for example, the customer’s account would show a debit, and the inventory file would show a decrease in the number of items in stock. Another operator instructs the computer to produce a print-out of the processed information in the form of a statement showing the purchases made by the customer.

2.7 Suppose there is a dispute between the company and the customer as to the price. The only record held by the company might be the record stored in the computer. Is the statement in the print-out admissible as evidence of the price? Is the statement in the print-out a statement “made by a person in a document” and, if so, by whom was it made? The employee responsible for activating the computer to record, store and process the information, may never have seen the print-out. Even if he had, it seems odd to say that he “made” the statement in the print-out. The difficulty becomes even greater if the information is derived

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<sup>7</sup> Id., s.79D(1), which provides that in estimating the weight to be given to a statement rendered admissible by s.79C regard is to be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.

<sup>8</sup> Section 79B(a) of the *Evidence Act* provides that “‘document’ includes books, maps, plans, drawings and photographs, and any device by means of which information is recorded or stored”.

<sup>9</sup> If, for example, a person dictated a statement to a secretary and the statement was recorded by the secretary in a document, it is arguable that the statement would not be a statement made by the person in a document. It would clearly be a statement made by the person if he signed the document or otherwise adopted the statement recorded in it.

from numerous orders made at different times and recorded by different operators. Alternatively can it be said that the operator who activates the computer to produce the print-out makes the statement in the print-out? It seems an abuse of language to describe his action in this way, since he may have no knowledge of the information contained in the print-out.

2.8 Leaving aside the problems associated with records produced by computers, another requirement of the section is that the maker of the statement in the document must be called as a witness if available and if the other party requires it. While such a requirement is desirable where the maker had personal knowledge of the matters dealt with in the statement, that is under the first part of the section, if he does not have personal knowledge, that is under the second part of the section, it is doubtful whether calling him is useful. He would not usually be able to give evidence as to the truth or falsity of the statement but only as to the circumstances under which he made it. It would seem better to require the calling of the person who initially supplied the information contained in the statement.<sup>10</sup>

2.9 Under the second part of s.79C it is necessary to show that the statement was made in the performance of a duty to record information supplied. The precise nature of this duty is unclear. It appears to be an unnecessary limitation on the admissibility of documentary statements. For example, if the maker is himself the owner of a business, it seems probable that a statement made by him in a document on information supplied by his salesman would not be admissible, since he would not have been under a duty to make it. The situation may be otherwise if he was a partner in a firm, since it could be argued that he was under a duty vis-a-vis his partner to record the statement.<sup>11</sup> Whilst a record made in the course of the performance of a duty to record information supplied may in many cases be accurate this is not necessarily so. Further in many cases information recorded otherwise than pursuant to a duty will be accurate. The manner and circumstances in which information is recorded should go to weight rather than admissibility. The Commission's recommendation on this matter is referred to later in the Report.<sup>12</sup>

2.10 As was stated in paragraph 2.3 above, s.79C(3) provides the court with a discretion in three different situations. The third of those situations provides that a documentary statement

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<sup>10</sup> See paragraph 3.12 below.

<sup>11</sup> A sole trader may be under a duty to record some information (e.g. that relating to his accounts for taxation purposes: *Income Tax Assessment Act 1936-1979* (Cwth), s.262A). This, however, may not be the sort of duty contemplated in s.79C.

<sup>12</sup> See paragraph 3.26 below.

may be admitted notwithstanding that the original document is lost, destroyed or mislaid, provided a true copy is produced in its place. This discretion is both understandable and reasonable. The other two situations are more difficult to understand. The first provides the court with a discretion to admit a statement notwithstanding "... that the statement is tendered by the party calling the maker of the statement". The provision of such a discretion is difficult to understand because the party tendering the statement is required, as a condition of admissibility, to call the maker of the statement. Possibly it is intended to overcome the common law rule that a previous statement cannot be admitted in examination-in-chief on the application of the party calling the witness.<sup>13</sup> However instead of providing expressly that a statement is admissible notwithstanding that it is tendered by the party calling the maker, the provision merely gives a discretion to the court to admit it. Accordingly, if the court rules against admission, the party attempting to tender the statement may be disadvantaged, particularly if the maker has little or no recollection about it.

2.11 In the second situation the court has a discretion to admit a statement notwithstanding "... that the maker of the statement is available but is not called as a witness". This appears to give the court a discretion to admit a statement without the maker of the statement being called as a witness even though one of the circumstances listed in s.79C (2)<sup>14</sup> has not been met.

### **Criminal proceedings**

2.12 In criminal proceedings, s.79E of the *Evidence Act* provides that a documentary statement is admissible as evidence of the matters dealt with by it if it is, or forms part of, a record relating to any trade or business. The record must be compiled in the course of that trade or business from information supplied, whether directly or indirectly, by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the information which he supplied.

2.13 A statement in a record relating to any trade or business is, however, only admissible if the person who supplied the information recorded in the document is -<sup>15</sup>

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<sup>13</sup> See the English Law Reform Committee, *Thirteenth Report* (Cmnd. 2964, 1966), paragraph 8.

<sup>14</sup> See paragraph 2.2 above.

<sup>15</sup> *Evidence Act 1906-1979*, s.79E(1)(b).

- (i) dead;
- (ii) beyond the seas;
- (iii) bodily or mentally unfit to attend;
- (iv) cannot be identified or found with reasonable diligence;
- (v) cannot reasonably be expected to have any recollection of the matters dealt with in the information he supplied.

This requirement is a significant limitation on the admissibility of business records in criminal proceedings. If the supplier is in Australia, is identifiable, not disabled, and can reasonably be expected to recollect the relevant matters, a party has no right to submit the document in evidence instead of calling the supplier personally. Nor does he have any right to submit the statement in addition to calling the supplier as a witness. As a result the evidence of the supplier cannot be supplemented by the tendering of the documentary statement.

2.14 In civil proceedings there is doubt as to whether records produced by computers are admissible. In criminal proceedings, however, as s.79E refers to the “person who supplied the information” in the document, rather than to a statement “made by a person in a document”, the problems associated with the latter phrase in the context of civil proceedings do not arise, and records produced by computers seem to be admissible under s.79E, provided the supplier of the information is unavailable for one of the prescribed reasons.

2.15 One possible difficulty in applying the section to records produced by computers is that the section only applies to a statement in a document which is or forms part of a record **compiled in the course** of a trade or business. It could be argued that a print-out made especially for the proceedings<sup>16</sup> would not be admissible under the section as the print-out would not have been made in the course of the trade or business, even though the information contained in it was collected in the course of the trade or business.<sup>17</sup>

2.16 Furthermore, it should be noted that s.79E refers to “a record relating to any trade or business.” It has been held in England that the medical records of a patient in a public hospital

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<sup>16</sup> In view of the cost of obtaining a print-out of information stored in a computer, a print-out is usually only obtained when it is required for some specific purpose. It is not usual for a print-out to be obtained each time further information is merely stored and processed.

<sup>17</sup> On the other hand, as the print-out is a reproduction of the information stored in the computer, it may be possible to prove the record by the production of a copy of it (i.e. the print-out): see generally *Cross on Evidence* (2nd Aust. ed., 1979) at 612 to 620.

do not fall within this class,<sup>18</sup> even though the section gives an extended meaning to “business” which includes:<sup>19</sup>

“... any public transport, public utility or similar undertaking carried on by the Crown or a statutory body and also includes any municipality.”

It is anomalous that a statement in a record of a doctor in private practice would be admissible under the same section. As a result of this type of problem, some jurisdictions in Australia have adopted an even wider definition of “business”. The Commission, however, considers that any attempt to distinguish “business” from “non-business” records results in arbitrary distinctions both as to what is a record and what is a business. In the Commission’s view it is unnecessary to make such distinctions as a condition of the admissibility of documentary statements.<sup>20</sup>

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<sup>18</sup> See *R. v Crayden* [1978] 2 All ER 700 and Bates, “Business Records as Evidence” [1979] 3 Crim. LJ 328 at 331-335.

<sup>19</sup> *Evidence Act 1906-1979*, s.79E(4).

<sup>20</sup> See paragraphs 3.5 to 3.9 below.



## **CHAPTER 3**

### **RECOMMENDATIONS**

#### **INTRODUCTION**

3.1 This chapter contains a discussion of the Commission's recommendations on whether or not records produced by computers should be admissible and on the conditions of admissibility which should be provided for documentary statements in civil and criminal proceedings. There is also a discussion of the ancillary and safeguard provisions which the Commission recommends should be provided.

#### **RECORDS PRODUCED BY COMPUTERS**

3.2 In 1976, a Committee appointed by the Western Australian Government to examine the question of privacy and data banks found that 12% of records kept by Western Australian Government departments and instrumentalities were recorded on computer files.<sup>1</sup> Government departments and instrumentalities, local government bodies, and private organisations (such as banks, building societies, insurance companies and other businesses) are increasingly using computers to record information. As a result, the Commission has no doubt that the question of whether or not records produced by computers should be admitted in legal proceedings as evidence of the truth of the matters asserted in them will assume increasing significance.

3.3 In the Working Paper the Commission expressed the provisional view that some amendment of the law as to the admissibility of documentary statements was desirable to ensure that computer records were readily admissible.<sup>2</sup> The Commission confirms its tentative view.

3.4 Records produced by computers may, of course, sometimes be inaccurate, whether as a result of accident or design. Errors can be made during the development of a system, in writing the computer's programme and in the collection or recording of information. Some of these problems arise in regard to records kept by more traditional means. In the case of all

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<sup>1</sup> Report of the Committee appointed to examine the question of *Privacy and Data Banks* (1976), paragraph 62. The percentage of files recorded by means of computers would almost certainly be greater now.

<sup>2</sup> See paragraph 6.1 of the Working Paper.

documentary records it is seldom that the only available evidence of the assertion would be the record. Even if it were, the courts can be relied upon to assess the weight to be given to it.

## **BUSINESS RECORDS**

3.5 In the Working Paper, the Commission suggested that the existing law should be revised by making separate provision for the admissibility of business records on the one hand and other documentary statements on the other. The Commission discussed<sup>3</sup> two possible approaches. Under the first, specific provision would be made for the admissibility of records produced by computers (as has been done in England, South Australia, Victoria and Queensland), leaving business records and other documentary statements to be dealt with separately.<sup>4</sup> Under the second approach provision would be made for the admissibility of business records as a whole, whether produced by a computer or other means (as has been done in the New South Wales and Commonwealth legislation),<sup>5</sup> leaving other documentary statements to be dealt with separately.

3.6 After giving the matter further consideration, the Commission has concluded that it would be undesirable to adopt either approach because to do so would make the law of evidence more complicated and technical than it is at present. The Commission considers it important that the law as to the admissibility of documentary statements be as simple as possible.

3.7 The first approach is complicated by the necessity to distinguish records produced by computers from other records. In the Commission's view this distinction is unnecessary.<sup>6</sup>

3.8 The second approach is complicated by the need to distinguish business records from other documentary statements. In the jurisdictions which have adopted this approach this

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<sup>3</sup> See paragraphs 6.9 to 6.22 of the Working Paper.

<sup>4</sup> England: *Civil Evidence Act 1968-1977*, ss.4 and 5.  
South Australia: *Evidence Act 1929-1979*, ss.45-45b and 59a-59c.  
Victoria: *Evidence Act 1958-1978*, ss.55-56 and 58A-58J.  
Queensland: *Evidence Act 1977-1979*, Part VI.

<sup>5</sup> New South Wales: *Evidence Act 1898-1979*, ss.14CD-14CV (added in 1976).  
Commonwealth: *Evidence Act 1905-1979*, ss.7A-7S (added in 1978). The approach adopted in New South Wales and by the Commonwealth of Australia was recommended by the New South Wales Law Reform Commission in its report - *Evidence (Business Records)*(1973).

The Law Reform Commission of Tasmania has recommended that the same approach be adopted in Tasmania: *Report and Draft Bill Relating to the Admissibility of Computer Data in Evidence* (1978).

<sup>6</sup> The legislation in those jurisdictions which make the distinction seems to place undue emphasis on the reliability of the computer's operation whilst ignoring the need to verify the information supplied to it.

distinction has been made by providing a definition of “business”. However, “business” has been defined so widely in an attempt to include all bodies which have regular systems of record keeping that it has ceased to be a significant distinction. For example, in Victoria business is defined as including:<sup>7</sup>

“... public administration and any business profession occupation calling trade or undertaking whether engaged in or carried on by the Crown, or by a statutory authority, or by any other person, whether or not it is engaged in or carried on for profit”.

Notwithstanding such a wide definition, the business records approach can lead to anomalies because the definition may not include, for example, local government authorities, intergovernmental or international organisations.

3.9 In the New South Wales and Commonwealth legislation which adopts this approach, a business record may be produced in civil proceedings without calling the person who made the statement in the record or supplied the information recorded in it provided that the statement was made by a qualified person. It is the Commission’s view that it is important that the person who made the statement or supplied the information contained in the statement should be available for cross-examination wherever possible rather than allowing the document to be admitted merely because it comes within a defined category.

## **CONDITIONS OF ADMISSIBILITY**

### **Civil proceedings**

3.10 As was foreshadowed in paragraph 1.8 above, the Commission now considers that the best approach to reform would be to amend s.79C of the *Evidence Act*. The Commission’s recommendations are discussed below. In making these recommendations, the Commission has avoided distinctions between records produced by computers and other business records, and between business records and other documentary statements.

3.11 At present, documentary statements are admissible in two circumstances under s.79C. In the first circumstance it must be shown that the statement was “made by a person in a document” and that that person had personal knowledge of the matters dealt with in the

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<sup>7</sup> *Evidence Act 1958-1978*, s.3(1). See also s.14 CD (1) of the *Evidence Act 1898-1979* (NSW).

statement. Alternatively, where the maker of the statement does not have personal knowledge of the matters dealt with by the statement, he must have made the statement in the performance of a duty to record information supplied, whether directly or indirectly, by a person who had, or may reasonably be expected to have had, personal knowledge of the matters dealt with in the information he supplied. In either case the maker must be called as a witness except for one of a number of prescribed reasons.

3.12 The Commission considers that it is desirable to revise s.79C so as to -

- (a) avoid the need to show that the statement recorded by an intermediary was recorded pursuant to a duty;<sup>8</sup>
- (b) require the ultimate supplier of the information to be called as a witness, rather than the intermediary; and
- (c) overcome the doubt whether or not computer records are admissible under the section because of the complex nature of their compilation.<sup>9</sup>

3.13 The Commission has drafted a provision which is designed to give effect to these changes to the section.<sup>10</sup>

3.14 Although many documentary statements will be admissible under the revision of s.79C proposed by the Commission, one class of documentary statements would not be admissible under it because the information recorded in the document is not information which has been supplied by a person, but reproduces or is derived from information automatically counted, measured, recorded or identified by a machine (“machine information”). For example, at the Land Titles Office, a device incorporating a clock is used to record on documents (such as a transfer of land) the time at which the documents are presented for registration. Machines, in association with computers, are also being used to despatch goods ordered by a person. In one such system being used by a local co-operative an order for groceries from a member is fed into a computer and the computer selects the groceries. On an instruction from the computer a machine drops the items ordered onto a

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<sup>8</sup> See paragraph 2.9 above.

<sup>9</sup> See paragraphs 2.5 to 2.7, and 3.2 to 3.4 above.

<sup>10</sup> See Appendix II.

conveyor belt and the groceries are collated and wrapped for despatch to the member. The computer can then be used to print out an invoice and account for the goods.

