



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 27

**Admissibility in Evidence of Computer
Records and other Documents**

WORKING PAPER

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

The Commissioners are –

Mr. N.H. Crago, Chairman

Mr. E.G. Freeman

Mr. D.K. Malcolm.

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Telephone: 325 6022).

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PREFACE

The Law Reform Commission has been asked to consider what provision should be made for the admissibility of records produced by computers and the admissibility of other documents.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms (with reasons where appropriate) on individual issues raised in the working paper, on the paper as a whole or any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 21 July 1978.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

CHAPTER 1 - TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on what provision, if any, should be made for the admissibility in court proceedings of records produced by computers. The Commission has also been asked to consider whether ss.79B to 79E of the *Evidence Act 1906*, which relate to the admissibility of documentary out-of-court statements in general, should be revised in view of reforms made in other jurisdictions.

1.2 Because of the emphasis given in the terms of reference to computer records, the Commission's approach in this paper is to focus attention primarily on the problems associated with the admissibility of those records. However, since the reference extends beyond this aspect, the paper also considers the question of the admissibility of other sorts of records and documentary statements.

Initial research and consultations

1.3 In preparing the paper the Commission received assistance from the Branch Manager in Western Australia of IBM Australia Limited and the Managers of the Financial and Government Group and the Data Centre of NCR Australia Pty. Ltd. They gave the Commission information about the manner in which computers operate and the ways in which they are used in Western Australia to compile business and other records. They also arranged for members of the Commission's research staff to observe a number of computers in operation.

1.4 The Manager of the Electronic Data Processing Centre of the Rural and Industries Bank of Western Australia explained in detail how the bank's computers obtain and process information.

1.5 In September 1976 Mr. P. Sieghart, a member of *Justice* (the British Section of the International Commission of Jurists), and an author of a book on certain legal aspects of computers,¹ attended the 7th Australian Computer Conference in Perth. During that time the Commission discussed with him matters relating to the admissibility of computer records.

¹ *Privacy and Computers* (1976 Latimer).

1.6 The Commission is grateful to all of these people for their assistance and expresses its thanks to them.

1.7 A member of the Commission's research staff, Mr. A.A. Head, attended a national conference on *Computers and the Law* at Monash University in May 1977. Part of this conference was concerned with questions dealing with the admissibility of computer-generated evidence.

CHAPTER 2 - OUTLINE OF THE PROBLEM

General

2.1 Under the common law, the general rule is that only statements made by a person actually testifying in court as to events within his personal knowledge are admissible in court proceedings as evidence of the facts asserted.¹ This is called "the rule against hearsay", or "the hearsay rule". For example, under the common law, it would not be possible for a party to submit the document in which a despatch clerk had noted that he had sent a particular item to a customer, as evidence that the clerk had done so. The document would be hearsay evidence because the assertion made in it would not be made by a witness testifying in court as to his own experience. In order to prove the despatch of the item, therefore, it would be necessary to call the despatch clerk himself to testify as to what he had done. This could be very inconvenient, particularly if the trader's business was Australia-wide. The despatch clerk may be in Brisbane, and the customer in Perth. If the trader wished to sue in Western Australia for non-payment, the hearsay rule would oblige him to bring the despatch clerk to Perth as a witness.

2.2 It is important to emphasise that the rule against hearsay relates to the admissibility of evidence, not to its cogency. The mere admission of an item of evidence does not give it any particular weight. In the example given in the previous paragraph, the trader might in any event wish to call the despatch clerk to give oral evidence, since he might consider that the court would not believe his claim on the mere evidence of the note. However, the hearsay rule would prevent the trader exercising any choice in the matter. At common law, he could not submit the despatch note, whether as an alternative to calling the despatch clerk, or to supplement his evidence.

2.3 The courts have been prepared to admit a number of exceptions to the hearsay rule. For example, statements in public documents, and statements made by persons under a duty

¹ Phipson formulates the rule as follows:

"Former oral or written 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": *Phipson on Evidence* (1970, 11th ed.) at 268.

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 969.

who have subsequently died can be admitted.² However, these exceptions would not normally cover computer and other business records.³

2.4 The obvious inconvenience of the hearsay rule has led legislatures in a number of jurisdictions to provide further exceptions to it. In 1967, the legislature in Western Australia enacted provisions which permit a wide range of documentary statements to be admitted in evidence. These provisions are contained in ss.79B to 79E of the *Evidence Act 1906*.⁴ In the example given in paragraph 2.1 above, it would probably not now be necessary to call the despatch clerk as a witness, since under s.79C(1) and (2) of the *Evidence Act* a document can be admitted as evidence of the truth of its contents without calling the maker of the statement as a witness if he is out of the State and it is not reasonably practicable to secure his attendance.⁵ However, this concession does not apply if the maker is in Western Australia, no matter how far he is located from the court.

² See *Cross on Evidence* (Aus. ed. 1970) at 528 to 537. Although the number of common law exceptions is large, the scope of their operation is narrow. In *Cross on Evidence* at 502 to 585 an attempt is made to list the common law exceptions, although it is conceded that the list may not be exhaustive.

³ One consequence of the decision of the majority (the majority comprised Lord Reid, Lord Morris of Borth-y-Gest, and Lord Hodson, with Lord Pearce and Lord Donovan dissenting) of the House of Lords in *Myers v Director of Public Prosecutions* [1964] 2 All ER 881 appears to be that it is unlikely that any further exceptions to the hearsay rule will be developed at common law and, that those which exist at present will not be extended. Lord Morris said (at 890) :

"Over eighty years ago the speeches of your Lordships' House in *Sturla v Freccia* ((1880) 5 App Cas 623) showed that the law is that as a general rule hearsay evidence is not admissible, and that authority must be found to justify its reception within some established and some existing exception to the rule. Just as no authority could in that case be cited to warrant the reception of the evidence, so also none has been cited in the present case".

It has been suggested that there are dicta of Dixon J. in *Potts v Miller* (1940) 64 CLR 282 which would be "one basis upon which the High Court could build if it were minded to admit computer-generated records subject to such safeguards as it thinks proper": Traill and Craigie, *Evidentiary Uses of Computer Based Information* at 6 (paper delivered at the national conference on *Computers and the Law* held at Monash University in May 1977). However, the High Court may find it difficult to do so in view of *Myers'* case, and because Dixon J. appears to have been merely referring to an established rule for the admissibility of business records as evidence of the financial results of business operations and not as evidence of the facts asserted in the books of account. Dixon J. said (at 303) :

"Little English authority will be found explaining the grounds upon which the books of account kept according to an established system in organised business are receivable in evidence as proof, not of the occurrence of some particular fact recorded or indicated by a specific entry or narration, but of the financial progress or result of business operations conducted on a large scale. Common sense has prevailed and such materials are used in practice without objection".

⁴ See Appendix I.

⁵ Section 79C(2) sets out other circumstances under which it is not necessary to call the maker of the statement as a witness: see paragraph 4.3 below.

Application to computer records

2.5 In the example in paragraph 2.1 above, it is assumed that the note made by the despatch clerk as to the despatch of the item had been kept by the trader. However, if the information had been recorded in a computer, and the document itself subsequently destroyed, the only record would be that stored either directly in the computer itself, or on a disc or tape. In other cases, there may be no originating document at all, the record of order and despatch having been fed directly into a computer. Could a computer print-out containing a statement as to the despatch of the item be admitted as evidence thereof? The answer is by no means clear, and may be different for criminal and civil proceedings.

2.6 Evidentiary problems associated with records kept in or produced by computers can arise at any point, and in a wide variety of legal proceedings. These problems, and others connected with the keeping of records generally, are discussed in Chapter 5 below.

CHAPTER 3 - PRESENT DAY USE OF COMPUTERS

3.1 Government departments, statutory instrumentalities, local bodies and private organisations are making increasing use of computers, to an extent which affects not only the range of records that are kept, but also the manner of creating and maintaining those records. In order to place the problem of computer records in context, the following paragraphs give three examples of the ways in which a computer¹ can be used to compile business or other records.

Banks

3.2 The most sophisticated business system known to the Commission is one used by banks to maintain accounts of customers, for example, current accounts, savings accounts, housing and personal loan accounts. The system employed by the Rural and Industries Bank of Western Australia is typical. During a banking day the bank's computers record information received from various sources. Some information may be received from other bodies, for example, the State Treasury supplies, in the form of a magnetic tape, details of salaries to be credited to the accounts of Government employees who are customers of the bank. There is therefore no written or typed document evidencing the transaction. Cheques drawn by customers of the bank and deposited for payment with other banks are a further source of information. These cheques are exchanged at a clearing house. Customers' cheques are encoded before issue with details of the customer's branch and account number by means of a process called magnetic ink: character recognition (MICR). Once a cheque is received, the amount of the cheque is also encoded and the cheque is passed through an input device called a magnetic ink character reader which senses the encoded information on the cheque and stores that information in the bank's computers.

3.3 Those branches of the bank which have computer terminals connected to the computer may also record details of transactions at the branch involving accounts with the bank, such as deposits and withdrawals, in the computers during a banking day. If a branch is not connected to the computer, for example a country branch, details of dealings at that branch may be forwarded to the computer centre where they are also stored in the computer. During the recording process the information recorded is checked and balanced to control totals.

¹ See Appendix II for a brief outline of the manner in which a computer operates.

3.4 The information which has been received during a banking day is stored in the computer, on a disc. At night the information is sorted and processed against the master ledger, which contains all the accounts of the bank needed by the computer stored on another disc. The various transactions recorded during the day are posted to the relevant account and a new master ledger incorporating the day's transactions is produced on another disc. Each account in the master ledger and the master ledger itself is balanced.

3.5 Various reports may be prepared from the information stored by the computer, such as a report for a branch of transactions processed for that branch during a particular day, or a statement for a customer. These are printed out by the computer using the magnetically stored information. Another method of obtaining human-readable reports is by the production of "microfiche".²

3.6 In the system discussed above the computer is used as an accounting and paper sorting machine and the bank, if necessary, can fall back on the various vouchers (cheques, deposit and withdrawal slips) in order to reconstruct an account. However, this would be both difficult and costly, and with the advent of paperless entries more and more entries will not be evidenced by written documents.

Traders

3.7 Another computer system in use enables a wholesaler to control and record details of the sale and distribution of goods. In this system a master file containing details of a wholesaler's stock, prices, the availability of stock on order and details of customers' accounts is fed into the computer. A customer's enquiry as to the availability and price of an item can be answered by an employee of the wholesaler operating a computer terminal. The computer can also record and supply details of a customer's credit situation and discount entitlement.

3.8 An order can be taken orally over the telephone, without an order form, and fed directly into the computer. The result is that the only record of the order is the entry in the computer. Once an order is fed into the computer the information is distributed so that every file affected by the transaction is updated. The computer then prints out an invoice and a slip

² See Appendix II, paragraph 5.

for the despatch clerk indicating the goods to be forwarded to the customer. The computer can periodically produce statements for the customer, a list of accounts which are overdue and various managerial reports such as reports of stock levels.

Local authorities

3.9 A further computer system, in use by some local bodies, enables information to be fed into a computer relating to properties within the authority's district. The following information may be recorded, either typed on loose-leaf cards, or recorded on a magnetic tape attached to the card: assessment number, name of owner, address, property description (including location, ward and street), current rates, rate arrears, rateable value, date of service of notices. The information can also be recorded on a separate magnetic tape for use in another computer, for example, in the preparation of the books of account of the authority.

