

Admissibility in Evidence of Computer Records and Other Documentary

Terms of Reference

In 1971, the Committee 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.¹ It was also asked to consider whether ss 79B–79E of the *Evidence Act 1906* (WA), which relate to the admissibility of documentary statements, should be revised in view of reforms made in other jurisdictions.

Background of Reference

At common law, the hearsay rule permits only statements made by persons actually testifying in court as to events within their personal knowledge, to be admissible in court proceedings as evidence of the facts asserted. Although there are a number of common law and statutory exceptions to this rule, the common law exceptions would not normally cover computer records and there was doubt whether the statutory exceptions were sufficiently wide to ensure their admissibility.

The Committee was asked to consider the reference in light of the recommendations of the Victorian Chief Justice's Law Reform Committee concerning the admissibility in court proceedings of records produced by computers, and related matters.² The Commission took over the reference from the Committee upon its inception in January 1973.³

Nature and Extent of Consultation

In May 1978, the Commission issued a working paper to inform the public of the issues involved in the project and to elicit relevant comment. The Commission received comments on the working paper from the Associated Banks in Western Australia, the Bureau of Consumer Affairs the Insurance Council of Australia and the Law Society of Western Australia.

Commission staff engaged in discussion with a number of suppliers and users of computers in order to gain an understanding of the operation and general applicability of computers. These discussions also cast light upon the extent to which computers were being used in Western Australia to record, store, process and communicate information. After extensive consultation and review of the law in other jurisdictions, the Commission submitted its report to the Attorney-General on 17 July 1980.⁴

Recommendations

It was the Commission's opinion that the existing law should be clarified and brought into accord with modern conditions by, amongst other things, providing a wide definition of "document". In summary, the Commission recommended that:

- 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.
- 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 or she is dead;
 - (b) he or she is unfit by reason of physical or mental condition to attend or testify as a witness;

¹ Research on this project assisted the Commission in completing its report on privacy. See Law Reform Commission of Western Australia, *Privacy*, Project No 65(II) (1990). Part I of this project was withdrawn in 1986. Part II considered the confidentiality of medical records and medical research.

² *Evidence (Documents) Act 1971* (Vic).

³ The Law Reform Committee of Western Australia was formally reconstituted as the Law Reform Commission of Western Australia on 19 January 1973.

⁴ Law Reform Commission of Western Australia, *Admissibility in Evidence of Computer Records and Other Documentary Statements*, Project No 27(I) (1980).

Statements

- (c) he or she is out of the state and it is not reasonably practicable to secure his or her attendance;
 - (d) all reasonable efforts to identify or find him or her have been made without success;
 - (e) no party to the proceedings who would have the right to cross-examine the person requires him or her to be called as a witness;
 - (f) having regard to the time which has elapsed since he or she made the statement and to all the circumstances he or she 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 have been caused by calling him or her as a witness; or
 - (h) he or she is compellable to testify but refuses to be sworn.
- 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 and used for the purpose of recording, measuring, counting or identifying information, not being information based on a statement made by any person.
 - Provision should be made for the following safeguard and ancillary provisions:
 - (a) weight to be attached to the evidence;
 - (b) credibility of the person responsible for the statement;
 - (c) corroborative evidence;
 - (d) discretion to exclude a statement;
 - (e) statements made or recorded for the purpose of or in contemplation of criminal proceedings;
 - (f) withholding documents from a jury;
 - (g) inferences;
 - (h) production of documents in court; and
 - (i) production of a medical certificate.
 - Express provision should be made for the admissibility of evidence of the absence of a record or entry. For example, a periodic rent payment would be admissible to prove that a particular event of that description did not happen.
 - Provisions relating to bankers' books be amended so as to make clear that they are merely a means of facilitating the production in court of copies of bankers' books.
 - 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.
 - As a mere visual inspection of computer tapes, disks or cards would be useless, the Commission recommended that the rules of court should make provision for the inspection of any such document by a print-out in a legible form.

A comprehensive record of the Commission's recommendations may be found at pages 15–36 and in Appendix II of its final report .

Legislative or Other Action Undertaken

In July 1985, the Attorney-General announced that the government had approved the drafting of legislation to address the recommendations made in this report.⁵ In 1987, the *Evidence Amendment Act 1987 (WA)* was enacted to implement the Commission's recommendations.⁶

⁵ JM Berinson, Attorney-General (WA), Media Statement (11 July 1985).

⁶ Implementation of the Commission's recommendations was discussed in the second reading speech, see Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 September 1987, 3724 (Mr Pierce, Leader of the House).