3.15 As the statement on the transfer form that it was presented for registration at a certain time and the statement on the invoice indicating that various goods were despatched to the member are not statements made by a person it could be argued that they would not be excluded by the hearsay rule.<sup>11</sup> However, the decision in *R. v Pettigrew, R. v Newark*<sup>12</sup> seems to suggest that they would not be admissible unless within one of the exceptions to the hearsay rule. In order to clarify the matter, the Commission considers that it is desirable to make specific provision for the admissibility of “machine information”. The Commission, therefore, recommends that a statement in a document should be admissible if the statement directly or indirectly reproduces or is derived from:<sup>13</sup>

“information from one or more devices designed for and used for the purpose of recording, measuring, counting or identifying information not being information based on a statement made by any person”.

3.16 At present, s.79B(a) of the *Evidence Act* defines “document” by listing a number of means used for recording information. That section provides that “document” includes:

“... books, maps, plans, drawings and photographs, and any device by means of which information is recorded or stored”.

Although the definition appears to be very wide it might be limited to specific classes of documents by the application of the *eiusdem generis* rule. A wider definition using functional terms is provided in Victoria and Queensland. The Commission considers that such a

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<sup>11</sup> See *The Statute of Liberty* [1968] 2 All ER 195.

<sup>12</sup> *R. v Pettigrew, R. v Newark* (CA) *The Times* January 22, 1980, at 23 and [1980] Crim. L.R. at 239-240. In that case an operator with the Bank of England fed five pound notes, in bundles of 100, numbered sequentially, into a device which automatically rejected any defective notes. The device recorded the serial number of the first and last notes and of any note which it rejected. A statement derived from the device as to the notes in the bundle sent by the Bank of England to another bank was held to be inadmissible under the equivalent of s. 79E of the *Evidence Act* because no person (including the operator) could be said to have had personal knowledge of the rejected notes, the rejection and recording of those notes being performed entirely by the computer. Although it is not clear from the report it seems that it was considered that the statement was otherwise inadmissible.

<sup>13</sup> See s.14CE (6)(b)(ii) of the *Evidence Act 1898-1979* (NSW). The term “derived” should be defined as meaning derived, by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures.

definition is preferable to the existing definition and therefore recommends that “document” should be defined as including, in addition to a document in writing: <sup>14</sup>

- “(i) any book, map, plan, graph or drawing;
- (ii) any photograph;
- (iii) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being produced therefrom;
- (iv) any 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 therefrom; and
- (v) any other record of information whatever”.

3.17 The condition that the maker of the statement must be called as a witness need not be satisfied at present if - <sup>15</sup>

- (a) he is dead;
- (b) he is unfit by reason of his bodily or mental condition to attend as a witness;
- (c) he is out of the State and it is not reasonably practicable to secure his attendance;
- (d) all reasonable efforts to identify or find him have been made without success;  
or
- (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness.

The Commission recommends that these exceptions be retained.<sup>16</sup> The Commission considers that the range of circumstances in which the statement can be admitted without calling the

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<sup>14</sup> This definition is based on the definition of document in s.5 of the *Evidence Act 1977-1979* (Qld) and s.3(1) of the *Evidence Act 1958-1978*(Vic). See also the definition in s.14CD(1) of the *Evidence Act 1898-1979* (NSW).

<sup>15</sup> *Evidence Act 1906-1979*, s.79C(2).

<sup>16</sup> Ground (b) could be extended to provide that the person need not be called if “he is unfit by reason of his bodily or mental condition to attend **or testify** as a witness”: see s.55(5)(a) of the *Evidence Act 1958-1978* (Vic).

maker should be extended. The Commission accordingly recommends that the requirement that the maker of the statement must be called as a witness need not be satisfied if - <sup>17</sup>

- (a) having regard to the time which has elapsed since he made the statement and to all the circumstances he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
- (b) having regard to all the circumstances of the case, undue delay inconvenience or expense would be caused by calling him as a witness;<sup>18</sup>
- (c) he is compellable to testify but refuses to be sworn.<sup>19</sup>

3.18 One particular matter considered in the Working Paper was whether a record in a system designed to keep a record of the happening of all events of a particular description, for example, a periodic rent payment, should be admissible to prove that a particular event of that description did not happen. The position is not clear, but such a record may not be admissible because it is hearsay evidence.<sup>20</sup>

3.19 The Law Society of Western Australia, which was the only commentator to advert to the matter, considered that express provision should be made for the admissibility of evidence of the absence of a record or entry. Such a provision would clarify the law relating to the proof of a negative fact.<sup>21</sup> The Commission considers that it is desirable to clarify the law on

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<sup>17</sup> In view of this expansion of the grounds upon which the maker need not be called as a witness the Commission sees no reason to retain any general power such as is contained in s.79C(3)(b) of the *Evidence Act*: see paragraph 2.11 above. It is desirable that the parties to litigation know in advance whether a witness need be called.

<sup>18</sup> The Commission is keen to ensure that statements on labels, signs, postal marks and shipping and transportation records are readily admissible as has been done or recommended in New South Wales (see clauses 81, 82 and 90 of the draft bill accompanying the New South Wales Law Reform Commission Report on *The Rule Against Hearsay* (1978)) and South Australia and Tasmania: *Evidence Act 1929-1979* (SA), s.45 and *Evidence Act 1910-1977* (Tas), s.81Q. The Commission's approach avoids having to make express provision for such statements.

<sup>19</sup> Exceptions (a) and (b) are based on s.14CG(2)(b)(v) and (vi) of the *Evidence Act 1898-1979* (NSW). Exception (c) is based on a recommendation of the New South Wales Law Reform Commission in its Report on *The Rule Against Hearsay* (1978): see clause 62(2)(b) of the draft bill accompanying the Report.

<sup>20</sup> See *Cross on Evidence* (2nd Aust. ed., 1979) at 451.

<sup>21</sup> An example of the need to prove a negative fact is provided by the case of *United States v DeGeorgia* 420 F2d 889 (9th Cir. 1969). In that case, evidence was given, based on the car rental records of Hertz, to prove that an allegedly stolen car had not been rented at the time that it was alleged to have been stolen. This evidence tended to support the allegation that the defendant had not rented it, but stolen it.

this matter and recommends that a provision along the lines of one in New South Wales be enacted in Western Australia.<sup>22</sup>

### **Criminal proceedings**

3.20 As can be seen from the discussion of the existing law in the previous chapter, the conditions of admissibility of documentary statements at present are different in civil and criminal proceedings. This distinction has existed since 1967 when s. 79C (which relates to civil proceedings) and s. 79E (which relates to criminal proceedings) were enacted. Both sections were based on legislation in England at that time. Section 79E was based on the *Criminal Evidence Act 1965* (Eng.). That Act was enacted in order to overcome the difficulties created by the decision in the case of *Myers v Director of Public Prosecutions*<sup>23</sup> pending a review of the law of evidence in criminal proceedings by the Criminal Law Revision Committee. The Committee made its recommendations in 1972.<sup>24</sup> It recommended that hearsay evidence should be admissible in criminal proceedings in circumstances comparable to those in civil proceedings under the *Civil Evidence Act 1968* (Eng). The report has not, as yet, been implemented. The *Civil Evidence Act 1968* (Eng) widened substantially the circumstances in which out-of-court statements could be admitted in evidence in civil proceedings.<sup>25</sup>

3.21 In paragraphs 3.10 to 3.19 above, the Commission made recommendations as to the admissibility of documentary statements in civil proceedings. The question arises whether documentary statements should be admissible in criminal proceedings in the same circumstances. The position in criminal proceedings must be carefully considered because -

- (i) the admission of documentary statements departs from the traditionally oral nature of the testimony in criminal trials;

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<sup>22</sup> *Evidence Act 1898-1979* (NSW), s. 14CH. This was enacted following a recommendation of the New South Wales Law Reform Commission: *Evidence (Business Records)* (1973) at 46 and 47, paragraph 48.

<sup>23</sup> [1964] 2 All ER 881.

<sup>24</sup> *Eleventh Report, Evidence (General)* (Cmnd 4991, 1972).

<sup>25</sup> That Act was based on a report by the Law Reform Committee, *Hearsay Evidence in Civil Proceedings* (Cmnd. 2964, 1966).



- (ii) there is a need to ensure that as far as practicable allegations are tested by cross-examination; and
- (iii) there is a need to avoid the danger that fabricated evidence could be presented which would be sufficient to raise a reasonable doubt in an otherwise hopeless case, or to strengthen a weak prosecution case.

As there are no interlocutory proceedings, such as discovery and inspection, in criminal trials, there is a greater danger that one party will be surprised by the tendering of a documentary statement by the other party.<sup>26</sup> This danger can be mitigated in civil proceedings by interlocutory proceedings or by an adjournment of the trial. In criminal trials, particularly those involving a jury, there may be more reluctance on the part of the court to grant an adjournment and any adjournment is likely to be shorter than would be the case in civil proceedings.

3.22 While the Commission is mindful of the difficulties associated with the admissibility of documentary statements in criminal proceedings, the Commission considers that, so far as possible, the rules of evidence in civil and criminal proceedings should be the same. The Commission has not had drawn to its attention any significant problems which have arisen from the admission of documentary statements in criminal proceedings under s.79E of the *Evidence Act*. The difficulties referred to in paragraph 3.21 above would be mitigated by the requirement that the person who made the statement recorded in the document is called as a witness, unless he need not be called for one of a number of prescribed reasons.<sup>27</sup> Further safeguards common to both civil and criminal proceedings are dealt with below.<sup>28</sup> These include -

- (i) the provision of a judicial discretion to exclude a statement<sup>29</sup> similar to an existing judicial discretion to exclude evidence the probative value of which is out-weighed by its prejudicial tendency;<sup>30</sup> and

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<sup>26</sup> In trials upon indictment documents in the possession of the prosecution may be disclosed during the committal proceedings but the prosecution is under no duty to disclose all documentary evidence in its possession.

<sup>27</sup> See paragraph 3.17 above.

<sup>28</sup> These and other safeguards and ancillary provisions are referred to in paragraphs 3.24 to 3.37 below.

<sup>29</sup> See paragraph 3.31 below.

<sup>30</sup> See *Cross on Evidence* (2nd Aust. ed., 1979) at 30-32. This discretion may, however, only be exercisable in favour of a defendant: see *R. v Sang* [1979] 2 All ER 46 at 62.

- (ii) the admission of evidence as to the credibility of the person who made the statement.<sup>31</sup>

A safeguard which specifically relates to criminal proceedings which the Commission recommends is -

- (iii) an exclusion of statements made or recorded for the purpose of or in contemplation of criminal proceedings save for circumstances in which such statements are admissible other than pursuant to the provisions of the section.<sup>32</sup>

Apart from these safeguards, the judge in a trial has considerable scope to comment on evidence in his direction to the jury.<sup>33</sup>

3.23 The Commission therefore recommends that, save for safeguard (iii) referred to in the previous paragraph, a documentary statement should be admissible in criminal proceedings in the same circumstances as in civil proceedings. Consequently, it recommends that s.79E of the *Evidence Act* be repealed and replaced by the proposed new provisions which deal with both criminal and civil proceedings.

## **SAFEGUARDS AND ANCILLARY PROVISIONS**

### *Introduction*

3.24 In providing for the admissibility of documentary statements in civil and criminal proceedings it is necessary to enact certain safeguards and ancillary provisions. The Commission's recommendations in this respect are discussed below. A number of these are already provided for in ss.79C, 79D and 79E of the *Evidence Act*. The others are modifications of existing provisions or provisions elsewhere.

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<sup>31</sup> See paragraphs 3.27 and 3.28 below.

<sup>32</sup> See paragraph 3.32 below.

<sup>33</sup> See *R. v Mawson* [1967] VR 205 at 208 and 209.

*Weight to be attached to evidence*

3.25 At present, in estimating the weight, if any, to be attached to a statement admissible as evidence under s.79C it is necessary to have regard to all the circumstances from which any inference can be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.<sup>34</sup> The Commission considers that such a provision serves a useful purpose as a guide by emphasising particular factors which should be taken into account in estimating the weight to be attached to a statement, and recommends its retention.

3.26 In addition, the Commission considers that it should be necessary for the court to have regard to -

- (i) whether or not the information was collected systematically;
- (ii) whether or not the information was collected pursuant to a duty to do so;
- (iii) in the case of a statement wholly or in part reproducing or derived from information from one or more devices, the reliability of the device or devices;  
and
- (iv) in the case of a statement reproducing or derived from any information, the reliability of the means of reproduction or derivation.

The last two factors are factors which it would be appropriate to take into account when the relevant statement reproduces or is derived from machine information.

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<sup>34</sup> *Evidence Act 1906-1979*, s.79D(1).

### *Credibility of person responsible for the statement*

3.27 In this chapter the Commission has recommended that a documentary statement should be admissible in some circumstances notwithstanding that the person who made the statement is not called as a witness. If that person had been called as a witness not only could he have been cross-examined with regard to the accuracy of the evidence he gave but evidence could also have been introduced for the purpose of destroying or supporting his credibility as a witness.<sup>35</sup>

3.28 In the Commission's view it is desirable to provide for the admissibility of evidence as to the credibility of that person when he is not called as a witness. The Commission therefore recommends that a provision along the lines of s.55A of the *Evidence Act 1958-1978* (Vic) be introduced.<sup>36</sup>

### *Corroborative evidence*

3.29 Although it is a general rule of the law of evidence that a court may act upon the uncorroborated testimony of one witness there are exceptional circumstances in which the evidence of a witness must be corroborated, either as a matter of law or practice.<sup>37</sup> If corroboration is required as a matter of law any conviction based on uncorroborated evidence will be set aside by an appellate court. If the corroboration is required as a matter of practice:<sup>38</sup>

“... absence of corroboration . . . need not be fatal to the charge or claim. It becomes a question of whether the matter has been properly taken into consideration and in most cases this means whether a proper direction has been given.”

3.30 At present, s.79D(2) of the *Evidence Act* provides that for the purpose of any rule of law or practice requiring evidence to be corroborated, a statement admissible under s. 79C is not to be treated as corroboration of evidence given by the maker of the statement. This provision preserves the principle that a witness may not corroborate his own evidence. The Commission recommends that it be retained.

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<sup>35</sup> See ss.21-23 and 25 of the *Evidence Act* and, generally *Cross on Evidence* (2nd. Aust. ed., 1979) at 245-261.

<sup>36</sup> See clause 79D(3) in Appendix II.

<sup>37</sup> See *Cross on Evidence* (2nd. Aust. ed., 1979) at 183-210.

<sup>38</sup> Edwards, *Cases on Evidence in Australia* (1968) at 221.

*Discretion to exclude a statement*

3.31 In both civil and criminal proceedings the court has a discretion to reject a statement notwithstanding that the conditions of admissibility have been fulfilled if it appears to be “inexpedient in the interests of justice that the statement should be admitted.”<sup>39</sup> The Commission recommends that this discretion be retained.<sup>40</sup>

*Statements made or recorded for the purpose of or in contemplation of criminal proceedings*

3.32 In paragraph 3.21 above the Commission stated that one of the dangers of admitting documentary statements in criminal proceedings was that it could lead to the introduction of fabricated evidence. The greatest danger arises with statements made during or following an investigation into a crime. The Commission therefore recommends that in a criminal proceeding a statement made or recorded in connection with the preparation of the case of the defence or prosecution, or with any investigation relating to or leading to a criminal proceeding, should not be admissible by virtue of the Commission’s proposed legislation, unless it is otherwise admissible at law.<sup>41</sup> The limitation should not, however, apply to a statement in a record made prior to the instigation of a criminal proceeding or investigation if it is merely reproduced or derived between that time and the time of the trial.