3.10 The computer can be used to produce rate notices, overdue accounts and instalment notices.

3.11 The system used by local authorities can also be programmed for use by other bodies for other purposes. For example, the system can be programmed for use by public accountants in order to prepare accounts, such as cash books, balance sheets, profit and loss statements and trading accounts.

General

3.12 Computers are being used more and more to record information and, although there are no figures available to indicate how widely they are used by private enterprise, the Committee appointed by the Western Australian Government to examine the question of privacy and data banks found that twelve percent of records kept by Western Australian Government departments and instrumentalities were recorded on computer files.³ There is no doubt that the question of the admissibility of computer records in court proceedings will assume increasing significance.

³ Report of the Committee appointed to examine the Question of Privacy and Data Banks (WA) (1976), paragraph 62.

CHAPTER 4 - THE LAW IN WESTERN AUSTRALIA

Statutory exceptions to the hearsay rule

4.1 Apart from the common law exceptions to the hearsay rule, ss.79B to 79D and s.79E of the *Evidence Act 1906*¹ provide statutory exceptions to that rule in civil and criminal proceedings respectively. The main features of these provisions are discussed below.

Civil proceedings

4.2 As far as civil proceedings are concerned, a statement² made by a person in a document is admissible in evidence of the matters dealt with by the statement in either of two circumstances. If certain conditions apply,³ the document is admissible if -⁴

- (a) the maker of the statement in the document had personal knowledge of the matters dealt with by the statement; or
- (b) 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 persons who had, or may reasonably be expected to have had, personal knowledge of the matters dealt with in the information they supplied.

4.3 In both of these cases, the maker of the statement must be called as a witness⁵ unless -⁶

- (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.

¹ See Appendix I for text. Provisions relating specifically to the admissibility of bankers' books are discussed below: see paragraphs 4.10 to 4.13.

² This includes a representation of fact or opinion: *Evidence Act 1906*, s.79B(b).

³ See paragraph 4.3 below.

⁴ *Evidence Act 1906*, s.79C(1)(a).

⁵ *Ibid.*, s.79C(1)(b). The object of making this a condition of admissibility is presumably to afford the other party an opportunity of cross-examining the maker of the statement as to the circumstances in which he made it.

⁶ *Ibid.*, s.79C(2).

4.4 The court has a discretion to admit a statement notwithstanding that it is tendered by the party calling the maker of it;⁷ 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.⁸

4.5 The party tendering the statement as 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 it if it would be inexpedient in the interests of justice to admit it.⁹ A further limitation is provided by s.79D(2) which 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 taken into account by the court in estimating the weight to be attached to a statement rendered admissible by s.79C.¹⁰

Criminal proceedings

4.6 The statutory provisions as to the admissibility of statements in documents in criminal proceedings are contained in s.79E of the *Evidence Act 1906*, and are different from those applicable in civil proceedings.¹¹

4.7 In criminal proceedings a statement in a document is admissible if the document is or forms part of a record relating to any trade or business compiled in the course of that trade or business from 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 which they supplied.¹²

⁷ This application of the discretion is difficult to understand because it is a condition of admissibility that the party tendering the statement call the maker of the statement. Possibly it is intended to overcome a common law rule that a previous statement cannot be admitted in examination-in-chief on the application of the party calling the witness: see the English Law Reform Committee, *Thirteenth Report* (Cmd. 2964, 1966) paragraph 8.

⁸ *Evidence Act 1906*, s.79C(3).

⁹ *Ibid.*, s.79C(4).

¹⁰ *Ibid.*, 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 be drawn as to the accuracy or otherwise of the statement, and in particular 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.

¹¹ Section 79E is based on an English provision (*Criminal Evidence Act 1965* (Eng), s.1), which was enacted to overcome the decision made in *Myers'* case.

¹² *Evidence Act 1906*, s.79E(1(a)).

4.8 The statement is only admissible if the person who supplied the information recorded in the document is -¹³

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

4.9 The court has a similar discretion to that in civil proceedings to reject such a statement, notwithstanding that the requirements of the section have been met, if for any reason it appears to be inexpedient in the interests of justice to admit it.¹⁴ There is also a provision relating to weight similar to that referred to in paragraph 4.5 above.¹⁵

Bankers' books

4.10 Sections 79B to 79E of the *Evidence Act 1906* are not the only provisions in that Act dealing with the admissibility of statements in records. Section 89 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. The provision applies to both civil and criminal proceedings. 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".¹⁶ The provision appears to go further and provide that a copy is admissible in evidence of the matters contained in it.¹⁷ However, Windeyer J. has cast doubt on whether the provision is as wide as this.¹⁸

¹³ Ibid., s.79E(1)(b).

¹⁴ Ibid., s.79E(2).

¹⁵ Ibid., s.79E(3).

¹⁶ Windeyer J. in *Elsey v Commissioner of Taxation (Cwth)* (1969) 43 ALJR 415 at 417.

¹⁷ See *Myers v Director of Public Prosecutions* [1964] 2 All ER 881 at 899 and 902.

¹⁸ *Elsey v Commissioner of Taxation (Cwth)* (1969) 43 ALJR 415 at 417.

4.11 Before a copy of an entry in a banker's book can be admitted¹⁹ the following conditions must be fulfilled -²⁰

- (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 officer of the bank.²¹

4.12 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.²²

4.13 Whether or not the provision renders copies admissible as evidence of the truth of the matters recorded, the definition of "bankers' books"²³ may not cover modern methods of recording information. The definition is based on legislation enacted in the United Kingdom in 1879²⁴ and consequently emanates from a time when records were kept in hand-written bound books. Since then banks have introduced loose-leaf ledgers and computers. As has been seen,²⁵ the accounts of a bank may be kept exclusively on computer print-out, microfiche, tapes, cards and discs, or recorded in a computer's memory. As the definition referred to above is in terms of "books" it may not include loose-leaf ledgers or accounts produced as part of a computer process.

¹⁹ 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 proceedings except by order of the Supreme Court: *Evidence Act 1906*, s.93.

²⁰ *Evidence Act 1906*, s.90(1).

²¹ *Ibid.*, s.90(2).

²² *Ibid.*, s.92.

²³ "Bankers' books" is defined in s.3 of the *Evidence Act 1906* as including:

"...ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank".

²⁴ *The Bankers' Books Evidence Act 1879*, 42 and 43 Vict., c.11.

²⁵ See paragraphs 3.2 to 3.6 above.

CHAPTER 5 - PROBLEMS ARISING OUT OF THE LAW IN WESTERN AUSTRALIA

Problems specifically connected with computer records

Civil proceedings

5.1 Section 79C of the *Evidence Act*, which relates to civil proceedings, does not provide specifically for the admissibility of records produced or kept by computers. However, the definition of "document"¹ in s.79B is such as probably to include them. A print-out produced by a computer would ordinarily be described as a document, and therefore no doubt would be included within the definition. However, the definition also includes "...any device by means of which information is recorded or stored...", and it would seem that a computer's internal memory, and discs, tapes, drums, punched cards and microfiche upon which information is stored would also be classed as a "document" for the purposes of the section.

5.2 However, even though the print-out and the devices mentioned are documents for the purposes of s.79C, it is doubtful whether the statements contained in them² would be admissible under that section. A major difficulty is that the section only applies to a statement "made by a person in a document". This does not mean merely that a statement was made by a person which was recorded (by someone else) in a document, but that the person must actually have made the statement in the document himself.³ It is doubtful whether this description could apply to statements contained in print-outs, or on discs or tapes. The difficulty appears to be brought about by attempts to adapt words normally used to describe such simple actions as writing or typing information onto a piece of paper, to complex computer operations, involving several steps, taken perhaps by several persons.

5.3 The following example may highlight the problem. Suppose an order for an item (I) has been taken by A over the telephone from B. A, using a keyboard terminal, feeds the details of the order, namely that "B ordered I at price \$P", into the computer and this information is stored by the computer in its internal memory and then transferred to a disc

¹ *Evidence Act 1906*, s.79B(a).

² Assuming that it is correct to describe information stored in a computer's memory bank, or on a disc, or drum, as a statement 'in' the memory bank or in the disc or drum.

³ See *Barkway v South Wales Transport Co. Ltd.* [1948] 2 All ER 460.

pending processing. The information so recorded is then processed so that the various files kept by the computer are updated (for example B's account would show a debit of \$P for the purchase of I, and the inventory file would show a decrease in the number of items of I that were still in stock).

5.4 Suppose there is a dispute between the employer of A and B as to whether B ordered I at \$P. B may allege that the price agreed upon was lower. The employer may wish to tender a computer print-out showing that B ordered I at price \$P. Is the statement in the print-out admissible as evidence of this fact? Could one say that the statement in the print-out was "made by a person" (which is a requirement of admissibility under s.79C) and, if so, by whom was it made? It is, of course, true that A was responsible for activating the computer to "record", "store" and "process" the information, but it may nevertheless be incorrect to say that A made the statement in the print-out. After all, he may never have seen the print-out or its contents. Even if he had seen it, it seems odd to say that he had "made" it. The difficulty becomes even greater if the information in the print-out is in processed form, for example, a statement as to the total amount owing to A's employer by B for numerous purchases. As an alternative, could it be said that the operator who activated the computer to produce the print-out "made the statement in the document" (i.e. the print-out)? It seems incorrect to describe his action in this way, since his role was simply to activate the computer and he may have no knowledge of the information contained in it.

5.5 Even if it were possible to describe the information in the print-out as being "made by" a person, the statement in the print-out is not admissible under the section unless the person who made it is called as a witness, unless special circumstances apply. This might not only be very inconvenient; it might also be pointless if the "maker of the statement" within the meaning of s.79C is held to be not the original supplier of the information, but the computer's operator who may very well be completely unaware of any of the circumstances surrounding the statement.

5.6 The difficulty would be compounded if an attempt was made to put in as evidence not the print-out, but the actual tape, disc or drum in which the relevant information was stored (these fall within the meaning of "document" in s.79C). Not only would the same problems arise as to the identity of the "maker of the statement" on the tape or disc, but there would be

the further difficulty that the information in that form would be useless because it was illegible.⁴

Criminal proceedings

5.7 Section 79E, which is the relevant section of the *Evidence Act* dealing with criminal proceedings, refers to the "person who supplied the information" in the document, rather than the "maker of the statement" in the document, so that the difficulties associated with that latter phase in the context of civil proceedings do not arise in criminal proceedings. Section 79E does, however, have limitations, although they are not confined to computer records. A document only becomes admissible under the section if the person who supplied the information contained in the document:

"...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."

5.8 The section does not therefore give either the prosecution or the defence an unfettered right to submit a documentary record of a trade or business merely because he wishes to avoid the expense or delay of calling the supplier of the information as a witness. If the supplier is in Australia,⁵ is identifiable, not disabled, and can be reasonably expected to recollect the relevant matters, a party has no right to submit the document in evidence instead of calling the supplier personally.

5.9 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 would not be admissible under the provision as not being made in the course of the trade or business.

⁴ This points to the need, if the statements on these devices are to be made able to be produced in evidence, for rules to be enacted for the information on them to be carried forward on to a print-out similar to those suggested in paragraph 9.7 below in relation to discovery.

⁵ Section 79E speaks of a person being "beyond the seas" which is identical to the phrase used in the English *Criminal Evidence Act 1965*, upon which s.79E is based. Would a person in Tasmania be beyond the seas for the purposes of s.79E?