*Withholding documents from a jury*

3.33 In its report, *Evidence (Business Records)*, the Law Reform Commission of New South Wales stated that the response to its working paper indicated that there was doubt over whether a judge had power to direct what exhibits should be with a jury during their deliberations.<sup>42</sup> The Commission considered that it was desirable for the matter to be clarified

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<sup>39</sup> *Evidence Act 1906-1979*, ss.79C(4) and 79E(2).

<sup>40</sup> See clause 79C(5) in Appendix II. The existing discretion is expressed in very general terms and it may be desirable to provide more explicit guidelines for the courts. For example, s.14CP of the *Evidence Act 1898-1979* (NSW) provides:

“(1) Where a party to a legal proceeding in a court tenders any evidence under this Part, and it appears to the court that the weight of the evidence is too slight to justify its admission, or that the utility of the evidence is outweighed by a probability that its admission will unduly prolong the proceeding, or that the evidence may be unfair to any other party, or (where there is a jury) mislead the jury, the court may reject the evidence or, if it has been received, exclude it”.

<sup>41</sup> For example, a confession would remain admissible: see *Cross on Evidence* (2nd. Aust. ed., 1979) at 521-531.

<sup>42</sup> *Evidence (Business Records)* (1973), paragraph 85 at 53.

and it recommended that a judge should have such a power.<sup>43</sup> A judge could then determine whether it was desirable for the jury to have the documents with them during their deliberations.<sup>44</sup> In a complex fraud case, for example, it might be desirable for a jury to have the documents with them during their deliberations. On the other hand, the judge might consider that this course was undesirable if he considered that the jury might give undue weight to the statements in the documents. The Commission considers that it is desirable for courts in Western Australia to have such an express power and recommends accordingly.

### *Inferences*

3.34 At present, a court, in deciding whether or not a statement is admissible, may draw any reasonable inference from the form or contents of the document in which the statement is contained.<sup>45</sup> The Commission considers that such a power is desirable and recommends that this provision be retained.

### *Production of documents in court*

3.35 At present, a statement otherwise admissible under s.79C is admissible notwithstanding that the original document has been mislaid or destroyed, or is not produced, if in lieu of it there is produced a copy of it or of the material part of it certified to be a true copy.<sup>46</sup> The Commission recommends that such a power be retained, though in a different form.<sup>47</sup>

3.36 The Commission also recommends that provision be made for the production of statements recorded in non-legible form, for example on film, discs or tapes, by their display or reproduction in a form which is intelligible to the court.<sup>48</sup> The court should also be

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<sup>43</sup> This recommendation was adopted when provision was made for the admissibility of business records: see s.14CQ of the *Evidence Act 1898-1979* (NSW).

<sup>44</sup> The Commission understands that it is the practice in this State for a jury to have all documents which have been admitted with it during its deliberations.

<sup>45</sup> *Evidence Act 1906-1979*, ss.79C(4) and 79E(2).

<sup>46</sup> *Id.*, s.79C(3)(c).

<sup>47</sup> See clause 79F(1) of Appendix II.

<sup>48</sup> See clause 79F(3) of Appendix II. In such a case the court should have power to obtain a record of the statement by means of a transcript or still prints: see clause 79F(5) of Appendix II. As to cinematic film and sound records see clause 79F(2) of Appendix II.

empowered to require that the original film, disc or tape be made available to the other party for examination or testing.<sup>49</sup>

*Medical certificate*

3.37 A court may also, in determining whether or not a person is fit to attend as a witness, act on a medical certificate purporting to be the certificate of a registered medical practitioner.<sup>50</sup> The Commission considers that this provision should be retained.

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<sup>49</sup> See clause 79F(4) of Appendix II.

<sup>50</sup> Evidence Act 1906-1979, ss.79C(4) and 79E(2).

## CHAPTER 4 OTHER MATTERS

### BANKERS' BOOKS

#### The present law

4.1 In both civil and criminal proceedings s.89 of the *Evidence Act* provides that, subject to the provisions of the Act, a copy of an entry in a banker's book is evidence of the entry and of the matters, transactions and accounts recorded therein. One purpose of the provision is "... to allow copies of entries in bankers' books to be received to overcome the inconvenience which would occur if books in current use had to be brought to court".<sup>1</sup> It is not clear whether it goes further and provides that a copy is admissible as evidence of the facts contained it.<sup>2</sup> Windeyer J. has cast doubt on whether the provision is as wide as this.<sup>3</sup>

4.2 Before a copy of any entry in a bankers' book can be admitted<sup>4</sup> it must be shown that-<sup>5</sup>

- (i) at the time of the making of the entry the book was one of the ordinary books of the bank;
- (ii) the entry was made in the usual and ordinary course of business; and
- (iii) the book is in the custody or control of the bank.

The fulfilment of these conditions may be proved, either orally or by an affidavit, by a partner or an officer of the bank.<sup>6</sup>

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<sup>1</sup> Windeyer J. in *Elsey v Commissioner of Taxation* (Cwth) (1969) 43 ALJR 415 at 417.

<sup>2</sup> See *Myers v Director of Public Prosecutions* (1964] 2 All ER 881 at 890 and 892.

<sup>3</sup> *Elsey v Commissioner of Taxation* (Cwth) (1969) 43 ALJR 415 at 417.

<sup>4</sup> A banker or an officer of the bank cannot be compelled to produce any banker's book or to appear as a witness with regard to the transactions and accounts recorded therein where the bank is not a party to the legal proceeding except by order a judge of the Supreme Court: *Evidence Act 1906-1979*, s.93. This power may also be exercised by a judge of the District Court or Family Court of Western Australia, a stipendiary magistrate and any justice of the peace on the investigation of complaints of indictable offences: *ibid.*, s.96.

<sup>5</sup> *Evidence Act 1906-1979*, s.90(1).

<sup>6</sup> *Id.*, s.90(2). It is still possible for a bank to be formed and operated by a partnership: see s. 11 of the *Banking Act 1959-1979* (Cwth).



4.3 An officer of a bank who has examined the banker's books may either orally or by an affidavit, give evidence as to the state of an account, or that a person does not have an account, or have any funds to his credit, without production of the books.<sup>7</sup>

4.4 Another problem with the provisions is that the definition of "bankers' books" may not cover modern methods of recording information.<sup>8</sup> The definition is based on legislation enacted in the United Kingdom in 1879<sup>9</sup> and consequently emanates from a time when records were kept in hand-written bound books. As the definition is in terms of "books" it may not include loose-leaf ledgers or accounts produced as part of a computer process.

### Recommendations

4.5 There are therefore two aspects of the existing law which are unclear. First, it is not altogether clear whether copies of bankers' books are admissible as evidence of the truth of the statements contained in them. Secondly, the definition of "bankers' books" may not include modern methods of recording information such as loose-leaf ledgers and computers.

4.6 The second part of this project is concerned with the admissibility in evidence of reproductions.<sup>10</sup> The law relating to the admissibility of copies of bankers' books will be reviewed as a part of that project. In the meantime, however, the Commission considers that the existing provisions in the *Evidence Act* should be clarified. As to the first area of doubt, the Commission considers that the only purpose of the provisions should be to enable a copy of an entry in bankers' books to be tendered in court to avoid the inconvenience of having to tender books in current use. Whether or not a particular statement in a book is admissible as evidence of the facts contained in it should be determined in accordance with the conditions of admissibility of documentary statements. The Commission therefore recommends that the provisions relating to bankers' books should be amended so as to make it clear that they are merely a means of facilitating the production in court of copies of bankers' books. The Commission notes that the *Credit Unions Act 1979* provides a simple procedure for producing

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<sup>7</sup> *Evidence Act 1906-1979*, s.92.

<sup>8</sup> "Bankers' Books" is defined in s.3 of the Evidence Act as including:  
 "...ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank".

But see *Barker v Wilson* The Times 5 February 1980 at 11 where an identical definition was held to include a record kept on microfilm.

<sup>9</sup> The *Bankers' Books Evidence Act 1879*, 42 and 43 and Vict., C.11.

<sup>10</sup> See footnote 2 in Chapter 1.

copies of entries in the books of a credit union.<sup>11</sup> It may be desirable to introduce a uniform procedure for banks, credit unions, building societies and other similar institutions.

4.7 As to the second area of doubt, the Commission recommends that in order to ensure that modern methods of recording information by banks, including computers, are not excluded from the provisions relating to bankers' books, the definition of bankers' books in s.3 of the *Evidence Act* should be amended to provide:<sup>12</sup>

“Expressions relating to ‘Bankers’ Books’ include any account, deed, writing or document and any other record of information however compiled, recorded or stored, whether in written or printed form or on microfilm or by electronic process or otherwise.”

4.8 It would also be necessary to amend the bankers' books provisions so that, where necessary, a reproduction of an entry in legible form could be produced in court. This matter is discussed in a wider context in the following paragraphs.

## **DISCOVERY, INSPECTION AND PRODUCTION OF COMPUTER RECORDS**

### **The present law**

4.9 The *Supreme Court Rules 1971-1980*, which apply to most civil proceedings<sup>13</sup> in the Supreme Court and the District Court,<sup>14</sup> but not criminal proceedings,<sup>15</sup> contain a number of provisions which relate to the discovery and inspection,<sup>16</sup> and the production in evidence of documents.<sup>17</sup> There are similar provisions in the *Local Courts Act 1904-1976*.<sup>18</sup>

4. 10 Whether or not the rules of court apply to records produced by computers stored in an internal memory or on materials such as tapes, discs or cards depends on the interpretation of

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<sup>11</sup> See s.119 of the *Credit Unions Act 1979*.

<sup>12</sup> See the definition of “books” in s.4(1) of the *Credit Unions Act 1979*. See also s.5 of the *Companies Act 1961-1979*. The Commonwealth Government has published a draft Companies Bill to be introduced in the Budget Session 1980 which contains a definition of “banker’s books” and “books”. The definition of banker’s books is in a different context and would not be useful. Books is defined as including:

“... any register or other record of information and any accounts or accounting records, however compiled, recorded or stored, and also includes any document”.

<sup>13</sup> *Supreme Court Rules 1971-1980*, Order 1 rule 3.

<sup>14</sup> See *District Court of Western Australia Act 1969-1978*, s.87.

<sup>15</sup> *Supreme Court Rules 1971-1980*, Order 1 rule 3(3).

<sup>16</sup> *Id.*, Order 26.

<sup>17</sup> *Id.*, Order 36 rules 11 and 12.

<sup>18</sup> *Local Courts Act 1904-1976*, ss.66-68, and Order 20 rule 3 of the *Local Court Rules 1961-1978*.

the word “document”. The Commission is not aware of any case referring specifically to a computer memory or to tapes, discs or cards. In Australia it has been held that video tapes<sup>19</sup> and tape recordings<sup>20</sup> are not documents.

In England, however, tape recordings<sup>21</sup> and cinematograph film<sup>22</sup> have been held to be documents.

## Recommendations

4.11 It is the Commission’s view that it is desirable that the existing law be clarified and brought into accord with modern conditions so that the modern means of recording information referred to above are subject to the interlocutory proceedings of the Supreme Court, the District Court and the Local Courts. This could be done by providing a wide definition of “document”.<sup>23</sup>

4.12 However, merely to provide such a definition would not ensure that the interlocutory proceedings would operate effectively in relation to these modern documents. For instance, as a visual inspection of computer tapes, discs or cards would be useless for the purpose of determining their contents,<sup>24</sup> the rules with regard to inspection do not appear to be appropriate. The Commission recommends that the rules of court should make provision for the inspection of any such document by a print-out in a legible form.<sup>25</sup> The Commission also recommends that the rules of court should make provision for an order to be made requiring a

<sup>19</sup> *Nicholls v McLeay and Herald - Sun T.V. Pty. Ltd.* (1971) 1 SASR 442.

<sup>20</sup> *Oswin v Radio 2UE Sydney Pty. Ltd.* [1968] 1 NSW 461; *Beneficial Finance Corp Co. Ltd. v Conway* [1970] VR 321; but cf. *Cassidy v Engwirda Construction Co.* [1967] QWN 16.

<sup>21</sup> *Grant v Southwestern and County Properties Ltd.* [1974] 2 All ER 465.

<sup>22</sup> *Senior v Holdsworth* [1975] 2 All ER 1009.

<sup>23</sup> For example, in paragraph 3. 16 above the Commission recommended that the term “document” should be defined as including, in addition to a document in writing -

- (i) any book, map, plan, graph or drawing;
- (ii) any photograph;
- (iii) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being produced therefrom;
- (iv) any 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 therefrom; and
- (v) any other record of information whatever.

<sup>24</sup> Visual inspection might be useful in determining whether a tape had been interfered with.

<sup>25</sup> Order 66 rule 47(4) of the *Supreme Court Rules 1971-1980*, which provides that “. . . the costs of obtaining discovery including inspection of documents is in the discretion of the Taxing Officer . . .”, probably provides a satisfactory means of assessing the costs of such a discovery and inspection.

copy, reproduction or print-out to be made under the direction of the Court and providing for the costs of doing so.

4.13 Under Order 36 rule 11 of the *Supreme Court Rules 1971-1980*, the Court may order that any person attend the Court for the purpose of “. . . producing any writings or other documents named in the order which the Court may think fit to be produced . . .”. It would appear to be desirable to enable the Court to make an order for the reproduction of information in a computer’s memory or on computer discs, tapes or cards in a legible form. This would also be necessary in criminal proceedings.<sup>26</sup>

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<sup>26</sup> See for example s.78 of the *Justices Act 1902-1979* where a witness may be compelled to produce “documents and writings in his possession or power”.

## **CHAPTER 5**

### **SUMMARY OF RECOMMENDATIONS**

5.1 The Commission summarises its recommendations as follows -

#### **Admissibility of documentary statements**

1. In civil and criminal proceedings a documentary statement should be admissible if it was made by or directly or indirectly reproduces or is derived from statements made by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with by the statement. In a case where the statement is not admissible in evidence unless made by an expert on the subject of the statement it should be shown that the maker is such an expert.

(paragraphs 3.10 to 3.13 and 3.20 to 3.23,  
and clause 79C(1)(a) and (b)(i) of Appendix II)

2. Where a statement is made by or reproduces or is derived from a statement made by a person, the person should be called as a witness unless -

- (a) he is dead;
- (b) he is unfit by reason of his bodily or mental condition to attend or testify as a witness;
- (c) he is out of the State and it is not reasonably practicable to secure his attendance;
- (d) all reasonable efforts to identify or find him have been made without success;
- (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;

- (f) having regard to the time which has elapsed since he made the statement and to all the circumstances he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
- (g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or
- (h) he is compellable to testify but refuses to be sworn.

(paragraph 3.17 and clause 79C(2) of  
Appendix II)

3. In civil and criminal proceedings a documentary statement should be admissible if it, directly or indirectly, reproduces or is derived from information from one or more devices designed for and used for the purpose of recording, measuring, counting or identifying information not being information based on a statement made by any person.

(paragraphs 3.14, 3.15 and 3.20 to 3.23, and  
clause 79C(1)(b)(ii) of Appendix II)

### **Safeguard and ancillary provisions**

4. Provision should be made for the following safeguard and ancillary provisions -

- (a) weight to be attached to the evidence;  
(paragraphs 3.25 and 3.26, and clause 79D(1)  
of Appendix II)
- (b) credibility of the person responsible for the statement;  
(paragraphs 3.27 and 3.28, and clause 79D(3)  
of Appendix II)
- (c) corroborative evidence;  
(paragraphs 3.29 and 3.30, and clause 79D(2)  
of Appendix II)
- (d) discretion to exclude a statement;

(paragraph 3.31 and clause 79C(5) of  
Appendix II)

- (e) statements made or recorded for the purpose of or in contemplation of criminal proceedings;  
(paragraph 3.32 and clause 79C(4) of Appendix II)
- (f) withholding documents from a jury;  
(paragraph 3.33 and clause 79D(4) of Appendix II)
- (g) inferences;  
(paragraph 3.34 and clause 79C(5) of Appendix II)
- (h) production of documents in court; and  
(paragraphs 3.35 and 3.36, and clause 79F of Appendix II)
- (i) production of a medical certificate.  
(paragraph 3.37 and clause 79C(5) of Appendix II)

**Absence of a record of an entry**

5. The Commission considers that express provision should be made for the admissibility of evidence of the absence of a record or entry. Under this recommendation, a record in a system designed to keep a record of the happening of all events of a particular description, for example, a periodic rent payment, would be admissible to prove that a particular event of that description did not happen.

(paragraphs 3.18 and 3.19, and clause 79E of Appendix II)

### **Bankers' books**

6. At present, a copy of an entry in a banker's book is evidence of the entry and of the matters, transactions and accounts recorded therein. It is not clear whether such a copy is admissible as evidence of the facts contained in it. The Commission recommends that the provisions relating to bankers' books be amended so as to make it clear that they are merely a means of facilitating the production in court of copies of bankers' books. Whether or not a particular statement in a book is admissible as evidence of the facts contained in it, should be determined in accordance with the conditions of admissibility of documentary statements.

(paragraph 4.6)

7. The Commission also recommends that the definition of "bankers' books" should be amended to ensure that modern methods of recording information by banks, including computers, are not excluded from the provisions relating to bankers' books.

(paragraph 4.7)

### **Discovery, inspection and production of computer records**

8. At present, it is not clear whether the rules of court relating to the discovery, inspection and production of documents apply to records maintained by computers and stored in an internal memory or on material such as tapes, discs or cards. Whether or not the rules apply to such records depends on the interpretation of the word "document". The Commission recommends that the law be clarified and brought into accord with modern conditions by providing a wide definition of "document" which includes the modern means of recording information referred to above.

(paragraph 4.11)

9. As a mere visual inspection of computer tapes, discs or cards would be useless, the Commission recommends that the rules of court should make provision for the inspection of any such document by a print-out in a legible form.

(paragraph 4.12)



(Signed) David K. Malcolm  
Chairman

Eric Freeman  
Member

H. H. Jackson  
Member

Charles Ogilvie  
Member

L.L. Proksch  
Member

15 July 1980

## **APPENDIX I**

### **List of those who commented on the Working Paper**

Associated Banks in W.A.

Bureau of Consumer Affairs

Insurance Council of Australia

The Law Society of Western Australia

## APPENDIX II

### Suggested implementation of the Commission's recommendations on the admissibility of documentary statements

	Proposed provisions	Comments
<b>Interpretation</b>		
79B. In section 79C of this Act -		
(a)	“derived” means derived, by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures;	This definition is new and is based on s.14CD(1) of the <i>Evidence Act 1898-1979</i> (NSW).
(b)	“document” includes, in addition to a document in writing -  (i) any book, map, plan, graph or drawing; (ii) any photograph; (iii) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being produced therefrom; (iv) any 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 therefrom; and (v) any other record of information whatever; (vi)	This definition is new and has been drafted in functional terms: see paragraph 3.16 of the Report.
(c)	“proceedings” includes arbitrations and references; and “court” shall be construed accordingly;	This definition is at present in s.79B of the <i>Evidence Act 1906-1979</i> .
(d)	“qualified person”, in relation to a statement means a person who	This definition is new and has been drafted in order to give effect

had or may reasonably be supposed to have had personal knowledge of the matters dealt with by the statement or in a case where the statement is not admissible in evidence unless made by an expert on the subject of the statement he was such an expert;

- (e) “statement” includes any representation of fact or opinion whether made in words or otherwise.

(together with clause 79C(1)) to the Commission’s principal recommendation that a documentary statement should only be admissible if it was ultimately made by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the statement: see paragraph 3.12 of the Report.

This definition is at present in s.79B of the *Evidence Act 1906-1979*.

### Admissibility of documentary statements

79C. (1) In any proceeding where direct oral evidence of a fact would be admissible any statement in a document and tending to establish the fact shall, on production of the document, be admissible as evidence of that fact if the statement -

Clause 79C(1) involves a substantial redraft of the existing s.79C(1). See paragraphs 3.10 to 3.13 of the Report.

Unlike the existing s. 79C(1), which applies only to civil proceedings, clause 79C(1) applies to both civil and criminal proceedings: see paragraphs 3.20 to 3.23 of the Report.

- (a) was made by a qualified person; or

(b) directly or indirectly reproduces or is derived from one or other or both of the following -

- (i) one or more statements, each made by a qualified person;
- (ii) information from one or more devices designed for and used for the purpose of recording, measuring, counting or identifying information not being information based on a statement made by any person.

This is a new provision based on s.14CE(6)(b)(ii) of the *Evidence Act 1898-1979* (NSW). Its purpose is to ensure that “machine information” is admissible: see paragraphs 3.14 and 3.15 of the Report.

(2) Where a statement is made by or reproduces or is derived from a statement made by a qualified person, the qualified person must be called as a witness unless -

The exceptions contained in clause 79C(2)(a)-(e) are the same as those in s.79C(2) of the *Evidence Act 1906-1979*, except for a minor modification contained in clause 79C (2)(b). The exceptions referred to in clause 79C(2)(f) and (g) are based on s.14CG(2)(b)(v) and (vi) of the *Evidence Act 1898-1979* (NSW). Clause 79C(2)(h) is based on a

- (a) he is dead;

recommendation of the New South Wales Law Reform Commission in its Report on *The Rule Against Hearsay*: see clause 62(2)(b) of the draft bill accompanying the Report.

- (b) he is unfit by reason of his bodily or mental condition to attend or testify as a witness;
  - (c) he is out of the State and it is not reasonably practicable to secure his attendance;
  - (d) all reasonable efforts to identify or find him have been made without success;
  - (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;
  - (f) having regard to the time which has elapsed since he made the statement and to all the circumstances he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
  - (g) having regard to all the circumstances of the case, undue delay inconvenience or expense would be caused by calling him as a witness; or
  - (h) he is compellable to testify but refuses to be sworn.
- (3) This section makes a statement admissible notwithstanding -
- (a) the rules against hearsay;
  - (b) the rules against secondary evidence of the contents of a document;
  - (c) that any person concerned in the making of the statement is a witness in the proceeding, whether or not he gives testimony

This is a new provision based on s 14CE(3) of the *Evidence Act 1898-1979* (NSW).

consistent or inconsistent with the statement; or

- (d) that the statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement which is otherwise inadmissible.

(4) In any criminal proceeding, notwithstanding that the conditions of admissibility contained in subsections (1) and (2) of this section have been met, a statement contained in a document which was made or recorded in the course of or for the purpose of -

- (a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceeding;
- (b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;
- (c) the preparation of a defence to a charge for any offence; or
- (d) the preparation of the case for the prosecution in respect of any offence;

shall not be admissible by virtue of this section.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any

This is a new provision based on s.55(3) of the *Evidence Act 1958-1978* (Vic). Its purpose is to prevent a statement recorded for the purpose of or in contemplation of criminal proceedings from being admitted: see paragraph 3.32 of the Report.

The provision is at present in ss.79C(4) and 79E(2) of the *Evidence Act 1906-1979*: see paragraphs 3.31, 3.34 and 3.37 of the Report.

reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

### Ancillary Provisions

79D. (1) In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of section 79C regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular -

- (i) to the question whether or not the qualified person made the statement contemporaneously with the occurrence or existence of the facts stated;
- (ii) to the question whether or not the qualified person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts;
- (iii) to the question whether or not the information was collected systematically;
- (iv) to the question whether or not the information was collected pursuant to a duty to do so;
- (v) in the case of a statement wholly or in part reproducing or derived from information from one or more devices, to the reliability of the device or devices; and
- (vi) in the case of a statement reproducing or derived from any information, to the reliability of the means of reproduction or derivation.

This is a new provision. Clauses 79D(1)(i) and (ii) are based on ss.79D(1) and 79E(3) of the *Evidence Act 1906-1979*. Clauses 79D(1)(iii)-(vi) are additional factors which the Commission considers should be taken into account: see paragraphs 3.25 and 3.26 of the Report.

Clauses 79D(1)(iii) and (iv) are new provisions.

Clauses 79D(1)(v) and (vi) are based on s.14CI(b) and (c) of the *Evidence Act 1898-1979* (NSW).

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by virtue of section 79C shall not be treated as corroboration of the evidence given by the qualified person.

This provision is at present in s. 79D(2) of the *Evidence Act 1906-1979*: see paragraphs 3.29 and 3.30 of the Report.

(3) (a) Where in any proceeding a statement is given in evidence by virtue of section 79C, but the qualified person is not called as a witness in the proceeding -

This is a new provision. It is based on s.55A of the *Evidence Act 1958-1978 (Vic)*: see paragraphs 3.27 and 3.28 of the Report.

- (i) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings;
- (ii) any evidence tending to prove that, whether before or after he made that statement, he made another statement (whether orally or in a document or otherwise) inconsistent therewith shall be admissible for the purpose of showing that he has contradicted himself -

but nothing in paragraphs (i) or (ii) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(b) Where in any proceeding a statement is given in evidence by virtue of section 79C, but the qualified person is not called as a witness in the proceeding any evidence proving that that person has been guilty of any indictable offence shall be admissible in the proceedings to the same extent as if that person had been so called and on being questioned as to whether he had been convicted of an indictable offence had denied the fact or did not admit the fact or refused to answer the question.



(4) Where in a proceeding there is a jury, and a statement in a document is admitted in evidence under section 79C, and it appears to the court that if the jury were to have the document with it during its deliberations it might give the statement undue weight, the court may direct that the document be withheld from the jury during its deliberations.

This is a new provision. It is based on s. 14CQ of the *Evidence Act 1898-1979* (NSW): see paragraph 3.33 of the Report.

### **Dispute as to the happening of an event**

79E. (1) Where in any proceeding the happening of an event of any description is in question, and a system of record keeping has been followed to make and keep a record of the happening of all events of that description, oral or other evidence to establish that there is no record of the happening of the event in question is admissible to prove that the event did not happen.

This is a new provision. It is designed to enable a record in a system designed to keep a record of the happening of all events of a particular description to be admissible to prove that a particular event of that description did not happen: see paragraphs 3.18 and 3.19 of the Report. It is based on s.14CH of the *Evidence Act 1898-1979* (NSW).

(2) Where evidence is, or is proposed to be, tendered under this section, the court may require that the whole or part of the record concerned be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(3) In estimating the weight, if any, to be attached to evidence admissible by virtue of this section, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence including whether any person concerned with the system had any incentive to omit recording the happening of the event in question.

(4) The absence of a record of the happening of an event in a record of information made by the use of a computer or any other device for storing, recording or processing information may be proved by the production of a document produced by the use of a computer or other device containing a statement based on the absence of such a record.

## Product of Documents

79F. (1) For the purpose of sections 79C and 79E of this Act a statement in a document may, as may be prescribed or by leave of the court, be proved by the production of a copy of the document, or of the material part of the document.

(2) For the purpose of sections 79C and 79E of this Act a statement in a document which is designed to be used to reproduce the statement in the form of a visual image or images or of sound may be proved by reproducing the statement in that form in the presence of the court.

(3) Where a statement which is admissible as evidence by virtue of sections 79C and 79E is embodied in a disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom such statement may be proved by production of a reproduction of the statement in legible form.

(4) Where a person proposes to prove, or proves, a statement in a document by producing a reproduction thereof the court may require that the document be produced or made available to the court or to other parties for examination or testing and, in default, may reject the statement, or if it is in evidence, exclude it.

(5) Where a person proposes to prove, or proves, a statement by reproducing the statement in the form of a visible display or of sound, the court may direct a record of the statement to be produced, and, in default, may reject the statement, or if it is in evidence, exclude it.

This is a new provision. It is designed to provide a means whereby copies of documents can be produced in court and whereby certain statements in documents which cannot be reproduced without the use of some device can be produced in court in a legible form: see paragraphs 3.35 and 3.36 of the Report. It is based on s.14CN of the *Evidence Act 1898 1979* (NSW).

**APPENDIX III**  
**EXTRACTS FROM THE EVIDENCE ACT 1906-1979**

Interpretation.  
Added by No.  
69 of 1967,  
s.2.

79B. In sections 79C and 79D of this Act -

- (a) “document” includes books, maps, plans, drawings and photographs, and any device by means of which information is recorded or stored;
- (b) “statement” includes any representation of fact or opinion whether made in words or otherwise;
- (c) “proceedings” includes arbitrations and references; and “court” shall be construed accordingly.

Admissibility  
of certain  
documentary  
evidence as to  
facts in issue.  
Added by  
No.69 of  
1967, s.2.

79C. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish the fact shall, on production of the document, be admissible as evidence of that fact -

(a) if the maker of the statement either -

- (i) had personal knowledge of the matters dealt with by the statement; or
- (ii) made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied whether directly or indirectly by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and

(b) if the maker of the statement is called as a witness.

(2) The condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is out of the State and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to identify or find him have been made without success, or where no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness.

(3) The court may at any stage of the proceedings order that the statement shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence, notwithstanding -

- (a) that the statement is tendered by the party calling the maker of the statement;
- (b) that the maker of the statement is available but is not called as a witness;

(c) that the original document is lost or mislaid or destroyed, or is not produced, if in lieu of it there is produced a copy of it or of the material part of it certified to be a true copy in such a manner as may be specified in the order or as the court may approve, as the case may be.

(4) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

Weight to be attached to documentary evidence.  
Added by No. 69 of 1967, s.2.

79D. (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 79C of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by section 79C of this Act shall not be treated as corroboration of evidence given by the maker of the statement.

Admissibility of certain trade or business records.  
Added by No.69 of 1967, s.2.

79E. (1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -

(a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the

circumstances) to have any recollection of the matters dealt with in the information he supplied.

(2) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or content of the document in which the statement 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 fully registered medical practitioner and the court may in its discretion reject the statement are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(3) In estimating the weight, if any, to be attached to a statement admissible as evidence by virtue of this section regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) In this section “statement” includes any representation of fact, whether made in words or otherwise, “document” includes books, maps, plans, drawings and photographs, and any device by means of which information is recorded or stored and “business” includes any public transport, public utility or similar undertaking carried on by the Crown or a statutory body and also includes any municipality.

### **Bankers’ Books**

Entries in  
bankers  
books.  
Vict.,  
No.6, s.3.

89. Subject to the provisions of this Act, a copy of any entry in a banker’s book shall be evidence of such entry and of the matters, transactions, and ac-58 counts therein recorded.

Proof that  
book is a  
banker’s  
book.  
58 Vict.,  
No. 6, s.4.

90. (1) A copy of an entry in a banker’s book shall not be received in evidence, unless it is first proved -

- (a) that the book was, at the time of the making of the entry, one of the ordinary books of the bank; and
- (b) that the entry was made in the usual and ordinary course of business; and
- (c) that the book is in the custody or control of the bank.

(2) Such proof may be given by a partner or officer of the bank, and may be given either orally or by affidavit.