5.10 The reason for enacting s.79E was the limited one of overcoming the undesirable consequences of the decision of the House of Lords in *Myers v Director of Public Prosecutions*.⁶ In that case the trial judge allowed the prosecution to introduce as evidence records compiled during the manufacture of certain cars alleged to have been stolen. The assemblers of the vehicles compiled the records by copying onto a card accompanying each vehicle the cylinder block number and the engine and chassis numbers. These cards were microfilmed and then destroyed, and the microfilm placed in the manufacturer's records.

5.11 On appeal to the House of Lords it was held, by a majority, that the evidence was inadmissible as hearsay. This ruling was obviously inconvenient, for it meant that the only way the evidence could be introduced in similar cases was through the uncertain recollections of the actual assemblers who would have to be called as witnesses, supposing they could still be identified. As a consequence, the United Kingdom Parliament enacted the *Criminal Evidence Act* in 1965. The Western Australian Parliament followed suit in 1967 by enacting s.79E of the *Evidence Act* which is almost identical to the English legislation. The enactment of the section was not intended as a thorough-going review of hearsay evidence in criminal proceedings.

5.12 A much wider review was undertaken in 1972 by the English Criminal Law Revision Committee.⁷ That Committee proposed that the law in England as to hearsay evidence in criminal proceedings be broadly assimilated to that in civil proceedings. So far,⁸ the recommendations of this Committee have not been implemented.

Other problems

Civil proceedings

5.13 The Commission has identified a number of possible defects in the present law in Western Australia applicable to business records generally.⁹ They are as follows –

⁶ [1964] 2 All ER 881.

⁷ Criminal Law Revision Committee: Eleventh Report, *Evidence (General)* (Cmnd. 4991) paragraphs 224 to 265: see Appendix III, paragraphs 20 to 24.

⁸ As at 31 December, 1977.

⁹ The law in this respect is presently contained in ss.79B to 79D of the *Evidence Act*. Although records are admissible under the common law in some circumstances, the circumstances are severely limited and it is unlikely that a business record could be admitted under them.

- (a) Section 79C adopts the general rule that in order to have the record admitted in evidence, the maker of the statement must be called as a witness if available and if the other party requires it.¹⁰ This condition limits the usefulness of the provision. However, it is doubtful whether calling the maker would in fact be of much use where he does not have personal knowledge of the matters dealt with in the statement. He would be able to give evidence as to the circumstances under which he made the statement, but not as to its truth or falsity. If it is desirable to call someone as a witness in such a case, it would seem better to require the calling of the person who ultimately supplied the information, directly or indirectly, to the maker of the statement, and yet this might be very inconvenient.¹¹
- (b) Unless the maker of the statement had personal knowledge of the matter in the statement, it can be admitted only if he made it in the performance of a duty to record that information. If, for example, the maker is himself the principal in the 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 any 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.¹²
- (c) Section 79C(3)(a) provides that the court has a discretion to admit a statement notwithstanding "that the statement is tendered by the party calling the maker of the statement". Expressed in this way the provision is puzzling. The Commission has already suggested what may be its purpose, namely to avoid an old common law rule restricting admissibility.¹³ 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

¹⁰ Unless the court, in its discretion, admits the statement: *Evidence Act 1906*, s.79C(3).

¹¹ The New South Wales Law Reform Commission did not consider that it was necessary, in the case of business records in civil proceedings, to require, as a condition of admissibility, that any of the persons associated with the making of the record be called as a witness: see paragraph 6.20 below.

¹² Possibly it could be argued that even a sole trader is under a duty to record some information (e.g. that relating to his accounts for taxation purposes): see *Income Tax Assessment Act 1936* (Cwth), s.262A.

¹³ See paragraph 4.4 above, footnote 7.

party attempting to tender the statement may be disadvantaged, particularly if the maker has little or no recollection about it.

Criminal proceedings

5.14 There are also two possible defects in the present law in Western Australia applicable to trade or business records. They are as follows –

- (a) One circumstance in which s.79E can be utilised is where the supplier of the information cannot reasonably be expected to have any recollection of the matters dealt with in the information supplied. It cannot be utilised if the supplier, on an objective test, could reasonably be expected to remember a matter, even if he cannot in fact do so.

- (b) The supplier of the information may be a spouse of the accused or a co-accused, and therefore not compellable.¹⁴ There is no provision in s.79E to admit the statement on the ground that the supplier refuses to give evidence. This defect was pointed out by the English Criminal Law Revision Committee, which recommended that a provision be enacted to make the statement admissible in such a case.¹⁵

¹⁴ See *Evidence Act 1906*, s.8.

¹⁵ Eleventh Report, *Evidence (General)* (Cmnd. 4991, 1972), at 194, clause 34 (2) (c) (iii) .

CHAPTER 6 - POSSIBLE REFORMS: BUSINESS RECORDS

General

6.1 The Commission is of the view that some amendment to the law as to the admissibility of records, particularly business records,¹ would be justified to take account of the ever increasing use of computers in normal record keeping. Computers are generally accepted as a reliable means of keeping records and the Commission considers that, at the least, the legislation should be drawn widely enough to take account of them. Computer records may of course sometimes be inaccurate, whether as the result of accident or design. Errors can occur in designing the 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 any case, it would be seldom that the only available evidence of a transaction would be a computer print-out. And even if it were, the opposing party would without doubt be at pains to point out to the court the dangers involved in relying solely upon it.

6.2 It is true that it may sometimes be more difficult to throw doubt upon the accuracy of a computer record than on other business records, although it must be remembered that mere admissibility does not bestow any particular degree of weight upon a record and that it is for the producer of the record to show that it is to be believed. However, it seems likely that standard questions will come to be formulated, derived from a detailed understanding of computers, to which the producer of the record must supply convincing answers before the record is accepted as satisfactory evidence. In addition, statutory safeguards could be provided, such as the requirement that notice of an intention to produce a computer-generated record be given to the other party. This and other possible safeguards such as the enactment of guidelines as to the weight to be accorded to the evidence and the provision of a general exclusionary discretion are discussed in Chapter 8.

¹ In this paper the Commission Uses the term "business" in the wide sense used in the *Evidence Act* of New South Wales, so as to include –

- (a) any business, 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 Western Australia or elsewhere; and
- (b) public administration of the Commonwealth, including a Territory of the Commonwealth, a State or any country, carried on in Western Australia or elsewhere: cf. *Evidence Act 1898* (NSW) , s.14CD(1) .

6.3 No doubt in many cases computer and other records are admitted in evidence without objection as a matter of course, at any rate in civil proceedings, even though, technically speaking, they are outside the conditions of admissibility laid down in ss.79C to 79E of the *Evidence Act*. This is no doubt because it is not interests of the other party to demand their exclusion. However, it is always open to a party to object to the admission of such records and a party's manner of presenting his evidence may be influenced by the fear that objection could be taken. It therefore seems preferable to bring the law into line with current practice, whenever that can properly be done without unduly jeopardising the interests of a litigant.

Abolition of the hearsay rule

6.4 One possible change that could be suggested is the complete abolition of the hearsay rule. The English Law Reform Committee has given the following three reasons for the hearsay rule:²

- "(a) the unreliability of statements, whether written or oral, made by persons not under oath nor subject to cross-examination;
- (b) the desirability of the "best evidence" being produced of any fact sought to be proved; and
- (c) the danger that the relaxation of the rule would lead to a proliferation of evidence directed to establishing a particular fact."

The Committee then went on to set out five disadvantages of the hearsay rule as follows:³

- (1) it results in injustice where a witness who could prove a fact in issue is dead or unavailable to be called;
- (2) it adds to the cost of proving facts in issue which are not really in dispute;
- (3) it adds greatly to the technicality of the law of evidence;
- (4) it deprives the court of material which would be of value in ascertaining the truth; and

² Thirteenth Report *Hearsay Evidence in Civil Proceedings* (Cmnd. 2964, 1966), paragraph 7.

³ *Ibid.*, paragraph 40.

- (5) it often confuses witnesses and prevents them from telling their story in the witness-box in the natural way.

6.5 Suggestions have in fact been made from time to time to abolish the hearsay rule. For example, in 1971 the then Chief Justice of Tasmania said:⁴

"In principle there is much to support the view that all evidence which is rationally probative of an issue ought to be admissible so long as a judge finds it to be sufficiently reliable to go to a jury or to be acted upon by himself - in other words, we should substitute for rules of evidence a standard of reasonable reliability".

6.6 However, although the hearsay rule has been criticised, the Commission is unaware of any common law jurisdiction where it has been completely abolished, so as to permit all statements, whether in documents or not and whether or not they are first or second-hand hearsay and no matter what the occasion was in which they were made, to be admitted as evidence tending to establish the truth of what was said. The direction of reform seems to be towards limiting the scope of the hearsay rule in particular areas and providing safeguards where it has been modified or excluded. The Commission does not consider that it is within its terms of reference⁵ to canvass the complete abolition of the hearsay rule.

6.7 Nevertheless, the terms of reference do encompass the question whether the rule should be excluded in the limited case of computer and business records, so that such a record would be admissible upon mere production and proof that it was a computer or business record. The arguments in favour of the hearsay rule generally do not appear to apply with the same force in regard to these records, as distinct from other "out of court" statements. The Commission therefore welcomes comment on the question whether the hearsay rule should be excluded in the case of computer and other business records in civil and criminal proceedings.⁶ If this were to be done, there may be a need to provide a residual safeguard by giving the court a discretion to exclude such records in special circumstances. However, the uncertainty created by such a provision might tend to destroy the purpose of relaxing the rule since a party might be reluctant to build his case upon it in case the court's discretion was exercised against him.

⁴ The Tasmanian Law Reform Committee, *Law of Evidence - The Hearsay Rule*, (working paper, 1971) at 2.

⁵ See paragraph 1.1 above.

⁶ The Commission is not aware that this has been done elsewhere.

Modification of the hearsay rule: civil proceedings

6.8 Assuming that a simple exclusion of the hearsay rule were not considered desirable the question arises whether more limited changes should be introduced. In discussing this question consideration is first given to possible reforms of the law in civil proceedings. Possible changes in regard to criminal proceedings are discussed in paragraphs 6.24 to 6.29 below.

Computer records: first approach

6.9 One approach is that adopted in England, Victoria, South Australia, Queensland and the Australian Capital Territory⁷ where specific provision is made for the admissibility of computer records, leaving other business records to be dealt with under legislation broadly similar to ss.79B to 79D of the *Evidence Act 1906* of this State.

6.10 The argument in favour of this approach is that the nature of computer records is such as to justify the enactment of legislation focusing expressly upon the conditions relating to their admissibility. This would help to ensure that the provisions deal adequately with computer-generated records. One special difficulty is that such records may not be in a form which is intelligible to the human senses. Another problem is that of testing the reliability of a record kept or produced by a computer. Computer records are kept or produced as the result of a complex operation involving the collection of data, the feeding of such data into a computer, the processing of the data (which involves a programme of operations), the storage of information, and finally the retrieval of information. It could be argued that special rules are required to deal with this complexity.