- Verification of copy.  
58 Vict., No. 6, s.5.
91. (1) A copy of an entry in a banker's book shall not be received in evidence unless it is further proved that the copy has been examined with the original entry and is correct.
- (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by affidavit.
- Legal proceedings. Amended by No. 10 of 1960, s.3. See N.S.W., No. 11 of 1898, s.48.
92. In any legal proceedings in which it is necessary to prove -
- (a) the state of an account in the books of any bank; or
- (b) that any person had not an account or any funds to his credit in such books,
- it shall not be necessary to produce any such book, but evidence of the state of such account, or that no such account or funds existed, may be given either orally or by affidavit by any officer or clerk of such bank who has examined such book
- Application of sections 89 to 92 to banks. Added by No. 10 of 1960, s.4.
- 92A. The provisions of sections eighty-nine, ninety, ninety-one and ninety-two of this Act shall apply to bankers' books and banks and branches of banks of any State or Territory of the Commonwealth.
- Cases in which banker etc., not compellable to produce book, etc.  
58 Vict., No. 6, s.6.
93. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable -
- (a) to produce any banker's book, the contents of which can be proved under the provisions of this Act; or
- (b) to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge of the Supreme Court made for special cause.
- Inspection of banker's books, see 58 Vict., No. 6 s.7.
94. (1) On the application of any party to a legal proceeding, the Court or a Judge of the Supreme Court may order that such party be at liberty to inspect and take copies of any entries in a banker's book relating to the matters in question in such proceeding.
- (2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank by delivering a copy of the order to an officer of such bank at a principal or a branch office thereof, having the custody of the book of which inspection is desired, three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs.
- Ibid., s.11.
- (3) Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this section.

Costs.  
58 Vict.,  
No. 6  
s.8.

95. (1) The cost of -
- (a) any application to a Court or Judge under or for the purposes of sections ninety-three or ninety-four; or of
  - (b) anything done or to be done under an order of a Court or Judge made under or for the purposes of section ninety-four.

shall be in the discretion of the Court or Judge, who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank.

- (2) Any such order against a bank may be enforced as if the bank was a party to the proceedings.

Power of  
judge  
extended to  
magistrates, etc.  
Vict., No. 6,  
s.9.  
Amended by  
No. 111  
of 1978, s.5.

96. A Judge of the District Court of Western Australia, a Judge of the Family Court of Western Australia, the magistrate of any local court, and any stipendiary magistrate, and any justice of the peace on the investigation of complaints of indictable offences may, with respect to any legal proceedings in the court in which he presides, exercise the powers of a Judge of the Supreme Court under this Act in regard to bankers' books.

## APPENDIX IV

### WHAT IS A COMPUTER?

1. A computer is a device capable of storing, recording and processing<sup>1</sup> information, and solving problems, in accordance with mathematical and logical rules. A computer consists of four basic types of machine; an input device, a storage device, a central processor and an output device.

2. The computer's programme<sup>2</sup> and the information to be stored in a computer, are fed into the computer by means of an **input** device. One means by which the programme and the information is fed into a computer is by converting the programme or information into punched holes in cards or tapes. The programme or information may also be recorded on magnetic tape or discs. The cards or tapes are then passed through an input device which reads the programme or information into the computer. It is also possible for the programme or information to be fed directly into a computer by the use of a keyboard terminal. A further means by which information can be fed into a computer is by the use of documents with characters printed on them with magnetic particles which can be sensed by a special device<sup>3</sup> or with the characters identified by their shape and read by an optical scanning device. An example of the use of characters printed with magnetic particles is the printing of a customer's account number on cheques.

3. Obviously the accuracy of information obtained from a computer will depend on the reliability of the source of the stored information and the accuracy of the process by means of which the information is fed into the computer. It is possible to check the punch cards and magnetic tapes when they are prepared. It is also possible for a computer to be programmed to check and verify the information which is fed into it, so reducing the risk of error.

4. Information and programmes which have been fed into a computer are retained in a device called a **storage device**. The main storage device is a part of the central processing unit which, together with the **arithmetical and logical unit**, performs the desired operations; processing information, calculations and logical operations. The main storage device stores

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<sup>1</sup> "Processing" refers to the operation of deriving information from or sorting the information stored in or recorded by a computer.

<sup>2</sup> A computer's programme is a series of instructions by means of which the computer's components and circuitry is controlled.

<sup>3</sup> This process is called Magnetic Ink Character Recognition - MICR.



the information and programme during processing. Information and programmes may be stored in an **external store** which, as the name suggests, is physically separated from the central processing unit. Information and programmes may be transferred between the store in the central processor and the external store.

5. Both stored and processed information may be retrieved at any time by means of an **output device**. There are various types of output device. Information may be printed out by machine printer or a teleprinter type terminal in plain language. The information may be displayed visually on a screen or punch cards and tapes may be produced for a further computer process or for use in a business machine. It is also possible for microfilm to be produced directly from data recorded on a magnetic tape, disc or drum or from data in electronic form in the central processing unit of a computer. The material recorded in the computer or on the tape, disc or drum is converted into readable characters on a cathode ray tube, and the characters are photographed by a camera. A microfilm is produced which can be read with the aid of a magnifying device. This process is styled C.O.M. or K.O.M. - Computer output on Microfilm.

### **The reliability of a computer system**

6. In systems for recording information which do not involve computers a great deal of reliance is placed on human beings not to make mistakes. A system using a computer must also rely on human beings. As Sieghart says:<sup>4</sup>

“Any information system, however much it is automated, must still rely on people to collect the data, prepare them for the computer, write and test the programs, run the right programs on the right data, and so on. And even the best people will always make some mistakes”.

However, a computer itself does not normally make mistakes.

7. In order to minimise the errors made with respect to information fed into a computer, computers can be programmed to check the consistency of the information fed into the computer.<sup>5</sup> Information which has been fed into a computer may be protected by recovery

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<sup>4</sup> Sieghart, *Privacy and Computers* (1976 Latimer) at 81.

<sup>5</sup> For a simple example of how a computer can be programmed to check information which is fed into a computer see Sieghart, *Privacy and Computers* (1976 Latimer) at 79-80.

plans which involve maintaining copies of vital programmes and data in case the system and its file of information is destroyed.

8. Apart from the problems of ensuring that information is accurately recorded by a computer and that that information, once recorded, is protected from loss there is also the problem of preventing people from embezzling money by manipulating a computer. One method of manipulation is simply to introduce a minor variation into a computer's programme. For example, a person could programme a computer to record a firm's purchase of goods at rates slightly above those actually paid and to forward the balance to a "ghost" company.

9. Attempts can be made to protect computers from fraudulent manipulation in a number of ways. First, the computer facility can be protected physically so that only authorised persons can have access to it. Second, the staff of the user of the computer can be screened to ensure that only persons of a high character can have access to the computer facility. Third, the computer itself can be used to safeguard stored information by requiring identification, verification and authorisation before a person can obtain access to information or a programme stored in a computer. This may involve a special procedure. For example, the person seeking to gain access to the computer may be required to identify himself by typing out a password. A computer can also be programmed to produce a journal or log in which is recorded the names of the people who have used the computer, when and how.

10. In general, computers are accepted as a reliable and accurate means of recording, storing and processing information. As the Committee appointed to examine the Question of Privacy and Data Banks said:<sup>6</sup>

"A competently designed computer system imposes disciplines on every stage in the processing of data which help to reduce mistakes and to ensure that those errors which do occur are detected and corrected. This does not mean that computers will not make mistakes, but when they do, it will almost always be because some human being has made a mistake in the first place - perhaps by feeding the wrong data into the system, or by making an error in the instructions (the 'program') given to the computer".

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<sup>6</sup> *Report of the Committee appointed to examine the Question of Privacy and Data Banks* (WA) (1976), paragraph 114.

# APPENDIX V

## THE LAW IN ENGLAND

### CIVIL PROCEEDINGS

#### Introduction

1. An important development in the law with regard to the admissibility of hearsay evidence in civil proceedings took place in England in 1968 with the implementation of the *Civil Evidence Act 1968-1977*.<sup>1</sup>

2. While the Act commences by abolishing the common law exceptions to the hearsay rule,<sup>2</sup> so that hearsay evidence is admissible in civil proceedings only where provided for by statute or by agreement of the parties, a number of the common law exceptions are preserved by s.9. Apart from these exceptions, express provision is made in Part I of the Act for the admissibility of the following categories of hearsay evidence -

- (i) out-of-court statements, s.2;
- (ii) statements in records, s.4; and
- (iii) statements produced by computers, s.5.

#### Out-of-court- statements

3. A statement, whether made orally, in a document or otherwise, is admissible as evidence of any fact or opinion<sup>3</sup> stated therein of which direct oral evidence would be admissible.<sup>4</sup> Although the statute itself does not make it a condition of admissibility that the maker of the statement be called as a witness this may be necessary as a result of the operation of the rules of court.<sup>5</sup> Where the statement is made otherwise than in a document, only direct oral evidence by the person who made the statement or any person who heard or

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<sup>1</sup> The provisions of Part I of the Act are based, in part, on the recommendations of the Law Reform Committee, Thirteenth Report, *Hearsay Evidence in Civil Proceedings* (1966, Cmnd. 2964).

<sup>2</sup> Section 1(1) of the *Civil Evidence Act 1968-1977* (Eng) provides that hearsay evidence is admissible only to the “. . . extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise”.

<sup>3</sup> See the *Civil Evidence Act 1972* (Eng), s.1(l).

<sup>4</sup> *Civil Evidence Act 1968-1977* (Eng), s.2(l).

<sup>5</sup> See paragraph 18 below.

otherwise perceived it being made is admissible for the purpose of showing what statement was made.<sup>6</sup>

4. If the party tendering the statement in evidence has called or intends to call the maker of the statement as a witness in the proceedings the leave of the court is required before the statement can be tendered.<sup>7</sup> Where such leave is given the statement cannot be given in evidence before the conclusion of the examination-in-chief of the maker of the statement except where before the maker is called the court allows evidence to be given of the making of the statement by a witness other than the maker of the statement, or where the court allows the maker to narrate the statement because preventing him from doing so would adversely affect the intelligibility of his evidence.<sup>8</sup>

5. It appears that statements made in previous legal proceedings are admissible under s.2, though not that part of a transcript dealing with a judge's summing-up.<sup>9</sup> However, that part of a transcript dealing with a judge's summing-up may be admissible under s.4.<sup>10</sup> If a statement is made by a person in the course of some previous legal proceeding (civil or criminal) the court may authorise the manner in which it may be proved.<sup>11</sup>

6. A number of safeguards which apply to statements admissible under s.2(1) are discussed in paragraphs 14 to 18 below.

### Statements in records

7. A statement contained in a document is admissible as evidence of any fact or opinion stated therein where the document is or forms part of a record.<sup>12</sup> The record must be compiled by a person acting under a duty (whether directly or indirectly through one or more intermediaries) from information supplied by a person (whether acting under a duty or not), who had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the information supplied.<sup>13</sup> The provision refers to records in general, for example

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<sup>6</sup> *Civil Evidence Act 1968-1977* (Eng), s.2(3).

<sup>7</sup> *Id.*, s.2(2)(a).

<sup>8</sup> *Id.*, s.2(2)(b).

<sup>9</sup> *Taylor v Taylor* [1970] 2 All ER 609 at 614.

<sup>10</sup> *Ibid.* Section 4 is discussed in paragraphs 7 to 9 below.

<sup>11</sup> *Civil Evidence Act 1968-1977* (Eng), s.2(3).

<sup>12</sup> *Id.*, s.4(1).

<sup>13</sup> *Ibid.*

administration records such as hospital records, and not only to trade or business records. In accordance with a recommendation of the Law Reform Committee<sup>14</sup> the definition of “duty” is wide, s.4(3) providing that any:

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

8. The statement is not admissible where the party wishing to tender the statement in evidence has called or intends to call the original supplier of information, except with the leave of the court.<sup>15</sup> Where such leave is given the statement cannot be tendered in evidence before the conclusion of the examination-in-chief of the original supplier of the information, except with the leave of the court<sup>16</sup>

9. A number of safeguards which apply to statements admissible under s.4(1) are discussed in paragraphs 14 to 15 below.

### Statements produced by computers

10. Where direct oral evidence of a fact is admissible, a statement contained in a document<sup>17</sup> produced<sup>18</sup> by a computer<sup>19</sup> is admissible as evidence of any fact stated therein.<sup>20</sup> Before such a statement is admitted it must be shown that:<sup>21</sup>

<sup>14</sup> Thirteenth Report, *Hearsay Evidence in Civil Proceedings* (1966) (Cmnd. 2964), paragraph 16(b).

<sup>15</sup> *Civil Evidence Act 1968-1977* (Eng), s.4(2)(a).

<sup>16</sup> *Id.*, s.4(2)(b).

<sup>17</sup> Under s.10(1) of the *Civil Evidence Act 1968-1977* (Eng):  
“document includes, in addition to a document in writing -

(a) any map, plan, graph or drawing;

(b) any photograph;

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom:

‘film’ includes a microfilm;

‘statement’ includes any representation of fact, whether made in words or otherwise”.

<sup>18</sup> A document is said to be produced by a computer whether it is produced by it directly or (with or without human intervention) by means of any appropriate equipment: *Civil Evidence Act 1968-1977* (Eng), s.5(5)(c).

<sup>19</sup> A “computer” means any device for storing and processing information: *Civil Evidence Act 1968-1977* (Eng), s.5(6).

<sup>20</sup> *Civil Evidence Act 1968-1977* (Eng), s.5(1).

<sup>21</sup> *Id.*, s.5(2).

- “(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities”.

11. A certificate may be given by a person who occupies a responsible position in relation to the operation of the relevant device or the management of the relevant activities, identifying the document containing the statement, describing the manner in which it was produced, giving details of any device used to produce the document for the purpose of showing that the document was produced by a computer, and relating to any of the conditions referred to in the previous paragraph.<sup>22</sup> This certificate is admissible as evidence of any matter stated in it. Provision is made for a penalty for wilfully making a false statement in such a certificate.<sup>23</sup>

12. A number of safeguards which apply to statements admissible under s.5(1) are discussed in paragraphs 14, 17 and 18 below.

### **Supplementary provisions**

- (a) Inferences

13. Section 6(2) of the *Civil Evidence Act 1968-1977* (Eng) provides that in deciding whether or not a statement is admissible in evidence under ss.2, 4 or 5 of the Act the court may:

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<sup>22</sup> Id., s.5(4).

<sup>23</sup> Id., s.6(5).

“... draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document”.

(b) Weight

14. Section 6(3) of the Act provides for the circumstances to be taken into account in estimating the weight to be attached to a statement admissible in evidence under ss.2, 4 or 5 of the Act.

(c) Corroboration

15. Section 6(4) of the Act provides that a statement admissible under ss. 2 or 4 of the Act is not capable of corroborating evidence given by the maker of the statement or the person who originally supplied the information from which the record containing the statement was compiled, as the case may be, for the purpose of any enactment or rule of law or practice requiring evidence to be corroborated.

(d) Evidence as to the credibility of the maker of the statement or the supplier of the information

16. Where the maker of a statement admissible under s.2 of the Act, or the person who originally supplied the information from which a record containing a statement admissible under s.4 of the Act was compiled, is not called as a witness in the proceedings, evidence is admissible as to his credit in certain circumstances. Section 7(1) of the Act provides that:

- “(a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and
- (b) evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that that person has contradicted himself:

Provided that nothing in this subsection shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied

that matter in cross-examination, evidence could not have been adduced by the cross-examining party”.