6.11 The jurisdictions in Australia which have adopted this approach seem to have taken the English legislation dealing with computer records as a model. The English legislation

⁷ England: see Appendix III, paragraphs 10 to 12.
Victoria: see Appendix IV, paragraphs 5 and 6.
South Australia: see Appendix VI, paragraphs 7 to 12.
Queensland: see Appendix VII, paragraph 4.
Australian Capital Territory: see Appendix VIII, paragraphs 4 and 5.

provides that a statement produced by a computer⁸ is admissible in civil proceedings⁹ if all the following conditions relating to the statement and the computer are satisfied -¹⁰

- (a) The document containing the statement was produced by the computer during a period over which it 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) 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) 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.
- (d) The information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

The definition of "document" is wide¹¹ and includes not only a written print-out but also a record on a disc, tape, card or other device. The definition of a "computer" is also wide and includes "any device for storing and processing information", so that even a tape recorder may come within the definition. However, even if it did it would be necessary to fulfil conditions (a) to (d) above before the information on the tape could be admitted in evidence.

6.12 The English legislation contains a number of ancillary provisions applicable to computer records.¹² Perhaps the most significant of these is that relating to rules of court which provide further conditions to be fulfilled and a procedure to be followed before a statement produced by a computer is admissible.¹³ A system of notice and counter-notice is provided by the rules of court and appears to fulfil two purposes. First, it ensures that a party who wishes to adduce a statement produced by a computer does not surprise the other party at the trial. The other party can assess the value of the statement and, if necessary, make preparations to challenge the statement. He is empowered to serve a notice on the party

⁸ The section appears to apply to information stored or processed by a computer bureau: see *Civil Evidence Act 1968*, s.5(5)(b).

⁹ The Criminal Law Revision Committee in its Eleventh Report, *Evidence (General)* (Cmnd. 4991, 1972) at paragraph 259 recommended that statements produced by computers should be admissible in criminal proceedings in circumstances similar to those in which they are admissible in civil proceedings. *Civil Evidence Act 1968*, s.5(2).

¹⁰ See Appendix III, footnote 17.

¹¹ See Appendix III, paragraphs 13, 14, 17 and 18.

¹² See Appendix III, paragraphs 17 and 18.

¹³ See Appendix III, paragraphs 17 and 18.

wishing to adduce a statement produced by a computer requiring him to call as witnesses certain persons associated with or responsible for the compilation of the record such as the manager of the data processing centre.¹⁴ Second, it enables certain questions relating to the admissibility of the record and the calling of witnesses to be dealt with and disposed of before the trial.¹⁵

6.13 In Australia, the major differences from the English model are as follows –

In Victoria -

- (a) the provision applies to criminal proceedings as well as civil proceedings;
- (b) the legislation does not provide for the making of rules of court;
- (c) the legislation gives the court a discretion to reject a statement if it appears to be inexpedient in the interests of justice to admit it, notwithstanding that the requirements of the section have been satisfied.

In Queensland -

- (a) the legislation does not provide specifically for the making of rules of court;
- (b) the legislation gives the court a discretion to reject a statement if it appears to be inexpedient in the interests of justice to admit it, notwithstanding that the requirements of the section have been satisfied.

In South Australia -

- (a) there is a more precise definition of a computer;
- (b) the conditions of admissibility are more detailed.

In the Australian Capital Territory -

- (a) the court has a discretion to refuse to admit a document if it has reason to doubt the accuracy or authenticity of the document;

¹⁴ A person wishing to adduce a statement produced by a computer must serve a notice of that intention on the other parties: *Rules of the Supreme Court* (Eng), Order 38 rule 21. The notice must contain certain particulars, including particulars of persons associated with or responsible for the compilation of the statement: see *Rules of the Supreme Court* (Eng), Order 38 rule 24(1). The other parties may serve a notice on that party requiring him to call any person named in the notice: *Rules of the Supreme Court* (Eng), Order 38 rule 26(1).

¹⁵ See *Rules of the Supreme Court* (Eng), Order 38 rule 27.

- (b) there is no provision for the admissibility of a certificate of a person in a responsible position in relation to the operation of the computer and the management of the relevant activities.¹⁶

6.14 If the English approach were to be adopted a number of specific questions arise for consideration. The first is whether the conditions for the admissibility of computer records referred to in paragraph 6.11 above are satisfactory. It may be considered that these conditions are unduly restrictive. For example, condition (a) requires that the computer was used *regularly* to store or process information for the purposes of any activity regularly carried on. It could be argued that infrequent use of a computer for such a purpose should also qualify. Condition (b) requires information of the relevant kind to have been regularly supplied to the computer in the *ordinary* course of that activity. It could be argued that the information should be admissible even though it was supplied outside the ordinary course of activities.

6.15 The second question is whether the conditions for admissibility specified in paragraph 6.11 above are matters which should go to weight and not to admissibility. For example, condition (c) requires that the computer was operating properly or, in so far as it was not, it was not such as to affect the production of the document or the accuracy of its contents. It is arguable that the question of whether or not a computer was operating properly at a material time is really a question affecting weight. If it is shown that a document was produced at a time when the computer was not operating properly this would be a reason for according little weight to it.

6.16 In England a person who is in a responsible position in relation to the operation of a computer or the management of the activities carried on by the body or individual may give a certificate identifying the document containing the statement, describing the manner in which it was produced, and dealing with the matters relating to the conditions of admissibility referred to in paragraph 6.11 above. Where such a certificate is given it is evidence of any matter stated in it. Assuming legislation specifically applying to computer records is to be enacted in this State, the question which would arise is whether provision should be made for a similar certificate. The adoption of the use of such a certificate would provide a convenient means of giving evidence on the matters covered by the certificate.

¹⁶ See paragraph 6.16 below.

Computer records: second approach

6.17 The second approach is to deal with business records as a whole, whether they are produced by a computer or other means. This was the solution adopted in New South Wales.¹⁷

6.18 The argument in favour of this approach was set out by the Law Reform Commission of New South Wales as follows:¹⁸

“...most business records can be kept by the use of a computer or by other means. There is no justification for imposing safeguards of reliability for records kept by use of a computer which differ from those applicable to records kept by other means. There should be only one provision for the admission of statements in business records expressed in terms which include records kept by the use of a computer”.

6.19 The legislation in New South Wales substantially adopts the recommendations of the New South Wales Law Reform Commission.¹⁹ The Commission recommended that the following business records should be admissible -

- (1) A record made in the course of or for the purpose of a business, if made by a qualified person having personal knowledge of the facts referred to in it.²⁰
- (2) A record which reproduces or is derived from information in a record made by a qualified person in the course of or for the purpose of a business, or information automatically recorded and not based on information supplied by any person.²¹ A record kept or produced by a computer is admissible under this category, as "derived" means:²²

"...derived, by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures".

¹⁷ See Appendix V, paragraphs 8 to 15.

¹⁸ *Evidence (Business Records)*, working paper, paragraph 202.

¹⁹ Law Reform Commission of New South Wales, *Evidence (Business Records)* (LRC 17) The Commission's recommendations were enacted by an amendment to the *Evidence Act 1898*: see *Evidence (Amendment) Act 1976*.

²⁰ See Appendix V, paragraph 10.

²¹ *Ibid.*

²² *Evidence Act 1898* (NSW), s.14CD(1).

- (3) A record in a business system designed to keep a record of the happening of all events of a particular description.²³

6.20 The New South Wales Law Reform Commission recommended that it should not be a requirement of admissibility that any of the persons associated with the production of a record be called as a witness. The Commission said:²⁴

"We think that experience indicates that in the great majority of cases in which a party would wish to rely upon a statement in a business record as evidence of the matter stated, some or all of the following circumstances would be present:

- (1) The statement would be reliable evidence of the matters dealt with by it; it might in fact be the best evidence.
- (2) The fact or expert opinion which it is sought to prove would not be the subject of bona fide dispute.
- (3) The statement would be unlikely to be the only evidence of any fundamental fact in issue in the proceedings.
- (4) The persons who made the statement or supplied the information from which it was made would either have no recollection of the matters recorded or would not be able to give any further or better evidence than that provided by the statement.
- (5) It would be difficult to identify the persons who made the statement or supplied the information for it or to prove that such persons cannot be identified.
- (6) If such persons can be identified, they would be numerous or engaged in important work and it would be a hardship to bring them to court, both to the party calling them and to the business in which they are engaged."

²³ See Appendix V, paragraph 12.

²⁴ *Evidence (Business Records)* (LRC 17), paragraph 51.

The Commission went on to say:²⁵

"Each party to litigation is anxious to win the case and ordinarily calls the most persuasive evidence available. We think that experience indicates that in nearly all cases in which a fact can be proved either by the testimony of a witness who is available, and by a statement in a business record, and the fact is of any importance in the proceedings, the witness will be called if it is practicable to do so. He will be called either because oral testimony will carry the most conviction in the mind of the tribunal of fact, or to avoid damaging comment on the failure to call a relevant witness, or to avoid any risk that the statement may be rejected or excluded pursuant to the safe-guard mentioned in paragraph 35(2)".

The Commission recognised that, for tactical reasons, a party might rely on a business record without calling an available witness who could assist the court.²⁶ Consequently, the Commission recommended that a court should have a discretion to reject a statement otherwise admissible. The Commission said that this safeguard should:²⁷

"...make a party hesitate not to call available oral evidence but rely solely on a business record when such oral evidence would be, or might be thought to be, likely to assist the court".

Other business records

6.21 One advantage of adopting the New South Wales approach is that the legislation there deals in a comprehensive way, not only with computer records, but with business records generally. If, on the other hand, the first approach is adopted whereby legislation is enacted dealing specifically with computer records, the question would remain of what to do in regard to the admissibility of other business records. At present they are admissible under the conditions laid down in ss.79B to 79D of the *Evidence Act*. One possibility is to leave unaltered these sections to deal with this class of business record. However, the Commission has put forward a number of possible criticisms of these provisions, the principal one being that admissibility depends on calling the maker of the statement as witness, if available.²⁸ The New South Wales approach does not have this requirement. Another possibility is to revise ss.79B to 79D along the lines of the Victorian legislation.²⁹ In the Victorian legislation, the

²⁵ Ibid., paragraph 52.

²⁶ Ibid., paragraph 53.

²⁷ Ibid.

²⁸ See paragraph 5.13(a) above.

²⁹ See Appendix IV, paragraphs 3 to 6.

emphasis is placed on the ultimate *supplier* of the information (who is to be called if available) rather than the maker of the statement, who may in fact have no first-hand knowledge of the facts.³⁰ A further possible alternative is the adoption of a provision similar to that enacted in England, where the ultimate supplier of the information, any intermediate supplier, and the maker ("compiler") are to be called as witnesses if the other party requires it.

General

6.22 The Commission at this stage has no firm view on which approach to adopt to the admissibility of business records in civil proceedings, and welcomes comment.

Absence of a record or entry

6.23 The Commission suggests that, whatever approach is adopted in respect of computer or other business records the law should ensure that, provided all the conditions of admissibility or business records are met, a record in a business 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.³¹

Modification of the hearsay rule: Criminal proceedings

6.24 Records "relating to any trade or business", including those kept or produced by a computer, are at present admissible in criminal proceedings under s.79E of the *Evidence Act 1906*, though only in limited circumstances.³² Whatever the approach taken to the admissibility of computer and other business records in civil proceedings a question which arises for consideration is whether such records should be admissible in criminal proceedings in similar circumstances.

³⁰ See paragraph 5.13(a) above.

³¹ Such a provision is included in the New South Wales legislation: see Appendix V paragraph 12. The Law Reform Commission of New South Wales pointed out that evidence of the absence of a record may not in fact be hearsay and therefore would be admissible: *Evidence (Business Records)* (LRC 17) at 46. The cases are unclear and the Commission suggests that the matter should be settled by statute. The Law Reform Commission of Canada recommended that a similar provision should be enacted in Canada: see Appendix XI, paragraph 4.