(e) Rules of court

17. Section 8 of the Act provides for the making of rules of court for the procedure to be followed and the conditions to be fulfilled before a statement admissible under ss.2, 4 or 5 of the Act can be admitted. Rules were made in 1969.<sup>24</sup>

18. Briefly the rules provide that a party desiring to tender a statement under ss.2, 4 or 5 of the Act is required to give notice of that intention to the other parties to the proceedings.<sup>25</sup> The notice must contain details of the statement, persons connected with the statement,<sup>26</sup> and any allegation that any such person cannot or should not be called as a witness.<sup>27</sup> The reasons which may be advanced for not calling such a person are that the person is:<sup>28</sup>

“... dead, or beyond the seas or unfit by reason of his bodily or mental condition to attend as a witness or that despite the exercise of reasonable diligence it has not been possible to identify or find him or that he cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice relates”.

<sup>24</sup> *Rules of the Supreme Court (Amendment) 1969* (S.I. 1969 No.1105) (Eng); Order 38 rules 20 to 33.

<sup>25</sup> *Rules of the Supreme Court 1965-1979* (Eng), Order 38 rule 21.

<sup>26</sup> In the case of a statement produced by a computer:

“... the notice must have annexed to it a copy or transcript of the document containing the statement, or of the relevant part thereof, and must contain particulars of -

- (a) a person who occupied a responsible position in relation to the management of the relevant activities for the purpose of which the computer was used regularly during the material period to store or process information;
- (b) a person who at the material time occupied such a position in relation to the supply of information to the computer, being information which is reproduced in the statement or information from which the information contained in the statement is derived;
- (c) a person who occupied such a position in relation to the operation of the computer during the material period;

and where there are two or more persons who fall within any of the foregoing subparagraphs and some only of those persons are at the date of service of the notice capable of being called as witnesses at the trial or hearing, the person particulars of whom are to be contained in the notice must be such one of those persons as is at that date so capable.

(2) The notice must also state whether the computer was operating properly throughout the material period and, if not, whether any respect in which it was not operating properly or was out of operation during any part of that period was such as to affect the production of the document in which the statement is contained or the accuracy of its contents”: *Rules of the Supreme Court 1965-1979* (Eng), Order 38 rule 24.

<sup>27</sup> *Rules of the Supreme Court 1965-1979* (Eng), Order 38 rules 22, 23 and 24.

<sup>28</sup> *Id.*, Order 38 rule 25.



A person on whom a notice has been served may give a counter-notice requiring any person referred to in the notice to be called as a witness.<sup>29</sup> If there is a dispute as to whether or not the person can or should be called as a witness that can be determined before the trial.<sup>30</sup> The court has a discretion to admit a statement in evidence, notwithstanding that a notice has not been served under rule 21, or that a person has not been called as a witness in response to a counter-notice under rule 26.<sup>31</sup>

## CRIMINAL PROCEEDINGS

### Present law

19. In criminal proceedings there is provision for the admission of trade or business records in limited circumstances.<sup>32</sup> Section 79E of the *Evidence Act 1906-1979* (WA) is similar to s.1 of the *Criminal Evidence Act 1965-1969* (Eng). The major difference between the provisions is that in Western Australia s.79E(2) provides the court with a discretion to reject a statement otherwise admissible. There is no such provision in the *Criminal Evidence Act 1965-1969* (Eng). There is no specific provision in England relating to the admissibility of statements produced by computers.

### Recommendations of the Criminal Law Revision Committee

20. The Criminal Law Revision Committee has recommended that hearsay evidence be admitted in criminal proceedings in circumstances comparable to the provisions in the *Civil Evidence Act 1968- 1977*(Eng).<sup>33</sup> The report has not, as yet, been implemented.

#### (a) Out-of-court statements

21. The Committee recommended that out-of-court statements, whether made orally,<sup>34</sup> in a document or otherwise, should be admissible as evidence of any fact stated therein if the maker is called as a witness, or if he cannot be called because he is dead, unfit to attend as a

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<sup>29</sup> Id., Order 38 rule 26.

<sup>30</sup> Id., Order 38 rule 27.

<sup>31</sup> Id., Order 38 rule 29.

<sup>32</sup> *Criminal Evidence Act 1965-1969* (Eng), s.1.

<sup>33</sup> Eleventh Report, *Evidence (General)* graph 224.

<sup>34</sup> However, only first-hand evidence of the making of the statement would be admissible.

witness, abroad, cannot be identified or found or being available he is either non-compellable or refuses to be sworn.<sup>35</sup>

(b) Statements in records

22. The Committee recommended that statements in records should be admissible if the information contained in them was supplied by a person who had, or could reasonably be supposed to have had, personal knowledge of the matter in question and if the supplier of the information is called as a witness, or cannot be called for one of the reasons referred to in paragraph 21 above, or if he cannot be expected to remember the matters dealt with in the information supplied.<sup>36</sup>

(c) Statements produced by computers

23. The Committee recommended that statements produced by computers should be admissible in criminal proceedings<sup>37</sup> in circumstances similar to those in which such statements are admissible in civil proceedings.<sup>38</sup>

(d) Safeguards

24. The major safeguards proposed by the Committee were:<sup>39</sup>

- “(ii) a statement contained in a proof of evidence (including a proof incorporated in a record) given by a person who is called as a witness in the proceedings in question will not be admissible unless the court gives leave for this on the ground that in the circumstances it is in the interests of justice that the witness’s evidence should be supplemented by the proof;
- (iii) at a trial on indictment a statement will not be admissible by reason of the impossibility of calling the maker unless the party seeking to give it in evidence has given notice of his intention to do so with particulars of the statement and of the reason why he cannot call the maker;
- (iv) a statement said to have been made, after the accused has been charged, by a person who is compellable as a witness but refuses to be sworn or by a person

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<sup>35</sup> Eleventh Report, *Evidence (General)* (1972) (Cmnd. 4991), paragraph 236, draft Bill, clause 31(1).

<sup>36</sup> Id., paragraph 236, draft Bill, clause 34.

<sup>37</sup> Id., paragraph 236, draft Bill, clause 35.

<sup>38</sup> See paragraphs 10 to 12 above.

<sup>39</sup> Eleventh Report, *Evidence (General)* (1972) (Cmnd. 4991), paragraph 237.

said to be abroad, impossible to identify or find, or to have refused to give evidence, will not be admissible at all (and there will be a similar restriction in the case of the supplier of information contained in a record);

- (v) a statement made by the wife or husband of the accused (not being tried jointly with the accused) will not be admissible on behalf of the prosecution unless the maker gives evidence for the prosecution or would have been a compellable witness for the prosecution”.

## **APPENDIX VI**

### **THE LAW IN VICTORIA**

#### **Introduction**

1. In 1971 the Chief Justice of Victoria's Law Reform Committee made a report, containing a draft bill, with regard to the admission of hearsay evidence. The draft bill was subsequently enacted with only minor alterations as the *Evidence (Documents) Act 1971*. The Act, which amended the *Evidence Act 1958*, provides for the admission of documentary out-of-court statements, business records, statements produced by computers, and books of account. These provisions are discussed below. The provision relating to the admissibility of statements produced by computers is based on the *Civil Evidence Act 1968-1977* (Eng).<sup>1</sup> However, there is no specific provision for the making of rules of court.<sup>2</sup>

#### **Documentary out-of-court statements**

2. Section 55(1)(a) of the Victorian *Evidence Act 1958-1978* (which applies to any legal proceeding other than a criminal proceeding) is similar to s.79C(1)(a)(i) of the *Evidence Act 1906-1979* (WA). Section 55(5) which provides for the circumstances in which the maker of the statement need not be called as witness is similar to s.79C(2) of the *Evidence Act 1906-1979* (WA). In addition, a statement admissible under s.55(1)(a) may be admitted notwithstanding that the maker of the statement is available, but not called as a witness, if the court is satisfied that undue delay or expense would otherwise be caused.<sup>3</sup>

#### **Business records**

3. In any legal proceeding, where direct oral evidence of a fact would be admissible, a statement contained in a document and tending to establish that fact is admissible where the document is, or forms part of a business record made in the course of the business from information supplied by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information supplied. The person who supplied the information recorded in the statement in question must be called as a witness in

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<sup>1</sup> See Appendix V, paragraphs 10 and 11.

<sup>2</sup> See Appendix V, paragraphs 17 and 18.

<sup>3</sup> *Evidence Act 1958-1978* (Vic), s.55(7).

the proceedings,<sup>4</sup> except in the same circumstances as those referred to in paragraph 2 above, or where it cannot reasonably be supposed that he would have any recollection of the matters dealt with in the information that he supplied.<sup>5</sup>

4. The wide definition of “business” contained in s.3(1)<sup>6</sup> raised the fear that certain self-serving statements, such as police briefs, would be admissible under s.55(2). Section 55(3) therefore describes certain documents which are not admissible in criminal proceedings, including police briefs.

### **Statement produced by computers**

5. Section 55B provides for the admissibility of statements produced by computers in both civil and criminal proceedings. The section is based on s.5 of the English *Civil Evidence Act 1968-1977*.<sup>7</sup> However, the English provision applies only to civil proceedings.

6. Unlike the English provision the court has a discretion to reject any such statement, notwithstanding that the requirements of the section have been fulfilled, if it appears to be inexpedient in the interests of justice to admit it.<sup>8</sup>

### **Safeguards**

#### **General**

7. There are a number of safeguards which apply to documentary out-of-court statements admissible under s.55(1) and (2). Certain statements by interested persons made at a time when proceedings are pending or anticipated are inadmissible.<sup>9</sup> The court also has a discretion, similar to that applicable to computer records referred to in paragraph 6 above, to reject any statement, otherwise admissible.<sup>10</sup> In certain circumstances evidence concerning the

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<sup>4</sup> Id., s.55(1)(b) and s.55(2).

<sup>5</sup> Id., s.55(6).

<sup>6</sup> Section 3(1) provides that “Business” includes:

“... public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on by the Crown, or by a statutory authority, or by any other person, whether or not it is engaged in or carried on for profit”.

<sup>7</sup> See Appendix V, paragraphs 10 to 12.

<sup>8</sup> *Evidence Act 1958-1978* (Vic), s.55B(7).

<sup>9</sup> Id., s.55(4).

<sup>10</sup> Id., s.55(9).

credibility of the person who made the statement or supplied the information recorded in the statement is admissible.<sup>11</sup>

#### Corroborative evidence

8. Section 56 of the *Evidence Act 1958-1978* (Vic) provides that for the purpose of any rule of law or practice requiring evidence to be corroborated, a statement rendered admissible under ss.55 (documentary out-of-court statements and business records) or 55B (statements produced by computers) of the Act is not to be treated as corroboration of evidence given by the maker of the statement or the person who supplied the information recorded in the statement, as the case may be.

#### Books of account

9. Prior to the 1971 amendment of the Victorian *Evidence Act 1958-1978*, the Act contained two divisions with regard to the admission of bankers' books (division 9), which was similar to ss.89-96 of the *Evidence Act 1906- 1979* (WA), and books of account (division 10). These have now been amalgamated in ss.58A to 58J of the Victorian *Evidence Act 1958-1978*.

10. In any legal proceeding an entry, or a copy of an entry, in a book of account<sup>12</sup> is prima facie evidence of the matters, transactions and accounts recorded therein.<sup>13</sup>

11. Where a person carrying on a business is a party to any legal proceeding the other party or parties are at liberty to inspect and to make copies of, or to take extracts from, the original entries and the accounts of which such entries form part.<sup>14</sup>

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<sup>11</sup> Id., s.55A.

<sup>12</sup> A "Book of account" is defined in s.58A of the *Evidence Act 1958-1978* (Vic) as including any: "...ledger, day book, cash book, account book, and any other document used in the ordinary business of a bank, or in the ordinary course of any other business for recording the financial transactions of the business and also includes any document used in the ordinary course of any business to record goods produced in, or stock in trade held for, the business".

<sup>13</sup> *Evidence Act 1958-1978* (Vic), s.58B.

<sup>14</sup> Id., s.58C.

12. Before evidence of any entry is admitted it must be proved that the book of account was at the time of the making of the entry one of the ordinary books of account of the business and that the entry was made in the usual and ordinary course of the business.<sup>15</sup>

13. If a person carrying on a business is not a party to legal proceedings, neither that person nor his employees can be compelled to produce the books of account of the business, or to appear as a witness to prove the accounts and transactions recorded, unless an order is made for special cause by a court.<sup>16</sup>

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<sup>15</sup> Id., s.58D(1).

<sup>16</sup> Id., s.58F to 58H.

## APPENDIX VII

### THE LAW IN NEW SOUTH WALES

#### **Admissibility of documentary out-of-court statements in civil proceedings**

1. In civil proceedings, where direct oral evidence of a fact is admissible, a statement made by a person in a document and tending to establish the fact is admissible if the maker of the statement had personal knowledge of the matters dealt with in the statement and if he is called as a witness.<sup>1</sup>

2. Where direct oral evidence of a fact is admissible, a statement made by a person in a document in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters tending to establish that fact (in so far as the matters dealt with in the statement are not within his personal knowledge) is admissible if the maker of the statement is called as a witness and if the document in question is or forms part of a record purporting to be a continuous record.<sup>2</sup>

3. The condition that the maker of the statement must be called as a witness need not be satisfied in certain circumstances.<sup>3</sup> The court has a discretion to admit a statement notwithstanding that the maker of the statement is available but is not called as a witness or the original document is not produced.<sup>4</sup> The court also has a discretion to admit a statement if, having regard to all the circumstances of the case, it is satisfied that undue delay or expense would otherwise be caused.<sup>5</sup>

4. A statement made by an interested person at a time when proceedings are pending or anticipated involving a dispute as to a fact which the statement might tend to establish is not admissible in the circumstances referred to in paragraphs 1 and 2 above.<sup>6</sup>

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<sup>1</sup> *Evidence Act 1898-1979* (NSW), s.14B(1).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.*, s.14B(1) Proviso.

<sup>4</sup> *Id.*, s.14B(2)(a) and (b).

<sup>5</sup> *Id.*, s.14B(2)

<sup>6</sup> *Id.*, s.14B(3).



5. There are provisions with regard to the weight to be attached to a statement admissible in the circumstances referred to in paragraphs 1 and 2 above,<sup>7</sup> and the corroborative value of such statements.<sup>8</sup>

6. Where the proceedings are with a jury the court has a discretion to reject a statement otherwise admissible if:<sup>9</sup>

“... it appears to the court that the weight of the statement is too slight to justify its admission, or that the utility of the statement is outweighed by a probability that its admission will be unfair or mislead the jury”.

7. Where the trial is with a jury the court also has a discretion to withhold a statement from the jury if it appears to the court that the jury might give the statement undue weight if it had the statement with it during its deliberation.<sup>10</sup>

## **Admissibility of business records**

### Introduction

8. In 1973 the New South Wales Law Reform Commission submitted a report<sup>11</sup> and a draft bill on the admissibility of business records. The draft bill as enacted with only minor alterations by the *Evidence (Amendment) Act 1976*.<sup>12</sup>

### Consideration of Victorian legislation

9. The New South Wales Law Reform Commission considered recommending the implementation of s.55B (relating to statements produced by computers) of the Victorian *Evidence Act 1958-1978*.<sup>13</sup> However, the Commission concluded that such an approach would have the effect of:<sup>14</sup>

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<sup>7</sup> Id., s.14C(1).

<sup>8</sup> Id., s.14C(2).

<sup>9</sup> Id., s.14B(6).

<sup>10</sup> Id., s.14B(7).

<sup>11</sup> Law Reform Commission of New South Wales, *Evidence (Business Records)* (LRC 17).

<sup>12</sup> The Law Reform Commission of New South Wales has since made a report on the rule against hearsay evidence: Law Reform Commission of New South Wales, *The Rule Against Hearsay* (1978).

<sup>13</sup> See Appendix VI, paragraphs 5 and 6.