³² See paragraphs 4.6 to 4.9 above.

6.25 The conditions of admissibility for computer and other records in civil proceedings in England differ from those applicable in criminal proceedings.³³ The English Criminal Law Revision Committee has recommended that records should be admissible in criminal proceedings in circumstances similar to those in which they are admissible in civil proceedings.³⁴

6.26 In New South Wales business records, including those kept or produced by a computer, are admissible in both civil and criminal proceedings. However, in criminal proceedings the statement is not admissible unless each person concerned in making the statement is called by the tendering party if any opposing party so requires, unless he is ill unavailable or cannot be called.³⁵

6.27 It has been suggested that it would be unfortunate if fundamental principles of the law of evidence should differ according to whether or not the issue being tried is civil or criminal.³⁶ However, criminal proceedings do raise special issues. First, it is less likely that a defendant in criminal proceedings will be represented than a party to civil proceedings (with the increasing availability of legal aid this is changing). If a defendant were not represented he would probably not be able to determine whether or not to oppose the admission of a record, or to comment adequately on its weight once admitted. Second, the consequences of criminal proceedings may be said to be more serious, as the liberty of the defendant may be involved. Although some protection is provided by the greater standard of proof in criminal proceedings, it may be argued that the admission of hearsay evidence could have the indirect effect of lowering the standard of proof.

6.28 In criminal proceedings, unlike civil proceedings, there are no rules providing for discovery and inspection of documents. In the case of criminal trials with a jury the trial, once begun, usually continues without adjournment. It would, therefore, usually not be possible for a party surprised by the tendering of a computer record to seek an adjournment to make enquiries as to the manner in which the record was produced. The defence is less likely to be surprised because the prosecution will usually have presented its evidence at the committal

³³ See Appendix III, paragraphs 7 to 11 and 19.

³⁴ Eleventh Report, *Evidence (General)* (Cmnd. 4991), paragraphs 236, 258 and 259.

³⁵ See Appendix V, paragraph 13.

³⁶ See the remarks of the Tasmanian Law Reform Committee, *Law of Evidence - The Hearsay Rule*, working paper at 1. The English Criminal Law Revision Committee held similar views: *Eleventh Report, Evidence (General)* (Cmnd. 4991), paragraph 235.

proceedings. However, the defence usually does not present any of its evidence at the preliminary hearing. An adjournment would appear to be possible in the case of summary trials.³⁷

6.29 Despite these difficulties it is the Commission's tentative view that the conditions for the admissibility of computer and other business records in criminal proceedings should be broadly the same as in civil proceedings. Perhaps in criminal proceedings the court should be given a wide discretion to refuse to admit them if it considers that they may unfairly prejudice the accused.³⁸

³⁷ See *Justices Act 1902*, s.86.

³⁸ cf. paragraph 8.12 below.

CHAPTER 7 - POSSIBLE REFORMS: OTHER DOCUMENTARY STATEMENTS

General

7.1 The discussion in Chapter 6 centred on the admissibility of computer and other business¹ records. Such records are reliable because of the demands imposed in running a business, but errors may occur. The Law Reform Commission of Canada said of business records:²

"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".

Other documentary statements cannot be said to have such a degree of reliability, since they may be made under a wide variety of circumstances and by a wide variety of persons. The question arises whether such statements should be admissible and, if so, in what circumstances.

Civil proceedings

7.2 At present s.79C(1)(a)(i) of the *Evidence Act 1906* makes provision for the admissibility in civil proceedings of documentary statements. Under this provision, a statement is admissible if the maker of the statement had personal knowledge of the matters dealt with by the statement and if he is called as a witness, provided he is available.³ The Commission is not aware of any criticism that has been levelled against the admissibility of a statement in these circumstances, outside of the context of business records.

7.3 Second-hand hearsay statements, that is statements made from information supplied by another person having personal knowledge of the facts asserted, are not admissible unless they were made in the performance of a duty to record information supplied.⁴ Thus the only

¹ "Business" is here being used in a wide sense: see chapter 6, footnote 1.

² Law Reform Commission of Canada, *Evidence* (1975) at 72-73.

³ See paragraphs 4.2 and 4.3 above.

⁴ See paragraph 4.2(b) above.

statements not made in the course of a duty to record information which are admissible are first-hand hearsay statements.

7.4 One matter which arises for consideration in respect of second-hand hearsay statements (other than computer and other business records) is whether to retain the requirement that the maker must have been under a duty to record information. This requirement may be unduly restrictive in the case of business records. However, in dealing with other documentary statements, the Commission considers that it is a reasonable condition of admissibility. Otherwise, all sorts of statements - entries in diaries or letters, possibly based on faulty recollection of what others have said, would be admissible. A duty to record imposes a discipline on the maker of the statement, so as to make it more reliable.

7.5 A suggestion in relation to business records was the abolition of the requirement that the maker of the statement be called as a witness, if available.⁵ It could be asked whether this requirement should be retained for other documentary statements. What purpose does the calling of the *maker* serve when he did not have personal knowledge of the matters contained in the statement? As in the case of business records the Commission suggests that if any person is to be called as a witness, that person should be the supplier of the information rather than the maker of the statement, if he is available. The Commission welcomes comment.

Criminal proceedings

7.6 At present the only documentary statements which are admissible in criminal proceedings under a statutory exception to the hearsay rule are "trade or business" records under s.79E of the *Evidence Act 1906*. There is no provision for the admission of other documentary statements.

7.7 In paragraphs 6.24 to 6.29 above the Commission discussed whether computer and other business records should be admissible not only in civil proceedings but also in criminal proceedings. This question also arises for consideration in respect of other documentary statements. Such statements are not admissible in criminal proceedings in any Australian jurisdiction or in England. However, the Criminal Law Revision Committee recommended

⁵ See paragraph 6.21 above.

that any documentary out-of-court statement⁶ should be admissible in criminal proceedings if the maker is called as a witness unless he cannot be called for one of a number of reasons.⁷ The Committee recognised that there was a case for preserving the rule against hearsay evidence in criminal trials.⁸ However, the Committee recommended that out-of-court statements should be admissible because it was of the opinion that the arguments against the hearsay rule were very strong.⁹

7.8 One particular danger recognised by the Committee was that of manufactured evidence. The Committee said:¹⁰

"The need to provide for safeguards against the use of manufactured evidence caused us more difficulty than did any of the other questions relating to hearsay evidence. ... Many of those who replied to our original request for observations expressed anxiety about this, as did several members during our discussion. We mentioned [paragraph 229] in particular the danger that the defence may seek to produce a statement, said to have been made by a person whom they are unfortunately unable to call as a witness, which, if true, would exculpate the accused".

7.9 As safeguards the Committee recommended that a party should be required to give notice of intention to tender a statement in evidence and that statements made after an accused was charged be excluded. The Committee said:¹¹

"The proposed requirement to give notice will enable the other parties to make inquiries as to the identity of the person supposed to have made the statement, as to whether it is really impossible to call him and as to the contents of the statement. ... The proposed provision excluding altogether a statement supposed to have been made after the accused has been charged may seem drastic. But in our opinion it might well be too dangerous to allow such a statement to be given in evidence at all, even subject to the discretion of the court, because this might well encourage the defence to "present such a statement in the hope that leave would be given".

7.10 The recommendations of the Committee with respect to out-of-court statements have been strongly criticised by the General Council of the Bar of England and Wales.¹² The

⁶ This recommendation extended so as also to include oral out-of-court statements.

⁷ Eleventh Report, *Evidence (General)*, (Cmnd. 4991), paragraph 236.

⁸ *Ibid.*, paragraph 229.

⁹ See paragraph 6.4 above.

¹⁰ Eleventh Report, *Evidence (General)*, (Cmnd. 4991), paragraph 240.

¹¹ *Ibid.*, paragraph 241.

¹² *Evidence in Criminal Cases* (1973), paragraphs 172-198.

Council said that the Committee had not given sufficient weight to the arguments against hearsay. It went on to say:¹³

"In our opinion, if the draft Bill were to be implemented in its present form, it would provide an opportunity to the mendacious to give lying evidence which could not be tested satisfactorily. If such an opportunity were to be provided, we are sure that it would be taken and, if taken, that in a high proportion of cases it would succeed in its purpose".

7.11 The present view of the Commission is that the recommendations of the English Criminal Law Revision Committee in respect to documentary statements, other than computer and other business records, should not be adopted.

¹³ Ibid., paragraph 177.

CHAPTER 8 – ANCILLARY MATTERS

Weight to be attached to evidence

8.1 At present both in civil and criminal proceedings there is provision for the factors to be taken into account in estimating the weight to be attached to a statement which is admitted in evidence.¹ It may be that such provisions are undesirable because the question of the weight to be attached to a particular piece of evidence is a question of fact in each case which will depend on common sense, logic and experience and which cannot be determined by rigid rules. However, provisions such as ss.79D(1) and 79E(3) of the *Evidence Act 1906* may serve a useful purpose as a guide by emphasizing particular factors which should be taken into account in estimating what weight to attach to such a statement.

Inferences

8.2 In both civil and criminal proceedings² 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. This provision enables a court to use a document which has not yet been admitted to determine whether or not it is admissible. For example, a court may be able to infer from a document initialled by A that a statement contained in the document was made by A. Such a provision would appear to be desirable.

Statements made for the purpose of or in contemplation of legal proceedings

8.3 In a sense, all records come into existence for the purpose of legal proceedings, if the need should ever arise. However, some statements may be prepared specifically for or in contemplation of legal proceedings. The Law Reform Commission of New South Wales noted that it is the practice of some government departments and employers to obtain signed statements from employees who witness an accident, and in other cases for statements to be obtained, when litigation is anticipated.³ The Commission recommended that statements prepared specifically for legal proceedings or in contemplation of legal proceedings should

¹ Civil proceedings: *Evidence Act 1906*, s.79D(1).
Criminal proceedings: *Evidence Act 1906*, s.79E(3).
² Civil proceedings: *Evidence Act 1906*, s.79C(4).
Criminal proceedings: *Evidence Act 1906*, s.79E(2).
³ *Evidence (Business Records)* (LRC 17) at 45.

not be admissible as business records,⁴ but under the provisions relating to the admissibility of other documentary statements.⁵ Such a provision would seem to be desirable.

8.4 If a definition of “business” is provided which is wide enough to include the activities of the police force.⁶

“...a statement might be made in a document which becomes part of its records which is relevant to an issue in criminal proceedings. Such a statement might be made, for instance, in the course of investigating the offence in question or of preparing the case for the prosecution. Statements made in the course of a private investigation of an offence might similarly become part of the records of a business and become relevant.”

The Law Reform Commission of New South Wales was of the opinion that such statements would present special dangers and could be unfair to an accused person, and, consequently should be excluded.⁷ Such an approach would also seem to be desirable.

Corroborative evidence

8.5 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 circumstances in which the evidence of a witness must be corroborated, either as a matter of law or practice.⁸ If corroboration is required as a matter of law and the evidence is not corroborated it will be rejected. If corroboration is required as a matter of practice:⁹

"... 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".

8.6 At present, s.79D(2) of the *Evidence Act 1906* provides that for the purpose of any rules 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.

⁴ The exclusion of such records is now provided for by s.14CF(1) of the *Evidence Act 1898* (NSW).

⁵ For example, in Western Australia, s.79C of the *Evidence Act 1906*.

⁶ *Evidence (Business Records)* (LRC 17) at 46.

⁷ *Ibid.* implemented by s.14CG(3) of the *Evidence Act 1898* (NSW).

⁸ See Cross, *Cross on Evidence* (Aus. ed. 1970) at 210-221.

⁹ Edwards, *Cases on Evidence in Australia* (1968) at 221.

This provision preserves the principle that a witness may not corroborate his own evidence. It would appear to be desirable to retain such a provision.

Withholding statements from a jury

8.7 The Law Reform Commission of New South Wales was of the opinion that cases might arise in which it would be undesirable in the interests of a fair trial for documentary evidence to be with a jury during their deliberations.¹⁰ In order to remove doubt as to whether a judge has power to direct what exhibits a jury should have during its deliberations it recommended that a court should have a discretion to withhold a statement from the jury if it appears to the court that the jury might give undue weight to a statement in a document if it had the document with it during its deliberations.¹¹ This recommendation was implemented by s.14CQ of the *Evidence Act 1898* (NSW). Such a provision may be desirable in Western Australia.

Medical certificate

8.8 At present, both in civil and criminal proceedings,¹² a court may act on a medical certificate in determining whether or not a person is fit to attend as a witness. It would appear to be desirable to retain such a provision.

Credibility of the maker of or the person who supplied information contained in a statement

8.9 The Commission has discussed certain circumstances in which a statement would be admissible notwithstanding that the maker of the statement is not called as a witness¹³ or the supplier of information contained in a statement is not called as a witness.¹⁴ Where such a person is called as a witness he may be cross-examined with regard to the accuracy of the evidence he has given and this cross-examination may cast doubt not only on the accuracy of

¹⁰ *Evidence (Business Records)* (LRC 17) at 53. An example might be where the record is of an oral statement by a person. A jury is not given the transcript of oral evidence given at the trial, and it may be prejudicial if it is permitted to take into the jury room oral statements merely because they were contained in a document.

¹¹ *Ibid.*

¹² Civil proceedings: *Evidence Act 1906*, s.79C(4).
Criminal proceedings: *Evidence Act 1906*, s.79E(2).

¹³ See paragraph 7.5 above.

¹⁴ See paragraph 6.22 above.

his evidence but also on his credit.¹⁵ One question which arises for consideration is whether evidence as to the credit of the maker of a statement or the supplier of information contained in a statement should be admitted where that person is not called as a witness.

8.10 It may be desirable to adopt a provision similar to s.55A of the *Evidence Act 1958* (Vic) which provides:

- "(1) Where in any legal proceeding a statement is given in evidence by virtue of section 55, but the person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding –
- (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;
 - (b) any evidence tending to prove that, whether before or after he made that statement or supplied that information, he made another statement or supplied other information (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 (a) or (b) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

- (2) Where in any legal proceeding a statement is given in evidence by virtue of section 55, but the person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding any evidence proving that that person has been guilty of any indictable or other 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 or other offence had denied the fact or refused to answer the question".

Discretion to admit a statement

8.11 It might be that a document would be tendered in evidence even though the conditions for the admissibility of the document have not been fulfilled. For example, the person who supplied the information recorded in a statement may not be called as a witness even though

¹⁵ See Cross, *Cross on Evidence* (Aus. ed., 1970) at 264. At common law there is a general rule that, in order to avoid raising side issues, evidence cannot be adduced to refute a denial by a witness who is being cross-examined as to a matter put to him in order to destroy his credit. Of course, the denial need not be accepted by the court or jury. There are also a number of exceptions to the general rule: *ibid.*, at 275-278.

the statute requires this.¹⁶ There is at present in civil proceedings, a discretion to admit a statement contained in a document notwithstanding that one or more of the conditions of admissibility have not been met.¹⁷ The Commission welcomes comment on whether such a discretion should be retained and extended to criminal proceedings.

Discretion to exclude a statement

8.12 In both civil and criminal proceedings¹⁸ the court has 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". It may be desirable to retain such an exclusionary discretion or perhaps to provide a more specific exclusionary discretion such as that contained in s.14CP(1) of the *Evidence Act 1898* (NSW). That section 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".

Notice provisions

8.13 Another matter which arises for consideration is whether a system of notice and counter-notice should be introduced. In England, in civil proceedings, where a party wishes to tender a statement produced by a computer, any other record or other out-of-court statement it is necessary to give notice of that intention to the other parties to the proceedings. The notice must contain details of the statement, persons connected with the production of the statement,¹⁹ and any allegation that any such person cannot or should not be called as a witness. A person on whom a notice has been served may give a counter-notice requiring that any person referred to in the notice be called as a witness. 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.

¹⁶ See, for example, paragraph 4.3 above.

¹⁷ See paragraph 4.4 above.

¹⁸ Civil proceedings: *Evidence Act 1906*, s.79C(4).

Criminal proceedings: *Evidence Act 1906*, s.79E(2).

¹⁹ In the case of a statement produced by a computer the persons who occupied a responsible position in relation to the activities in which the record was produced, the supply of information and the operation of the computer.

8.14 It is the Commission's tentative view that such a system of notice and counter-notice is desirable in civil proceedings because it would enable the other parties to the proceedings to make enquiries as to the manner in which the statement was produced²⁰ and to be in a position to challenge its accuracy, if necessary, or to assess the weight which should be given to the statement. It might also be thought that these reasons would be equally applicable to criminal proceedings.

²⁰ In order to assist these enquiries it may be necessary to require the party wishing to tender computer-generated evidence to specify in the notice where the computer's programme may be inspected.

CHAPTER 9 - OTHER PROBLEMS

Bankers' books

9.1 In paragraphs 4.10 to 4.13 above the Commission discussed the provisions in the *Evidence Act 1906* relating to bankers' books. Two difficulties were referred to in that discussion. First, it is not altogether clear whether the provisions go beyond the purpose of allowing copies of entries in bankers' books to be tendered in court to avoid the inconvenience of having to tender books in current use to make the copies admissible as evidence of the truth of the statements contained in them.¹ Second, the definition of "bankers' books" may not cover modern methods of recording information such as loose-leaf ledgers and computers.²

9.2 If the sole purpose of the provisions is to allow a copy of entries in bankers' books to be tendered to avoid the inconvenience of tendering the originals it is the Commission's tentative view that the definition of "bankers' books" should be amended to include loose-leaf ledgers and records kept by means of a computer.

9.3 If, however, it is a further purpose of the provisions to render copies of entries in bankers' books admissible in evidence of the matters recorded, it is the Commission's tentative view that whatever provision is made for the admissibility of computer and business records should also apply to bankers' books and that there should be no special provision relating to the admissibility of bankers' books.

The Supreme Court Rules 1971

9.4 The *Supreme Court Rules 1971*, which apply to most civil proceedings³ in the Supreme Court and the District Court,⁴ but not criminal proceedings,⁵ contain a number of provisions which relate to the discovery and inspection,⁶ and the production in evidence of

¹ See paragraph 4.10 above.

² See paragraph 4.13 above.

³ *Supreme Court Rules 1971*, Order 1 rule 3.

⁴ See *District Court of Western Australia Act 1969*, s.87.

⁵ *Supreme Court Rules 1971*, Order 1 rule 3(3).

⁶ *Ibid.*, Order 26.

documents.⁷ There are similar provisions in the *Local Courts Act 1904* which apply to proceedings in local courts.⁸

9.5 Whether or not the rules of court apply to computer tapes, discs or cards will depend on the interpretation of the word "document". The Commission is not aware of any case referring specifically to computer tapes, discs or cards. In Australia it has been held that video tapes⁹ and tape recordings¹⁰ are not documents. In England, however, tape recordings¹¹ and cinematograph film¹² have been held to be documents.

9.6 In those cases in which it has been held that recording materials such as tapes are documents the basis for the decision has been that the materials have been used for the purpose of furnishing or recording information. In *Grant v Southwestern and County Properties Ltd.* Walton J. said that the authorities "...have consistently stressed the furnishing of information - impliedly other than as the document itself - as being one of the main functions of a document".¹³ A difficulty which arose in that case, which would apply to computer tapes, discs and cards, is that information recorded on tapes or film is not intelligible by a person's natural senses. However, it was said that the fact that the tapes and film must be deciphered by the interposition of an instrument or device does not appear to make any difference to the question of whether such recording materials are documents.¹⁴

9.7 If the approach in the English cases were adopted in Western Australia it would appear that computer tapes, discs and cards would be discoverable. It would seem to be desirable to clarify the rules so that these modern means of recording information are discoverable. However, the rules with regard to inspection do not appear to be appropriate as a visual inspection of computer tapes, discs or cards would be useless for the purpose of determining their contents.¹⁵ It would appear to be necessary for the rules of court to make provision for the inspection of such documents by a print-out in human readable form.

⁷ Ibid., Order 36 rule 11.

⁸ *Local Courts Act 1904*, ss.66-68.

⁹ *Nicholls v Mcleay and Herald-Sun T.V. Pty. Ltd.* (1971) 1 SASR 442.

¹⁰ *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 Engwinda Constructions Co.* [1967] QWN 16.

¹¹ *Grant v Southwestern and County Properties Ltd.* [1974] 2 All ER 465.

¹² *Senior v Holdsworth* [1975] 2 All ER 1009.

¹³ [1974] 2 All ER 465 at 469.

¹⁴ Ibid., at 474.

¹⁵ Visual inspection might be useful in determining whether a tape had been interfered with.

Consideration would also need to be given to whether the present means of assessing the costs of discovery and inspection are satisfactory.¹⁶

9.8 Under Order 36 rule 11 of the *Supreme Court Rules 1971* the Court may order the attendance of any person for the purpose of “...producing any writings or other documents named in the order which the Court may think fit to be produced...”. Once again it would seem to be desirable to ensure that computer tapes, discs and cards can be produced and that there is some means whereby they can be deciphered.

¹⁶ See Order 66 rule 47(4) of the *Supreme Court Rules 1971* which provides that “...the costs of obtaining discovery including inspection of documents is in the discretion of the Taxing Officer...”.

CHAPTER 10 - SUMMARY OF QUESTIONS FOR DISCUSSION

10.1 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of this paper, and in particular on the following –

Computer and other business records

- Abolition of the hearsay rule* (1) Should the hearsay rule be abolished in relation to business records?
(paragraphs 6.4 to 6.7)
- Modification of the hearsay rule: civil proceedings* (2) Should specific provision be made for the admissibility of computer records in civil proceedings? If so,
(i) what should be the conditions of admissibility;
(paragraphs 6.9 to 6.11, and 6.14)
(ii) should provision be made for a certificate relating to the conditions of admissibility;
(paragraph 6.16)
(iii) what provision should be made for the admissibility of other business records?
(paragraph 6.21)
- (3) Alternatively, in civil proceedings, should provision be made for the admissibility of business records, whether they are produced by a computer or other means, along the lines of the New South Wales legislation?
(paragraphs 6.17 to 6.20)
- (4) Should provision be made for the admissibility of the absence of a record or entry?
(paragraph 6.23)
- Modification of the hear-say rule: criminal proceedings* (5) What provision should be made for the admissibility of computer records and other business records in criminal proceedings?
(paragraphs 6.24 to 6.29)

Other documentary statements

- Civil Proceedings* (6) Should first-hand documentary statements continue to be admissible in civil proceedings?
(paragraph 7.2)
- (7) In what circumstances should second-hand hearsay documentary statements other than business records be admissible?
(paragraphs 7.3 to 7.5)
- Criminal Proceedings* (8) Should documentary statements other than computer and business records be admissible in criminal proceedings?
(paragraphs 7.6 to 7.11)
- Bankers' books* (9) What provision should be made with respect to bankers' books?
(paragraphs 9.1 to 9.3)
- Ancillary matters.* (10) What provision should be made for the following ancillary matters –
- (a) weight to be attached to evidence;
(paragraph 8.1)
 - (b) inferences;
(paragraph 8.2)
 - (c) statements made for the purpose of or in contemplation of legal proceedings;
(paragraphs 8.3 and 8.4)
 - (d) corroborative evidence;
(paragraphs 8.5 and 8.6)
 - (e) withholding statements from a jury;
(paragraph 8.7)
 - (f) medical certificates;
(paragraph 8.8)
 - (g) credibility of the maker of or the person who supplied information contained in a statement;
(paragraphs 8.9 and 8.10)

- (h) discretion to admit a statement;
(paragraph 8.11)
- (i) discretion to exclude a statement;
(paragraph 8.12)
- (j) notice provisions?
(paragraphs 8.13 and 8.14)

Discovery and production

- (11) Should specific provision be made in the *Supreme Court Rules 1971* for discovery, inspection and production of modern recording documents such as computer tapes, discs or cards?
(paragraphs 9.4 to 9.8)

APPENDIX I

EXTRACTS FROM THE EVIDENCE ACT 1906

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 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 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.