<sup>14</sup> *Evidence (Business Records)* (LRC 17), paragraph 4.

“...making a document admissible if it was produced by a computer, but inadmissible if it was produced by other reliable means”.

It was the Commission's view that such a result was unjustified and it recommended that the New South Wales *Evidence Act 1898* be amended to provide a: <sup>15</sup>

“... [statutory] exception which will facilitate the admission in legal proceedings of reliable statements in business records, however kept or produced, as evidence of the matters recorded”.

### Conditions of admissibility

10. The *Evidence (Amendment) Act 1976* provided for a new Part IIC (ss.14CD to 14CV)<sup>16</sup> relating to the admissibility of business records. Section 14CE provides that where in legal proceedings evidence of a fact is admissible, a statement in a document<sup>17</sup> of the fact, is admissible as evidence of the fact,<sup>18</sup> if the document is or forms part of a record of a business and if the statement was made in the course of or for the purpose of the business.<sup>19</sup> The statement must have been made by a “qualified person”,<sup>20</sup> or reproduce or be derived<sup>21</sup> from

<sup>15</sup> Id., paragraph 5.

<sup>16</sup> The numbering of the sections in the Act differs from the numbering of the clauses in the draft Bill prepared by the New South Wales Law Reform Commission.

<sup>17</sup> See *Evidence Act 1898-1978* (NSW), s.14CD(1), where “document” is defined as including any record of information. It was intended to extend to all things used to record information which have been or may be devised, including a computer

<sup>18</sup> Section 14CE(2) provides that in so far as s.14CE(1) is concerned “fact” includes opinion.

<sup>19</sup> “Business” is defined as including:

“(a) any business (including business as a banker), profession, occupation, calling, trade or undertaking whether engaged in or carried on -

(i) by the Crown in right of the State or any other right, or a person;

(ii) for profit or not; or

(iii) in New South Wales or elsewhere; and

(b) public administration of the Commonwealth, including a Territory of the Commonwealth, a State or any country, carried on in New South Wales or elsewhere”: *Evidence Act 1898-1979* (NSW), s.14CD(1).

<sup>20</sup> “Qualified person” means a person who, at the time the statement was made was an owner, or a servant or agent of the business, or a person retained for the purposes of the business or a person associated with the business in the course of another business; and where the statement is not admissible in evidence unless made by an expert, that the person was an expert, or in any other case the person had or may reasonably be supposed to have had personal knowledge of the facts stated: *Evidence Act 1898-1979* (NSW), s.14CD(1).

A statement is said to be made by a person if it is written, made, dictated or otherwise produced by him or it is recognized by him as his statement by signing, initialling or otherwise: s.14CD(2). This section was intended “. . . to resolve doubts and prevent debate about who is to be considered the maker of a statement in situations such as where a person dictates a statement to a typist who transcribes it from shorthand notes and the person who dictates it does not sign or initial it”: *Evidence (Business Records)* (LRC 17) at 40.

<sup>21</sup> “Derived” means derived by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures: s.14CD(1). The New South Wales Commission intended that the definition would limit the application of “derived” to “. . .

information in one or more than one statement each made by a qualified person in the course of or for the purpose of the business, or from information, not supplied by any person, but supplied by a device designed for recording, measuring, counting or identifying information. In civil proceedings it is not a condition of admissibility that any person concerned in the making of the statement is called as a witness.

11. A statement is admissible under s.14CE notwithstanding the rule against hearsay, the rule against secondary evidence,<sup>22</sup> that any person concerned in the making of the statement is not called as a witness, or that the statement was in such a form that it would not be admissible if given as oral testimony.<sup>23</sup>

12. Section 14CH of the Act provides that where in the course of a business a system has been followed to make and keep a record of all events of a particular kind the absence of a record of an event of that kind is evidence that it did not happen. Section 14CJ provides for the matters to be taken into account in estimating the weight of evidence admitted under s. 14CH.

### Safeguards

#### (a) Criminal proceedings

13. In criminal proceedings, where a statement is tendered in evidence under s.14CE and the statement is made by a person or is derived from or reproduces information in a statement made by a person, the statement is not admissible unless each person concerned in making the statement is called by the tendering party as a witness if so required by any opposing party, or unless it appears to the court:<sup>24</sup>

- “(i) that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness;

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procedures of an objective nature and to those commonly accepted as accurate although involving some subjective judgment”: *Evidence (Business Records)* (LRC 17) at 39.

<sup>22</sup> These rules provide that the contents of a document must be proved by the production of the original. There are, however, exceptions, for example where the original has been lost: See *Cross on Evidence* (2nd Aust. ed. 1979) at 612-620.

<sup>23</sup> *Evidence Act 1898-1979* (NSW), s.14CE(3).

<sup>24</sup> *Id.*, s.14CG(1) and (2).

- (ii) that he is outside New South Wales and it is not reasonably practicable to secure his attendance;
- (iii) that all reasonable steps have been taken to identify him and he cannot be identified;
- (iv) that his identity being known, all reasonable steps have been taken to find him and he cannot be found;
- (v) that, having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement; or
- (vi) that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling him as a witness.”

A statement made in connection with criminal proceedings or with investigations is not admissible under s.14CE,<sup>25</sup> and Part IIC does not operate to affect the power of the court to reject evidence which if admitted would operate unfairly against the defendant.<sup>26</sup>

(b) General

14. There are a number of general safeguard provisions which apply to any statement admissible under s.14CE. Section 14CI makes provision for the matters to be taken into account in estimating the weight to be attached to such a statement and s. 14CK provides for the admissibility of evidence as to the credibility of a person who made such a statement where that person is not called as a witness. A statement made or obtained for the purpose of, or in contemplation of, a legal proceeding or other legal proceeding arising out of the same or substantially the same facts is not admissible under s.14CE.<sup>27</sup> The court also has a general discretion to reject evidence tendered under Part IIC if its weight is slight, or if its admission

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<sup>25</sup> Id., s.14CG(3).

<sup>26</sup> Id., s.14CS.

<sup>27</sup> Id., s.14CF(1).

will unduly prolong the hearing or it is unfair or misleading.<sup>28</sup> A further safeguard is provided in the case of trial with a jury. Section 14CQ of the Act provides that in a jury trial where it appears to the court that if a jury were to have the document during its deliberations it might give undue weight to the statement the court may direct that the document be withheld from the jury during its deliberations.

15. Section 14CU of the Act provides for the making of rules of court or regulations requiring notices and particulars to be given of evidence which a party proposes to tender under Part IIC. The Commission was of the opinion that the:<sup>29</sup>

“... nature of such rules or regulations is a matter which it is the function of the Supreme Court Rule Committee and the other rule and regulation making authorities to consider.”

### **Bankers' books**

16. The New South Wales Law Reform Commission recommended only minor alterations to the bankers' books provision of the New South Wales *Evidence Act* so that modern accounting methods would not be excluded from the operation of the provision.<sup>30</sup>

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<sup>28</sup> Id., s.14CP.

<sup>29</sup> *Evidence (Business Records)* (LRC 17) at 54.

<sup>30</sup> Id., at 38.

## APPENDIX VIII

### THE LAW IN SOUTH AUSTRALIA

#### Documentary out-of-court statements

I. In South Australia there is provision<sup>1</sup> for the admission of documentary out-of-court statements in civil proceedings similar to s.14B(1) to (5) of the *Evidence Act 1898-1979* (NSW).<sup>2</sup> In addition s.45b(1) of the *Evidence Act 1929-1979* (SA) provides that an apparently genuine document purporting to contain a statement of fact, or a written, graphical, or pictorial matter in which a statement of fact is implicit or from which a statement of fact may be inferred is admissible in evidence. It has been held that an opinion included in a document is not admissible under the section.<sup>3</sup> A document is only admissible if the court is satisfied that the person by whom, or at whose direction, it was prepared could, at the time of the preparation of the document, have deposed of his own knowledge as to the statement that is contained, or implicit in, or may be inferred from, the contents of the document.<sup>4</sup>

2. Moreover, the document is not admissible if the court is of the opinion that the person by, or at whose direction, the document was prepared can or should be called as a witness; or that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties; or that it would be otherwise contrary to the interests of justice to admit it.<sup>5</sup>

#### Business records

3. Section 45a(1) of the *Evidence Act 1929-1979* (SA) provides that an apparently genuine document purporting to be a business record is admissible as evidence without further proof of any fact stated therein or of any fact that may be inferred from the record. A “business record” is defined as:<sup>6</sup>

“... any book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business .. .”

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<sup>1</sup> *Evidence Act 1929-1979* (SA), ss.34c and 34d.

<sup>2</sup> See Appendix VII, paragraphs 1 to 5.

<sup>3</sup> See *Bates v Nelson* (1973) 6 SASR 149.

<sup>4</sup> *Evidence Act 1929-1979* (SA), s.45b(2).

<sup>5</sup> Id., s.45b(3).

<sup>6</sup> Id., s.45a(4).

or any reproduction of the document.<sup>7</sup>

4. However, the document is not admissible if the court is of the opinion that the person by, or at whose direction, the document was prepared can or should be called as a witness; or that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties; or that it would be otherwise contrary to the interest of justice to admit it.<sup>8</sup>

5. There is also a specific provision with respect to the admissibility of documents relating to the transportation of persons or goods.<sup>9</sup> An apparently genuine “document of a prescribed nature”,<sup>10</sup> relating to the transportation or shipment of any person or goods from one place to another is admissible in evidence, on production, without further proof.<sup>11</sup> Such a document is evidence of any fact stated or referred to in, or inferred from, the document, and that the owner of goods referred to in any such document is the consignee named in the document, or his assignee.<sup>12</sup>

6. This section enables the admission of evidence such as that which was admitted in *R. v Rice*.<sup>13</sup> In *R. v Rice* a used ticket, which bore the name of a person, was admitted as evidence that a person of that name travelled on the flight mentioned on the ticket.

### Computer records

7. In 1969, the Law Reform Committee of South Australia in its Tenth Report<sup>14</sup> recommended the implementation of legislation based on s.5 of the *Civil Evidence Act 1968-1977* (Eng),<sup>15</sup> providing for the admissibility of documentary statements produced by computers. The recommendation was implemented by s.14 of the *Evidence Amendment Act*

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<sup>7</sup> Ibid.

<sup>8</sup> *Evidence Act 1929-1979* (SA), s.45a(2).

<sup>9</sup> *Id.*, s.45.

<sup>10</sup> *Id.*, s.45(4). “Document of a prescribed nature” means a “... bill of lading, manifest, shipping receipt, consignment note, waybill, delivery sheet, register or order, invoice, ticket, passenger list or register, and any document of a like nature”.

<sup>11</sup> *Evidence Act 1929-1979* (SA), s.45(1)(a).

<sup>12</sup> *Id.*, s.45(1)(b).

<sup>13</sup> [1963] 1 All ER 832.

<sup>14</sup> *Evidence Act - New Part VIA Computer Evidence* (1969).

<sup>15</sup> See Appendix V, paragraphs 10 to 12.

1972 (SA). This provided for the addition of three new sections in the principal Act: s.59a, 59b and 59c.

8. Section 59a contains definitions of “computer”, “computer output” or “output” and “data”. Section 59b provides that computer output is admissible as evidence in civil or criminal proceedings once the court is satisfied that certain conditions have been fulfilled.

9. These conditions are that the computer is - <sup>16</sup>

- (i) correctly programmed and regularly used to produce output of the same kind as that tendered in evidence;
- (ii) that the data from which the output is produced by the computer is systematically prepared upon the basis of information that would normally be acceptable in a court of law as evidence;
- (iii) that there is no reasonable cause to suspect any departure from the system in the case of the output tendered in evidence;
- (iv) that the computer was not subject to a malfunction that might reasonably be expected to affect the accuracy of the output over the period from the time of the introduction of the data to that of the production of the output;
- (v) that during the period no alterations have been made to the mechanism or processes of the computer that might reasonably be expected adversely to affect the accuracy of the output;
- (vi) that records have been kept by a responsible person in charge of the computer of alterations to the mechanism and processes of the computer during that period; and

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<sup>16</sup> Evidence Act 1929-1979, (SA), 59b(2).



- (vii) that there is no reasonable cause to believe that the accuracy or validity of the output has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer.

10. An apparently genuine document purporting to be a record kept in accordance with these conditions must be accepted as such in the absence of contrary evidence.<sup>17</sup>

11. A certificate may be given by a person having prescribed qualifications or a person responsible for the management or operation of the computer system as to any or all of the conditions referred to above.<sup>18</sup>

12. In the absence of evidence to the contrary the certificate is proof of the matters certified.<sup>19</sup> The court has a discretion to require that oral evidence be given of any matters contained in the certificate and to require the person who gave the certificate to attend for examination or cross-examination upon the matters contained in the certificate.<sup>20</sup>

### **Bankers' books**

13. Sections 46 to 52 of the *Evidence Act 1929-1979* (SA) relate to bankers' books and are similar to ss .89 to 96 of the *Evidence Act 1906-1979* (WA).

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<sup>17</sup> Id., s.59b(5).

<sup>18</sup> Id., s.59b(4).

<sup>19</sup> Ibid.

<sup>20</sup> *Evidence Act 1929-1979* (SA), s.59b(6).

# APPENDIX IX

## THE LAW IN QUEENSLAND

### Introduction

1. In November 1975, the Law Reform Commission of Queensland submitted a report, including a draft bill, with regard to the consolidation and reform of the law of evidence in Queensland.<sup>1</sup> The recommendations of the Commission were substantially enacted by the *Evidence Act 1977*.

### Civil proceedings

#### Documentary statements

2. Under s.92(1)(a) of the *Evidence Act 1977-1979* documentary statements of which the maker had personal knowledge are admissible if the maker is called as a witness. In certain circumstances, the maker of the statement need not be called.<sup>2</sup>

#### Records

3. Where a document is or forms part of a record relating to any undertaking<sup>3</sup> and is made in the course of that undertaking from information supplied by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information supplied the document is admissible if the supplier of information is called as a witness.<sup>4</sup> In certain circumstances, the supplier of information need not be called as a witness.<sup>5</sup>

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<sup>1</sup> Law Reform Commission of Queensland, *Evidence* (QLRC 19).

<sup>2</sup> *Evidence Act 1977-1979* (Qld), s.92(2).

<sup>3</sup> “Undertaking” includes:

“... public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on -

(a) by the Crown (in right of the State of Queensland or any other right), or by a statutory body, or by any other person;

(b) for profit or not; or

(c) in Queensland or elsewhere”: *Id.*, s.5(1).

<sup>4</sup> *Id.*, s.92(1)(b).

<sup>5</sup> *Id.*, s.92(2).

### Statements produced by computers

4. Under s.95 of the *Evidence Act 1977-1979* statements produced by computers are admissible in circumstances similar to those in which statements in records produced by computers are admissible in England.<sup>6</sup>

### **Criminal proceedings**

5. In criminal proceedings a document which is or forms part of a record relating to any trade or business is admissible in circumstances similar to those in which such records are admissible in Western Australia in criminal proceedings.<sup>7</sup>

6. Section 95 of the *Evidence Act 1977-1979*, referred to in paragraph 4 above, relating to the admissibility of statements in records produced by computers also applies to criminal proceedings.

### Books of account

7. Under ss. 83-91 books of account are admissible in circumstances similar to those in which books of account are admissible in Victoria.<sup>8</sup>

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<sup>6</sup> See Appendix V, paragraphs 10 to 12.

<sup>7</sup> *Evidence Act 1977-1979* (Qld), s.93.

<sup>8</sup> See Appendix VI, paragraphs 9 to 13.