(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 who supplied the information recorded in the statement 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. 58 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 accounts therein recorded.

Proof that book is a bankers' 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 books.

- 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 in 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 may order that such party be at liberty to 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 costs 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 proceeding.

Powers of judge extended to magistrates, etc. 58 Vict., No. 6, s.9. 96. The magistrate of any local court, and any stipendiary magistrate, any justice of the peace on the investigation of complaints of indictable offences, or the chairman of any court of general sessions of the peace may, with respect to any legal proceeding in the court in which he presides, exercise the powers of a Judge under this Act in regard to bankers' books.

APPENDIX II

WHAT IS A COMPUTER?

1. A computer is a device capable of storing, recording and processing¹ 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 programme² 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 device³ 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;

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

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

³ This process is called Magnetic Ink Character Recognition - MICR.

processing information, calculations and logical operations. The main storage device stores 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:⁴

"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

⁴ Sieghart, *Privacy and Computers* (1976 Latimer) at 81.

computer.⁵ Information which has been fed into a computer may be protected by recovery 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:⁶

"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".

⁵ 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.

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

APPENDIX III

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*.¹

2. While the Act commences by abolishing the common law exceptions to the hearsay rule,² so that hearsay evidence is admissible in civil proceedings only where provided 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 opinion³ stated therein of which direct oral evidence would be admissible.⁴ 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.⁵ Where the statement is made otherwise than in a document,

¹ 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).

² Section 1(1) of the *Civil Evidence Act 1968* (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".

³ See *Civil Evidence Act 1972* (Eng), s.1(1).

⁴ *Civil Evidence Act 1968* (Eng), s.2(1).

⁵ See paragraph 18 below.

only direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made is admissible for the purpose of showing what statement was made.⁶

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.⁷ 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.⁸

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.⁹ However, that part of a transcript dealing with a judge's summing-up may be admissible under s.4.¹⁰ 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.¹¹

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.¹² 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

⁶ *Civil Evidence Act 1968* (Eng), s.2(3).

⁷ *Ibid.*, s.2(2) (a).

⁸ *Ibid.*, s.2(2) (b).

⁹ *Taylor v Taylor* [1970] 2 All ER 609 at 614.

¹⁰ *Ibid.*, at 614. Section 4 is discussed in paragraphs 7 to 9 below.

¹¹ *Civil Evidence Act 1968* (Eng), s.2(3).

¹² *Ibid.*, s.4(1).

with in the information supplied¹³ The provision refers to records in general, for example administration records such as hospital records, and not only to trade or business records. In accordance with a recommendation of the Law Reform Committee¹⁴ 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.¹⁵ 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.¹⁶

9. A number of safeguards which apply to statements admissible under s.4(1) are discussed in paragraphs 14 to 18 below.

Statements produced by computers

10. Where direct oral evidence of a fact is admissible, a statement contained in a document¹⁷ produced¹⁸ by a computer¹⁹ is admissible as evidence of any fact stated therein.²⁰ Before such a statement is admitted it must be shown that -²¹

¹³ Ibid.

¹⁴ Thirteenth Report, *Hearsay Evidence in Civil Proceedings* (Cmnd. 2964), paragraph 16.

¹⁵ *Civil Evidence Act 1968* (Eng), s.4(2)(a).

¹⁶ Ibid., s.4(2)(b).

¹⁷ Under s.10(1) of the *Civil Evidence Act 1968* (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".

¹⁸ 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* (Eng), s.5(5)(c).

¹⁹ A "computer" means any device for storing and processing information: *Civil Evidence Act 1968* (Eng), s.5(6).

²⁰ *Civil Evidence Act 1968* (Eng), s.5(1).

- "(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.²² 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.²³

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* (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:

²¹ Ibid., s.5(2).

²² Ibid., s.5(4).

²³ Ibid., 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 1969.²⁴

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.²⁵ The notice must contain details of the statement, persons connected with the statement,²⁶ and any allegation that any such person cannot or should not be called as a witness.²⁷ The reasons which may be advanced for not calling such a person are that the person is:²⁸

"...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".

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.²⁹ If there is a dispute as to whether or not the

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

²⁵ *Rules of the Supreme Court* (Eng), Order 38 rule 21.

²⁶ 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 of store or process information;
- (b) a person who at the material time occupied such a position in relation to the supply of information to the computer, being information which is reproduced in the statement or information from which the information contained in the statement is derived;
- (c) a person who occupied such a position in relation to the operation of the computer during the material period;

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

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

²⁷ *Rules of the Supreme Court* (Eng), Order 38 rules 22, 23 and 24.

²⁸ *Ibid.*, Order 38 rule 25.

²⁹ *Ibid.*, Order 38 rule 26.

person can or should be called as a witness that can be determined before the trial.³⁰ The court has a discretion to admit a statement in evidence, notwithstanding that a notice has not been served under rule, or that a person has not been called as a witness in response to a counter-notice under rule 26.³¹

Criminal law

Present law

19. In criminal proceedings there is provision for the admission of trade or business records in limited circumstances.³² Section 79E of the *Evidence Act 1906* (WA)³³ is similar to s.1 of the *Criminal Evidence Act 1965* (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* (Eng) There is no specific provision in England relating to the admissibility of statements produced by computers.

Recommendation 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* (Eng).³⁴ 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,³⁵ 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

³⁰ Ibid., Order 38 rule 27.

³¹ Ibid., Order 38 rule 29.

³² *Criminal Evidence Act 1965* (Eng), s.1.

³³ See Chapter 4, paragraphs 4.6 to 4.9.

³⁴ Eleventh Report, *Evidence (General)* (Cmnd. 4991), paragraph 224.

³⁵ 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.³⁶

(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.³⁷

(c) Statements produced by computers

23. The Committee recommended that statements produced by computers should be admissible in criminal proceedings³⁸ in circumstances similar to those in which such statements are admissible in civil proceedings.³⁹

(d) Safeguards

24. The major safeguards proposed by the Committee were:⁴⁰

- "(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

³⁶ Eleventh Report, *Evidence (General)* (Cmnd. 4991), paragraph 236, draft Bill, clause 31(1).

³⁷ Ibid., paragraph 236, draft Bill, clause 34.

³⁸ Ibid., paragraph 236, draft Bill, clause 35.

³⁹ See paragraphs 10 to 12 above.

⁴⁰ Eleventh Report, *Evidence (General)* (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 IV

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 provisions relating to the admissibility of business records and statements produced by computers are based on the *Civil Evidence Act 1968* (Eng).¹ However, there is no specific provision for the making of rules of court.²

Documentary out-of-court statements

2. Section 55(1)(a) of the Victorian *Evidence Act 1958* (which applies to any legal proceeding other than a criminal proceeding) is similar to the Western Australian provision referred to in Chapter 4, paragraph 4.2(a). 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 Western Australian *Evidence Act 1906*.³ 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.⁴

Business records

3. In any legal proceeding, where direct oral evidence of a fact be 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,

¹ See Appendix III, paragraphs 7 to 11.

² See Appendix III, paragraphs 17 and 18.

³ See Chapter 4, paragraph 4.3.

⁴ *Evidence Act 1958* (Vic), s.55(7).

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 the proceedings,⁵ 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.⁶

4. The wide definition of "business" contained in s.3(1)⁷ 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.

Statements 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*.⁸ 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.⁹

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.¹⁰ The court also has a discretion, similar to that applicable to computer records referred to in paragraph 6 above, to

⁵ Ibid., s.55(1)(b) and s.55(2).

⁶ Ibid., s.55(6).

⁷ 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".

⁸ See Appendix III, paragraphs 10 to 12.

⁹ *Evidence Act 1958* (Vic), s.55B(7).

¹⁰ Ibid., s.55(4).

reject any statement, otherwise admissible.¹¹ In certain circumstances evidence concerning the credibility of the person who made the statement or supplied the information recorded in the statement is admissible.¹²

Corroborative evidence

8. Section 56 of the *Evidence Act 1958* (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*, 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* (WA)¹³, and books of account (division 10). These have now been amalgamated in ss.58A to 58J of the Victorian *Evidence Act 1958*.

10. In any legal proceeding an entry, or a copy of an entry, in a book of account¹⁴ is prima facie evidence of the matters, transactions and accounts recorded therein.¹⁵

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.¹⁶

¹¹ Ibid., s.55(9).

¹² Ibid., s.55A.

¹³ See Chapter 4, paragraphs 4.10 to 4.13.

¹⁴ A "Book of account" is defined in s.58A of the *Evidence Act 1958* (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".

¹⁵ *Evidence Act 1958* (Vic), s.58B.

¹⁶ Ibid., 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.¹⁷

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.¹⁸

¹⁷ Ibid., s.58D(1) .

¹⁸ Ibid., ss.58F to 58H.

APPENDIX V

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 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.¹

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, 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.²

3. The condition that the maker of the statement must be called as a witness need not be satisfied in certain circumstances.³ 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.⁴ 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.⁵

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.⁶

¹ *Evidence Act 1898* (NSW), s.14B(1).

² *Ibid.*

³ *Ibid.*, s.14B(1) Proviso.

⁴ *Ibid.*, s.14B(2)(a) and (b).

⁵ *Ibid.*, s.14B(2).

⁶ *Ibid.*, 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,⁷ and the corroborative value of such statements.⁸

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

"...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 deliberations.¹⁰

Admissibility of business records

Introduction

8. In 1973 the New South Wales Law Reform Commission submitted a report¹¹ and a draft bill on the admissibility of business records. The draft bill was enacted with only minor alterations by the *Evidence (Amendment) Act 1976*.¹²

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

⁷ Ibid., s.14C(1).

⁸ Ibid., s.14C(2).

⁹ Ibid., s.14B(6).

¹⁰ Ibid., s.14B(7).

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

¹² The Law Reform Commission of New South Wales has since issued a working paper dealing with the rule against hearsay: Law Reform Commission of New South Wales, working paper on *The Rule Against Hearsay* (1976). The proposals discussed in the working paper would not alter these provisions. However, they would alter the law relating to the admissibility of documentary statements discussed in paragraphs 1 to 7 above.

Evidence Act 1958.¹³ However, the Commission concluded that such an approach would have the effect of:¹⁴

"...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:¹⁵

"... [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)¹⁶ 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 document¹⁷ of the fact, is admissible as evidence of the fact¹⁸ 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.¹⁹ The statement must have been made by a "qualified person",²⁰ or reproduce or be derived²¹ from

¹³ See Appendix IV, paragraphs 5 and 6.

¹⁴ *Evidence (Business Records)* (LRC 17), paragraph 4.

¹⁵ *Ibid.*, paragraph 5.

¹⁶ 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.

¹⁷ See *Evidence Act 1898* (NSW), s.14CD(1), "document" includes any record of information and was intended to extend to all things used to record information which have been or may be devised, including a computer.

¹⁸ Section 14CE(2) provides that in so far as s.14CE(1) is concerned "fact" includes opinion.

¹⁹ "Business" is defined as including:

- (a) any business, 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* (NSW), s.14CD(1) .

²⁰ "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* (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

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,²² 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.²³

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:²⁴

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.

²¹ "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 the definition to limit the application of "derived" to "...procedures of an objective nature and to those commonly accepted as accurate although involving some subjective judgment": *Evidence (Business Records)* (LRC 17) at 39.

²² 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, *Cross on Evidence* (Aus. ed. 1970) at 636-645.

²³ *Evidence Act 1898* (NSW), s.14CE(3).

²⁴ *Ibid.*, s.14CG(1) and (2).

- "(i) that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness;
- (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,²⁵ 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.²⁶

(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.²⁷ The court also has a general discretion to reject evidence tendered under Part IIC if its weight is slight, or if its admission will unduly prolong the hearing or it is unfair or misleading.²⁸ 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

²⁵ Ibid., s.14CG(3).

²⁶ Ibid., s.14CS.

²⁷ Ibid., s.14CF(1).

²⁸ Ibid., s.14CP.

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:²⁹

"...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."

Rules of court have not, as yet, been made.

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.³⁰

²⁹ *Evidence (Business Records)* (LRC 17) at 54.

³⁰ *Ibid.*, at 38.

APPENDIX VI

THE LAW IN SOUTH AUSTRALIA

Documentary out-of-court statements

1. In South Australia there is provision¹ for the admission of documentary out-of-court statements in civil proceedings similar to s.14B(1) to (5) of the *Evidence Act 1898* (NSW).² In addition s.45b(1) of the *Evidence Act 1929* (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.³ 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.⁴

2. Moreover, the document is not admissible if the court is of the opinion that the person 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.⁵

Business records

3. Section 45a(1) of the *Evidence Act 1929* (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:⁶

¹ *Evidence Act 1929* (SA), ss.34c and 34d.

² See Appendix V, paragraphs 1 to 5.

³ See *Bates v Nelson* (1973) 6 SASR 149.

⁴ *Evidence Act 1929* (SA), s.45b(2).

⁵ *Ibid.*, s.45b(3).

⁶ *Ibid.*, s.45a(4).

"...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..."

or any reproduction of the document.⁷

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 interests of justice to admit it.⁸

5. There is also a specific provision with respect to the admissibility of documents relating to the transportation of persons or goods.⁹ An apparently genuine "document of a prescribed nature",¹⁰ 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.¹¹ 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.¹²

6. This section enables the admission of evidence such as that which was admitted in *R. v Rice*.¹³ Doubt has been cast on that decision by *Myers'* case.¹⁴ In *R. v Rice* a used airline 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 Report¹⁵ recommended the implementation of legislation based on s.5 of the *Civil Evidence Act 1968*

⁷ Ibid.

⁸ Ibid., s.45a(2).

⁹ Ibid., s.45.

¹⁰ Ibid., s.45(4) "Document of a prescribed nature" means a "...bill of lading, manifest, shipping receipt, consignment note, way-bill, delivery sheet, register or order, invoice, ticket, passenger list or register, and any document of a like nature".

¹¹ *Evidence Act 1829* (SA), s.45(1)(a).

¹² Ibid., s.45(1)(b).

¹³ [1963] 1 All ER 832.

¹⁴ See Chapter 5, paragraphs 5.10 and 5.11.

¹⁵ *Evidence Act – New Part VIA Computer Evidence* (1969).

(Eng),¹⁶ providing for the admissibility of documentary statements produced by computers. The recommendation was implemented by s.14 of the *Evidence Amendment Act 1972* (SA). This provided for the addition of three new sections in the principal Act: ss.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 proceedings once the court is satisfied that certain conditions have been fulfilled.

9. These conditions are that the computer is -¹⁷

- (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 to adversely 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

¹⁶ See Appendix III, paragraphs 10 to 12.

¹⁷ *Evidence Act 1929* (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.¹⁸

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.¹⁹

12. In the absence of evidence to the contrary the certificate is proof of the matters certified.²⁰ 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.²¹

Bankers' books

13. Sections 46 to 51 of the *Evidence Act 1929* (SA) relate to bankers' books and are similar to ss.89 to 95 of the *Evidence Act 1906* (WA).²²

¹⁸ Ibid., s.59b(5).

¹⁹ Ibid., s.59b(4).

²⁰ Ibid.

²¹ Ibid., s.59b(6).

²² See Chapter 4, paragraphs 4.10 to 4.13.

APPENDIX VII

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.¹ 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* 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 as a witness.²

Records

3. Where a document is or forms part of a record relating to any undertaking³ 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.⁴ In certain circumstances, the supplier of information need not be called as a witness.⁵

¹ Law Reform Commission of Queensland, *Evidence* (QLRC 19).

² *Evidence Act 1977* (Qld), s.92(2).

³ "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”: Ibid., s.5.

⁴ *Evidence Act 1977* (Qld), s.92(1)(b).

⁵ Ibid., s.92(2).

Statements produced by computers

4. Under s.95 of the *Evidence Act 1977* statements produced by computers are admissible in circumstances similar to those in which statements produced by computers are admissible in England.⁶

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.⁷

6. There is no specific provision relating to the admissibility of statements produced by computers or relating to the admissibility of other documentary statements.

Books of account

7. Under Division 6(ss.83-91) books of account are admissible in circumstances similar to those in which books of account are admissible in Victoria.⁸

⁶ See Appendix III, paragraphs 10 to 12.

⁷ *Evidence Act 1977* (Qld), s.93. See Chapter 4, paragraphs 4.6 to 4.8.

⁸ See Appendix IV, paragraphs 9 to 13.

APPENDIX VIII

THE LAW IN THE AUSTRALIAN CAPITAL TERRITORY

Documentary out-of-court statement

1. Where direct oral evidence of a fact or opinion is admissible, a statement made by a person¹ 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.² Before the statement is admitted -³

- (i) in the case of a statement tending to establish a fact, it must be shown that the maker of the statement had 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;⁴
- (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

¹ A document cannot be said to be made by a person unless the material part of the document is written, made or produced by the person with his own hand, or 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 Act No. 66 of 1971 (Australian Capital Territory *Evidence (Temporary Provisions)*) and Act No. 10 of 1973 (Australian Capital Territory *Evidence (Temporary Provisions)*).

² *Evidence Ordinance 1971* (ACT), s.28(1).

³ Ibid.

⁴ 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).

supposed to have had personal knowledge of the matters dealt with in the information supplied by him, the statement is admissible if direct oral evidence of the fact would be admissible and once the following conditions are satisfied -⁵

- (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, 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 practical 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 criminal proceedings are pending, or at a time when it might reasonably have been contemplated that the proceedings would be instituted, is not admissible.⁶

Computer records

4. In civil proceedings a statement contained in a document produced by a computer⁷ 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 -⁸

⁵ *Evidence Ordinance 1971 (ACT)*, s.29(2).

⁶ *Ibid.*, s.31.

⁷ A computer is defined as a device which stores or processes information, or stores and processes information: *Evidence Ordinance 1971 (ACT)*, s. 39 (1).

⁸ *Evidence Ordinance 1971 (ACT)*, 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;
- (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.⁹

Bankers' books

6. The provisions with regard to bankers' books¹⁰ are similar to ss.89 to 96 of the *Evidence Act 1906 (WA)*.¹¹

The Evidence (Australian Capital Territory) Bill 1972

7. In 1972, following the disallowance of the *Evidence Ordinance 1971*¹² the Evidence (Australian Capital Territory) Bill 1972 was introduced. This Bill was referred to the Senate

⁹ Ibid., s.43(1).

¹⁰ Ibid., ss.21-27.

¹¹ See Chapter 4, paragraphs 4.10 to 4.13.

¹² See footnote 1 above.

Standing Committee on Constitutional and Legal Affairs. That Committee reported to the Senate on the Bill in November 1977.¹³

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.¹⁴ It said that:¹⁵

"...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".¹⁶

¹³ Senate Standing Committee on Constitutional and Legal Affairs, *The Evidence (Australian Capital Territory) Bill 1972* (November 1977).

¹⁴ *Ibid.*, paragraphs 62 to 65.

¹⁵ *Ibid.*, paragraph 62.

¹⁶ *Ibid.*, paragraph 42.

APPENDIX IX

THE LAW IN TASMANIA

Documentary out-of-court statements

1. In 1974 following the recommendations of the Tasmanian Law Reform Committee¹ 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* 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.² 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.³ The notice must be accompanied by a copy of the representation.⁴

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

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

¹ The Tasmanian Law Reform Committee, *Law of Evidence - The Hearsay Rule*.

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

³ *Evidence Act 1910* (Tas), s.81G(1)(a).

⁴ *Ibid.*, s.81G(1)(b).

⁵ *Ibid.*, s.81G(3).

⁶ *Ibid.*, s.81G(4).

consideration that its admission or that the determination of its admissibility may necessitate 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.⁷ The common law discretion to exclude evidence at a criminal trial is preserved.⁸

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 expedient in the interests of justice to admit the representation.⁹

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.¹⁰

8. Section 81J provides for the circumstances in which evidence 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* 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.¹¹ The Tasmanian *Evidence Act*

⁷ Ibid. , s.81H(1).

⁸ Ibid. , s.81H(2).

⁹ Ibid., s.81N.

¹⁰ Ibid., s.81P.

¹¹ Ibid., s.40A(2).

has no specific provision relating to the admissibility of statements produced by computers. There is also provision for the admission of documents relating to the transportation of persons or goods.¹²

¹² Ibid., s.81Q.

APPENDIX X

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.¹ 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* (NSW).² In criminal proceedings there is provision for the admissibility of business records in circumstances similar to s.79E of the *Evidence Act 1906* (WA).³ There is no specific provision for the admissibility of computer records.

¹ 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). This report has not been implemented.

² *Evidence Amendment Act 1945* (NZ), s.3. Reprinted in place of the repealed ss.24 and 25 of the principal Act: *1965 New Zealand Statutes* Vol. 3 at 1401. See Appendix V, paragraphs 1 to 5 for a discussion of the New South Wales provision.

³ *Evidence Act 1908* (NZ), s.25A. For the Western Australian provision see Chapter 4, paragraphs 4.6 to 4.9.

APPENDIX XI

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.¹

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:²

"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

¹ Law Reform Commission of Canada: *Evidence* (1975).

² *Ibid.*, at 72-73.

information had personal knowledge, and that the record was made in the course of a regularly conducted activity".

3. The Commission therefore recommended that statements made in the course of regularly conducted activities should be admissible:³

"...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:⁴

"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:⁵

"...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".

³ Ibid., at 27, clause 31(a).

⁴ Ibid., at 74.

⁵ Ibid., at 27-28, clause 31(d) .