## APPENDIX X

### THE LAW IN THE AUSTRALIAN CAPITAL TERRITORY

#### Documentary out-of-court statements

1. Where direct oral evidence of a fact or opinion is admissible, a statement made by a person<sup>1</sup> in a document tending to establish the fact or expressing the opinion, as the case may be, is admissible as evidence of the fact or opinion.<sup>2</sup> Before the statement is admitted -<sup>3</sup>

- (i) in the case of a statement tending to establish a fact, it must be shown that the maker of the statement and personal knowledge of the matters dealt with by the statement;
- (ii) in the case of a statement expressing an opinion, it must be shown that the person expressing the opinion is qualified to give evidence of his opinion;
- (iii) the maker of the statement must be called as a witness;<sup>4</sup>
- (iv) the court must be satisfied that the statement was made at a time when the facts stated in the document were fresh in the memory of the witness or, in the case of a statement expressing an opinion, that the facts upon which the opinion was based were fresh in the mind of the person expressing the opinion.

#### Records

2. Where a statement is made by a person in a document, tending to establish a fact, from information supplied (directly or indirectly) by a person who had or might reasonably be supposed to have had personal knowledge of the matters dealt with in the information

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<sup>1</sup> A document is deemed to have been made by a person if it or the material part of the document is written, made or produced by the person with his own hand, or is signed or initialled or otherwise recognised by him as his statement: *Evidence Ordinance 1971 (ACT)*, s.35. This Ordinance was disallowed by the Senate on the 19th August 1971: *Commonwealth Parliamentary Debates*, Senate, Vol. S49 1971, at 173. However, the Ordinance has continued in force by virtue of the Australian Capital Territory *Evidence (Temporary Provisions) Act 1971-1973 (Cwth)*.

<sup>2</sup> *Evidence Ordinance 1971 (ACT)*, s.28(1).

<sup>3</sup> Ibid.

<sup>4</sup> For the circumstances in which a statement may be admitted when the maker of the statement is not called as a witness see ss.29(1) and 30(1)(c) of the *Evidence Ordinance 1971 (ACT)*.

supplied by him, the statement is admissible if direct oral evidence of the fact would be admissible and once the following conditions are satisfied -<sup>5</sup>

- (i) that the document was made by a person acting under a duty to make the statement;
- (ii) that the document was made in the course of, and as a record, or part of a record relating to any business; or in the course of, or as a record or part of a record relating to, the administration of, or in the performance of the functions of a government department from information supplied by a person who had, or might reasonably be supposed to have had personal knowledge of the matters dealt with in the information supplied; and if
- (iii) the supplier of information is dead or outside Australia and it is not reasonably practicable to secure his attendance as a witness; or unfit by reason of old age or his bodily or mental condition to appear as a witness; or cannot with reasonable diligence be identified or found; or cannot reasonably be expected, having regard to the time that has elapsed since he supplied the information and to all other relevant circumstances, to recollect the matters dealt with in the information supplied by him.

3. A statement in a document, made at a time when a criminal proceeding was pending, or at a time when it might reasonably have been contemplated that the proceedings would be instituted, is not admissible.<sup>6</sup>

### **Computer records**

4. In civil proceedings a statement contained in a document produced by a computer<sup>7</sup> is, subject to certain conditions, admissible as evidence of any facts stated in the document of which direct oral evidence would be admissible. The conditions are -<sup>8</sup>

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<sup>5</sup> *Evidence Ordinance 1971 (ACT)*, s.29(2).

<sup>6</sup> *Id.*, s.31.

<sup>7</sup> A computer is defined as a device which stores or processes information, or stores and processes information: *Id.*, s.39(1).

<sup>8</sup> *Id.*, s.42.

- (i) that the document was produced by the computer during a period when the computer was used to store or process information;
- (ii) that the information contained in the statement or of the kind from which the information contained in the statement is derived was in that period regularly supplied to the computer in the ordinary course of the carrying on of those activities;
- (iii) that the computer was, throughout the material part of that period operating properly or, if not, that in any respect in which it was not so operating properly or was out of operation that it was not such as to affect the production of the document of the accuracy of its contents; and
- (iv) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of carrying on of those activities.

5. The court has a discretion to refuse to admit the document in evidence if it has reason to doubt the accuracy or authenticity of the document sought to be admitted.<sup>9</sup>

### **Bankers' books**

6. The provisions with regard to bankers' books<sup>10</sup> are similar to ss.89 to 96 of the *Evidence Act 1906-1979* (WA).

### The Evidence (Australian Capital Territory) Bill 1972

7. In 1972, following the disallowance of the *Evidence Ordinance 1971*<sup>11</sup> the Evidence (Australian Capital Territory) Bill 1972 was introduced. This Bill was referred to the Senate Standing Committee on Constitutional and Legal Affairs. That Committee reported to the Senate on the Bill in November 1977.<sup>12</sup>

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<sup>9</sup> Id., s.43.(1)

<sup>10</sup> Id., ss.21-27.

<sup>11</sup> See footnote 1 above.

<sup>12</sup> Senate Standing Committee on Constitutional and Legal Affairs, *The Evidence (Australian Capital Territory) Bill 1972* (November 1977), Parliamentary Paper No. 237/1977.

8. The provisions of the Bill relating to the admissibility of documentary out-of-court statements, records and statements produced by computers are almost identical to the corresponding provisions of the *Evidence Ordinance 1971* discussed in paragraphs 1 to 5 above. One significant difference is that clause 42 of the Bill provides for the admissibility of computer records in both civil and criminal proceedings; under the Ordinance such records are only admissible in civil proceedings.

9. The Committee recommended that the provisions with respect to the admissibility of computer records should be assimilated to those applicable to documentary out-of-court statements and records.<sup>13</sup> The Committee said that:<sup>14</sup>

“... there should not be a different standard of admissibility for documents produced by computer to documents produced by equally reliable means in the course of conventionally kept records.”

10. The provisions of the Bill relating to bankers' books are almost identical to those in the *Evidence Ordinance 1971* referred to in paragraph 6 above. The Committee recommended that the provisions relating to bankers' books “. . . be widened to include equivalent accounting records kept by business and by government”.<sup>15</sup>

11. The Committee also recommended that a review of the law of evidence be undertaken by the Australian Law Reform Commission.<sup>16</sup> The Commonwealth Attorney General accepted this recommendation and in July 1979 the Commission was asked to review the law of evidence applicable in proceedings in Federal and Territory courts. In a Ministerial Statement in November 1979<sup>17</sup> the Attorney General said that having referred the matter to the Australian Law Reform Commission it would be inappropriate to introduce a Bill on the law of evidence.

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<sup>13</sup> Id., paragraphs 62 to 65.

<sup>14</sup> Id., paragraphs 62

<sup>15</sup> Id., paragraph 42.

<sup>16</sup> Id., paragraph 26.

<sup>17</sup> *Commonwealth Parliamentary Debates*, Senate, Vol. S.23 1979, at 2551-2553.

## APPENDIX XI

### THE LAW IN TASMANIA

#### Documentary out-of court statements

1. In 1974 following the recommendations of the Tasmanian Law Reform Committee<sup>1</sup> amendments were made to the *Evidence Act 1910* with regard to the admissibility of hearsay evidence. A new division, Division VII (ss.81A to 81Q), was enacted providing a number of statutory exceptions to the hearsay rule.

2. Section 81B of the *Evidence Act 1910-1977* provides for the admissibility of documentary evidence of facts in issue where the maker of a representation in a document is called as a witness.<sup>2</sup> Section 81C makes provision for the admissibility of documentary evidence of facts in issue where the maker of the representation in the document is unavailable, and section 81D makes provision for the admissibility of documentary evidence of opinions where the person expressing an opinion in the document is unavailable.

3. In proceedings (other than committal proceedings) where a party intends to tender in evidence a representation under ss.81C and 81D without calling the maker of the representation, he is required to give to the other party or parties to the proceeding a notice of that intention.<sup>3</sup> The notice must be accompanied by a copy of the representation.<sup>4</sup>

4. In committal proceedings, a complainant may submit in evidence a representation which is prima facie admissible under ss. 81B, 81C and 81D.<sup>5</sup> The justices presiding at the committal hearing are not permitted to rule on its admissibility, though they may prohibit its publication.<sup>6</sup>

5. The trial judge has a discretion to exclude any evidence tendered under ss.81B, 81C or 81D if the judge is satisfied that the probative value of the evidence is outweighed by the consideration that its admission or that the determination of its admissibility may necessitate

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<sup>1</sup> The Tasmanian Law Reform Committee, *Law of Evidence - The Hearsay Rule*.

<sup>2</sup> This provision is based on s.28 of the *Evidence Ordinance 1971 (ACT)*: see Appendix X, paragraph 1.

<sup>3</sup> *Evidence Act 1910-1977 (Tas)*, s.81G(1)(a).

<sup>4</sup> *Id.*, s.81G(1)(b).

<sup>5</sup> *Id.*, s.81G(3).

<sup>6</sup> *Id.*, s.81G(4).



undue consumption of time, or that it may create undue prejudice, or confuses the issues, or, in the case of a proceeding with a jury, mislead the jury.<sup>7</sup> The common law discretion to exclude evidence at a criminal trial is preserved.<sup>8</sup>

6. In civil proceedings, where it is not proved that the maker of the representation is unavailable in accordance with ss.81C or 81D and he is not called as a witness, the judge has a discretion to order that the representation be admitted in evidence when undue delay or expense would otherwise be caused or, it would not for any reason be inexpedient in the interests of justice to admit the representation.<sup>9</sup>

7. In criminal trials, a representation admitted under ss. 81B, 81C or 81D is to be read to the jury. However, it is not to be made available to them as an exhibit unless the judge is of the opinion that the contents of the representation are so complex that the representation could not reasonably be comprehended by members of the jury without reading it for themselves.<sup>10</sup>

8. Section 81J provides for the circumstances in which may be given impeaching the credit of the person who made the representation admitted in evidence by virtue of ss . 81C or 81D.

### **Business records**

9. Provision is made in s.40A of the *Evidence Act 1910-1977* for the admission of business records in both civil and criminal proceedings.

10. Section 40A provides that where a memorandum or record is made in the regular course of a business at or about the time of the occurrence of the act, matter, or event recorded and, the source of information, the method and time of preparation of the memorandum or record were such as to indicate its trustworthiness, the memorandum or record is admissible in evidence as proof of the facts stated therein. The court has a discretion to reject the document if the interests of justice would not be served by its admission.<sup>11</sup> There is also provision for

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<sup>7</sup> Id., s.81H(1).

<sup>8</sup> Id., s.81H(2).

<sup>9</sup> Id., s.81N.

<sup>10</sup> Id., s.81P.

<sup>11</sup> Id., s.40A(2).

the admission of documents relating to the transportation of persons or goods.<sup>12</sup> The Tasmanian Evidence Act has no specific provision relating to the admissibility of statements produced by computers.

11. In 1978 the Law Reform Commission of Tasmania recommended that provisions along the lines of ss.14CD-14CU of the *Evidence Act 1898-1979* (NSW) should be enacted in Tasmania.<sup>13</sup>

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<sup>12</sup> Id., s.81Q.

<sup>13</sup> *Report and Draft Bill Relating to the Admissibility of Computer Data in Evidence* (1978).

**APPENDIX XII**  
**THE LAW OF THE COMMONWEALTH OF AUSTRALIA**

In any proceeding before the High Court or any court, other than a court of a Territory, created by the Commonwealth Parliament business records are admissible under ss. 7A-7S of the *Evidence Act 1905-1979* in circumstances similar to those applicable to business records in New South Wales.<sup>1</sup> The Act does not contain any exceptions to the hearsay rule similar to ss.79B to 79E of the *Evidence Act 1906-1979* (WA).

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<sup>1</sup> See Appendix VII, paragraph 8 to 15.

## APPENDIX XIII

### THE LAW IN NEW ZEALAND

1. There is provision in New Zealand for the admissibility of documentary out-of-court statements in both civil and criminal proceedings.<sup>1</sup> In civil proceedings documentary out-of-court statements are admissible in circumstances similar to those provided in s.14B(1) to (5) of the *Evidence Act 1898-1979* (NSW).<sup>2</sup> In criminal proceedings there is provision for the admissibility of business records in circumstances similar to s.79E of the *Evidence Act 1906-1979* (WA).<sup>3</sup> There is no specific provision for the admissibility of computer records.

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<sup>1</sup> The Torts and General Law Reform Committee of New Zealand has recommended that the circumstance in which documentary out-of-court statements should be admissible be extended: *Hearsay Evidence* (July 1967). A Bill based on this report and reports of the Committee in 1972 and 1977 was introduced in October 1979 and referred to the Statute Revision Committee for study.

<sup>2</sup> *Evidence Amendment Act 1945* (NZ), ss.2-4. See Appendix VII, paragraphs 1 to 5 for a discussion of the New South Wales provision.

<sup>3</sup> *Evidence Amendment Act 1908-1977* (NZ), s.25A. Inserted by s.2 of the *Evidence Amendment Act 1966*.

**APPENDIX XIV**  
**THE RECOMMENDATIONS OF THE LAW**  
**REFORM COMMISSION OF CANADA**

**Introduction**

1. In 1975 the Law Reform Commission of Canada submitted a report, including a draft code, on the law relating to evidence.<sup>1</sup>

**Recorded information**

2. The Commission recognised that the exceptions to the hearsay rules created at common law and by statute enabling the admission of recorded information are founded upon simple necessity. The Commission recommended that recorded information kept in the course of a regularly conducted activity should be admissible. The Commission said:<sup>2</sup>

“Ultimately, most of the exceptions created for what is often referred to compendiously as business records are founded upon simple necessity. Many business transactions are so complex that it would be prohibitively costly if not impossible to call all the witnesses necessary to reconstruct the transaction from persons with firsthand knowledge. In many cases, of course, the records will be highly reliable. This is particularly true of strictly business records. They are made in the same fashion habitually and systematically, errors are likely to be detected by others relying on the record, and the entrant is likely to be very careful about the accuracy of the record since his job may depend upon it. However, even under the present law business records are admissible as hearsay evidence even though these safeguards are not present. The necessity of providing a convenient method of proving certain transactions or events simply outweighs the objections to reliability.

The proposed exception retains the essential underlying safeguards of reliability provided by the present law, but at the same time consolidates and greatly simplifies the many hearsay exceptions dealing with the matter, and does away with many of the requirements of the present law that do not add appreciably to the reliability of the record. Thus, for instance, the word ‘business’ is not used in the section, the person making the record does not have to be ‘under a duty’, and the statements made on the record are admitted whether they are statements of an act, event, condition, opinion, or diagnosis, so long as they are otherwise admissible. The conditions ensuring the reliability of the record are that it was originally made at or near the time of the matter recorded, that the person making the record or the person who supplied him with the information had personal knowledge, and that the record was made in the course of a regularly conducted activity”.

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<sup>1</sup> Law Reform Commission of Canada: *Evidence* (1975).

<sup>2</sup> *Id.*, at 72-73

3. The Commission therefore recommended that statements made in the course of regularly conducted activities should be admissible.<sup>3</sup>

“... 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”.

#### **Absence of a record or entry**

4. The Commission was of the view that there may be situations in which a record of a regularly conducted activity is silent on a matter of which a record would normally have been kept. The Commission said:<sup>4</sup>

“The absence of the record is clearly relevant as tending to prove that the matter did not take place.”

The Commission therefore recommended that evidence should be admissible to show:<sup>5</sup>

“... 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”.

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<sup>3</sup> Id., at 27, clause 31(a).

<sup>4</sup> Id., at 74.

<sup>5</sup> Id., at 27-28, clause 31(d).